



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**JUDICIAL REVIEW MISC. APPLICATION NO. 12 OF 2016**

**IN THE MATTER OF AN APPLICATION BY MUEMA KITULU T/A MUEMA KITULU &  
COMPANY ADVOCATES FOR LEAVE TO INSTITUTE PROCEEDINGS FOR ORDER OF  
MANDAMUS**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNEMENT ACT NO 17 OF 2012**

**AND**

**IN THE MATTER OF HIGH COURT MISCELLANEOUS CAUSES NOS: 75 OF 2015, 76 OF  
2015, 73 OF 2015, 80 OF 2015, 39 OF 2014, 40 OF 2014, 283 OF 2013, 81 OF 2015, 78 OF 2015  
AND 38 OF 2014**

**BETWEEN**

**MUEMA KITULU & COMPANY ADVOCATES AND THE COUNTY GOVERNMENT OF  
KITUI**

**AND**

**IN THE MATTER OF A CLAIM FOR TAXED ADVOCATES/CLIENT COSTS**

**BETWEEN**

**THE REPUBLIC OF KENYA.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,**

**COUNTY GOVERNMENT OF KITUI.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KITUI.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE MUEMA KITULU ADVOCATE.....EX-PARTE APPLICANT**

**JUDGMENT**

The *ex parte* Applicant (hereinafter referred to as “the Applicant”) is an Advocate of the High Court of Kenya, and on diverse days between 17th December 2008 and 4th June 2012 he provided professional legal services to the County Council of Kitui in various legal matters. When the County Government of Kitui was established in place of the said Council, it withdrew instructions from the Applicant, who then lodged Advocate/Client Bills of Costs between 28th November 2013 and 23rd April 2015, and served the Respondents with the same, and which were opposed.

The Taxing Master of this Court subsequently awarded costs in favour of the Applicant of taxed Advocate/Client Bills of Costs in HC Misc. Appl. NO. 282 of 2013, HC Misc. Appl. No. 38 of 2014, HC Misc. Appl. No. 39 of 2014, HC Misc. Appl. No. 40 of 2014, HC Misc. Appl. No. 73 of 2015, HC Misc. Appl. No. 75 of 2015, HC Misc. Appl. No. 76 of 2015, HC Misc. Appl. No. 78 of 2015, HC Misc. Appl. No. 80 of 2015, HC Misc. Appl. No. 81 of 2015, as against the Respondents on diverse dates in 2015 and 2016. The Applicant subsequently applied for adoption of the taxation awards as judgments of the Court, and this Court issued judgment for the said awards and interest thereon of 14% per annum from the date of judgment, which was totaling to Kshs 8,116,553.30. (Kenya Shillings Eight Million One Hundred Sixteen Thousand Five Hundred Fifty Three and Thirty Cents) as at 31st March 2016.

The Applicant has now filed an application by way of a Notice of Motion dated 10th May 2016, seeking an order of Mandamus to compel the Respondent to pay to the Applicant this Court’s award of Advocates costs following successful taxation of the following causes, together with interest at 14% and further costs from the date of filing the each individual causes until payment in full; namely HC Misc. Appl. No. 282 of 2013, HC Misc. Appl. No. 38 of 2014, HC Misc. Appl. No. 39 of 2014, HC Misc. Appl. No. 40 of 2014, HC Misc. Appl. No. 73 of 2015, HC Misc. Appl. No. 75 of 2015, HC Misc. Appl. No. 76 of 2015, HC Misc. Appl. No. 78 of 2015, HC Misc. Appl. No. 80 of 2015, HC Misc. Appl. No. 81 of 2015 .

The Applicant’s claim as stated in the foregoing is set out in a statement of facts and verifying affidavit sworn by the Applicant, both dated 23rd March 2016 and filed in Court on 29th March 2016. The Applicant’s also filed written submissions in Court dated 6th June 2016.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are the Secretary of the County Government of Kitui and the County Government of Kitui respectively, filed grounds of opposition dated 2nd June 2016 through the firm of J.K. Mwalimu & Company Advocates. The Respondents oppose the application on the grounds that the Applicant never acted for the Respondents, and that the 1st Respondent has never been a party to the taxation awards sought to be enforced and therefore is improperly joined in the case. Further, that the Applicant's claims emanated from instructions issued by the defunct County Council of Kitui , and therefore should be enforced against the Transition Authority or its successor, and not the 2nd Respondent or its agents. The Respondents did not file any submissions after being directed to do so by this Court.

### **The Issues and Determination**

I have considered the pleadings and submissions made by the Applicant and Respondent. The order sought by the Applicant of mandamus is defined in the **Halsburys Laws of England, 4th Edition, Vol 1** at page 111 as follows:

**“The order of mandamus is of most extensive remedial nature and is in the form of 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 of 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 it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual.”**

The issues that require to be determined therefore are firstly, whether the Respondents are under a public

duty to pay the Applicant the awarded costs, and secondly, if so whether the Applicant is entitled to the relief he seeks.

The Applicant in this regard relied on various judicial authorities for the position that County Governments are obligated to settle debts of their predecessors, being the local authorities previously within their jurisdiction. He cited the decisions in **Argos Fisheries Limited vs Municipal Council of Mombasa, HCC, MSA Civil Suit No. 13 of 2008 [2014] eKLR, J.A.S. Kumenda & Another vs Municipal Council of Kisii & 6 Others, Kisii ELC Judicial Review Application No. 3 of 2013 [2013] eKLR, and Gateway Insurance Company Limited vs Jimmy Kiamba (Treasurer Nairobi County Government) and 2 Others, NRB HCC JR No. 366 of 2014.** He also urged the court to adopt the findings of Odunga J. in **Njoroge & Company Advocates -vs- County Secretary, Olkejuado County Government**, HC Misc. Application No. 208 of 2015 (J R) where the facts were similar to those in this application.

The issue raised by the Respondents that the claims against the Kitui County Council should be enforced against the Transition Authority or its successor were addressed extensively in the said judicial decisions. Section 134 of the County Government Act in this respect provides for the repeal of the Local Government Act under which local authorities including the Kitui County Council were established, and provides that all issues that may arise as a result of the repeal shall be dealt with by the body responsible for matters relating to transition. The said body is the Transition Authority which was established under section 4 of the Transition to Devolved Act 2012 pursuant to section 15 of the Constitution, and its mandate was to facilitate and coordinate the transition to devolved system of government, including validating and transferring all existing assets and liabilities of defunct local authorities.

What is notable about the provisions regarding the legal duties of the Transition Authority as regards liabilities of local authorities is that firstly, the said Authority was not placed with any legal obligation to pay outstanding liabilities of local authorities, but provide for an orderly and accountable system of verification and transfer of the said liabilities. Sections 3 and 7 of the Transition to Devolved Act 2012 were clear that the Transition Authority was to provide for policy and operational mechanisms during the transition period for the audit, verification and transfer to the national and county governments of *inter alia* assets and liabilities of local authorities.

Secondly, the Transition to Devolved Act 2012 and Transition Authority had a limited lifespan, with the transition period within which the authority was to act clearly defined as the period between the commencement of the Transition to Devolved Act 2012 and three years after the first elections under the Constitution. The date of commencement of the said Act was 1st March 2012 and the transition period was therefore between 1st March 2012 and 4th March 2016, as the first general elections under the Constitution were held on 4<sup>th</sup> March 2013.

The finding of this Court is that there is no Transition Authority in existence as claimed by the Respondents, which can be looked to enforce the Applicant's claim. In addition, no successor of the said Transition Authority is provided for by law.

As to which body therefore now has the legal duty as regards the liabilities incurred by local authorities including the Kitui County Council, I agree with, and adopt in its entirety the decision by Majanja J. in this regard in **Republic v Town Clerk of Webuye County Council & Another, Nairobi High Court Judicial Review Application No. 448 of 2006. [2014] eKLR,** where the learned Judge held as follows on the transition from defunct local authorities to the County Governments regarding pending suits:

**“Despite the statutory lacunas in the County Government Act and the Urban Areas and Cities Act. the rights accrued as a result of the litigation are preserved upon repeal of the local Government Ad by the Constitution. Section 33 of the Sixth Schedule to the Constitution provides for succession of institutions upon promulgation. It states that “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'. 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.”**

There is therefore no doubt that the Kitui County Government is the successor of the defunct Kitui County Council, as its natural and presumptive successor, and must now bear the legal burden and duty of liabilities incurred against of the defunct Council, including the judgment delivered in favour of the Applicant arising from claims against the Kitui County Council.

The 1st Respondent in addition also claimed that it is not a proper party as it has never been a party to the taxation awards sought to be enforced. Execution proceedings against a government or public authority can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was the holding in **Republic vs Permanent Secretary Office of the President Ministry of Internal Security, Misc. Civil Application JR 132 of 2012** and **Town Clerk vs City Council of Nairobi, Misc. Civil Application No. 224 of 2012**. The office of Secretary of a County Government is established under section 44(1) of the County Government Act and its functions as set out in section 44(3) are as follows:

**“3) The county secretary shall—**

**(a) be the head of the county public service;**

**(b) be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee;**

**(c) convey the decisions of the county executive committee to the appropriate persons or authorities; and**

**(d) perform any other functions as directed by the county executive committee.”**

The finding of this Court therefore is that the 1st Respondent as the Chief officer of the Kitui County Government is under a legal obligation to implement the judgments in favour of the Applicant on behalf of the 2nd Respondent.

Lastly, as to whether the Applicant is entitled to the relief sought, he has shown his interest and *locus standi* in terms of the judgment he secured in his favour as against the Respondents, and this Court has found that the Respondents are under both a constitutional and legal duty to satisfy the said judgment.

The Applicant’s Notice of Motion dated 10th May 2016 is accordingly found to have merit, and an order of mandamus is hereby issued compelling the Respondents to pay to the Applicant the sum of Kshs 8,116,553.30. (Kenya Shillings Eight Million One Hundred Sixteen Thousand Five Hundred Fifty Three and Thirty Cents) being the decretal sum in HC Misc. Appl. NO. 282 of 2013, HC Misc. Appl. No. 38 of 2014, HC Misc. Appl. No. 39 of 2014, HC Misc. Appl. No. 40 of 2014, HC Misc. Appl. No. 73 of 2015, HC Misc. Appl. No. 75 of 2015, HC Misc. Appl. No. 76 of 2015, HC Misc. Appl. No. 78 of 2015, HC Misc. Appl. No. 80 of 2015, HC Misc. Appl. No. 81 of 2015 together with interest thereon at 14% per annum from 1st April 2016 until payment in full.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 11<sup>th</sup> DAY OF OCTOBER 2016**

**P. NYAMWEYA**

**JUDGE**