



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 518 OF 2017**

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

**AND**

**IN THE MATTER OF MISCELLANOUS CIVIL APPLICATION NO. 375 OF 2014**

**AND**

**IN THE MATTER OF AN ARBITRATION BETWEEN AFRICA PROJECT CO-ORDINATION  
AGENCY LIMITED AND THE GOVERNMENT OF KENYA (MINISTRY OF LOCAL GOVERNMENT)**

**AND**

**IN THE MATTER OF THE ARBITRAL AWARD BY LUCAS A. N. OCHIENG DATED 31<sup>ST</sup> OCTOBER, 2013**

**BETWEEN**

**AFRICA PROJECT CO-ORDINATION AGENCY LIMITED.....APPLICANT**

**VERSUS**

**THE PERMANENT SECRETARY,**

**MINISTRY OF DEVOLUTION AND PLANNING.....RESPONDENT**

**JUDGMENT**

**The Application**

1. The Applicant herein, Africa Project Coordination Agency Limited, is a limited company incorporated in Kenya under the Companies Act. The Respondent is the Permanent Secretary in the Ministry of Devolution and Planning, who is sued by the Applicant as the successor to the Permanent Secretary, Ministry of Local Government. The Applicant has moved this Court by way of a Further Amended Notice of Motion dated 6<sup>th</sup> December 2018 seeking the following orders:

**a) That this Court be pleased to issue orders of Mandamus compelling Mr. Charles Sunkuli, the Principal Secretary in the Respondent Ministry, to honour the Decree of this court issued on 25<sup>th</sup> May 2017 and pay the sum of Kenya Shillings Four Million One Hundred and Seven Thousand and Eighty Seven (Kshs. 4,107,087/=) together with interest thereon at the rate of 18% per annum from the date of judgment until payment.**

**b) That this court be pleased to issue further or such orders as it may deem fit to grant.**

**c) That costs of this application be provided for.**

2. The Applicant relied on a supporting affidavit sworn on 17<sup>th</sup> August 2017 by its director, Florian J. Muli, and a Statement of Facts of even date that were filed in Court on 21<sup>st</sup> August 2017. The crux of the Applicant's case is that it is the beneficiary of an Arbitral Award by one

Lucas A. N. Ochieng pronounced in **In the Matter of Arbitration between Africa Project Co-ordination Agency Limited and the Government of Kenya (Ministry of Local Government)**, in which the Respondent was ordered to pay to it the sum of Kenya Shillings Four Million One Hundred and Seven Thousand and Eighty Seven (Kshs. 4,107,087/=), together with interest thereon at the rate of 18% per annum from the date of judgment until payment.

3. That on 31<sup>st</sup> October 2016 the said award was by consent recognized and adopted as the judgment of this Court, and on 25<sup>th</sup> May 2017, the Applicant served the Respondent with a copy of the Decree therein, and demanded payment of the decretal sum together with interest within fourteen (14) days from the date thereof. However, that the Respondent has failed and/or refused to pay. The Applicant annexed a copy of the Arbitral award dated 31<sup>st</sup> October 2013, and of the decree issued in Nairobi Misc. Application N0. 375 of 2014 on 24<sup>th</sup> May 2014 adopting the said award as a judgment of the court.

4. The Respondent's response is in a replying affidavit and further affidavit sworn on 20<sup>th</sup> November 2018 and 10<sup>th</sup> April 2019 respectively by Kanini Nthiga, a Senior State Counsel in the Office of the Attorney General. It is contended therein that this matter arises from a dispute between the parties in relation to an agreement for Consultancy Services for Digital Mapping and the Preparation of Strategic Urban Development Plan for Garissa and Madogo Towns (2008-2030), signed on 24<sup>th</sup> September, 2008. That the dispute was referred for arbitration before the sole arbitrator appointed with the consent of the parties, the said Lucas A.N. Ochieng.

5. Further, that upon full hearing of the parties, the sole arbitrator published an arbitral award on 31<sup>st</sup> October, 2013 in the following terms:

- a) The prayer for specific performance by the Respondent fails;
- b) The Applicant's claim for Madogo work, for Garissa work, for losses and damages for breach of contract and for value of the project vehicle all fail;
- c) The Respondent's claim for damages for breach of contract fails;
- d) The Respondents to pay the Claimant (within 14 days from the date the award is taken up) Kshs. 3,439,489.00/- (inclusive of VAT) being the increase in contract price already due in accordance with the provisions of the contract;
- e) The Respondents to pay the Claimant's costs reasonably incurred as a result of the extension of time for service of the Respondent's Statement of Defence as agreed by the parties or determined;
- f) The Costs of the Arbitrator were Kshs. 1,189,720.00/- of which Kshs. 667,598.00/- were payable by the Respondent together with simple interest thereon at 18% per annum calculated from the date of the Award until payment.
- g) Neither of the parties was entitled to interest.

6. That the office of the Attorney General was served with the decree of the Court containing the terms of the award by the Applicant's Advocates on 25<sup>th</sup> May 2017, and thereupon forwarded the decree to the Respondent with instructions to pay the decretal sum as per the terms of the decree. That the decretal sum was subsequently received by the Attorney General's office in July 2018, who then wrote to the Applicant's Advocates requesting for its bank account details and a signed discharge voucher, so as to enable remittal of the decretal sum to him. However, that instead of forwarding the requested details, the Applicant's Advocate responded by stating that the decretal sum payable was not the one quoted in the letter, rather that he is entitled to the decretal sum with interest in the sum of Kshs. 7,700,000.00/-. The Respondent annexed copies of the said correspondence exchanged with the Applicant.

7. According to the Respondent, the present application by the Application for orders of payment of the decretal sum together with interest thereon at the rate of 18% per annum from the date of judgment until payment is contrary to the provisions of the law, and is a misguided attempt by the Applicant to review and/or vary the terms of the arbitral award. Further, that the Respondent has already demonstrated that it is ready and willing to pay the decretal sum due and owing to the Applicant, and it is the Applicant who has stood in the way of payment of the same.

8. The Respondent in its further affidavit reiterated that above averments, and stated that upon receipt of the decree it determined that the total sum payable was Kshs. 4,107,087.95/=, which is inclusive of Kshs. 3,439,489/= and Kshs. 667,598/=, with the latter being the refund of the arbitrator's fees paid by the Applicant on behalf of the Respondent. Further that to date, the Applicant has not laid a claim before the Respondent for the payment of monies that it may have paid to the arbitrator as accrued interest on the Respondent's portion of arbitrator's fees of Kshs 667,598/-. In addition, that pursuant to the orders of the Court of 26<sup>th</sup> November 2018, the Respondent has since paid out Kshs 4,107,087.95/= to the Applicant, and the Respondent annexed copies of discharge vouchers duly signed by the Applicant, electronic funds transfer details forms, payment vouchers and a bank statement confirming transfer of the said sum to the Applicant.

### **The Determination**

9. The instant application was canvassed by way of written submissions. The Applicants' Advocate, Mukuria & Company Advocates, filed submissions dated 13<sup>th</sup> March 2019, while Ms. K. Nthigah, a Senior State Counsel in the Attorney General's Chambers filed submissions for the Respondent dated 5<sup>th</sup> April 2019.

10. It is necessary to point out at the outset that the parties in a consent recorded in this Court on 26<sup>th</sup> November 2018 agreed that the undisputed decretal amount of Kshs 4,107,087/95 would be paid to the Applicant. It is also notable that the Applicant did not dispute the Respondent's averments and evidence of payment of the said undisputed amount, which is basically made up of the decretal sum of Kshs.

3,439,489/= and the fees payable by the Respondent of Kshs. 667,598/=. The only outstanding contested issue is whether the Respondent can be compelled to pay the interest demanded by the Applicant on the decretal sum of Kshs. 4,107,087/=:, at the rate of 18% per annum from the date of judgment until payment.

11. Submitting on the claim for interest, the Applicant argued that although the Arbitrator did not award interest on the Arbitral Award, once the Award was adopted as a judgment of this Court, then normal court rules on payment of interest applied to the decretal amount and therefore interest is payable. Therefore, that the period for which the interest is claimed is from the date the Award was adopted as a judgment of the court namely 24<sup>th</sup> May 2017, to the date when payment of the decretal sum was done which in this case was on 26<sup>th</sup> February 2019. The Applicant's Advocate then proceeded to calculate the interest due on the decretal sum which he submitted was Kshs. 739,275.48/=. The Applicant further contended that it has taken the Respondent 6 years to pay the principal sum, and even after the court made a specific order in November 2018, it took the Respondent 3 months to comply.

12. The Respondent on its part relied on the decisions in **Republic vs Attorney General & another Ex-parte Meshack Ochieng (2017) eKLR** and **Arthur Kinuthia Albert vs Permanent Secretary Ministry Of Health (2008) eKLR** to submit that that orders of mandamus can only issue to the Respondent commanding him to do that which he is legally bound to perform, and that the scope of the duty imposed upon the Respondent is defined in the decree that the Applicant seeks to enforce. Further, that a plain reading of the decree does not contain any proviso for interest on the amount payable to the Applicant by the Respondent, save for the arbitrator's fee from the date of the award until payment, and that the Applicant had not made a claim for any such interest paid. Therefore, that this Court has no jurisdiction to order payment of interest on the decretal sum.

13. This Court notes that the Applicant is seeking the remedy of mandamus with respect to payment of interest at the rate of 18% per annum from the date of judgment until payment on the decretal sum of Kshs 4,107,087/=. The terms of the arbitral award as regards payment of the decretal sum, fees and interest, that were adopted as a judgment of the Court by consent of both parties in the decree issued on 24<sup>th</sup> May, 2017, were as follows:

**“... (e) THAT the Respondent shall, within 14 days from the date of this award is taken up, pay to the Claimant Kshs. 3,439,489.90/- (inclusive of VAT) in respect of the part of the increase in contract price already due in accordance with the provisions of the contract.**

**(f) THAT the Respondent shall pay to the Claimant all reasonable costs reasonably incurred by the Claimant in relation to the extension of the time for service of the statement of defence, the Respondent's application dated 18<sup>th</sup> October, 2012 and the adjournment of the hearing on 31<sup>st</sup> July, 2013, the amount of such costs if not agreed to be determined by me on the standard basis (that is with any doubt as to reasonableness being resolved in favor of the paying party); while for all other costs, each party shall bear its own cost.**

**(g) THAT the total amount of recoverable fees and expenses is Kshs. 1,189,720.10/- of which Kshs. 119,496.00/- is in relation to the extension of time for service of the statement of defence, the Respondent's application dated 18<sup>th</sup> October, 2012 and the adjournment of the hearing on 31<sup>st</sup> July, 2013 and Kshs. 25,980.00/- is in respect of interest on delayed payment of initial deposit by the Respondent. The Respondent shall be liable for Kshs. 667,598.05/- while the Claimant shall be liable for Kshs. 522,122.05/-, all together with simple interest thereon at 18% per annum calculated from the date of this Award until payment. If either party has already paid any sum in excess of their liability, the other party shall forthwith reimburse the sum so paid.”**

14. An ordinary interpretation of the terms of the decree are that the amount payable by the Respondent was the decretal sum of Kshs. 3,439,489.90/-, and recoverable fees and expenses of Kshs. 667,598.05/-. It is also evident that the orders of the Court were that simple interest at the rate of 18% per annum would only be payable on the recoverable fees and expenses due from the Respondent of Kshs 667,598.05/-. No interest was ordered to be paid on the decretal sum of Kshs. 3,439,489.90/-. Furthermore, according to the terms of the judgment, the calculation of the actual amount of interest owed on the sum of Kshs 667,598.05/- was to take into account any sums already paid by the parties in this regard. To this extent therefore, the Applicant's demand of interest on the entire decretal sum of Kshs 4,107,087/= at 18% per annum cannot lie as there was no such order made by the Court.

15. It is necessary in this regard to restate this Court's remit when it comes to its judicial review jurisdiction. As was held in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 as follows:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of**

taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

16. It was also emphasized by the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, a reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

17. Applying the above principles to the issue at hand, which is that of the grant of mandamus with respect to interest payable under a decree, I adopt the reasoning by Odunga J. in Republic vs Attorney General & another Ex-parte Meshack Ochieng (supra) wherein the learned Judge explained as follows:

“Whereas this Court appreciates that the ex parte applicant’s claim for the award of interest may not be farfetched, this Court exercising its judicial review jurisdiction in these kind of matters on compels the payment of what is decreed as due and not what ought to have been due since the Court does not deal with merits. Therefore without pinpointing to a specific order that expressly awarded interest to the ex parte applicant after the decree was entered, for this Court to direct the Respondents to pay interest to the ex parte applicant, this Court would in effect be varying the decree, a jurisdiction this Court does not have. If the ex parte applicant feels that interests ought to be paid to him as a result of the delay in settling the sum due to him, he must first seek to have the decree varied to reflect the same before this Court may compel the Respondents to pay.”

18. In addition, the circumstances when the remedy of mandamus can issue was discussed by the Court of Appeal in its decision in Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, (1997) e KLR, wherein it was held 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**, 4<sup>th</sup> 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..... .”

19. Over and above proof of the existence of a legal duty for orders of mandamus to issue, there is also a procedure that is prescribed by law for enforcement of orders against Government entities in civil proceedings. Section 21 of the Government Proceedings Act provides as follows in this regard:

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

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

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall

state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

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

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”

20. Once this procedure is followed, execution proceedings against a government or public authority can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was the holding in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) e KLR** where J. Githua held as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act*) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

21. It is my finding that taking into account the foregoing principles of law and procedures, the outstanding prayer in the instant application as to whether the Respondent can be compelled by an order of mandamus to pay the Applicant any interest payable under the decree issued on 24<sup>th</sup> May 2017 is therefore premature for two reasons. Firstly, the amount of interest has not been ascertained, as calculations on the amount of any interest due from the Respondent on the fees of Kshs 667,598.05/- will have to be calculated by the Deputy Registrar of this Court, after taking into account any payments made as ordered in the said decree. It is also notable that the Applicant did not amend its Notice of Motion after the consent entered herein on 26<sup>th</sup> November 2019 to indicate the disputed amount of interest it was seeking the Respondent to be compelled to pay as it had been directed by this Court, and instead chose to address the amount due in its submissions.

22. Secondly, once the amount if any of such interest due is ascertained, the procedure in section 21 of the Government Proceedings Act will need to be followed, before an order of mandamus can lie as regards payment of the said interest.

23. In the premises, the Applicant’s Further Amended Notice of Motion dated 6<sup>th</sup> December 2018 is struck out with no order as to costs for the foregoing reasons.

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2019

P. NYAMWEYA

JUDGE