Gichina (Suing as the administrator of the Estate of the Late Joseph Gichina Muhoro) v County Government of West Pokot (Environment & Land Case 125 of 2016) [2024] KEELC 7104 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7104 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 125 OF 2016

FO NYAGAKA, J

OCTOBER 24, 2024

BETWEEN

ROBINSON MWANGI GICHINA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPH GICHINA MUHORO) ..... PLAINTIFF

AND

THE COUNTY GOVERNMENT OF WEST POKOT ..... DEFENDANT

RULING

On whether to set aside warrants of attachment and proclamation on account of being executed against a county government

1. By an Application dated 20th December 2023 the Defendant moved this Court for a number of prayers. It brought the Application under a number of provisions. These were Section 21(1), (2), (3) and (4) of the *Government Proceedings Act*, Chapter 40 Laws of Kenya, Sections 1A, 1B, 3A, and 63(e) of the *Civil Procedure Act* and Order 22 Rule 22, Order 29 Rule 29(2)(b), Order 53 Rules 1 and 2 of the Civil Procedure Rules and Articles 1, 2, 10, 159, 174, 175, 176(1), 177(1), 185, and Chapter 6 of *the Constitution* of Kenya, 2010. It sought the following prayers:-

    1. ...spent

    2. ...spent

    3. That the court be pleased to lift, set aside and/or annul the warrants of attachment dated 15th December 2023 and the subsequent proclamation by FEMFA Auctioneers dated 19th December 2023 attaching the property belonging to the Applicant.

    4. That the Respondent be condemned to pay their cost of this application and the auctioneer charges.

5. That the court be pleased to grant any other order and/or directions as it may deem fit.

2. The Application was based on eleven grounds. These were that the Warrants of Attachment of movable property dated 15th December 2023 and the subsequent Proclamation dated 19th December 2023 attaching property belonging to the applicant were bad in law, illegal, unlawful and untenable. On 15th December 2023 the Responded extracted a Warrant of Attachment of mobile property against the County Government of West Pokot. The Respondent had the since instructed M/S FEMFA Auctioneers who on 19th December 2023 proclaimed and attached property belonging to the County Government. The property may be disposed of by the said Auctioneers at any time and the auctioneers had since billed the County Government a sum of Kenya Shillings 667,600/= for its services yet execution should not levied against the property of the National or County Government in settlement of a decree in a civil case. Section 21 for the *Government Proceedings Act* and Order 29(2)(b) of the Civil Procedure Rules prohibit courts from making an order of attachment against the property of the National or County Government. The decree holder had the option of instituting an application for judicial review seeking an order of mandamus to enforce the decree.

3. The warrants of attachment and proclamation were misconceived, illegal, and should therefore be set aside, annulled and/or lifted and the Respondent to bear the auctioneers' charges. The applicant stood to suffer irreparable loss and damage if the order sought were not granted, and it was in the interest of justice and fairness that the order be granted.

4. The Application was supported by the affidavit sworn by Jonathan Siwanyang sworn on 20th December 2023 in which he reiterated the contents of the grounds in support of the application but in deposition form. In addition, he attached to the Affidavit a copy of Warrants of Attachment dated 15th December 2023 which he marked as J S-O1, a copy of the Proclamation dated 19th December 2023, which he marked as J S-O2 and the Auctioneers Bill of costs dated 19th December 2023 which he marked as JS-O3. He stated further that the Respondents had given the Applicants seven days through the Proclamation to pay the decree and costs failure of which the auctioneers would proceed to dispose of the attached property and sell it by auction.

5. He then pleaded deposed that a monetary decree could not issue against County Government and therefore the Warrants of Attachment and subsequent Proclamation by the auctioneers were illegal and lawful and untenable and should be set aside. Lastly, the act of proclamation had disrupted the services of the Defendant/Applicant.

6. The Plaintiff opposed the application through a Replying Affidavit sworn on 22nd December 2023. He deposed that the Application was an abuse of the process of the court and should be dismissed with costs. It was an afterthought, purely meant to delay the course of justice and deny him the fruits of his judgment. It was frivolous and vexatious and fatally defective for the following reasons;

    1. Judgment was delivered on 22nd September 22.

    2. No appeal had been referred against it and the Defendant had not made any efforts to liquidate the judgment delivered over 15 months before the application.

    3. The application violated Order 9 Rule 9 of the Civil Procedure Rules.

    4. The county government was a body corporate with perpetual succession, hence the provisions of the *Government Proceedings Act* did not apply to the County Government.

    5. The Applicant had promised to settle the judgement only to come up with the application, having failed to fulfill its promise.

7. Further, the County Government is distinct from the National Government and County Government was not envisioned as a government under the *Government Proceedings Act*, Chapter 40 of the Laws of Kenya. Further, the Attorney General did not act for the County Government. The Applicant had not presented justifiable grounds for staying the execution. It was an indolent litigant who should not find favor in the discretion of the court to deny the Respondent the merits of a judgment lawfully obtained. The Applicant had not shown cause why exactly the court should exercise its discretion in its favor.

8. Further, that reliance on the provisions of the *Government Proceedings Act* was only intended to deny him access to justice and enjoyment of the fruits of his judgment in violation of Article 48 and 159 of *the Constitution*. It was not enough for the applicant to depose that it would suffer irreparable loss and prejudice unless the application was allowed because it had not shown how that substantial loss would be occasioned. The order sought could not be given in vain. The Applicant's conduct was mischievous, and its acts done in bad faith and the court should read mischief and mala fide and conspiracy on the Applicant's part. The Application was fatally defective and should be struck out with costs.

9. The Application was disposed of by way of written submissions. The Applicant filed its submissions dated 31st January 2024 on the same date. It began by summarizing and arguing that the Warrants of Attachment were illegal by virtue of Order 29 Rule 2(2)(b) of the Civil Procedure Rules and Section 21 (4) and (5) of the *Government Proceedings Act*. It then summarized the application and set forth two issues for determination before the court. The first one was whether the mode of execution is lawful insofar as the same is against the County Government and the second one is whether the application violated Order 9 Rule 9 of the Civil Procedure Rules.

10. On the first issue which is whether the mode of execution is lawful insofar as it is levied against the County Government, the Defendant submitted that Order 29 Rule 2(2) (c) and (d) of the Civil Procedure Rules stipulate that no order against the government may be made under Order 22 which is in regard to execution of decrees and orders and Order 23 which is in regard to attachment of debts. Further, that the procedure for executing decrees against the government is stipulated in the *Government Proceedings Act*. It then argued that the mode of execution against the government was stipulated under Section 21(4) of the Act, which it reproduced verbatim. Further it relied on the Government Proceedings (Amendment) *Act No. 35 of 2015*. In particular, it stated that vide the new Amendment, Section 21 of the *Government Proceedings Act* was amended to introduce a new subsection after subsection 4. The new Subsection is 5 which provides that;

> " 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."

11. It submitted further that Article 62 of *the Constitution* of Kenya provides that Kenya's government is a government at both national and county levels, which are distinct and interdependent of each other and that they work in cooperation as stated under Article 189. Therefore, there is only one government which works at two (2) levels, with each level complementing each other and working in unity hence any execution proceedings against the Applicant, such as the county government should comply with the provisions of Section 21 of the *Government Proceedings Act*. It relied on the case of Jamleck Waweru Karanja versus The County Government of Nakuru [2020] eKLR wherein the learned Lady Justice Mbaru held that as the law stood, no execution could be levied against the property of a county government in a settlement of a decree in a civil case, hence the only cause available to the decree holder was to apply for mandamus against the Chief Officer of the government and obtaining such orders and the decree holder will be at liberty to apply for committal of the said Chief Officer if he did not comply with the order of mandamus.

12. As regards whether the Applicant violated Order Rule 9 of the Civil Procedure Rules, learned counsel made submissions which this court needs not summarize for reasons that it delivered in this matter a ruling touching on the same on the 12th February, 2024, as will be explained below.

13. The applicant prayed that the application be allowed, and the Respondent be condemned to bear the auctioneers' charges upon this Court setting aside Warrants of Attachment and Proclamation against it.

14. The Plaintiff/Respondent filed his submissions dated 15th April 2024 on the same date. First, it listed the prayers sought and summarized the background to the Application, including the decree of the Court. It then argued that there was no justification presented to allow the Court to exercise its discretion in favor of the Applicant since the application was a clear abuse of the office and process (sic) and aimed at denying the respondent the fruits of judgment. Further, the County Government is a distinct entity from the national government, and it was not envisioned under the *Government Proceedings Act*. It relied on the case of Shah v Mbogo [1967] (sic) and Bob Thompson Dickens Ngobi (sic) in which the learned judge stated that a statutory provision that seeks to hinder anyone's access to justice seeks to impose hurdles on the way of citizens from seeking accountability, openness and efficiency in the service delivery by government and all government agencies and violates Article 48 of *the Constitution* hence should be held unconstitutional. He also relied on the case of Absa Bank Kenya Plc (ABSA) v. Kenya Deposit Insurance Corporation (sic) where Prof. (Dr.) Sifuna J declared Section 13A and even 21 discriminatory. He summed it that reliance on Chapter 40 of the Laws of Kenya was there for unfounded and against the rules of natural justice and the application ought to be dismissed.

ISSUE, ANALYSIS AND DETERMINATION

15. This Court has considered the Application, the law and the parties' submissions thereon. For reasons that the issue as to whether or not Order 9 Rule 9 of the Civil Procedure Rules were complied with by learned counsel who filed the instant Application was decided on by this Court's ruling delivered on 12th February 2024 (see Gichina (Suing as the Administrator of the Estate of the Late Joseph Gichina Muhoro) v County Government of West Pokot (Environment & Land Case 125 of 2016) [2024] KEELC 710 (KLR) (12 February 2024) (Ruling)) this Court shall not deal with it again. To be clear, it is instructive at this stage to point out that the said issue was a subject of determination in the said ruling following an application made orally on 07th February 2024. The Ruling was delivered in the presence of learned counsel for the plaintiff, learned counsel for the Defendant and the learned County Solicitor of the Defendant who was said to be acting alongside learned counsel for the said defendant. It followed an oral objection that the said Solicitor could not come on record and act alongside the learned counsel for the Defendant after judgment. In the ruling the Court found and stated as follows:

> " 17. ... A holistic interpretation of Order 9 Rule 9 of the Civil Procedure Rules would import a bar to a County Attorney to come on record post judgment where a County Government had engaged learned counsel previously in the matter up to the time of judgment unless the County Attorney had complied with the provisions of the Rule, that is to say, filed an Application to come on record or filed a consent to that effect.
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> 18. The circumstances of the instant case do not point to that. I have carefully looked at the Notice of Appointment dated 20/12/2023 and filed the same date. It clearly states that "...the Defendant has appointed the Hon. County Attorney, County Government of West Pokot to act on its behalf in this matter alongside the law firm of M/S Kidiavai and Company Advocates..." (emphasis

mine). It is not in any way confusing that the County Attorney did not and has not come on record by taking over the representation of the Defendant from M/S Kidiavai and Company Advocates. There was therefore no need for the said Office of the County Attorney to either file an Application to come on record or a consent to that effect.

19. The upshot is that the Application is without merit and I dismiss it with costs to the Respondent."

16. The above finding has neither been set aside nor reviewed. Therefore, this Court shies away from making a further finding on the issue. That's the only remaining issue would be whether the Application is merited and the attendant one, who to bear the costs of this application.

17. It is not in dispute that this quote delivered judgment hearing on 22nd September, 2022 and it was not appealed against. Further, it is not in dispute that subsequent to the delivery of the judgment the Plaintiff, who succeeded in the claim taxed his costs of the suit. Also, he had extracted Warrants of Attachment against movable property of the Defendant/Applicant. From the record, the warrants were issued on 13th December, 2023 to FEMFA Auctioneers. They were for attachment for realization of the sum of Kenya Shillings 4,348,300/=. Further, the record shows that they were executed by way of a Proclamation of the Defendant's various properties on 19th December, 2023.

18. The action by the Plaintiff and the auctioneers in regard to the attachment and proclamation of the defendant's property is the one in issue. The Applicant argues that the step taken by the decree holder through its auctioneers is illegal, unlawful and untenable for reasons that it did not comply with the law. On their part, the Plaintiff argued that the execution is lawful and should be led to proceed, hence the application be dismissed.

19. The basis of the Applicant's contention against the execution that is underway, and it is submitted by the Defendant, is that it is a County Government is an entity that is part of the National Government in respect of which procedures of execution are governed by the *Government Proceedings Act*, and specifically, prohibited by the Civil Procedure Rules where they provide against execution of monetary decrees against the government in the conventional civil way or process. On his part, the Plaintiff argues that the provisions do not apply in respect of County Governments. This prompts this Court to examine the law in that regard.

20. Under the Civil Procedure Rules, 2010, the procedure of execution of decrees and attachment of a judgment debtor's property, whether movable or immovable, are governed by Order 22. Order 22 Rule 22 provides for situations where a court to which a decree is sent for execution may for sufficient reasons stay the execution of the same pending or to allow time for the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution. This is not the case herein since the stay of execution sought herein is not temporary pending another application to be made in another court. In any event this Court is the one that issued the decree herein. The provision is irrelevant.

21. Order 29 of the Civil Procedure Rules generally governs proceedings by or against the Government. Order 29 Rule 1(1) provides that;

> " The expressions "civil proceedings by the Government", "civil proceedings against the Government" and "civil proceedings by or against the Government" have the same respective meanings as in Part III of the *Government Proceedings Act* and do not include any of the proceedings specified in subsection (3) of section 19 of that Act."

22. This means that regard has to be made to Part III of the *Government Proceedings Act* when reference to proceedings by or against government is made.

23. Further, Order 29 (2) (2) (b) provides that, "No order against the Government may be made under- (b) Order 22 (Execution of decrees and orders)." In regard to interpretation of the phrase "no order against the government", Order 29(1)(1) provides that:

> " "order against the Government" means any order (including a judgment, decree, rule, award, declaration and an order for costs) made in civil proceedings brought by or against the Government, or in connection with any arbitration to which the Government is a party, in favour of any person against the Government or against a Government department or against a public officer as such."

24. In my humble view, the provisions above are clear that execution against government made can only be made pursuant to the provisions of the *government Proceedings Act*, Chapter 40 of the Laws of Kenya. Thus, no order against government can be made in civil proceedings for execution of decrees in terms of Order 22 of the Civil Procedure Rules. The question that remains, even as I turn to the provisions under the *Government Proceedings Act*, is whether a County Government is also or part of the government so as to have the provisions above to apply to it.

25. Under the *Government Proceedings Act* the relevant provisions in regard to execution of decrees against government is Section 21 of the Act. Further, the Section has been amended by The Government Proceedings (Amendment) Act, 2015, *Act No. 35 of 2015*, assented to on 18th December, 2015 and commenced on 7th January, 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."

26. 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 new provision includes the execution against any county governments to be levied in the manner and way the Section provides. It thus puts such executions against county governments outside of and totally distinct from the procedure of executions of monetary and other decrees or orders of a civil nature or process as is levied against other entities or persons than government under Order 22 of the CPR. Of the executions against government and by the same token and law as against county governments, the procedure laid down by the *Government Proceedings Act* is the one Applicable.

27. If, and contrary to the submissions by the Respondent, the *Government Proceedings Act*, Chapter 40 Laws of Kenya, does not apply to the executions 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. The Act served the country well prior to *the Constitution* 2010 and when the latter introduced county governments which are only a second level of government which are closer to the people, the statute had to be amended to speak to the realities of the new constitutional dispensation. If not for the sake of argument, the Plaintiff is advised to live in the new constitutional reality.

28. I find persuasion in the holding of Jamleck Waweru Karanja v County Government of Nakuru [2020] eKLR where her ladyship Mbaru J held that no execution against the property of the government or County Government in settlement of a civil decree may be levied, but rather that the execution ought to be by way of an application for judicial review for an order of mandamus.

29. 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 Respondents assigned the County Government of West Pokot. At paragraph 5(iv) of his Replying Affidavit he deposed that the "County Government is a body corporate with perpetual succession and hence the *Government Proceedings Act* (Cap 40) of the Laws of Kenya do not apply to County Government." He then 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.

30. 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!

31. 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:"

32. 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. And *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?

33. 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"?

34. 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;
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> (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."

35. 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.

36. 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."

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:

> "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.""

37. 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....
>
> 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."

38. 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."";

39. 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:
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> > "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."

40. 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."

41. 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.

42. 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.

43. 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."

44. 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.

45. 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;

> " 189. Government at either level shall-
>
> (1) (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."

46. 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.

47. 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."

48. The Plaintiff submitted that the Defendant (County Government of West Pokot) 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.

49. 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 13th October, 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."

50. 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.

51. 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.

52. 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."

53. 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."

54. 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.

55. 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.

56. Let us hear the conclusion of the whole matter. This Court finds that the application is merited. It is allowed in its entirety. The Warrants of Attachment dated 15th December, 2023 and the Proclamation dated 19th December, 2023 are declared null and void and contrary to the law. They are set aside. The Plaintiff shall bear the auctioneers' charges. He shall also bear the costs of this Application.

57. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 24TH DAY OF OCTOBER, 2024.

HON. DR. IUR NYAGAKA

JUDGE, ELC KITALE

In the presence of:

1. Mr. Nyangoro Advocate for the Plaintiff

2. Mr. Songole Advocate for the Defendant

3. Mr. Magal P. Advocate/ County Solicitor acting alongside Songole for the Defendant