Republic v Chairperson Rent Restriction Tribunal & another; Onteri (Exparte); Kionga (Interested Party) (Judicial Review Application E188 of 2021) [2023] KEHC 230 (KLR) (Judicial Review) (19 January 2023) (Judgment)

Neutral citation: [2023] KEHC 230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E188 OF 2021

AK NDUNG'U, J

JANUARY 19, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE CHAIRPERSON RENT RESTRICTION TRIBUNAL .... 1ST RESPONDENT

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

AND

JANE NYANGARA ONTERI ..... EXPARTE

AND

REUBEN KIONGA ..... INTERESTED PARTY

JUDGMENT

1. The application before this Court is the *Ex parte* Applicant's Notice of Motion application dated September 29, 2022 which is brought under Order 53 rule 3 of the *Civil Procedure Rules* and the *Law Reform Act*.

2. The application seeks a raft of prayers as follows;

    1. A Declarationis hereby made that the decision and/or orders made and/or issued by the Chairperson of the Rent Restriction Tribunal in Nairobi Tribunal Case No 1741 of 2019 and the proceedings thereof in general are ultra vires, invalid, void and of no effect for the reasons that the 1st Respondent dealt with a matter which is outside the scope of

powers conferred upon it under Section 2(1) of the *Rent Restriction Act* whereupon the Chairperson is restricted to hear and determine matters in relation to dwelling houses whose standard monthly rent does not exceed Kshs 2,500/-; whereas in the said matter the monthly rent payable is Kshs 12,000/-.

2. An order of *certiorariis* hereby issued to remove into the High Court for the purposes of its being quashed the decision and/or orders made and/ or issued by the Chairperson of the Rent Restriction Tribunal in Nairobi Tribunal Case No 1741 of 2019 and the proceedings thereof in general.

3. An Order ofProhibitionis hereby issued restraining the 1st Respondent from hearing and/or determining Nairobi Tribunal Case No 1741 of 2019 (Reuben Kionga —vs- Jane Nyangara Onteri).

4. The Respondents and Interested Party do bear the costs of the proceedings herein jointly and or severally.

5. And that all necessary and consequential directions be given.

3. The application is supported by a Statement dated September 29, 2022 and a Verifying Affidavit of even date sworn by the *Ex parte* Applicant. The grounds upon which the application is based are that the Interested Party herein filed a suit before the Rent Restriction Tribunal which is presided over by the 1st Respondent disclosing that he pays a monthly rent of Kshs 12,000/- exclusive of utilities such as water, electricity and garbage collection bills. According to the *Ex parte* Applicant the said rent is way above the set margin of the standard rent of Kshs 2,500/- within which the 1st Respondent is bestowed with the powers of exercising jurisdiction over as is provided for under the *Rent Restriction Act*, cap. 296, Laws of Kenya.

4. It is the ex parte applicant's case that in rebuttal to this application she raised a Preliminary objection before the 1st Respondent on the issue of jurisdiction and also filed an application to have the suit dismissed as it had been filed before a forum without jurisdiction to hear and determine it. The *Ex parte* applicant alleges that the same is yet to be heard the delay being occasioned by the mysterious instances of the Court file missing from the registry and conveniently resurfacing whenever the Interested Party seeks to file his endless Applications.

5. The 1st Respondent is said to have acknowledged that she was aware that a Notice of Preliminary Objection and the application to have the suit dismissed were filed but she stated that the Tribunal had jurisdiction and directed the *Ex parte* applicant to file a statement on rent payment as the Tribunal would proceed to hear the Interested Party's application and suit on merits.

6. The Interested Party is accused of using the Ex parte orders obtained from the Tribunal to perpetuate further illegalities by tempering with electricity and water meters at the Ex parte Applicant's premises so as to avoid paying for the water and electricity utility bills and even her right to levy for distress, increase rent, terminate the tenancy relationship and/ or evict the Interested Party. He is also accused of refusing to pay rent or vacating the premises despite being issued with a notice terminating the tenancy agreement.

7. The Respondents in opposition to the instant application filed grounds of opposition dated September 9, 2022. The grounds raised include that the application offends the mandatory provision of Order 53 rule 7 of the *Civil Procedure Rules* which provides that the decision sought to be quashed must be attached to enable the court access the same and make a determination.

8. The Respondents also argue that the current application is an appeal disguised as a judicial review application and ought not to be entertained by this Honourable Court. It is also their case that in asking the Respondent to file a statement of rent payment, the 1st Respondent wanted to ascertain rent payable thus confirming the issue of jurisdiction. The Ex parte applicant is also faulted for failing to exhaust the review mechanisms in section 5(1) (m) of the *Rent Restriction Act*

9. The Interested Party also filed two Replying Affidavits sworn on October 13, 2022 by the Interested Party and by Gerald Muchiri who swears to be the advocate who attended this matter at the Rent Restriction Tribunal. Mr Kionga in his affidavit contends that he faithfully paid the agreed rent with only few lapses in 2020 when his transport business slumped down due to government restrictions to movement. Further that the *Ex parte* applicant's allegations that he has been tampering with electricity and/or water meters are false.

10. Learned counsel on the other hand in his affidavit swears that when the issue of jurisdiction came before the Tribunal on November 10, 2021 it observed that the question of what the standard rent for the premises in question had not been ascertained and that there was therefore need to undertake an assessment to establish the same as the law provides that where a premises had not been constructed as at January 1, 1985, it was imperative for an assessment of rent to be done suo motu or on Application.

11. This was the reason for the adjournment of the *Ex parte* Applicant's application challenging the jurisdiction of the Tribunal as Mr. Obed who was representing the *Ex parte* Applicant before the Tribunal sought for time to seek for instructions on the same from his client. The *Ex parte* Applicant is also said to have been directed to file a rent book/records while the Interested party was directed to file evidence of rent payment to avoid prolonging the reference on interlocutory Applications so that the Court could revert to the main reference before it in 2019.

12. The Ex parte Applicant is accused of failing to attend court on the date set for mention on December 7, 2021 when parties were to take directions on their applications and the Preliminary Objection. Learned counsel urged that he explained to the court the necessity of the orders sought in their Application dated September 24, 2021 for the release of business vehicle Registration Number KAQ 423T as M–Pesa records submitted to the Tribunal showed full rent payments and the absence of the *Ex parte* Applicant and their rent records as directed spoke of mischief of increasing auctioneer storage costs and delays on the part of the ex parte applicant.

13. The Tribunal is said to have, upon considering its previous directions and the records presented by the Interested Party, ordered for the release of the vehicle. The Tribunal, is said to have been unaware of these High Court proceedings.

14. I have considered the issues raised hereinabove and this is the view I form of the matter. It is clear that the only ground upon which these proceedings were commenced is that the Respondent had no jurisdiction to entertain the matter before it as the monthly rents in issue exceeded the amount for which the Respondent can invoke its jurisdiction.

15. The Ex parte Applicant reiterates that the Tribunal does not have jurisdiction as the standard rent between himself and the tenant is the agreed sum of Kshs 12,000/=.The case of *Republic v Chairman Rent Restriction Tribunal; Samuel Joel Kibe & Another (Interested Parties) Ex-parte Charles Macharia Mugo* [2019] eKLR has been cited to support this argument.

16. The case of *Republic –vs- Chairman, Rent Restriction Tribunal & 2 Others Ex Parte Agatha Njoki Mwangi* [2015] eKLR has also been cited on this Honourable Court's duty of ensuring the rule of law is upheld.

17. The respondents case primarily is that an applicant cannot approach the court for judicial review orders of certiorari, when the very decision that seeks to be quashed has not been made. Further that an order of prohibition should be granted where there is an abuse of the process of the court, which will have the effect of stopping the prosecution already commenced.

18. The Respondents also urge that the Tribunal in asking parties to file a Statement on Rent payment was so as to facilitate it to determine whether or not it had jurisdiction to determine the matter. It is the respondent's case that this did not happen as the *Ex parte* Applicant filed the instant application.

19. The Interested Party in its submissions submits that the *Rent Restriction Act* under Section 3(1)(a)(iii) has an elaborate procedure of arriving at the standard rent in cases where the premises were constructed way after the base year of 1981 set in the Act and that no assessment for standard rent has been done in the instant case to date. Further that Section 5(1)(a) of the *Act* is explicit that only the Tribunal can declare a "standard rent" after calculating and interrogating the issues raised in the Act.

20. The Ex parte Applicant is also accused of failing to exhaust all remedies available such as the Tribunal reviewing its own decision prior to approaching higher forums for the same and/or other remedies.

21. The jurisdiction of the Rent Restriction Tribunal is found under Section 2 of the *Rent Restriction Act*, which provides as follows:

> " 2. Application
>
> (1) This Act shall apply to all dwelling-houses, other than—
>
> (a) excepted dwelling-houses;
>
> (b) dwelling-house let on service tenancies;
>
> (c) dwelling-houses which have a standard rent exceeding two thousand five hundred shillings per month, furnished or unfurnished.
>
> (2) Where a dwelling-house is let on a composite tenancy each dwelling-house in the composite tenancy shall be treated for the purposes of this Act as though it were let on a separate tenancy.

22. From the above section it is clear that the Tribunal would hear cases when the "standard rent" does not exceed Kshs 2,500/=, Section 3 provides the following definition of "standard rent" as follows: -

> " standard rent" means—
>
> (a) in relation to an unfurnished dwelling-house—
>
> (i) if on the January 1, 1981, it was let unfurnished, the rent at which it was lawfully so let, the landlord paying all outgoings;
>
> (ii) if on the January 1, 1981 it was let furnished, the rent at which it was lawfully so let, less a sum at a monthly rate not exceeding one percent of the value (as determined by the tribunal) of the furniture, excluding any soft furnishings, linen, cutlery, kitchen utensils, glass-ware and crockery, and a sum not exceeding two percent of the value (as determined by the tribunal) of any soft furnishings, linen, cutlery, kitchen utensils, glassware and

crockery, in respect of the furniture which was in the dwelling-house on the January 1, 1981, the landlord paying all outgoings;

(iii) if on the January 1, 1981, it was not let, or not erected, or the tribunal is unable to determine whether or not it was on that date let or erected, a rent to be assessed by the tribunal at a monthly rate of not less than one and one-quarter and not more than one and one-half percent of the cost of construction and the market value of the land, the landlord paying all outgoings;

(b) in relation to a furnished dwelling-house—

(i) if on the January 1, 1981, it was let furnished, the rent at which it was lawfully so let, the landlord paying all outgoings;

(ii) if on the January 1, 1981, it was let unfurnished, the rent at which it was lawfully so let plus a sum at a monthly rate not exceeding one percent of the value (as determined by the tribunal) of the furniture, excluding any soft furnishings, linen, cutlery, kitchen utensils, glassware and crockery, and a sum not exceeding two percent of the value (as determined by the tribunal) of any soft furnishings, linen, cutlery, kitchen utensils, glassware and crockery, in respect of the furniture of the dwelling-house, the landlord paying all outgoings;

(iii) if on the January 1, 1981, it was not let, or not erected, or the tribunal is unable to determine whether or not it was on that date let or erected, the standard rent which would be applicable if it were unfurnished, plus a sum at a monthly rate not exceeding one percent of the value (as determined by the tribunal) of the furniture, excluding any soft furnishings, linen, cutlery, kitchen utensils, glassware and crockery, and a sum not exceeding two percent of the value (as determined by the tribunal) of any soft furnishings, linen, cutlery, kitchen utensils, glassware and crockery, the landlord paying all outgoings;"

23. I have had the advantage of perusing the record of proceedings before the Tribunal and the documents filed in this matter. In his own affidavit sworn on the 17th of October 2019, the Interested Party depones at Paragraph 2 thereof as follows;

> "''That I stays (sic)at the 1st Defendant's house paying monthly rent of Ksh. 15,000 and has (sic) stayed therein from 2014 to date".

This position is reiterated in the grounds in support of the Notice of Motion filed at the Tribunal.

24. From the face of the proceedings and through the Interested Party's averment on oath, it is clear that the agreed rent is way beyond the jurisdiction of the Respondent. Jurisdiction is the authority giving a court or a tribunal power to adjudicate over a dispute. The issue of jurisdiction is one that goes to the root of a case and as such must be determined before a court can take any further action in the matter.

The court in *Republic v Public Procurement Administrative Review Board & another; XRX Technologies Limited (Interested Party); Express Automation Limited Ex Parte* [2020] eKLR, stated as follows;

> "Jurisdiction is donated to a court by either constitution or legislation or both. The Supreme Court in Samuel Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR had this to say on jurisdiction of courts;
>
> > 68. "A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively, in In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

25. As to what is jurisdiction, the Court of Appeal stated in *Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (Consolidated))* [2022] KECA 15 (KLR), on what constitutes jurisdiction in general as follows: -

> 36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:
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> By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".

26. In our instant suit, an argument has been proffered by the Respondent and the Interested Party that the request for statement on rent payment made by the respondent was within its powers to enable assessment of the standard rent payable which would in turn inform the question whether the respondent had pecuniary jurisdiction over the matter. It is also urged that the Applicant has failed to bring forward to this court the impugned decision or orders. This argument in my view is not tenable in the circumstances of this case. In his own averment the Interested Party acknowledges he was paying a rent of Ksh 15000. This fact is readily discernable from the record at the Tribunal. The Tribunal ought to have made enquiries on the issue of jurisdiction and with due diligence should have found that its jurisdiction was ousted.

27. The case of *Republic v Chairman Rent Restriction Tribunal; Samuel Joel Kibe & Another (Interested Parties), Ex Parte Charles Macharia Mugo* [2019]eKLR is spot on and I will quote from the finding in extenso. The court held;

> "I am in agreement with the interested parties that it was the standard rent payable for the suit property that could give the tribunal jurisdiction to entertain the dispute or to reject the same. The applicant took the first opportunity to raise the issue of the tribunal's jurisdiction to entertain the dispute.
>
> I am in agreement with the applicant that once the issue of jurisdiction was raised before the tribunal, the tribunal should have determined its jurisdiction first before giving any order in the matter. The interested parties had contended that the tribunal heard the applicant's objection to its jurisdiction and agreed with the interested parties that it had jurisdiction to entertain the dispute. The interested parties did not place any evidence before the court in support of that contention. A copy of the tribunal's order or decision on the issue of jurisdiction was not placed before the court.
>
> The interested parties put forward a very strong and persuasive argument that rent of Kshs 16,000/- per month that was being paid by the applicant was an agreed rent and not the standard rent for the suit property. They argued that since the standard rent for the suit property had not been determined, the tribunal had jurisdiction to determine the dispute between the parties as it was not known whether the standard rent for the premises was above Kshs 2,500/= or below. The interested parties' argument is novel, however, in my view, it is not tenable for a number of reasons. First, if the standard rent for the suit property was not known, the first application that should have been brought by the interested parties to the tribunal was one seeking a determination of the standard rent for the suit property and it was after the tribunal had determined the standard rent for the suit property that it could proceed to hear the interested parties' application for vacant possession and rent arrears or lay down its tool on account of lack of jurisdiction. Secondly, if indeed the standard rent for the suit property was not known or had not been determined as claimed by the interested parties and the interested parties strongly believed that the standard rent for the premises was Kshs 2,500/= or below, the interested parties had no basis for claiming a monthly rent of Kshs 16,000/= per month from the applicant. The rent for the premises should have been Kshs 2,500/= or below per month until determined otherwise by the tribunal. The interested parties' argument that the tribunal had jurisdiction to entertain the case that they filed before it is in the circumstances self-defeating.
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> In my view, it was incumbent upon the tribunal to determine its jurisdiction before entertaining the dispute. The tribunal had a duty to make enquiries on the standard rent for the suit property. From that enquiry, it would have determined whether the premises

had a standard rent or not. If the premises from its enquiry had not been erected or not let as at 1st August 1981 then, the tribunal should have proceeded to assess the standard rent before entertaining the dispute. In entertaining the dispute without first determining whether it had jurisdiction over the same, the tribunal acted irregularly and unreasonably. It was common ground that the applicant was a tenant of the 1st interested party on the suit property and that the applicant was paying a monthly rent of Kshs 16,000/= to the 1st interested party. It follows therefore that since the applicant was paying a monthly rent of Kshs 16,000/= per month for the suit property, the premises were prima facie outside the jurisdiction of the tribunal. I am of the view that the standard rent for the suit property had to be taken to be Kshs 16,000/= which was being paid by the applicant for the suit property unless it was determined otherwise by the tribunal. In the circumstances, in assuming jurisdiction over the premises whose rent was Kshs 16,000/=, the respondent acted without jurisdiction. It is settled that jurisdiction is everything and without it, a court or tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it conferred by agreement. As was stated in Desai v. Warsama [1967] E.A 351, no court can confer jurisdiction upon itself and where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and the determination are nullities".

Having come to the conclusion that the tribunal had no jurisdiction to entertain the claim that was brought before it by the interested parties, it is my further finding that the proceedings before the tribunal and its orders issued on 21st August, 2017 were all nullities".

28. Having established that the Respondent had no jurisdiction to entertain the matter, it follows then that the proceedings and orders of the Respondent in Rent Restriction Case No 1741 of 2019 are a nullity.

29. So what orders are available to the Ex parte Applicant? The suitability of the orders available to a successful applicant in an application for judicial review were set out by the court of appeal in *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR. The court stated;

> " That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the Council in this case. What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law of England, 4th Edition, Vol 1 at pg 37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition. 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".

30. In our instant case, therefore, prayers 1, 2and 3 of the notice of motion dated September 29, 2022 are available to the applicant and I grant the same as prayed. The respondent and the interested party are to bear the costs of these proceedings. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY, 2023.

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A. K. NDUNG'U

JUDGE