



Republic v Director General Kenya National Highways Authority; Kenya Revenue Authority (Interested Party); SBI International Holdings (Kenya) (Exparte) (Application E037 of 2022) [2023] KEHC 22442 (KLR) (Judicial Review) (25 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E037 OF 2022
J NGAAH, J
SEPTEMBER 25, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**DIRECTOR GENERAL KENYA NATIONAL HIGHWAYS
AUTHORITY RESPONDENT**

AND

KENYA REVENUE AUTHORITY INTERESTED PARTY

AND

SBI INTERNATIONAL HOLDINGS (KENYA) EXPARTE

JUDGMENT

1. The application before court is the motion dated 26 July 2022 in which the applicant seeks the order of mandamus against the respondent. The prayer for this order is expressed as follows:
 - a) An order of mandamus to direct and compel the Director General, Kenya National Highways Authority to satisfy the decree of court dated 8th June 2021 and issued on 1st October 2021, issued in High Court Civil Case No. E229 of 2020; SBI International Holdings (Kenya) versus Kenya National Highways Authority, within 7 days of the judgment and order herein.”
2. The applicant has also sought for costs of the application.

The application is brought under Order 53 Rule 1, 2 and 4 of the Civil Procedure Rules; Article 48 of *the Constitution*; Section 68 (a) and (b) of the *Kenya Roads Act*, No. 2 of 2007 and section 74 of the



Public Finance Management Act, No. 18 of 2012. It is based on a statutory statement dated 4 March 2022 and an affidavit sworn on even date by Gilad Mishni in verification of the facts relied upon.

Mishni has sworn that he is the managing director of the applicant. His case is that there exists an unsatisfied judgment and decree of this Honourable Court issued in High Court Civil Case No. E229 of 2020; SBI International Holdings (Kenya) versus Kenya National Highways Authority. The judgment in that case was rendered on 8 June 2021 and a decree issued on 1 October 2021 in the following terms:

“That judgment be and is hereby entered in favour of the plaintiff as against the defendant for:-

- a. The sum of Kshs. 149, 719,262.00 as determined in the decision of the Dispute Board of 28th August 2019;
 - b. the sum of Kshs. 166,361,520.24 as determined in the decision of the dispute board of 28th February 2020;
 - c. Costs of the suit on the indemnity basis.”
3. On 11 November 2021 the deputy registrar of this Honourable Court issued a certificate of costs for the amount of Kshs. 3,224,512.62 payable to the applicant. Thus the decretal sum together with costs amounted to Kshs. 319, 305, 294.86.

It is deposed that there is no stay of execution against the decree.

On 1 October 2021 the applicant through its counsel demanded settlement of the decree by the Director General of the Kenya National Highways Authority in accordance with section 68 (a) and (b) of the Kenya Roads Act, No. 2 of 2007.

The respondent has failed or neglected to make good the payment and settle the decree hence the present application. According to the applicant, this application is the only means through which the respondent can be compelled to perform what he is obligated to do and which, in turn, would ensure that the applicant enjoys the fruits of its judgment.

4. The applicant has also sworn that the delay in settlement of the decretal sum is prejudicial to the applicant. The judgment and decree stems from FIDIC (Federation Internationale des Ingenieurs-Conseils or the International Federation of Consulting Engineers) contract, which by design, enjoins any party to urgently settle and pay any amount determined to be payable by the party. It is, thus, necessary that decretal sums be paid immediately.

The respondent opposed the application. A replying affidavit to this effect was sworn by Engineer Charles Okeyo who has introduced himself as an engineer working in the directorate of development at the respondent Authority. Okeyo has admitted that indeed the applicant obtained a decree against the respondent as deposed in the applicant’s affidavit.

However, the respondent was precluded from paying because it received a notice of preservation of funds from the Kenya Revenue Authority under section 43(2) of the Tax Procedures Act, No. 29 of 2015 on 9 June 2022.

5. According to the respondent, the applicant has instituted two parallel suits on the same subject; this suit and High Court Miscellaneous Application No. E457 of 2022 (Kenya Revenue Authority versus Kenya National Highways Authority and SBI International Ltd) in which a preservation order was obtained by the interested party restraining the respondent from making payment of any money due to the applicant.



The preservation order was extended by the court on 20 June 2022. However, the applicant moved and filed an application seeking to set aside the order of preservation.

If the interested obtained the preservation order before the applicant moved to set it aside, it is logical that High Court Miscellaneous Application No. E457 of 2022 was initiated by the interested party contrary to the respondent's allegations that the applicant was the author of the suit.

The respondent has also disputed the validity of the consent order that was obtained in that suit between the applicant and the interested party. In the respondent's words:

“Despite the respondent being a party to the proceedings and the one to bear the financial windfall when the alleged amounts due are to be paid, they were neither consulted nor privy to the consent.”

6. As a result of the respondent's reservations about the consent, it has filed an application to set it aside.

The respondent understands the consent to mean that the order preserving funds is limited to the sum of Kshs. 2 Billion and that the rest of the funds are available to the applicant. According to the respondent, it is unclear how the figure of Kshs. 2 Billion was reached.

It is the respondent's case that the applicant cannot be paid in settlement of the decrees it holds against the respondent until a decision has been made in High Court Miscellaneous Civil Case number E457 of 2022.

It has also been deposed that the applicant is a foreign company based in Israel with only skeletal operations in Kenya and any payment made to the applicant prior to the resolution of the dispute on taxes due may occasion loss to the Kenya Revenue Authority for which the respondent may be held liable.

As far as I see, the facts in this case are not in dispute and, most importantly, the respondent does not dispute that the decretal sum or sums are due and owing. The only point of contention is that the interested party has a claim on the funds due to the applicant from the respondent.

7. According to the respondent, the interested party invoked section 43(2) of the *Tax Procedures Act* to restrain the respondent from paying the applicant until the taxes alleged to be due have been paid. For better understanding of section 43(2) it is necessary that I reproduce both subsection (1) and (2). They read as follows:

43. Preservation of funds

1. This section applies if the Commissioner reasonably believes—
 - a. that a taxpayer—
 - i. has made taxable supplies, has removed excisable goods, or has derived an income, in respect of which tax has not been charged; or
 - ii. has collected a tax, including withholding tax, that has not been accounted for; and
 - b. that the taxpayer is likely to frustrate the recovery of the tax.
2. The Commissioner may by notice in writing, in respect of a taxpayer to whom this section applies, require a person—
 - a. who owes or may subsequently owe money to the taxpayer;



- (b) who holds or may subsequently hold money for or on account of the taxpayer;
- (c) who holds or may subsequently hold money for on account of another person for payment to the taxpayer; or
- (d) who has the authority from some other person to pay money to the taxpayer, to preserve such money, and that person shall not transfer, withdraw, dispose of or otherwise deal with that money except as provided for in the notice for a period of ten working days or until the application by the Commissioner made in accordance with subsection (3) is heard and determined by the High Court.

8. The interested party moved to court under section 43(2) (d) in Miscellaneous Application No. E457 of 2022 in which it obtained a preservation order that was subsequently extended on 20 June 2022. On its part, the applicant filed an application to set aside the preservation order.

But on 25 July 2022, the applicant and the interested party reached consent which was adopted as the order of the court. The consent order was in these terms:

“The notice of motion application dated 6th July 2022, be and (sic) hereby settled as regards interlocutory reliefs, pending its full determination, in the following terms:

- a. That the orders of the honourable court issued on 20th June 2022, extending the preservation of funds order issued by the applicant (Kenya Revenue Authority) on 9th June 2022 in respect of any and all monies held by the 2nd respondent (Kenya National Highways Authority) payable to the 1st respondent (SBI international Holdings AG Kenya) based on the following contractual awards: Kisumu Boys Mamboleo Road-Kshs. 4,531, 261,407.52, Ahero Interchange Kshs. 853,435,616.22 and Kericho Interchange-Kshs. 783.893,767.82, be and is hereby invited, and the honourable court to order and allow the continued existence of the preservation orders issued on 9 June 2022 and extended on 20 June 2022 limited for the preservation of Kshs. 2 Billion by the 2nd respondent (Kenya National Highways Authority) and order and allow the payment of the residue sum thereof forthwith to the 1st respondent (SBI International Holdings AG Kenya) forthwith, and the said amount of Kshs. 2 Billion be preserved pending determination of this application, and determination of the notice of motion application dated 17th of June 2022, by the applicant here in, or until further orders of this honourable court.”

9. The wording is somewhat convoluted but what I understand the order to be saying is that out of the total sum due to the applicant from the respondent, the latter was to hold Kshs. 2 Billion under the preservation order and pay the rest of the amount to the applicant, apparently pending settlement of the dispute on the tax or taxes due to the interested party. It has been noted in this judgment that the respondent is of the same mind except that it disputes how the Kshs. 2 Billion was arrived and the validity of the consent as a whole considering that it was not privy to it.

I would agree with the applicant that in the wake of the consent order, there is no excuse for the respondent not to settle the decretal sum of Kshs. 319,305,294.86 due in High Court Civil Case No. E229 of 2020 between the applicant and the respondent.

It must be understood that as much as there is dispute over tax or taxes due to the interested party from the applicant, the latter holds a valid decree in its favour against the respondent. It is not for



the respondent to determine how the tax or taxes, if due, will be paid; that is a question between the applicant and the interested party and I suppose that is what the High Court Miscellaneous Civil Case number E457 of 2022 is all about.

10. Without appearing to prejudge the outcome of the respondent's application to set aside the consent order between the applicant and the interested party, the respondent need not have been privy to the consent. It may not even be a necessary party in that suit since the dispute on whether the applicant owes the interested party any tax or taxes is an issue between those two parties.

As for the respondent, it was always under obligation to settle the applicant's decree either by releasing the entire decretal sum to the applicant or such part of it that is the remainder after deduction of tax or taxes that may be found due to the interested party. It follows that if, in its own assessment, the interested party is satisfied that out of the total sum payable to the applicant, Kshs. 2 Billion will be sufficient to cover what it alleges are unpaid taxes, it is not for the respondent to question the interested party, or any other party for that matter, how it reached that figure.

Having come to that conclusion, the next question is whether there is any course available to the applicant to enforce payment other than through the order of mandamus in the face of default to pay by respondent's Director General.

11. One of the ways through which decrees or orders are enforced is, of course, execution or attachment. However, the respondent is protected from such process of execution or other similar process in enforcement of decrees or orders by section 68 of the [Kenya Roads Act](#). This section reads as follows:

68. Restriction on execution against property of Authority 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.

12. With this protection from execution or attachment and, considering that the respondent's Director General has not given any written consent to seize the respondent's property in satisfaction of the decree, there should be no dispute that the only available route open to the applicant is to compel the respondent's Director General to perform his statutory duty and pay what has been decreed as due and owing to the applicant. In other words, only the order of mandamus would be the appropriate order under the circumstances.

According to Halsbury's Laws of England/Judicial Review (volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

“A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”



This is reiterated in paragraph 703 which states:

“ A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

13. And with particular reference to public officers who, like in the instant case, fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

“706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See R v Metropolitan Police Comr, ex p Blackburn (No 3) [1973] QB 241, [1973] 1 All ER 324, CA; R v London Transport Executive, ex p GLC [1983] QB 484, [1983] 2 All ER 262, DC.)”

14. A demand for payment having been made and the respondent’s Director General having failed to pay, no other evidence is required to demonstrate that the respondent’s Director General has failed to perform a public duty with which he is charged under section 68 (a) of the *Kenya Roads Act*. This duty is to pay the applicant the decretal sum. A mandamus order would issue in such circumstances. Accordingly, I hereby allow the applicant’s motion dated 26 July 2022 in the following terms:

1. An order of mandamus is hereby issued compelling the respondent’s Director General to pay the applicant the sum of Kshs. 319,305,294.86 or as otherwise decreed in the decree dated 8 June 2021, issued on 1st October 2021 in High Court Civil Case No. E229 of 2020.
2. Costs would ordinarily follow the event but if I have to award costs against the respondent, the burden will ultimately be borne by the tax payer. I will therefore not make any order on costs.

Orders accordingly.

SIGNED, DATED AND DELIVERED ON 25 SEPTEMBER 2023

NGAAH JAIRUS

JUDGE

