



**Republic v Kenya National Highways Authority & another; Masosa Costruction Limited (Exparte Applicant) (Judicial Review Miscellaneous Application E259 of 2024) [2025] KEHC 6151 (KLR) (Judicial Review) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6151 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E259 OF 2024**

**JM CHIGITI, J**

**MAY 15, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
DIRECTOR GENERAL, KENYA NATIONAL HIGHWAYS AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**MASOSA COSTRUCTION LIMITED ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The application that is before the court for determination is the one dated 12<sup>th</sup> November 2024 wherein the applicant seeks the following orders;
  1. That, this Honourable Court be pleased to issue an order of MANDAMUS compelling the 1<sup>st</sup> Respondent to pay the Applicant the decretal sum of Kshs. 350,842,807.79 together with accrued interest at the rate of 17% from 12<sup>th</sup> November 2018 arising from the Judgment and Decree issued on 26<sup>th</sup> August 2022 by the High Court of Kenya at Nairobi, Commercial and Tax Division, in Commercial Case No 418 of 2015 – Masosa Construction Limited vs. SBI International Holding AG (Kenya) & 2 Others.
  2. That, this Honourable Court be pleased to issue an order of MANDAMUS compelling the 1<sup>st</sup> Respondent to pay the Applicant the sum of Kshs. 288,165.11 together with interest from 28<sup>th</sup> August 2015 until payment in full arising from the Judgment and Decree issued on 26<sup>th</sup>



August 2022 by the High Court in Commercial Case No 418 of 2015 – Masosa Construction Limited vs. SBI International Holding AG (Kenya) & 2 Others.

3. That, this Honourable Court be pleased to issue an order of Mandamus compelling the 1<sup>st</sup> Respondent to pay the Applicant costs of the suit taxed Kshs. 12,125,050.00 arising from the certificate of taxation issued on 16<sup>th</sup> September 2024 by the High Court of Kenya at Nairobi in Commercial Case No 418 of 2015 – Masosa Construction Limited vs. SBI International Holding AG (Kenya) & 2 Others.
4. That, this Honourable Court be pleased to issue a mandatory injunctive Order compelling the 2<sup>nd</sup> Respondent, the Director General KENHA, to satisfy the Decree, Costs and Interest in Commercial Case No 418 of 2015 – Masosa Construction Limited vs. SBI International Holding AG (Kenya) & 2 Others in prayer 1, 2 and 3 within fourteen (14) days from the date of service of the order of mandamus.
5. That, in default of compliance with Orders 1, 2, 3 and 4, a Notice to Show Cause does issue against the 2<sup>nd</sup> respondent to show cause why he should not be cited for contempt.
6. That, the costs of the instant application be provided for.

### **Applicant's case**

2. The Applicant filed Commercial Case No 418 of 2015 – Masosa Construction Limited vs. SBI International Holding AG (Kenya) & 2 Others seeking inter alia an order compelling the 1<sup>st</sup> Respondent to settle the Final Account duly certified by the 1<sup>st</sup> Respondent's Project Manager.
3. On 26<sup>th</sup> August 2022 judgment was delivered, in favour of the Applicant as follows;
  - i. The Plaintiff's claim against the 1<sup>st</sup> Defendant is hereby dismissed with costs.
  - ii. As against the 3<sup>rd</sup> Defendant, the 3<sup>rd</sup> Defendant having commenced to realize the securities in breach of the law, it is hereby restrained from realizing its securities for six months from the date of this judgment. Thereafter, the 3<sup>rd</sup> Defendant shall be at liberty to issue the requisite notices and realize its securities accordingly.
  - iii. For the avoidance of doubt, the amount recoverable by the 3<sup>rd</sup> Defendant from the Plaintiff shall not exceed Kshs. 108,222,163.40 in terms of the in duplum rule.
  - iv. The Plaintiff is entitled to retention of Kshs 288,165.11 as against the 2<sup>nd</sup> Defendant together with interest at court rate from the date of filing suit until payment in full.
  - v. The Plaintiff claim for Kshs 138,931,967.70 for loss of productivity is dismissed.
  - vi. The Plaintiff is entitled to payment by the 2<sup>nd</sup> Defendant of Kshs 350,842,807.79 on account of the final account and final certificate together with interest at the rate of 17% pa from November 12, 2018 until payment in full.
  - vii. The costs of the suit is awarded to Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in any event.
4. A Decree was thereafter issued on 1<sup>st</sup> October 2022. Thereafter on 31<sup>st</sup> August 2022 the Applicant filed a Party-and-Party Bill of Costs against the Respondent and the Interested Party which was on 16<sup>th</sup> September 2024 at the sum of Kshs. 12,125,050.00. A Certificate of Taxation dated 16<sup>th</sup> September 2024.



5. It is its case that the total interest due to the Applicant as of 31<sup>st</sup> October 2024 is the sum of Kshs. 356,759,611.81.
6. It argues that although the Respondent filed a notice of appeal against the said judgment, the period for filing the appeal has since lapsed and no steps have been taken to institute the same.
7. Section 68 of the Kenya Roads Act, it is urged obligates the Director General of the Respondent, acting on its behalf, to ensure that any judgments or Orders entered against the 1<sup>st</sup> Respondent are promptly settled from the 1<sup>st</sup> Respondent's revenue.
8. Further that on 1<sup>st</sup> October 2024, it sought to have the 2<sup>nd</sup> Respondent settle the Decree.
9. In its submissions, reliance is placed in Kenya National Examination Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others where the Court of Appeal pronounced itself on the scope of an order of mandamus and cited with approval Halsbury's Law of England as follows;

“The next issue we must deal with is this: 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.”

10. The Applicant also relies on the case of Shah vs. Attorney General.
11. The Ex-parte Applicant submits that despite the lapse of over two (2) years from the date of entry of judgment, the 2<sup>nd</sup> Respondent has failed to settle the decretal sum in violation of his statutory and constitutional obligations. As a result, the ex-parte Applicant cannot enjoy the fruits of its judgment unless the 2<sup>nd</sup> Respondent is compelled to pay the decretal amount.



12. That Section 68(a) of the Kenya Roads Act imposes a statutory obligation upon the 2<sup>nd</sup> Respondent herein to promptly settle out of the 1<sup>st</sup> Respondent's funds any judgment or decree entered against it as follows;

“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.”

13. It is submitted that Section 68 of the Kenya Roads Act, confers the 1<sup>st</sup> Respondent herein with statutory protection against having either its assets seized or accounts attached in settlement of any judgment or Decree issued against it as follows;

“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.”

14. The ex-parte Applicant submits that in the circumstances, it has no other option to receive the decretal sum save for an order of mandamus being issued by this Honourable Court compelling the 2<sup>nd</sup> Respondent to comply with his statutory obligation to pay out of the funds of the 1<sup>st</sup> Respondent, the decretal sum together with accrued interest.

15. In support of this submission, the ex-parte Applicant relies on the decision of the High Court in *Republic vs. The Attorney General & Another ex parte James Alfred Koroso* where the court held as follows;

“16. In the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful



rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit...

It follows therefore that the institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought 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 Accounting Officer 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 Public Officer in his official capacity and the duty is owed not to the State 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. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform.

Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

16. Reliance is also placed in Republic vs. Town Clerk of Webuye County Council & Another where the High Court outlined this Honourable Court’s obligation when dealing with an application for mandamus as follows;

“...a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant’s right of access to justice protected under Article 48 of the Constitution.”



## **Ex-Parte Applicant's Rejoinder Submission**

17. The ex-parte Applicant submits that the 1<sup>st</sup> Respondent herein is an independent state agency vested with corporate identity. It is separate and distinguished from its line ministry under which it is founded.
18. It is submitted that however, the National Land Commission is an independent Commission established under the Constitution.
19. Reliance is placed in The Court of Appeal at paragraph 82 of its judgment in *Five Star Agencies Limited & Another vs. National Land Commission & 2 others* [2024] KECA 439 (KLR) where he court considered whether the National Land Commission is analogous to the government and held as follows;

“As regards the first issue, the central issue that the trial court had to determine was whether or not the NLC is analogous to the government and therefore not subject to execution in the manner provided for under Order 23 rule 1 of the Civil Procedure Rules 2010. The court analyzed various provisions of the law and judicial decisions and arrived at the conclusion that the NLC is a State organ and although independent, it is infused with governmental character. This finding of the trial court is not a contested issue in the consolidated appeals. We need not therefore belabour the findings of the trial court on the issue.”

20. The Applicant also relies on *Five Star Agencies Limited vs. National Land Commission; Kenya National Highways Authority (Intended Respondent); National Bank of Kenya* where the Court of Appeal arrived at the decision that the National Land Commission was synonymous with the government as follows;

“Pursuant to article 1(3) of the Constitution, the sovereign power of the people of Kenya is exercised by the following State organs: Parliament and Legislative Assemblies in the County Governments, National Executive and Executive Structures in the County Government and the Judiciary and Independent Tribunals.

99. Article 67 of the Constitution establishes the National Land Commission as a constitutional commission. Article 260 on the other hand sets out the definition of ‘state organ’ to mean a commission, office, agency or other body established under the Constitution. The same section defines “State” as the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution.

100. A reading of the above provisions and the decision of the Supreme Court of India in *International Airport Authority of India* leaves no doubt that the Judgement Debtor is a state organ with certain defined functions within the governmental structure...”

21. It is further submitted that unlike the National Land Commission, the 1<sup>st</sup> Respondent herein is established as a body corporate under Section 3 of the Kenya Roads Act as follows;

“3. Establishment of the Kenya National Highways Authority there is established an Authority to be known as the Kenya National Highways Authority, which shall be a body corporate with perpetual succession and a common seal, and which shall, subject to this Act, be capable in its corporate name of—



- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding and disposing of movable or immovable property;
- (c) borrowing money with the approval of the Cabinet Secretary and the Cabinet Secretary responsible for finance; and,
- (d) doing or performing all such other things or acts for the proper performance of its functions under this Act as may lawfully be done or performed by a body corporate.”

- 22. It is submitted that The Kenya Highways Authority, the 1<sup>st</sup> Respondent herein, having been established under statute and not the Constitution is a state corporation but not a state organ under Article 260 of the Constitution. The 1<sup>st</sup> Respondent therefore does not come within the scope of the government proceedings contemplated by the Supreme Court and the Court of Appeal.
- 23. The 1<sup>st</sup> Respondent herein is not subject to the provisions of the Government Proceedings Act and a Certificate of Order was not required for enforcement of the judgment.
- 24. Further, that clear provisions are provided under the Kenya Roads Act on how judgments and Decrees entered against the 1<sup>st</sup> Respondent are to be enforced, the Ex-parte applicant’s application is clearly merited.
- 25. In support of this submission, the Ex-parte Applicant relies on the holding in the case of Simonash Investment Ltd vs. Kenya National Highways Authority & 2 Others where the court held as follows;

“Sections 3 and 4 of the Kenya Roads Act, 2007 (hereinafter referred to only as “the Act” provide as follows:

“3. Establishment of the Kenya National Highways Authority

There is established an Authority to be known as the Kenya National Highways Authority, which shall be a body corporate with perpetual succession and a common seal, and which shall, subject to this Act...

4. Functions of the Authority

- (1) The Highways Authority shall be responsible for the management, development, rehabilitation and maintenance of national roads..

- 13. Section 68 of the Act which deals with execution against the 1<sup>st</sup> Respondent provides as follows: “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.”



From the statutory objectives and functions of the 1<sup>st</sup> Respondent, I agree with the contention by the 1<sup>st</sup> Respondent that the 1<sup>st</sup> Respondent is an agency or a department of the Government of Kenya. The 1<sup>st</sup> Respondent is however not protected against execution by Section 21(4) of the Government Proceedings Act, Chapter 40 Laws of Kenya but rather by the provisions of Section 68 of the Act which provides that no attachment or execution can be levied against the property of the 1<sup>st</sup> Respondent. The Section provides that where there is a monetary judgment against the 1<sup>st</sup> Respondent, the Director-General of the 1<sup>st</sup> Respondent shall settle the same out of the revenue of the 1<sup>st</sup> Respondent. I agree with the 1<sup>st</sup> Respondent that the mode of execution that the Petitioner adopted against the 1<sup>st</sup> Respondent was unlawful as it was contrary to the express provisions of the Act.”

26. It is further submitted that Section 68 of the Kenya Roads Act, obligates the 2<sup>nd</sup> Respondent, acting on behalf of the 1<sup>st</sup> Respondent to ensure that any judgments or Orders entered against the 1<sup>st</sup> Respondent are promptly settled from its revenue.
27. The High Court in Kenya National Highways Authority vs. Ahmednassir Maalim Abdullahi upheld the 2<sup>nd</sup> Respondent’s statutory obligation under Section 68 of the Kenya Roads Act as follows;
- “ 48. Fundamentally, the law directs the Director General to pay without delay but he has not. While the same law restricts a successful litigant from execution on the premise that there will be prompt payment, the person directed to pay does not pay. That is what prompted the respondent to argue, and correctly so in my view, that such a provision places one of the parties at an advantage over the other despite the clear constitutional stand that every person is equal before the law and has the right to equal protection and equal benefit of the law.
49. Looking at section 68 vis a vis the Constitution, does it afford all persons equal protection and benefit? Why would a successful litigant fail to enjoy the fruits of his litigation yet the person who is commanded to pay fails discharge his statutory obligations to the detriment of the successful litigant? Does the section violate the right of access to justice and the rule of law?
50. The respondent urged this court to find that the section violates the principle of equality and dismiss the applicant. This court will resist the temptation to answer the respondent’s request or any of the questions above. This is because what is before this court is an application which cannot be the proper basis for returning a verdict on those questions.
51. In the end, having considered the twin applications, submissions and the law, it is this court’s finding that section 68 of Kenya Roads Act, restricts attachment of the applicant’s assets, and therefore, no attachment should have taken place. However, the section mandates the Director General to pay without delay and he knows it.”
28. The Ex parte Applicant submits that in the event the 2<sup>nd</sup> Respondent does not settle the balance of the decretal sum on behalf of the 1<sup>st</sup> Respondent, a Notice to Show Cause should be issued to the 2<sup>nd</sup> Respondent to answer why he should not be held in contempt for breach of a lawful court order and his statutory obligation.



29. The Ex-parte Applicant submits that contrary to the Respondents assertion, a notice of appeal does not operate as an automatic stay against enforcement of a judgment.
30. No order exists barring/stopping the Ex-parte Applicant from seeking to enforce the fruits of its judgment.
31. Further, the ex-parte Applicant submits that the Respondents having elected to settle part of the decretal amount, they cannot now advance the argument that the court cannot make an order under Section 68 of the Kenya Roads Act to order them to comply and settle the outstanding decretal amount.
32. Reliance is placed in the case of *Muema vs. OM Shree Holding Ltd* where the court held as follows;

“From the correspondences exchanged specifically the Respondents letter dated 01.03.2023, copied to the respondent’s insurer, it is clearly indicated that the cheque issued was in the name of J.M Kimathi & Partners Advocates LLP. The said advocate on 29.03.2023 sent an email confirming receipt of the decretal sum and even correspondence exchanged show clearly that the same were addressed to the appellants advocate “D.M Wambua Advocate”, who has sworn the replying affidavit herein. The issue of turning their back to this settlement therefore does not arise. Unlike Apostle Peter who denied, his master, the appellants herein cannot run away for the fruits of their judgement, having already enjoyed the same.

Further while the appellants right of Appeal cannot be taken away, I do hold that they are estopped from proceeding with this appeal having consented to wholly settle the decree appealed against. They cannot desire for two mutually exclusive alternatives and enjoy the benefit of both. They chose their bed and they must hold their peace and lie on it.”

### **Respondents case**

33. The Respondents in response to the application filed a Replying affidavit sworn on 1<sup>st</sup> April 2025 by Eng. Fredrick Oyugah Onyango.
34. In the affidavit it is averred that being an autonomous agency under the Ministry of Transport, Infrastructure, Housing Urban Development and Public Works it does not have any revenue on its own and that the duty to settle decrees lies on the shoulders of multiple government agencies, ministries and public officers.
35. It is the Respondents’ case that it the Authority filed a Notice of Appeal dated 2<sup>nd</sup> September 2022 together with a letter requesting for proceedings of even date. The Respondents state that they intend to pursue their appeal and as such they have been following up on the same.
36. The Respondents case is also that the Applicant is yet to comply with the mandatory requirement of Section 21 of the Government Proceedings Act which requires it to serve upon the Authority a copy of the Certificate of Order. It is urged that as was held by the court in the case of *Five Star Agencies Limited vs. National Land Commission, Nairobi Court of Appeal No.E290 of 2023* the certificate is mandatory and a condition precedent to the issuing of an order of mandamus.
37. According to the Respondents the duty to pay is yet to crystallize under a Certificate of Order as was held by the Court In *re National Land Commission (Reference E001 OF 2024) [2025] KESC 12 (KLR) (21 March 2025) (Advisory Opinion)*.



38. It is also urged that section 21(4) of the Government Proceedings Act bars personal responsibility and as such the prayers for Notice to Show Cause against the Director General ought not to issue in the manner sought or at all.
39. The respondents case is that the prayers for mandamus ought not to issue as no duty has crystallized in the absence of a copy of the Certificate of Order, there is no specific duty exclusively on the Director of the Authority to pay the decretal sum, the mandate to pay commands more than the Director General, the Authority is dissatisfied with the decree and has lodged a Notice of Appeal and the mandate to pay is not time-bound and cannot be performed within 14 days as sought due to elaborate approvals of the expenditure of the Authority.
40. The Respondents further contends that there will be practical problems if the court is to compel payment of the decretal sums within 14 days. It is also urged that the same is in violation of Section 32 of the Government Proceedings Act and Section 35 of the Roads Act which contemplate a full budget cycle replete with concurrence between the Ministry and National Treasury.
41. The Respondents also filed written submissions dated 16<sup>th</sup> April 2025. In the submissions reliance is placed in the case of Five Star Agencies Limited vs. National Land Commission Nairobi Court of Appeal No.E290 of 2023 where the Court of Appeal observed that execution against the Government under the Civil Procedure Rules (including garnishee proceedings) is barred in so far as the Government is concerned. It is also submitted that in the above case the court also held that no person shall be individually liable under any order for the payment by the Government or any Government department.
42. Reliance is also placed in the case of Alhaajar Investment Limited vs. Kenya National Highway Authority & National Land Commission, ELC Petition No.E028 OF 2022 (Ruling) (9 April 2025) (Unreported) where the court disallowed the application for execution by way of Notice to Show Cause.
43. The Court in Five Star Agencies Limited vs. National Land Commission supra it is submitted held that as satisfaction of decrees or judgments is deemed as expenditure by Parliament the same must be justified in law and provided for in the Government's expenditure.
44. The Respondent also rely on the case of Kenya National Examination Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR where the Court observed that where a general duty is imposed, a mandamus cannot require it to be done at once or command that the duty be carried out in a specific way. It is also submitted that the instant application failed to meet the criteria under section 7(b) and (c) of the Fair Administrative Action Act.

#### **Analysis and determination;**

45. The following issues form for determination;
  - i. Whether documents that have been filed out of time are admissible.
  - ii. Whether the applicant has made out a case for the grant of the orders sought.
  - iii. Who shall bear the costs.

#### **Whether documents that have been filed out of time are admissible.**

46. On 7.12.24, the court issued the following directions:
  1. The Application dated 6.11.24 allowed as prayed.



2. The Applicant shall file and serve the substantive Application within 14 days.
  3. The Respondents shall file and serve their responses within 14 days of service.
  4. The Applicant shall thereafter file and serve its submissions within 14 days of the date of service.
  5. The Respondents shall file and serve their submissions within 14 days thereafter.
  6. The matter shall be mentioned on 26.2.25 for further directions.
47. The Ex-parte Applicant on 11<sup>th</sup> April 2025 proceeded to deliver physical copies of the said documents at the 1<sup>st</sup> Respondent's legal office and at the 2<sup>nd</sup> Respondent's offices on 15<sup>th</sup> November 2024. This is gleaned from the affidavit of service sworn on 24<sup>th</sup> February 2025.
  48. On 26<sup>th</sup> February 2025, this Honourable Court confirmed that the Respondents had been served but had not complied and consequently reserved a judgment date.
  49. The Respondents however, served the Ex-parte Applicant with their replying affidavit sworn on 1<sup>st</sup> April 2025 and their submissions dated 16<sup>th</sup> April 2025.
  50. The said documents/pleadings were filed out of time in defiance of a court order and without leave of this Honourable Court. This ran afoul the court orders of 7.12.24.
  51. The Ex-parte Applicant urged the court that the replying affidavit sworn on 1<sup>st</sup> April 2025 and the submissions dated 16<sup>th</sup> April 2025 be expunged from the record.
  52. The Supreme Court in the case of Dande & 3 others v Director of Public Prosecutions & 2 others (Petition 4 (E005) of 2022) [2022] KESC 23 (KLR) (19 May 2022) (Ruling) rendered itself thus:
    - “(18) However, before we conclude, it is important at this juncture to note that pre-trial directions in this matter were issued by the Deputy Registrar on March 11, 2022, therein, the respondent was to be served with the application forthwith and was in turn to file a response within 7 days therein. Unfortunately, we observe that parties in defiance of the said directions, and after being issued with the ruling notice on May 4, 2022, continued to file responses up to the eleventh hour including as late as May 11, 2022. This practice is irregular and unacceptable. We have, in this respect, not taken into consideration in this ruling, submissions irregularly filed”
  53. The Respondents did not file its pleadings in time and failed to comply with the directions prescribed timelines. They made no application for the enlargement of time under Order 50 of the Civil Procedure Rules. The Replying Affidavit and the Submissions that were filed by the Respondents are hereby expunged from the record.
  54. This court is also guided by the Supreme Court case of Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others (Application E029 of 2023) [2023] KESC 69 (KLR) where it was held;
    - “26. Taking all the above matters into account, we must state that, this court has on several instances underscored the importance of compliance with its orders, rules and practice directions. With regard to filing and service of documents within the requisite time, the court has in a long line of decisions stressed that it



will not countenance breaches of timelines set by the rules or by the court, and affirmed the general constitutional principle that justice shall not be delayed. See Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others, SC Petition No 5 of 2016; [2018] eKLR and Kenya Railways Corporation & 2 others v Okoiti & 3 others, SC Petition (Application) No 13 of 2020 & Petition 18 of 2020 (Consolidated); [2022] KESC 68 (KLR). It goes without saying that compliance with court orders goes to the root of the rule of law as well as the dignity of any court.

27. Neither the Supreme Court Act nor the Supreme Court Rules or this court's Practice Directions permit the applicants to file written submissions in the manner that they did. Rule 31 of this court's Rules stipulates that an interlocutory application, such as the applicants', should be filed together with written submissions. Therefore, we find it irregular for parties to file joint submissions as well as separate submissions at the same time. Not only would it be repetitive but also unnecessary and a waste of precious judicial time. In any event, based on the directions issued, the applicants' submissions were to be served together with the motion. In the end and without be labouring the point, we hereby strike out the four sets of the applicants' written submissions. In addition, we caution litigants to adhere to the court's practice directions relating to the length of written submissions lodged before the court, as explained in the preceding paragraph.
28. Moving onto the respondents' responses and/or submissions, we are not convinced with the explanation for the delay. To begin with, litigants and advocates should accord this court the respect and decorum it deserves as the apex court of the land. Further, nothing has been placed before us to substantiate the contention by the 5th and 9th respondents that the delay was occasioned by difficulties in accessing the court's online platform.
29. Be that as it may, to accede to the respondents' prayer to deem the responses and/or submissions filed out of time as properly before the court is tantamount to sanctioning an illegality. The respondents ought to have first sought leave of the court to file their responses out of time prior to filing the same. See Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others, SC Application No 16 of 2014; [2014] eKLR and University of Eldoret & another v Hosea Sitienei & 3 others, SC Application No 8 of 2020; [2020] eKLR. Consequently, save for the 3rd and 4th respondents submissions, we strike out the responses and submissions filed out of time without leave of the court."

#### **Whether the applicant is entitled to the orders sought.**

55. The following are the undisputed facts, that on 26<sup>th</sup> August 2022 judgment was delivered, in favour of the Applicant. A decree was extracted on 1<sup>st</sup> October 2022. A certificate of taxation was extracted on 16<sup>th</sup> September 2024. The foregoing were served upon the Respondents. However, no certificate of order was extracted.



56. Section 3 of the Kenya Roads Act reads as follows;

“ 3. Establishment of the Kenya National Highways Authority there is established an Authority to be known as the Kenya National Highways Authority, which shall be a body corporate with perpetual succession and a common seal, and which shall, subject to this Act, be capable in its corporate name of—

(a) suing and being sued;

57. There is no doubt that the 1<sup>st</sup> Respondent herein is established as a body corporate. It is bound by the provisions of the said Act.

58. Section 68(a) of the Kenya Roads Act provides that;

“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.”

59. In case of Simonash Investment Ltd vs. Kenya National Highways Authority & 2 Others the court held as follows;

“Sections 3 and 4 of the Kenya Roads Act, 2007 (hereinafter referred to only as “the Act” provide as follows:

“3.Establishment of the Kenya National Highways Authority

There is established an Authority to be known as the Kenya National Highways Authority, which shall be a body corporate with perpetual succession and a common seal, and which shall, subject to this Act...

Section 68 of the Act which deals with execution against the 1<sup>st</sup> Respondent provides as follows: “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.”

From the statutory objectives and functions of the 1<sup>st</sup> Respondent, I agree with the contention by the 1<sup>st</sup> Respondent that the 1<sup>st</sup> Respondent is an agency or a department of the Government of Kenya. The 1<sup>st</sup> Respondent is however not protected against execution by Section 21(4) of the Government Proceedings Act, Chapter 40 Laws of Kenya but rather by the provisions of Section 68 of the Act which provides that no attachment or execution can be levied against the property of the 1<sup>st</sup> Respondent. The Section provides that where



there is a monetary judgment against the 1<sup>st</sup> Respondent, the Director-General of the 1<sup>st</sup> Respondent shall settle the same out of the revenue of the 1<sup>st</sup> Respondent. I agree with the 1<sup>st</sup> Respondent that the mode of execution that the Petitioner adopted against the 1<sup>st</sup> Respondent was unlawful as it was contrary to the express provisions of the Act.”

60. The court is satisfied that the 1<sup>st</sup> Applicant is established as a body corporate under Section 3 of the Kenya Roads Act as result of which the Applicant is not bound by the provisions of The Government proceedings Act. It is not a must that the Applicant extracts and serves a Certificate of order under the Government Proceedings Act before executing a Decree against the 1<sup>st</sup> Respondent.
61. Section 68 of the Kenya Roads Act, obligates the 2<sup>nd</sup> Respondent, acting on behalf of the 1<sup>st</sup> Respondent to ensure that any judgments or Orders entered against the 1<sup>st</sup> Respondent are promptly settled from its revenue.
62. The High Court in Kenya National Highways Authority vs. Ahmednassir Maalim Abdullahi upheld the 2<sup>nd</sup> Respondent’s statutory obligation under Section 68 of the Kenya Roads Act as follows;
  - “ 48. Fundamentally, the law directs the Director General to pay without delay but he has not. While the same law restricts a successful litigant from execution on the premise that there will be prompt payment, the person directed to pay does not pay. That is what prompted the respondent to argue, and correctly so in my view, that such a provision places one of the parties at an advantage over the other despite the clear constitutional stand that every person is equal before the law and has the right to equal protection and equal benefit of the law.
  49. Looking at section 68 vis a vis the Constitution, does it afford all persons equal protection and benefit? Why would a successful litigant fail to enjoy the fruits of his litigation yet the person who is commanded to pay fails discharge his statutory obligations to the detriment of the successful litigant? Does the section violate the right of access to justice and the rule of law?
  50. The respondent urged this court to find that the section violates the principle of equality and dismiss the applicant. This court will resist the temptation to answer the respondent’s request or any of the questions above. This is because what is before this court is an application which cannot be the proper basis for returning a verdict on those questions.
  51. In the end, having considered the twin applications, submissions and the law, it is this court’s finding that section 68 of Kenya Roads Act, restricts attachment of the applicant’s assets, and therefore, no attachment should have taken place. However, the section mandates the Director General to pay without delay and he knows it.”
63. In the instant suit, this court is satisfied that the Applicant has a Decree that is yet to be settled by the Respondents. The Judgment that the Applicant seeks to execute was issued on 26<sup>th</sup> August 2022.



64. The delay in settling the decree is a clear demonstration on the part of the 2<sup>nd</sup> Respondent that he is not willing to comply with Section 68 of the Kenya Roads Act which enjoins the Director-General in mandatory terms.

“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.”

65. A decree holder always has a legitimate expectation that they will enjoy the fruits of the judgment.

66. According to De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6<sup>th</sup> Edn. Sweet & Maxwell page 609:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

67. The Court in Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR at paragraph 55 observed as follows:

“It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate “in the sense of an expectation which will be protected by law”.

68. This was the view adopted in Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR where it was held that:

“...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.”

69. This court is satisfied that the 2<sup>nd</sup> Respondent is standing in the way of access to justice as guaranteed under Article 48 of the Constitution.

70. The Applicant has proven that the Respondents have failed to discharge their statutory obligation. The Director-General has refused to cause to be paid out of the revenue of the Authority the decretal balance as ordered by the Decree that was awarded against the Authority.

71. The court is in the circumstances satisfied that the failure to act on the part of the Respondents amounts to a presumption that the Respondents are conducting themselves illegally.

72. The Respondents have failed to discharge their statutory mandate in flagrant infraction of Article 47 (1) of the Constitution which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



73. The 2<sup>nd</sup> Respondent's duty to ensure that the 1<sup>st</sup> Respondent settles Decrees seamlessly given that the 1<sup>st</sup> Respondents enjoys an unusual insulation from execution. Decree holders must not be left helpless at the mercies of the 2<sup>nd</sup> Respondent. That offends the rule of law.
74. This court is under a duty to protect the rights of decree holders from statutory office bearers like the 2<sup>nd</sup> Respondent who abdicate their duty to promote and fulfill access to justice under Article 48 of the Constitution. The 2<sup>nd</sup> Respondent did not tell the court why he has not caused the settlement of the balance owed.
75. This court is of the view that a notice of appeal is not an order of Stay of execution. It doesn't bar a decree holder from executing a decree. An order for the stay of execution is issued pursuant to the filing and the hearing of an application. It doesn't come automatically with the filing of a Notice of Appeal. The applicant cannot be blamed for pursuing the fruits of the judgment. In the same vein, the Respondent has his liberty of prosecuting its appeal.
76. The Ex parte Applicant has also advanced an argument that in the event the 2<sup>nd</sup> Respondent does not settle the balance of the decretal sum on behalf of the 1<sup>st</sup> Defendant, a Notice to Show Cause should be issued to the 2<sup>nd</sup> Respondent to answer why he should not be held in contempt for breach of a lawful court order and his statutory obligation.
77. Given that the Director-General has refused in mandatory terms, to without delay, cause to be paid out of the revenue of the Authority the decretal balance as ordered by the Decree that was awarded against the Authority this court finds it fit to issue a Notice to show cause to the 2<sup>nd</sup> Respondent to answer why he should not be held in contempt for breach of a lawful court order.

### **Disposition;**

78. The Applicant has proven its case within the standards of section 107 and 108 of the evidence act.
79. It has established a case within the parameters of the grant of the order of Mandamus.

#### Costs

The Applicant has also sought for an order for costs.

80. In Halsbury's Laws of England, 4<sup>th</sup> ed Re-Issue (2010), Vol. 10, para. 16:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” [emphasis supplied].

81. In Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J. thus observed:

“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court



is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].

82. The Civil Procedure Act (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):

“Subject to such conditions and limitations’ as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order” [emphases supplied].

83. So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p.94]:

The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

#### **Order;**

1. An order of Mandamus compelling the 1<sup>st</sup> Respondent to pay the Applicant the decretal sum of Kshs. 350,842,807.79 together with accrued interest at the rate of 17% from 12<sup>th</sup> November 2018 arising from the Judgment and Decree issued on 26<sup>th</sup> August 2022 by the High Court of Kenya at Nairobi, Commercial and Tax Division, in Commercial Case No 418 of 2015 – Masosa Construction Limited vs. SBI International Holding AG (Kenya) & 2 Others is hereby issued.
2. An order of Mandamus compelling the 1<sup>st</sup> Respondent to pay the Applicant the sum of Kshs. 288,165.11 together with interest from 28<sup>th</sup> August 2015 until payment in full arising from the Judgment and Decree issued on 26<sup>th</sup> August 2022 by the High Court in Commercial Case No 418 of 2015 – Masosa Construction Limited vs. SBI International Holding AG (Kenya) & 2 Others is hereby issued.
3. An order of Mandamus compelling the 1<sup>st</sup> Respondent to pay the Applicant costs of the suit taxed Kshs. 12,125,050.00 arising from the certificate of taxation issued on 16<sup>th</sup> September 2024 by the High Court of Kenya at Nairobi in Commercial Case No 418 of 2015 – Masosa Construction Limited vs. SBI International Holding AG (Kenya) & 2 Others is hereby issued.
4. The orders so issued shall be complied with within 90 (90) days from the date of service of the order of mandamus.
5. In default of compliance with Orders 1, 2, 3 and 4, a Notice to Show Cause shall issue against the 2<sup>nd</sup> Respondent to show cause why he should not be cited for contempt.
6. Costs to the applicant.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2025.

.....

**J. M. CHIGITI (SC)**

**JUDGE**

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