**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 2832 OF 1990**

**KISYA INVESTMENTS LTD ……..……..... APPLICANT**

**VERSUS**

**ATTORNEY GENERAL …….....… 1ST RESPONDENT**

**R. L. ODUPOY ……..…..……..... 2ND RESPONDENT**

**JUDGMENT**

Sometime in June, 1990 the Applicant, Kisya Investments Limited, instituted the present suit, H.C.C.C. No. 2832 of 1990 against the Attorney General on behalf of the Ministry of Public works and Housing. On the 8th November, 1991, the Attorney General's defence was struck out and the suit proceeded to Formal Proof on 12th May, 1992. On the 10th September, 1992, the Late Justice Tank delivered the court's Judgment in favour of the Plaintiff for Kshs.31,222,071.31 being special and general damages with interest thereon and costs of the suit.

The Court issued the Decree on 15th September, 1992 for a sum of Kshs.57,040,293.95 and the Plaintiff made various attempts at execution of the Decree for payment of the said amount. On record are numerous applications by both parties in the High court and in the Court of Appeal after the said Decree was issued. A significant matter of record is that the Judgment of Justice Tank has never been varied, set aside or vacated and is still valid and in force. The Attorney General in his submissions referred to some pending appeal and also alleged that the Plaint and Amended Decree had been forged and/or were fraudulent. It is our view that these issues are not the subject matter of this application and can only be pursued elsewhere, if at all.

It is common ground that on the 24th September, 1997 the Ministry of Public works and Housing through the Defendant, the Attorney General paid a sum of Kshs.57,020,637.97 after the Plaintiff obtained orders requiring the Permanent Secretary/Accounting Officer to appear in court to show cause why he had not effected payment pursuant to the orders of the court. As a result of an application for an order of Mandamus filed by the Plaintiff/Decree-holder on 7th December, 1992, the court in a decision by Justice Okubasu made the following order:-

> **"1. That an Order of Mandamus be and hereby is granted to the applicant compelling (the accounting officer) the permanent Secretary, Ministry of Public works to pay the applicant the sum of Kshs.57,040,293/95 together with interest at 12% per annum from 11th September, 1992 until payment in full."**

It is after the said order was made on 9th March, 1993 and the Applicant/Plaintiff moved to execute it that the aforesaid payment was made. Strictly, that ought to have been the end of the matter save for payment of any balance arising from accumulation of interest due to lapse of time. However, immediately after receipt of payment of Kshs.57,040,293.95 about 24th September, 1992, the Applicant/Plaintiff filed a fresh application dated 23rd October, 1997 to amend the Decree issued on 15th September, 1992. The application under sections 99 and 100 of the Civil Procedure Act sought the following main order:-

> *"**That the decree issued on 15th September, 1992 showing decretal amount of Kshs.57,040,293.90 (Fifty seven million, forty thousand, two hundred ninety three shillings and cents ninety) be and is hereby amended to Kshs.82,227,117.90 (Eighty two million, two hundred and twenty seven thousand, one hundred and seventeen shillings and cents ninety) together with a certificate of Order against the Government …….**"*

The Applicant in his affidavit in support contended that the decree correctly stated the principal amount awarded but there is an arithmetical or computation or clerical error in calculating or computing the exact accrued amount of interest of 18% p.a. compounded monthly with monthly interest rests on each of the sums awarded up to 10th September, 1992 as awarded by the court. After hearing both sides, Justice Okubasu (as he then was) on 25th June, 1998 allowed the amendment of the Decree stating that:-

> ***"…… Now that we have referred to that application***
>
> ***perhaps it may be useful to consider the ruling delivered***
>
> ***by this court on 23rd April, 1997. In that ruling the court***
>
> ***confirmed the rate of interest to be 18% and not 12% as it***
>
> ***had been urged by Mrs. Madahana. It is from that ruling that***
>
> ***the applicant proceeded to calculate the interest on principal***
>
> ***amount. I, therefore, agree with Mr. Opiyo that this is purely an***
>
> ***arithmetical exercise which the applicant has very carefully carried***
>
> ***out as can be seen in the affidavit of Mr. Ageng. Clearly Mrs. Madahana***
>
> ***for the respondent has no answer to this application. In view of the foregoing***
>
> ***the Notice of Motion dated 23rd October, 1997 is granted as prayed."***

The Court went ahead to issue an amended Decree on 13th July, 1998 for Kshs.82,227,112.90. After various other attempts to enforce and execute this Decree, the Applicant on 23rd March, 1999 applied to the court for an Order of Mandamus to compel the Accounting Officer the Permanent Secretary, Ministry of Roads and Public works to pay to the Applicant the amount stated in the Amended Decree and Amended Certificate of Order against the Government (Order XXVIII, Rule 3) less what had been paid and in default of non-compliance the Accounting Officer be committed to civil jail for contempt of court. The application was heard by Justice Okubasu (as he then was) who disallowed it on the ground that the Permanent Secretary could not be committed to jail for contempt of court as Section 21 (4) of the Government Proceedings Act, Cap 40, Laws of Kenya, does not allow the same to be done.

Being aggrieved by the aforesaid decision and being unable to enforce and execute the Decree for the balance of the amount set out therein, the Applicant filed the Notice of Motion dated 31st October, 2002 under the provisions of Sections 84 (1) and 2(a), 70 (a), 60 (1) and 72 (1) (b), (c), (2) and (3) of the Constitution of Kenya. He seeks the following Declarations:-

"(a) That Section 21 (4) of the Government Proceedings Act, Cap 40 of the Laws of Kenya is inconsistent with Section 72 (1) (b) and (c) of the Constitution of Kenya.

(b) That the said Section 21 (4) of the Government proceedings Act is null and void and the same is unconstitutional.

(c) That Order XXVIII rules 2 (a) (particularly the part referring to Order XX1 (execution and decrees) and Order XXII) and 4 (1) of the Civil Procedure Rules of the Civil Procedure Act Cap 21 Laws of Kenya are inconsistent with Section 70 (a) of the Constitution of Kenya.

(d) That Order XXVIII rules 2 (a) and 4 (1) of the Civil Procedure Rules of the Civil Procedure Act Cap 21 laws of Kenya are inconsistent with Section 60 (1) of the Constitution of Kenya and Section 3A of the Civil Procedure Act as they oust the unlimited jurisdiction of the High Court of Kenya as established by section 60 (1) of the Constitution of Kenya as they limit and affect the inherent powers of the court as per Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya to make Orders as may be necessary for end of justice or to prevent abuse of the process of the court.

(e) That the said Order XXVIII rules 2 (a) and 4 (1) of the Civil Procedure rules of the Civil Procedure Act, Cap 21 Laws of Kenya are null and void and the same are unconstitutional.

2. That the prohibition provided by Order XXVIII Rules 2 (a) (particularly the part relating to Order XXI (Executions and decrees) and Order XXII) and 4 (1) of the Civil Procedure Rules of the Civil Procedure Act Cap 21 of the Laws of Kenya is in contravention of the applicant's fundamental rights to the protection of the Law under Section 70 (a) of the Constitution of Kenya and the same is unlawful, illegal and wrongful.

3. That the said Orders prohibit and/or deprive the 2nd applicant of the enjoyment of their fundamental rights to the protection of Law and as they deny the 2nd Applicant the enjoyment of their rights accrued to them on 10/9/92 from the judgment in H.C.C.C. No. 2832 of 1990 – Kisya Investments Ltd –v- Attorney General and R.L. Odupoy accrued to the applicant from 10/9/92.

4. That the said orders have hindered the 2nd Applicant fair litigation and/or execution of the decree against the Government in H.C.C.C. 2832 of 1990 obtained lawfully on 10/9/92.

5. That costs of this application be provided for."

On 6th March, 2003, the former Chief Justice, Honourable Justice Benard Chunga admitted this application as a Constitutional matter and ordered that a Constitutional bench be appointed to hear it. The said Chief Justice retired before nominating a specific bench. His successor, Honourable Chief Justice Gicheru subsequently appointed a bench of 2 judges constituting Justice Aluoch and Justice Ibrahim. The said bench did not hear the matter as Justice Aluoch disqualified herself and the matter was referred to the Chief Justice to set up a new bench. This was done and the matter fixed for hearing before us on 30th March, 2004. The Attorney General by then had not filed any Replying Affidavit. He had filed Grounds of Preliminary Objection which the state counsel, Mr. Allan Sitima was allowed to convert to Grounds of Opposition. At the resumed hearing on 29th June, 2004, the Respondent/Attorney General presented an application under certificate of urgency seeking orders, inter alia, to be allowed to file an Affidavit in Reply out of time.This was heard on 15th July, 2004 and after lengthy arguments, the court made its ruling on 22nd July, 2004 granting the leave and allowing the Applicant to file a Supplementary Affidavit. The hearing was concluded on 29th September, 2004. The Attorney General opposed the application. The Grounds of Opposition laid down 3 grounds while the Replying Affidavit sworn by the Permanent Secretary, Mr. Erastus Mwongera which apart from introducing factual issues added other grounds of law. We see the following issues of law as being articulated by the Attorney General:-

1. That the application does not seek or raise any matter which requires the interpretation of the Constitution in so far as it relates to the execution of a judgment and/or decree of the court under the provisions of the Civil Procedure Act and Rules.

2. That the matters complained of inter alia, are matters in the realm of Judicial Review and can be adequately addressed pursuant to the provisions of Section 8 and 9 of the Law Reform Act, Cap. 26 Laws of Kenya and Order 53 of the Civil Procedure Rules.

3. That the issues raised by the Applicant are in any event not justiciable and this court has no jurisdiction to entertain them.

4. That the application is not a proper matter for a Constitutional reference, as the same is of the peculiar circumstances, as such, the circumstances enumerated by the Applicant do not warrant the Issuance of the Orders sought.

5. That justification for the procedure under Section 21 of the Government proceedings Act, Cap 40, Laws of Kenya, lies in the fact that the Public interest sought to be protected under this Act, is so large that it cannot and should not be taken away on the basis of the facts and issues, raised by the Applicants in its application.

6. That the matter before the Constitutional court substantially touches on the subject matter before the court of Appeal in NAI. C.A. No. 305 of 2001 and the court of Appeal is the right court to canvass and determine the Applicant's rights arising from the alleged Amended Decree.

7. That the overall benefit of having the fundamental provisions of the Government Proceedings Act, and specifically the provisions relating to execution of court decrees against Government, is overridden, by the transient, expediency of the Applicant's application.

8. That the scales of Justice must tilt in favour of the retention of the provisions of the Government proceedings Act and the Civil Procedure Act and Rules, cited by the Applicant.

The provisions of the Government Proceedings Act and the Civil Procedure Act and Rules which are the subject matter of this Constitutional application are as follows:-

***1. Government Proceedings Act, Section 21 (4) which reads as follows:***

***"(4) save as provided in this section, no execution or attachment***

***or process in the nature thereof shall be issued out of any court for***

***enforcing payment by the Government of any money or costs, and***

***no person shall be individually liable under any order for the payment***

***by the Government of any money or costs, and no person shall be individually***

***liable under any order for the payment by the Government, or any Government***

***department, or any officer of the Government as such, of any money or costs."***

2. The Civil Procedure Rules, Order XXVIII Rules 2 (1) (a) and (2) and 4 (1) read as follows:-

***"2 (1) Except as provided by the Government Proceedings Act or by these Rules.***

***(a) these Rules shall apply to all Civil Proceedings by or against the Government.***

**……**

***(2) No order against the Government may be made under -***

***Order XIII, rule 4(impounding of documents);***

***Order XXI (Execution of decrees and orders);***

***Order XXII (attachment of debts)***

***Order XL (appointment of receiver)***

***Order XXVIII, Rule 4(1):- " 4(1) No order for the attachment of debts under Order XXII or for the appointment of a receiver under Order XL shall be made or have effect in respect of any money due or accruing or alleged to be due or accruing from the Government."***

The essence of all of the foregoing provisions of the law is that they protect and insulate the Government against any form of execution or attachment of its property, assets, funds or personnel in or during the enforcement of any judgment, decree, or other orders of the court against it or, any other person as a result of which it affects the Government, its property, etc.

We have now to look at and consider each of the Constitutional provisions referred to in the application which protect the fundamental rights of the Applicant against the aforesaid statutory provisions which are said to offend the same. The terms of reference of the court and the question for determination are set out and must strictly be guided by the pleadings before the court and the manner set out therein.

**SECTION 70 (a) OF CONSTITUTION**

Section 70 (a) stipulates that:

**"70. whereas every person in Kenya is entitled to the**

**Fundamental rights and freedoms of the Individual, that**

**is to say, the right, whatever his race, tribe, place of origin**

**or residence or other local connexion, political opinions,**

**colour, creed or sex, but subject to respect for the rights and freedoms**

**of others and for the public interest, to each and all of the following**

**namely –**

**(a) life, liberty, security of the person and the Protection of the law.**

**(b) ……**

**(c) ……**

***The Provisions of this Chapter shall have the effect for the***

***purpose of affording protection to those rights and freedoms***

***subject to such limitations of that protection as are contained***

***in those provisions, being limitations designed to ensure that***

***the enjoyment of those rights and freedoms by any individual***

***does not prejudice the rights and freedoms of others or the public interest."***

Section 70 in our view is the threshold to Chapter V of the Constitution of Kenya which enshrines the Protection of Fundamental Rights and Freedoms of the Individual i.e. the Bill of Rights. It lays down the foundation of the said protections in a general, summarized but firm manner while the subsequent Sections 71 – 83 specifically define the said specific rights and manner of protection. Section 84 covers the enforcement process of those rights and freedoms.

Section 70 is declaratory of rights and freedom of the Individual and the extent of its application. It does not by itself create any of the enforceable protections or the violable constitutional rights and in some cases the consequences penalties or remedies. In the premises, we are of the view that strictly it is not capable of express violation to the extent that enforceable rights accrue. However, there is no doubt that if any of the protective sections are offended or violated then the spirit of Section 70 would also be breached. Section 70 is always read together with each and every of the protective sections – Ss. 71 – 83.

**SECTION 72 (1) (b) AND (c)**

Section 72 (1) (b) and (c) stipulates that:-

***"72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases –***

***(a) …… (b) In execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal***

***(c) In execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law,***

***(d) ……..***

***(e) ……...…"***

Our understanding of the Applicant's invocation of the said provisions is that the Permanent Secretary/Accounting officer of the Ministry of Public works and Housing in this case was in contempt of the High Court by his failure, neglect or refusal to comply with the order of Mandamus which had been issued by the court to pay the decretal sum herein and that he should be committed to civil jail as applied for, for his failure, neglect or refusal to pay the said decretal sum in this case. That Section 72 (1) (b) of the Constitution itself permits or allows such deprivation of personal liberty as an exception to the protection of the right to personal liberty. That Section 21 (4) of the Government Proceedings Act which protects the Permanent Secretary/Accounting Officer from personal liability under the court Order herein for the payment by or satisfaction of the decree by the Government of the said monies thereunder, is inconsistent with Section 72 (1) (b) of the Constitution therefore null and void to the extent of the said inconsistency; and thus unconstitutional.

With regard to Section 72 (1) (c) is in effect that while the Constitution provides that no person shall be deprived of his personal liberty, yet the same Constitution in this Section permits the same if it is in the execution of the Order of a court made to secure fulfillment of an obligation imposed on him by law. That the Permanent Secretary/Accounting officer has an obligation imposed by law to pay the decretal sum and having failed to pay then the Constitution allows the execution of any Order of the court to secure fulfillment of the obligation, in this case the payment of the decretal sum. The execution of such an order would be the order of Mandamus and consequential order of committal to civil jail for non-compliance.

In order for the court to determine the question whether the insulation or protection of the Permanent Secretary in this case and other officers as persons generally from personal liability on the basis of their office under Section 21 (4) of the Government Proceedings Act is unconstitutional vis – a – vis Sections

72 (1) (b) and (c) of the Constitution, it is pertinent that the court determines in the first place, the following:-

1. under Section 72 (1) (b) - whether the Permanent Secretary was guilty of contempt of court therefore deserving to be committed to civil jail.

2. Under Section 72 (1) (c) - was there an obligation imposed on the Permanent Secretary by law to pay the decretal sum in compliance of the order of Mandamus issued by the court?

1. **CONTEMPT OF COURT (Section 72 (1) (b)**

Contempt of court is a very grave and serious matter. Lord Denning in the case of **RE BRAMBLEVALE LTD (1969) 3 All ER 1062** said:

***"A contempt of court is an offence of a criminal character.***

***A man may be sent to prison. It must be satisfactorily proved.***

***To use time – honoured phrase, it must be proved beyond reasonable doubt."***

In our Kenyan case of **MAWANI –V- MAWANI (1977) KLR 159,** the consequences of disobedience of court and contempt of court are fully enunciated. In the present case, the applicant moved this court for an order of Mandamus to compel the Permanent Secretary to pay the decretal sum and in default compliance for him to be committed to civil jail for contempt of court. Justice Okubasu (as he then was) nipped the application in the bud by invoking the provisions of Section 21(4) of the Government Proceedings Act. As a result there was no finding of any contempt of court as the stage of enforcement of the orders sought was never reached. No order of Mandamus was granted on the basis of the aforesaid statutory provision.

In view of the said provision, it is the view of this court that the applicant could not in law present an application for an order of Mandamus to enforce the decree against the government by way of committing the Permanent Secretary to civil jail if there was default or non-compliance. Such an application was not and is not sustainable at law.

We hold that the mode of execution of the decree chosen by the Applicant was expressly prohibited by statute – The Applicant by the application for an order of Mandamus, strictly, was not executing an order of the High Court punishing the Permanent Secretary for contempt of the court as no such order had been given. In any case, no such order could validly be given by the court and the presentation of the very application was in disregard of the Law. It should not have been filed in the first place as it was prohibited and an act in vain.

A true interpretation of Section 72 (1) (b) is that a person (read the Permanent Secretary) could only be deprived of his personal liberty where there is an execution of an order of the court punishing him for contempt of that court. In this case, there was no such order neither was the mode of execution allowed by the Law. Section 70 of the Constitution contemplated and expressly provides that every person in Kenya is entitled to the fundamental rights and freedoms of the Individual but this shall be subject to respect for the rights and freedoms of others. In this case, the Permanent Secretary is protected and insulated against personal or individual liability under any order for payment by the Government of any money or costs.

The court declined to grant the order of Mandamus and the issue of compliance could not be tested. It is a matter of speculation or hypothesis as to what could have happened if the order was granted and served on the Permanent Secretary. The order was not granted and there is no order to execute/enforce and there is no order capable of being executed to punish the Permanent Secretary as contemplated by Section 72(1) (b).

The upshot is that we hold Section 21 (4) of the Government Proceedings Act is not inconsistent with Section 72 (1) (b) of the Constitution of Kenya in the circumstances of this case.

2. **AN OBLIGATION IMPOSED BY LAW [Section 72 (1) (c)]**

Under section 72 (1) ( c), no person shall be deprived of his personal liberty save as may be authorized by law in this case in the execution of the order of a court made to secure fulfillment of an obligation imposed on him by law.

Again, it is our view that the principles and reasoning above would equally apply to this provision. The order of Mandamus sought by the Applicant was never granted or issued.The Decree and certificate of order against the Government, strictly, are orders against the Government as a party in the suit. As a result there was no order by the court made to secure the fulfillment of any obligation on his part, personally or in his official capacity.

Was or is there any obligation imposed on him by law to pay or settle the decretal sum?In our view to answer such a question the obligation must be personal or individually imposed on him so that if there is any default then the enforcement would also be personally against him. It is evident from section 21 (4) of the Government Proceedings Act that any individual liability of any person in respect of payments due from the Government is expressly prohibited. The correct position is that the law expressly excludes any imposition of any obligation on the Permanent Secretary or any other person to be personally liable for fulfillment or satisfaction of dues from the Government.These are the interpretations that the court would give in construing Section 21 (4) of the Act vis –a- vis Section 72 (1) (c).

As a result, we hold that Section 21 (4) is not inconsistent with Section 72 (1) (c) of the Constitution of Kenya in the circumstances of this case. The said Section of the Constitution expressly requires the existence of a court order directed to the person and an obligation imposed on him by law to fulfill the same. If these ingredients do not exist then the affected person enjoys his full protection of personal liberty.

In the course of his submissions counsel for the Applicant, Mr. Opiyo invoked the provisions of Section 75 of the Constitution which deals with protection from deprivation of property. With respect, this was not pleaded in the body of the application and the court will not and cannot depart from the confines of the pleadings. In any case, this section deals with the protection from deprivation of property without due compensation.

This is not relevant to the application but the court does appreciate that a judgment or decree confers on the successful litigant, some proprietary rights and/or interests.

The Applicant also cited Section 82 (1), (2) and (3) of the Constitution in the head - title of the Application. This Section deals with protection from discrimination. It states that subject to certain exceptions set out in the said section no law shall make any provision that is discriminatory either of itself or in its effect. Counsel for the Applicant made submissions in respect of this provision and referred to them in its Grounds but a careful scrutiny of the application reveals that there is no declaration or other prayer which is specifically sought under this provision. As a consequence, it will be a futile exercise for the court to refer to this Section and it is best that the court makes no reference to it. The parties are bound by their pleadings and the court will only deal with or grant what is expressly asked for.

**Orders XXVIII, Rules 2 (1) (a), (2) and 4 (1), Civil Procedure Rules**

We have already in this judgment set out the aforesaid provisions which are being challenged by the Applicant. By virtue of Order XXVIII, Rules 2 (1) (a), the provisions of the Government Proceedings Act are invoked to override any of the Rules in the Civil Procedure Rules. The said Rules are made to be subject to the Provisions of the said Act.This is as it should be since the provisions of a statute supercede those of subsidiary legislation. In any case, these very rules expressly respect this application of the law. The aforesaid rule says as follows:-

> *"**2(1) Except as provided by the Government Proceedings Act or these Rules –***

***(a) these Rules shall apply to all civil proceedings by or against the Government …"***

We have perused the aforesaid relevant rules in this regard and found no inconsistency of any of the said Rules with the Government Proceedings Act. Rule 2 (2) reads:-

***"(2) No order against the Government may be made under –***

***……..***

***Order XXI (execution of decrees and orders)***

***Order XXII (attachment of debt)***

***……."***

And Rule 4 (1) states that:-

***"4 (1) No order for the attachment of debts under Order XXII or for the appointment of a receiver under Order XL shall be made or have effect in respect of any money due or accruing or alleged to be due or accruing from the Government."***

Since all the aforesaid Rules are subject to the provisions of the Government Proceedings Act and there is no inconsistency between the said Act and Rules, we hold that what we have said and decided in respect of the provisions of Section 21 (4) of the Government Proceedings Act hereinabove, equally apply to these particular Rules. We therefore hold that the said Rules are **NOT** inconsistent with the provisions of Sections 70 (a) and 72 (1) of the Constitution, neither are they in contravention thereof. The said Rules are therefore not unconstitutional.

The other declaration that the Applicant seeks is that Order XXVIII, Rules 2 (a) and 4 (1) of the Civil Procedure Rules of the Civil Procedure Act, Cap 21 Laws of Kenya are inconsistent with Section 60 (1) of the Constitution of Kenya and Section 3A of the Civil Procedure Act as they oust the unlimited jurisdiction of the High Court of Kenya as established by Section 60 (1) of the Constitution of Kenya and as they limit and affect the inherent powers of the Court as per Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya to make orders as may be necessary for ends of justice or to prevent abuse of the Court.

Section 60 of the Constitution provides that:-

***"60 (1) There shall be a High Court which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."***

We have carefully looked at this provision and those in Orders XXVIII, Rules 2 (a) and 4 (1) of the Civil Procedure Rules. As indicated earlier, the effect of the application of the said Rules is that all forms of execution or attachment of the Government's property, assets, fund or against its personnel towards satisfaction of any decrees or orders are expressly prohibited. It is such execution and attached which is prohibited. Jurisdiction of the High Court or any other law is acquired or donated by the Law. The exercise of jurisdiction cannot be done in a vacuum and it must obtain its legal purpose and efficacy from the Law. It cannot be assumed or imagined. It cannot be exercised without direction and guidance from the Constitution, the statutes or other applicable laws.

In our view a**n** ouster of jurisdiction is not the same as interpretation and application of the Law. The aforesaid Rules do not, strictly, oust the jurisdiction or authority of the High Court over the enforcement of decrees or orders against the Government (in so far as execution and attached is concerned). They only prohibit or restrict certain forms of execution/attachment i.e. against the Government. Limitations or prohibitions of the Law do not amount to an ouster of jurisdiction. It is not like saying that the Court shall

not hear or determine any disputes or matters relating to execution against the Government under the said Rules.

Section 3A of the Civil Procedure Act is a saving provision of the inherent powers of the Court. It reads:-

> ***"3A. Nothing in this Act shall limit or otherwise affect the inherent power of the***
>
> ***Court to make such orders as may be necessary for the ends of justice or to prevent***
>
> ***abuse of the process of the Court."***

Do these Rules [Order XXVIII, Rules 2 (1) (a), (2) and 4 (1) of the Civil Procedure Rules] affect the Court's inherent powers? The said Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the Courts are bound to apply the Law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said Laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable.

**History and Rationale of Government's immunity from execution**

Before we conclude this decision, it is our view that it is essential, if not imperative on the court's part, to give its observations regarding the history, purpose and usefulness or otherwise of Section 21 (4) of the Government Proceedings Act and Order XXVIII, Rules 2 (1) (a), (2) and 4 (1).

In preparing our judgment, we have carried out some considerable research regarding the history of the protection and immunity of the Government from execution and attachment of its property/goods but could not find any text covering the subject. We could not obtain any case law or precedent directly on the point. However, it would appear that the genesis of the said protection and immunity arose from two situations:-

> 1. Firstly, there has been a policy in respect of Parliamentary control over revenue. This is threefold and is exercise in respect of:
>
> (i) The raising of revenue – (by taxation or borrowing)
>
> (ii) its expenditure and
>
> (iii) the audit of public accounts.

The satisfaction of decrees or judgments is deemed to be an expenditure by Parliament and as a result this must be justified in law and provided for in the Government's expenditure. It is for this reason that Section 32 of the Government Proceedings Act provides as follows:-

> **"32 (1) Any expenditure incurred by or on behalf of the**
>
> **Government by reason of this Act shall be defrayed out of**
>
> **moneys provided by Parliament."**

Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority. No payment out of public funds is legal unless it is authorized by Statute, and any unauthorized payment may be recovered – (***See Halsbury's Laws of England 4th Edition, Volume 11 at paragraphs 970, 971 and 1370).***

As a result of the aforesaid provision which was borrowed from the Crown Proceedings Act, 1947 (Section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over expenditure. This is as it should be.No Ministry or Department has any ready funds at all times to satisfy decrees or judgments. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. In a case from New Zealand, **- AUCKLAND HARBOUR BOARD VS R** (**1924) A. C. 318**, it was held (p. 326) by Viscount Haldane in the Privy Council:-

> ***"… For it has been a principle of the British Constitution now for more***
>
> ***than two centuries, a principle which their Lordships understand to have***
>
> ***been inherited in the Constitution of New Zealand with the same stringency,***
>
> ***that no money can be taken out of the Consolidated Fund into which revenue***
>
> ***of the State have been paid, excepting under a distinct authorization from Parliament***
>
> ***itself. The days are gone by in which the crown, or its servants, apart from Parliament***
>
> ***could give such an authorization or ratify an improper payment. Any payment out of the***
>
> ***consolidated fund made without Parliamentary authority is simply illegal and ultra vires,***
>
> ***and may be recovered by the Government if it can, as here, be traced."***

2. The second situation which arises from the above is that once a decree or judgment is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, the Comptroller and Auditor General e.t.c. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments.

Considering the nature of Government Structure, procedures, red-tap and large number of claims, this could take a long time.

If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgments and it will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached, its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore, the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt, but it's Constitutional and Statutory duties will not be capable of performance. This will lead to a chaos, anarchy and the breakdown of the Rule of Law.

In our view, this is the rationale or the objectives of the Law that prohibits execution against and attachment of the Government's assets and property. We form this view from a general reading of the English Statutes, **Halsbury's Laws of England** and some case law which do not bring out all these, but one is able to construe the intentions.

This brings us to the proviso in Section 70 (a) of the Constitution:-

> ***"… The provisions of this Chapter shall have effect for the purpose of affording***

***protection to those rights and freedoms subject to such limitations of that protection***

***as are contained in those provisions, being limitations designed to ensure that the***

***enjoyment of those rights and freedoms by any individual <u>does not prejudice the rights</u>***

***<u>and freedoms of others or the public interest.”</u>*** (emphasis ours).

If the facts and circumstances of this case, could have led us to decide that the Applicant’s fundamental rights and freedoms under Sections 70, 72, 75 and 82 have been violated or infringed upon by the operation of Sections 21 (4) of the Government Proceedings Act and Order XXVIII Rules 2 and 4, then we would certainly have held that the public interest herein in insulating the Government from execution and attachment overrides the Applicant’s enjoyment of his rights and the fruits of judgment through execution and that it was in the public interest that the said laws have been enacted and must continue to be in force unless and until Parliament legislated otherwise.

Before we conclude, we think that it is our duty as a Court to point out that we think the problem and difficulties in this case in not necessarily the law but the office of Attorney General’s conduct and performance of its duties in this case. It is our view that satisfaction of the decree herein against the Government was to be obtained by means of the Certificate containing particulars of the decree issued by the Court and served on the Attorney General as required by Section 21 (1), (2) and (3) of the Government Proceedings Act. The applicant duly served such a certificate and the Attorney General was obliged to advise the relevant Ministry and Ministry of Finance of the consequences and ensure that payment was made within a reasonable time taking all circumstances into account. Alternatively, it was upon the Attorney General to appeal against the decision giving rise to this debt.

In our view the said office did not procure payment until matters had gone out of hand and by the time payment was made interest had accumulated and snow-balled and the Government instead of paying Kshs.31,222,071.31in 1992 paid Kshs.57,020,637.97 in 1997. The alleged outstanding balance as submitted by Counsel for the Applicant is an astronomical and unbelievable sum of over Kshs.700,000,000/=!! This is outrageous and should not have been allowed to happen by any means or circumstances, if at all it is true that there is any balance leave alone the amount claimed to be due.

The Government is obliged to obey the law and discharge all of its statutory and legal obligations. It ought not abuse the privileges and immunities granted to it by law to the detriment of other parties and in particular the public and the public interest. The provisions herein granting insulation and immunity to the Government were intended ultimately to protect the public interest but in this case the Government has allowed to it to operate against the public interest as it is the Kenyan tax payers and the public which could ultimately be called upon to pay the colossal sums which may have accrued on the original decretal sum, if the claims and amounts are correct.

In the case of **<u>M VS HOME OFFICE AND ANOTHER</u> (1992) 4 AII E R 97** Lord Simon Brown (at p.114) discussing the Crown Proceedings Act of 1947 in England held:-

***“……***

***Point of high constitutional importance though this is, and reluctant though***

***any court must be to proclaim the crown beyond the reach of its ultimate***

***coercive power, it is I believe, difficult to regard this as a black day for the rule***

***of law or the liberty of the subject. The Court is not abrogating a historic responsibility***

***for the control of executive government. Rather, it is recognizing that when it comes to***

***the enforcement of its decisions the relationship between the executive and the judiciary must, in the end, be one of trust. Parliament essentially made it so in 1947: the postulate implicit in SS: 21 and 25 of the 1947 Act is that the Crown will be true to its obligations. But if not – if it fails to observe them – it will be answerable to Parliament. It is not, then, given to the courts to exercise the power of punishment.***

***It goes without saying that nothing in this judgment affects the long established principle that the Crown not only is bound always and in all respects to abide by the rule of law but also must submit, to the court's jurisdiction to rule upon all disputed issues …"***

This reinforces the principle that it is the duty of the Government and every department and Ministry to abide by and obey the Law which includes satisfaction of decrees and compliance with Court orders.

It is our view that the Government in this case has failed to observe and comply with the orders of this court within a reasonable time and as a result the taxpayer and the public have lost a large sum of money and could be called upon to pay further huge amounts arising purely and totally from unnecessary escalating interest on the principal sum in the decree. This dereliction of duty and negligence is unacceptable and is hereby unequivocally condemned. We sincerely hope that this shall be the last of such unnecessary cases which have resulted in wasted public funds and coffers and thereby continued to increase the burden and poverty of Kenyans.

In conclusion, and for reasons outlined, we hold that the Applicant is not entitled to any of the declarations sought in the said application and it has not proved any violations of its constitutional rights. The Application must, therefore, fail and the same is dismissed with no order as to costs. The Attorney General would have been entitled to costs but this suit is brought out of frustration and the Respondent has allowed the situation and is part of the problem and we think that he is not entitled to costs. Orders accordingly. We take this opportunity to thank both Counsel for an exemplary and gallant articulation of their respective client's cases.

**Dated and delivered at Nairobi this 24th day of January, 2005.**

**ALNASHIR VISRAM**

**JUDGE**

**MOHAMMED K. IBRAHIM**

**JUDGE**