**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO. 615 OF 2017**

**IN THE MATTER OF AN APPLICATION BY SCHON NOORANI & JACK AND JILL SUPERMARKET FOR LEAVE TO APPLY FOR AN ORDER OF *MANDAMUS***

**AND**

**IN THE MATTER OF HIGH COURT OF KENYA AT NAIROBI CIVIL APPEAL NO. 667 OF 2000**

**AND**

**IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT, CAP 40, LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY, MINISTRY**

**OF INTERNAL SECURITY.....1ST RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT**

**AND**

**SCHON NOORANI & JACK AND JILL**

**SUPERMARKET LIMITED.....*EX PARTE* APPLICANTS**

**JUDGMENT**

1. Pursuant to the leave of the Court granted on **6th** October 2017, the *ex parte* applicant moved this Court by way of Notice of Motion dated **6th**November 2017 expressed under the provisions of Article **47** of the Constitution, Section **8** of the Law Reform Act[1] and Order **53** Rules **1, 2, 3 & 4** of the Civil Procedure Rules, 2010, seeking :- ***(a)*** *An order of Mandamus directed to the Respondent, namely, the Principal Secretary, Ministry of Internal Security and the Hon. Attorney General, to pay to the applicants the sum of* ***Ksh. 387, 116.29*** *being the decretal amount in Nairobi HCC Appeal No.* ***667*** *of 2000 together with interest at* ***12 %*** *per*

*annum from **20th** June 2011 until payment in full plus costs of this application.*

2. The core grounds relied upon are:- ***(i)** On **29th** January 2007, judgment was passed in Nairobi HCC Appeal No. **667** of 2000 against the ex parte applicants and the Respondents jointly and severally; **(ii)** that the applicants paid the decretal sum of **Ksh. 462,239.75** to the appellant; **(iii)** that the applicants have since then unsuccessfully sought reimbursement from the Respondents for a half of the paid sum; **(vi)** In a ruling delivered on **28th** June 2011, Ang'awa J. ordered the Respondents to pay **50%** of the decretal sum of **Ksh. 462,239.75** together with interests; **(v)** that on **13th** February 2017, the ex parte applicant obtained a Certificate of Order against the Government for a sum of **Ksh. 387,116.29** which certificate was served upon the Respondents; **(vi)** that this Court has powers to grant the orders sought.*

**The Respondents' Grounds of opposition.**

3. The Hon. Attorney General filed grounds of opposition on **24th** January 2018 stating that:- ***(a)** that the ex parte applicant has not demonstrated that they paid the said sum; **(b)** that if at all the applicant is entitled to any amount, then it should be a half of the amount paid; **(c)** that the interest on costs was to be borne by all the six defendants and that there is discrepancy in interests on the amount stated in the statement and the application; **(d)** that the Certificate of Order is unclear and does not specify the period within which the interest was calculated.*

**Issues for determination.**

4. Upon analysing the opposing facts presented by the parties, I find that two issues distil themselves for determination, namely:- ***(a) Whether the Respondents are arguing grounds of appeal as opposed to grounds for opposing a Judicial Review application; (b) Whether the ex parte applicant has established grounds for this Court to issue an order of Mandamus.***

***(a)* Whether the Respondents are arguing grounds of appeal as opposed to grounds for opposing a Judicial Review application.**

5. In opposition to the application, counsel for the Honourable Attorney General filed grounds reproduced above which are:- ***(a)** that the ex parte applicant has not demonstrated that they paid the said sum; **(b)** that if at all the applicant is entitled to any amount, then it should be a half of the amount paid; **(c)** that the interest on costs was to be borne by all the six defendants and that there is discrepancy in interests on the amount stated in the statement and the application; **(d)** that the Certificate of Order is unclear and does not specify the period within which the interest was calculated.*

6. **Miss Nyakora** for the Honourable Attorney General framed and addressed three issues. The first two issues are:- ***(a)** how much should the Respondents reimburse the ex parte applicant, and, **(b)** should the balance owed to the ex parte applicant accrue interest.* On the first issue, she cited section **26 (1)** of the Civil Procedure Act[2] and argued that having fully paid the decretal sum, no interest should be paid since the amount due stopped accruing interest. On the second issue., she argued that where there are joint tortfeasors, each one of them is liable to settle the full liability.[3]

7. On his part, counsel for the *ex parte* applicant argued that the amount payable was determined by Ang'awa J. on **28th** June 2011 and a Certificate of Order against the government was extracted as required under section **21** of the Government Proceedings Act,[4]the only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money decrees against the government.[5]He submitted that the Respondents' objection is premised on the amount payable which was determined by Ang'awa J., hence it is an invitation to this Court to sit as an appellate Court over the said decision which this Court cannot do in exercise of its Judicial Review jurisdiction.[6]

8. It is common ground that that on **28th** June 2011, **Angawa J.** made a determination ordering the Respondents herein to pay **50%** of the decretal sum of **Ksh. 462, 239.75** together with interests thereon within **30** days from the said date. A Certificate of Order against the Government was issued on **13th** February 2017, six years after the determination by Angawa J. The certificate reads "*that the Kenya Government through the respective Ministry, namely the office of the President do pay the **50%** of the decretal sum of Ksh. **Ksh. 462, 239.75** together with interest within **30** days of this order."*

9. Clearly, from the above grounds, the Respondents are challenging the amount payable and interest. Such issues ought to have been raised before Angawa J. or by way of a review or an appeal but **not** in this Judicial Review application. This Court cannot

exercise appellate jurisdiction of a decision rendered by a Court of co-ordinate jurisdiction. Besides, Judicial Review is not an appeal and the law governing Judicial Review jurisdiction is limited in scope and application.

10. There is a long-established and fundamental distinction between an Appeal and Review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

11. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. As stated above, this Court cannot in exercise of its Judicial Review powers purport to Review or upset the decision rendered by Court of co-ordinate jurisdiction. The grounds cited by the Respondents and the submissions advanced by the Respondents counsel are an open invitation to this Court to venture into a merit review of the decision or exercise appellate jurisdiction. I decline the invitation to venture into the forbidden sphere.

***(b) Whether the ex parte applicant has established grounds for this Court to issue an order of Mandamus.***

12. The *ex parte* applicant's Advocate submitted that under section **21 (4)** of the Government Proceedings Act[7] the *ex parte* applicant cannot execute the decree against the Government, hence, the application for *Mandamus*[8] and argued that the application meets the tests for granting the orders sought.[9]

13. **Miss Nyakora** for the Respondents submitted that section **8** of the Law Reform Act[10] provides that the High Court shall not issue any of the orders in the exercise of its civil or criminal jurisdiction and that the order will be issued in any case where the High Court in England is by virtue of the provisions of section **7** of the Administration of Justice (Miscellaneous provisions) Act, 1938, of the United Kingdom empowered to make an order of *Mandamus, Prohibition* or *Certiorari* the High Court shall have power o make like order.

14. It is beyond argument that **Miss Nyakora** has based her arguments on the provisions of Order **53** of the Civil Procedure Rules which replicate the common law principles of Judicial Review enunciated in sections **8** and **9** of the Law Reform Act.[11] The cases cited in support of the said position are also premised on the said provisions. The relevancy of her argument after the promulgation of the Constitution of Kenya, 2010, is in doubt. In fact, as demonstrated below, such an argument cannot stand. I find it surprising that eight years after the promulgation of the Constitution and with numerous pronouncements by our superior Courts emphasising that Judicial Review is now entrenched in the Constitution, practitioners are still invoking the common law principles of Judicial Review.

15. The *ex parte* applicant cited Article **47** of the Constitution in addition to the Civil Procedure Rules. It is important to bear in mind that Article **259** of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.[12]The Constitution of Kenya gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights, Rule of Law etc.[13]

16. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where it was held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[14]*** that "[t]he common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts. The Court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

17. As can be seen, the entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. Parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Court decisions should show strands of the recognition of the Constitution as the basis of Judicial Review.

18. Our courts need to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Our courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution. Judicial Review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a Constitutional principle to safeguard the Constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

19. Judicial Review is available as relief to a claim of violation of the rights and freedoms guaranteed in the constitution.[15] The Constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is no longer whether the function was public or private or by a statutory body, or whether the decision was communicated orally or in writing or whether it's an order or proceedings by a tribunal or public body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article **47**, or the right to natural justice under Article **50**. In this regard, refusal to honour a Court order is an act or conduct that is capable of affecting rights of the ex parte applicant.

20. The test is no longer whether the impugned decision is a judgment, a Court decree, order or proceeding as provided under order **53** of the Civil Procedure Rules, 2010 and sections **8** and **9** of the Law Reform Act[16] but to view the act or decision complained of within the lens of the Constitution and in particular whether it violates the rights of a citizen and the values enshrined in the Constitution. In other words, decisions by those in power must pass the lens of the Constitution.

21. **Miss Nyakora's** argument is premised on the traditional common law principles of Judicial Review. The Kenyan judiciary must guard against the development of a two-tracked system of Judicial Review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of Judicial Review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of Judicial Review as required by the 2010 Constitution.[17] A close examination of decided cases including the cases cited by counsel for the Respondents will evidently review this two-tracked system whereby the courts heavily relied on the common law in either allowing or disallowing Judicial Review orders. My strong view is Judicial Review is now entrenched in our Constitution and this ought to be reflected in the Court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, then the decision in question is subject to Judicial Review and such a decision cannot stand Court scrutiny. It is not by accident that an order of Judicial Review is one of the Remedies the Court can grant under Article **23** of the Constitution.

22. The Supreme Court of Kenya recognized that the power of any Judicial Review is now found in the constitution in the case of *C.C.K. vs Royal Media Services Ltd**[18]**where it* painted the clearest picture of the evolved nature of Judicial Review in Kenya. In that case, the Supreme Court held that the power of Judicial Review in Kenya is found in the Constitution, as opposed to the principle of the possibility of Judicial Review of legislation established in *Marbury vs Madison**[19]*** The Court cited Articles **23(3)(d)** and **165(3)(d))** of the constitution.

23. In view of my above analysis, I decline the invitation by counsel for the Respondents to be guided by the common law principles eight years after Kenya promulgated a transformative and progressive Constitution which deliberately expanded the scope of Judicial Review as opposed to the narrow and rigid Judicial Review tests under the traditional common law jurisdiction which guided our Courts for a long time.

24. The next point is whether the *ex parte* applicant has in the circumstances to this case established grounds to warrant this Court to grant the orders sought.

25. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[20] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[21]

26. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[22]

27. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.

28. In the present case, the complaint arises out of a decree arising from the decision rendered by **Ang'awa** J in Civil Appeal No. **667** of 2000. This Court has had the benefit of reading the said decision and the Certificate of Order against the Government. The Respondents do not dispute the existence of the said decree or order. They do not dispute having been served with the said Certificate. They have raised what I described above as grounds of appeal not grounds in opposition an application for Mandamus.

29. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[23] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[24] The eight factors that must be present for the writ to issue are:-

*(i) There must be a public legal duty to act;*

*(ii) The duty must be owed to the Applicants;*

*(iii) There must be a clear right to the performance of that duty, meaning that:*

a. *The Applicants have satisfied all conditions precedent; and*

*b. There must have been:*

*I. A prior demand for performance;*

*II. A reasonable time to comply with the demand, unless there was outright refusal; and*

*III. An express refusal, or an implied refusal through unreasonable delay;*

(iv*) No other adequate remedy is available to the Applicants;*

*(v) The Order sought must be of some practical value or effect;*

*(vi) There is no equitable bar to the relief sought;*

*(vii) On a balance of convenience, mandamus should lie.*

30. Clearly, there is a public duty on the part of the Respondents to act. They do not deny this. The duty is owed to the *ex parte* applicant. This has not been denied. Instead the Respondents have advanced grounds which are of no help to them in this application. They confused this application with an appeal or an application for Review under the Civil Procedure Rules.

31. The applicant has satisfied all the conditions precedent. For example, they obtained the requisite Certificate of Order as the law demands. The applicants demanded the payment. This is not denied. There is failure to comply despite reasonable notice to perform. In fact the refusal to perform is express and evident. It has not been denied. There is no other adequate remedy available to the Applicants. It is not possible to execute against the Government. The order sought is of practical effect. There is no equitable bar to the relief sought. The Respondents did not even allege there is such a bar. It is also evident that on a balance of convenience, *Mandamus* should lie. There is nothing to show otherwise.

32. On the test of what constitutes a reasonable notice before *Mandamus* can issue, the Certificate of Order against the Government is dated **13th** February 2017. It was served upon the Respondents. There are demand letters dated **15th** June 2010, **16th** March 2017, **19th** April 2017, **8th** June 2017 and **8th** July 2017. No payment was made. The application seeking leave was filed on **6th** October 2017 and the substantive application was filed on **8th** November 2017. There is nothing to show that the Respondent's ever appealed against the decision rendered by Angawa J. I find that there has been reasonable notice to comply and that there has been wilful refusal to comply.

33. The other test is *"an express refusal, or an implied refusal through unreasonable delay*." *First*, as I have concluded above, *"unreasonable delay'* has been established in the present case. *Secondly*, an express refusal or even implied refusal to pay has also been established. *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay. These have been proved in the present case.

34. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has satisfied all the conditions enumerated in the above cited case. It follows that there is a basis at all for this Court to grant the order of *Mandamus.*

35. **Miss Nyakora** argued that Judicial Review orders are discretionary and the Court has the ultimate discretion either to grant or decline.[25] I entirely agree with this submission. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for Judicial Review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, the Respondent's counsel did not draw to the attention of the Court any of the above grounds or any other ground that may warrant this Court to decline exercising its discretion in favour of the *ex parte* applicant nor did I find any such grounds in my analysis of the material before me.

36. In any event the grant of the orders or *Certiorari*, *Mandamus* and *Prohibition* is discretionary and the Court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify or decline the orders sought. In this regard, I am unable to find any grounds to refuse the orders sough nor were any drawn to my attention save the grounds discussed above which went into merits of the order being enforced as opposed to grounds in opposition for a Judicial Review application.

**Final orders.**

37. In view of my determination and findings herein above, the conclusion becomes irresistible that application dated **6th** November 2017 is merited. I allow it and order that:-

*a. An order of **Mandamus** be and is hereby issued directed to the Respondent, namely, the Principal Secretary, Ministry of Internal Security and the Hon. Attorney General, to pay to the applicants the sum of **Ksh. 387, 116.29** being the decretal amount in Nairobi HCC Appeal No. **667** of 2000 together with interest at **12 %** per annum from **20th** June 2011 until payment in full.*

*b. That the Respondents, namely, the Principal Secretary, Ministry of Internal Security and the Hon. Attorney General, to pay to the applicants herein the costs of this application.*

Orders accordingly

**Signed, Dated and Delivered at Nairobi this 11thday of September 2018.**

**JOHN M. MATIVO**

**JUDGE**

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[1] Cap 26, Laws of Kenya.

[2] Cap 21, Laws of Kenya.

[3] Citing *Dubai Electronics vs Total Kenya & 2 Others*, High Court (Milimani Commercial and Admiralty Division) Civil Case No. 870 of 1998 and *Republic vs Permanent Secretary in Charge of Internal Security-Office of the President & Another ex parte Joshua Mutua Paul* {2013}eKLR.

[4] Cap 40, Laws of Kenya.

[5] Counsel cited *Republic vs Attorney General & Another ex parte Ongata Works Limited* {2016} eKLR.

[6] Counsel cited *Arthur Kinuthia Albert vs Permanent Secretary Ministry of Health* {2008} eKLR.

[7] Cap 40 Laws of Kenya.

[8] Counsel cited *Republic vs Attorney General & Another ex parte James Alfred Koroso* {2013} eKLR, and *Republic vs Principal Secretary Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 Others* {2018} eKLR.

[9] Counsel cited *Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997}

eKLR.

[10] Cap 26 Laws of Kenya.

[11] Cap 26, Laws of Kenya.

[12] See *Tinyefunza vs A G of Uganda*, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3.

[13] Article 10 (1) (a)-(e).

[14] *2000 (2) SA 674 (CC) at 33.*

[15] Article 23.

[16] Cap 26, Laws of Kenya.

[17] Professor James Thuo Gathii's has posed the warning in "*The Incomplete Transformation of Judicial Review" quoted in* "The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would be Decided Differently Today"

http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/

[18] *{2014}eKLR*

[19] 5 U.S. 137 (1803).

[20] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[21]W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[22] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[23] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[24] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

[25] Counsel cited *Republic vs Judicial Service Commission ex parte Pareno* {2004] KLR 203 at 219, *Republic vs The Commissioner o Lands & Another ex parte Kithinji Murugu M'agere*, Nairobi High Court Misc. Application No. 395 of 2012.