



Republic v Director General Kenya National Highways Authority; Kenya Revenue Authority (Interested Party); SBI International Holdings (Kenya) (Exparte) (Application E038 of 2022) [2023] KEHC 22441 (KLR) (Judicial Review) (25 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E038 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. E374 of 2020; SBI International Holdings (Kenya) versus Kenya National Highways Authority, within 7 days of the judgment and order herein.”

The applicant has also sought for costs of the application.



2. 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.
3. 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. E374 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. 266,827,490.70 as determined in the decision of the Dispute Board of 10th July 2020;
 - b. Costs of the suit on indemnity basis.”
4. On 11 November 2021 the deputy registrar of this Honourable Court issued a certificate of costs for the amount of Kshs. 2,744,193.34 payable to the applicant. Thus the decretal sum together with costs amounted to Kshs. 269,571,684.04.
5. It is deposed that there is no stay of execution against the decree.
6. 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.
7. 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.
8. 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.
9. 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.
10. But he says that the matter is sub judice because there are similar proceedings pending before the Tax Appeals Tribunal, being Tax Appeals Tribunal Miscellaneous Application No. 23 of 2022. Accordingly, the applicant is alleged to have violated section 9(2) (3) and (4) of the *Fair Administrative Action Act* because it has not exhausted the alternative review mechanisms before invoking the jurisdiction of the judicial review court.
11. Further, the respondent has not declined to pay the decretal sum but it has been precluded from paying because on 23 December 2021, it received agency notices from the Kenya Revenue Authority pursuant



- to section 43(2) of the [Tax Procedures Act](#), No. 29 of 2015, demanding funds held by the respondent on behalf of the applicant in settlement of tax arrears which the applicant had failed to remit.
12. According to the notices, the Director-General of the respondent was required to remit the sum of Kshs. 3,686,434,991 to the Kenya Revenue Authority within thirty (30) days from the date of the notices.
 13. The respondent has, however, admitted that it was aware that the applicant contested the agency notices in tax appeals Tribunal Case No. 23 of 2022 and that there was an order, apparently from the Tax Appeals Tribunal, dated 27 January 2022, staying enforcement of the agency notices pending the hearing of the appeal. According to the respondent the effect of staying of the notices was that the respondent could not transmit the funds to the Kenya Revenue Authority. It also meant that the Kenya National Highways Authority could not pay any sums to the applicant owing to the stay orders otherwise the decision of the tax appeals tribunal would be rendered nugatory.
 14. For these reasons, it has been sworn, the Director General of the respondent has been unable to comply with the decree sought to be enforced by the applicant in these proceedings.
 15. 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.
 16. In response to the replying affidavit, the applicant filed a further affidavit on which it exhibited a ruling delivered in the Tax Appeals Tribunal No. 23 of 2022. The ruling was rendered on 14 April 2022 and in its pertinent part, it reads as follows:
 - i. The agency notices dated 23 December 2021 and issued requiring the Kenya National Highways Authority to pay the Respondent the sum of KES 3,686,434,989.49 be and are hereby set aside.”
 17. Despite the ruling by the Tax Appeals Tribunal, the director-general neglected or failed to make the payments or issue written permission for attachment of assets of the Kenya National Highways Authority in settlement of the decrees.
 18. But even after this ruling had been delivered, the respondent did not make good the decrees and pay the applicant.
 19. On 9 June 2022, the interested party issued a preservation order in line with section 43 (2) of the [Tax Procedures Act](#) requiring Kenya National Highways Authority to withhold payment of the monies under the decrees on the basis of an average tax obligation by the applicant of the sum of Kshs. 3,286,434,991.00.
 20. In an application filed by the interested party as High Court Miscellaneous Civil Application No. E457 of 2022, the preservation order of 9 June 2022 was extended to 20 June 2022.
 21. In a bid to avoid payment, the respondent abandoned its earlier stance that he could not pay on the basis of agency notices but that he could now not settle the decrees because of the preservation order.
 22. The applicant proceeded and filed an application dated 6 July 2022, to set aside the preservation order in the suit filed by the interested party. When the applicant’s application came up for directions on 14 July 2022, both the applicant and Kenya Revenue Authority intimated to court that they were out to resolve their dispute amicably with the aim of lifting the preservation order pending the hearing and



determination of the application on the prayers of residual orders in the application by Kenya Revenue Authority dated 7 June 2022 and the applicant's application of 6 July 2022.

23. Subsequently, on 25 July 2022 the applicant and the interested party entered a consent which was adopted as the order of court on 27 July 2022 in the following 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.”

24. The consent order varied the preservation order made on 9 June 2022 and extended on 20 June 2022 restricting it to preservation of Kshs. 2 Billion, which was to be retained by the Kenya National highways authority. The balance of Kshs. 2 Billion was to be paid to the applicant.
25. The consent order was served upon the respondent on 3 August 2022 together with the demand notice demanding payment of Kshs. 801, 384,052.95 and US dollars 5,918,829.55. As at the time of filing this application, the respondent has not settled the decrees hence the instant application.
26. The interested party filed a replying affidavit sworn by Victor Mino who has introduced himself as an officer appointed under and in accordance with section 13 of the *Kenya Revenue Authority Act* cap. 469 and for this reason he was competent to swear the affidavit.
27. Mino has sworn that the dispute between the applicant and the interested party started way back in November 2020. During the audit of the tax due from the applicant the interested party discovered that the applicant had obtained judgement in its favour against the respondent and that payment was due. The interested party also discovered that the applicant had made demand for payment.
28. On 23 December 2021, the interested party issued an additional assessment income tax of Kshs. 3,686,434,989.49 made up of under declaration of income tax for the period between 2016 to the date the affidavit was sworn and VAT for the period 2016 to 2020. These amounts included penalties and interest.
29. The interested party established that the applicant had a foreign account into which the respondent was to make payments instead of principal local account and, therefore, the interested party was apprehensive that should such funds be paid in a foreign account when the audit was going on, the



interested party was not going to realise any taxes that will be found to be due and payable once the audit was complete.

30. The interested party issued agency notices but the applicant challenged those notices in Miscellaneous Application No. 23 of 2023, apparently in the Tax Appeals Tribunal.
31. Based on the audit conducted and tax assessment raised, the interested party, on 9 June 2022 invoked section 43 (2) of the *Tax Procedures Act* and issued preservation of funds orders to the respondent on an account of it held on behalf of the applicant being the sum of Kshs. 3,286,434,991/=. The orders are in force in High Court Miscellaneous Application No. E457 of 2022.
32. There are also proceedings in the tax appeals tribunal being appeal number 888 of 2022. In the circumstances, it has been sworn that it will be unjust and contrary to statutory provisions to demand or direct the respondent to remit all the money is when there is a court order preserving the funds due to the applicant from the respondent.
33. 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 is that the interested party has a claim on the funds due to the applicant from the respondent.
34. 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

2. 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.
3. 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.



35. 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.
36. But on 25 July 2022, the applicant and the interested party reached a 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.”
37. 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.
38. 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. 269,571,684.04 due in High Court Civil Case No. E374 of 2020 between the applicant and the respondent.
39. It must be understood that as much as there is a 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.
40. It has been sworn elsewhere that the respondent has made an application to set aside the consent order. Without appearing to prejudge the outcome of that application, 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.



41. 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.
42. 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.
43. 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.
44. 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.
45. 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.”
46. 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.”

47. 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.)”

48. 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. 269,571,684.04 or as otherwise decreed in the decree dated 8 June 2021, issued on 1st October 2021 in High Court Civil Case No. E374 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.

49. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 25 SEPTEMBER 2023

NGAAH JAIRUS

JUDGE

