REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. CIVIL APPLICATION NO. 84 OF 2013

WACHIRA NDERITU NGUGI & CO. ADVOCATES.....APPLICANT

VERSUS

THE TOWN CLERK CITY COUNCIL OF NAIROBI.....RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 16th November, 2015, the *ex parte* applicant herein, **Wachira Nderitu Ngugi & Co. Advocates**, seeks the following orders:

> **1) THAT this Court do be pleased to order the County Secretary, Nairobi City County, to appear and show cause why he should not be cited for contempt of Court for failing to pay the applicant the sum of Kshs 2,673,223.80 as ordered by this Court on the 20th January, 2014 in the total sum of Kshs 2,673,223.80.**
>
> **2) THAT the County Secretary does accordingly be punished for contempt of Court.**
>
> **3) THAT the County Secretary be further ordered to pay further interest on the sum of Kshs 2,673,223.80 at the rate of 14% p.a. from the 17.11.2015 until payment in full**
>
> **4) THAT the costs of this application be provided for.**

Applicant's Case

2. According to the Applicant, on the 20th day of January 2014, this Honourable court ordered by way of an order of *mandamus* that the Town Clerk, City Council of Nairobi does pay the applicant a sum of Kshs. 1,884,616.50 together with interest within 30 days of the said order, and in default, a notice to show cause do issue against the said Town Clerk for him to show cause why he should not be cited for contempt of court. Pursuant thereto, on the 22nd day of January 2014, the applicant duly served the said order upon the Town Clerk, City Council of Nairobi.

3. Despite that, it was averred that the said sum has not been paid and hence this application.

4. The Applicant disclosed that it was aware that there was in office a County Secretary and Nairobi City County in place of the Town Clerk and City Council of Nairobi respectively, the same have been enjoined

by the express provisions of s.59 of the ***Urban Areas and Cities Act, 2011*** as the bodies established by law against whom these proceedings should continue.

5. According to the Applicant, the instant matter is one among a series of matters involving the applicant and the respondent over the issue of various unpaid taxed costs which the applicant has been seeking to recover from the respondent. To the Applicant, the issues raised in the respondent's replying affidavit were previously raised, almost word for word, by the respondent in answer to a similar application by the applicant in HC. JR. Misc. Application No. 354 of 2012 between the same parties and in a ruling by this Honourable court dated 16th day of February 2015, this Court held that the jurisdiction, if any, of the Transition Authority relates to the verification, by the authority, of any assets and liabilities of the then local authorities and cannot extend and/or apply to a judgment and orders by this Honourable court. Moreover, and it was in the public knowledge, the life of the Transitional Authority was to come to an end in March this year, being the third year since the year 2013 when the same came into being.

6. The Applicant nevertheless disclosed that the respondent had in any event almost settled the applicant's decree in the aforesaid JR. Misc. Application No. 354 of 2012 and being also a debt owed by the then City Council of Nairobi. To the Applicant, the respondent is fully liable to the applicant under S.59 of the ***Urban and Cities Act, 2011*** as the body duly established to take over the liabilities of the then Nairobi City Council.

7. The Applicant asserted that the order of mandamus dated 20th January 2014 was duly served upon the respondent, Nairobi City County, on the 22nd January 2014 at 9.35 a.m. The Applicant further disputed the fact that the Nairobi City County had never received any allocation by the National Government and averred that the National Treasury had advertised the release of the said equitable share of revenue for Nairobi City County and others.

8. To the Applicant it was difficult to understand why the respondent was so averse to settling debts when such delay ends up costing the taxpayers millions of shillings in accrued interest from the said debts.

Respondent's Case

9. It was the Respondent's case that the decretal sum stems from the Applicant's legal fees in the sum of Kshs 1,884,616.50.

10. However, according to the Respondent, the Applicant has never, served it with any pleadings, notice of entry of judgment or decree in this matter thus the same would be contrary to Article 47 and 50 of the constitution of Kenya 2010. The Respondent averred that it was only through the motion that it realized that there existed such a matter and a decree subsequently issued by the honourable court order given on 20th day of January 2014.

11. It was the Respondent's case that it is trite law that committal proceedings ought not to issue against a party who has not been personally served by the order or decree said to be in contempt of. It however averred that whereas it was an ardently believer in the rule of law, the honour and integrity of this Court and always committed to obey, respect and preserve the integrity of court orders, the orders were sought against the Town Clerk City Council of Nairobi which is now a defunct office and the same cannot be effected unless vide an amendment of the motion which has not been sought by the Applicant.

12. According to the Respondent, it is constitutionally mandated to provide essential services, including health, water, sanitation to over four million residents in the county using limited resources at its disposal and in executing its mandate, the county must inevitably undertake a delicate balancing in meeting financial obligations. However, it is yet to receive from the National Government its financial allocation under the ***County Allocation of Revenue Act 2014***, thus entirely relies on its meagre internally generated revenue to undertake its over forty seven (47) functions extensively set out in Part 2 of the Fourth Schedule to the Constitution of Kenya. It was therefore contended that the Respondent's officers can only be committed to civil jail on account of non-compliance with a court order to pay money by Nairobi City County where Nairobi City County has funds and has deliberately refuse to pay funds earmarked for

payment as no personal liability can be incurred in the circumstances.

13. Based on legal advice, it was asserted that Transitional Authority, a statutory body established under Section 4 of the ***Transition to Devolved Government Act***, 2012 Cap 265A, pursuant to section 15 of the Sixth Schedule of the Constitution, with the general mandate of facilitating and coordinating the transition of all existing assets and liabilities of government, public entities and defunct local authorities and that Transitional Authority had publicized a moratorium (which was still in force) on transfer of assets and liabilities as provide pursuant to section 35 of Transition to Devolved Government Act, 2012 which stipulates that a state organ, public office, public entity of local authority (defunct) shall not transfer assets of its liabilities during the transition period without seeking the approval of the Transitional Authority. It was further disclosed that the Transitional Authority, a statutory body established under section 4 of the ***Transition to Devolved Government Act, 2012, CAP 265A***, pursuant to section 15 of the Sixth Schedule of the Constitution, with the general mandate of facilitating and coordinating the transition to devolved system of government and also to prepare and validate and inventory of all existing assets and liabilities of government, public entities and defunct local authorities.

14. In the Respondent's view, the Authority had publicized a moratorium (which was still in force) on transfer of assets and liabilities as provided pursuant to section 35 of ***Transition to Devolved Government Act, 2012*** which stipulates that a state organ, public office, public entity of local authority (defunct) shall not transfer assets of its liabilities during the transition period without seeking the approval of the Transitional Authority. To the Respondent, it was public notice that the Transitional Authority advised the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities to enable the state organ to verify the liabilities and conclude on its nationwide audit of assets and liabilities of the defunct local authorities, before taking any action against a county government. Through a letter dated 11th December 2014, the Transition Authority acknowledged that it is still verifying the assets and liabilities of the defunct local authorities to facilitate the transfer of these debts to the respective county government and advised the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities.

15. It was averred that phase one of the Transitional Phases as prescribed under the Fourth Schedule of the ***Transition Devolved Government Act, 2012*** was still ongoing as the Transitional Authority is yet to conclude its national verification and audit of assets and liabilities of defunct local authorities and thus the assets and liabilities are yet to be transferred to the County Government as described in Phase Two of the Transitional Phases as prescribed under the Fourth Schedule of the ***Transition Devolved Government Act, 2012***.

16. The Respondent asserted that there has never been any agreement between the Nairobi City County and the national government to take the mandate of the national government to control assets and liabilities and in turn pay claims on unverified liabilities of the defunct local authorities that are in the custody of the national government through the Transition Authority during the transition period. To the Respondent, section 6 of the Sixth Schedule to the Constitution of Kenya vests in the National Government, all rights and obligations however arising that the Government entered into with any party prior to the establishment of the Nairobi City County on 4th March 2013. Further, section 59 of the ***Urban Areas and Cities Act*** ought to be read in line with section 6 of the Sixth Scheduled to the Constitution of Kenya and section 4 of the ***Transition to Devolved Government Act, 201, Cap 265A***, pursuant to section 15 of the Sixth Scheduled of the Constitution, section 35 of ***Transition to Devolved Government Act, 2012*** and Phase One of the Transitional Phases as prescribed under the Fourth Schedule of the ***Transition Devolved Government Act, 2012***.

17. It was the Respondent's belief that since the assets and liabilities of the Nairobi City County are yet to be transferred by the national government, by law, the national government is the proper party from which the Applicant can legitimately claim payments of its liabilities which emanate from the defunct local authority, Nairobi City Council.

Determination

18. I have considered the issues raised in this application.

19. The issues which are the subject of these proceedings are not moot. They are issues which have been dealt with by this Court before in JR 366 of 2014 – **Gateway Insurance Company Limited vs. Treasurer Nairobi County Government & 2 Others** in which the Court dealt extensively with the issues raised by the Respondent herein.

20. In that case the Court analysed section 15(1) of the Sixth Schedule of the Constitution which obliges Parliament to legislate for the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185 of the Constitution and found that Article 185 deals with legislative authority of county assemblies. Accordingly, the Court held that the legislation contemplated under the said section 15 deals only with the phased transfer of the legislative functions of the county assemblies.

21. It is true that section 6 of the Sixth Schedule to the Constitution provides that all rights and obligations however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under the Constitution. However, those rights and obligations are expressly stated to be subject to contrary provisions in the Constitution. Section 33 of the sixth schedule, on the other hand provides:

> ***An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.***

22. According to **Kasango, J** in **Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008,** in which the learned Judge cited with approval the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006**:

> **"Pursuant to the provisions of the said section 33 of the Sixth Schedule to the Constitution of Kenya, 2010 County Governments are therefore the natural and presumptive legal successors of the defunct local authorities."**

23. **Majanja, J** who delivered the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** pronounced himself on the provisions of section 59 of the ***Urban Areas and Cities Act*** No. 13 of 2011 as read with Section 33 of the Sixth Schedule of the Constitution. The former provides:

Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force or any defence appeal or reference howsoever field by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.

24. The learned Judge accordingly found that:

> **"the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgement. The court cannot grant orders incapable of enforcement as the Town Council and its Town Clerk no longer exist (See Republic vs. Minister for Land & 2 Others ex parte Kimeo Stores Ltd (2011) eKLR, Kenya National Examination Council vs. Republic exparte Geoffrey Gathenji Njoroge & Others CA Civil Appeal No. 266 of 1996)."**

25. It follows that section 33 of the 6th Schedule is an exception to section 6 thereof hence legal rights and

liabilities of the defunct local authorities are to accrue in favour of and be sustained against their successors which in this case are the respective County Governments and not the National Government. Whereas the Transitional Authority (whose term has since lapsed) was empowered to develop the criteria necessary to determine the transfer of functions from the national to county governments, there was an exception provided by section 33 of the Sixth Schedule hence the settlement of decrees against the defunct local authorities is not a function of the national government.

26. The Respondent also relied on section 35 of the ***Transition to Devolved Government Act, 2012*** which stipulates that a state organ, public office, public entity of local authority (defunct) shall not transfer assets or liabilities during the transition period without seeking approval of the Authority. Such a moratorium was the subject of the decision in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which the Court expressed itself as follows:

"From the respondent's own deposition, it is clear that the public notice that the Transitional Authority gave was to advise the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities to enable the state organ to verify the liabilities and conclude on its nationwide audit of assets and liabilities of the defunct local authorities, before taking any action against a County Government. [Emphasis added]...In this case not only has a judgement been given in favour of the ex parte applicant, but this Court has gone ahead to grant an order of mandamus compelling the respondent to satisfy the decree in question since execution proceedings cannot issue against the respondent. There is nolonger a question of verifying the liabilities which seems to have been the Authority's concern in the said notice. In my view the issue being raised herein ought to have been raised at the time of the hearing of the application for mandamus since the effect of the moratorium could have been to keep the finding of the respondent liable to satisfy the decree in abeyance. Once that stage was passed the horse had bolted and any attempt to close the stable thereafter would not serve any useful purpose."

27. I am still of the same view.

28. Whereas the Court in **Gateway Insurance Company Limited vs. Treasurer Nairobi County Government & 2 Others** (supra) appreciated that the said section forbids the transfer by a State organ, public office, public entity or local authority of assets and liabilities during the transition period, the Court was not prepared to interpret that section to mean that payment of debts accrued by the defunct local authorities which devolve or are transmitted to the relevant County Governments amount to transfer of assets and or liabilities and associated itself with the holding of **Majanja, J** in **Republic vs. Town Clerk of Webuye County Council & Another** (supra) that:

> "...**a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution."**

29. Similarly, in this case we are dealing with the duty to pay a debt already decreed by a competent Court of law to be due and payable by the defunct local authority which liability has been statutorily and constitutionally inherited by the County Government.

30. The Respondent contended that the Applicant did not comply with the provisions of section 13A(1) of the ***Government Proceedings Act*** which require that a 30 days period notice must be served before legal proceedings are instituted against the Government. It was further contended that being a Government execution cannot be levied against the County Governments.

31. This submission calls for the determination of the issue whether County Governments are Governments pursuant to the provisions of the ***Government Proceedings Act***. The question is whether the

provisions of the said Act apply to County Governments or only to National Government. The above Act does not define the term "Government". Nor does such definition appear in Article 258 of the Constitution. Section 2 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya on the other hand provides:

> ***"the Government" means the Government of Kenya***

32. Article 189(1)(a) of the Constitution provides that Government at either level shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level. In my view a holistic approach to this provision would lead to the conclusion that there is only one Government being exercised at two levels both levels complementing each other and operating in the spirit of co-operation and complementariness. It would follow that both levels subject to the Constitution exercise similar powers under the Constitution.

33. Although the provisions of the ***Government Proceedings Act*** do not expressly refer to County Governments, section 7 of the Sixth Schedule to the Constitution (Transitional And Consequential Provisions) provides that:

> ***All law 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.***

34. It follows that the provisions of the ***Government Proceedings Act***, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of the Constitution requires that the Constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.

35. The importance of the devolved system of governance was appreciated by the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** in which **Mutunga, CJ** expressed himself as follows:

> **"The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state..."**

36. The learned President of the Supreme Court continued:

> **"Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units...Article 96 of the Constitution represents the *raison d'être* of the Senate as "to protect" devolution. Therefore, when there is even a scintilla**

of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular...It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities…National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). ***Devolution*** **is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya's social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of** ***developing rich jurisprudence on devolution*** **could not have been more clearly reflected than in the provisions of the Constitution and the** ***Supreme Court Act.***"

37. The objects of devolution of Government are provided under Article 174 of the Constitution as follows:

(a) to promote democratic and accountable exercise of power;

(b) to foster national unity by recognising diversity;

(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

(d) to recognise the right of communities to manage their own affairs and to further their development;

(e) to protect and promote the interests and rights of minorities and marginalised communities;

(f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

(g) to ensure equitable sharing of national and local resources throughout Kenya;

(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and

(i) to enhance checks and balances and the separation of powers.

38. It is therefore clear that the importance of devolution of Government cannot be underestimated. It is therefore not by coincidence that sharing and devolution of power is recognised as one of the national values and principles of governance in Article 10 of the Constitution. This Court must therefore protect devolution and promote its principles. It must not condone actions which are likely to promote onslaught on the County Government and grind its operations to a halt and paralyse it from realising and fulfilling its Constitutional mandate. It is therefore my view and I hold that the extent of the immunity granted to the National Government under section 21(4) of the ***Government Proceedings Act***, Cap 40 Laws of Kenya must necessarily extend to the County Governments.

39. The next issue is whether the provisions of the ***Government Proceedings Act*** apply to applications for

judicial review. The preamble to Cap 40 provides that it is:

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

40. It follows that Cap 40 only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. With respect to judicial review proceedings, it has been held time without a number that such proceedings are neither criminal nor civil. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 4.**

41. This position was adopted in **The Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995 [1995-1998] 1 EA 1**, where the Court of Appeal held:

> **"S. 136 (1) and (2) of the [Government Proceedings Act], provides as follows: "136 (1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards. (2) Notice in writing of the action and the cause thereof shall be given to the defendant one month at least before the commencement of the action." Neither the *Government Lands Act,* the *Government Proceedings Act,* nor the *Civil Procedure Act,* and Rules made thereunder, have a definition of the term "action". The term is defined under s.3 of the *Interpretation and General Provisions Act,* Cap 2 Laws of Kenya, thus: ".....means any civil proceedings in a Court and includes any suit as defined in section 2 of the Civil Procedure Act."...That definition without more does not tell us much. However, when looked at together with the provisions of s.8 of the *Law Reform Act,* Cap 26 Laws of Kenya, we are able to discern that an application for an Order of Certiorari or any of the prerogative orders is not an action. S.8(1), of that Act provides as follows: "8(1) The High Court shall not, whether in the exercise of its Civil or Criminal exercise of its Civil or Criminal jurisdiction, issue any of the prerogative Writs of Mandamus, prohibition or Certiorari." By virtue of the provisions of S.7 of the *Administration of Justice (Miscellaneous Provisions) Act,* 1938, of the United Kingdom, which is applicable in this country by reason of S.8 (2) of the *Law Reform Act,* prerogative writs were changed to be known as "Orders", except for the writ of habeas corpus. So S.8 (1) above denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising Civil or Criminal jurisdiction. What that then means is that notwithstanding the wording of S.13A, above, which talks of proceedings, in exercising the power to issue or not to issue an order of certiorari the Court in neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S. 136 (1) of the *Government Lands Act,* and also, S. 13 A of the *Government Proceedings Act,* which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that S. 13A, above, when read closely, its wording, clearly shows that a suit within the meaning of the term "Suit" in S. 2 of the Civil Procedure Act is envisaged."**

42. I further associate myself with the decision in **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996** to the effect that:

> **"Judicial review matters are commenced by a notice to the Registrar under Order 53 rule 1(3) of the Rules. This is a Notice which the Registrar is supposed to and ought to be dispatching to the Attorney General or the intended Respondent to come and oppose the application for leave if he or it so wish and that is the only Notice required to be given on account of intended Judicial Review applications...Section 109 of the Kenya Posts & Telecommunications Act Cap. 411 has no application to judicial review as the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application...Judicial Review aims at providing justice at**

minimum delays and therefore a multitude of Notices to be given before an application for judicial review is made is contrary to that spirit of judicial review...Public institutions cannot afford luxuries of bad manners."

43. The requirement of notice to sue before commencement of legal proceedings has been the subject of litigation in this country. In **Pradhan vs. Attorney General & Another [2002] 1 KLR 1,** the Court was of the opinion that provisions of ***Government Proceedings Act***, Cap 40 [which require that the Government be served with a notice before institution of a suit] did not override the then section 3 of the Constitution which provided that the provisions of the Constitution shall prevail over all other provisions of the law all over the Republic. No requirement of any notice was required under section 84 of the Constitution and in any case the Court was prepared to find that the Attorney General had been given adequate notice by the Applicant that the Applicant was intending to take legal action against the Government.

44. It therefore follows from the foregoing discourse that the rules applicable to the notices and execution proceedings under the ***Civil Procedure Act*** and the Rules thereunder such as notice of judgement are not necessarily applicable judicial review applications. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the ***Government Proceedings Act*** have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of *mandamus,* the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See **The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs. The Brecknock And Abergavenny Canal Co. 111 ER 395** and **R vs. The Bristol and Exeter Railway Co 114 ER 859.**

45. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court. The rationale for the immunity against normal execution proceedings and by extension the said elaborate procedure was explained by **Visram** and **Ibrahim, JJ** (as they were) in **Kisya Investments Ltd vs. Attorney General & Another [2005] 1 KLR 74,** as follows:

"Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable….History and rationale of Government's immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii).its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered. *SEE HALSBURY'S LAWS OF ENGALAND 4TH EDN VOL. 11 PARA 970, 971 AND 1370.* As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of

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

46. It is therefore clear that apart from the fact of the existence of a judgement against the government, the law recognises that due to the special role played and the central position held by the Government both national and county in the management of the affairs of the country, there is a necessity for further proceedings to be undertaken before the judgement can be implemented.

47. Where a party has complied with all the procedures leading to the grant of an order of *mandamus* to subject the party to the normal civil law procedures would engender a miscarriage of justice yet Article 159(2)(b) mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd. Therefore apart from the notices contemplated under sections 8 and 9 of the ***Law Reform Act*** as read with Order 53 of the ***Civil Procedure Rules***, no other notices are required to be given in judicial review proceedings.

48. I must state that the issue in this case is the duty to pay a debt already decreed by a competent Court of law to be due and payable by the defunct local authority which liability has been statutorily and constitutionally inherited by the County Government.

49. As this Court appreciated in **High Court Judicial Review Miscellaneous Application No. 44 of 2012** between **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**:

"…in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the

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

50. Although the Respondent contended that contempt proceedings ought not to be commenced against the Respondent's officers, the law as it stands presently is that no execution can be levied against the property of a Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for *mandamus* against the Chief Officer of the Government, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of *mandamus* is not complied with. See **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441** where 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".

51. In this case, on 20th January, 2014, this Court granted an order compelling the Respondent to pay the applicant Kshs 1,884,616.50 together with interests at the rate of 14% p.a. from 21st December, 2012 till payment in full which sum was to be paid within 30 days from the date of service of the order. According to the applicant the order was duly served upon the legal Director of the Nairobi City County on the 22nd January, 2014 which order has never been complied with.

52. It is clear that this Court's order has not been complied with. In the circumstances, the reasons advanced by the Respondents for the failure to comply with the orders of this Court by satisfying the decree are flimsy excuses meant to deny the applicant the fruits of his judgement. The said grounds ought to have been advanced at the time of the application for mandamus. Once the *mandamus* was granted the horse has since bolted and it is too late now to attempt to close the stable, which in my view is what he Respondent is attempting to do by raising the issues contained in the response to this application.

53. This Court appreciates that most of the County Governments are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up and that taking into account their debt portfolio as against their financial resources, it is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. That recognition however does not justify the County Governments to evade meeting their constitutional and statutory obligations owed to other people. Such a consideration can only be taken into account when the Court is determining the mode of the settlement of the said obligations. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations.

Order

54. Accordingly, I find that by failinto comply with the orders of this Court the County Secretary, Nairobi City County, who is the accounting officer to the County is indeed in contempt of Court. Consequently, a notice will issue to the said officer to appear before this Court and show cause why he should not be punished for contempt of Court for failing to pay the applicant the sum of Kshs 1,884,616.50 together with interest at 14% p.a. from 21st December, 2012 till payment in full as ordered by this Court on the 20th January, 2014. The Applicant will have the costs of this application.

Dated at Nairobi this 2nd day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nderitu for the Applicant

Cc Mutisya