REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 55 OF 2017

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: SECTION 21(3) OF THE GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLE 48 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 47(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF ENFORCEMENT OF DECREE PASSED BY HIGH COURT ON 2ND DECEMBER, 2011 IN THE HIGH COURT OF KENYA AT NAIROBI(COMMERCIAL & TAX DIVISION) CIVIL CASE NO.159 OF 2006 EQUIP AGENCIES LIMITED VS. HON. ATTORNEY GENERAL

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH.....1S RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

EQUIP AGENCIES LIMITED.....EXPARTE APPLICANT

JUDGMENT

1. This determination settles the exparte applicant's Notice of Motion dated 22nd March 2017 pursuant to leave of court granted on 20th March 2017 by Honourable Odunga J.

2. In the Exparte applicant's Notice of Motion filed by **Equip Agencies Ltd**, the Exparte applicant seeks for Judicial Review orders of Mandamus compelling the 1st respondent who is the Principal Secretary, Ministry of Health to pay the exparte applicant:

a) The sum of kshs 1,862, 302, 792 being the decretal amount owed to it as a result of the judgment issued on 2nd December, 2011 in HCC 159 of 2006 Equip Agencies Ltd v The Honourable Attorney General.

b) Interest in the kshs 1,862,302,792 above compounded at 18% per annum from 1st March 1999 until payment in full; and

c) The taxed costs of the suit in the sum of kshs 446,073,972.70;

d) Costs of the application to be borne by the respondents.

3. The Notice of Motion is supported by the Statutory Statement and Verifying Affidavit of **Diryesh Indubhai Patel**, filed accompanying the application for leave.

4. The application was opposed by the respondents who filed replying affidavit sworn by **Julius Korir** on 18th April 2017 and a supplementary affidavit sworn by the same **Julius Korir** on 9th October 2017.

5. The exparte applicant's case is that on 22nd July 1999, the exparte applicant instituted a civil suit vide **High Court at Nairobi Commercial and Tax Division in HCC 1459 of 1999** later renumbered **HCC 159/2006 Equip Agencies Ltd vs The Honourable Attorney General,** ***claiming for kshs 1,862,302,792 from the Ministry of Health for supply of various anti-malaria medical equipment and anti malarial drugs throughout the country, which sums due had remained unpaid despite demands for payment made.***

6. That on 19th July 2000 the applicant filed an application for striking out of the defence filed by the Attorney General who was sued on behalf of the Ministry of Health, on grounds that the defence as filed was frivolous and vexatious.

7. That on 15th December 2000, the Court granted the application by the applicant, effectively striking out the defence filed by the Attorney General on behalf of the Ministry of Health.

8. However, it is averred that the Attorney General appealed against the said ruling to the **Court of Appeal vide Nairobi Civil Appeal No.189 of 2002 Attorney General vs Equip Agencies Ltd** and that on 10th February 2006 the Court of Appeal granted the Honourable Attorney General an unconditional leave to defend the suit in the High Court.

9. It is pleaded that the case then proceeded to hearing interpartes with the applicant/plaintiff calling two witnesses whereas the Attorney General defendant closed their defence without calling any witness.

10. On 2nd December 2011 the court, Honourable Justice Muga Apondi (as he then was) [(read and delivered on his behalf by Honourable Daniel Musinga J (as he then was)] rendered a judgment in favour of the plaintiff/ exparte applicant herein against the respondent for a sum of kshs 1,862,302,792 together with interest at 18% per annum from 1st March 1999 until payment in full and ordered the defendant to bear the costs of the suit. The said judgment was delivered in the presence of both parties' advocates as shown by annexture DIP'4.'

11. The exparte applicant claims that after the judgment was delivered, the defendant Attorney General filed a Notice of Appeal on 15th December 2011 but that todate no steps have been taken to file a record of appeal within the required timelines stipulated in Rule 83 of the Court of Appeal Rules, 2010.

12. According to the exparte applicant, later, vide a ruling dated 30th October 2012, the High Court amended the judgment dated 2nd December 2011 to the effect that the sum of kshs **1,862,302,792 was to attract interest at 18% per annum from 1st March 1999** until payment in full, and that on 26th June 2013, a decree was drawn and extracted with the approval of the Attorney General. Later on 7th November 2014, the exparte applicant drew and filed a party and party bill of costs which were taxed by the Deputy Registrar at kshs **446,073,972.70** as shown by copy of annexed ruling on Taxation delivered on 16th November 2016. However, it is claimed that the Attorney General never filed any reference to challenge the taxation ruling thereof.

13. It is also claimed that on 6th December 2016, a Certificate of Order Against the Government was drawn for a total sum of **Kshs 34,736,558,592** ***inclusive of decretal sum, interest and costs as taxed which certificate of order was served upon the Government as required under Section 21(2) of the Government Proceedings Act (Cap 40 Laws of Kenya).***

14. It is alleged that despite the demand for settlement of decree, the Accounting Officer of the Ministry of Health has to date refused, neglected and or failed to settle the decree as per the Certificate of Order Against the Government which refusal and or failure to pay is unconstitutional and violates the applicant's right to access justice as enshrined in Article 48 of the Constitution.

15. The exparte applicant avers that it is now over 5 years since judgment was delivered in favour of the applicant but the respondent has refused to settle decree despite being supplied with the goods namely, **Anti-malarial equipment and drugs for supply all over the country way back in 1995 and before the contract for supply was cancelled on 23rd August 1996.**

16. It is asserted that the claim was only for the goods supplied to the Government. The exparte applicant therefore claims that since Section 21(4) of the Government Proceedings Act prohibits execution and attachment of government money and properties, the 1st respondent is hiding behind the said provisions of the law to unreasonably fail to pay to the applicant herein the decretal sum, despite several demands made in writing.

17. It is alleged that the failure to pay the decretal sum is a serious dereliction of duty on the part of the respondents as the decretal sum continues to escalate due to interest rates which is an imprudent management of public finances contrary to Article 201 of the Constitution of Kenya, 2010. It is claimed that despite the applicant's willingness to negotiate for a settlement in reasonable installments to ensure that the decretal sum is fully paid without overstretching the public finances, the Accounting Officer has been unwilling to discuss any options.

18. On the part of the Respondents, in their replying and supplementary affidavits sworn by Mr Julius Korir, it is claimed that the judgment of the High Court is contested by the respondents and that it is subject of an **impending appeal** by the respondent; in accordance with the leave to appeal granted by Muga Apondi J (as he then was) and as shown by the notice of appeal dated 15th December 2011.

19. According to Mr **Julius Korir**, the typed proceedings in **Nairobi HCC 159/2006** have yet to be availed todate for the purposes of preparing and filing of a record of appeal.

20. Further, that despite several written requests to the Deputy Registrar of the Court seeking to be furnished with the typed proceeding, there has been no feedback on the same and that time for filing of the appeal does not run until the typed proceedings have been availed hence the respondents are still within the prescribed time for filing the record of appeal hence the notice of appeal dated 15th December 2011 remains valid.

21. It is also claimed that the decision of the Taxing Master in the taxation ruling of 16th November 2016 is challenged vide a Reference filed and dated 27th February 2017 and which is pending before the High Court.

22. The respondents contend that the progress of the appeal has been undermined by the loss or otherwise the disappearance of the court file in Nairobi HCC 159/2006 or the disappearance of the record of proceedings from the said court file HCC 159/2006.

23.It is further contended that equally, the office file at the office of the Attorney General with respect to HCC 159/2006 also vanished and that as a result, the office had to reconstruct a new file from the court file records whereupon on several occasions the court file was perused but found not to have any record of proceedings and judgment made by Honourable Justice Muga Apondi in the said matter.

24. It is further claimed that the matter of the missing file has been referred to the Judiciary Ombudsman for his intervention hence the application herein for mandamus is premature and should be struck out.

25. In the supplementary affidavit filed on 10th October 2017, sworn by Mr Julius Korir, the respondents claim that the decree and Certificate of Order Against the Government which is sought to be enforced is substantively defective and that the disappearance of the court's record of proceedings has been referred to the Judiciary Ombudsman hence the Decree and Costs as certified by the court cannot be enforced by this court.

26. The parties' advocates argued the application orally before me on 11th October 2017 with Mr Githumbi counsel holding brief for Mr Waweru Gatonye for the applicant whereas the respondents were represented by Miss Nthiga holding brief for Mr Waigi Kamau.

27. According to Mr Githumbi, the Accounting Officer is under a duty to settle decree once a Certificate of Order Against the Government has been served upon them and if they fail to pay that would be in violation of Section 21(3) of the Government Proceedings Act.

28. It was submitted that failure to pay or to propose on how to settle the decretal sum is unreasonable. Reliance was placed on **Republic vs Attorney General & James Alfred Koroso [2013] e KLR** where the Court held that failure to settle decree is a violation of one's right to access justice. Further reliance was placed on **Sec M. Co Ltd CS County Government of Narok [2017] e KLR** where it was held that once a Certificate of Order Against the Government is issued, and a demand for payment made, mandamus must issue.

29. It was further submitted that albeit a Notice of Appeal was filed and served, no action or steps have been taken to have the appeal heard since 2011. It was further submitted that the application for proceedings was only made in 2013 after an application for leave herein to institute these Judicial Review proceedings was filed and served upon the Honourable Attorney General and so was the application for enlargement of time to file a reference challenging the taxation which took place in November, 2016. It was submitted that a notice of appeal was not a stay hence the motion should be allowed.

30. In response to the application for Mandamus, Miss Nthiga for the respondents submitted that she wholly relied on the replying and supplementary affidavits sworn by Mr Julius Korir referred to above urging the court to dismiss the motion with costs. It was submitted that the court file in the HCC 159/2006 does not contain a record of proceedings and judgment hence they did not understand how the taxing officer arrived at the Taxation of costs figures and or in issuing a certificate of Order Against the Government.

31. Counsel further maintained that there is a pending appeal against the judgment filed by the Honourable Attorney General on 15th December 2011 yet there are no proceedings to enable the Honourable Attorney General file an appeal albeit efforts were ongoing to get the proceedings.

32. In a brief rejoinder, Mr Githumbi submitted that the respondents were at all times represented in the civil matter and that the applicant even filed an application for clarification of the judgment, taxed the costs, all proceedings taking place interpartes but that the respondent only applied for proceedings on 28th February 2017 over six (6) years from 2011 when the judgment was rendered and a notice of appeal filed hence there can be no *bona fides* in the contentions of the respondents.

33. Further, that the alleged defects in the decree, certificate of costs and Certificate of Order Against the Government have not been

particularized. Further, that the taxation which was done interpartes was vehemently opposed based on the contents of the judgment and proceedings.

DETERMINATION

34. I have carefully considered the foregoing and in my humble view, the main issues for determination in this matter are whether the exparte applicant is entitled to Judicial Review Orders of mandamus; and what orders should this court make; and finally, who should bear the costs of the proceedings. There are also many anciliary questions to be answered.

35. On the first issue of whether the exparte applicant is entitled to the Judicial Review orders of mandamus sought against the 1st respondent Principal Secretary, Ministry of Health, the commencement point is Section 21(4) of the Government Proceedings Act, Cap 40 Laws of Kenya which prohibits execution against the Government.

36. In this case, there is no dispute that there is a valid judgment of the Superior Court in HCC 159/2006 in favour of and between the exparte applicant herein as plaintiff against, and against the Attorney General who was sued as the legal representative of the National Government in all civil proceedings to which the National Government or Government Departments are parties, as stipulated in Article 156 of the Constitution.

37. That judgment which was delivered by Honourable Daniel Mutungi J (as he then was) on 2nd December 2011 on behalf of Honourable Justice Muga Apondi (as he then was), was clear that the applicant herein had sued the Attorney General seeking for special damages (liquidated) sum of **kshs 1,862,302,792 together with interest at 18% per annum compounded from 1st March 1999 until payment in full, representing money owed to the applicant company by the Ministry of Health on account of supply and delivery of anti-malaria equipment and drugs pursuant to two contracts of agreement S/4056 of 15th July 1993 and contract agreement No. S/4420 of 14th July 1995 between the Government and the applicant herein Equip Agencies Limited.**

38. The case proceeded to hearing interparties with the applicant calling two witnesses who testified namely **Mr Divyesh Indubhai Patel and Wilfred Abincha Onono.** This was after the Court of Appeal upheld the appeal by the Attorney General challenging the summary judgment that had initially been entered against the Attorney General following the applicant's successful application before the High Court to strike out the defence filed by the Attorney General on account, inter alia, that the defence was frivolous and vexatious.

39. It is not in dispute that at the interpartes hearing of the suit, the Attorney General offered to close the defence case without calling any witness to counter the plaintiff/applicant's case and hence the judgment of 2nd December 2011 which is annexed to the applicant's verifying affidavit and marked 'DIP 4' is born out of non-contested evidence adduced by the exparte applicant herein.

40. Again, the material placed before the court vide Annexture 'DIP-6' which is a ruling delivered on 16th November 2016 in the same suit wherein the applicant had sought clarification of the judgment of 2nd December 2011 on whether the interest actually awarded to the plaintiff was indeed the compound interest referred to in the judgment and that should there be a clerical mistake, then the court be pleased to correct the same under section 99 of the Civil Procedure Act.

41. The Court- Muga Apondi J (as he then was) clarified the judgment and affirmed the courts judgment of 2nd December 2011 to the effect that the 18% per annum was compounded interest.

42. But before then, the documents annexed to these proceedings show that on 15th December 2017, after delivery of judgment in HCC 159/2006 originally HCC 1459/1999 the 2nd respondent Attorney General filed a Notice of Appeal dated the same day, intending to file an appeal to the Court of Appeal challenging the judgment of 2nd December 2011.

43. In the affidavits in reply to the motion subject of this judgment sworn by the 1st respondent's Principal Secretary Mr Julius Korir, it is deposed that the Notice of Appeal was filed with leave of court enlarging the period.

44. Annexture 'DP8' is the plaintiff's/exparte applicant's bill of costs which was taxed interpartes by Honourable Carolyne Watimmah, Deputy Registrar of the Court, vide her ruling issued on 16th November 2016 in the presence of the plaintiff's counsel Mr Githumbi and Ms Mamet Advocate holding brief for Mr Kihara advocate for the defendant/respondent herein.

45. Annexture DIP6 is a decree given on 30th October, 2012 and issued on 26th June 2013 whereas Annexure DIP 10 is the Certificate of Order Against the Government dated 6th December pursuant to Order 20 Rule 3 of the Civil Procedure Rules.

46. Annexture DIP 11 is a letter by the applicant's counsel to Mr Cleophas Mailu Cabinet Secretary Ministry of Health dated 13th September 2016 seeking for settlement of the decretal sum and this was followed by another letter dated 15th December 2016 addressed to the Honourable Attorney General, and another letter to Honourable Githu Muigai dated 19th January 2017 complaining that the Government had todate not settled the decree in the suit and threatening legal action by way of Judicial Review proceedings as that was the last reminder.

47. In the letter dated 13th September 2016, the applicant's advocate enclosed copy of the ruling dated 30th October 2012 which clarified/corrected the judgment of 2nd December 2011 and in the letters dated 19th January 2017 and 15th December 2016 respectively, the certificate or Order Against the Government was enclosed.

48. The respondents have not denied any of the above factual narrations. The only defence put forward to these proceedings is that the motion for Mandamus is not merited because there is a notice of appeal pending and that the respondent's efforts to get copies of proceedings from the HCC 159/2006 have proved futile as those proceedings on perusal of the court file, were found to be missing. Secondly, that until the court proceedings are availed to the respondents, the notice of appeal as filed on 15th December 2011 is still valid. Further, that the respondents' own office file also vanished.

49. There is, however, no order of stay of execution of the judgment of the Superior Court, pending the filing, hearing and determination of the intended appeal. In addition, there is no application filed seeking for such stay either from the Superior Court where judgment was delivered or from the Court of Appeal, explaining the circumstances under which the record of appeal has not been filed from 15th December 2011 to date.

50. Further, from the 16th November 2016 when the ruling on taxation of costs was delivered, no reference or notice of objection to taxation of costs was ever filed and it was only on 2nd March 2017 when an application for enlargement of time for filing of the reference was lodged. That application was filed simultaneous with another application dated 27th February 2017 filed on 2nd March 2017 seeking for review and or setting aside of the ruling of taxation of 16th December 2016 on taxation of party and party bill of costs dated 6thOctober 2014.

51. The respondent's own annextures JK2 dated 16th March 2017 show that the first time the respondent was seeking for typed copies of proceedings in the Superior Court was on 28th February 2017, and a reminder dated 16th March 2017. That letter refers to another letter dated 28th March 2017 which was a future date.

52. By 28th February 2017 the exparte applicant herein had already filed these proceedings seeking for leave to apply and on 13th February 2017 this court had directed that the application for leave to be served upon the respondents for interpartes hearing on 20th March 2017. When the matter came up on 20th March 2017, the respondents never appeared despite service of the chamber summons for leave upon them and therefore Honourable Odunga J had no difficulty granting the exparte applicant leave to apply.

53. Again, the applications for review of the ruling for taxation and or for enlargement of time within which to file a reference was filed on 2nd March 2017 after these proceedings were initiated. Similarly, it was on 6thApril 2017 when the respondents after these proceedings were initiated, wrote to the office of Judiciary Ombudsman complaining that they had not received any feedback on their requests for copies of typed proceedings for purposes of appeal. There is nothing in that letter to the Judiciary Ombudsman to show that the 2nd respondent had perused the file and failed to get handwritten proceedings therein, or that the court file had gone missing.

54. Furthermore, the letter written on 6th April 2017 was only received at the office of the Ombudsman on 17th April 2017. There is also annexture JK5 which is a letter to the Deputy Registrar, Milimani Commercial Courts dated 3rd December 2014 seeking to photocopy the entire file (proceedings, pleadings and judgment) in respect of the civil case to enable the 2nd respondent reconstruct its file for records and necessary action. There was no indication as at 3rd December 2014 three years after the judgment on 2nd December 2011, to indicate that the respondents ever intended to obtain typed or certified copies of proceedings and judgment or the record for purposes of preparing a record of appeal, to actualize the intended appeal as per the notice of appeal filed on 15th December 2011.

55. The office of the Attorney General is one of the most important public and state offices in the Republic of Kenya and there is no other office like that office which is endowed with great legal minds with the mandate of protecting the public interest and the Rule of Law.

56. It is not in dispute that what now seems to be the outstanding sums due on the judgment of 2nd December 2011 is a colossal sum of money going into nearly 50 billion Kenya shillings, from a judgment of about 2 billion in 2011 and taxed costs of about 500 million. The extra money is arrived at due to the ever accruing compound interest which was awarded by the court at 18% per annum from 1999 until payment in full.

57. There is no dispute that the drugs and equipment which were supplied in the 1990s by the applicant no doubt benefited the many Kenyans who most needed the anti malarial drugs and equipments. We live in a tropical country and therefore malaria being a tropical decease is rampant such that unless measures are put in place to diagnose and treat, many citizens are likely to suffer even to death, and especially children under the age of 10 years.

58. There is no denial that the good Government of Kenya procured and the exparte applicant supplied the equipment and the anti-malarial drugs as per the judgment of 2nd December 2011. A supply of goods in excess of kshs 1.8 billion in the late 1990s is no mean supply and the money then cannot be equated to the current value of the Kenya Shillings due to inflationary trends.

59. But this court has got one great concern. That of the laxity, complacence or at the very worst, apparent incompetence on the part of the officers at the civil litigation Department office of the Honourable Attorney General who have all along handled this matter, a matter of such great magnitude. This complacency is demonstrated in the documentation that I have just referred to showing that even after the judgment of 2nd December 2011, and a notice of appeal filed, no request for certified copies of proceedings and judgment was ever sought or made to the court to enable the respondents compile and file a record of appeal within 60 days or after, with leave of the Court.

60. The matter was fully heard interpartes with a denial of the claim which was liquidated yet no single witness was called by the office of the Attorney General from the Ministry of Health to counter the oral and documentary evidence adduced by the two witnesses called by the exparte applicant. One therefore wonders, whether the Respondents would wish to call that evidence on appeal to reverse the judgment of 2nd December 2011. Wheras it is possible under the law to apply for additional evidence on appeal, in this case there is no such

suggestion or contemplation. In addition, a letter dated 3rd December 2014 Ref AG/MOH/13/99(TY) to the Deputy Registrar, Milimani Commercial Courts only sought for photocopies of the entire file for reconstruction of the 2nd respondent's own office file for their records and necessary action, (NOT for purposes of preparing a record of Appeal). As at that date, not a single request had been made for certified typed court proceedings!

61. Furthermore, the question that begs many answers is, where did the 2nd respondent's office file go? And between the 2nd respondent's office file and the court record, which of the two was critical for purposes of preparing a record of appeal in the intended Appeal?

62. The respondents now contend that on their perusal of the court file, they were unable to get any proceedings upon which the judgment of 2nd December 2011 and the ruling on taxation by the taxing master were anchored, yet the proceedings were conducted interpartes! Are the respondents now saying that there is no judgment upon which Mandamus can issue or that infact there is no valid decree or Certificate of Order Against the Government?

63. In addition, the court is bothered by the question of whether there is a relationship between the alleged disappearance of the court proceedings and the 2nd respondent's office file at the office of the Attorney General and if so, who is this person or persons responsible for this kind of mischief and with what intention?

64. Furthermore, is the letter to Ombudsman which was written only after these proceedings for Judicial Review were initiated only but a cover up of a scheme to defraud the public through delay so that more interest can accrue, due to non payment? Is there a veiled attempt to defraud the public and share the spoils? Who was responsible, if at all for the disappearance of the office file at the Attorney General's Office and why? Why did the office of the Attorney General not bother with the issue of the intended appeal only to wake up nearly six years later to pretend to be pursuing a nonexistent appeal?

65. All the above questions among others beg for answers and are perturbing to even think of how this matter has been handled so casually by the advocates from the Office of the Attorney General in the sense that even on the hearing date, the advocate who was tasked with the conduct of the matter Miss Nthiga was hard pressed through probing by the court to explain what defects she found existed in the application and why she thought the motion by the respondent was not merited and all she could say was that her instructions were that because there were no proceedings upon which the judgment and taxation of costs were anchored, then the application for mandamus was defective and that because there was pursuit of an appeal, no mandamus could lie. Miss Nthiga could not answer to the simple question whether there was any application for stay pending appeal or an application for order of stay of these proceedings pending the purported appeal or challenge to the Order on Taxation of the Party and Bill of Costs.

66. It is not within the province of this court to delve into the merits or demerits of the intended appeal as not even a single ground of appeal was mentioned to exist.in other words, no draft memorandum of Appeal was annexed to demonstrate the would be arguable appeal. However, it is disturbing to learn that billions of shillings belonging to the public has to go towards settling interest at a compounded rate of 18% per annum from 1999 until payment in full, to only one individual Kenyan corporate entity, without an appeal or stay order, yet the respondents are not even bothered to negotiate with the exparte applicant's counsel who, through the letters shown on record, has been more than willing to negotiate the mode of payment and probably consider, as a sensible citizen of this country, to waive off some interest to enable the government budget for the money and settle or to seek orders stopping the interest from accruing further. From the initial shs 1.8 billion in 1999, it is now over 35 million! Even if this money was fixed in an interest earning or call account, one would never earn interest of 18% per annum for the past 18 years! The public is no doubt being defrauded by design.

67. I have found it necessary to venture into the above territory because the people of Kenya expect public officers and offices to take care of their scarce resources. Article 201 (d) of the Constitution is clear that public money shall be used in a prudent and responsible way. Paying for drugs and medical equipment is a prudent way of expending public funds but delay in doing so, in order to cause irredeemable loss to many poor Kenyans who cannot even afford basic medical care in public hospitals either because the Doctors and other medical personnel are on strike for non-payment of their dues or because there is no medicine and equipment is unacceptable and immoral.

68. Public and state officers have a duty to perform- that duty of settling decrees of the court, upon being served with judgment and Certificate of Order Against the Government. And if they suspect that the Decree or Order is fraudulent, they can confirm from the court record of proceedings and judgment, especially where the case was conducted exparte. Failure to do so attracts the court's discretion to issue the order of mandamus since there is no other remedy available to the exparte applicant (**see Republic vs Attorney General & Another exparte James Alfred Koroso[2013] e KLR.**

69. People who come to court seeking for justice and in whose favour decrees and judgments are made must be allowed to enforce those judgments for that is the only way justice can be seen to be done. Illusionary justice is no justice at all and therefore the provisions of Article 48 of the Constitution on access to justice for all and the principles and values espoused in Articles 10 and 159 of the Constitution on the respect for the rule of law, equity, social justice, human rights, equality, expeditions justice shall be but a mirage if a party who obtains a judgment from a court of competent jurisdiction in proceedings which are conducted openly and transparently can be kept waiting for decades to enforce the decree.

70. There is even no indication that the respondents have the intention of settling the decree in HCC 159/2006 now or in the near or far future.

71. Mandamus here is not being sought to enforce any decree against the respondents individually for they cannot be individually or personally liable to settle the decree. The Government Proceedings Act allows the applicant to seek to compel the government official who is the accounting officer responsible for incurring of the debt subject of the decree to do that which the Government, through Parliament has directed him/her to do.

72. The duty to settle decrees of the court by the accounting officers out of monies or funds provided by Parliament is an imperative duty

not a discretionary duty and in ordering for the mandamus to compel payment, what the court would be doing is to promote substantial justice and the Rule of Law.

73. The exparte applicant has waited long enough. It has no other way of ensuring that the judgment in HCC 159/2006 is enforced and unless this court acts, the applicant will forever baby sit the barren decree and remain oppressed. It can also become bankrupt. It is even surprising that the applicant after supplying drugs and equipment work over 1.8 billion shillings to the government of Kenya, over 20 years ago has remained a going concern.

74. The Government of Kenya should not kill local investments and should not incur heavy debts unnecessarily by delayed payments which accrue interest that eventually overshadow the principal sums due.

75. The fact that a notice of appeal against the judgment and decree of the superior court was filed way back in 2011 is not in itself an appeal. Moreso, as earlier stated, there is no application for stay of enforcement of that judgment and the application for certified copies of proceedings was only made this year after 6 years of the date of judgment, upon these proceedings being instituted.

76. The only inference that this court can make is that the respondents are hiding behind the notice of appeal to evade their obligations under the decree which may occasion a miscarriage of justice since there is no guarantee that the intended appeal, in the alleged absence of court proceedings, will ever be filed, heard and determined, six years down the line since judgment was rendered infavour of the exparte applicant on 2nd December 2011. The conduct of the officers of the 2nd respondent, in my view, is not that of a person who is desirous of expediting the appeal process.

77. It follows that whereas the amount due as at now is quite colossal, and subject to calculation by the Court Deputy Registrar before a decree for Mandamus can be extracted, it is not for this court to deny the successful litigant the fruits of a lawful judgment obtained from a court of competent jurisdiction, and where the applicant has no other alternative remedy.

78. The exparte applicant has complied with all the procedures leading to grant of an order of mandamus, after making several demands and notices to institute these proceedings after the issue and service of the judgment and Certificate of Order Against the Government upon the respondents and there is no denial by the respondents of the above position.

79. As was correctly pointed out by Honourable Odunga J in **Sec & M Company Ltd vs County Secretary, county Government of Narok & Another [2017] e KLR**:

> ***"50…….to subject the party to the normal civil law procedures would engender a miscarriage of justice, yet Article 159(2) (b) of the Constitution mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the government to settle a decree would be to turn the legal process into a theatre of the absurd. The procedure subsequent to the issuance of the decree and order in my view is meant to facilitate the settlement of the amount due from the Government without ambush. Otherwise the liability of the government accrues once the decision made against the government. It is only that such liability cannot be enforced unless and until certain legal steps are taken in that direction. In other words there is no bar to the government settling a decree as soon as the judgment is delivered for the same. Infact, it is my view that the Government ought to do so in order to save the tax payer further burden in form of interest.***
>
> ***In my view, the immunity extended to the government against the turbulence of execution is meant to be used in good faith and is not meant to insulate or shield the Government from meeting its legal obligations owed to the citizens or third parties.***
>
> ***With respect to the pending appellate process, it is clear that mere challenge to a judgment does not bar the court from issuing orders of mandamus though the court may well be entitled to take the same into account in the exercise of its undoubted discretion.***
>
> ***In my view, the only way in which the respondent can avoid payment where there is a valid judgment of a court of competent jurisdiction, save where the conditions precedent have not been satisfied, is to show that the judgment has been set aside an appeal or on review or that an order of stay has been issued suspending the execution of the said judgment.***
>
> ***Order 42 Rule 6(1) of the Civil Procedure Rules is clear that even pendency of an appeal does not ipso facto operate as a stay of the decree or order appealed against.***

80. In this case, Section 21(1), and (2) of the Government Proceedings Act Cap 40 Laws of Kenya is clear that payment will be based on a Certificate of Order Against the Government obtained by the successful litigant from the court issuing decree which should be served on the Attorney General after 21 days of entry of judgment.

81. Upon such Certificate of Order Against the Government being served on the Attorney General, Section 21(3) of the Government proceedings Act imposes a duty on the Accounting Officer concerned to settle the sums specified in the said order(s), to the person entitled or to his advocate together with any interest lawfully accruing thereon. The above provision does not condition payment to any budgetary allocations and a Parliamentary approval of the government expenditure in the financial year subsequent to which government liability accrues. (**see Githua J in Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] e KLR.**

82. In this case, there is no dispute that the Certificate of Order Against the Government was issued and served upon the Attorney General

and this was long after the entry of judgment, nearly six years later, after the costs were taxed.

83. For all the foregoing reasons, and consideration, I am satisfied that the exparte applicant's notice of motion dated 13th February 2017 is merited.

84. In the end, the order that commends itself in this matter is:

a) That an order of ***Mandamus*** be and is hereby issued compelling the 1st respondent Principal Secretary, Ministry of Health to pay to the exparte applicant Equip Agencies Ltd:

i. the sum of kshs 1,862,302,792 being the decretal sum owed to the applicant as decreed on 2nd December 2011 in HCC 159 of 2006 Equip Agencies Ltd vs The Honourable Attorney General.

ii. Interest on the kshs 1,862,302,792 above compounded at 18% per annum from 1st March 1999 until payment in full.

iii. The taxed costs of the suit in the sum of kshs 446, 073, 972, 70.

85. In order to avoid escalation of the costs which are payable by the already overburdened Kenyan tax payers in these hard economic times, I shall not punish the tax payers for the lethargic conduct of the respondents. I order that each party shall bear their own costs of these Judicial Review proceedings.

86. I further direct the Deputy Registrar of this Court to effect service of this judgment upon the Solicitor General of the Republic of Kenya to take necessary action.

Dated, signed and delivered in open court at Nairobi this 18th day of December, 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Munene Counsel h/b for Mr Kihara for the Respondents

Miss Muema h/b for Mr Githumbi for the exparte applicant

Court Assistant: George