REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW NO. 4 OF 2016

IN THE MATTER OF AN APPLICATION BY JAMES GACHERU KARIUKI

HARRISON THUKU, GEOFFREY GICHOBE KAIRU, JOHN KARIGA NAGE,

JAMES NGANGA KAMAU, HENRY NJENGA KIMANI, GEORGE KURIA MAINA,

FRANCIS MWANGI KAMAU, SARAH MUMBI KAMANDE, JACINTA WANJIRU

FOR LEAVE TO APPLY FOR JUDICAL REVIEW ORDERS IN THE

NATURE OF MANDAMUS, CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTIONS 25(1) OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF CAP 2 LAWS OF KENYA

AND

IN THE MATTER OF CAP 80 LAWS OF KENYA

AND

IN THE MATTER OF THE LAW REFORM COMMISISON ACT NO. 19 OF 2013

AND

IN THE MATTER OF CLAUSE 7(1) OF PART 2 OF THE SIXTH SCHEDULE TO THE

COSTITUTION OF KENYA 2010

AND

IN THE MATTER OF GAZETTE NOTICE NO. 8899 DATED 24TH NOVEMBER 2015

AND

IN THE MATTER OF GAZETTE NOTICE NO. 9208 DATED 11TH DECEMBER 2015

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT 2015

BETWEEN

REPUBLIC .....APPLICANT

AND

THE KIAMBU COUNTY EXECUTIVE COMMITTEE .....1ST RESPONDENT

THE KIAMBU COUNTY ASSEMBLY.....2ND RESPONDENT

THE LAW REFORM COMMISSION.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

-EXPARTE-JAMES GACHERU KARIUKI & 9 OTHERS

RULING

A. INTRODUCTION

1. Before 27/08/2010, the laws and regulations permitting the appropriate authorities to value land for the purpose of rates and the establishing of Valuation rolls was straightforward and predictable. Indeed, it had remained so largely unchanged since independence. It was anchored in Section 3 of the Valuation for Ratings Act, Chapter 266 of the Law of Kenya. The Section provides that:

> **Local authority to cause valuation roll to be prepared**
>
> Every Local Authority shall from time to time, but at least once in every ten years or such longer period as the Minister may approve, cause a valuation to be made of every rateable property within the area of the local authority in respect of which a rate on the value of land is, or is to be imposed, and the values to be entered in a valuation roll.

2. On the other hand, Section 5(1) of the Ratings Act, Chapter 267 of the Laws of Kenya Provided as follows:

> **5.**(1) Subject to subsection (2), the rating authority may, with the approval of the Minister, adopt one or more of the following methods of rating—
>
> (a) a flat rate upon the area of land;
>
> (b) a graduated rate upon the area of land;
>
> (c) a differential flat rate or a differential graduated rate upon the area of land according to the use to which the land is put, or capable of being put, or for which it is reserved;
>
> (d) an industrial rate upon the area of land used for other than agricultural or residential purposes;

(e) a residential rate upon the area of land used for residential purposes;

(f) such other method of rating upon the area of land or buildings or other immovable property as the rating authority may resolve, and a rate levied in accordance with any such method as aforesaid shall in this Act be known as an area rate.

(2) The rating authority may adopt different methods of area rating for different parts of the area of the rating authority and may from time to time vary the method or methods adopted, and may adopt in relation to any rating area the methods of area rating referred to in subsection

(1) in the manner following, that is to say—

(i) method (a) or method (b) or method (c) as alternative methods which are mutually exclusive;

(ii) method (d) or method (e), or both, in addition to method (a) or method (b), but not in addition to method (c);

(iii) method (f) shall not be combined with any other method of area rating.

3. The reason the law was straightforward in its application was because the two main actors who in the valuation regime were ?local authorities? and the ?Minister?. Both were clearly defined in the Acts of Parliament an there was no confusion who had the regulatory power and the process to be followed. ? Local Authority? was defined to mean ?a county council, town council, or municipal council constituted by or under any law.? And Minister meant the Cabinet Minister for the time being in charge of Local Government.

4. This blissful and predictable Valuation and Rating Regime for property rates was profoundly disrupted by the coming into force the Constitution of Kenya, 2010 and its associated developments. Among other things, the Constitution wrote into oblivion the entities known as ?Local Authorities?. In their place, the Constitution established fourty-seven Counties as self-governing units in an intricate devolution scheme. Additionally, the Constitution re-constituted the National Government – including the number of established ministries and the titles of the political heads of those ministries changed from ?Ministers? to ?Cabinet Secretaries.? Perhaps more importantly, is the realisation that the establishment of the fourty-seven Counties is a radical act of devolution that self-consciously disperses the sovereign power of the people of Kenya at both the National Level and the County Level.

5. It is this profound but productive disruption that is the genesis of the present suit. It is plain that the sole purpose of a Valuation and Rating Regime is to raise revenue for the applicable entity. The Constitution of Kenya, 2010 expressly preserved the power to raise revenue through property rates for the County Governments. Indeed, it is one of the two specific taxes that County Governments are expressly permitted to levy under Article 209(3) of the Constitution without the need for authorization by an Act of Parliament (the other being entertainment taxes).

6. However, this plain Constitutional provision does not, in context, cure all practical problems associated with the new Valuation and Rating Regime. The present case makes this clear. The *Ex Parte* Applicants have approached the Court for prayers premised on their contention that the levying of property rates by the County Government of Kiambu using the extant Rating Act and Valuation for Rating Act is illegal and Constitutionally impermissible. They contend that even though the Constitution permits, in section 7 of the 6th Schedule of the Constitution, for ?all laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution?, the County Government of Kiambu is not the correct entity to ?construe? the existing Valuation and Rating Regime to enable it to levy property taxes as it has done. Rather, they argue, only the Honourable Attorney General of the Republic and/or the Law Reform Act can ?construe? the existing Acts. Hence, they find the reliance by the County Government of Kiambu on the Rating Act and the Valuation for Rating Act to levy taxes illegal.

B. *EX PARTE* APPLICANTS CASE

7. The tenor of the *Ex Parte* Applicants' arguments can somewhat, if only vaguely, be surmised from the broad prayers they have requested from the Court. They have asked for orders:

> a) That an order of mandamus do issue, compelling the Kenya Law Reform Commission(3rd respondent herein) and the Honourable Attorney General of the Republic of Kenya(4th respondent herein) to jointly or in the alternative, forthwith construe the provisions of the Rating Act Cap 267 laws of Kenya and more specifically the provisions of Cap 266 laws of Kenya and more specifically the provisions of section 3 of the act with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution of Kenya 2010 and publish a revised edition of the Acts.
>
> b) That an order of certiorari do issue removing into the high court and quashing Kenya gazette notice No. 8899 dated 2nd December, 2015 and/or Gazette Notice Number 9639 of 31st December, 2015 and/or Kenya gazette Notice No. 9208 dated 11th December 2015.
>
> c) That an order of prohibition do issue, prohibiting the Kiambu County Executive Committee (1st respondent herein) and/or the Kiambu County Assembly (2nd respondent herein) from usurping the powers of the Cabinet Secretary of approval under the provisions of section 5(1) of the Rating Act cap 267 Laws of Kenya and/or under the provisions of Section 5(1) of the Rating Act cap 267 Laws of Kenya and/or under the provisions of Section 3 of the Valuation for Rating Act Cap 266 Laws of Kenya.
>
> d) That An order of prohibition do issue, prohibiting the Kiambu County Executive Committee(1st respondent herein) from purporting to give effect to county legislations which are not published in the gazette through commencements notices in the gazette.
>
> e) That the costs of the application herein be provided for.

8. The *Ex Parte* Applicants' case is simple enough. They argue that the Valuation for Rating Act and the Rating Act (hereinafter both referred to as ?Valuation and Rating Acts?) are laws which were in force immediately before the effective date of the Constitution of Kenya, 2010 and continue in force. As such, these two Valuation and Rating Acts must be construed with the alterations, adaptations, qualification and exceptions necessary to bring them into conformity with the Constitution as provided for under Section 7(1) of the Sixth Schedule of the Constitution of Kenya, 2010.

9. According to the Petitioner, the duty of construing the Valuation and Rating Acts is bestowed on the Honourable Attorney General by the provisions of section 7 and section 8 of Revision of Laws Act (Chapter 1 of the Laws of Kenya). These two sections provide as follows:

> 7. The Attorney-General shall as soon as practicable after the beginning of every year prepare and publish an annual supplement to the Laws of Kenya which shall contain—
>
> (a) a revised edition of every Act which has been enacted or has come into force during the previous year together with such subsidiary legislation made thereunder as the Attorney-General thinks fit to include, unless any such Act is omitted under section 5 or its sole effect is to amend, without replacing, other written laws;
>
> (b) a new revised edition of the Constitution, any Act, any foreign legislation applied to Kenya or any subsidiary legislation where, by reason of—
>
> (i) its having been substantially amended; or
>
> (ii) in the case of the Constitution or an Act, a substantial quantity of subsidiary legislation

having been made thereunder, during the preceding year or years, a new revised edition is in the opinion of the Attorney-General desirable;

(c) a revised edition of any Act omitted under section 5 where the reason for the omission in the opinion of the Attorney-General no longer subsists;

(d) a new revised edition of the accumulative index, table of contents and table of omitted Acts;

(e) a new revised edition of the chronological table or a supplement thereto:

Provided that more that one supplement may be prepared under this section in respect of any one year, or a supplement may be prepared in respect of more than one year, where the Attorney-General considers it expedient; and where a second or subsequent supplement is prepared in respect of any one year, it may contain all or any of the revised editions specified in this section.

8. *Powers on revision*

(1) In the preparation of the annual supplement to the Laws of Kenya the Attorney-General shall have the following powers—

(a) to omit—

(i) all laws or parts of laws which have been repealed expressly or by necessary implication, or which have expired, or which have become spent or have had their effect;

(ii) all repealing enactments contained in laws, and all tables or lists of repealed enactments, whether contained in schedules or otherwise;

(iii) all preambles or parts of preambles to laws, and all or any recitals in laws, where such omission can, in the opinion of the Attorney-General, conveniently be made;

(iv) all introductory words of enactment in any law;

(v) all enactments prescribing the date when any law or part of any law is to come into force, where such omission can, in the opinion of the Attorney-General, conveniently be made;

(vi) all amending laws or parts of laws where the amendments effected by such laws or parts of laws have been embodied by the Attorney-General in the laws to which they relate;

(b) to allocate Chapter numbers to newly included Acts and subsidiary legislation and generally to arrange the Acts by Chapters in such sequence and groups and generally in such order and manner as the Attorney-General thinks proper, and to leave unallocated between groups or in groups such Chapter numbers as he considers may be required for Acts to be enacted in the future;

(c) to consolidate into one law two or more laws *in pari materia*, making the alterations thereby rendered necessary in the consolidated law, and affixing such date thereto as seems most convenient;

(d) to alter the order of sections in any law, and, in all cases where it is necessary to do so, to renumber the sections of any law;

(e) to alter the form or arrangement of any section of any law, either by combining it in whole or in part with another section or other sections or by dividing it into two or more subsections;

(f) to divide any law, whether consolidated or not, into Parts or other divisions;

(g) to transfer any provisions contained in an enactment from that enactment to any other enactment to which the Attorney-General considers that it more properly belongs;

(h) to supply or alter marginal notes and tables showing the arrangement of sections;

(i) to correct cross-references;

(j) to shorten or simplify the phraseology of any law;

(k) to add a short title or citation to any law which requires it, and, if necessary or expedient, to alter the long title, short title or citation of any law;

(l) to correct grammatical and typographical mistakes in the existing copies of laws, and for that purpose to make verbal additions, omissions or alterations not affecting the meaning of the laws;

(m) to correct the punctuation in any law;

(n) to provide footnotes by way of amplification;

(o) to make such formal alterations as to names, localities offices and otherwise as are necessary to bring any law into conformity with the circumstances of Kenya;

(p) to make such adaptations of or amendments to any law as appear to be necessary or proper as a consequence of changes in the constitutions of Commonwealth countries or the composition of the Commonwealth;

(q) to make such formal alterations to any law as are necessary or expedient for the purpose of securing uniformity of expression the Laws of Kenya, and power to do all other things relating to form and method, whether similar to the foregoing or not, which appear to him necessary for the perfecting of the Laws of Kenya.

(2) Subparagraphs (i), (ii) and (vi) of paragraph (a) and paragraph (n) of subsection (1), and no more, shall apply in respect of foreign legislation applied to Kenya.

(3) The provisions of section 23(3) of the Interpretation and General Provisions Act (Cap. 2) shall apply to all omissions made by virtue of this section as if the laws or parts of laws omitted had been repealed.

(4) Nothing in this section shall empower the Attorney-General to make any alteration or amendment in the substance of any law.

10. In the alternative, if the Honourable Attorney General neglects or fails to perform his duty of ?construing? the Valuation and Rating Acts the *Ex Parte* Applicants argue that it should be the duty of the Kenya Law Reform to ?construe? the Valuation and Rating Acts by virtue of section 6 of the Kenya Law Reform Commission Act.

11. The *Ex Parte* Applicants are categorical that the act of ?construing? the Valuation and Rating Acts (as in all other laws existing before the Effective Date of the Constitution) is an ?imperative and not a permissive duty and of public interest not personal interest? hence the need for the Court to compel the Honourable Attorney General and the KLR to do it by way of an order of mandamus. In asking for this order, the *Ex Parte* Applicants are, again, quite categorical that neither the County Government of Kiambu nor this Court can do the ?construing? as that will be usurping a role given to another organ under the Constitution.

12. Having established this argument, the *Ex Parte* Applicants next argue that with the Valuation and Rating Acts remaining ?unconstrued? (my term), it follows that the County Executive of Kiambu County could not rely on these two Acts to levy property taxes in Kiambu County. As such, the *Ex Parte* Applicants would argue that the Gazette Notices the County Executive issued purportedly to notify the citizens of Kiambu of the property rates they are liable to pay – and particularly Kenya Gazette Notice No. 9208 dated 11/12/2015 – which is the effective notification establishing property rates in Kiambu to date – are illegal and cannot form the basis for levying property rates in Kiambu County.

13. Instead, the *Ex Parte* Applicants argue that for Kiambu County to levy any property rates in accordance with Article 216(2) of the Constitution of Kenya, 2010 and Article 209(3) of the Constitution of Kenya, 2010, it must table at the Kiambu County Assembly a money bill in relation to property rates, have the same debated in the Assembly, passed and assented to by the Governor. Then, that County Act on property rates must be published in the Kiambu County Gazette as well as the Kenya Gazette. After that, the County must then establish a Valuation roll as required under section 3 of the Valuation for Rating Act. Finally, they County must, then, get the approval of the Cabinet Secretary as required under section 5(1) of the Rating Act. In the absence of these procedures, the *Ex Parte* Applicants argue that publishing any Gazette Notice respecting property rates in Kiambu was illegal and should be declared so.

14. In furtherance of their argument, the *Ex Parte* Applicants argue that what the County Executive has done is to effectively usurp the powers and functions of the County Assembly of Kiambu by publishing the Gazette Notice imposing property rates in Kiambu without legislative action first. Additionally, the *Ex Parte* Applicants argue that it is equally illegal for the County Executive to purport to levy property rates by publication of the Gazette Notice without getting the approval of the Cabinet Secretary.

15. There are other allegations related to some of the Gazette Notices which were published in the County Gazette and not in the Kenya Gazette which the *Ex Parte* Applicants argued were illegal ab initio under Article 199(1) of the Constitution. This issue has recently been clarified by Lenaola J. (as he then was) in ***James Gacheru Kariuki & 2 Others v the AG & Another (Nairobi Constitution Petition No. 52 of 2016)*** where Justice Lenaola ?declared that a County Legislation does not take effect unless it is published as such in the Kenya Gazette in line with Article 199(1) of the Constitution and thereafter in the County Gazette if necessary.? I have read the entire judgment by the Learned Judge and I fully align myself with his reasoning. I do not, therefore, propose to go into that tangential issue except to observe that any notices published in the County Gazette without first having been published in the Kenya Gazette are declared to be null.

C. <u>RESPONDENTS' CASE</u>

16. This brings me to the Respondents' case. Unfortunately, the Honourable Attorney General, the KLR and the County Assembly chose not to participate in the proceedings. Only the County Executive, named as the 1st Respondent – and obviously with a lot more stake in the case – opposed the Application for Judicial Review.

17. The County Executive took a two-track strategy in its opposition. In the first track, they preliminarily objected to the proceedings on account that the Application is time barred and res sub juice. In the second track, the County Executive defended the actions of the County Executive on their merit. Ironically, the County Executive spend 32 of 36 paragraphs of its Written Submissions on the first track. That is 89% of its written brief! Only four short paragraphs are actually dedicated to the substantive matter.

18. It would seem that the County Executive had too much faith it its technical arguments. Unfortunately, I was not sympathetic to the technical arguments at all and I easily dismissed them.

19. I will begin with their second salvo: that the matter is *res sub judice* because one of the *Ex Parte* Applicants and the County Executive are parties in the ***James Gacheru Kariuki & 2 Others v the AG & Another (Nairobi Constitution Petition No. 52 of 2016)*** (cited above). That suit has since been concluded – so this objection would now mutate to be one of res judicata. Its fate would still be the same: the issue of publication in a County Gazette is only one of the tangential issues in this case as I declared above. It is

not a matter that is directly and substantially in issue in the other case. As Mr. Ranja confirmed to me when setting down the matter for judgment, there are other substantial issues in this case that are not at issue in the other matter. To that extent, then, this objection is quickly overruled.

20. The second objection is a lot more substantial. The complaint is that this is a Judicial Review Application and is therefore governed by the provisions of the Law Reform Act, Order 53 and the Fair Administrative Actions Act. The County Executive believes that reading these three pieces of legislation together will lead to the conclusion that this suit is time barred because it was brought more than six months since the offending Government Notice was published.

21. The County Executive begins by citing section 9(3) of the Law Reform Act. That section begins provides as follows:

> In the case of an application for an order for certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

22. Next, the County Executive cites Order 53 Rule 2 which provides:

> Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction, or other proceedings for the purpose of being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and a time limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

23. Then, after citing the Fair Administrative Actions Act (FAAA) which is not solidly in consonance with the two previous cited legislations, the County Executive argues thus:

> The common thread running through the Civil Procedure Rules and the Law Reform Act is that a party seeking issuance of the judicial review order of certiorari has to do so within a period of 6 months from the date of the decision. Failure to do so within the set time limits will result in the Applicant not being granted leave to apply for orders of certiorari.

24. The County Executive submitted that the requirements of the two legislations are mandatory and serve the function of guiding litigants and to provide consistency in the application of the law. They are not mere procedural requirements. They cite, approvingly, a gem delivered by Kiage J.A. in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others [2013] eKLR*** where the Learned Justice of Appeal stated:

> That however is not to say that the new thinking totally uproots well-established principles or precedents in the exercise of discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.

25. The County Executive also cited ***Milka Nyambura Wanderi & Another v Principal Magistrate's Court Muranga & 4 Others*** where the Court of Appeal upheld a decision by Ombwayo J. in dismissing the Appellants' application for leave which was filed six months after the decision.

26. I wish to begin my analysis here. Our Constitution of 2010 took a decidedly anti-formalist turn. Whereas our previous jurisprudence might have been enamoured of arcane formalist logic on process before one could be permitted to perfect a substantive claim, our 2010 Constitution self-consciously rejects such an approach to adjudicating substantive claims especially those involving public interest. In the case of judicial review, the Constitution of 2010 introduced two new important provisions.

27. First, in Article 47, the Constitution expressly constitutionalizes administrative justice as a right and removes it from the clutches of Common Law. Indeed, the FAAA is the legislation required to implement Article 47 of the Constitution.

28. Second, in Article 23, the Constitution, in spelling out the authority of the High Court to uphold and enforce the Bill of Rights, expressly permits the Court to grant any appropriate relief including an order for judicial review (Article 23(3)(f).

29. My reading of these two provisions is that they have the functional effect of blitzing the bifurcation between challenges to the exercise of public power using the traditional mechanism of judicial review rooted in the common law (and, in Kenya, the Kenya Law Reform Act) and those based expressly on the Constitution. In a straightforward petition to enforce the Bill of Rights under Article 23 of the Constitution, the High Court can issue an order for Judicial Review. Conversely, one can found a substantive suit challenging the exercise of administrative power under Article 47 of the Constitution or the FAAA which is the statute enacted to perfect that Article.

30. If that is the case, what, pray, is the utility of insisting on strict procedural timelines for one form of action and not the other? The County Executive says predictability and certainty are the operative functions. However, that predictability in the formalist traditional common-law based judicial review is precisely what the Constitution of Kenya 2010 hoped to overturn and install in its place a jurisprudence and process more in keeping with Article 47. In this regard, it is important to point out that the FAAA does not have any set time limits on when an aggrieved party can bring an action. Tellingly, at section 10(1) it provides that ?an application for judicial review shall be heard and determined without undue regard to procedural technicalities.?

31. If I am wrong that the six-month set time limit to bring judicial review applications is no longer a categorical bar to suits of this nature, then I will point out that while styled as a judicial review application, it seems to me unclear whether this is a judicial review application *strictu sensu* or whether it is more of a constitutional petition seeking constitutional review of certain actions and inactions by public organs. I note that the suit papers were drawn and filed by *pro se* litigants – and the entire suit was prosecuted by *pro se* litigants. The nature of this suit easily persuades me that it would be an inappropriate one to apply the rigid rules set for common-law style judicial review of administrative action.

32. So, on to the merits of the suit.

33. The main point taken by the County Executive is that an order for prohibition should never be granted to stop a public body from performing its statutorily mandated functions. The County Executive cites ***Jipe House Kindergarten Limited v City Council of Nairobi [2012] eKLR*** where Githua J. stated:

> The law is that the Court cannot issue orders of prohibition to prevent public bodies like the Respondent or inferior tribunals from performing their statutory duties and functions when the same are executed in accordance with the law. The supervisory jurisdiction of the High Court can only be exercised where it is proved that public entities or inferior tribunals have either abused their powers in the exercise of their statutory duties, have acted without or in excess of their jurisdiction or have breached the rules of natural justice inter alia occasioning legal injury to the person complaining of the aforesaid action.

34. The County Executive argues in the first place that prayer (c) in the application cannot be granted because the actions complained against have already happened. The County Executive says that, in fact,

what the *Ex Parte* Applicants are seeking are certiorari. The only difference in the characterization that I can fathom would be the implications if I had held above that the six-month set timeline for certiorari applies.

35. More substantively, the County Executive argues that an order for prohibition should not issue because the County Executive acted procedurally. The County Assembly argues that section 8(2) of the County Governments Act allows County Governments to use National legislation with the necessary modifications and alterations, where the County Assembly has yet to enact a legislation necessary to allow the County Government to perform its functions under schedule 4 of the Constitution. The section provides as follows:

> If a county assembly fails to enact any particular legislation required to give further effect to any provision of this Act, a corresponding national legislation, if any, shall with necessary modifications apply to the matter in question until the county assembly enacts the required legislation

36. The County Executive Committee argues that it is the absence of County legislation to provide for rating that caused the County Government of Kiambu to place reliance on the existing National Valuation for Rating Act and Rating Act as permitted under section 8(2) of the County Governments Act. Thus, the County Executive Committee argues that in issuing Gazette Notice No. 9639, it acted well within the law since the County Executive Committee is given the mandate to exercise executive authority as provided by either the national or county legislation.

D. ANALYSIS AND DETERMINATION

37. I have adumbrated the positions and arguments of the parties in a way that clearly delineates the issues to be determined by the Court. The answers to some of the issues have already recommended themselves in my analysis. Succinctly, there are five issues for determination:

a. First, should the case be dismissed outright under the doctrine of *res sub judice*? I have already determined this in the negative.

b. Second, is the suit time-barred? I have also already answered this in the negative and hence permitted the case to be determined on its merits.

c. Third, can the County Executive Committee impose property rates without an enabling County legislation or is such an action usurping the function and role of the County Assembly?

d. Fourth, assuming the third question can be answered in the positive, can the County Executive Committee impose property rates under Valuation for Rating Act and Rating Act without the approval of the Cabinet Secretary in charge of Inter-governmental relations or Treasury?

e. Fifth, assuming the fourth question is answered in the positive, can the County Executive Committee rely on valuation rolls of the defunct local authorities?

f. Sixth, must the Honourable Attorney General or, upon his failure, the Kenya Law Reform construe laws in light of the sixth schedule of the Constitution or could the County Executive Committee validly construe Valuation for Rating Act and Rating Act and act upon such construction?

D.1. Must the Honourable Attorney General or the Kenya Law Reform Commission Construe Laws to Bring them into Conformity with the Constitution?

38. I will reverse the order and begin with the sixth question because its answer is a necessary predicate of the other three questions that remain undetermined. Does the Constitution and our laws contemplate that only the Attorney General or, in his failure, the Kenya Law Reform Commission should ?construe?

laws to bring them into conformance with the Constitution after the Effective Date? The short and only possibly correct answer to the question is in the negative. While it is true that as Chief Legal Adviser the Constitution and our legal structure accord the Honourable Attorney General a special role in bringing necessary amendments to the attention of Parliament, the *Ex Parte* Applicants are simply mistaken in their belief that only the Honourable Attorney General can ?construe? laws to bring them into conformance with the Constitution.

39. Indeed, the Constitution of Kenya, 2010 is unique in giving every public official and public organ a duty to interpret, defend and obey the Constitution and the values underpinning it – see Articles 3 and 10 of the Constitution. The Transformation of the Kenyan society would not happen if the duty of construing laws to bring them into conformity with the Constitution was left to the monopoly of the Honourable Attorney General. The Constitution commands every individual or public organ that interprets the Constitution to do so in a manner that takes into consideration national values and principles of governance. This must, of necessity, include the duty to construe any existing laws to bring them into conformity with the Constitution.

40. This is to say that is no such position as ?Chief Construer? with the sole task of construing laws to bring them into conformity with the Constitution! Indeed, our Courts have countless times ?construed? various laws to bring them into conformity with the Constitution. Examples include a nod to this practice by the Supreme Court in ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR***. The Court stated thus:

We would state an evident fact: while the new Constitution repealed the old Constitution, it did not extinguish all existing legislation. This is the import of Article 264 of the Constitution which thus provides:

> *"Subject to the Sixth Schedule, for the avoidance of doubt, the Constitution in force immediately before the effective date shall stand repealed on the effective date."*
>
> **[130]** Our apprehension is that on the effective date, it is only the old Constitution that fell into disuse, save for the various sections saved by the Sixth Schedule. The existing legislative regime, on the other hand, remained in force, as decreed by Section 7 of the Sixth Schedule in the following terms:
>
> *"(1) All law in force immediately before the effective date continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution"*[emphasis supplied].
>
> **[131]** The inevitable inference resolves into the principle that the new Constitution did not envisage or create a legal vacuum, and all processes regulated by law were to continue in progress, as signalled by the Constitution.

41. Indeed, in this case, the Supreme Court gave the Superior Courts clear guidelines on how they should undertake the task of ?construing? laws that existed before the Effective Date to bring them into conformance with the Constitution. The Supreme Court states in paragraph 197 of its decision thus:

We do, thus, have a reliable jurisprudential basis for proposing the principles to serve as a guide, in interpreting constitutional provisions in the transitional framework, especially as regards the Fifth Schedule, and Section 7 of the Sixth Schedule to the Constitution of Kenya. Our perception is set out in specific terms as follows:

> I. *The Constitution of 2010 came into operation being cognizant of existing legislation. Flowing from the Constitution's supremacy clause, it was imperative to provide a formula by which old legislation would transit into the new constitutional dispensation, without creating a vacuum. Section 7(1) of the Sixth Schedule, therefore, is vital as a medium for ensuring harmonious transition.*

II. *The Fifth Schedule gives a time-frame within which Parliament ought to act by amending or repealing old legislation, or enacting new law, so as to give effect to particular Articles of the Constitution.*

III. *All laws in force immediately before the promulgation of the Constitution remain in force, but subject to Section 7(1) of the Sixth Schedule.*

IV. *In construing any pre-Constitution legislation, a Court of law must do so taking into account necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with the Constitution.*

V. *Where it is not possible to construe an existing law in accordance with (iv) above, so as to bring it into conformity with the Constitution, that is to say, where a law cannot be conditioned through judicial intervention without usurping the role of Parliament, such a law is invalid for all purposes*

42. With this clear exposition by the Apex Court, I do not need to belabour the point.

D.2. Can the Kiambu County Executive Committee Impose Property Rates Without an Enabling County Legislation and on Reliance of National Legislation Only?

43. The next question asks whether the County Executive Committee can impose property rates without an enabling County legislation. The question gets at the separation of powers ordered by the Constitution in the conduct of county affairs – with the County Executive Committee given executive powers to implement both County and national legislation and the County Assembly bequeathed the role of making laws for the county as appropriate. The *Ex Parte* Applicants argue that by the County Executive Committee relying on the National Legislation to impose property rates, the County Executive Committee is bypassing the County Assembly and usurping its functions. According to the *Ex Parte* Applicants, the only option open to the County Executive Committee is to publish a money bill on property rates and send it to the County Assembly for debate and passage.

44. The County Executive Committee, on the other hand, has placed its reliance on the provisions of Section 8(2) of the County Governments Act. As reproduced above, this Section appears to give a temporary avenue for the County Executive Committee to perform its executive functions by relying on existing national legislation until the County Assembly passes the appropriate legislation.

45. In my view, this is a common case of both sides being right – to some extent. The County Executive Committee is surely right that the provisions of Section 8(2) permit it to use national legislation to perform its executive functions as defined in Section 34 of the County Governments Act. However, four and half years into the life of the County Government, one must ask the question for how long the County Executive Committee will continue to rely on this default position on a matter as serious and consequential as the levying of property rates.

46. The *Ex Parte* Applicants are right that any money bill – indeed, any legislation – must go through the County Assembly with the attendant procedural safeguards for public participation. They are also right that a County legislation is needed to levy property rates in Kiambu County.

47. On the other hand, as aforesaid, the County Executive Committee is within its legal rights – at least textually – to use the provisions of the Valuation for Rating Act and the Rating Act to impose property rates until the County Assembly passes a County legislation on the matter. Section 8(2) is quite plain on that.

48. Where does that leave us? One must lament at the failure by the County Executive Committee to propose an appropriate county legislation on property rates. Similarly, one must frown upon the failure of the County Assembly to initiate and pass one on its own following the failure of the County Executive Committee to do the same. It would appear that the safeguard in Section 8(2) of the County Governments Act that was meant to ensure the smooth functioning of County Governments ephemerally has become

the long term escape route for inaction by County Governments. There appears to be little excuse for not proposing an appropriate legislation relating to property rates in Kiambu County for four and a half years. I noted that the County Executive Committee did not even allege that they have made any efforts whatsoever to propose such legislation. The County Executive Committee is simply contended to rely on the National legislation.

49. There are obvious problems with this state of affairs. The most obvious one – pointed out by the *Ex Parte* Applicants -- is that it denies the County Assembly its legal function to pass the necessary County legislation on such an important matter. Of course the County Assembly is equally at fault for it could, *suo motto*, initiate such County legislation. The second and more serious but related problem is that this state of affairs had denied the citizens of Kiambu a role – through the legislative process – in participating in their own governance by giving views on the County legislation on this important issue. This is diametrically opposed to one of the more important objects of devolution which is ?to recognise the right of communities to manage their own affairs and to further their development.? (Article 174(d) of the Constitution). By importing the use of national legislation in the important area of property rates for an infinite length of time, the County Executive Committee denies the people of Kiambu the right to determine and manage their own affairs and an opportunity to meaningfully participate in their governance. By the same token, the County Executive Committee fails to ?enhance checks and balances and the separation of powers? as provided for in Article 174(j) of the Constitution.

50. This leads me to two related conclusions. First, I expressly find that Section 8(2) of the County Governments Act as read together with Section 7(1) of the Sixth Schedule of the Constitution permits the County Executive Committee to use the provisions of Valuation for Rating Act and the Rating Act to levy property rates in Kiambu County. However, I also find that the delay in proposing Kiambu County's own autochthonous legislation on property rates to be inordinate and to be inimical to the principles and objectives of devolution. Hence, while I expressly find that the imposition of property rates by the County Executive Committee is saved by the correct reading of the Constitution and the existing legislation, I will issue conditions on how long such reliance on national legislation must continue in order to protect the objects and principles of devolution.

51. There is the related question of whether, given my finding above that Section 8(2) of the County Governments Act as read together with Section 7(1) of the Sixth Schedule of the Constitution permits the County Executive Committee to use the provisions of Valuation for Rating Act and the Rating Act to levy property rates in Kiambu County, whether such action must be taken only with the approval of the Cabinet Secretary for the time being responsible for inter-governmental relations (or Treasury as the *Ex Parte* Applicants suggested). This question arises because Section 5(1) of the Ratings Act expressly states that the rating method must be elected only with the approval of the ?Minister.? Before the Effective Date, that Minister was the Minister for Local Government.

52. The question post-2010 becomes, who, then should approve the rating method? The *Ex Parte* Applicants are categorical that it should be the Cabinet Secretary. The County Executive Committee argues that it should be the County Executive Member responsible for finance in the County. My view is that the County Executive Committee is right on this one. In these days when the Constitution commands that devolution should be entrenched, it would be, in my view a step back to give the Cabinet Secretary responsible for inter-governmental relations a role in County affairs. This would be directly pernicious to the objects and principles of devolution and breach the Constitutional principle that a County Government is an independent and autonomous unit.

53. My reading is in keeping with the saving clause in Section 8(2) of the County Governments Act which provides that National legislation can be used to facilitate the running of County affairs with the necessary modifications. The modification called for here, is to substitute the word ?Minister? with the words ?County Executive Member responsible for Finance.?

54. It is, therefore, my finding that no approval was needed from the Cabinet Secretary before adopting the rating method provided for in the Valuation for Rating Act and the Rating Act.

D.3. Can The County Executive Committee Rely On Valuation Rolls Of The Defunct Local Authorities?

55. This finally brings me to the last question: could the County Executive Committee rely on the Valuation rolls established by the defunct local authorities? The *Ex Parte* Applicants' argument is that since the local authorities ceased to exist and the County Governments Public Finance Management Transition Act stood repealed on 30/09/2013, it follows that all revenue raising measures saved under that Act would no longer be operational beyond the appointed repeal date i.e. 30/09/2013.

56. With respect, I do not think the arguments by the *Ex Parte* Applicants are apposite on this point. The Public Finance Management Transition Act was repealed with respect to the approved revenue raising measures of the defunct local authorities following coming into effect of County Governments. However, the position with respect to property rates is that, as aforesaid, it is a revenue raising measure that is expressly permitted under the Constitution of Kenya, 2010. As analysed above the County Executive Committee could utilise existing National Legislation to continue imposing property rates until appropriate County Legislation is enacted. Coupled with that authorization is the necessary authorization to continue using the Valuation rolls used by the defunct local authorities. There is nothing illegal or improper (subject to my remarks about the delay in passing County Legislation) in the County Executive Committee, in the exercise of its executive power, adopting the Valuation Rolls used by the defunct local authorities.

E. DISPOSITION AND ORDERS

57. Consequently, from my findings above, I make the following orders:

a. It is proper, legal and constitutionally-permissible for the County Government of Kiambu to rely on existing National Legislation to impose rates and to use existing Valuation Rolls. However, the Constitution envisaged that the use of the existing National Legislation would not be infinite but for only a period of time necessary for the County to pass its own County Legislation on the issue.

b. Consequently, the County Executive Committee shall, within thirty days of today, initiate at the County Assembly, an appropriate legislation on property rates and make every good faith effort to ensure that it is debated and passed subject to the calendar of the County Assembly.

c. If the County Executive Committee fails to initiate and expend good faith efforts towards the debate, passage and assent of an appropriate County legislation on property rates within the time period indicated in (b) above, the *Ex Parte* Applicants will be at liberty to apply to this Court for orders declaring the continued use of the National Legislation to impose property rates in Kiambu as illegal.

d. The County Executive Committee shall, within thirty (30) days report to Court the efforts made to comply with (b) above.

e. All the Gazette Notices published in the County Gazette only will remain invalid as per the orders of Justice Lenaola (as he then was) issued on 23/02/2017.

f. Each party will bear its own costs as this was a litigation brought in the public interest.

58. Orders accordingly.

Dated and delivered at Kiambu this 15th day of June, 2017.

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JOEL NGUGI

JUDGE