REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 114 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

-BETWEEN-

SEC & M COMPANY LIMITED.....APPLICANT

-AND-

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF NAROK.....1ST RESPONDENT

THE CHIEF FINANCE OFFICER,

COUNTY GOVERNMENT OF NAROK.....2ND RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 4th May, 2016, the *ex parte* applicant herein, **SEC & M Company Limited,** wrongly described in these proceedings as the applicant seeks an order of *mandamus* directed against the respondents namely; The Count Government of Narok and the Chief Finance Officer, The County Government of Narok to pay the Applicant a sum of Kshs 49,435, 020.50/= being the certified costs thereon together with interest at 14% per annum from 29/11/2013 until payment in full. The applicant also seeks an order as to costs.

2. The reason why I say the applicant was wrongly described is because Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. *Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic*. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

3. In judicial review applications, it must therefore always be remembered that the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held that:

"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".

4. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari, Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

"REPUBLIC…..……..……..…APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA…..…RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI"

5. However in **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

6. It follows that the improper intitulement is not necessarily fatal to an application for judicial review.

Applicant's Case

7. According to the applicant, by a contract dated 4th August, 2008, the respondent, County Government of Narok contracted the applicant to provide services in respect of valuation of the respondent's moveable and immovable assets which contract the applicant carried out subsequent to which it presented its invoice for payment.

8. It was averred that the respondent paid part of the bill but refused and/or neglected to pay a sum of Kshs 49,435,020,50/=. As the contract between the applicant and the respondent provided for Arbitration in case of a dispute the parties went to arbitration as regards the unpaid sum of Kshs. 49,435,020.50/= which arbitral process was fully handled through arbitration by **Mr. Arthur K. Igeria** and on 29h November, 2013, the said arbitrator delivered his award in which he awarded the applicant a sum of Kshs. 49,435,020.50 with interest at the rate of 14% per annum from 29th November, 2013, the date of the award together with costs. Pursuant thereto, the said award was adopted on 11th March, 2015 and a decree issued on 23rd September, 2015. Costs were then taxed at Kshs 1,124,870.50/= and a certificate of taxation issued on 23rd September, 2015.

9. It was however averred that despite repeated demands and requests that the applicant pays the award and satisfy the decree, the applicant failed refused, ignored and/or neglected to satisfy the award and/or decree of the High Court.

10. It was revealed that as the respondent persisted in its refusal to settle the decretal award, the applicant applied for execution against the respondent's county secretary by way of committal to civil jail which application was disallowed by the Deputy Registrar in her ruling dated 13th January 2016 on the basis that other methods of execution ought to be explored instead.

11. The applicant lamented that by reason of the respondent's failure to settle the said award and decree, the applicant is wrongly deprived of the use of the benefit of the proceeds of the said award and decree and as a consequence thereof it continues to suffer loss and damage.

12. To the applicant, the county secretary, Narok County Government together with the Chief Officer Finance, County Government of Narok are under a public duty to make payment to the applicant yet they have wrongly refused to do so.

Respondents' Case

13. The Respondents opposed the application.

14. According to it, the Applicant's arose from events undertaken between the defunct County Council of Narok whose mandate was governed by the provisions of the ***Local Government Act,*** Chapter 265, Laws of Kenya (now repealed). It was conceded that the County Council of Narok *(hereinafter the "County")* contracted the Applicant to conduct a valuation of its moveable and immovable assets vide a contract dated 14th August, 2008. Following this valuation, the Applicant raised a fee note of Kshs.89, 101, 215.00 which amount was however successfully negotiated downwards following a meeting between the Committee of the Council and the County to 50% vide an agreement dated 15th October, 2009 thereby entitling the County to half of the initial fee charged. Therefore in the Respondents' view, the professional fees due to the Applicant became Kshs. 44, 550, 608.00 pursuant to the compromise agreement which it was agreed the County was to settle within 2 years. It was however noted that the original contract provided for a 10% Penalty should the County default in payment.

15. According to the Respondents it was readily admitted by the Applicant that between 25th August, 2008 and 30th August, 2012, the County pursuant to the said compromise, paid the Applicant an aggregate sum of Kshs. 46,426,316.00 which sum comprised of the re-negotiated professional fees and a further Kshs.2,000,000.00/= that was paid as disbursements.

16. The Respondents however averred that it however transpired that vide a letter dated 15th October, 2009, one **Mr. Malinda**, the then Clerk of the County, unprocedurally, unilaterally and without the County's approval or authority, varied the terms of the Compromise Agreement by authoring a ***"Letter of Comfort"*** to the Applicant purportedly to ***"clarify"*** some issues not captured in the compromise; particularly that should the County fail to pay the agreed compromise amount within 2 years, the Applicant can claim the original sum. According to the Respondents, unlike the Committee meeting that resulted in the 50% compromise, no such meeting was held by the County to sanction the so-called "***letter of comfort***". In effect therefore, the Applicant was aware that **Mr. Malinda** had no authority to bind the Council to the bargain contained in the said "***letter of comfort***".

17. According to the Respondents, relying on the purported ***"letter of comfort"*** the Applicant subsequently sought to revert to its original fee note of Kshs.89, 101, 215.00 on the grounds that the County had failed to pay the negotiated amount within 2 years. Therefore the Applicant demanded a total of Kshs. 54,561,336.50 constituting Kshs. 49,601,215.00 as alleged unpaid professional fees and 10% interest on the same despite the fact that it had been paid Kshs. 46,426,316.00 by the County.

18. It was revealed that it was this stand-off that crystallized into the dispute that was referred to

Arbitration pursuant to Clause 19 of the Head Contract between the parties and **Mr. Arthur Igeria, Advocate** was then nominated by the Chairperson of the Chartered Institute of Arbitrators as the Sole Arbitrator. He deliberated on the matter culminating into an Award delivered on 29th November, 2013.

19. It was however contended that a significant misnomer of the arbitral proceedings is that **Mr. Malinda** while still a public officer appeared as a witness of the Applicant and proceeded not only to justify his action in authoring the impugned ***"letter of comfort"*** but he also unlawfully gave adverse evidence against the County. The said proceedings, it was disclosed culminated into the Arbitral Award made and published by **Mr. Arthur K. Igeria** on 29th November, 2014 which was the subject of the Application filed by the County dated 27th February, 2014 to set aside the arbitral award which gave rise to the Ruling delivered by **Honourable Justice Kamau** on 9th December, 2014 wherein the judge dismissed the application with costs to the Applicant.

20. The Respondents averred that aggrieved by the above decision, the County lodged a Notice of Appeal on 9th December, 2014 while the substantive Appeal was lodged on 6th November, 2015 as *Civil Appeal No. 268 of 2015*, which appeal is scheduled for hearing on 14th February,2017. According to the Respondents, soon after service of the Notice of Appeal, the Applicant, through its' advocates then, **Koin Lompo & Company Advocates** filed a Notice to Show Cause dated 23rd September, 2015 against the County Secretary, **Mr. Lenku Kanar Seki**, to show cause why the Arbitral Award had not been satisfied or committal to civil jail. In a bid to secure the interests of the County, an Application for stay of execution on the Notice to Show Cause or on the Decree to Costs dated 26th October, 2015 was lodged in ***Civil Application No. Nai. 265 of 2015 (UR 224/2015)*** pending the hearing and determination of the intended Appeal which application was slated for hearing on 21st June, 2016.

21. It was contended by the Respondents that by a ruling of the Court dated 13th January, 2016, the Notice to Show Cause dated 23rd September, 2015 against the County Secretary was dismissed in his favour on the premise that he had no statutory authority to secure the release of funds sought by the Applicant.

22. In their submissions the Respondents relied on section 21(1) of the ***Government proceedings Act*** which provides that:

> ***(i) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:***
>
> > ***Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.***
>
> ***(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.***
>
> ***(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:***

Provided that the court by which any such order as aforesaid is made <u>or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended</u>, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

23. It was the Respondents' case that section 21(4) of the ***Government proceedings Act*** expressly prohibits execution against the government and its officers in their individual capacity hence the prayers for *mandamus* as taken out and the prayers sought are unconstitutional and against the bill of rights as read together with Article 2(6) of the Constitution of Kenya 2010.

24. The Respondents submitted that since an Appellate process had already been commenced by the County Government to reverse an Award that was, on the face of the record, made in complete contravention to the express law and rules of public policy, as a consequence all consecutive actions undertaken under the Offices of the Chief Finance Officer of the County Government will be at complete cross-purposes with the Office of the County Secretary of the County Government responsible for all legal affairs. The Court was therefore urged that before it proceeds to issue any orders as sought by the applicant it must satisfy itself that the provisions of the ***Government Proceedings Act*** have been complied with respect to issuance of a certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment.

25. It was contended that the said elaborate procedure is meant to give adequate notice to the County government to make arrangement to satisfy the decree but is in our view not meant to relieve the government of the statutory obligation to satisfy the decrees and orders of the court. In the Respondents' view, the rationale for immunity against normal execution proceedings by extension the said elaborate procedure was explained by **Visram** and **Ibrahim, JJ** (as they were) in **<u>Kisya investments Ltd vs. Attorney General & Another [2005] eKLR</u>**. While appreciating the dearth of legal pronouncements regarding the history of the protection and immunity of the Government from execution and attachment of its property/goods, the Respondents urged the Court to give its observations regarding the history, purpose and usefulness or otherwise of section 21(4) of the ***Government Proceedings Act*** and Order 28, Rules 2(1) (a), (2) and 4(1) of the ***Civil Procedure Rules***.

26. It was submitted, based on ***Halsbury's Laws of England 4th Edition, Volume 11 at paragraphs 970, 971 and 1370,*** that Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and that no payment out of public funds is legal unless it is authorized by Statute, and any unauthorized payment may be recovered.

27. In support of its submissions, the Respondent relied on the New Zealand case of **<u>Auckland Harbour Board vs. R</u> (1924) A. C. 318**, where it was held (p. 326) by **Viscount Haldane** in the Privy Council that:

"… For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the Consolidated Fund into which revenue of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are gone by in which the crown, or its servants, apart from Parliament could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced."

28. The second situation, in the Respondent's view arising from the above is that once a decree or judgment is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, the Comptroller and Auditor General e.t.c. for scrutiny and approvals for it to be paid from the Consolidated Fund since the Ministries and Departments do not have their "own" funds to settle such decrees or payments. The Respondents contended that considering the nature of Government Structure, procedures, red-tape and large number of claims, this could take a long time and if execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgments and it will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached, its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore, the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt, but it's Constitutional and statutory duties will not be capable of performance. This will lead to a chaos, anarchy and the breakdown of the Rule of Law.

29. The Respondents therefore submitted that this is the rationale or the objectives of the Law that prohibits execution against and attachment of the Government's assets and property. In the absence of the compliance with the requirement for service it was submitted that the Application for *mandamus* seeks to impart personal liability for the debts of the County Government upon the Respondents on the guise that it is a personal matter against them. The said application for *mandamus* is premature and only aimed at embarrassing the Respondents and goes against the clear laid down provisions of the law aforementioned.

30. On costs the Court was urged to be guided by the principle that '*costs follow the event':* the effect being that the party who calls forth the event by instituting the suit, will bear costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant of Respondent will bear costs.

31. It was the Respondent's case that it is clear from the outset that the instant Application raises no cogent reasons to warrant this Honourable Court to exercise its powers in issuing the orders the Applicant so craves. Further, the present Application is incompetent, bad in law, misconceived and an abuse of the Honourable Court in that it seeks certain relief the grant of which will run afoul the provisions of the Constitution of Kenya, 2010 and the integrity of the Honourable Court. They therefore urged the Court to award the costs to the Respondents to be borne by the Applicant.

Determinations

32. I have considered the material before me.

33. It is not in doubt that section 21(4) of the ***Government Proceedings Act*** prohibits execution against the Government. However section 21(1) of the Act provides:

> ***Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:***
>
> > ***Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.***

34. Section 21 (3) of the said Act on the other hand provides:

*"**If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:***

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein."

35. The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department.

36. This procedure in such matters was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** expressed himself, *inter alia*, as follows:

***"Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual…In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment…The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty…English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties…With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile…It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government…Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go… In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also**

admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament…"

37. The Court continued:

"In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata,* and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few…*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory…On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject…The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice… The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

38. Section 21(4) of the ***Government Proceedings Act*** Cap 40 Laws of Kenya provides:

Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.

39. It is however not lost to this Court that the preamble to the ***Government Proceedings Act*** states that it is:

An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters.

40. Judicial review, it has however been held are neither civil nor criminal in nature. This was the position adopted by the Court of Appeal in **The Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995 [1995-1998] 1 EA 1** where the Court expressed itself as follows:

"…in exercising the power to issue or not to issue an order of certiorari the Court in neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S. 136 (1) of the *Government Lands Act,* and also, S. 13 A of the *Government Proceedings Act,* which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that S. 13A, above, when read closely, its wording, clearly shows that a suit within the meaning of the term "Suit" in S. 2 of the Civil Procedure Act is envisaged…It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."

41. It must always be remembered that while sitting as a judicial review Court, the High Court is exercising its supervisory jurisdiction pursuant to Article 165(6) of the Constitution which is neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *sui generis.* It is therefore my view that the provisions of the ***Government Proceedings Act*** cannot be called in aid to curtail a person's right to seek judicial review remedies where the same are deserved. In any case the proviso to section 21(3) of the said Act, in my considered view, applies to the Court by which an order for payment of money by way of damages or otherwise or costs in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party. This includes an order for costs made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such. Judicial review proceedings, however, are not the proceedings under which damages are awarded. They are proceedings for the enforcement of an already awarded relief for damages made in other proceedings. It follows that the proviso to section 21(3) which empowers "***the court by which any such order as aforesaid is made or any court to which an appeal against the order lies"*** to suspend payment of the whole of any amount so payable pending an appeal or otherwise, does not apply to judicial review proceedings for the reasons that judicial review proceedings are not captured under the ***Government Proceedings Act*** and the proceedings for judicial review relief are not the kind of proceedings contemplated under section 21 of the said Act.

42. The nature of judicial review proceedings seeking relief for an order of *mandamus* compelling the settlement of a decree was explained by this Court in **Republic vs. Attorney General & Another Exparte James Alfred Koroso [2013] eKLR** as hereunder:

"…in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus,* he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the

provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit…The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

43. It was contended that this Court must satisfy itself that the certificate mentioned in section 21 of the said Act was served before an order of *mandamus* can issue against the Government, or against a Government department, or against an officer of the Government as such, the Court whose decision is to be implemented ought to issue a certificate in the prescribed form containing particulars of the order otherwise known as *Certificate of Order Against the Government*. Such a certificate however can only be applied for after the expiration of twenty-one days from the date of the decision or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later. In other words after a decision against the Government is made the person in whose favour the decision is made must wait for at least 21 days before applying for the said prescribed certificate. However a separate certificate may be issued in respect of costs. A copy of the said certificate may then be served by the person in whose favour the decision is made upon the Attorney-General.

44. In my view it is only after the said procedure is complied with and a demand for payment is made that the cause of action accrues for the purposes of an application for an order of *mandamus* seeking to compel the Government, or a Government department, or an officer of the Government to settle the sum in question.

45. I therefore associate myself with the views expressed by **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick**

Manoah Egunza [2012] eKLRthat:

> **"In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act)* which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues."**

46. Being a condition precedent for the issuance of an order of *mandamus*, it follows that the Court can only issue the said relief when satisfied that the said certificate was issued and served. **In other words where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore where there is a genuine dispute as to whether the right to apply for an order of *mandamus* has matured, the Court must deal with the issue. In this case there is no averment and much less evidence of the existence of the statutory certificate under section 21 aforesaid. No such copy has been exhibited either. In Sebaggala vs. Attorney General and Others [1995-1998] EA 295 it was held that:**

> **"A "cause of action" means every fact, which, if traversed, it would be necessary for the plaintiff, to prove in order to support his right to a judgement of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can probably accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the plaintiff to prove to enable him to obtain decree. Everything, which is not proved, would give the defendant a right to an immediate judgement must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."**

47. Therefore what constitutes the cause of action must be gleaned from the facts as averred by the parties and not on the prayers sought. With respect to judicial review, those facts are contained in the verifying affidavit. This position was restated by the Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal**

No. 45 of 2000, where it was held that:

> **"We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:**
>
> > **'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.'**
>
> **At page 283 of the report of the case of R v. Wandsworth Justices, Viscount Caldecote CJ said:**
>
> > **'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.' "**

48. **Without a positive averment that the statutory certificate was issued and served, I cannot find that a cause of action for the purposes of these proceedings seeking a judicial review relief in the nature of *mandamus* had accrued.**

49. **With respect to the issue of immunity, although the Respondent contended that there are no authorities on the issue, the Respondent itself alluded to the holding in Kisya Investments Ltd vs. Attorney General & Another [2005] 1 KLR 74 where the rationale for immunity against execution against the Government in the ordinary manner was explained by Ibrahim** and **Visram, JJ** (as they were) in the following terms:

> **"Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable…History and rationale of Government's immunity from execution arises from the following…Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament.**

Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered. *SEE HALSBURY'S LAWS OF ENGALAND 4TH EDN VOL. 11 PARA 970, 971 AND 1370.* As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. *SEE AUCKLAND HARBOUR BOARD VS.R (1924) AC 318, 326.* The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inudated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property."

50. **There it is in black and white.** It is therefore clear that apart from the fact of the existence of a judgement against the government, the law recognises that due to the special role played and the central position held by the Government both national and county in the management of the affairs of the country, there is a necessity for further proceedings to be undertaken before the judgement can be implemented. However, where a party has complied with all the procedures leading to the grant of an order of *mandamus,* to subject the party to the normal civil law procedures would engender a miscarriage of justice yet Article 159(2)(b) mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd. The procedure subsequent to the issuance of the decree and order in my view is meant to facilitate the settlement of the amount due from the Government without ambush. Otherwise the liability of the Government accrues once the decision is made against the Government. It is only that such liability cannot be enforced unless and until certain legal steps are taken in that direction. In other words there is no bar to the Government settling a decree as soon as the judgement is delivered for the same. In fact, it is my view that the Government ought to do so in order to save the tax-payer further burden in form of interest. In my view the immunity extended to the Government against the turbulence of execution is meant to be used in good faith and is not meant to insulate or shield the Government from meeting its legal obligations owed to the citizenry or third parties.

51. **With respect to the pending appellate process** it is clear that mere challenge to a judgement does not bar the Court from issuing orders of mandamus though the Court may well be entitled to take the same into account in the exercise of its undoubted discretion.

52. In my view, the only way in which the Respondent can avoid payment where there is a valid judgement of a Court of competent jurisdiction, save where the conditions precedent have not been satisfied, is to show that the judgement has been set aside on appeal or on review or that an order of stay

has been issued suspending the execution of the said judgement. Order 42 rule 6(1) of the ***Civil Procedure Rules*** is clear that even the pendency of an appeal does not *ipso facto* operate as a stay of the decree or order appealed against.

53. Having found that there is no evidence that the conditions precedent to the institution of these proceedings were complied with, it is my view and I hereby hold that there proceedings are incompetent.

Order

54. In the result Notice of Motion dated 4th May, 2016 is struck out with costs.

55. Orders accordingly.

Dated at Nairobi this 1st day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Waiganjo for Mr Gichure for the applicant

Mr Ambala for the Respondent

CA Mwangi