



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL HUMAN RIGHTS AND JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW APPLICATION NUMBER 366 OF 2014**

**GATEWAY INSURANCE COMPANY LIMITED.....APPLICANT**

**VERSUS**

**JIMMY KIAMBA, TREASURER NAIROBI**

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

**LILIAN NDEGWA, SECRETARY NAIROBI**

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

**NAIROBI COUNTY GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Notice of Motion dated 3<sup>rd</sup> October, 2014, the ex parte applicant herein, **Gateway Insurance Company Limited**, seeks the following orders:

**1) This Honourable Court be pleased to issue an order for judicial review proceedings against the Respondents by themselves, their agents, servants, officers and/or otherwise for an order of mandamus to compel them to implement the Decree/Order emanating from the Judgment given by this Honourable Court in HCCC 890 of 2002 on 20<sup>th</sup> February, 2009.**

**2) Costs of this application be provided for**

2. The history in this matter according to the Applicant is that, the Applicant and the **Nairobi City Council** (hereinafter referred to as “the Council”) were respectively plaintiff and defendant in HCCC No. 890 of 2002 in judgment was entered against the Council and in favour of the Applicant on the 20<sup>th</sup> of February, 2009 and a decree thereon issued on 10<sup>th</sup> of March 2009 the sum of Kshs. 111,776,014.28/= including interest thereon at the rate of 24% from September 1999 to 20<sup>th</sup> February 2009 the date of judgment plus costs. It was disclosed that an attempt by Council was unsuccessful. The said decree was however duly served on the Council.

**The Applicant’s Case**

3. It was the Applicant's case that up to the date of filing these proceedings, the 3<sup>rd</sup> Respondent had not, despite numerous demands, satisfied the said decree which continued to attract interest and stood at Kshs. 369,066,554.72 as at 31<sup>st</sup> August, 2014.
4. According to the Applicant this being a decree of the court, the 3<sup>rd</sup> Respondent has a mandatory legal obligation to satisfy the decree thereof and implement the orders therein.
5. With respect to the Sixth Schedule to the Constitution, the Transitional and Consequential Provisions, the Applicant's position was that section 15 thereof is not applicable to this claim as the section only involves the phased transfer of assets and responsibilities from National Government to County Government of the function assigned to them under Article 185. In addition, the applicant approached the Ministry of Devolution and Planning and by a letter dated 5<sup>th</sup> August, 2014 addressed to the Attorney General and the Chairman of the Transition Authority and the Principal Secretary was of the view that as the claim pertained to a contractual debt incurred by the Council under section 143 of the repealed **Local Government Act**, by virtue of section 143(8) thereof the obligation to pay automatically passed to the Nairobi City County Government by operation of the law. In the applicant's view there was a clear obligation to honour the judgement.
6. According to the applicant, the claim in these proceedings fell outside the Public Advert on the verification of assets and liabilities because it pertained to a court judgement and hence no verification was required. Since the judgement had not been satisfied, the applicant had no obligation to approach the Authority or Central Government to seek assistance in meeting the debts. To the applicant, the Authority had no statutory right to interfere with the payment of a debt that was due and payable by the County Government otherwise it would be overstepping its mandate.
7. It was the Applicant's submission that *mandamus* is a prerogative order and is issued to compel an official to perform a public duty as was held in **Republic vs. Permanent Secretary Office of the President Ministry of Internal Security Misc Civil Application JR 132 of 2010 that:**
- “The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgment made by the court against that department. As was held by Lord Goddard C.J in the English case of R (Regina) vs. Dudsheath ex parte Meredith (1950) 2 ALL ER 741 at 743, Mandamus is neither a writ if course nor a writ of right, but 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. See also Republic vs. Town Clerk Kisumu Municipality Ex Parte East African Engineering Consultants (2007) 2 EA 441.”**
8. Based on **Republic vs. Town Clerk Naivasha Municipal Council ex parte Benson Muturi Kamande Nairobi HC Misc Civil 1046 of 2007** the Applicants submitted that the protection against prosecution under Section 263A of the **Local Government Act** Cap 265 (repealed) was not a protection against the legal responsibility of the Clerk once served with decree of the court to pay the money decreed from the funds of the local authority. The Applicants also relied on the cases of **Republic vs. Attorney General & 2 Others Ex-parte Mwikali Muindi Katunga & Another HC JR Misc Civil Application No. 187 of 2012** and **Republic vs. Attorney General & Another Ex Parte James Alfred Koroso HC JR Misc Application No. 44 of 2012** where the court found that it had jurisdiction to issue order of mandamus directing and compelling the Respondent therein to pay to the applicants the decretal amount of unsatisfied judgment plus costs and interests.
9. The Applicants argued that HCCC No. 890 of 2002 was filed and judgment given before the promulgation of the new constitution and prior to the enactment of the **County Government Act** and as Nairobi City County Government is in law the successor of the City Council of Nairobi the judgment debtor herein, is bound to satisfy the decree given against the Council. This submission was founded on Section 18 of the Sixth Schedule Transitional and Consequential Provisions provide that:

***All local authorities established under the local government Act (Cap 265) existing immediately before the effective date shall continue to exist subject to any law that might be enacted.***

10. Further reliance was placed on Section 33 of the Sixth Schedule of the Constitution.

11. The Applicant submitted that it is unconscionable that some 6 years after judgment was delivered the defendant had taken no steps to satisfy the decree which it is statutorily obliged to satisfy. The Applicant argued that a litigant has the right to enjoy the fruits of a judgment delivered by the court and no excuse or justification has been demonstrated by the judgment debtor as to why the decree holder cannot get paid and relied on **Town Clerk vs City Council of Nairobi Misc Civil Application No. 224 of 2012** where the court held that:

***“The law as it stands presently is that no execution can be levied against the property of a local authority 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 local authority 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.”***

12. In the applicant’s view, section 15 of the Sixth Schedule to the Constitution which provides for the transfer of legislative functions from National to County Assemblies as read with Article 185 of the Constitution relates solely to legislative powers of the County Assemblies. Articles 186 and 187 on the other hand are not applicable to section 15 but have been implemented under section 5 of the ***County Governments Act*** and ought to be understood in the same manner as referring to distribution of functions between the National and County Governments.

13. The Applicants in their supplementary submissions argued that the Respondent’s sole argument is that the Transition Authority established under Section 4(1) of the ***Transition to Devolved Governments Act 2012*** has not completed verification of the assets and liabilities of the City Council of Nairobi and rely on a public notice of 1<sup>st</sup> December 2014.

14. The Applicants argued that the Respondents ought to address the provision under Section 143 of the repealed ***Local Government Act*** which provides that:

***(1) A local authority may enter into contracts necessary for the discharge of any of its functions.  
(8) All contracts lawfully made under this section shall be valid and binding on the local authority, its successors, and all other parties thereto.***

15. The Applicants also relied on Sections 55, 56, 57, 58 & 59 of the ***Urban Areas and Cities Act*** which provide that:

***55. All rights, assets and liabilities accrued in respect of the properties vested in the local authorities established under the Local Government Act (Cap. 265) which shall stand repealed after the first election under the Constitution shall be dealt with as provided by law.***

***56. All directions, resolutions, orders and authorizations given by by-laws made, and licenses or permits issued by the local authorities established, under the Local Government Act and subsisting or valid immediately before the commencement of this Act shall be deemed to have been given, issued or made by the boards established pursuant to this Act, as the case may be, until their expiry, amendment or repeal.***

***57. (1) Every person who, immediately before the commencement of this Act was an officer, agent or member of staff appointed, seconded or otherwise employed by a local authority shall, on the commencement of this Act be seconded or otherwise deployed as may be provided by law.***

***58. (1) Any act, matter or thing lawfully done by any local authority before the commencement of this Act and any contract, arrangement, agreement, settlement, trust, bequest, transfer,***

*division, distribution or succession affecting any service delivery, trade of any form, sale or dealings on land or any other matter affecting assets, liabilities or property belonging to any local authority whether moveable, immovable or intellectual property shall, unless and until affected by the operation of this Act, continue in force and be vested in a body established by law.*

*59. 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 filed 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.*

### **The Respondent's Case**

16. The Respondents acknowledged that the decree of the court in the sum of Kshs. 27,531,038.00 and interest thereon at the rates of 24% from 20<sup>th</sup> September 1999 to 20<sup>th</sup> February 2009 of Kshs. 84,244,976.28 which amounted to a total of Kshs. 111,776,041.28 issued in HCCC 890 of 2002 on 20<sup>th</sup> of February 2009 was so issued against the now defunct City Council of Nairobi.

17. It was also not disputed that in these proceedings, the Applicant is seeking an order of mandamus to compel the Respondents to pay the sum of Kshs. 369,006,554.72 being the alleged decretal sum plus interest which stood unpaid by the Respondents as at 31<sup>st</sup> August 2014.

18. However, based on legal counsel, Respondents averred that pursuant to the provisions of Section 2(2) of the Sixth Schedule to the Constitution, the provisions of the Constitution relating to devolved governments became effective on the date of the first elections for county assemblies and governors which were conducted on 4<sup>th</sup> March 2013. To them, Section 6 of the Sixth Schedule to the Constitution vests in national government, all rights and obligations however arising of the Government or the Republic and subsisting immediately before the effective date to continue as rights and obligations of the national government or the Republic under the Constitution of Kenya.

19. They contended that it is the clear intention of the drafters of the Constitution of Kenya as expressly manifested in Section 15(2) (a) (ii) and (iii) of the Sixth Schedule to the Constitution of Kenya that any law that Parliament enacts to operationalize the functioning of devolved government shall: (ii) assist county governments in building their capacity to govern effectively and provide the services for which they are responsible; and (iii) support county governments. Therefore the Nairobi City County 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 that in executing its mandate the County must inevitably undertake a delicate balancing in meeting financial obligations given its limited resources. It was however disclosed that the County was experiencing financial constraints that have made it difficult for the County to meet its monthly obligations as well as settle debts accrued by the defunct City Council of Nairobi which debts in any event should be settled by the national government in compliance with Section 15(2) (a) (i) & (ii) of the Sixth Schedule to the Constitution which mandates the national government to build the county capacity to provide services.

20. It was the Respondent's case that Transitional Authority (hereinafter referred to as "the Authority"), a statutory body established under section 4 of the ***Transition to Devolved Government Act, 2012***, pursuant to section 15 of the Sixth Schedule to the Constitution, with the general mandate of facilitating and coordinating the transition to devolved system of Government and also to prepare and validate an inventory of all existing assets and liabilities of Government, public entities and defunct local authorities, had publicised a moratorium (which was in force) on transfer of assets and liabilities as provided pursuant to 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. In stead the 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.

21. It was the respondent's position that the Phase One of the Transitional Phases as prescribed under the Fourth Schedule of the ***Transition to Devolved Government Act, 2012*** is yet to conclude its national verification and audit of assets and liabilities of the defunct local authorities and thus the assets and liabilities are yet to be fully transferred to the County Governments as prescribed in Phase Two of the Transitional Phases under the Fourth Schedule to the ***Transition to Devolved Government Act, 2012***.

22. According to the Respondent there has never been any agreement between the Respondent and the national government to take over 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 custody of the national government through the Transitional Authority during the transition period hence 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 Respondent on 4<sup>th</sup> March, 2013.

23. It was therefore the Respondent's contention that the assets and liabilities of the Respondent 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.

24. The Respondents' position was that in view of the fact that the judgment issued in HCCC 890 of 2002 was based on unpaid premiums owed by the defunct City Council of Nairobi the responsibility of settling the decretal sum and the interest thereon rests with the national government and not the County Government of Nairobi and as such the order of mandamus does not lie against the Respondents herein.

25. The Respondents submitted that the national government is the proper party from which the ex-Parte Applicant can legitimately claim payments of its liabilities which emanate from the payments of insurance premiums to the defunct local authority, Nairobi City Council because these payments emanate from salaries, remuneration, allowances and other benefits due to the members of the 3<sup>rd</sup> Respondents who were previously under the defunct local authority and now seconded by the national government by dint of provisions of sections 73(2) and 138(1) (a) of the ***County Governments Act*** No. 17 of 2012 as read together with the provisions of Section 6 of the Sixth Schedule to the Constitution of Kenya.

26. To the Respondents, county governments' (including Nairobi City County) constitutional and statutory functions are spelt out in Part 2 Schedule 4 of the Constitution and under Section 5 of the ***County Government Act*** wherein it is provided that constitutionally counties are mandated to provide essential services such as water, health, sanitation and others to over four million residents in the county using very limited resources as such a delicate balancing act is inevitable in meeting these financial obligations. They submitted that in determining this application this court must appreciate the profound change in the governance of this country ushered in by the Constitution of 2010 in regard to devolution and that though the sovereign power of the people is vested in Article 1 of the Constitution, the same also provides for delegation of that power to various state organs.

27. It was submitted that the objects of devolution and the principles of devolved government as entrenched in Articles 174 and 175 of the Constitution must be put into consideration in determining this application. The Constitution, it was contended, empowered Parliament under Article 261(1) to pass legislation to give effect to the Articles on devolution in the fifth schedule and as a result the ***Transition to Devolved Government Act 2012*** was passed in which an Authority known as the Transition Authority was established under section 4 with a clear mandate to carry out the transfer of functions and devolving services to the citizens. In carrying out its functions under the Act the Transition Authority is mandated under Section 15 of the Sixth Schedule to the Constitution and Sections 2, 3,4 (2) (c) of the Act to provide a legal and institutional framework for a co-ordinated transition to the devolved system of government while importantly ensuring continued and quality delivery of services to citizens. The Respondents submitted that among its functions under Section 7 of the ***Transition to Devolved Government Act*** is that it is mandated to prepare and validate an inventory of all existing assets and liabilities of government, public entities and defunct local authorities. Pursuant to section 35 of the ***Transition to Devolved Government Act 2012***, the Authority published a moratorium on transfer on assets and liabilities of any

state organ, public office, public entity or local authority unless with its approval which moratorium remains in force as the Authority is yet to complete its nationwide audit of assets and liabilities of the defunct local authorities and has called on members of the public to register their complaints regarding payment of claims on liabilities before taking any action against county governments.

28. It was submitted that the fourth schedule of the **Transition to Devolved Government Act 2012** sets out the phases which the Authority undertakes its functions. The Respondents relied on a newspaper publication of the Transitional Authority advertised on 1<sup>st</sup> December 2014 which the Respondents argued indicated that Phase One was still ongoing as the Transitional Authority was yet to conclude its national verification and audit of assets and liabilities of defunct local authorities and as such the transfer of these assets and liabilities as prescribed under Phase 2 was yet to be finalized.

29. It was submitted on behalf of the Respondent that after the promulgation not all provisions became effective such as Section 2(2) of the Sixth Schedule to the Constitution which relates to devolved governments became effective on the date of the first elections for county assemblies and governors and cited the same section which provides that:

***The provisions of this Constitution relating to devolved government, including Article 187, are suspended until the date of the first elections for county assemblies and governors held under this Constitution.***

30. The Respondents also referred to Section 138(1)(a) of the **County Governments Act No. 17 of 2012** which provides that:

***(1) Any public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming to effect of this Act and is serving in a county on the date of the constitution of that county government shall be deemed to be in the service of the county government on secondment from national government with their terms of service as at that date and—(a) the officer’s terms of service including remuneration, allowances and pension or other benefits shall not be altered to the officer’s disadvantage; and (b) the officer shall not be removed from the service except in accordance with the terms and conditions applicable to the officer as at the date immediately before the establishment of the county government or in accordance with the law applicable to the officer at the time of commencement of the proceedings for the removal; and (c) the officer’s terms and conditions of service may be altered to officer’s advantage.***

31. Based on the foregoing provisions, the Respondents argued that because the public officers are deemed to be working for the 3<sup>rd</sup> Respondent, now a defunct local authority on secondment from the national government, payment of any dues arising from the public officer’s service is to be borne by the national government.

32. The Respondents also relied on Section 73(2) of the **County Governments Act** which provides:

***(2) Unless there is an agreement to the contrary, it shall be the responsibility of the national government to pay the salaries, remuneration, allowances and other benefits due to the staff seconded to a county government during the transition period.***

33. It was the Respondent’s argument that if parliament intended that this responsibility be borne by the county government it would have expressly stated so. The Respondents also submitted that in enacting Section 73(2) of the **County Government Act**, Parliament complied with Section 15 of the Sixth Schedule which provides that:

***15. (1) Parliament shall, by legislation, make provision 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.***

***(2) The legislation referred to in subsection (1) shall— (a) provide for the way in which the national government shall—(i) facilitate the devolution of power; (ii) assist county governments in building their capacity to govern effectively and provide the services for which they are responsible; and (iii) support county governments.***

34. The Respondents argued that the framers of the constitution intended that the national government assist the county government to transition into the devolved system of government and that it was not their intention that the national government abdicates its obligations immediately after the first election hence the need for the transition period. The Respondents also argued it was not the intention of the framers of the constitution that county governments would from day one of their establishment inherit debts, obligations and liabilities that the national government previously negotiated and as such during the transitional period of three years the county governments were allowed to establish a system capable of supporting exercise of their constitutional mandate.

35. The Respondents argued then that there being no agreement between the 3<sup>rd</sup> Respondent and the national government on the contrary over payment of debts incurred by the defunct local authority regarding the staff previously under the defunct local authority and now seconded to the 3<sup>rd</sup> Respondent then that obligation by law remains with the National Government.

### **Determination**

36. This matter must be purely determined under the legal framework governing transition under the old constitutional regime to the new constitutional regime. Before we go any further this court must define what this transition period is. According to the ***Transition to Devolved Government Act 2012*** the term transition period is defined under Section 2 (1) as: **“?transition period” means the period between commencement of this Act and three years after the first elections under the Constitution.** The date of commencement for the ***Transition to Devolved Government Act*** was on 9<sup>th</sup> March, 2012. This means that the transition period shall be from 9<sup>th</sup> March, 2012 to 4<sup>th</sup> March, 2016. This also means that we are still within the transition period.

37. This court is now called upon to examine the legislation that governs the transition period in regard to devolution. The necessary legislation required to implement the devolved system of government have been enacted. These include the ***County Government Act 2012, Transition to Devolved Government Act, 2012, Urban Areas and Cities Act, 2011, Intergovernmental Relations Act, 2012, Public Finance Management Act, 2012, Transition County Allocation of Revenue Act, 2012, Transition County Appropriation Act, 2013*** and ***County Government Public Finance Management Transition Act, 2013.***

38. 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.”***

39. 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.***

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

41. What then is the effect of the repeal of a law? Section 23(3)(c) of the ***Interpretation and General Provisions Act, Cap 2 Laws of Kenya*** provides:

*Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed;*

42. Under Section 55 to 59 of the *Urban Areas and Cities Act* it is provided that:

*55. All rights, assets and liabilities accrued in respect of the properties vested in the local authorities established under the Local Government Act (Cap. 265) which shall stand repealed after the first election under the Constitution shall be dealt with as provided by law.*

*56. All directions, resolutions, orders and authorizations given by by-laws made, and licenses or permits issued by the local authorities established, under the Local Government Act and subsisting or valid immediately before the commencement of this Act shall be deemed to have been given, issued or made by the boards established pursuant to this Act, as the case may be, until their expiry, amendment or repeal.*

*57. (1) Every person who, immediately before the commencement of this Act was an officer, agent or member of staff appointed, seconded or otherwise employed by a local authority shall, on the commencement of this Act be seconded or otherwise deployed as may be provided by law.*

*58. (1) Any act, matter or thing lawfully done by any local authority before the commencement of this Act and any contract, arrangement, agreement, settlement, trust, bequest, transfer, division, distribution or succession affecting any service delivery, trade of any form, sale or dealings on land or any other matter affecting assets, liabilities or property belonging to any local authority whether moveable, immoveable or intellectual property shall, unless and until affected by the operation of this Act, continue in force and be vested in a body established by law.*

*59. 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 filed 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.”*

43. This necessarily leads to a determination of who the “body established by law” is. **Okongo, J in J.A.S. Kumenda & Another vs. Clerk Municipal Council of Kisii & 6 others [2013] eKLR** held:

**“Due to the foregoing, it is clear that there are no transitional provisions in the County Governments Act dealing with actions and legal proceedings that were pending as at the date of the repeal of the Local Government Act. The reason for this obvious omission in drafting is not clear but I am of the opinion that it may be due to the fact that, an Act that was enacted earlier before the County Governments Act, namely, the Urban Areas and Cities Act, No. 13 of 2011 (“Urban Areas and Cities Act”) had transitional provisions dealing with rights and interests that had accrued prior to the repeal of the Local Government Act including pending actions and legal proceedings. Section 59 of the Urban Areas and Cities Act to which both parties herein referred to in their submissions although to support conflicting positions provides as follows; “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 filed 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”. This section vests the power to proceed with and to defend actions and legal proceedings pending against the defunct local authorities upon “a body established by law”. This “body” is neither defined nor constituted under this Act. This section therefore attempts to provide a solution to the transitional question under consideration but one which is vague and not totally helpful.”**

44. The learned Judge went on to say:

**“It follows therefore that until the body referred to in section 59 of Urban Areas and Cities Act is established, legal actions that were pending by and against the defunct local authorities can be sustained or pursued against County Governments under whose jurisdiction such local authorities were situated. To hold as argued by the respondents herein that such legal proceedings should remain suspended until such a time that the said body is set up would result in an absurd and a manifestly unjust situation for the hundreds of litigants who have pending suits against the defunct local authorities. Such holding would also put courts in very awkward position as they would not know what to do with matters involving the defunct local authorities which are pending rulings and judgments before them. In conclusion, it is my finding that this application is sustainable and until the body referred to in section 59 of Urban Areas and Cities Act is set up or established, it shall be sustained against Kisii County Government which will also be bound by any orders that may be issued herein in place of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the application.”**

45. Section 143(1) and (8) of the repealed *Local Government Act* provide:

***(1) A local authority may enter into contracts necessary for the discharge of any of its functions.***

***(8) All contracts lawfully made under this section shall be valid and binding on the local authority, its successors, and all other parties thereto.***

46. A “successor” is defined under *Black’s Law Dictionary* 9<sup>th</sup> Edition as:

***“A person who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor.”***

47. In **Republic vs. Town Clerk of Webuye County Council & Another, Nairobi High Court Judicial Review Application No. 448 of 2006, [2014] eKLR, Majanja, J**, dealing with the issue of the transition from defunct local authorities to the County Governments regarding pending suits held:

**“Despite the statutory lacuna’s 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 Act 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...In my view and taking into account the legal provisions I have cited, 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 judgment.”**

48. There is therefore no doubt that the Nairobi County Government is the successor of the defunct Nairobi City Council.

49. Moving to matters transition, *The Transition to Devolved Government Act 2012* provides under 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;

50. 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].**

51. The different phases alluded hereinabove within which the mandate of the Transition Authority is supposed to be completed are “Phase One” and “Phase two” and the same are defined under Section 2(1) as follows:

**“Phase One means the period between commencement of this Act and the date of the first election under the Constitution;**

**Phase Two means the period between the date of the first elections and three years after the first elections under the Constitution;**

52. This means that Phase One lapsed on the 4<sup>th</sup> of March 2013 and Phase Two is yet to lapse on the 9<sup>th</sup> of March 2016 and as such we are legally in Phase Two of the Transition period. Under the Fourth Schedule in the Transition Phases of the **Transition to Devolved Government Act 2012** the mandate of the Transition Authority during Phase One is *inter alia* to audit assets and liabilities of local authorities, to establish the asset, debts and liabilities of each Local Authority and to provide for a mechanism that will secure assets and liabilities held by the Local Authorities. Therefore this court should have in its possession a completion of the audit of the assets liabilities and debts of the defunct Nairobi City Council as prepared by the Transition Authority to establish its status and fulfill its obligations as to payments of the defunct local authority’s debts.

53. However Section 35 of the **Transition to Devolved Government Act 2012** provides that:

**(1) A State organ, public office, public entity or local authority shall not transfer assets and liabilities during the transition period.**

**(2) Despite subsection (1), a State organ, public office, public entity or local authority shall- (a) during Phase One, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation, the Ministry of Local Government and the Ministry of Lands; or (b) during Phase Two, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations; and (c) transfer immovable property, with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations and lands.**

**(3) The Authority may, on its own motion or on a petition by any person, review or reverse any irregular transfer of assets or liabilities in contravention of subsection (1).**

**(4) Any transfer of assets or liabilities made in contravention of subsection (1) shall be invalid.**

54. Regulation 10(1)(a) of the **Regulations for Transfer of Assets and Liabilities During the Transition Period, 2012** provide:

**The Authority may approve a request for transfer of an asset or liability where –**

**a) there is an existing court order;**

55. Section 15(1) of the Sixth Schedule of the Constitution clearly 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. Article 185 however deals with legislative authority of county assemblies. It is therefore clear that the legislation contemplated under the said section 15 deals only with the phased transfer of the legislative functions of the county assemblies.

56. It is true that Section 6 of the Sixth Schedule to the Constitution vests in national government, all rights and obligations however arising of the Government or the Republic and subsisting immediately before the effective date to continue as rights and obligations of the national government or the Republic under the Constitution of Kenya. 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.**

57. This section has been the subject of interpretation by this Court in at least two cases. In **Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008** Kasango, J citing **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** held:

**“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.”**

58. On his part, Majanja, J 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.**

59. The learned Judge then proceeded to pronounce himself as follows:

**“In my view and taking into account the legal provisions I have cited 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).”**

60. What comes out from the said decision is that section 33 of the 6<sup>th</sup> 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 governments as contended by the Respondent. Whereas the Transitional Authority is empowered to develop the criteria as may be necessary to determine the transfer of functions from the national to county governments, I have already held that 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.

61. In their supplementary affidavit the Respondents have referred to the existence of a moratorium published by the Authority on transfer of assets and liabilities pursuant to 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. What however is referred to as the moratorium in the submissions is a public advert dated 1<sup>st</sup> December, 2014. In the said advert it is indicated that the mandate of the Transition Authority is *inter alia* to prepare and validate an inventory of all the existing assets and liabilities of Government, other public entities and defunct local authorities. The said advert was dealt with 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:

**“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 no longer a question of verifying the liabilities which seems to have been the Authority’s concern in the said notice.”**

62. It is true 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. I am not however 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.

63. I associate myself 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.”**

64. I must state that the issue in this case is not “payment of debts incurred by the defunct local authority regarding the staff previously under the defunct local authority and now seconded to the 3<sup>rd</sup> Respondent”. Rather it 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.

65. 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 no longer 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.”**

66. As it were this court must have a realistic outlook to this matter. I take cognizance of the fact that the county governments are very hard pressed in regard to the financial burden that they inherited from their predecessors. I am also aware that one cannot execute proceedings against the County Government. The Respondents have annexed their monthly revenue and obligations wherein it is stated that the county has been experiencing financial constraints during the months of July – October 2014 due to the uneven

revenue cycle and they hope that the situation will improve in January 2015 when revenue collection is expected to improve. They also state that they have developed a debt management strategy with a view to liquidate all debts inherited from the defunct council. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi** (supra) in which this Court pronounced itself as follows:

**“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its 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. The Court appreciates and it is a matter of judicial notice that most of the local authorities 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. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”**

67. 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.

68. Having considered the issues raised herein, I have no reason to decline to grant the orders sought herein

### **Order**

69. I accordingly grant an order of *mandamus* compelling the Respondents them to implement the Decree/Order emanating from the Judgment given by this Honourable Court in HCCC 890 of 2002 on 20<sup>th</sup> February, 2009.

70. Costs of this application are awarded to the Applicant.

**Dated at Nairobi this 11<sup>th</sup> day June, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Njiru for the applicant***

***Mr Faraji for the Respondent***

***Cc Richard***