



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 154 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE INDEPENDENT POLICE OVERSIGHT POLICING AUTHORITY

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 23(3)(f)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF EXECUTIVE OFFICER, INDEPENDENT

POLICING OVERSIGHT AUTHORITY.....1ST RESPONDENT

OFFICER COMMANDING STATION (OCS).....2ND RESPONDENT

FATUMA HADI; DCIO LANGATA.....3RD RESPONDENT

EX PARTE :

HARISH KANJI PATEL

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Harish Kanji Patel claims that on or about 12th March 2017, officers from Langata Police Station picked him from Buffalo Bar in Langata, under threat of arrest for a civil debt allegedly owed to a company called Creative Joiners Limited. That the said officers forced the *ex parte* Applicant to sign cheques and a 'commitment', and that it was only upon obliging that he was released. That the said officers instructed him to go home and collect his cheque book, and thereafter meet them at the said Buffalo Bar to hand over the signed cheques. Further, that they denied the *ex parte* Applicant access to legal representation and/or advice. The *ex parte* Applicant further stated that after release, he was contacted sometime later by the Divisional Criminal Investigation Officer (DCIO) of Langata, who is the 3rd Respondent herein, and taken to the County Criminal Investigations Officer (CCIO) at Milimani by police officers, and was once again forced to sign further cheques and electronic transfers in favour of Creative Joiners Limited.

2. The *ex parte* Applicant claims that he subsequently requested the Independent Policing Oversight Authority, which is the 1st Respondent herein, to investigate the circumstances of his case, ascertain the degree of improper use of police powers and/or abuse of office, and take remedial action, but that no response or action was taken. He annexed copies of letters written by his Advocates to the 1st Respondent in this respect. The *ex parte* Applicant thereupon filed the instant judicial review application by way of a Notice of Motion dated 19th April 2018, seeking an order of mandamus directed at the 1st Respondent, namely the Chief Executive Officer of Independent Policing Oversight Authority (IPOA), compelling it to conduct an investigation on the police harassment on the *ex parte* applicant. He also sought that the costs of the application be in the cause.

3. The application was supported by a statutory statement dated 11th April 2018, and the Applicant's verifying affidavit sworn on the same date. The grounds are that the *ex parte* Applicant's rights were infringed due to the harassment he received from the 2nd and 3rd Respondent together with fellow officers, as their actions were in bad faith and beyond their powers. Further, that the 2nd and 3rd Respondents together with fellow officers continued to extort money from the *ex parte* Applicant and his rights continued to be infringed by the officers' unlawful acts of constant harassment.

4. The *ex parte* Applicant's Advocates, Macharia Kahonge Advocates, filed written submissions dated 27th September 2018, wherein the 1st Respondent was faulted for its failure to conduct an investigation on the police harassment. The *ex parte* Applicant cited section 5 of the Independent Policing Oversight Authority Act which sets out the 1st Respondent's objectives, and section 6 of the Act which specifically sets out the 1st Respondent's functions. The *ex parte* Applicant submitted that the 1st Respondent has a public and statutory duty to hold the police accountable to the public in the performance of its functions, in order to give effect to the provisions of Article 244 of the Constitution.

5. According to the *ex parte* Applicant, it is not enough for the 1st Respondent to argue that they acted on his report by writing to the Internal Affairs Unit of the National Police Service to investigate the matter and furnish the authority with a report on its investigations and findings. The *ex parte* Applicant contended that the police force has never been known to impartially investigate itself when complaints are raised against it. It was submitted that the instant application is not premature as the 1st Respondent refused to discharge its statutory duty, yet the *ex parte* Applicant continued to suffer and to have his rights infringed. Reliance was in this respect placed on the decision in **Republic vs The Commissioner of Lands & Another ex parte Kithinji Murugu M'agere (2014) e KLR**, as to the circumstances in which an order of mandamus can issue

The Responses

First Respondent's Case

6. The 1st Respondent case is contained in the Replying Affidavit sworn on 14th August 2018 by Diana Watila, the 1st Respondent's Head of Complaints Department, and in written submissions dated 28th November 2018 filed by its Advocate, Mercy Waiterero. It was averred that in order to meet its objectives as provided under section 5 of the Act, the 1st Respondent is mandated under section 6 of the Independent Policing Oversight Authority Act to *inter alia* investigate any complaints related to disciplinary or criminal offences committed by any member of the National Police Service, whether of its own motion or on receipt of a complaint, and make recommendations to the relevant authorities. That, the said recommendations may include prosecution, compensation, internal disciplinary action or any other appropriate relief as the 1st Respondent may determine.

7. It was further averred that in tandem with its other statutory functions, the 1st Respondent is mandated to monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the National Police Service in response to complaints against the police and keep a record of such complaints. As such, the 1st Respondent has since monitored the progress of the *ex parte* Applicant's complaint, which was forwarded to the Internal Affairs Unit for investigations.

8. The 1st Respondent submitted that the *ex parte* Applicant was accorded due process in accordance with the Independent Policing Oversight Authority Act and the 1st Respondent's internal mechanism. That, the 1st Respondent was of the view that the Internal Affairs Unit of the National Police Service which is established by and empowered under section 87(4)(e) of the National Police Service Act, was better placed to deal with the matter. That it hence instructed the said Unit to investigate the matter and furnish the 1st Respondent with a report on its investigations and findings on or before 31st August 2018, and had annexed a letter written to the said Unit.

9. It was their submission that the said investigations on the *ex parte* Applicant's complaint were still ongoing, thus a finding was yet to be made on the culpability of the concerned police officers, therefore the 1st Respondent is yet to recommend disciplinary and/or other action against the said police officers. In the circumstances, the 1st Respondent submitted that the instant application is premature and ought to be dismissed with costs.

The Second Respondent's Case

10. The 2nd Respondent, who is the Officer Commanding Station (OCS) Langata Police Station, did not make appearance and/or participate in the instant proceedings.

The Third Respondent's Case

11. The 3rd Respondent filed a Replying Affidavit sworn on 12th July 2018, and her Advocates, Ochieng', Onyango, Kibet & Ohaga Advocates, filed written submissions dated 15th October 2018. The third Respondent contends that at all material times she was not the DCIO Langata. She averred that she worked in Langata Division as the Acting DCIO from 21st October 2015 to 13th December 2016, upon which she handed over to the new DCIO, one Mr. Samson Kiptum. That, at the material time, the 3rd Respondent was working at the DCI, Nairobi County Headquarters. It is therefore submitted that an order of mandamus cannot issue against the 3rd Respondent for reasons that she was not stationed at Langata Division, and was therefore not obliged or expected to oversee the conduct of the officers in Langata Police Station. That therefore, the 3rd Respondent is improperly enjoined as a party to this suit.

12. Regarding the *ex parte* Applicant's allegations that the 3rd Respondent went to his house to harass and intimidate him, it was submitted that the allegations are malicious and unfounded, as the *ex parte* Applicant has not adduced firm and credible evidence of the 3rd

Respondent's departures from the law and wanton acts of illegality. It was submitted that in any case, the 3rd Respondent could not be held liable for illegal and/or irrational acts and procedural impropriety for reasons that she was not based in Langata Division at all material times. The decisions in **Hillary Kipruto Bett vs Director of Public Prosecutions & 2 Others (2016) e KLR** and **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] eKLR** were cited for the position that the orders sought of mandamus cannot therefore issue against the 3rd Respondent.

The Determination

13. I have considered the pleadings by the Applicant, and the issue sought is whether the Respondents actions merit the issue of the remedy of mandamus sought by the Applicant. The Court of Appeal discussed the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] eKLR** 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..... .”

14. Applying the above principles to the present case, it is not disputed that the *ex parte* Applicant did make a complaint and request to the 1st Respondent to investigate his treatment by police officers, and he annexed a letter to this effect from his lawyers to the 1st Respondent dated 20th February 2018. The said letter was annexed as Annexure “HKP1” to the *ex parte* Applicant’s verifying affidavit. The 1st Respondent’s asserted that it has acted on the complaint and is awaiting further action from the Internal Affairs Unit of the National Police Service. The 1st Respondent annexed as “Annexure DW1” to its replying affidavit, a letter dated 29th May 2018 it wrote to the said Unit.

15. Under section 6(a) of the Independent Policing Oversight Authority Act, one of the functions of the 1st Respondent is to investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, and to make recommendations to the relevant authorities for appropriate relief. Section 7 of Act in addition grants the 1st Respondent the following powers in the exercise of its functions:

“(1) The Authority shall have all the powers necessary for the execution of its functions under this Act, and without prejudice to the generality of the foregoing, the Authority shall have the power—

(a) to investigate the Service on its own motion or on receipt of complaints from members of the public, and for that purpose, to gather any information it considers necessary by such lawful means as it may deem appropriate, including by—

(i) requisition of reports, records, documents or any information from any source, including from the Police, irrespective of whether that source is located within or outside Kenya and irrespective of whether any other person or body, other than a court of law, has already instituted or completed a similar investigation or similar proceedings;

(ii) entering upon any establishment or premises, including Police premises, on the strength of a warrant, and subject to any relevant law, where the premises are a private home or dwelling;

(iii) seizing and removing any object or thing from any premises, including Police premises, which may be related to the matter under investigation, and in respect of which a receipt shall be given to the owner or person apparently in control of the object or thing;

(iv) interviewing and taking statements under oath or affirmation from any person, group or members of organizations or institutions and, at its discretion, to conduct such interviews in private;

(v) summoning any person to meet with its staff, or to attend any of its sessions or hearings, and to compel the attendance of any person who fails to respond to its summons;

- (vi) administering oaths or affirmations before taking evidence or statements where necessary;
 - (vii) summoning any serving or retired Police officer to appear before it and to produce any document, thing or information that may be considered relevant to the function of the Authority;
 - (viii) ensuring that where necessary, the identities of complainants or witnesses are not disclosed to their detriment;
 - (ix) recommending to the Director of Public Prosecutions the prosecution of any person for any offence;
 - (x) investigating any death or serious injury occurring or suspected of having occurred as a result of police action.
- (b) to take over on-going internal investigations into misconduct or failure to comply with any law if such investigations are inordinately delayed or manifestly unreasonable;
 - (c) where appropriate, to provide relevant information to enable a victim of unlawful police conduct, to institute and conduct civil proceedings for compensation in respect of injuries, damages and loss of income;
 - (d) require the Director of Public Prosecutions to provide it with his response to any recommendation made by the Authority to prosecute any person or body;
 - (e) require the Service to within a specified, reasonable time, provide it with information on issues relating to policy, its implementation and its effectiveness, and its response to any recommendation made to it by the Authority;
 - (f) subject to the approval of a complainant, and only if it is not a serious complaint, reconcile or mediate on any matter within its mandate; and
 - (g) exercise any other power provided for in this Act or any other law which is necessary for the effective performance of its functions.
- (2) The Authority may in the exercise of its powers under this Act, request and receive such assistance from the or any other governmental or international body or person as may in its opinion be necessary in the exercise of its powers.”

16. It was in this regard held in **Padfield vs Minister of Agriculture Fisheries and Food (1968) AC 997** that if a public body has a power to take a particular step which is exercisable upon an application or complaint being made to it, but it fails or refuses to apply its mind whether to exercise its power, then it acts unlawfully. Lord Morris held as follows in the said case as regards a complaint made to the Minister under the provisions of the United Kingdom’s Agricultural Marketing Act of 1958:

“1 think it follows that an Order of Mandamus could only be made against the Minister if it is shown that in some way he acted unlawfully. A court could make an Order if it were shown (a) that the Minister failed or refused to apply his mind to or to consider the question whether to refer a complaint or (b) that he misinterpreted the law or proceeded on an erroneous view of the law or (c) that he based his decision on some wholly extraneous consideration or (d) that he failed to have regard to matters which he should have taken into account.”

17. In the present case, the 1st Respondent upon receipt of the *ex parte* Applicant’s complaint chose not to act but to refer the complaint to a third party, namely the Internal Affairs Unit of the National Police Service, which in its own words “was better placed to handle the complaint” (emphasis mine). There are no express powers given to the 1st Respondent to delegate its functions to the Internal Affairs Unit of the National Police Force, and on the contrary, one of its functions under section 6 (d) of the Independent Policing Oversight Authority Act is to “monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken”. Therefore an implied power to delegate its functions to the Internal Affairs Unit cannot also exist, as the said Unit is one of the subjects of the exercise of the 1st Respondents’ functions and powers.

18. In addition, section 5 of the Act provides for the objectives sought to be achieved by the 1st Respondent as follows:

“The objectives of the Authority shall be to—

- (a) hold the Police accountable to the public in the performance of their functions;
- (b) give effect to the provision of Article 244 of the Constitution that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and
- (c) ensure independent oversight of the handling of complaints by the Service.”

The nature of the 1st Respondents objectives and its functions are therefore essentially quasi-judicial in nature, as they involve investigation and disciplining of the Police Service. These objectives and functions of necessity and in the interests of fairness and justice rules out any implied power to delegate the 1st Respondent’s functions of investigating complaints made to it about police misconduct to the Internal

Affairs Unit of the same Police Service. The 1st Respondent therefore in effect failed to exercise powers given to it, and instead illegally delegated its functions to the Internal Affairs Unit, and also made its decision dependent upon the actions of, and a report being made by the said Internal Affairs Unit. This constituted an impermissible abdication of its decision making power.

19. For the same reasons, no duty or power to investigate the complaints made by the Applicant can be implied upon the 2nd and 3rd Respondents, and the Applicant did not point to any law that requires such action on their part. The 2nd and 3rd Respondents are also part and parcel of the complaint made by the Applicant, and therefore subject to the investigations required to be carried out by the 1st Respondent. To this extent they are non-suited in the present application and the application against them is premature.

20. Lastly, this Court has considered the provisions of section 87(4) of the National Police Act which provides as follows as regards the functions of the Internal Affairs Unit set up under the section:

“(4) The Unit shall investigate misconduct and hear complaints—

(a) from members of the Service or members of the public;

(b) at the direction of a senior officer;

(c) on its own initiative; or

(d) on the direction of the Inspector-General; or

(e) at the request of the Independent Police Oversight Authority.”

It is my view that this section cannot be interpreted as giving powers to the 1st Respondent to delegate any of its functions or powers under the Independent Policing Oversight Authority Act in relation to complaints that are specifically made to it to the Internal Affairs Unit, as no such power of delegation is given to the 1st Respondent under its Parent Act. Section 87(4)(e) of the National Police Act can only therefore be interpreted to mean that the 1st Respondent can make independent requests *suo moto* to the Internal Affairs Unit to investigate misconduct or complaints that has come to its knowledge by any other means, other than by complaints specifically made to it.

21. This Court therefore finds that the 1st Respondent failed to exercise its statutory duty and powers to investigate the Applicant’s complaint for the afore-mentioned reasons, and that that the *ex parte* Applicant’s Notice of Motion dated 19th April 2018 is merited. I accordingly grant the following orders:

a) An order of mandamus directed to the Chief Executive Officer of the Independent Policing Oversight Authority (IPOA), compelling him to conduct an investigation on the complaint made to it by the *ex parte* Applicant in the letter by the *ex parte* Applicant’s Advocates dated 20th February 2018, and to make the appropriate recommendations and inform the *ex parte* Applicant of the said recommendations within 90 days of the date of this Judgment.

b) The 1st Respondent shall meet the costs of the *ex Parte* Applicant’s Notice of Motion dated 19th April 2018.

22. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF APRIL 2019

P. NYAMWEYA

JUDGE