



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW MISC. APPLICATION NO. 41 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR GENERAL,

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

EX PARTE :

TALEWA ROAD CONTRACTORS LIMITED

JUDGMENT

Introduction

1. Talewa Road Contractors Limited, which is the *ex parte* Applicant herein, and the Kenya National Highways Authority, hereinafter referred to as “KeNHA”, entered into a contract for the periodic maintenance of Mombasa – Miritini (A109) Road for the sum of Kshs. 341,180,245.56, after engaging in a tender process. Works on the project commenced in February 2012, but a dispute arose thereafter between the parties. As a consequence, thereof, a sole Arbitrator was appointed to determine the dispute between the parties.

2. After hearing the dispute, the Arbitrator published his award on 22nd March, 2018 which was as follows:

- a) The Claimant’s claim against the Respondent was awarded in the sum of Kshs. 115,131,449 which did not include VAT, payable within 45 days of the date of the award.
- b) VAT at 16% amounting to Kshs. 18,421,032 was to be paid to KRA.
- c) Each party was to bear its costs.
 - i) The costs and expenses of the Sole Arbitrator of Kshs. 10,446,731 which included 16% VAT was be paid by the Parties in equal shares of 50% each.
 - ii) VAT was to be paid directly to KRA and the parties were to present proof of payment when lifting the award.

3. The *ex parte* Applicant thereafter filed *Talewa Road Contractors Limited vs Kenya National Highways Authority, High Court Misc. Application Cause No. 535 of 2018* in the High Court, seeking recognition and enforcement of the award, and, the Court delivered a ruling therein allowing the application and the final orders were given on 9th December, 2019 .

4. The *ex parte* Applicant has now moved this Court by a Notice of Motion application dated 19th February, 2020 in which it has sued the Director General of Kenya National Highways Authority as the Respondent, seeking the following orders:-

- a) **An order of Mandamus be and is hereby issued to compel the Director General, Kenya National Highways Authority to forthwith pay the decretal sum in High Court Misc. Application Cause NO. 535 of 2018 - Talewa Road Contractors Limited vs Kenya National Highways Authority.**

b) An order of Mandamus be and is hereby issued directing Director General, Kenya National Highways Authority to comply with the provisions of section 68 of the Kenya Roads Act Act, No. 2 of 2007, by paying Talewa Road Contractors Limited the decretal sum in High Court Misc. Application Cause No. 535 of 2018 Talewa Road Contractors Limited vs Kenya National Highways Authority.

c) The costs of the application and the case be borne by the Respondent.

5. The application is supported by a statutory statement dated 14th February 2020 and the verifying affidavit of John Wainaina, the *ex parte* Applicant's Managing Director, which was sworn on the same date. The application was opposed by the Respondent by way of Grounds of Opposition dated 9th March 2020 and filed on 10th March 2020, and a Replying Affidavit sworn on 6th April, 2020 by Jessica Karimi Mbae, KeNHA's Senior Legal Officer. The parties' respective cases are set out hereunder.

The ex parte Applicant's Case

6. The *ex parte* Applicant's case in a nutshell is that the Respondent has not challenged the arbitral award dated 22nd March 2018, and has not applied to the High Court seeking to set aside the award, hence the said award is payable in accordance with section 68 of the Kenya Roads Act. Further, that pursuant to the award published on 22nd March, 2018, the Respondent was directed to settle the sums awarded within a period of 45 days but to-date the said sum had not been settled.

7. The *ex parte* Applicant averred that its Advocates served the Respondent and its Advocates in *Misc. Application Cause No. 535 of 2018* with notices and demands seeking settlement of the decretal sum in the said cause, but that this notwithstanding, the Respondent had failed to settle the said decretal sum. Further, that the delay by the Respondent to settle for a period of about two (2) years is inordinate, and the Respondent had not given any reasons for its refusal to settle the said decretal sum. Therefore, that the failure by the Respondent to pay the Applicant the decretal amount as awarded in *High Court Misc. Application Cause No. 535 of 2018* was in breach of the law.

8. It was the *ex parte* Applicant's deposition that its business and operations was wrecked by KeNHA, who after termination of the subject contract confiscated their yard, together with all their equipment and documents which were therein at the time, without any justification. In addition, that it has not received back the equipment which had been confiscated by the Respondent, and that it is facing financial challenges as a result of the refusal to settle the decretal sum in *Misc. Application Cause No. 535 of 2018*.

9. The *ex parte* Applicant disclosed that it had filed an appeal at the High Court wherein they were seeking an enhancement of the arbitral award, which appeal was dismissed on 14th February, 2019. Consequently, that it lodged an appeal against the dismissal at the Court of Appeal in Civil Appeal No. 246 of 2019. However that the said appeal was not a ground for the Respondent to refuse settlement of the decretal sum, as they were seeking an enhancement of the award.

The Respondent's case

10. The Respondent opposed the application on the following grounds:

a) The application is fatally incompetent and bad in law having been filed contrary to the express provisions of section 36(3) of the Arbitration Act 1995.

b) The application is fatally incompetent and bad in law having been filed contrary to the express provisions of Rule 6 of the Arbitration Rules 1997, and during the pendency of proceedings invoking the court's powers under section 35 of the Arbitration Act in **High Court Civil Appeal No. E001 of 2018 - Talewa Road Contractors Limited versus Kenya National Highways Authority.**

c) The application is premature as the Respondent has filed an application to set aside the orders for recognition and enforcement of the arbitral award which the *ex parte* Applicant was seeking to enforce herein.

d) The application herein offends the express provisions of section 9(2) as read with section 9(4) of the Fair Administrative Action Act.

e) The application is otherwise an abuse of the process of this Court.

11. The Respondent contended that the *ex parte* Applicant was guilty of misrepresentation and concealment of material facts necessary for just determination of the application herein. The Respondent in this respect averred that following publication of the arbitral award, the *ex parte* Applicant filed an appeal against the arbitral award in **Nairobi High Court Civil Appeal No. E001 - Talewa Road Contractors Limited vs Kenya National Highways Authority** together with an application to enlarge time for filing the appeal, which application was dismissed with costs to the Respondent. Further, that following dismissal of its appeal, the *ex parte* Applicant filed an appeal against the ruling of the High Court to the Court of Appeal, and at the same time also filed **High Court Misc. Application Cause No. 535 of 2018 - Talewa Road Contractors Limited vs Kenya National Highways Authority** seeking recognition and enforcement of the award.

12. The Respondent explained that the High Court issued orders for recognition and enforcement of the subject arbitral award on 9th December 2019, and that the Respondent subsequently duly filed an application to the High Court to review and set aside the said ruling and subject decree. It was also the Respondent's deposition that the *ex parte* Applicant has all along been participating in the said proceedings and had filed responses to the application for review. The Respondent further averred that the *ex parte* Applicant had wilfully failed to disclose to the Court about the pendency of the above review proceedings before the High Court, so as to deprive the Court of the correct and true status of the subject decree which it is seeking to enforce herein.

13. It is the Respondent's case that the grant of the judicial orders sought herein by the *ex parte* Applicant was wholly discretionary, and the circumstances herein did not justify the exercise of such discretion in its favour. Further, that the subject decree which the *ex parte* Applicant was seeking to enforce through the instant application had not become final, as they were currently being challenged by Respondent through the review proceedings pending before the Commercial Division of the High Court. Therefore, that the public duty conferred upon the Respondent by section 68 of the Kenya Roads Act had not yet crystallised, because the decree which would otherwise be satisfied by payment pursuant to the section had been challenged through the said review proceedings. Lastly, the Respondent averred that in the alternative, the instant proceedings ought to be stayed to await the conclusion of the review proceedings which are pending before the Commercial Division of the High Court.

The Determination

14. The application was canvassed by way of written submissions. The *ex-parte* Applicant filed its written submissions dated 22nd May, 2020 and supplementary submissions dated 10th June, 2020, while the Respondent filed its written submissions on 8th June, 2020. A synopsis of the submissions made by the parties is as follows.

15. The *ex-parte* Applicant submitted that the crux of this matter was the proper construction of section 6 of the Arbitration Rules, 1997 and section 68 of the Kenya Roads Act, especially on the issue whether the Respondent could challenge or refuse to settle an arbitral award at this stage, whereas the High Court had recognized the award and issued a decree. Further, that the Respondent had not applied to set aside the arbitral award nor appeal against it. Further, whether the Respondent is in breach of the provisions of Section 68 of the Kenya Roads Act.

16. The Respondent on the other hand submitted that this application ought to be dismissed, or at the very least stayed, pending the hearing and determination of **Civil Appeal No. 246 of 2019 - Talewa Road Contractors Ltd vs Kenya National Highways Authority** filed by the *ex parte* Applicant in the Court of Appeal, and of the Respondent's Notice of Motion application to set aside the ruling of 15th November 2019 and the consequential orders of 9th December 2019 in **HC Comm Misc. Application No. 535 Of 2018 - Talewa Road Contractors Ltd Vs. Kenya National Highways Authority** which application is pending ruling. Counsel submitted that the issue arising for determination in this application is whether the orders of mandamus could be granted in view of the *ex parte* Applicant's pending appeal, and the Respondent's pending review application which are challenging and seeking to set aside the arbitral award.

17. It is necessary at this stage to delineate and clarify the role of this Court as a judicial review court, as regards the dispute between the *ex parte* Applicant and Respondent, before further consideration of their arguments. The parameters of judicial review were explained in detail in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

18. In addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveal an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

19. This Court as a judicial review court cannot therefore interrogate any issues raised as to the merits of the arbitral award. In addition, this Court has limited jurisdiction to address or redress any issues arising from the proceedings on the recognition and enforcement of the said arbitral award, which are specifically regulated by the Arbitration Act. It is notable in this respect that the Arbitration Act specifically provides in section 10 thereof that no court shall intervene in matters governed by the Act, except as provided therein.

20. Recourse to the Courts for the setting aside of arbitral awards and their recognition and enforcement is in this respect provided for in sections 35, 36 and 37 of the said Act. Section 35 provides that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3) which provide *inter alia* for the grounds for the setting aside and the time limits within which to bring such an application. Section 36 on the other hand provides that a domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced upon the original arbitral award or a duly certified copy thereof being furnished to the Court. Section 37 provides for the grounds for refusal of recognition or enforcement. From the pleadings filed by the parties, it is evident that the recognition and enforcement proceedings have been on going in the Commercial Division of the High Court in Nairobi, which is the trial Court.

21. This Court as a judicial review Court, therefore has no jurisdiction to consider any issue raised or arguments made by the parties herein as regards the challenges to the subject arbitral award and recognition thereof, save to note the existence of any such challenge. Any such issues and arguments must be resolved in accordance with the procedures set out in the Arbitration Act, and in the forum specified by the Act, namely the appropriate trial Court in the High Court, or where applicable on appeal in the Court of Appeal.

22. The limited intervention of this Court as a judicial review court in the circumstances of this application can only be with respect to the execution of the subject arbitral award once judgment is entered thereon, as a continuum of the enforcement of the award. It is notable that judgments on arbitral awards may be executed in the same manner as any other judgment of the courts. The *ex parte* Applicant in the instant application is in this regard seeking orders of mandamus to effect payment of the decretal sum in the arbitral award.

23. The main issue in the present application therefore is whether the Respondent is under a duty to pay the decretal amount in an arbitral award which is subject to a pending appeal and review. If the Court finds the existence of such a duty, it will then proceed to consider the issue of whether the Respondent has breached the duty, and whether the *ex parte* Applicant is entitled to the remedies sought.

Whether the Respondent is under a duty to pay the decretal amount in an arbitral award that is subject to appeal and review

24. The *ex parte* Applicant's arguments on this issue were that the Respondent had not filed any affidavit before the Court to explain why he had not paid the decree issued in *Misc. Application No. 535 of 2018*, in line with his statutory obligation as set out in Section 68 (a) of the Kenya Roads Act. Further, that the said decree had not been stayed or varied due to the statutory protection of the Respondent from execution as set out in Section 68 of the Kenya Roads Act, and that that the said decree could only be stayed in the Court or matter which issued it, being *Misc. Application No. 535 of 2018*, or by the Court of Appeal.

25. It was also submitted that the Respondent is in breach of the provisions of section 68 of the Kenya Roads Act, for reasons that the arbitral award directed it to pay the sums awarded within a period of 45 days but to-date, over 2 years later, there had been no compliance. It was contended that the Respondent had taken advantage of the fact that the Arbitrator did not award the *ex parte* Applicant interest to delay settling the sums awarded, while prejudicing the *ex parte* Applicant, hence its actions were in bad faith and an abuse of the Court process. It was further submitted that in as much as the provisions of section 68(a) of the Kenya Roads Act shielded the Respondent from execution or execution process, it placed an obligation on the Respondent in his personal capacity in that:

- a) It makes it mandatory for the Respondent to settle the decree or orders issued unless there is something contrary to the law;
- b) It directs the Respondent make payment without delay, and
- c) It directs the Respondent to make payment from the revenue of the Respondent's Authority.

26. The *ex parte* Applicant further contended that judicial review is the procedure used by courts to supervise the exercise of public power, and not to review the merits of the dispute. Reliance was placed on the decisions in the cases of **Republic vs Judicial Service Commission, Judicial Review Misc. Civil Application No. 1025 of 2003**, and **Republic vs Public Procurement Administrative Review Board & Others; Ex Parte, Saracen Media Limited, Judicial Review Misc. Cause No. 90 of 2018**, for this position. According to the *ex parte* Applicant, the issues raised by the Respondent relating to High Court Misc. Application No. 535 of 2018, and the appeal in the Court of Appeal are on the merits of the dispute, which ought to have been argued in Misc. Application No. 535 of 2018 and that such issues or arguments are not within the jurisdiction of the judicial review court. The *ex parte* Applicant urged the Court to instead consider whether the Respondent's decision in refusing to pay the sum awarded in the arbitral award was arbitrarily, capricious and unfair, as it has not appealed or applied to set aside the award.

27. Furthermore, that under the circumstances of the present case, the primary considerations were whether firstly, there was an arbitral award which directed the Respondent to pay the *ex parte* Applicant, and secondly, whether there was an order for recognition and enforcement of the arbitral award by the High Court. The *ex parte* Applicant submitted that the answer to these two considerations was in the affirmative. The last consideration posited by the *ex parte* Applicant was whether there was an order staying execution of the decree issued in High Court Misc. Application No. 535 of 2018, whose answer was in the negative.

28. The *ex parte* Applicant's take on the Respondent's submissions on the application of the provision of section 9(2) of the Fair Administrative Action Act was that the said provision could not be read in isolation without considering the provisions of Section 4(1) and (2) of the said Act, and the provisions of Section 10 and 32(A) of the Arbitration Act. In addition, that the principle of finality in arbitral proceedings was now well established in our jurisdiction, and there could be no recourse on arbitral matters other than what was provided by the Arbitration Act. Lastly, that litigation must come to an end, and that this was one matter where this Court should bring closure to the application for review filed by the Respondent in Misc. Cause No. 535 of 2018, as it was not provided within the Arbitration Act.

29. In conclusion, the *ex parte* Applicant urged that the Respondent had a statutory mandate to settle the arbitral award without delay as provided by section 68 of the Kenya Roads Act, and that the refusal to settle the award was unfair, a breach of the law and an abuse of the Court process. Further, that this is a proper case for the Court to invoke the provisions of Articles 201 and 226(5) of the Constitution, and direct the Respondent to personally pay the costs for the proceedings herein as the said costs had been incurred due to his personal acts and abuse of office by failing to undertake his statutory mandate as required pursuant to Section 68 of the Kenya Roads Act. It was further submitted that this is a proper case for the Court to order payment of interest on the sums awarded from 22nd June, 2018 when the 45 days' period for payment of the awarded lapsed.

30. The Respondent on its part submitted that if this Court proceeds with the determination of the instant application, there will be a risk and danger of conflict between the orders of this Court, and the orders that will be made on the Respondent's review application that is pending in **HC Misc. Application No. 535 of 2018 - Talewa Road Contractors Ltd -Vs- Kenya National Highways Authority**, and in the *ex parte* Applicant's appeal that is pending in the Court of Appeal. Further, that the outcome of the pending cases have a direct bearing on the

instant application, as they may nullify the arbitral award and the arbitration may be started afresh. Therefore, that the Court should refuse to grant the orders sought herein and should instead await the outcome of the pending litigations first.

31. It was further averred that it could not be said that the Respondent had neglected to perform his statutory duty to pay the decretal sum in the arbitral award, when KENHA was actively in court seeking to set aside the recognition and enforcement orders of the said arbitral award. Further, that the Respondent could not be said to have neglected or refused to perform his public duties when the arbitral award for which an order to pay is sought, has been challenged by the *ex parte* Applicant at the Court of Appeal in Civil Appeal No. 246 of 2019. The Respondent cited the judgement in **Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge & Others, [1997] eKLR** for the submission that an order of mandamus compels the performance of a duty imposed by statute, where the person or body on whom the duty is imposed fails or refuses to perform the same.

32. It was also contended that the *ex parte* Applicant's application offended the express provisions of Section 9(2) as read with section 9(4) of the Fair Administrative Action Act which provides that the High Court shall not review an administrative action or decision unless internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Further, that section 9(2) is couched in mandatory terms as was held by the High Court in **Republic vs Kenya Revenue Authority, Commissioner ex parte Keycorp Real Advisory Limited (2019) eKLR**, and that the *ex parte* Applicant had indeed invoked the mechanism of an appeal and with the ultimate aim of setting aside the arbitral award. In addition, that the remedy of appeal invoked by the *ex parte* Applicant was an effective and adequate remedy, and had not been exhausted as the appeal was pending hearing and determination. It was also submitted that the *Ex parte* Applicant could not therefore on the one hand take steps by way of an appeal to set aside the entire arbitral award, and on the other hand seek to compel payment of the very same arbitral award that it was challenging.

33. Hence, the Respondent urged the Court to exercise its discretion in refusing to grant the orders of mandamus sought, as the facts demonstrated that the public duty conferred upon the Respondent by section 68 of the Kenya Roads Act had not fully crystalized yet, and the appeal mechanism had not been exhausted. Reliance was placed on the holdings of the High Court in **Republic vs Independent Electoral and Boundaries Commission ex parte Mohamed Ibrahim Abdi & 4 Others [2017] eKLR**, that an order of mandamus is a discretionary remedy and ought not to be granted unless in cases where there is a clear legal right on the part of the applicant, and when it will work no inequity to the party against whom it is sought. It was submitted that there will be practical problems, including administrative chaos and public inconvenience, and the possibility of loss of public money, that will be occasioned by granting of the orders sought in the instant application.

34. The nature of the remedy of mandamus was discussed in detail by the Court of Appeal in **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, (1997) e KLR** as follows:

“...What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....”

35. Section 68 of the Kenya Roads Act in this respect provides for execution proceedings against KeNHA, and the Respondent's duty to pay decretal amounts awarded in judgments on the following terms:

“Notwithstanding anything to the contrary in any law—

(a) where any judgment or order has been obtained against an Authority, no execution or attachment, or process in the nature thereof, shall be issued against such Authority or against its property, but the Director General shall, without delay, cause to be paid out of the revenue of the Authority such amounts as may, by the judgment or order, be awarded against the Authority;

(b) no property of an Authority shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Director-General.”

36. It is evident that section 68 imposes a statutory duty upon the Respondent to pay amounts awarded in a judgment or order made against KeNHA without delay. The facts of the existence of the arbitral award that is the subject of this application, and that judgment was entered

thereon, are not in dispute in the present application. Therefore, in ordinary circumstances the performance of the Respondent's duty in section 68 as regards the payment of the decretal sums awarded in the judgment would be purely ministerial, as he has no discretion on the amounts awarded.

37. The requirements of section 68 of the Kenya Roads Act with regards to the performance of the Respondent's duty were also explained by Onguto J. in the case of **Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 Others** [2015] eKLR. as follows:

“Section 68 of the Kenya Roads Act which seeks to prohibit any execution proceedings against the 1st Respondent. It is a rare statutory provision. Ordinarily it is never and should never be the intention of any legislation to place parties in a position where the courts judgment is never realized. Courts, as they say, do not and should not act in vain. Consequently, in reviewing or interpreting such statutory provisions, the construction must be liberal and lean towards the Constitutional principle that every person including judicial persons are equal before the eyes of the law and must be subjected to the rule of law.

It is clear to me that Section 68 never intended to have a situation where the Authority , in this case the 1st Respondent runs away from any legal liability. The section did not state so either. Instead the section expressly made provision for the Director-General to ensure that ‘without delay’ judgments or orders awarded against the authority are settled. The Director General has a statutory compulsion to ensure that payment is made without undue delay.

The mischief intended to be arrested by the section, in my view, was the embarrassment and prejudice which so often accompanies the ordinary process of attachment and execution. It is noteworthy that subsection (b) of the said section expressly states that any execution or attachment can only be proceeded on with once the director-general of the Authority grants written permission. If therefore there is any delay in honouring a court judgment or order, it is for the Director General to explain to the court and to the judgment –creditor the cause or reason for the delay. It is however clear from a reading of Section 68 of the Kenya Roads Act that the court judgment or order must ultimately be honoured, either involuntarily or voluntarily. I hasten to add that the director general can also not arbitrarily refuse to grant permission for the execution to proceed. Where he does so, the court can intervene.

Payment towards satisfaction of any decretal amount is to be made out of the revenue of the Authority. It would however be sacrilege to hold that the payment is to be made only when the Director General deems it fit. The statute itself dictates that it be made without delay. Where therefore there is delay in payment, the judgment creditor has the right to invoke the due process of law to enable him enjoy the fruits of his judgment.”

38. However, the circumstances in the present application are not ordinary. It is not disputed in this respect that there are ongoing proceedings both in the Court of Appeal and High Court, on the setting aside, and recognition and enforcement of the arbitral award. In these circumstances, the Court cannot compel the satisfaction of a duty that is not certain or due. The House of Lords in the case of **Julius vs Lord Bishop of Oxford** (188) 5 App.Cas 214 laid out the test for determining the existence of a duty that is due as follows:

“Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised.

39. In the present case, a number of undisputed factors demonstrate that the conditions necessary for the due performance of the Respondent's duty have not been met. Firstly, there is a dispute as to the sums payable in the arbitral award and judgment thereon as a result of the pending cases, and there is therefore no specificity and finality as to the decretal sums due, for the duty in section 68 of the Kenya Roads Act to be enforceable by mandamus. Secondly, the grant of the order of mandamus is discretionary, and it is notable in this respect that the *ex parte* Applicant has contributed to the delay in settlement of the arbitral award by its own applications and appeal against the subject arbitral award, and had initially failed to disclose that there is a pending application seeking to stay and set aside the recognition and judgment on the award. The *ex parte* Applicant is in the circumstances not deserving of the exercise of this Court's discretion in his favour.

40. In light of the foregoing findings, this Court finds that the Respondent's duty under section 68 of the Kenya Roads Act has not crystallised, and the secondary issues as to whether the Respondent has breached the provisions of section 68 of the Kenya Roads Act and whether the relief sought is merited therefore become moot.

Disposition

41. In the premises, I decline to grant the orders sought herein at this stage, and am of the view that it would be prudent to await the determination of the *ex parte* Applicant's pending appeal in the Court of Appeal, and of the Respondent's application seeking to set aside the judgement on the arbitral award that is the subject of this application. Accordingly, the *ex parte* Applicant's Notice of Motion dated 19th February 2020 fails, and is hereby struck out. The *ex parte* Applicant is however at liberty to seek the same prayers if the Respondent's application for setting aside the said judgement fails, and depending on the outcome of its appeal.

42. Each party shall bear its costs of the Notice of Motion dated 19th February 2020.

43. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF AUGUST 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE