Nyongesa v County Government of Trans Nzoia (Environment & Land Case E021 of 2023) [2024] KEELC 13578 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13578 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE E021 OF 2023

FO NYAGAKA, J

NOVEMBER 28, 2024

BETWEEN

ELIZABETH NASIMIYU NYONGESA ..... PLAINTIFF

AND

COUNTY GOVERNMENT OF TRANS NZOIA ..... DEFENDANT

RULING

1. The Plaintiff filed the instant suit against the Defendant on 19/04/2023. She sought various reliefs, amongst which were an injunction against the defendant either by itself, its officers, servants, agents or otherwise howsoever from evicting, repossessing, demolishing or interfering with (sic) her quiet enjoyment of that property known as LR No. 2116/276 situate in Trans Nzoia County. In the alternative, she sought damages or compensation for the current value of the suit property, including the price of the property including buildings and structures thereon. She sought also costs and interest at commercial rates prevailing from time to time.

2. Immediately upon filing the suit, the plaintiff applied for an order of injunction along the lines of the relief sought in the Plaint. This Court issued a temporary injunction in terms of prayer 2 of the Plaintiff's Application on 19/04/2023. On 26/04/2023 the Defendant filed a Notice of Appointment of Advocates through the firm of Oringe Waswa & Company Advocates. In the course of time the Defendant disobeyed the injunction, and the Plaintiff filed an application for contempt of Court against the Defendant's County Secretary, among other officers and the Governor. The Court declined the orders against the other officers but found the County Secretary in contempt of its orders and fined the officer.

3. The record shows further that the Defendant did not file a Defence all along. On 08/04/2024 the Plaintiff filed an Amended Plaint dated 04/04/2024. Thereafter, she filed a request for judgment against the Defendants, under Order 10 Rules 4(2) and (9) of the Civil Procedure Rules 2010. It was dated 21/05/2024. Accompanying the Request for Judgement was an Affidavit of Service

sworn by one George Mumali on 22/05/2024. He deposed that he had sworn another affidavit on 07/04/2024 whose depositions he wished to clarify. He served the court process on 08/04/2024 and not 06/04/2024 even though the documents he returned to Court bore a receiving stamp by the defendant's office dated 06/04/2024. He annexed to the Affidavit copies of the Summons to Enter Appearance given under the seal of the Court on 31/10/2023, a copy of the Amended Plaint, and a copy of the first page of the Plaintiffs List and Bundle of Documents all stamped the 06/04/2024 by the County Government of Trans Nzoia.

4. When the Deputy Registrar received the Request, he declined to endorse on 19/06/2024. He made remarks on the filed against the Request that it could only be granted with leave of the court in terms of Order 10 Rule 8 of the Civil Procedure Rules. He advised counsel to move the court appropriately.

5. On 02/07/2024 the plaintiff's counsel contended before me that he had made a Request for Judgment against the defendant, but it had not been granted. The court noted that, indeed, it had not been granted. The Plaintiff's counsel insisted on convincing the court that it was merited, and the Deputy Registrar had erred in law in failing to enter judgment as prayed. The court invited the parties to submit on the contention and fixed the arguments on 19/09/2024. The parties filed their submissions and urged the Court that they highlight them orally.

6. Learned counsel for the plaintiff argued that despite numerous directions by the court that the Defendant files a Defense they had failed to do so as of 08/04/2024. Therefore, the Plaintiff resorted to make the Request for Judgment after the time lapsed. He argued that the defendant was a body corporate which had two legal personalities: a body corporate properly so called and Government. He cited Section 6 of the *County Governments Act*. He insisted that the Plaintiff had sued a body corporate and that was why the Attorney General had not come into the matter to represent the Defendant. Further, the County Attorney who represented the Defendant appeared as private counsel. Section 16 of the *Government Proceedings Act* did not apply in the circumstances given that the Court had issued an injunction against the Defendant, and it had been given. He relied on the number of authorities he filed.

7. Learned counsel for the defendant decided to not highlight the submission he had filed.

8. In her submissions dated 15/07/2024 the Plaintiff argued that by virtue of Section 6(1) of the *County Governments Act*, a County Government was defined as "an entity Exercising Constitutional authority shall be a body corporate. Further that under Section 43 of the Act, County Governments may be represented in civil proceedings by the request the Attorney-General, at their request pursuant to Article 156(4), of *the Constitution*. Herein the Defendant had not done so. Also, that Section 7(e) of the Officer of the County Attorney Act the County Attorney shall on instructions of the County Government represent the County Government in civil matters. He relied on the case of Attorney-General -versus- Kenya Commercial Bank Ltd, Nrb HCCC No 329 of 2001 (unreported) where the A-G purported to institute a case on behalf of a body corporate. The Court rejected that move as a misadventure.

9. He also relied on the case of Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 others [201S] eKLR where the Learned Judge held that since the Defendant has all along acted as a body corporate, it could not change the position to argue that it was government during execution stage. Also, she relied on the case of on Kenya Revenue Authority v Habimana Sued Hemed & another where the court found the KRA a body corporate.

10. She then submitted that Section 21 of the *Government Proceedings Act* regarding satisfaction of orders did not apply to interlocutory orders such as requests for judgments. She relied on the case of Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M'etirikia (2021) eKLR (Civ. Appeal 16-21 of 2020).

11. On its part the Defendant filed submissions dated 14/10/2024. It summed up the application and went on to state that in the suit, general damages were sought hence an interlocutory judgment could not issue. It relied on the case of Janian Enterprises Limited v. Kiragu (Environment and Land Case 7 of 2023) [2024] KEELC 1074 (KLR) (29 February 2024) (Ruling) Neutral Citation [2024] KEELC 1074 (KLR).

12. It also submitted that the Defendant was a government and the procedure of entry of judgment against it required that leave must be sought for it. It relied on Articles 1(4) and 6(1) and 176(1) of *the Constitution* of Kenya. It also relied on Order 10 Rule 8 of the Civil Procedure Rules which provides that no entry of default judgment may be entered against government without leave of the Court. It relied on the case of Maua Methodist Hospital Sacco v. Commissioner Kenya Revenue Authority which held that the Kenya Revenue Authority was deemed to be government hence the provisions of the *Government Proceedings Act* applied to it. It also relied on the case of Gulf Fabricators v. County Government of Siaya [2020] eKLR which held that the Appellant should have used the leave granted to request for judgment against the County Government of Siaya.

13. It also argued that pleadings could only close after a matter had been certified ready for hearing which was not the case herein. It cited Order 2 Rule 13 of the Civil Procedure Rules and Order 8 Rule 1 of the Civil Procedure Rules on amendment of pleadings without leave of Court, and Sections 1A and 1B of the *Civil Procedure Act*. Lastly, it submitted on striking out of proceedings as being unfair, and procedural infractions should not have an invalidating effect of they do not cause injustice.

Issue, Analysis And Determination

14. I have considered the application, the law and the submissions together with authorities relied on by the parties. This issue before me herein is simple: it is whether the Court should enter interlocutory judgment in favour of the Plaintiff on account of failure by the Defendant to file a Defence despite service of summons to enter appearance or the Plaintiff should apply for leave for entry of judgment against the Defendant for reason of the default.

15. I have given due regard to the law as applied to the facts herein. I begin the determination by making finds on misinterpretations of the law as made by the parties herein. First, while the Defendant correctly got to the point that it was government as contemplated in the law hence leave of the Court was necessary before entry of judgment against it in default of appearance or defence, it erred in submitting that entry of judgment could not be made against it simply because one of the reliefs sought against it was general damages. Whereas it was the correct view about no entry of interlocutory judgment being made in cases of claims for general damages, this Court is of the opinion that where there is a liquidated sum claimed, as was in the one of the prayers in the Amended Plaint, interlocutory judgment could be entered without leave of court in default of defence or appearance within the stipulated time where summons are duly served. However, that is possible to the exclusion of government.

16. Similarly, the submission that pleadings had not closed in this case is neither here nor there, because in terms of the law, particularly Order 2 Rule 13 of the Civil Procedure Rules, pleadings close at the end of the 14th day from the last pleading that is filed and served in accordance with the law.

17. Regarding the substance of the contention herein, I find the arguments by the plaintiff not merited for the following reasons. The Defendant being a County Government is government in another level than the National Government, in terms of Articles 1(4) and 2(1) of *the Constitution* of Kenya. Therefore, the procedure under the *Government Proceedings Act* applies to proceedings by or against in the same way as it does for the national government. It does not matter whether the County Government is represented by the Attorney-General or the County Attorney or any other legal counsel. Contrary

to submissions by the Plaintiff, representation of a County Government by counsel other than the Attorney-General does not turn it into a private entity. It still remains government. In any event there are many instances where the National Government outsources the services of private legal counsel for representation in unique matters. It does not turn the government into a private entity such as a corporation.

18. Furthermore, Order 10 Rule 8 of the Civil Procedure Rules provides that no entry of judgment against government may be entered, in default of appearance or defence without the leave of the court being sought first and being granted. It therefore follows that an application must be made by the party who is of the view that a County Government has not entered the appearance or filed defence despite service of summons to enter appearance.

19. The submissions by the plaintiff regarding the provisions of law she cited are irrelevant, and the understanding or interpretation thereof was flawed and defective or in error: a total misinterpretation thereof.

20. The fundament of the contention herein is that a County Government is a body corporate hence, in terms of the argument by the Plaintiff, it is not part of the National Government. Thus, the procedure government by the *Government Proceedings Act* do not apply, hence those of the Civil Procedure Rules are the ones to apply. Therefore, to the Plaintiff, an interlocutory judgment ought to be entered in the conventional way as against the Defendant. On its part, the Defendant argues that the provisions of the *Government Proceedings Act* apply in respect of County Governments. This prompts this Court to examine the law in that regard.

21. Under the Civil Procedure Rules, 2010, the procedure of entry of interlocutory judgment against a party in default of either appearance or defence where summons to enter appearance have been served is Order 10 Rule 4 regarding a liquidated claim, Order 10 Rule 8 regarding an unliquidated claim, and Order 10 Rule 8 for judgment in default against government. The relevant Rules for purposes of the contention herein are Order 10 Rule 4(2) and 8. Order 10 Rule 4(2) provides:

> "Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim."

22. The above provision is clear in relation to judgment in default as against a party other than government where the claim is both unliquidated and liquidated. The pleadings herein seek the two sets of reliefs hence relevant. This leads to an examination of Order 10 Rule 8 which provides that:

> "No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day."

23. Where then does one find the procedure to use in place of the one which the Order 10 Rule 8 has outlawed? The starting point is Order 1 Rule 111 which provides that:

> "In respect of civil proceedings by or against the Government, this Order shall have effect subject to Section 12 of the *Government Proceedings Act* (which relates to parties to such proceedings)."

24. Section 12 of The *Government Proceedings Act* provides that subject to any other written law, the Attorney-General may institute or defend proceedings against government. The written law in immediate contemplation is the *County Governments Act*, Chapter 17 of 2012, Laws of Kenya.

25. Order 29 Rule 2(1) of the Civil Procedure Rules then provides that:

> 1. Except as provided by the *Government Proceedings Act* (Cap. 40) or by these Rules-
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> a. these Rules shall apply to all civil proceedings by or against the Government; and
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> b. civil proceedings by or against the Government shall take the same form as civil proceedings between subjects and shall, if no special form is applicable, take the form of a suit instituted by a plaint."

26. When proceedings against County Governments are concluded or there is an order made against the said entity, execution thereof is governed by Section 21 of the *Government Proceedings Act*. The Section has been amended by The Government Proceedings (Amendment) Act, 2015, *Act No. 35 of 2015*, assented to on 18/12/2015 and commenced on 07/01/2016. The provision stipulates that:

> "Section 21 of the *Government Proceedings Act* is amended by inserting the following new sub-section immediately after sub-section (4)- (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party."

27. It is not in doubt that Section 21 of the *Government Proceedings Act* which was amended by *Act No. 35 of 2015* is the one that provides for execution against the government. The amended provision includes the execution against any county governments to be levied in the manner and way the Section provides. In my humble view the provisions on execution against the county governments ought to be interpreted in a similar manner and way as for the procedure after institution of a suit. If, and contrary to the submissions by the Plaintiff, the *Government Proceedings Act*, Chapter 40 Laws of Kenya, does not apply to Request for Interlocutory Judgement against County Governments, Parliament could not have amended Section 21 of the *Government Proceedings Act* to include its application, with necessary modifications, to the County Governments. To argue that only the national government is envisioned in the Act is being simplistic and parochially viewing the Act in the prism of *the Constitution* of Kenya (now repealed or retired) prior to the promulgation of *the Constitution* 2010. If not for the sake of argument, the Plaintiff is advised to live in the new constitutional reality.

28. The meaning of the phrase "body corporate" may confuse at times. Often simple legal minds would mistakenly view and limit the meaning to associations of persons, in the business sense, brought together by way of incorporation under the laws of a certain country for that end: carrying out business. Perhaps this may be the meaning the Plaintiff assigned the County Government of Trans Nzoia by arguing as much. She submitted that the County Government is distinct from the National Government and is thus not envisioned under the *Government Proceedings Act*, Chapter 40 Laws of Kenya.

29. With such deposition and submissions as those of the Respondent herein, this Court poses a question it must answer: Should the reference to a County Government just as County Assembly to being "a body corporate with perpetual succession" under Sections 6(1) and 12(2) respectively of the *County Governments Act*, *Act No. 17 of 2012* turn the two entities into business entities. Far from the truth!

30. The Cambridge Online Dictionary (https://dictionary.cambridge.org/dictionary/english/body-corporate) defines a body corporate as "an organization such as a company or government that is considered to have its own legal rights and responsibilities."

31. Regarding the understanding of whether the County Governments in Kenya are distinct and different from the National Government, recourse must always be made to the document that created them. This is *the Constitution*, 2010. In that regard, *the Constitution* should be interpreted purposively as to bear in mind the law is always speaking: speaking to the generations as and when they live. If this were to be done bona fide, there would be no need for clamour for amendments of the constitutions of the world. But it is never always the case due to human selfishness. No wonder constitutions world over are being amended day in day out to suit the selfish interests of those with power: power to vote and win by such a vote as against the minority, weak and uninformed or 'unable' in society. This is unlike the law of God which is immutable: why is it that the ten commandments have never been changed and never will?

32. Since county governments are a direct creature of *the Constitution* of Kenya 2010, recourse must be made to what the document terms them to be, and if there is no definition of such then one must look into the text (that is to say, textual interpretation or ordinary meaning) and spirit (intention of framers and purposive interpretation) of *the Constitution* in order to discern the intention of the framers of the provisions that brought the entities into existence and interpret them in such a manner as to give the entities the meaning they were to and ought to be given. In so doing one other tool that may be called into application is the historical context of the time of promulgation. The million-dollar question here then is: did the framers of *the Constitution* and by extension the people of Kenya intend to create bodies corporate in the sense of incorporated business entities by establishing county governments or a government that is closer to the people? Put in another way, if one met an ordinary Kenyan on the street or on the road who is headed to the office of the County Government of his county for an issue he/she wishes to be resolved by the office and asked him, "where are you going?" Shall that ordinary individual answer, "I am going to my local/county government to have my issue resolved" or he/she shall answer, "I am going to a business place or company to resolve my issue"? Does an ordinary Kenya whether resident in a county or other place understand that a county government is government at a local level? Yes. How then does it translate to a "body corporate" in the sense that removes it from being government and places it in the nature of the ordinary legal sense of "body corporate"?

33. Of constitutional interpretation, *the Constitution* of Kenya 2010 gives everyone the intent of the framers in the manner in which the said Constitution was and is supposed to be interpreted. Article 259 provides:

    1. This Constitution shall be interpreted in a manner that-

        a. promotes its purposes, values and principles;

        b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

        c. permits the development of the law; and contributes to good governance.

    2. If there is a conflict between different language versions of this Constitution, the English language version prevails.

        3. Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—

a. a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;

b. any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;"

34. As is clear from the plain reading of the text, Sub-Article 1(a) gives a guide as to an interpretation that gives life to the purpose of the provision in the document. I will turn to this soon after analyzing one or two decisions on purposive interpretation immediately below.

35. Of purposive interpretation, the Court of Appeal in Attorney General vs. Law Society of Kenya & 4 others [2019] eKLR held that:

> " The starting point, as always, is Article 259 on the construction of *the Constitution* which directs that it shall be interpreted 'in a manner that: (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance'. Those values must permeate the process of constitutional interpretation. Many local and international decisions were cited before us to illustrate other governing principles of interpretation but we shall not belabour them as they are largely common ground. For emphasis, however, we reiterate what this Court stated in the case of Njoya & 6 Others vs. Attorney General & another [2004] eKLR thus:
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> "Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that *the constitution*, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document."
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> We also emphasize the principle of holistic interpretation where *the Constitution*, which has different Chapters and Articles is read as one document, not disjointed sections; where each provision is read as supporting the other and not destroying the other; where the provisions are all ultimately in harmonious symphony. In the case of Tinyefuze vs. Attorney General of Uganda Constitutional Petition No. 1 of 1997 [1997] 3 UGCC the Uganda Constitutional Court put it thus:
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> "The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness."
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> Our own Supreme Court In the Matter of Kenya National Commission on Human Rights [2014] eKLR explained what a holistic interpretation entails when one counsel before it persisted on asking the Court to find that Article 163(6) of *the Constitution* does not mean what it says, through "a holistic interpretation". The Court stated:
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> "But what is meant by a 'holistic interpretation of *the Constitution*'? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.""

36. The learned Judge Mativo, J (as he then was) stated in Stephen Wachira Karani & Another vs. Attorney General & 4 Others [2017] eKLR gave the guiding principles of constitutional interpretation as follows:

> 26. The purposive approach (sometimes referred to as purposivism, or purposive construction, or purposive interpretation, or the modern principle in construction) is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (a statute, part of a statute, or a clause of a constitution) within the context of the law's purpose....
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> 28. The leading case in which purposivism was definitively accepted by the House of Lords was Pepper vs Hart. The case established the principle that when primary legislation is ambiguous and certain criteria are satisfied, courts may refer to statements made in the House of Commons or the House of Lords in an attempt to interpret the meaning of the legislation. Before the ruling, such an action would have been seen as a breach of parliamentary privilege. The House of Lords held that courts could now take a purposive approach to interpreting legislation when the traditional methods of statutory construction are in doubt or result in an absurdity."

37. Similarly, the five-judge High Court Bench in Leina Konchellah & Others v Chief Justice and President of Supreme Court of Kenya & Others; Speaker of National Assembly & Others (Interested Parties) [2021] eKLR cited with approval Justice Mativo in Stephen Wachira Karani (supra) by stating that the learned judge identified the principles a court should consider in both statutory and constitutional interpretation when he held as follows:

> 45. It is equally important that the court should also as far as possible, avoid any decision or interpretation of *the Constitution*, which would bring about the result of rendering *the Constitution* unworkable in practice or create a situation that will go against other provisions of *the Constitution* governing the subject in issue. In this case, it is important to bear in mind the goal and objects of the drafters of *the Constitution*. What was the mischief the drafters intended to cure...
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> 46. There are important principles which apply to the construction of statues such as (a) presumption against "absurdity" - meaning that a court should avoid a construction that produces an absurd result; (b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and (d) the presumption against artificial result - meaning that a court should find against a construction that produces "artificial" result and, lastly, (e) the principle that the law should serve public interest -meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," "economic", "social" and "political" or "otherwise.""

38. In arriving at the finding that a purposive interpretation should give the intention of the statute, the Supreme Court of Kenya in case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 26 of 2014 [2014] eKLR, stated as follows:

> "In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is

free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

39. Also, in seeking to understand how to determine the intention of an enactment, the Court of Appeal in County Government of Nyeri & Anor. vs. Cecilia Wangechi Ndungu [2015] eKLR held that:

> " Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

40. Turning to the import of Article 259 of *the Constitution*, from a textual interpretation of the document, it is clear in Sub-Article 1 (a) that one of the ways in which it is to be interpreted is to give effect to its purposes. Thus, what was the purpose of the text providing in Article 1(4) of *the Constitution* that sovereign power of the people is exercised at the national level and the county level? My understanding of the provision was that a County Government was a creature of the people of Kenya brought into existence by them for purposes of exercising sovereign power at that level and not a "body corporate" for any other sense and purpose than the exercise of sovereign power as they exercise it at the national level.

41. Thus, *the Constitution* 2010, under Article 1 (4), provides that, "The sovereign power of the people is exercised at- (a) the national level; and (b) the county level". Here the interpretation rendered should take into account the main purpose which is the exercise of sovereign power.

42. To give clarity to that exercise of sovereign power, *the Constitution* then set out to demarcate the territorial units where the levels of government are to be, and even named them in the First Schedule. It provides, under Article 6(1) and (2), thus;

    1. The territory of Kenya is divided into the counties specified in the First Schedule.

    2. The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation."

43. Further again, Article 187 then provides for one way of how the two levels relate, which is by way of transfer of some functions between the national and county governments. In my humble view, it would be an extreme absurdity if the county governments shall be viewed legally and even in practice as totally different, with one - the County Government - being treated as a body corporate in the sense of an incorporated entity hence a private entity and the National Government the only sole government of

the Republic. If such a view were to hold, it would be a further paradox for the National Government to transfer its functions to a private entity and vice versa, without serious constitutional violations and consequences. Further, if such narrow view were to be the case it would lead to situations where when one level (private) is faced with legal obligations it would transfer its 'business' to other level (public) and vice versa to defeat the law. This is not what the people of Kenya intended.

44. Moreover, Article 189 which provides for cooperation between the National and County Governments views the two levels of government as one. It does so by referring to them jointly as "Government". It provides;

1. Government at either level shall-

    a. perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;

    b. assist, support and consult and, as appropriate, implement the legislation of the other level of government; and

    c. liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

2. Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities."

45. Further still, Article 217(1) provides for Senate determining by a resolution, once in every five years, the basis for allocating among the counties the share of national revenue that is annually allocated to the county level of government. Additionally, Article 218(1)(a) provides for the annual enactment, at least two months before the end of a financial year, of a Division of Revenue Bill which hall divide revenue raised by the national government among the national and county levels of government. One would wonder what business the Senate which is one level of the Parliament has to do with sharing the national revenue with a body corporate that, if the Plaintiff's argument were, for the sake of it, to stand.

46. Again, of incorporation of commissions and independent offices *the Constitution* provides at Article 253;

> " Each commission and each independent office- (a) is a body corporate with perpetual succession and a seal; and (b) is capable of suing and being sued in its corporate name."

47. The Plaintiff submitted that the Defendant (County Government of Trans Nzoia) is a body corporate hence judgment should be entered against it as any other body corporate. Learned counsel who appeared did not attempt to give the meaning of body corporate. The question that follows immediately is: was it the intention of the framers of *the Constitution* 2010 that the commissions and independent offices automatically became "incorporated" as contemplated in the law of business associations, for instance, the *Companies Act*, *Act No. 17 of 2015* Laws of Kenya so that they are now detached or removed from being part of government? I do not think so. The intention of the framers was to set these bodies apart as entities that possession the character of perpetuity and can sue or be sued in their own name and not through the office of the Attorney General, otherwise they would lose the independence required of them.

48. It is my view that even where these bodies have been specifically referred to as "body corporate" the courts have been clear in attributing government to their meanings, and this Court is not prepared to depart from that meaning, that the entities in Kenya known as county governments are part of government and the procedure laid down in the *Government Proceedings Act* applies to them. For instance, in Nairobi City County Government v John Kamau & Another [2017] eKLR the learned Lady Justice L. Njuguna J. held on 13/10/2017 as follows with regard to whether the Nairobi City County Government was or was not a government;

> "Whereas this court appreciates the constitutional and statutory provisions in regard to the locus to sue and to be sued by body corporate, the court also notes the special circumstances of this case. The Plaintiff herein is a County Government which can be defined as government for the people and by the people and not just any other body of persons. It is run using public resources and it is a mini government so to speak. It is different from the former local authorities."

49. In Patrick Mukono Kisilu t/a Mutomo Kandae General Agencies v County Government of Kitui [2021] eKLR, Limo J. held that, Section 6(1) of County Government Act clearly provides that a County Government is a body corporate which means that it has the capacity to sue to be sued in its corporate name.

50. My simple but humble understanding of the learned view of the judges is that a County Government as established within the Kenyan Constitution is a government albeit at that level which is different than the national government level. Since it has obligations and may at one time or other breach others' rights or others other than it also cause infractions against its rights whether constitutional or otherwise, then it functions as a body corporate in terms of suing or being sued only but retains the features and nature of government.

51. Further, in Josephat Gathee Kibuchi -vs- Kirinyaga County Council [2015] eKLR Muchemi, J. held that:-

> "...A County Government is part of the state or government. *The Constitution* of Kenya establishes two levels of government being the National and County Government. The provisions of Section 21 of the *Government proceedings Act* are therefore applicable to proceedings relating to a County Government."

52. Further, in James Muigai Thugu -vs- County Government of Tran Nzoia & 2 Other [2015] eKLR, a decision given on 21st day of July, 2015, which was about five months before the *Government Proceedings Act*, Chapter 40 was amended the following year, the learned Judge E. Obaga stated;

> "The question that arises is whether the Act can extend to the County Government. The County Governments are body corporate with power to sue and be sued. There is no provision in the County Government Act of 2012 which protects them from injunction orders. I do not think that it was the intention of the legislature that the County Governments were to enjoy the same status as the National Government. If this was the intention then the *Government Proceedings Act* would have been amended expressly to include County Governments. I therefore do not find that the County Government can come under the umbrella of the *Government Proceedings Act*, when it comes to injunctions against them as well as their officers."

53. Therefore, courts should be careful not to give an impression that they are selective in interpretation of the law and its application. Consistency in interpretation and fidelity to both *the Constitution*, international norms or laws and the domestic law should be as key and adhered to as the needle is to the pole. If Parliament did not intend that the GPA applies to all civil proceedings and even arbitration applies to the county governments as well it should have said so.

54. This Court, thus, finds further that even as this Court refers to that provision, it should be borne in mind that unlike the entities mentioned in the Article, *the Constitution* does not regard county governments as bodies corporate. The operative Article 176 provides in sub-Article 1 that "(1) There shall be a county government for each county, consisting of a county assembly and a county executive." This is an important note when compared with the provision on commissions and independent offices. It means further that if one were to define the county governments as bodies corporate in a manner as to disassociate them from and place them apart from government he/she would immediately run afoul *the Constitution*. In my humble view the reference of the county governments in Sections 6(1) and County Assemblies in Section 21(2) of the *County Governments Act* is only a matter of legislative convenience for purposes of giving each both the separability and divisibility from both the national government and each county government and assembly for purposes of perpetuity in succession, suing and being sued but they remain government.

55. Let us hear the conclusion of the whole matter. The County Government of Trans Nzoia, just as any other, is not a body corporate in the sense of being a private entity. It is not distinct from government save that it is at a different level. Thus, for any party to successfully have interlocutory judgment against it in default of appearance or defence where summons to enter appearance have been served and the said body has not taken the requisite step within the required time, that party must apply for leave of the court to enter judgment against in the same manner as one would apply for entry of judgment against the national government. It turns out that the request by the Plaintiff is flawed and hereby declined. There shall be no order as to costs. The defendant is hereby directed file its Defence and the documents that accompany it in terms of Order 7 Rule 5 of the Civil Procedure Rules, within the next ten (10) days in default the plaintiff may move the court by applying for leave of the court to enter judgment against it. The suit shall be mentioned on 11/12/2024 for confirmation of compliance with these orders.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 28TH DAY OF NOVEMBER, 2024.

HON. DR.IUR F. NYAGAKA,

JUDGE, ELC KITALE

In the presence of:

Masika Advocate for the Plaintiff

Obuli Advocate for the Defendant

Opere Advocate acting alongside Oringe Waswa & Co. Advocates for Defendant.