



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 2 OF 2022

(Formerly High Court Nairobi Judicial Review Application No. E007 of 2021)

Before Hon. Lady Justice Maureen Onyango

IN THE MATTER OF: AN APPLICATION BY NAIROBI CITY COUNCIL ASSEMBLY SERVICES BOARD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: SECTION 4(3)(b), 5(2)(b) & (c), 7(1)(a) & (2), 9, 10, 11(1) OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: ARTICLES 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF: THE NOTICES OF THE CENTRAL BANK OF KENYA DATED 22ND JUNE

2021 AND 12TH JANUARY 2022

AND

IN THE MATTER OF: ORDER 53 RULE 1(1) & (2) OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CENTRAL BANK OF KENYA.....RESPONDENT

OFFICE OF THE CLERK OF THE COUNTY

ASSEMBLY OF NAIROBI.....INTERESTED PARTY

EDWARD OMBWORI GICHANA.....INTENDED 2ND INTERESTED PARTY

COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE, PLANNING,

NAIROBI CITY COUNTY.....INTENDED 3RD INTERESTED PARTY

AND

NAIROBI CITY COUNTY ASSEMBLY

SERVICES BOARD.....EX-PARTE APPLICANT

RULING

1. By way of a Chamber Summons dated 26th January, 2022, the Ex-Parte Applicant instituted this suit in the Judicial Review Division of the High Court in **HCJR CASE NO. E007 OF 2022: REPUBLIC -VS – CENTRAL BANK OF KENYA & OTHERS EX-PARTE NAIROBI CITY COUNCIL ASSEMBLY SERVICES BOARD.**

2. Pursuant to the directions of **Ngaah J.** issued on 28 January 2022 the file was transferred to this Court.

3. The Chamber Summons seeks *inter alia* the following orders: -

i. That leave be granted to the Ex-Parte Applicant to apply for an Order of Mandamus to remove to the High Court for purposes of compelling the Central Bank of Kenya, the Respondent herein, to effect signatory and mandates changes in CBK IB Account Nos xxxxxx,xxxxxx & xxxxxx for account operations to the Clerk of the Nairobi County Assembly, Interested Party as a Signatory and Approver 2 level by virtue of being an Accounting Officer of Nairobi City Council Assembly.

ii. That the grant of such leave do operate as an order compelling the Respondent to replace the erstwhile CBK IB Alternates for CBK IB Account No.s xxxxxx,xxxxxx & xxxxxx at the Approver 2 level with any new nominee being a senior member of staff of the Applicant forwarded to the Respondent by the Accounting Officer pending the hearing and determination of the substantive application for Judicial Review.

iii. That costs of this application be provided for.

4. The Chamber Summons (“the **Leave Application**”) is brought under **Article 47** of the Constitution of Kenya, 2010, **Sections 4, 5, 7, 8, 9, 10 & 11** of the Fair Administrative Actions Act, 2015. **Sections 2, 3, 11 & 22** of the Statutory Instruments Act; **Order 53 Rule 1(1) & (2)** of the Civil Procedure Rules and all other enabling provisions of the law.

5. It is supported by the grounds on the face of the Leave Application, a Statement of Facts and a Verifying Affidavit sworn by **GAVIN R. CASTRO** on 26th January, 2022.

6. The Leave Application having been filed under Certificate of Urgency was placed before this Court on 31st January 2022. This Court in the presence of the parties, issued directions on filing of responses and submissions and scheduled the application for highlighting of submissions on 17th February, 2022.

7. A day later, by a Notice of Motion dated 1st February, 2022, (“the **Motion**”) filed under Certificate of Urgency the Ex-Parte Applicant sought the following orders: -

(1) Spent

(2) **THAT** pending the hearing and determination of the Applicant’s Chamber Summons Application dated 26th January, 2022, the Applicant be granted partial access to the Nairobi City County Assembly Bank Accounts being Account No. xxxxxx, xxxxxx and xxxxxx with the Respondent to enable payment of January salaries for MCAs, Members of Staff and Ward office staff; KRA Tax, Statutory deductions and payment of essential service providers to avert imminent collapse and closure of the operations and affairs of the Nairobi City County Assembly.

(3) **THAT** pending the hearing and determination of the Applicant’s Chamber Summons Application dated 26th January, 2022, the Applicant be allowed to introduce Mr. Fredrick Macharia Mwangi (Senior Finance Officer) and Ms. Adah Owuor Onyango (Deputy Clerk) as Signatories and Level 2 Approvers of the Nairobi City County Assembly Bank Accounts being Account No.s xxxxxx, xxxxxx and xxxxxx to the Respondent to enable payment of January salaries for MCAs, Members of Staff, Ward Office Staff, KRA Tax, statutory deductions and payments of essential service providers to avert imminent collapse and closure of the operations and affairs of the Nairobi City County Assembly.

(4) **THAT** Edward Ombwori Gichana and the County Executive Member Finance and Economic Planning be joined in this suit as the 2nd and 3rd Interested Parties respectively.

(5) **THAT** this Court be pleased to issue any other interim reliefs as it may deem fit in the circumstances.

(6) **THAT** costs of this application be provided for.

8. The Motion is brought under **Article 47** of the Constitution, **Section 63** of the Civil Procedure Act, **Sections 4, 5, 7, 8, 9, 10 & 11** of the Fair Administrative Actions Act, 2015, **Order 51 Rule 1** of the Civil Procedure Rules and all other enabling provisions of the law.

9. It is supported an Supporting Affidavit sworn by **GAVIN R. CASTRO** on 1st February, 2022.

10. On 2nd February, 2022, the file was placed before my brother, **Rika J.** (Duty Judge) who declined to grant any interim orders and directed that the Motion be placed before this Court for further directions.

11. Pursuant to directions issued by this Court on 7th February, 2022, in the presence of the parties, the Respondent was directed to file a response to both Applications (the Leave Application and the Motion). In this regard, the Respondent filed a Replying Affidavit sworn by **KENNEDY KAUNDA ABUGA** on 9th February 2022.

12. The parties highlighted submissions on 10th February 2022 with respect to both Applications.

Brief Background

13. The Ex-Parte Applicant – the Nairobi City County Assembly Services Board is a body corporate established under **Section 12** of the **County Government Act No. 17 of 2012** seized with providing services and facilities to ensure the efficient and effective functioning of the County Assembly of Nairobi.

14. The Respondent is established under the **Central Bank of Kenya Act, Chapter 491** of the Laws of Kenya and mandated therein and by the **Constitution of Kenya, 2010** to be responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament. Under the Central Bank of Kenya Act, to be banker, advisor to and fiscal agent of the National and County Governments in the Republic of Kenya.

15. The Nairobi City County Assembly – the 1st Interested Party herein is the holder of IB Account Numbers xxxxxx, xxxxxx and xxxxxx held by the Respondent.

16. On 4th June 2021, the Court of Appeal in **Civil Application No. E351 OF 2021** issued Orders restraining the then Clerk of the County Assembly of Nairobi, Mr. Edward Ombwori Gichana from exercising the functions of the Office of the Clerk of the County Assembly pending hearing and determination of the matter.

17. On 7th June 2021, the Ex-Parte Applicant appointed a Ms. Adah Onyango as the Acting Clerk of the County Assembly. Consequently, the Ex-Parte Applicant communicated the appointment to the County Executive Committee Member from Finance who relayed the same to the Respondent vide a letter dated 8th June 2021.

18. By a letter dated 22nd June 2021, the Respondent responded to the Ex-Parte Applicant with a list of requirements and documents that ought to be submitted in order to facilitate the Ex-Parte Applicant's request pursuant to the Respondent's Standard Operating Procedures (SOPs) key of which included: -

i) A letter forwarding to the Respondent the Internet Banking (IB) Token surrendered by the then outgoing Clerk, Mr. Edward Ombwori Gichana.

ii) Mandate forms signed by the outgoing Accounting Officer, Mr. Edward Ombwori Gichana and the then incoming Accounting Officer, Ms. Adah Onyango to facilitate a handover.

19. On 20th December 2021, the then Acting Clerk Ms. Adah Onyango was restrained from exercising the functions of the Office of the Clerk pursuant to a Court Order in **NAIROBI ELRC NO. E201 OF 2021**. This necessitated the appointment of Mr. Gavin R. Castro as the current Acting Clerk of the County Assembly.

20. Following Mr. Castro's appointment, the Ex-Parte Applicant through a letter dated 5th January 2022 requested the Respondent to recognize him as the Accounting Officer of the Nairobi City County Assembly.

21. The Respondent responded to the foregoing request through a letter dated 12th January 2022 reiterating the requirements contained in their letter of 22nd June 2021.

The Ex-Parte Applicant's Case

22. The Ex-Parte Applicant has stated that the Nairobi City County Assembly, the 1st Interested Party is mandated to nominate and maintain alternated CBK IB Mandate Holders. These Mandate Holders are permitted by the Respondent to access the Assembly Accounts with the approval of the Ex-Parte Applicant.

23. That the Mandate holders being Samuel Kalundu Ndana and Pauline Sarah Akuku were interdicted for gross misconduct and insubordination respectively.

24. It is the Ex-Parte Applicant's case that the Respondent's refusal to approve and effect the changes has hindered the resumption of normal County Assembly operations including but not limited to urgent payment of salaries, benefits, taxes and suppliers.

25. The Ex-Parte Applicant seeks to challenge the actions of the Respondent on the grounds that: -

i. The Respondent's action of denying the Ex-Parte Applicant and Interested Party access to the Assembly Account was made in bad

faith.

ii. The Respondent's action of refusing and/or denying the Applicant and the Interested Party access to the Assembly Account was an abuse of discretion, unreasonably delay or failure to act in discharge of its duty imposed under the Public Finance Management Act.

iii. The Respondent's action of refusing and/or denying the Applicant and the 1st Interested Party access to the Assembly Accounts was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant and the 1st Interested Party.

iv. The Respondent in refusing and/or denying the Ex-Parte Applicant and the Interested Party access to the Assembly Account, the Respondent acted in excess of jurisdiction and/or power conferred under any written law.

v. The Respondent is reasonably biased or reasonably suspected of bias in electing to ignore to consider the Applicant's justification and/or efforts to comply with the Respondent's requests as enumerated in the Respondent's letters of 22nd June 2021 and 12 January 2022.

vi. The Respondent failed to take into account relevant consideration to wit the actions of one Mr. Edward O. Gichana and the attendant consequence of his failure to handover.

vii. The Respondent's action of refusing and/or denying the Applicant and the Interest Party access to the Assembly accounts is not proportionate to the interests or rights affected to wit employees, creditors, members of the County Assembly and the general public.

26. The Ex-Parte Applicant has reiterated its case as contained in the Leave Application in the Motion and pleaded for grant of the interim orders to avert the imminent collapse and closure of its operations.

27. During the hearing of oral submissions on 10th February, 2021, Mr. Ratemo appearing together with Mr. Theuri made submissions in support of the two applications.

28. It was submitted that the Leave Application is grounded on the fact that the Ex-Parte Applicant is aggrieved by the administrative actions of the Respondent in the application of the Respondent's Standard Operating Procedures. Mr. Ratemo listed four grounds for the Court's consideration as follows: -

- i. Procedural impropriety - of the Respondent in denying the Ex-Parte Applicant's access to the Accounts and was in bad faith.
- ii. Illegality – in the Respondent's action of refusing or denying access to the account which amounted to the Respondent acting in excess of its powers.
- iii. Bias – The Respondent was reasonably biased or suspected of bias in refusing the Ex-Parte Applicant's request to access the accounts.
- iv. Irrationality – The Respondent failure to take into account relevant factors, including Mr. Gichana's refusal to hand over.

29. It was submitted that for a matter to be considered appropriate for judicial review, the Court is tasked to review the lawfulness of an enactment, decision or action of a Respondent in its administrative functions.

30. It was the Ex-Parte Applicant's submission that some of the actions that may influence the Court exercise of discretion are the availability of an alternative remedy, prematurity of the claim and most importantly where the claim would cause great prejudice to third parties and the public interest.

31. It was submitted that there is no alternative adequate remedy to address the grievances of the Ex-Parte Applicant. That the claim is not premature as there have been reasonable efforts by the Ex-Parte Applicant to ensure the issues before the Court are addressed outside the Court arena. Further, that the hardships that are being caused are not only those to the Ex-Parte Applicant but also to various third parties including staff members, KRA and those affecting the sittings of the 1st Interested Party.

32. Mr. Ratemo submitted that the Court should not delve deeply into the issues when considering an application for leave. He relied on the case of **Patel Lalji & Another v the AG & 3 Others [2021] eKLR** in support of this submission.

33. It was submitted that in addition to the grant of leave, the Court should also allow the Motion and the interim reliefs sought therein to avert the imminent collapse of the County operations.

The Respondent's Case

34. The Respondent is mandated under the Central Bank of Kenya Act (CBK Act) to act as the banker, advisor to, and fiscal agent of the National and County Governments in the Republic of Kenya. That it is empowered to formulate and implement such policies as best promote the establishment, regulation, and supervision of efficient and effective payment, clearing and settlement systems.

35. All Nairobi City County Assembly accounts held by the Respondent must be operated as provided in the Public Finance Management Act No. 18 of 2012 and the principles of public finance set out under Chapter 12 of the Constitution.
36. In adherence with the mandate and the principles set out in the Constitution, the Respondent promulgated Standard Operating Procedures (SOPs) designed to ensure order, accountability, and transparency in all financial matters.
37. The SOPs have been applied evenly to all accounts held by all national and county government entities at the CBK and not exclusively to the counties only.
38. Section 148(4) of the Public Finance Management Act provides that the Clerk to the County Assembly shall be the accounting officer of the County Assembly. The appointment and performance of mandate by the Accounting Officers ought to adhere fully to the principles set out under Chapter 12 of the Constitution.
39. All that the Respondent has done is to acquire the Ex-Parte Applicant to comply with the SOPs which are designed to ensure accountability and transparency for funds utilised during the tenure of a Public Officer so that in the event of misuse of funds, the officer then in charge of the County Assembly Accounts is answerable for the utilisation of those funds during their tenure.
40. It is the Respondent's case that the test to be applied by the Court in deciding whether or not to grant leave is whether the Ex-Parte Applicant has an arguable case.
41. The Ex-Parte Applicant has in its leave application alleged that CBK's decision to uphold constitutional principles by insisting on compliance with the SOPs was in bad faith, an abuse of discretion, informed by ulterior motive, in excess of jurisdiction, biased, devoid of proportionality with public interest and violates the Ex-Parte Applicant's legitimate expectation.
42. The Respondent opines that an Order of Mandamus is to be granted where a public authority has refused to Act. In the present case, the Respondent has not refused to act but instead insisted on the compliance with the SOPs which the Ex-Parte Applicant complied with at all times prior.
43. That the Ex-Parte Applicant has not exhausted alternative remedies to wit:-
- i. Section 13 of the County Government Act No. 17 of 2012 provides that a Clerk of the County Assembly shall be appointed by the Ex-Parte Applicant with approval of the County Assembly.
 - ii. The designation of Ms. Adah Awuor Onyango and Mr. Gavin R. Castro was not supported by a confirmation that such designation was approved by the County Assembly. Therefore, their purported appointment was legally incomplete.
 - iii. The Ex-Parte Applicant wrote a letter to the Directorate of Criminal Investigations (DCI) dated 14th January 2022 requesting assistance in compelling the attendance of Mr. Edward Ombwori Gichana. An outcome of this process has not been arrived at.
 - iv. The Ex-Parte Applicant failed to disclose in both Applications about the existence of **ELRC Petition Number E168 of 2021 Edward Ombwori Gichana v Adah Onyango & another**. In the matter, Mr. Edward Ombwori Gichana still contends that he is the substantive Clerk entitled to the salary of a clerk of the Nairobi City County Assembly. The matter is yet to be determined hence enhancing further the need for CBK to insist on compliance with its SOPs.
 - v. The Ex-Parte Applicant purports that it forwarded to CBK letters dated 23rd December 2021 and 7th January 2022 nominating alternate CBK IB Mandate holders. This is misleading as there is no evidence of such service.
 - vi. In any event, this arrangement is in violation of Section 148 (4) of the Public Finance Management Act that explicitly provides that the accounting officer shall be Clerk of the County Assembly.
44. That whereas the Ex Parte Applicant is aggrieved with the refusal of Mr Gichana to appear before the CBK in person and hand over, the Ex-Parte Applicant deemed it not necessary to join Mr Gichana to these proceedings until after the Respondent and this Court brought up this issue in Court on 31st January 2022.
45. That to date, the Applicant has not served the said Mr. Gichana to enable him to come before this Court and be heard before any Order is issued against him.
46. That the Ex-Parte Applicant has run its accounts smoothly as shown by the fact that it took the Ex-Parte Applicants 7 months to come to Court. That there were ongoing instructions as at 7th January 2022 and an Agency Notice by the KRA had already been debited on 25th January 2022.
47. That granting the orders would unjustifiably interfere with CBK's role to formulate and implement policies on effective payment, clearance and settlement systems.
48. During the hearing of the oral submissions, Mr. Omondi submitted that there are several matters pending in Court revolving around the question of who the Accounting Officer of the Ex-Parte Applicant is. There are disputes over who should discharge the duties of the Clerk of the County Assembly.

49. That in consideration of Section 148 and 149 of the Public Finance Management Act, 2012 it becomes very difficult to determine who is the Clerk of the Nairobi County Assembly. The Clerk is the person who accounts for all the funds of the County and it behoves the Respondent to ensure that the funds of the County Assembly are only accessed by authorized persons who follow due process.

50. It was the Respondent's submission that Judicial Review Orders are only granted where there is a prima facie case or an illegality or an irrationality in the decision of a public body. That Order 53 Rule 1 prescribes discretion to grant leave and that discretion ought to be subjected to irrationality, unreasonableness or illegality by a public body.

51. The Respondent submitted that the funds held in the accounts are public funds that are only being managed by the Ex-Parte Applicant as they offer services to the residents of Nairobi.

52. That the Respondent has not refused to effect the changes to the signatories but has required compliance with the Standard Operating Procedures that apply to all other Counties.

53. The Respondent relied on the provisions of Article 201 of the Constitution on the principles of public finance which include openness and accountability and that public money should be used prudently. That the principles informed the documentation of the Standard Operating Procedures.

54. That the failure by the Ex-Parte Applicant to join Mr. Edward Gichana or take any steps to compel his production of the IB Token cannot be visited on the Respondent. The Respondent cannot issue a new Token when there is still an active one currently held by Mr. Gichana.

55. The Respondent submitted that the accounts have been operating and this apparent as the Ex-Parte Applicant only came to Court in January, 2022. That their conduct led to their current predicament.

56. The Respondent submits that it only seeks to protect public funds and not take sides in the internal wrangles of the County. That it is not justifiable for the orders related to the proposed signatories to be granted without due process.

57. The Respondent referred the Court to the decision of **Bwonwong'a J. in County Assembly of Service Board of West Pokot v Governor County Government of West Pokot & 3 others [2021] eKLR** in support of its submission that a proper handing over must be done in order for the changes to be effected.

Rejoinder by the Ex-Parte Applicant

58. Mr. Theuri in rejoinder on behalf of the Ex-Parte Applicant submitted that the Respondent appears keen on managing the internal affairs of the Ex-Parte Applicant. That the issue of who should be the rightful Clerk of the County Assembly is a matter before the Court of Appeal for determination.

59. Mr. Theuri submitted that it was unreasonable for the Respondent to expect the appearance of an outgoing officer once he has already been asked to step aside by an Order of the Court.

60. It was submitted that **Section 148** of the **Public Finance Management Act** requires the County Executive Officer of Finance to designate the Accounting Officer.

61. Further, that there was substantial compliance with the SOPs and the only outstanding issue was that the outgoing Clerk physically presents himself.

62. That the Respondent going into the merits and demerits of the cases on the leadership of the County Assembly, is a manifestation of the interference with the internal affairs of the County.

63. Mr. Theuri submitted that the role of the Respondent is to ensure the account is operated as per the mandate of the account. That the moment it starts involving itself with who can or cannot be appointed as set out in paragraph 48 it is stretching their mandate.

64. He submitted that Ada Awuor is the current Deputy Clerk. Macharia is Chief Finance Officer. That it appears the Respondent is uncomfortable with their designations as approvers. That the Respondent does not give reasons why it thinks the Ex-parte Applicant has made an error.

65. Further, Mr. it was Mr. Theuri's submission that there is nothing in SOPs to suggest the Applicant cannot make such appointments. That the orders that were obtained were that Ada Onyango stops acting as Clerk, having acted for more than six months. That in the circumstances despite an order barring Ms. Ada from acting Clerk, that is not a bar for her being appointed as signatory.

66. In conclusion Mr. Theuri submitted that the Ex-Parte Applicant has made out a case for grant of leave and for appointment of alternate signatories to ensure that the county does not ground to a halt. That the accounts were last operated in January and it is now February and salaries have not been paid. That the orders sought in the motion application would enable the Ex-Parte Applicant resume partial operations as it deals with this suit.

Analysis and Determination

67. I shall begin by considering the Leave Application on which the suit and indeed the Motion are anchored. Without leave, the suit and

consequently the Motion would fail.

68. The need for leave to commence Judicial Review is predicated upon the provisions of **Order 53 Rule 1** of the Civil Procedure Rules, 2010. The reasoning behind the requirement and the relevant considerations to be taken into account were succinctly captured by Waki, J (as he then was), in **Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** when he held as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

69. Similarly in **Patel Ravji Lalji & another v Attorney General & 3 others** (supra) as cited by the Ex-Parte Applicant in its submissions the Court held: -

“Once a case is found to be amenable to and appropriate for the exercise of the Court’s discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant’s case is sufficiently meritorious to justify leave.”

70. In the present Leave Application, it therefore behoves this Court to consider the matter without delving deeply, and to ascertain whether there is an arguable case that is fit for further examination to determine whether leave to seek the Judicial Review Orders sought ought to be granted.

71. The leave sought by the Ex-Parte Applicant is for purposes of substantively applying for an order of *Mandamus* to compel the Respondent to on-board its proposed signatories.

72. An order of *Mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. [See **Republic v Kenya National Examinations Council Ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996**].

73. The Respondent is established under **Article 231(1)** of the Constitution of Kenya and **Section 3(1)** of the Central Bank of Kenya Act, Chapter 491 of the Laws of Kenya. **Article 231(2)** mandates the Respondent to be responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions as conferred on it by an Act of Parliament. **Section 4(1)** of the Central Bank of Kenya Act further mandates the Respondent to act as the banker, adviser to and fiscal agent of the National and County Governments of the Republic of Kenya.

74. The duty of the Respondent is therefore clearly spelled out in in the Constitution of Kenya and in the statute. **Section 4A (1)(d)** of the Central Bank of Kenya Act empower the Respondent to implement policies as best to promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems. The Standard Operating Procedures (SOPs) formulated and promulgated by the Respondent are such policies that are applicable across the board.

75. It is the view of this Court that the Ex-Parte Applicant is indirectly inviting the Court to provide an exemption from complying with the said SOPs by the Ex Parte Applicant owing to the internal predicament caused by the various Court Orders and internal indictments.

76. Under the provisions of **Article 231(3)** of the Constitution, the Respondent shall not be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions.

77. Directing the Respondent to make an exception to the SOPs, which in any event the Ex Parte Applicant has not impugned, would be going against the provisions of the Constitution which this Court is enjoined to implement.

78. Further, I do not find that the Ex-Parte Applicant has taken sufficient steps towards compliance with the SOPs with regard to available remedies to compel Mr. Gichana, the Clerk to the County Assembly, to surrender the IB Token or appear before the CBK for that matter. From the record, the letters to Mr. Gichana to hand over are dated 4th June and 10th November 2021. The only action taken by the Ex Parte Applicant to compel Mr. Gichana to hand over after he failed to heed its request is the letter dated 14th January 2022 addressed to Mr. George Kinoti, the Director, Directorate of Criminal Investigations, a few days before filing the instant suit.

79. The Ex Parte Applicant has not demonstrated that the Director, Directorate of Criminal Investigation has failed or is unwilling to assist in tracing and compelling Mr. Gichana to surrender the Internet Banking Token and formally handover in the manner prescribed in the SOPs.

80. The logical step would have been to seek the compelling of the said Mr. Gichana to comply with the SOPs and not to compel the Respondent to disregard the SOPs for the sake of accommodating the Ex-Parte Applicant. These are internal matters that need to be first addressed before seeking the intervention of the Court to compel the Respondent to act against its SOPs. Mr. Gichana has not even been

made a party to these proceedings, an attempt only having been made to join him as an Interested Party in the application dated 2nd February 2022 after the Respondent and the Court brought up the issue.

81. My brother, **Bwongong'a J** in the case of **County Assembly of Service Board of West Pokot v Governor County Government of West Pokot & 3 others (supra)** as cited by the Respondent had occasion to consider a fairly similar matter and held: -

“Additionally, the accounting officer in terms of section 148 (2) of the said Public Finance Management Act, is also the person responsible for the administration of a county government entity and in his capacity as the accounting officer, he is responsible for managing the finances of that entity.

The submission of the petitioner that the said Daniel Kakosom Dapamuka had been interdicted did not change the position in law; since the interdiction is an internal matter for West Pokot County Assembly. For the interdiction to be operational, it must be communicated to the CBK and a proper handing over had to be done between the outgoing and the incoming officers. This had not been done.”

82. It is paramount that the handing over is done to ensure that the previous mandate holders with credentials and access to the IB tokens do not have access to the accounts. This is very well articulated in the letter from Gavin R. Castro, the current Acting Clerk, dated 14th January 2022 addressed to the Director, Directorate of Criminal Investigation.

83. The intent banking tokens are accountability instruments. As explained by the Respondent, a new token cannot be issued when the other one is still held by Mr. Gichana. This is particularly critical because there is no substantive holder of the position of Clerk and all the persons who have been authorised after Mr. Gichana are temporary accounting officers.

84. At stake are public funds. I do not find the Respondent's noncompliance to be unreasonable considering the standard of care that is expected of the Respondent by the Constitution in safeguarding public funds.

85. The Ex Parte Applicant has further not confirmed that Mr. Castro has been authorised by the County Assembly as required by the SOPs.

86. I therefore find that the Ex-Parte Applicant has not established an arguable case to warrant leave to commence Judicial Review proceedings for an Order of Mandamus in the manner prayed in the leave application.

87. The upshot is that the Chamber Summons application dated 26th January 2022 is dismissed. Consequently, the notice of motion dated 1st February 2022 also stands dismissed.

88. In view of the fact that both the Respondent and the Ex Parte Applicant are government entities, there shall be no order for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE