



Republic v Director of Pensions, National Treasury; Miyogo (Exparte) (Judicial Review Application E119 of 2021) [2023] KEHC 231 (KLR) (Judicial Review) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E119 OF 2021
AK NDUNG’U, J
JANUARY 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PENSIONS, NATIONAL TREASURY RESPONDENT

AND

EUNICE MORAA MIYOGO EXPARTE

RULING

1. By a Notice of Motion application dated 24th September, 2021 and filed under Sections 8 and 9 of the Law Reform Act and Order 53 Rules 3(1) and (3) of the Civil Procedure Rules, 2010, the Ex parte Applicant seeks the following orders:
 1. An Order of Mandamus to compel the Respondent to pay to the Ex Parte Applicant, being her entitlement as a widow and primary dependant of Ayaga Charles Ondima under the Widows & Children’s’ Pension Scheme the following:
 - a. Kshs. 2,540,720 being the lump sum payment due and owing.
 - b. Kshs. 719, 848.00 being the shortfall between the monthly pension due and payable and amount actually received in the Applicants account every month between January 2016 and August 2018.
 - c. Payment of the monthly pension figure Kshs. 31,759 from September 2021 on every succeeding month until the Applicants death.
 2. Costs of this Application.



3. Any other relief this Honourable Court may deem just and expedient to grant.
2. The Application is supported by the grounds on its face, a Statutory Statement dated 20th September, 2021 and a Verifying Affidavit sworn by Eunice Moraa Miyogo on even date.
3. The Ex parte Applicant's case is that she is the widow and Primary Dependant of one Ayaga Charles Ondima who died on 16th December, 2015. The deceased is said to have been working as a teacher under the Teachers Service Commission since 1985 until February 2014 when he was offered an appointment at Kisii University. The applicant argues that the deceased qualified under the Kisii University Superannuation Scheme and that the Teachers Service Commission would also pay for the previous teaching service.
4. The Ex parte Applicant depones that upon the death of her husband and Kisii University writing to the Teachers Service Commission on the said death and requesting it to process its own share of the pension the Teachers Service Commission did the same and forwarded the monies to the Respondent herein as is evidenced in its letter of 17th May, 2018.
5. This culminated into several visits by the Ex parte applicant to the Respondent's office and even a visit to the Huduma Centre where she became aware that she was supposed to be paid a lumpsum of Kshs.2,540,720/= and a monthly payment of Kshs.31,759/= which is Kshs.10,586/= less than what she had been receiving monthly.
6. The Ex parte Applicant argues that she instructed her advocates to send a demand letter to the Teachers Service Commission on 12th April,2021 which letter although acknowledged did not elicit any action. A follow up letter was done on 1st July, 2021 addressed to both the Teachers Service Commission and the Respondent herein. The Respondent is said to have responded alleging that it did not owe the Ex parte Applicant any monies other than the monthly payments.
7. In rebuttal the Respondent through its affidavit sworn on 12th October, 2022 by Michael A. Kagika who swears to be the Secretary/Director of Pensions Department at the National Treasury and Planning contends that as at the time of death of the deceased he was working at the Kisii University College and therefore his death gratuity ought to have been paid by the University as the Pension Act does not provide for payment of death gratuity to an officer whose services are transferred.
8. Further that the deceased Mr. Charles Ondima Ayaga was a contributor to the Widows and Children's Pension Scheme (WCPS) pursuant to which the office processed and paid arrears of Kshs.793,635.00 to his widow, Ms. Eunice Moraa Miyogo in January 2019,through her Cooperative Bank Account. This together with the monthly payments of Kshs.21, 173.00 according to the Respondent finalized the matter.
9. In light of the above, one issue crystallizes for determination and that is whether the Respondent is under a public duty and obligation to pay the amounts claimed by the Ex parte Applicant.
10. The Ex parte applicant in her submissions contends that the Respondent's affidavit does not meet the threshold provided for under the Oaths & Statutory Declaration Act and to further buttress this argument cites the case of *Gideon Sitelu Koncellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR. It is further submitted that the deceased died as a public officer within the meaning of the [Pensions Act](#).
11. The Respondent reiterates its position that the [Pensions Act](#) under Section 13 does not provide for the payment of death gratuity to an officer whose services are transferred.



12. The Court of Appeal while addressing its mind on the scope and efficacy of an order of Mandamus in the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR stated as follows;

“The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury’s Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says: -

‘The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.’

At paragraph 90 headed “the mandate” it is stated:

‘The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.’

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. We can do no better than give examples. The Liquor Licensing Act, Chapter 121 Laws of Kenya, by section 4(1) creates a licensing court for every licensing area and provides that the licensing court, chaired by the District Commissioner of each area, is to consider and determine applications for and the cancellation of liquor licences. Section 8 of the Act provides the manner and procedure to be followed by those who desire to acquire liquor licences. The duty imposed on the licensing court is “to consider and determine applications and the cancellation of licences”- section 4(1)

Now, if a party applies for a licence under section 8 and the licensing court simply refuses or neglects to consider and determine the application such a party would be entitled to come and ask the High Court for a mandamus, and if the High Court is satisfied that the licensing court has simply refused or neglected to consider and determine the “application” the High Court would be entitled to issue an order of mandamus, compelling the licensing court to consider and determine the application as it is bound by the law to do so. The High Court would, in those circumstances, be compelling, through the remedy of mandamus, the licensing court to perform its public duty imposed on it by section 4(1) of the Liquor Licensing Act, and the public duty imposed by that section is the consideration and determination of the application for a licence. The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the licence. The



power to grant or refuse a licence is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a licence. In fact, the Act provides for appeals to the High Court by persons whose licences the licensing court has refused to renew or whose licences have been cancelled.

Another example is to be found in the [Kenya National Examinations Council Act](#) itself. Section 10(1) of that Act provides that:

“The Council shall have, for the furtherance of its objects and purposes, the following powers and duties.

- (a) to conduct such academic, technical and other examinations as it may consider desirable in the public interest;
- (b) to award certificates or diplomas to successful candidates in such examination;
- (c)
- (d)
- (e)

Paragraph (a) above imposes on the Council a general duty to conduct academic, technical and other examinations as it may consider desirable.

It is public knowledge that the council conducts academic examination known as Kenya Certificate of Primary Education, which is the subject of the dispute before us, and the Kenya Certificate of Secondary Education. It is also public knowledge that these examinations are conducted towards the end of each year. If the Council were to refuse to conduct any of these examinations and there were candidates ready and desiring to take the examinations, we have no doubt the High Court would be perfectly entitled to compel it by mandamus to conduct the examinations as its failure to do so would constitute a failure to perform its statutory duty under section 10(a) of the Act. But the section does not specify when or how often the examinations are to be held in any one year and a candidate who is ready to take his examinations at a time when the Council is not conducting any would not be entitled to an order compelling the Council to conduct an examination for him alone. The times and frequency of the examinations are left to the discretion of the Council and it cannot be forced by mandamus to hold an examination at any particular time in the year.

Again, as an incident of conducting the examinations, the Act imposes on the Council an obligation to mark the papers of the papers of the candidates. If the Council refuses or neglects to mark the examinations within a reasonable time, or having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the papers or to declare the results as the case may be. The same goes for awarding diplomas or certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b). But the High Court would not be entitled to order the Council, when carrying out the process of marking the examination papers, to award any particular mark to any particular candidate. That duty or function lies wholly within the province of the Council and no court has any right to interfere. To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that



the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter.”

13. A reading of the above excerpt of the Court of Appeal case clearly shows that this Court in exercising its mandate to issue an Order of Mandamus must be careful not to usurp the Public body’s mandate by directing how the said mandate ought to be exercised.
14. The Pensions Department under the National Treasury is the Department with among other duties the duty to Administer and pay pensions, death gratuities and other retirement benefits to eligible public officers and dependants. There being a statutory mandate imposed upon the said department the mode of performing the duty is in its hands and therefore a mandamus order cannot command the duty in question to be carried out in a specific way.
15. In the instant case before this Court the Ex parte Applicant seeks to have this Court direct the Respondent on how it should exercise its powers in the payment of monies that have accrued owing to the death of her husband. I note from the record that the Respondent has produced evidence of monies paid into the Ex parte Applicant’s bank account a fact which has not been controverted by the Ex parte applicant. I also note that she has also been receiving a monthly pension a fact that she acknowledges.
16. The Ex parte applicant however, argues that the said amounts that have been paid by the Respondent are less than what ought to be paid. To my mind I note that the Ex parte applicant is not challenging the Respondent’s failure to fulfill its duty but the manner in which it is fulfilling the said. This Court cannot in such cases interfere with the manner in which a Public Body undertakes its mandate all it can ensure is that the body performs the duties it is required to perform.
17. It is clear from the rival positions taken by the parties that a dispute exists as to the amounts due and payable to the applicant. The resolution of the dispute calls for evidence from both divides for the court to make a determination of the amounts due and payable. As was held in Republic v Zacharia Kabuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); Johanness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another [2020] eKLR.

“It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disapproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. [9] This position has been up held by our superior courts on numerous occasions. In Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [10] it was held: -

55. ... where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the



Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”(Emphasis supplied)

57. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.
58. The applicants are simply inviting this court to determine contested issues of facts without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. The core dispute as stated above is: - (a) the validity of the nomination process, (b) the validity of elections and its outcome, and; (c) the suitability or otherwise of the candidates who were elected. How can this court determine issues of fact without hearing oral evidence? This case falls totally outside the province of Judicial Review jurisdiction. It is simply a misconceived shortcut designed to obtain orders in an otherwise civil dispute. The validity of the elections is essentially a matter to be resolved by way of evidence, which is the province of a civil court hearing a challenge on the validity of the elections and the subsequent installation of the elected persons. The applicants ought to have filed a civil case as opposed to judicial review proceedings.
59. I am fortified by *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & Another*[11] which held that: -

‘...Where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. It is governed by sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law....” (Emphasis added)

18. From the foregoing, the applicant has failed to achieve the legal threshold for the grant of the judicial review orders sought. I proceed to dismiss the application. In view of the applicant’s circumstances, I direct that each party bears its own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023

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A. K. NDUNG’U

JUDGE

