REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 70 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 256

AND

IN THE MATTER OF THE VALUATION ACT CAP 266

AND

IN THE MATTER OF THE RATING ACT CAP 267

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT CAP 286

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21

AND

IN THE MATTER OF ORDER 53 RULES 1, 3, 4 & 5

BETWEEN

REPUBLIC …….....……APPLICANT

VERSUS

THE COMMISSIONER OF LANDS.....…….....……1ST RESPONDENT

THE PERMANENT SECRETARY

MINISTRY OF LOCAL GOVERNMENT..…….....…..2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

TRANSITIONAL AUTHORITY.....INTERESTED PARTY

EX PARTE: - THE COUNTY COUNCIL OF BOMET

JUDGEMENT

Introduction

1. By a Notice of Motion dated 15th March, 2013, the *ex parte* applicant herein, **The County Council of Bomet**, seeks the following orders:

a. **That mandamus orders do issue compelling the 1st and 2nd Respondents and or any state organ responsible to remit and or cause to be remitted to the ex-parte Applicants the Government's contribution in lieu of rates (CILOR) for the fiscal years 2010/2011, 2011/2012 and 2012/2013 as well as prior to this time in the sum of Kshs.182,047,221.00/= as itemized hereunder:-**

i.	**2010 arrears B/F**	**1,360,896.00**
ii.	**2010/2011 rates**	**56,000,000.00**
iii.	**2011/2012 rates**	**62,343,162.50**
iv.	**2012/2013 rates**	**62,343,162.50**
		182,047,221.00

b. **That in the alternative orders of mandamus do issue directed at the Respondents compelling them to degazette revert and or restore Chepalungu and South Mara forests to the ex-parte Applicants to be managed as a Trustland under the County Council of Bomet and or its successor the Bomet County.**
c. **Cost of and incidental to this application be provided for.**
d. **Such further and other reliefs as the honorable court may deem just and expedient to grant.**

Applicant's Case

2. According to the *ex parte* applicant, by an order published in Legal Notice No. 363 of 1992 the Minister for Local Government in exercise of the powers conferred upon him by sections 5,9,28 & 39 of the ***Local Government Act*** established the County Council of Bomet (hereinafter referred to as "the Council") and that the Second schedule to the said Legal Notice No. 363 of 1992 establishes the area of the Township of Bomet as delineated on the Boundary of plan. No. 541/98 which is signed and deposited in the survey of Kenya Nairobi.
3. It was averred that the Council is a body corporate with perpetual succession, with powers to sue and be sued and with a Kenya Revenue Authority Personal Identification Number PO51107976K.
4. According to the Applicant, by the promulgation of the Constitution of Kenya 2010 in August 2010 the Council of Bomet was succeeded by the County of Bomet. However, by a performance contract entered on the 10th September 2012 between the ex-parte Applicant and the 2nd Respondent (hereinafter referred to as "the PS") the said PS (at Pat III of the said Contract) committed to make . . . "timely disbursement of central government funds i.e. LATF, CILOR as per schedule", so as to enable the Council meet its obligation as captured in the Council's supplementary budget estimate for the financial year 2012/2013. By a letter dated 4/9/2009 Ref FOR/68/9/VOL.VI/75 addressed to the council by the Director Kenya Forest Service, the said Director of the Kenya Forest Service informed the council that the following forests fall within the county council of Bomet:

a. Chepalungu Forest measuring 10,187.5 Ha created pursuant to proclamation No. 360 of 1956 and
b. Transmara Forest Measuring 17,400.0 Ha created pursuant to proclamation No. 102 of 1941.

[Annexed hereto and marked DSN5 is a copy of the said Kenya Forest Service letter to the council dated 4/9/2009].

5. It was averred by the Applicant that on or around 14th June, 2010 the council instructed M/S Sec & M Co Ltd to carry out a valuation of the said two forests for purposes of rating and by their letter dated 1/10/2010 Ref Sec M /Val/CCB/10/04/264 M/S Sec & M Co Ltd submitted their valuation to the council in which it was indicated that Chepalungu Forest Measuring 10.187 Ha or 26,223.10 acres would attract rates at Kshs.550/= per acre while South West Mau (Trans Mara) Forest measuring 17,400 Ha or 43,082.40 acres would attract a rating of Kshs.1, 125 per acre.
6. It was averred that thereafter the ex-parte Applicants sought and obtained approval of the Deputy Prime Minister and Minister for Local Government to apply the proposed valuation rates as recommended in the valuation report dated 1/10/10 by M/S Sec & M Co Ltd. By a Legal Notice No. 14659 published in the Kenya Gazette No 4425 on 18th November 2011 the council Gazetted the new rates to apply to Chepalungu and South West Mau (Trans Mara) Forests and by the Council's letter dated 18/11/11 Ref CCB/MIN/A/52 addressed to the Commissioner of Lands and copied to the Permanent Secretary Ministry office of Deputy Prime Minister and Minister for Local Government the council informed the Commissioner of Lands of the approved new rates applicable to Chepalungu & South West Mau (Trans Mara) Government Forests. Accordingly by a letter dated 22/11/11 Ref Val. 61/(6) addressed by the Commissioner of Lands to the Permanent Secretary of the Deputy Prime Minister and Minister for Local Government was requested to pay to the Council Ksh.62,343,162/50 being payment of the Government's contribution in lieu of rates for the year 2011.
7. According to the Applicant, the said sum of Kshs.621, 343, 162/50 for 2011 has to date not been paid to the council as directed by the commissioner of lands save for a sum of Kshs.4,990,058/= remitted to the ex-parte applicants in May 2012. In the Applicant's view, since then more CILOR has accrued for the fiscal years 2011/2012 at Kshs.62,343,162/50 and for the fiscal year 2012/2013 at Kshs.62,343,162/50 besides the balance brought done in 2010 of Kshs.1,360,896.00. However, the council reminded the Ministry of Lands by way of its letter dated 26/01/12 Ref B.57/8 with a copy to the Permanent Secretary office of the Deputy Prime Minister for Local Government, no to no avail. By a further letter dated 11th April 2012 Ref B. 57/8/1 addressed the Council reminded the Office of the Deputy Prime Minister and Minister for Local Government that the rates liability had escalated to Kshs.182,047,221.00/= comprising the following:-

i. 2010 arrears B/F 1,360,896.00
ii. 2010/2011 rates 56,000,000.00
iii. 2011/2012 rates 62,343,162.50
iv. 2012/2013 Rates 62,343,162.50

182,047,221.00

8. The Applicant averred that on the same 11th day of April 2012 it wrote a letter Ref B. 57/8/1 to the Permanent Secretary Office of Deputy Prime Minister for local Government reminding them to remit to the council bank account shown on the said letter the Government's contribution in lieu of rates for the years 2011 and 212 in the sum of Kshs. 124,686,325 but no payment has ever come forth to the Council as demanded or at all but meanwhile the pressure on the council to deliver services continues mounting. On 2nd May 2012 by a letter Ref. B.57/8/1 the Council again wrote to the P.S. Office of DPM and Ministry of Local Government pleading for the Government's contribution in lieu of rates which had then accumulated to Ksh.127,070,062.40/- for the Council to prepare itself for impending transitional processes and to enable it establish the necessary structures to facilitate its delivery of effective services to its customers, the citizenry and even outlined the extremely urgent expenditure items that it was under pressure to incur amounting to Kshs. 72,600,000/- but even this did not move the Respondents to carry their duty.
9. The Applicant disclosed that meanwhile by a circular Ref. 3801/347 issued to all clerks and all clerks of Councils in the Rift Valley Region by the then P.S. Office of the DPM and Minster for Local Government **Prof. Karega Mutahi** and copied to the Regional Local Officer, the Central

Government appointed 3 auditors to validate outstanding contribution in lieu of rates (CILOR), way leave and other statutory debts. Annexed to the said circular was a Ministerial circular No. MLG/1A/CILOR/VOL.I/(4) of 29th March, 2012 addressed to all the authority clerks by the P.S. office of DPM of Ministry of Local Government to all local authority clerks on the Ministry's validation exercise on outstanding CILOR, Way Leaves and other statutory deductions.

10. According to the Applicant, the terms of Reference for the audit exercise included inter-alia:-

> "1. Verify the total debt that the Government owes the Local Authorities in terms of CILOR.
>
> 2. Verify the funds the government owes to Local Authorities in respect of way leave.
>
> 3. Establish the total debt the Local Authorities owe the Government and other statutory creditors.
>
> 4. Reconcile the debt between the Government and the Local Authorities and recommend what should be paid and by who…"

11. The Applicant's case was that it was furnished with a checklist for CILOR and wayleave validation review which were comprehensively completed and returned to the auditors. In response to the audit, the P.S. in the Office of the DPM & Ministry of Local Government issued another circular Ref CMOLG/1058/111/(104) dated 27/8/2012 outlining the challenges ensuing from the validation of CILOR or/and way leave. However, the Applicant asserted that the challenges outlined in the said circular dated 27/8/12 (DSN 17) did not apply to the County Council of Bomet particularly in the following:-
    a. There was a valuation role.
    b. The valuation rolls were up to date.
    c. Financial and other records relating to CILOR were properly kept and were availed to the auditors.
    d. There was confirmation that all rates levied to the Government of Kenya had corresponding assets.
    e. The inventory of the public lands within the County Council of Bomet were availed to the auditors. The said inventory exists.
12. The Applicant added that by its letter dated 30/10/12 Ref B.57/8/1(67) addressed to the P.S. Ministry of Local Government and copied to the Minister of the same Ministry, the Council pleaded for the outstanding balance of CILOR for the 2011/12 and 2012/13 fiscal years which had accumulated to Kshs. 122,680,004.40/- to no avail and that not even the information to the Respondents/ Ministries that there was a maize crop failure within Bomet County which had adversely affected the Revenue flow to the County Council of Bomet moved the Respondents to honour their obligation to the Council either in part or in whole.
13. To the Applicant, the Respondents have abdicated their duty to the ex-parte Applicant by failing, neglecting and/or refusing to remit the o outstanding CILOR in the sum of Kshs. 127,070,062.40/- as at 29th January 2013 and thereafter promptly whenever it falls due despite the Council having exercised patience and restraint which was hurting the performance of its functions and the citizenry at large.
14. To the Applicant, the Council and the 1st Respondent have signed performance contracts which either party is required to satisfy besides the social contract with the people of Kenya and Bomet in particular that the Government shall render services to the citizenry. The Applicant disclosed that in Judicial Review case number 71 of 2013 the ex-parte Applicants are fighting off a prosecution pending before a Sotik Court in Case No. 212 of 2013 for purported arrears in NSSF contributions which the court should take judicial notice of to appreciate the ex-parte Applicant's predicament.
15. It was therefore the Applicant's position that the ends of justice will best be served if the Respondents were compelled through *mandamus* to carry out their obligation under the laws of this Republic since the liability is acknowledged yet the Respondents have not taken necessary

steps to settle it. To the Applicant, unless the Respondents are compelled through mandamus to perform their duty and obligations to the Ex-parte Applicant the Ex-parte Applicant's operations will be affected irreparably more so as devolved system of Government was due to commence after the 4th March General Elections hence the pre-existing liabilities of the Central Government to the Local Authorities such as the Ex-parte Applicant should be settled in full.

16. In the Applicant's belief, every Government department including the Respondents which owes other funds that have been provided for in the National Budget as is the case herein should be compelled to remit the said funds to the intended destination in a timely manner failing which such defaulter as in the case herein should be ordered by this honorable court to expeditiously remit such funds to the owed state organ, department or person such as the ex-parte Applicant herein hence the orders sought herein.
17. On behalf of the Applicant, it was submitted that this Court is vested with competent jurisdiction to hear and determine this application as sections 8 and 9 of the ***Law Reform Act*** vests this Court with the competent jurisdiction to issue the orders sought.
18. While admitting that pursuant to the enactment of the current Constitution, a new system of governance came into existence under which the County Governments took over most of the functions previously undertaken by the defunct local authorities, it was contended that the transition to the County Governments is governed by the ***Transition to Devolved Government Act,*** 2012 particularly section 7 thereof. The Applicant cited **Republic vs. County Secretary Muranga County Government exp Stephen Thiga Thuita [2014] eKLR** in support of this position.
19. According to the Applicant the general legal position is that legal proceedings which were instituted against or by defunct local authorities should proceed by or as against the County Government under whose jurisdiction the concerned local authority was located. To support this submission the Applicant relied on **J.A.S. Kumenda & Another vs. Clerk Municipal Council of Kisii & 6 Others [2013] eKLR** and **Republic vs. Town Clerk of Webuye County Council & Another [2014] KLR**.
20. It was therefore contended that the Application filed herein is neither defective in substance or in form and that the contributions in lieu of rates can rightfully be remitted to the Applicant.
21. To the Applicant, the obligation to pay Contributions in Lieu of Rates (CILOR) is a statutory obligation and not a civil debt. As such, enforcement of payment of CILOR can only be enforced by this Court and not a civil court as alleged by the Respondent and that the then Deputy Commissioner of Land wrote to the Permanent Secretary, Office of the Deputy Prime Minister instructing the PS to arrange to issue a cheque of Kshs 62,343,162.50 in respect thereof.
22. Based on **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2014] eKLR**, the Court was urged to award costs to the Applicant.

Respondent's Case

23. According to the Respondent, following the repeal of the Local Government Act by section 55 of the ***Urban Areas and Cities Act***, the Applicant had no locus standi to institute these proceedings.
24. It was contended that though as at the time of the filing of this application the ex parte applicant and the Minister for Local Government were in existence pursuant to the retired Constitution and the repealed ***Local Government Act***, the operationalisation of the devolution provisions of the current Constitution completely altered the status of the parties to the extent that they are not entities known to law hence incapable of enforcing any Court orders. According to the Respondent though section 18 of the Sixth Schedule to the Constitution provides that all local authorities established under the said repealed Act existing immediately before the effective date shall continue existing subject any law that might be enacted, the legal standing of these local authorities as provided under section 28(3) of the said repealed Act should be read with necessary modifications and adaptation to conform to the constitutional text by dint of section 7 of the sixth schedule to the Constitution.
25. It was contended that by dint of Article 179 of the Constitution, the executive authority of the County is vested in the County Executive Committee consisting of the County Governor, Deputy Governor and the members appointed by the County Governor. It was therefore contended that the existing councils when construed with necessary adaptation are only relevant as further

decentralised units of County Governments pursuant to Article 176(2) with no autonomy to execute any executive function, own property and have capacity to sue and be sued in any proceedings.

26. The respondent relied on the doctrine of avoidance and based on **Alphoonse Mwangemi Munga & 10 Others vs. Africa Safari Club [2008] eKLR** and **Harrikison vs. Attorney General Trinidad and Tobago [1980] AC 265**, contended that:

> **"...the Constitution is the supreme law of the land but it has to be read together with other laws made by Parliament and should not be construed as to be disruptive of other laws in the administration of justice."**

27. The Respondents further relied on this Court's decision in **Republic vs. Ministry of Interior and Coordination of National Government exp ZTE Corporation & Another [2014] KLR** and **Narok County Council vs. Transmara County Council & Another Civil Appeal No. 25 of 2000** for the proposition that where the law provides for a procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute.

28. To the Respondents the instant matter is in the nature and form of a dispute concerning the National and County Government and that the Constitution under the principle if cooperative governments proffers succinct dispute resolution procedures in such disputes in Article 189(3) of the Constitution under which in any dispute between the said governments, they shall make every reasonable effort to settle the dispute, including by means of procedure provided under the national legislation. Article 189(4) on the other hand provides that the envisaged national legislation shall provide procedure s for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. It was contended that under section 33 of the ***Intergovernmental Relations Act***, such disputes ought to be resolved by initiating direct negotiations with each other or through an intermediary failure to resolve the same, the dispute ought to be referred to the Summit, the Council or any other intergovernmental structures established under the Act.

29. The Court was urged that though the suit was filed before the operationalisation of the County Governments, since the suit has not undergone active litigation, the Court should not usurp the constitutional and statutory responsibilities of other institutions to hear the dispute.

30. It was contended that in the alternative, the law contemplates verification mechanisms of all assets and liabilities owned by the national government and local authorities before assigning them to either level of government. It was contended that under section 7(2)(h)(ii) of the ***Transition to Devolved Government Act, 2012,*** the determination and allocation of liabilities is a function of the Transition Authority and in this case, it was not clear whether the Transitional Authority was consulted prior to the filing of the suit.

31. According to the Respondents from the supporting affidavit, it was clear that the amount demanded were payments of the Government's contribution in lieu of rates for the year 2011 and that the law applicable to the new rates were gazetted on the 18th November, 2011. I was therefore contended that in essence, no payment could accrue out of a retrospective application of the law. In support of this position the Respondents relied on **Municipality of Mombasa vs. Nyali Limited [1963] EA 371**, **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others SCK Application No. 2 of 2011 [2011] eKLR**, as well as section 23(3) of the ***Interpretation and General Provisions Ac***t, Cap 2 Laws of Kenya.

32. In the final analysis it was the Respondents' contention that since the existence of the debt was disputed considering the retrospective application of the law by the ex parte applicant and the fact that the Transition Authority had not been consulted on the subject, the Court ought not to compel the respondent to perform something not yet verified and anchored in law

33. This Court was therefore urged to dismiss the application with costs.

Determination

34. Having considered the application, the affidavits both in support of and in opposition to the application, this is the view I form of the matter.

35.I have considered the issues raised by the parties in these proceedings.

36.In **Republic vs. Kenya National Examinations Council *ex parte* Gathengi & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, *Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89*** thus:

> ***"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."***

37.In the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J.** said -

> ***"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. "***

38.In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441,** it was held:

> **"The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution".**

39.This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** eloquently, in my view, 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. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature…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…Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law…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…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."

40. **I have reproduced the aforesaid decisions in order to show the circumstances under which the Court exercises its supervisory or judicial review jurisdiction in granting an order of *mandamus*. What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due. In matters where the applicant claims that the Respondent ought to be compelled to pay a certain amount of money it does not suffice to simply aver that the Respondent is under an obligation to settle its liability to the Applicant. The Applicant must go a step further and prove that the sum claimed is actually due. Where therefore liability is admitted or proved, the next stage is to prove the actual quantum payable and where the said sum is yet to be determined an order of mandamus cannot for forth for payment of the said sum.**
41. **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 the exact sums payable, the Court will not**

by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. As was appreciated in N<u>ewton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi HC JR 472 of 2014</u>:

> **"It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised."**

42. **Whereas the Court may compel the performance of the general duty where such duty exists, it will however not compel its performance in a particular manner for example by compelling the respondent to pay a particular amount unless that amount has been ascertained. This position was appreciated by the Court of Appeal in** the Court of Appeal in **<u>Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996</u>** as follows:

> **"*<u>The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way</u>*...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done..."** [Emphasis added].

43. In this case the Applicant claims the sum of Kshs 127, 070,062.40. According to the Applicant this sum is not in doubt. It relies on the letter dated 22nd November, 2011 written by the Senior Deputy Commissioner of Lands to the Permanent Secretary Office of the Deputy Prime Minister and Ministry of Local Government. However the said letter was limited to Kshs 62,343,162.50. By a letter dated 29th March, 2012, from the Permanent Secretary, Office of the Deputy Prime Minister and Ministry of Local Government, the said Permanent Secretary however asserted that the Ministry was undertaking a validation exercise in order to determine what was owed by the local authorities to the central government and vice versa. There is no evidence that this process of validation was actually completed. It would seem that each level of government had a claim against the other which claims were yet to be resolved.
44. Section 134 of the ***County Governments Act 2012*** provides that:

> ***(1) The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution.***

(2) All issues that may arise as a consequence of the repeal under subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition."

45.Section 7 of the ***Transition to Devolved Government Act*** on the other hand provides that:

(1) The Authority shall facilitate and co-ordinate the transition to the devolved system of government as provided under section 15 of the Sixth Schedule to the Constitution.

46.It is not in doubt that the Transition Authority is the body referred to under section 134 of the ***County Governments Act 2012***.

47.***The Transition to Devolved Government Act 2012*** provides in section 3 that:

The object and purpose of this Act is to— (a) provide a legal and institutional framework for a co-ordinated transition to the devolved system of government while ensuring continued delivery of services to citizens; (b) provide, pursuant to section 15 of the Sixth Schedule to the Constitution, for the transfer of powers and functions to the national and county governments; (c) provide mechanisms to ensure that the Commission for the Implementation of the Constitution performs its role in monitoring and overseeing the effective implementation of the devolved system of government effectively; (d) provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of— (i) assets and liabilities;(ii) human resources;(iii) pensions and other staff benefits of employees of the government and local authorities; and(iv) any other connected matters.

48.Section 7 of the same Act also provides that:

(1) The Authority shall facilitate and co-ordinate the transition to the devolved system of government as provided under section 15 of the Sixth Schedule to the Constitution.

(2) Despite the generality of subsection (1), the Authority shall — (a) facilitate the analysis and the phased transfer of the functions provided under the Fourth Schedule to the Constitution to the national and county governments; (b) determine the resource requirements for each of the functions; (c) develop a framework for the comprehensive and effective transfer of functions as provided for under section 15 of the Sixth Schedule to the Constitution; (d) co-ordinate with the relevant State organ or public entity in order to− (i) facilitate the development of the budget for county governments during Phase One of the transition period ;(ii) establish the status of ongoing reform processes, development programmes and projects and make recommendations on the co-ordinated management, reallocation or transfer to either level of government during the transition period; and (iii) ensure the successful transition to the devolved system of government;(e) prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities; (f) make recommendations for the effective management of assets of the national and county governments (g) provide mechanisms for the transfer of assets which may include vetting the transfer of assets during the transitional period; (h) pursuant to section 15 (2) (b) of the Sixth Schedule to the Constitution, develop the criteria as may be necessary to determine the transfer of functions from the national to county governments, including−(i) such criteria as may be necessary to guide the phased or asymmetric transfer of functions to county governments; and (ii) the criteria to determine the transfer of previously shared assets, liabilities and staff of the government and local authorities; [Emphasis added].

49.It is therefore clear that the body which was mandated with preparation and validation an inventory of all the existing assets and liabilities of government, other public entities and local authorities was the Transitional Authority. In my view where a specific or special body is tasked with performing certain duties, that body ought to be granted every latitude to perform its task without interference because there are good reasons for setting up specialised bodies to undertake

certain obligations. As was appreciated by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

50. **I agree with the position adopted in Council of Civil Unions vs. Minister for the Civil Service [1985] AC 374 HL** that:

> **"It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken."**

51. In this case, the Respondent has raised pertinent issues which have not been addressed by the Applicant. There is the issue whether the Applicant's claim can be applied retrospectively. It is also contended that the Applicant ought to have sought alternative remedies before invoking this Court's supervisory jurisdiction. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

52. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment,

> **" The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that**

in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge , in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in t he statute with respect we agree with the judge."

53. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3rd parties or buyer for value without notice and without affording such parties effective remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.
54. This position is even more relevant to situations such as the instant one where what is sought is an order of *mandamus*. In **R (Regina) vs. Dudsheath**, ex parte**, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "

55. The same position was adopted in the case of **The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194,** in which **Chesoni, J** (as he then was) stated:

"Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government…All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist."

56. In similar vein, **Lenaola, J** in **H.C.Petition No. 203 of 2012; Kapa Oil Refineries Limited vs. The Kenya Revenue Authority, The Commissioner of Customs Services and The Attorney General**, had this to say at page 15:

"I am also aware that even if this Court has jurisdiction to determine a violation of fundamental rights and freedoms. It must also first give an opportunity to other relevant bodies established by law deal with the dispute as provided in the relevant statute.

57. This position is nolonger just a matter of prudence as the same has acquired a statutory underpinning vide the ***Fair Administrative Action Act***, No. 4 of 2015. Section 9(2) of the said Act

provides:

> ***The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

58. Subsection (3) thereof provides:

> ***The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

59. It ought to be appreciated that the decision whether or not to grant the remedy of judicial review is discretionary. As is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."** [Emphasis added].

60. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

> **"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance."**

61. Taking into account the fact that the actual sum due if at all is still at large coupled with the fact that the Applicant has not exhausted the other available avenues to redress its grievance, in the exercise of the discretion conferred upon this Court I decline to award the orders sought herein. Let the Applicant pursue the said remedies and once the actual amount due to it is determined then it can approach this Court for an order compelling the Respondent to pay the sum decreed to be due.
62. With respect to the alternative remedy I have noticed at the time of leave no such relief was intended to be sought with the result that no leave to apply for the same was granted. I therefore decline to delve on the merits if any of the said prayer.

Order

63. In the result the Notice of Motion dated 15th March, 2013 fails and is dismissed but with no order as to costs taking into account the fact that the Respondents seem not to be expediting the process of evaluating the respective claims of the parties with a view to arriving at a final determination contrary to the dictates of Article 47 of the Constitution.
64. Orders accordingly.

Dated at Nairobi this 9th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Chimau for the Respondent

Cc Mutisya