



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO. 193 OF 2015**

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

**IN THE MATTER OF HIGH COURT KENYA CIVIL SUIT NO. 690 OF 2012 (COMMERCIAL  
AND ADMIRALTY DIVISION)**

**AND**

**IN THE MATTER OF THE CONSTRUCTION OF MUTHURWA HAWKERS MARKET AND  
PUBLIC TRANSPORT TERMINUS**

**AND**

**IN THE MATTER OF THE CONSENT JUDGMENT DATED 26<sup>TH</sup> MARCH 2014**

**REPUBLIC.....APPLICANT**

**EX-PARTE ONGATA WORKS LIMITED**

**VERSUS**

**ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS, HOUSING &**

**URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 30<sup>th</sup> June, 2015 the *ex parte* applicant herein, **Ongata Works Limited**, seeks the following reliefs:

1. **That an order of Mandamus do issue directed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents ordering the 2<sup>nd</sup> Respondent to pay to the Ex parte Applicant (MS Ongata Works Limited) the sum of Kenya Shillings: Four Hundred Ninety Seven Million Seven Hundred and Thirty Five Thousand Four Hundred and Seventy One Cents Seventeen (Kshs 497,735,471.17) due and owing as at 31<sup>st</sup> May 2015 on account of judgment entered by consent against the respondent**

**on the 26<sup>th</sup> March 2014 in HCCC No. 690/2012 together with the taxed costs with interest and further interest now accruing on the judgment debt.**

- 2. Any other order the honourable court may deem fit and just to grant.**
- 3. Costs of this application be provided for.**

### **Applicant's Case**

2. According to the Applicant, by a contract dated the 9<sup>th</sup> day of March 2007 between the Ex parte and the then Ministry of Local Government, the Ministry of Local Government contracted the applicant to construct the Muthurwa Hawkers Market and Public Transport Terminus and all associated external works in Nairobi which works the ex parte applicant carried out and completed on the 25<sup>th</sup> day of March 2008. The said works, according to the applicant were handed over to the then Ministry of Local Government on the same date and the facility was immediately opened for public use in accordance with Clause 31 of the contract.

3. According to the applicant, it complied with the contract provisions and applied for the issuance of final accounts after making the usual contractual calculations, measurements and compiling the final claims which was finally agreed on by all the parties on 31<sup>st</sup> October 2011 and a final payment certificate for the amount payable was issued.

4. However, the 2<sup>nd</sup> Respondent under whose ministry the department was transferred failed, refused and neglected to observe the provisions of the contract and the plaintiffs claim remained unpaid several years after the contract came to a closure necessitating the filing of the HCCC No. 690 of 2012 in which the 1<sup>st</sup> respondent entered appearance on behalf of the Government of the Republic of Kenya on the 16<sup>th</sup> November 2012 but no defence was filed. Consequently, an application for leave to enter judgment was made on the 21<sup>st</sup> November 2013 and the parties reached consent which was adopted as an order of the Court by the Deputy Registrar on the 26<sup>th</sup> March 2014.

5. The applicant averred that pursuant thereto, the ex parte Applicant extracted the decree and served it on the 1<sup>st</sup> Respondent with a request for settlement. Despite repeated promises to pay the decretal sum, the respondents failed to honour their part and appropriate notice was issued on the 14<sup>th</sup> October 2014. It was disclosed that the 1<sup>st</sup> Respondent wrote demanding a host of other documents some of which were not relevant to the making of the due payment on 27<sup>th</sup> October 2014 which was clearly a delay tactic on their part. As the costs could not be agreed, the same were taxed and a certificate of taxation issued. Further, the certificate of order for costs against the government was also issued.

6. According to the applicant the 2<sup>nd</sup> respondent owes it the sum of Kshs 497,735.471.17 as at 31<sup>st</sup> May 2015 which amount continue to attract interest at the contract rate. The applicant reiterated that there had been no payment despite its persistent attempt culminating in its letter dated 23<sup>rd</sup> January 2015.

7. In its view, the ex parte Applicant has suffered loss and continues to service loans advanced by financiers to carry out the works and the same pose a serious financial loss to the ex parte Applicant as the financiers have continued to demand payment. It was therefore averred unless compelled by this honourable court, the respondents are unlikely to pay the sum duly certified as due and owing to the ex parte Applicant.

8. It was the applicant's case that the claim sum is not in dispute as the same was duly certified by the Respondent and further a judgment was entered by consent of the parties based on the certified sum and the interest accrued based on the contract. It therefore asserted that the interest element is not illusory as alleged as the same is contractual. To it, the interest due is lawfully claimed and the Respondents' action to force the applicant to rebate any amount thereof is without basis, unconstitutional null and void. It was therefore of the view that the calling of a meeting for negotiations was inconsequential since the respondent was not disputing the correctness in the computation but was only interested in rebate.

9. The applicant therefore urged the Court to grant the prayers sought herein.

### **Respondents' Case**

10. According to the Respondents, they have never withheld or otherwise wilfully denied the Ex parte Applicant the benefit of the decretal amounts. In their view, the principal claim of Kshs 234,736,214.69 payable under the Consent judgment of 11<sup>th</sup> March 2014 was paid on 26<sup>th</sup> June 2015 being the amount of the claim duly ascertained thus far. However, due to the fact that the interest element rendered the final decretal amount illusory given the differences on the amounts indicated on the decree and on the certificate of order against Government the matter was best suited to be resolved between the parties.

11. According to the Respondents, following payment of the principal amount, they have been willing and ready to settle the entire decretal amount and only sought to negotiate on the amount of interest accrued with a view to an agreeable settlement. On this account the respondent instructed counsel on record to engage the ex parte Applicant in a bid to negotiate and determine the interest amounts accrued and payable and thereby amicably dispose-off the matter. However, that interparty engagement failed to take off for lack of participation by the ex parte Applicant. Notwithstanding the failed negotiations towards an agreeable amount for settlement, the amount outstanding is yet to be established and remains unknown there being different amounts computed by either party as being outstanding. It was therefore their position that the issue for determination in this matter is the amount of interest payable hence the matter in issue does not merit an action for mandamus by the Ex parte Applicant in view of the fact that whereas the order for mandamus operates to compel the performance of a public duty in this case the Respondent is ready and willing to perform its duty under statute.

12. It was further contended that it is the ex parte Applicant through its conduct specifically by failing to give negotiations a chance missed an opportunity to resolve the issue of the amount payable between the parties. In their view, the circumstances of this action do not warrant any enforcement action in an order for mandamus but rather an interrogation of the substantive matter of computation of interest for purposes of settling the decree.

### **Determination**

13. I have considered the application, the verifying affidavit as well as the submissions file on behalf of the parties.

14. It is not in doubt that section 21(4) of the **Government Proceedings Act** prohibits execution against the Government. The said provision states:

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

15. However section 21 (1) of the Act provides:

***“Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:***

***Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.”***

16. Section 21 (3) of the said Act on the other hand provides:

***“If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:***

***Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.”***

17. The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department.

18. In **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996**, the Court of Appeal cited, with approval, *Halsbury’s Law of England*, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89 thus:

***"The order of mandamus is of 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."***

19. In the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J.** said -

***"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. "***

20. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, it was held:

***“The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the mandamus order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to***

pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution”.

21. This procedure was dealt with extensively in Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543 where Goudie, J eloquently, in my view, expressed himself, *inter alia*, as follows:

“*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will

grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go... In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament...In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

22. I have reproduced the aforesaid decisions in order to show the circumstances under which the Court exercises its supervisory or judicial review jurisdiction in granting an order of *mandamus*. What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due. In matters where the applicant claims that the Respondent ought to be compelled to pay a certain amount of money it does not suffice to simply aver that the Respondent is under an obligation to settle its liability to the Applicant. The Applicant must go a step further and prove that the sum claimed is actually due. Where therefore liability is admitted or proved, the next stage is to prove the actual quantum payable and where the said sum is yet to be determined an order of mandamus cannot for forth for payment of the said sum.

23. In other words where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore where there is a genuine dispute as to the exact sums payable, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. As was appreciated in Newton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi HC JR 472 of 2014:

“It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.”

24. Whereas the Court may compel the performance of the general duty where such duty exists, it will however not compel its performance in a particular manner for example by compelling the respondent to pay a particular amount unless that amount has been ascertained. This position was appreciated by the Court of Appeal in the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 as follows:

“The order must command no more than the party against whom the application 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...These principles mean that an order of *mandamus* compels 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. 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 but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...” [Emphasis added].

25. I also associate myself with the views expressed by Githua, J in Republic vs. Permanent Secretary Ministry of State for Provincial Administration and Internal Security & Another ex parte Fredrick Manoah Egungza that:

**“The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issues against the Government is found in section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon. Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgement. Once the certificate of order against the Government is served on the Hon. Attorney General, Section 21(3) imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. The Respondent’s claim that the Applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year.”**

26. I adopt reasoning in the said cases.

27. In this case, on 26<sup>th</sup> March, 2014, the High Court in Nairobi (Commercial & Admiralty Division) HCCC No. 690 of 2012 endorsed a consent by which judgement was entered for the plaintiff (applicant herein) against the defendant (the Attorney General) in the sum of Kshs 234,736,214.69 as prayed in the plaint. By the same judgement it was ordered that interest would accrue as pleaded in the plaint. The costs were to be agreed or taxed. According to the plaint, the applicant/plaintiff sought the sum of Kshs 55,351,151/49 being accrued interest from 1<sup>st</sup> December, 2011 to 31<sup>st</sup> October, 2012. It further sought interest on the delayed payment at the Central Bank rate plus 3% points from 1<sup>st</sup> November, 2012 till payment in full. There was also interest sought on the principal sum, the accrued interest and interest on delayed judgement above at commercial rates from the date of judgement.

28. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** *inter alia* as follows:

**“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 or 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...These principles mean that an order of *mandamus* compels 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.”**

29. Therefore as was appreciated in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) there is a specific legal right but no specific legal remedy available for enforcing that right as execution cannot issue against the Government in the ordinary way. In such circumstances it is clear that an order of *mandamus* may go forth in order to remedy the defects of justice.

30. However *mandamus* will only issue for the settlement of the sum decreed. In this case, there is a decree extracted in which the sum of Kshs 397,339,786.68 is indicated as due. There is also a certificate of costs for the sum of Kshs 2,687,740.20. The certificate of order extracted was for a total sum of Kshs 467,728,032.87 and there was provision for a further sum accruing in respect of interests at the contract

rate from 12<sup>th</sup> May, 2014. However the certificate of order against the Government did not specify the said amount of contractual interest.

31. In this application, the applicant seeks that an order of Mandamus do issue directed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents ordering the 2<sup>nd</sup> Respondent to pay to the Ex parte Applicant (MS Ongata Works Limited) the sum of Kenya Shillings: Four Hundred Ninety Seven Million Seven Hundred and Thirty Five Thousand Four Hundred and Seventy One Cents Seventeen (Kshs 497,735,471.17) due and owing as at 31<sup>st</sup> May 2015 on account of judgment entered by consent against the respondent on the 26<sup>th</sup> March 2014 in HCCC No. 690/2012 together with the taxed costs with interest and further interest now accruing on the judgment debt.

32. According to the certificate of order against the Government, the sum due and owing to the applicant as at 31<sup>st</sup> January, 2015 was Kshs 467,728,032.87. That sum was inclusive of interest at the rate of 12% and costs. It is not possible for the Court to determine whether this rate of interest was in respect of delayed payment or the commercial rate as pleaded in the plaint. However what is clear is that under section 21 of the ***Government Proceedings Act***, the respondents are only under an obligation to pay the amount for the time being contained on the face of the certificate. This was the position adopted by **Wendoh, J** in **Arthur Kinuthia Albert vs. Permanent Secretary, Ministry of Health [2008] eKLR** which position I associate myself with and in which the learned Judge expressed herself inter alia as follows:

**“The question I pose is whether it is this court to determine what sum is payable in terms of interest. Judicial review merely deals with the decision making process but not the merits of the decision. In my view, the applicant’s Counsel is calling upon this court to determine whether or not interest was payable to them and I am of the view that that is not the purview of this court’s jurisdiction. The figure of interest included in the decree is foreign to the judgement in CMCC 773/03. Interest may vary according to what the Plaintiff has pleaded in the plaint. It is outside this court’s jurisdiction to assume and to determine whether or not interest was payable or how much is payable. Since the court in CMCC 773/03 had not specifically ordered for payment of interest it was upon the Applicant to move the court which gave the judgement for a review of its orders on account of there being an error on the face of the record. This court’s jurisdiction is limited to compelling the Respondent to pay based on the judgement, decree and certificate of order but it is not to determine what is due to the Applicant and this court would decline to grant the order prayed.”**

33. Although in the instant case, interest was pleaded, the amount of interest payable cannot be ascertained based on the material before me. Having considered the issues raised in this application, the order which commends itself to me and which I hereby grant is that the 2<sup>nd</sup> Respondent is hereby compelled to pay the ex parte applicant the sum of Kshs 467,728,032.87 as appears in the Certificate of Order Against the Government issued in the said Civil Suit, less any sums already paid by the Respondents to the applicant.

34. The applicants will have the costs of these proceedings.

35. It is so ordered.

**Dated at Nairobi this 17<sup>th</sup> day of May, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Mawira for Mr Mwenda for the Applicant***

***Miss Mbuyu for Mr Kihara for the Respondent***

***Cc Mutisya***