



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 14 OF 2015

BETWEEN

THE (INTERIM) COUNTY SECRETARY, COUNTY

GOVERNMENT OF KAKAMEGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

EX-PARTE: ALI ADAM AND MUMIA RAZAQ CHITECHI

(Appeal from the ruling of the High Court of Kenya at Kakamega,

(Dulu, J.) dated the 27th day of October, 2014

in

HC. MISC. CIVIL APPLICATION NO. 4 OF 2014 J.R.)

JUDGMENT OF D. K. MUSINGA, JA.

1. The background to this appeal has been well captured by **Gatembu** and **Murgor, JJ.A**, as I had the privilege of perusing the learned judges’ draft opinions. I shall therefore avoid repetition of the facts. While I agree with the conclusion arrived at by Murgor, J.A, I have some additional remarks that I wish to make.

2. The gravamen of the appeal as stated in ground 1 of the memorandum of appeal and as submitted before this Court by **Mr. Ashitiva**, learned counsel for the appellant, is that the learned trial judge erred in law and fact “*by failing to find that payment of the decretal sum in the Superior Court in Nairobi Industrial Court Cause No. 1540 of 2011, by the appellant herein could be made only after the Transition Authority had carried out an audit of the assets and liabilities of the appellant and provided for a mechanism aimed at securing those assets and liabilities in line with the provisions of section 7 (3) of the Transition to Devolved Government Act, 2012 and paragraphs 1 (b) and (p) of the Phase one of the Fourth Schedule to the Devolved Government Act, 2012.*”

3. In other words, was it a matter of course that immediately upon coming into existence, the County Government of Kakamega, the appellant, ought to have taken up and settled all the liabilities of the defunct Municipal Council of Kakamega? The learned trial judge rejected the appellant's contention that payment of the decretal sum of Kshs.3,000,000/= could not be effected unless and until an audit of the liabilities of the defunct local authority was done by the Transition Authority pursuant to the provisions of the **Transition to Devolved Government Act No. 1 of 2012**.

4. In rejecting that argument, the learned judge stated:

“An audit is an internal matter either in the County Government or in consultation with the National Government. It does not affect or involve the applicants herein. Further, no reason has been given for the failure to carry out the said audit. No time frame has been given or suggested as to when that audit would be carried out and completed ... I find that the so called audit is a mere excuse and in any case, cannot affect a court order which has not been challenged in court through the laid down machinery.”

5. **Mr. Amasakha**, the respondent's learned counsel, urged this Court to affirm the trial court's judgment. He submitted that the appellant is the successor of the defunct Municipal Council of Kakamega and therefore it was under a legal duty to satisfy the decree in issue. He added that the provisions of the Transition to Devolved Government Act cannot affect a decree. In support of his submissions counsel cited the decision of Odunga, J. in **Gateway Insurance Company Limited v Jimmy Kiamba, Treasurer Nairobi County Government & 2 Others [2015] eKLR**, where the court granted an order of mandamus to compel the Treasurer of Nairobi County Government to settle a decree issued against the defunct Nairobi City Council in HCCC No. 890 of 2002 on 20th February, 2009.

6. I must however point out that the issue for determination in the above cited matter was different from the one in the case that gave rise to this appeal. In **Gateway Insurance Company Limited v Jimmy Kiamba (Supra)**, Odunga, J. succinctly captured the respondents' main argument as follows:

“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.”

7. On the other hand, **Dulu, J.** summarized the respondents' position in **Ali Adam & Another v The County Secretary & County Government of Kakamega (which gave rise to this appeal)** as hereunder:

“That the above notwithstanding, debts and liabilities attributed to the defunct Municipal Council of Kakamega did not automatically become debts and liabilities of the County Government. That there were clear laid down procedures to be followed in dealing with debts and liabilities of the defunct Municipal Council. That the County Government has not yet been mandated to start paying debts owing from the defunct Municipal Council. That it would be a clear violation of the provisions of the 4th schedule of the Transition to Devolved Government Act No. 1 of 2012 if the County Government of Kakamega purports to pay the ex parte applicants. That it was therefore a fallacy to say that the County Government had refused to pay the amount.”

8. It is therefore clear that in the **Gateway Insurance** case the County Government of Nairobi categorically denied liability to pay the decretal sum and averred that it was the responsibility of the national government to settle the decretal sum. On the other hand, the County Government of Kakamega argued that the payment of the decretal sum had to await the audit report by the Transition Authority in terms of the provisions of the **4th schedule to the Transition to Devolved Government Act, 2012**.

9. Based on the above arguments, the two courts below were therefore determining different legal issues,

though arising from similar circumstances.

10. In this appeal, the substantive issue for determination is as stated in paragraph 2 above. That requires a close scrutiny of **section 15** of the **Sixth Schedule** to the **Constitution**, various sections of the Transition to Devolved Government Act and some policy guidelines issued by the Transition Authority as well as relevant sections of the County Government Act, among other laws.

11. **Section 15** of the **Sixth Schedule** to the **Constitution** is clear that the process of transition to devolved government was to be done in phases and Parliament was required to enact legislation to provide 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 186** of the **Constitution**.

12. The preamble to the Transition to Devolved Government Act stipulates that it is: “*An Act of Parliament to provide a framework for the transition to devolved government pursuant to section 15 of the Sixth Schedule to the Constitution, and for connected purposes.*”

13. **Section 4** of the said Act established the Transition Authority whose functions are set out under **section 7** of the Act and include, to “prepare and validate an inventory of all existing assets and liabilities of government, other public entities and local authorities”. Under the Fourth Schedule to the Act, the Transition Authority was required, among other duties, to, “audit assets and liabilities of local authorities, to establish the assets, debts and liabilities of each Local Authority” and provide a mechanism to secure assets and liabilities of Local Authorities during phase one of the transition period, which was the period between the commencement of the Act and the date of the first election under the new Constitution, 4th March, 2013.

14. During phase two, that is, the period between the date of the first elections and three years after the first elections under the Constitution, the Transition Authority was to complete any activity that may be outstanding from phase one, among other duties. It therefore means that if the Authority did not complete the task of auditing assets and liabilities of local authorities within the first phase of its operations, it could do so within the second phase.

15. In my view, the decree of **Kshs.3,000,000/=** against the Municipal Council of Kakamega that was issued in August, 2012 formed part of the liabilities of that Local Authority and was subject to audit by the Transition Authority. The learned trial judge erred in finding that “*the so called audit is a mere excuse*”. The audit was a statutory requirement.

16. The Local Government Act that was in force when the decree in issue was passed stood repealed immediately upon the final announcement of all the results of the first election held under the new Constitution. See **section 134 (1)** of the **County Government Act**. **Section 134 (2)** of the **County Government Act** provides that all issues that arose as a consequence of that repeal of the said Act were to be dealt with and discharged “*by the body responsible for matters relating to transition.*” In my view, that body is the Transition Authority.

17. The appellant cited a publication by the Transition Authority known as “**Mechanisms and Criteria for Transfer of Assets and Liabilities of Government and other Public Entities.**” Under **part 4.3** of that publication, the Transition Authority acknowledged that employee benefits or benefits payable for termination of employment were part of a Local Authority’s liabilities which it was required to audit. At page 25 of the same publication, it was stated that some of the liabilities of defunct Local Authorities include legal obligations, such as the decree in question. Under **part 7.3** relating to transfer of court cases involving the defunct Local Authorities, the Transition Authority was to determine the nature of the cases and advise accordingly.

18. In yet another publication by the Transition Authority that was referred to by the appellant’s learned counsel, “**Guidebook for Governors: Explaining the Administrative Arrangements for the Transition to Devolved Government**”, on the question: “*Who is responsible to pay outstanding*

liabilities?”, the Transition Authority stated:

“This issue has not yet been resolved. There is also a question of offsetting the amount which the national government owes the local authorities in unpaid local rates (CILOR).”

(See Page 33 of the publication).

On the same page, the Transition Authority stated that there is *“a list of outstanding liabilities for local authorities, and public entities that are being transferred to the Counties ...”*

19. All the above is a clear pointer to the central role of the Transition Authority in preparation and validation of an inventory of all existing assets and liabilities of Local Authorities during the transition period as defined under the Act.

20. During the hearing of the appeal, it was submitted that the statutory period of the Transition Authority expired before it had finalized its task of auditing the assets and liabilities of local authorities and establishing the assets, debts and liabilities of each Local Authority. What then becomes of the statutory duties that were being undertaken by the Transition Authority? The **Intergovernmental Relations Act, 2012** establishes the Intergovernmental Relations Technical Committee. Under **section 12 (b)** of the said Act, the Technical Committee took over the residual functions of the Transition Authority after expiry of the term of the Authority. It is therefore this Committee that was required to finalise the audit and verification of assets and liabilities of the defunct Local Authorities. It is not clear whether that has been done.

21. In view of the foregoing, I do not think that the trial court was right in taking the view that the County Government of Kakamega was duty bound to settle the decretal sum irrespective of whether the audit that was required to be undertaken by the Transition Authority had been done or not.

22. I did not understand the appellant to be saying that it was not at all liable to pay the decretal amount. Its position was well articulated by Christabel Ashiono, the appellant’s Principal Legal Officer in her replying affidavit to the respondent’s application for order of mandamus. She deposed as follows:

“6. That the foregoing notwithstanding, debts and liabilities attributed to the defunct Municipal Council of Kakamega do not automatically become the debts and liabilities of the County.

7. That without prejudice to the foregoing there are clearly laid down procedures to be followed in dealing with the debts and liabilities of the defunct Municipal Council of Kakamega.

8. That as at now, the County has not been mandated to start paying the debts owing from the defunct Municipal Council of Kakamega.

9. That until and unless such communication and/or directions are received from the Transition Authority or the National Treasury on how to deal with the liabilities and debts of the former Councils, the County is in a straight jacket.

10. That as at now, the Transition Authority has not made any such communication and/or directions.

11. That the County Government of Kakamega will be in clear violation of the provisions of the Fourth Schedule of the Transition to Devolved Government Act No. 1 of 2012 if it purports to pay the ex parte applicants.

12. That it is therefore a fallacy for the ex parte applicants to aver that the county has refused to pay them.”

23. It must be borne in mind that the respondent's application for an order of mandamus to compel the appellant to pay the decretal amount was instituted on 20th March, 2014, which was within Phase Two of the Transition period as provided under the **Fourth Schedule** to the **Transition to Devolved Government Act** before the Authority had completed the audit exercise.

24. Pursuant to **section 15** of the **Sixth Schedule** to the **Constitution**, Parliament enacted an appropriate law that spelt out how assets and liabilities of defunct Local Authorities were to be dealt with and, in my view, the statutory path, however long winded and convoluted it may appear, is always the safest route in reaching the desired destination.

25. The appellant never denied that it had the responsibility to settle the decree in favour of the respondent; its contention was simply that the process that was to lead to its settlement had not yet been finalized. I hope the process has now been finalized and if not, it would be completed in the near future.

26. I would therefore allow the appeal and set aside the trial court's judgment.

27. As **Murgor, J.A.** agrees, the final orders of the Court are that this appeal is hereby allowed. The Ruling and Order of **Dulu, J.** dated 3rd October, 2014, delivered on 27th October, 2014 by **Mrima, J.** is set aside. Considering the nature of the appeal, we order that each party bears its own costs.

DATED and Delivered at Kisumu this 31st day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.

JUDGMENT OF GATEMBU, JA.

1. I have read the opinion of the Honourable Lady Justice Murgor, JA. and wish to add my voice on the matter.

2. The issue in this appeal is whether the appellant is legally under a duty to satisfy a decree issued against the defunct Municipal Council of Kakamega.

Background

3. The background to this matter is captured in detail in the opinion of Murgor, JA. For purposes of context however, I will restate, although briefly, the uncontested facts from which the issue in this appeal stems. The respondents were employees of Municipal Council of Kakamega (the Council). They worked as firemen drivers from 15th February 2007. On 10th November 2010, the Council terminated their employment. They challenged that termination and lodged a claim in the Industrial Court at Nairobi. They sought a declaration that they were entitled to the status of permanent employees, having worked for the Council for over three years. They also sought monetary reliefs for unlawful termination of their employment.

4. The Council did not contest the respondents' claim. Negotiations were entered into. A consent judgment was recorded before the Industrial Court on 22nd August 2012 under which the Municipal Council agreed to pay the respondents Kshs. 3,000,000.00 in final settlement of their claims. A decree in those terms was issued by the court on 28th August 2012. That decree remains unsatisfied.

5. Correspondence was exchanged between the advocates for the respondents and the appellant, the County Government of Kakamega, in a bid to have payment made. In a letter dated 20th June 2013 addressed to the firm of Amasakha & Company Advocates, the advocates for the respondents, the Legal Officer, Office of the Governor, County Government of Kakamega acknowledged the County's responsibility to settle the decretal amount, requested the respondents to forego a portion of their entitlement by accepting a lesser amount than that decreed, pleaded for time to make payment.

6. In their response dated 25th June 2013, the advocates for the respondent, in what they referred to as the spirit of maintaining good relations with the County Government, indicated that their clients, the respondents, had on a without prejudice basis agreed to accept Kshs. 2,800,000.00. Payment was still not made.

7. In March 2014, the respondents lodged an application for judicial review by a Notice of Motion dated 19th March 2014 before the High Court at Kakamega in Misc. Application No. 4 of 2014. They sought an order of mandamus to compel the appellant to pay the decretal amount plus interest and costs. The basis of the application was that the decree issued on 28th August 2012 had not been satisfied and that the County Government was legally under a duty to satisfy it.

8. In opposition to that application, the Principal Legal Officer of the County Government of Kakamega swore a replying affidavit. Based on that affidavit, the position taken by the appellant was that the devolved system of government was not in place when the respondents commenced their suit before the Industrial Court; that the County was not privy to the proceedings before the Industrial Court; that the debts and liabilities attributed to the Council were not automatically assumed by the County; that there was a clear procedure to be followed "*in dealing with the debts and liabilities of the defunct*" Council; that the County had "*not been mandated to start paying debts owing from*" the defunct Council; that unless and until the Transition Authority instructed the County on how to deal with the liabilities and debts of the Council, the County was not in a position to do anything about the decree; that in the event of the County purporting to pay the decreed amount, it would be in violation of the 4th Schedule of the Transition to Devolved Government Act No. 1 of 2012; and that in those circumstances an order of Mandamus could not be issued or enforced against the County.

9. That application for judicial review was heard by Dulu, J. whose ruling dated 3rd October 2014 was delivered on his behalf by Mrima, J. on 27th October 2014. The court held that the County is under the law "*a successor to the defunct Municipal Council of Kakamega*" and "*that execution could properly be effected against*" it; and that the County "*is fully liable to pay the decretal amount.*"

10. In the Judge's view, the matter raised by the County that an audit by Transition Authority under the Transition to Devolved Government Act No. 1 of 2012 was pre requisite was an internal matter either in the County or in consultation with the National Government was an excuse and was "*no defence.*" In any case, the Judge held, "*a court order is not subject to audit.*" With that, the court allowed the application and granted the order of mandamus. Aggrieved, the appellant lodged this appeal.

The appeal and submission

11. Learned counsel for the appellant, Mr. B. M. Ashitiva, submitted that county governments are new creatures created by the Constitution of Kenya, 2010; that if it was intended that county governments should automatically assume the responsibilities and assets of local authorities, an express provision to that effect would have been made; that instead, the Transition Authority was established to audit and ascertain which liabilities would be assumed by the national government and which would be assumed by the county governments; that the responsibility over the decree in this case lay with either the national government through the Public Service Commission or the Transition Authority and the decision to execute against the County is premature as the audit process by the Transition Authority had not been concluded.

12. It should be borne in mind, counsel argued, that the respondents in this case never worked for the

County and did not therefore provide any benefit to the County. In counsel's view, the Court should take the approach taken in **Republic v County Secretary Murang'a County Government Exparte Stephen Thiga Thuita [2014] eKLR** where the High court at Murang'a expressed the view that it was incumbent upon the Transition Authority to come up with a criterion to determine the transfer of assets and liabilities before which enforcement action would be premature.

13. A similar approach was taken by the High Court in Busia in **County Government of Busia & another v Julius Orina Manwari & 12 others [2015]eKLR**. In counsel's view therefore, the learned Judge erred in failing to find that payment of the decretal sum could only be made after the Transition Authority had carried out an audit in accordance with Section 7(3) of the Transition to Devolved Government Act, 2012. Counsel maintained that the County is not the natural and presumptive legal successor to the defunct Council to the extent that assets and liabilities of the Council are concerned.

14. Opposing the appeal, learned counsel for the respondents, Mr. Amasakha, submitted that the respondents were constrained to seek an order for mandamus from the court because the County failed to satisfy the decree, despite having requested the respondents for time to do so. In counsel's view, the issue raised by the appellant whether an audit by the Transition Authority had been undertaken is, in effect, a red herring that has nothing to do with the matter. In that regard counsel drew our attention to correspondence between the advocates for the respondent and the County in which the County sought time to make payment.

15. Citing a decision of the High Court at Nairobi in the case of **Gateway Insurance Company Limited v Jimmy Kiamba, Treasurer Nairobi County Government & 2 others [2015] eKLR**, and the decision of the Industrial Court at Kisumu in **Timothy Omollo & 79 others v Kakamega County Government & Kakamega County Public Service Board, Cause No. 182 of 2013**, counsel submitted that the County is the natural and legal successor of the Council and that employment and labour function was in any case taken over by the County. Counsel also referred to Section 33 of the 6th Schedule to the Constitution and to Sections 58 and 59 of the Urban Areas and Cities Act to support the argument. In any event, any failure on the part of the Transition Authority to carry out its mandate should not be visited upon the respondents.

Analysis

16. Having considered the appeal and the submissions by counsel, the issue in this appeal, as already stated, is whether the County is under an obligation to satisfy a decree issued by the Industrial Court on 28th August 2012 against the now defunct Council.

17. The lower court was categorical that the answer to that question is in the affirmative on the basis that the County is the successor to the Council. According to the County however, the lower court could only have arrived at any decision regarding whether the County was liable "*only after the Transition Authority had carried out an audit of the assets and liabilities*" of the County in line with the provisions of Section 7(3) of the Transition to Devolved Government Act, 2012.

18. We were referred to four decisions of the High Court on this question. The ruling in case of **Timothy Omollo & 79 others v Kakamega County Government & Kakamega County Public Service Board** (above) related to an application for a temporary injunction to restrain the Kakamega County Government and the County Public Service Board from terminating or dismissing the claimants therein from employment without due process.

19. The claimants in that case were employees of the defunct Municipal Council of Kakamega whose employment was governed by terms and conditions of service of officers of local authorities in Kenya, the Public Service Commission (Local Authority Officers) Regulations, 2007, and the Employment Act. The claimants asserted that when they reported to work on 2nd June 2013, their supervisors informed them that they had instructions not to assign them duties as from June 2013. They were subsequently removed from the payroll. When granting a temporary injunction to restrain their termination, the Industrial Court took the view that the claimants "*automatically became County Government staff*"

after local authorities were abolished when the Local Government Act was repealed, and could not be removed from employment without due process. We bear in mind that the court was, in that case, dealing with an interlocutory application and the issue was not fully and substantively canvassed.

20. In **Republic v County Secretary Murang'a County Government Exparte Stephen Thiga Thuita** (above) Justice Ngaah, J. was dealing with a motion, which was not opposed, seeking a mandamus order against the town clerk, Municipal Council of Murang'a, to pay to the applicant therein costs awarded in a civil suit by the magistrates' court at Murang'a. That motion was then amended by substituting the town clerk, Municipal Council of Murang'a with the County Secretary, County Government of Murang'a.

21. Without having been addressed by either party, the learned Judge took issue with that amendment as an issue that "*merits mention in [his] judgment*" and observed that "*the amendment was informed by the presumption that the county Government of Murang'a carried over the liabilities of the Municipal council of Murang'a. This presumption however is not supported by any legal provision I know of and none was shown to me.*" The learned Judge then concluded that there would be "*no basis to hold the county government of Murang'a responsible for liabilities which were hitherto attributed to the Municipal Council of Murang'a.*"

22. In reaching that conclusion, the Judge reasoned:

"The closest law that appears to address the devolution of assets and the assumption of liabilities of the local authorities prior to their extinction is the Transition to Devolved Government Act, Chapter 265A, of the Laws of Kenya. With the emergence of the County Governments, the assets and pre-existing liabilities of the now defunct local authorities were to be shared between those county governments and the national government. The body that was established to work out how this distribution was to be done was the Transition Authority which is created under section 4 of the Transition to devolved Government Act. Among its functions set out in section 7 of the Act, the Transition Authority is required to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities. Once this is done it is upon the Transition Authority to come up with the criteria to determine the transfer of previously shared assets, liabilities of the government and local authorities. As at the time this application was argued, there was no evidence and none was brought to the attention of the court that such a criteria is now in place as contemplated under the Transition to Devolved Government Act. Without this criteria, it would be premature to attribute the local authorities' pre-existing liabilities to the county Governments."

In the case of **County Government of Busia & another v Julius Orina Manwari & 12 others** (above) Tuiyott, J. felt "*constrained to make some observations*" regarding the question whether, "*as a matter of course, a county government takes up the liabilities of the defunct Local Authorities that were located within their jurisdiction.*" While dismissing the constitutional petition in that case on the ground that it was an abuse of the court process, he agreed with Ngaah, J. in **Republic v County Secretary Murang'a County Government Exparte Stephen Thiga Thuita**. He stated that:

"I do not think that it is in the place of the court to find that all proceedings against the named defunct local authorities must naturally continue against the County Government of Busia because there is a statutory authority, being the Transition Authority, that has the constitutional mandate to carry out the function of identifying who should assume the responsibility."

24. He does not appear to have been impressed by the view taken by Okongo, J. in **J. A. S. Kumunde & Another v Clerk Municipal Council of Kisii & 6 others [2013]eKLR** that "*County Governments are... the natural and presumptive legal successors of the defunct local authorities*" nor by the opinion of Majanja, J. in **Republic v Town Clerk Webuye County Council and Another [2014]eKLR** where the judge stated 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.*"

25. In **Gateway Insurance Company Limited v Jimmy Kiamba, Treasurer Nairobi County Government & 2 others** (above) Odunga, J. after analyzing the pertinent legal provisions concluded, that the County Government was the successor to the local authority under Section 33 of the 6th Schedule to the Constitution. He held that the county government had a 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.*”

26. Those are the different perspectives embraced by the High Court on the question whether county governments are the successors to the defunct local authorities.

27. As already noted, the respondents worked as firemen drivers under the employment of the Municipal Council of Kakamega from 15th February 2007 to 10th November 2010. The Municipal Council of Kakamega, a local authority, was an establishment under the since repealed Local Government Act, Chapter 265 of the Laws of Kenya.

28. County governments were introduced into the fabric of the Kenyan Society and came into existence under the Constitution of Kenya, 2010[1]. The functions and powers of the national government and the county governments, respectively were set out in the Fourth Schedule of the Constitution in terms of Article 186(1) thereof.

29. Local authorities did not cease to exist immediately upon promulgation of the Constitution of Kenya, 2010 on 27th August 2010. Section 18 of the Sixth Schedule to the Constitution on Transitional and consequential provisions, provided 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.” Such law was indeed enacted. The County Governments Act, whose object and purpose was to, among other things, provide for matters necessary or convenient to give effect to Chapter Eleven of the Constitution pursuant to Article 200 of the Constitution; give effect to the objects and principles of devolution as set out in Articles 174 and 175 of the Constitution was enacted. Section 134(1) of that Act repealed The Local Government Act by providing that upon the final announcement of all the results of the first elections held under the Constitution, that Act would stand repealed.

30. It was appreciated that issues may arise as a result of the repeal of the Local Governments Act. Section 134(2) therefore provided that “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.”

31. The first elections under the Constitution of Kenya, 2010 were held on 4th March 2013 and upon the announcement of the results of that election, local authorities ceased to exist. Therefore, the Municipal Council of Kakamega, like other local authorities, continued to exist until that date.

32. The Constitution and the County Governments Act do not have a provision, in express terms, to the effect that the County Government is the successor to local authorities. However, Section 33 of the Sixth Schedule to the Constitution provides 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 name or a new name.

33. Section 143(8) of the repealed Local Government Act looked beyond the life of a local authority to provide that all contracts lawfully entered by a local authority under that section shall be valid and binding on the local authority and **its successors...**”

34. The answer to the question whether, under Section 33 of the Sixth Schedule to the Constitution, an institution established under the Constitution is a successor to an institution that existed under the old constitutional order is in my view dependent on the function discharged or performed by such institution.

35. The respective functions and powers of the national government and the county governments were provided for under Article 186(1) and set out in the Fourth Schedule to the Constitution. Further provision was subsequently made, under Section 5, of County Government Act, that a county government shall be responsible for any function assigned to it under the Constitution or by an Act of Parliament.

36. Instructively, the function of firefighting services and disaster management, in which category the respondents would have belonged, was allocated and assigned under the Constitution, to the county government under Section 12 of Part 2 of the Fourth Schedule.

37. In my view, and based on the consideration of the functions taken over by the county government from the Council, the County is the legal successor of the local authority. To that extent, I am in agreement with the view expressed by Odunga, J. in **Gateway Insurance Company Limited v Jimmy Kiamba, Treasurer Nairobi County Government & 2 others** (above) that “*the 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.*”

38. Much was said about the Transition Authority. The task of providing a framework for the transition to devolved government was left to Parliament. See Section 15(1) of the Sixth Schedule to the Constitution on Transitional and consequential provisions. Under that provision, Parliament was required to legislate for phased transfer from the national government to county governments of the functions assigned to them under Article 185 of the Constitution.

39. Parliament did that by enacting the Transition to Devolved Government Act. Under Section 3 thereof, the object and purpose of that statute was 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; 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; provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of, among other things: assets and liabilities; human resources; pensions and other staff benefits of employees of the government and local authorities; and (iv) any other connected matters.

40. For that purpose, a Transition Authority was established under Section 4, whose functions included: facilitating and coordinating the transition to the devolved system of government as provided under section 15 of the Sixth Schedule to the Constitution; analysis and the phased transfer of the functions provided under the Fourth Schedule to the Constitution to the national and county governments; determining the resource requirements for each of the functions; developing a framework for the comprehensive and effective transfer of functions as provided for under section 15 of the Sixth Schedule to the Constitution; ensuring the successful transition to the devolved system of government; preparing and validating an inventory of all the existing assets and liabilities of government; providing mechanisms for the transfer of assets which may include vetting the transfer of assets during the transitional period; 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; perform any other function as may be assigned by national legislation.

41. Based on those statutory provisions therefore, the role of the Transition Authority was to facilitate and coordinate the transition. It was not the function of the Transition Authority, as suggested by the appellant to determine the liability of the County. The appellant appreciated as much. In the letter dated 20th June 2013 addressed to the firm of Amasakha & Company Advocates, the advocates for the respondents, the Legal Officer, Office of the Governor, County Government of Kakamega wrote as follows:

“To: AMASAKHA & COMPANY ADVOCATES,

MEGA MALL, TUSKYS, 2ND FLOOR

P. O. BOX 551 – 50100,

KAKAMEGA.

RE: NAIROBI INDUSTRIAL COURT CASE NO. 1540 OF 2011

ALI ADAM & ANOR VS THE MUNICIPAL COUNCIL OF KAKAMEGA

Refer to the above matter and to yours dated 11th June, 2013.

As you may be aware, we are at the teething stage of the devolution process and so still establishing ourselves and/or the offices to handle such matters. As such we need as much time and co-operation from yourselves to enable us sail through this process successfully.

We have duly noted the matter and have embarked on retrieving the records of the same from the defunct Municipal council to enable us verify the matter regards to the payments that were made and what is owing so as settle it the soonest time possible.

In view of enhancing co-operation and good relations between yourselves and the County Government of Kakamega, we urge you to bring down the figure owing to Kshs.2 M, subject to verification of the records of aforesaid.

Kindly be advised that the County is yet to receive funds for the first financial year; be it the case; settlement of the decree shall be made as soon as we receive the monies.

Your response on the matter is highly appreciated.

Yours Faithfully

Christabell Ashiono

LEGAL OFFICER”

42. In view of the contents of that letter, the learned Judge of the High Court was correct, in my view, when he stated in his decision that the matter of audit by the Transition Authority was “a mere excuse” which could not affect “a court order which has not been challenged” and correctly granted the order of Mandamus to compel payment.

43. In my view therefore, the appeal is devoid of merit. I would dismiss it and would order that each party bears its own costs in the High Court and of this appeal. The final orders in this appeal are as pronounced in the judgment of Musinga, JA.

Dated and delivered at Kisumu this 31st day of March, 2017.

S. Gatembu Kairu, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF A.K MURGOR, JA

This appeal is brought by *the Interim County Secretary, County Government of Kakamega (the*

appellant), against an order of mandamus issued by the High Court on 27th October 2014 compelling it to pay the *exparte* respondents their terminal employment dues of an amount of Kshs.3,000,000/- in terms of a court order in *Industrial Cause No. 1540 of 2011*, together with interest and costs.

At the core of this application is the question whether county governments automatically assumed and subsumed the responsibility for the assets, liabilities and staff, (including court orders and decrees for or against) the now defunct local authorities.

The ruling arises from a Notice of Motion dated 19th March 2014, and is supported by the affidavits of **Ali Adam** and **Munia Razaq Chicheti**, (*exparte respondents*) and brought under **sections 8 and 9** of the **Law Reform Act (cap 28)** and **Order 53 rule 3, 4, and 5** of the **Civil Procedure Rules**.

The background is that the *exparte respondents* were appointed as casual firemen drivers of the Kakamega Municipal Council (*the defunct council*) on 15th February 2007. On 22nd October 2010, their employment was terminated without notice. Aggrieved by the defunct council's actions, the *exparte respondents* filed a suit in the Industrial Court claiming that their employment was unlawfully terminated when they sought to have it converted from casual to permanent following 3 years of employment. They further claimed terminal benefits for wrongful termination, accrued leave payment, under payment of their salaries, and one month's salary in lieu of notice.

On 22nd August 2012, the parties entered into a consent for payment of the sums claimed whereupon the suit was marked as settled.

With the promulgation of the Constitution of Kenya 2010, all local authorities, including the defunct council were dissolved. The *exparte respondents* then turned to the appellant and demanded that it comply with the court order. When the appellant's response was not forthcoming, they filed a Judicial review application in the High Court, seeking an order of mandamus to compel the appellant to comply with the orders of the Industrial Court.

The High Court granted the order upon reaching the conclusion that the appellant was fully liable to pay the decretal sum, for reasons that the ongoing audit and verification process by the Transition Authority was inconsequential in the face of an existing court order and decree. In this regard the High Court had this to say,

“The respondent has argued that payment cannot be effected unless an audit is done pursuant to the provisions of the Transition to Devolved Government’s Act No. 1 of 2012. Though that might be true in my view, it is no defence. It cannot be a blanket defence. An audit is an internal matter either in the County Government or in consultation with the National Government. It does not affect or involve the applicants herein. Further, no reason has been given for the failure to carry out the said audit. No time frame has been given or suggested as to when the audit will be carried out or completed.”

Aggrieved by the decision of the High Court, the appellant filed this appeal specifying several grounds, to the effect that, the court fell into error when it wrongly concluded that payment of the decretal sum could be made before completion of an audit of assets and liabilities by the Transitional Authority; that the court misdirected itself by holding that the audit was an internal matter of the appellant, that the learned judge misinterpreted the case of ***Republic vs Permanent Secretary Ministry of Water Resources Management & Development ex parte Akamba Timber & Hardware Ltd [2006] eKLR*** where the facts differed from the instant case involving the provisions of the Transition to Devolved Government Act, 2012; that the learned judge fell into error when he sanctioned payment of the decretal sums in total regard of the processes and procedures of the laid down by the Transition to Devolved Government Act, 2012.

Learned counsel for the appellant **Mr. B.M. Ashitva** adopted his written submission filed on 3rd July 2015 and the supplementary submissions filed on 22nd October 2015. Counsel submitted that the learned judge wrongly concluded that all the functions and liabilities of the defunct county councils naturally

devolved to the county governments; that the correct position was that since county governments were newly created under the Constitution, they were not the direct successors of the former local authorities, in this case, the defunct council. It was argued that if this were the case, it would have been expressly provided in the Constitution.

Counsel further submitted that the object and purpose of the Transition Authority was to provide a framework for the transition of staff, assets and liabilities from the National Government to devolved governments; and that by virtue of **section 107** of the retired Constitution, the employment of former employees of the defunct local authority which was the case here, vested in the Public Service Commission.

Counsel posited that, the court order amounted to a shared debt between the National Government and the defunct local authority, and so the *exparte* respondents should await the outcome of the statutory audit and the methodology of determining the manner in which it would be shared between the two organs of government. In support of this, counsel cited Ngaah, J. in ***Republic vs County Secretary Murang'a County Government exparte Thiga Thuita [2014] eKLR*** and Tuiyot, J. in ***County Government of Busia & Another vs Julius Orina Manwari & 12 Others [2015] eKLR***.

Mr. Amasakha learned counsel for the *exparte* respondents adopted the submissions dated 2nd July 2015, and opposed the appeal. Counsel submitted that, in their claim, the *exparte* respondents initially sought the conversion of their employment terms to that of permanent employees; that the suit was not determined on its merits because the defunct council had consented to pay the amounts due. Once the consent was filed and a decree obtained it became a debt to be complied with by the defunct council or in this case its successor, the appellant.

Counsel argued that by virtue of **section 33** of the **Sixth Schedule** and **section 55** and **59** of the **Urban Areas and Cities Act**, county governments were the natural successors and assignees of the defunct local authorities, and were liable to pay their debts.

Counsel further submitted that the High Court rightly ordered the appellant to comply with the court order; that reliance on the audit of the Transition Authority was tantamount to leaving the *exparte* respondents without a remedy, and was a breach of their fundamental rights. It was counsel's view that any failing on the part of the defunct local council should not be visited upon the *exparte* respondents.

Mr. Ashitiva's reply was that the body contemplated by the Constitution was at all times the Transition Authority and not the county governments.

Having considered the pleadings, submissions of the parties, as well as the law, in my view the main issues that fall for consideration are:

- i. Whether under **section 33** of the **Sixth Schedule** county governments are the legal successors of the defunct local authorities;*
- ii. Whether under **section 59** of the **Urban Areas and Cities Act** intended that legal rights or causes of action commenced in a court of law or tribunal against a local authority is the responsibility of the county government;*
- iii. Whether all legal rights or causes of action commenced for or against a local authority prior to the commencement of the Act is the responsibility of the county government;*
- iv. Whether the Constitution prescribed a process of transition from the national government to devolved governments;*
- v. Whether the decretal sum was immediately payable to the *exparte* respondent; and*
- vi. Whether the appellant was responsible for the *exparte* respondents' debt.*

Beginning with whether **section 33** of the **Sixth Schedule** should be construed to mean that County Governments are the legal successors of the defunct local authorities.

In considering this issue, it is instructive that the High Court has reached varied findings on this issue. See *Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008*, *Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006*, *Gateway Insurance Company Limited vs. Jimmy Kiamba, Treasurer Nairobi County Government & 2 others [2015] eKLR*, *Republic vs County Secretary Murang'a County Government ex parte Thiga Thuita [2014] eKLR* and *County Government of Busia & Another vs Julius Orina Manwari & 12 Others [2015] eKLR*.

As to whether or not this is the correct position, must be discerned from the meaning and intent of the constitutional provisions in question. At the same time, it will be borne in mind that it is a fundamental principle of interpretation of the Constitution that it should be construed as a whole, and not by interpreting or construing each provision in isolation.

Section 33, to be found within the “**Miscellaneous Matters**” of the **Sixth Schedule** of the **Constitution** reads;

“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.”

With regard to the meaning of “**office**”, the Interpretation or definitions provisions at **Article 260** defines “**public office**” as, “... ***an office in the national government, a county government or the public service, if the remuneration and benefits are payable directly from the Consolidated Fund or directly out of money provided by Parliament***”. (emphasis mine)

The *Oxford English Dictionary* defines an “**institution**” as “***an establishment, organization or association instituted for the promotion of some object especially one of public or general utility, religious, charitable, educational, etc***”.

Therefore when the generic usage of the word “**office**” or “**institution**” are read within the context of “**public office**”, they should be construed to mean an office or institution established within the national or county government or the public service.

Further guidance on the definition of office is proffered at **section 31** of the **Sixth Schedule** which is headed “**Existing Offices**”. There, reference is made to the holder of an office established under the former Constitution. Specific reference is made in **sections 31(5)** and **(6)** to new offices established as the Director of Public Prosecution, and the Controller of Budget.

From the above, it is evident that “**office**” in this case refers to the Office of Director of Public Prosecution or the Controller of Budget or any other office established after the promulgation of the Constitution, but more particularly where a corresponding office existed prior to the establishment of the new offices.

Since offices or institutions as defined by the Constitution are limited to those within the national or county governments or the public service, it clearly was not intended that county governments were to be construed to be the offices or institutions contemplated by **section 33**. To the contrary, County Governments were established under **Article 176** of **the Constitution** as a newly created tier of self-government, with a different structure and orientation from the defunct local authorities. Without any express provision to designate them as legal successors of the defunct local authorities, it cannot be inferred that County Governments should be included within the definition of legal successors as provided by **section 33**.

The absence of an express provision on the successorship of County Governments, was perhaps deliberate

on the part of the framers of the Constitution, and was intended to take into account the situations where, not all defunct local authorities as previously existed, were directly assumed and subsumed by the County Governments within the geographical areas in which they exist today. One of the key findings of the ***Transition Authority: Mechanisms and Criteria for transfer of Assets and Liabilities of Government and other Public Entities Manual***, at **page 15** is instructive. It was observed thus;

“8. More than 50% of the 40 counties visited had defunct Local Authorities whose boundaries transcend more than one county, thereby raising questions on sharing of assets and resources.”

The direct consequence of this is that, a defunct local authority may have had more than one county government as its successor, begging the question of, which of the affected county governments would be considered the legitimate successor, and to which of the county governments would the assets, resources, and might I add, the liabilities be ascribed.

In view of the foregoing, I find that it was not intended that county governments would be the direct legal successors of the defunct local authorities.

Turning to the issue of whether **section 59** of the ***Urban Areas and Cities Act*** intended that legal rights or causes of action commenced in a court of law or tribunal against a local authority is the responsibility of the county government.

With specific reference to the urban areas and cities previously within the jurisdiction of the defunct municipal and county councils, **Article 184** of the ***Constitution*** has made provision for the classification, governance and management of urban areas and cities, pursuant to which the ***Urban Areas and Cities Act*** was enacted. In accordance with **sections 11** and **12** of that Act, though the governance and management of cities and municipalities vested in the respective county governments, they were to be administered by boards, based upon, amongst other principles, recognition and respect for the constitutional status of the county government.

As to the manner in which legal rights or causes of action commenced in a court of law or tribunal against a local authority were to be dealt with, **Section 59** of the ***Urban Areas and Cities Act*** provided,

“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 provision makes it clear that a legal right or cause of action by or against a local authority continues to subsist against a body established by law. It is my considered view that what was contemplated as “the body established by law” was that body against which any legal rights or cause of action had already accrued by the time of enactment of the Urban Areas and Cities Act. It was then envisaged that such rights and causes of action would be dealt with, in accordance with the transition provisions, as will be discussed hereafter.

In this case, the body against which the exparte respondents have already obtained a court order would have been the defunct council, and which according to the Act would continue to be sustained as such. In any event, if it was intended that the body established by law was the county government, nothing would have been easier than for this to be specified by the Parliament, as, by the time of enactment of the Act, the county governments had already come into existence.

This then leads into the issue of whether in promulgating a devolved system of government, the Constitution prescribed a mechanism by which to facilitate or superintend the transition to devolution process.

So as to comprehensively address this issue, it will be essential to delve into the Constitutional and legislative provisions concerned with devolving towards county governments. Beginning with the

provisions of the Constitution, there is no doubt that, the transition to devolved governments was intended to be undertaken in a phased manner. **Section 15 (1)** of the **Sixth Schedule** of the **Constitution** prescribed that 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.

To achieve this, **section 15 (2) (b)** of the **Sixth Schedule** to be found within the Transitional provisions of the Constitution, required the enactment of legislation that would set out criteria to be met before particular functions were devolved to ensure that the County Governments were not given functions that they were incapable of performing.

In order to realize the requirements of the **section 15** of the **Sixth Schedule**, the **Transition to devolved Governments Act 2012** was enacted. **Section 3 (d)** sets out the objects and purpose of the Act which, amongst other requirements, was to develop the 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) pension and benefits of employees of government and local authorities.

So as to facilitate and coordinate the transition towards a devolved system of government prescribed by **section 15** of the **Sixth Schedule**, **section 7 (1)** of the **Transition to devolved Governments Act** established the Transition Authority.

Under **section 7 (2) (e)**, the Transition Authority was mandated to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities.

According to **Section 7 (3)**, the process was to be carried out in two phases, where Phase One was defined as the period between commencement of the Act, and the date of the first election under the Constitution, and Phase Two was the period between the date of the first elections and three years after the first elections under the Constitution.

In addition to the above, the **Fourth Schedule** of the Act specifically stipulated that, during Phase One of the transition period the Transition Authority would interalia “...**(b) audit assets and liabilities of local authorities, to establish the assets, debts and liabilities of each Local Authority...**”, and at **(o)** it would “...**provide a mechanism that will secure assets and liabilities held by Local Authorities.**” Phase Two was for the completion of any activity that remained outstanding from Phase One.

So as to ensure that the County Governments were part and parcel of the transition process, **section 134 (1)** of the **County Governments Act 2012** repealed the Local Government Act, and with it, dissolved the local authorities. It was also stipulated that;

“(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.”

When this provision is read together with **section 15** of the **Sixth Schedule** and the **Transition to Devolved Governments Act**, there can be no question that the body referred to in **section 134 (2)** is the Transition Authority. There can also be no doubt that one of the mandatory obligations of the Transition Authority was to carry out an audit of the assets and liabilities of the defunct local authorities, and to prepare an inventory detailing all their assets and liabilities.

After the inventory was completed, **section 7 (h) (ii)** of the **Transition to Devolved Governments Act** stipulated that, pursuant to **section 15 (2) (b)** of the **Sixth Schedule** of the Constitution, the Transition Authority was to develop a criteria upon which to determine the transfer of functions and shared assets, liability and staff from the national to the county government 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...”

The purpose of the audit and creation of an inventory by the Transition Authority was aptly captured by Ngaah, J. in the High Court case of *Republic vs County Secretary Murang'a County Government ex parte Thiga Thuita [2014] eKLR*. stated,

“With the emergence of the County Governments, the assets and pre-existing liabilities of the now defunct local authorities was to be shared between those county governments and the national government. The body that was to work out how this distribution was to be done was the Transition Authority which was created under section 4 of the Transition to Devolved Government’s Act. Among its functions set out in section 7 of the Act, the Transition Authority is required to prepare an inventory of all existing assets and liabilities of the government, other public entities and local authorities. Once this is done it is upon the Transition Authority to come up with the criteria to determine the transfer of the previously shared assets, liabilities of the government and the local authorities.”

Similarly, in the High Court case of *County Government of Busia & Another vs Julius Orina Manwari & 12 Others [2015] eKLR* Tuiyot, J. observed thus;

“But Devolution involved the replacement of one system of Government with another. The drafters of the Constitution, in section 15 of the Sixth Schedule of the Constitution, provided for a Phased transition. This Court is not told that the phases for transition set out in the Transition to Devolved Government Act is against the spirit of the Constitution and is unconstitutional. There could be hardship and inconvenience during the period of transition but through Constitutional and Statutory provisions, the People of Kenya agreed that a period of 3 years from the date of the first election under the Constitution was required for an orderly and coordinated transition to the Devolved System of Government.”

I agree with the observations of the High Court in the aforesaid decisions. Essentially, the enactment of the transitional provisions was to provide an institutional framework to coordinate a phased transition into a devolved system of government. At stake were various assets and liabilities belonging to the national and local authorities, and the requirement was for a mechanism to be developed, that would ensure the equitable and systematic sharing of such assets and liabilities between the two levels of government.

The Transition Authority was established and empowered to superintend the transition process, and to conduct a mandatory audit of assets and liabilities of government, other public entities and local authorities. Thereafter, it was to prepare and validate an inventory of the pre-existing assets and liabilities. Once the audit and verification exercise was completed, it would develop a mechanism of transfer of the shared assets, liabilities and staff to the national or county governments.

On account of the clearly stipulated transition process, I do not agree with the court below that the audit was an internal matter between the County Government in consultation with the National Government, or that no audit was in progress, or that no time frame for completion of the audit was stipulated, or that all pre-existing assets and liabilities of local authorities were naturally subsumed by the County Governments.

The transition to devolved governments was a deliberately and carefully crafted process mandated by the Constitution and subsequent legislation, to facilitate a smooth and structured transfer of shared assets, liabilities and staff between the national and county governments, and in some cases, between the county governments themselves. It was to be carried out within a pre-determined statutory period, and strict adherence to its prerequisites was mandatory from all State organs, public offices, public entities or local authorities.

Bearing the transitional intent and structure in mind, the next issue is whether the decretal amount was to be paid prior to completion of the audit by the Transition Authority.

A court order and decree would fall into the category of a civil debt or liability. This is defined by *Black's Law Dictionary (Ninth Edition)* as a “**Liability imposed under the civil, as opposed to criminal law; the state of being legally obligated for civil damages**”.

When the mandatory processes to be carried out by the Transition Authority are taken into account, what is clear is that, the audit required to be completed prior to any transfer of the assets or liabilities. **Section 35 (1)** of the *Transition to Devolved Governments Act* specified that there was to be no transfer of any assets or liabilities by a State organ, public entity or local authority during the transition period.

The only proviso was that if a State organ, public office, public entity or local authority required to transfer assets or liabilities in Phase One or Two, **section 35 (2) (a)** and **(b)** authorized such transfer with the approval of the Transition Authority, in consultation with the National Treasury, the Commission on Revenue Allocation, the Ministry of Local Government and the Ministry of Lands.

These provisions, make it clear that there was to be no unauthorised transfer by a State organ, public entity or local authority of any assets or liabilities during the transition period, which period had not yet lapsed. In my view, the *exparte* respondents' decretal sums were caught by the statutory prohibition, to the extent that the appellant would have no legal authority to pay out the sums ordered prior to expiry of the transition period.

Having found as I have that the County Governments are not legal successors of the defunct local authorities, and that under **section 59** accrued rights and causes of action continued to subsist against the defunct local authorities, I now turn to the question of whether the appellant was responsible for the *exparte* respondents' debt.

In the instant case, there is no dispute that from 15th February 2007 to 22nd October 2010 the *exparte* respondents' were employed as casual firemen drivers of the defunct council, and that a court order was obtained against the defunct local council for payment of employment sums due to them.

The appellant's case is that, by virtue of **Article 107** of the retired constitution as read with sections 107 to 112 of the repealed Local Government Act, all appointments of officers referred to under Part VIII were appointees of the Public Service Commission. Additionally, since section 114 delegated powers to the local authorities to appoint such officers, they were considered appointees of the Public Service Commission of the National Government.

On the other hand, the *exparte* respondents' case is that the court order is a debt that belonged to the defunct local council and following devolution was immediately payable the appellant.

The arguments notwithstanding, on account of the stipulated transitory provisions, it is not in dispute that the *exparte* respondents' court order was a debt eligible to be included within the schedule of verifiable liabilities of the defunct council. What was awaited was the completion and outcome of the ongoing audit by the Transition Authority.

By the time this application was filed, the transition period had yet to expire, and there was nothing to show that the Transition Authority had concluded the audit and verification process, or that the mechanism for transfer of the assets and liabilities had been developed and implemented. Since this mandate was specifically designated to the Transition Authority by the Constitution, I consider that during the period of transition, the court has no role to play, and the *exparte* respondents must therefore await the completion of the transitory processes and procedures.

In failing to apply the constitutional and legislative provisions relating to transition to devolved governments to the circumstances of the case, I find that the court below misdirected itself in granting an order of mandamus to compel the appellant to prematurely pay the decretal sums. As a consequence, I consider it necessary to interfere with the decision of the High Court.

Accordingly, I would allow the appeal and set aside the judgment of the High Court, and order each party

to bear its own costs in view of the public interest genre of the appeal. The final orders are as pronounced in the judgment of Musinga, JA.

It is so ordered.

Dated and delivered at Kisumu this 31st day of March, 2017.

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

[\[1\]](#) See in Article 6 and Chapter 11 of the Constitution of Kenya, 2010