



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO. 312 OF 2017

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW
PROCEEDINGS FOR AN ORDER OF MANDAMUS COMPELLING THE NAIROBI CITY
COUNTY GOVERNMENT TO OPEN ACCESS TO THE GROUND FLOOR OF LR NO.
209/2763 NEW PUMWANI ROAD**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF UNIFIED BUSINESS PERMIT

NO. 1436853 YEAR 2017; (NAIROBI)

AND

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

THE DIRECTOR OF CITY INSPECTORATE.....2ND RESPONDENT

EX PARTE: SIMON MUKURIA KAMAU T/A CITY CLOTHING

JUDGEMENT

Introduction

1. By a Notice of Motion dated 4th July, 2017, the *ex parte* applicant herein, **Simon Mukuria Kamau T/A City Clothing**, seeks the following orders:

1. That an order for Mandamus be issued directed to the Nairobi City County Government and its directorate of City inspectorate compelling them to execute their constitutional and statutory obligations by removing the illegal Hawkers illegally blocking the entrance to the Ex parte applicants licenced business on the Ground Floor of LR No. 209/2763 New Pumwani Road Nairobi.

2. Any other relief the honourable court deem fit and expedient.

3. That the costs of the ex parte application and the entire proceedings be granted to the applicant.

Ex Parte Applicant's Case

2. The applicant's case is that he is a Businessman duly authorized by the 1st respondent to carry on the Business of Retailing clothes on LR No. 209/2763 along New Pumwani Road which business he has stocked with all kinds of apparels for ladies, gentlemen and children valued at approximately Million shillings (3,000,000/=). According to him, on a normal day he can make sales of up to one hundred thousand shillings (100,000/=). He disclosed that both himself and his wife and their four employees all work in the said shop and draw their livelihood solely from this business.

3. The applicant however averred that sometimes in the beginning of the month of June 2017 strangers started invading the veranda and entrance to his shop by erecting illegal structures namely wooden platforms placed on stone/rock sticks and started selling all kinds of merchandise including clothes footwear earrings, watches etc and they have effectively established an open air market at the entrance and entire frontage of his business completely crippling his business by denying entry to his customers and selling exactly the same items stocked inside his shop. Despite having complained about these incidents to the Nairobi County Government inspectorate officers, no action has been taken.

4. The applicant contended that it is the duty of the respondents to ensure that licenced business people within the Jurisdiction of the county Government carry on their Business peacefully and without unlawful interference by illegal traders.

5. Responding to the response by the respondents, he asserted that the grounds of opposition by the respondents are mischievous constituting a mere denial and amount to an abuse of court process as they deliberately set out to mislead the Court. He specifically averred that the Respondent's contention that the applicant has never complained was untrue as he had complained in writing by a letter dated 5th June, 2017.

6. The applicant reiterated that the 1st respondent is under statutory obligations pursuant to section 5 of the **County Government Act of 2012**, Article 183 of the Kenya Constitution 2010 and its own subsidiary legislation or By-Laws to manage the conduct of Business within its Jurisdiction. However, in violation of its own By-Laws the respondent has allowed illegal hawkers to carry on their business within the verandah of the applicants licenced business premises.

7. With respect to the affidavit sworn by the interested parties, it was averred that they have not exhibited any trading licences authorizing them to trade on the veranda and entry of the applicant's business premises or any business premise or any licence whatsoever to carry on business in any part of the city and they are therefore illegal traders and have come to court in a mischievous attempt to have the Court validate or legitimize their illegal activities.

Interested Parties' Case

8. The application was opposed by the interested parties, **Gikomba Posta Open Air Traders**.

9. According to them, their members pay out daily cess to the Nairobi City County of Kshs. 50 and that amounts to Kshs 15,000/= daily from their 300 members as compared to Kshs 9,500/= annually paid by

the applicant.

10. The interested parties averred that **Simon Mukuria Kamau** is not the proprietor of City Clothing. They contended that he is a retired Nairobi City County employee who is just trying to use his influence in City Hall to make money by creating a space for himself and others at the busy Gikomba Market and is now using the courts to legalize his actions because of the political environment in the country. They contended that the owner of the business is known as **Mburu**.

11. The interested parties claimed that the Ex parte applicant used the order granting leave to forcefully evict their members from their trading areas prompting their advocates on record to protest. They disclosed that **Mukuria** despite having come to court has now fenced the entire area and forcefully thrown out their members without waiting for the verdict of the Court.

12. The interested parties asserted that Traders in the Gikomba Open Air Market and those in the shops have co-existed in harmony for years until the shop owner of city clothing came in around June 2017 and if the Court allows itself to be used to disturb the *status quo* then the market called Gikomba might just as well be closed and supermarkets erected therein. To them, the likely event is that the decision of the court would create a precedent for other shop owners to evict all other hawkers in the open market and thousands of hawkers in the market and their dependents will suffer.

13. It was the interested parties' case that there is no statutory law requiring the 1st respondent to remove hawkers from Gikomba Open Air Market and leave shop owners only and therefore the applicant should not have gone to court through judicial review as he is safeguarding his personal interests. They contended that people in this country have freedom to choose where to do business and if you choose establish your business at the heart of Gikomba, you must be prepared to compete with all other traders fairly and not resorting to unfair advantage because of influence.

14. The interested parties lamented that their customers come to referral some from up country and changing location means losing the customers and the income they bring. Gikomba is now fully occupied and over populated and if their members are displaced, they will be rendered jobless.

Determinations

15. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions made.

16. The scope of the judicial review remedy of *Mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** in which the said Court held *inter alia* as follows:

“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 or 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. The order must command no more than the party against whom the application 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...These principles mean that an order of mandamus 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. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully 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 without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

17. Similar position was adopted in Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, *inter alia*, as follows:

“*Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice.”

18. In Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707 it was held:

“A *mandamus* issues to enforce a duty the performance of which is imperative and not optional or discretionary...The order of *mandamus* is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon 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 remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual.”

19. It is therefore clear that a person seeking an order of *mandamus* must satisfy the Court that the action he seeks to compel the respondent to perform is a duty which the respondent is under a duty whether at common law or by statute to perform. Where there is no such a duty or it is not clear to the Court that

such a duty exists the Court would be reluctant to grant such an order.

20. In this case, the applicant's case is that interested parties have invaded his business veranda thus making it impossible for him to meaningfully carry out his business. In support of his case he has relied on section 5 of the **County Government Act of 2012**, Article 183 of the Kenya Constitution 2010 and the Respondent's subsidiary legislation or By-Laws which according to him empowers the Respondent to manage the conduct of business within its Jurisdiction. However, in violation of its own By-Laws the respondent has allowed illegal hawkers to carry on their business within the veranda of the applicants licenced business premises. I have perused the said provisions and nowhere do they oblige the Respondents to remove the interested parties from the area in question.

21. Even if the applicant's case is correct that the Respondent's By-Laws empowers the Respondent to manage the conduct of business within its Jurisdiction, it is not averred that the manner of such management is spelt out in the said Bye-Laws. Accordingly, the discretion on how to manage the conduct of business within the Respondent's jurisdiction can only be interfered with where it is shown that (1) it is being abused; (2) it is being exercised for an improper purpose; (3) the decision-maker is in breach of the duty to act fairly; (4) the decision-maker has failed to exercise statutory discretion reasonably; (5) the decision-maker acts in a manner to frustrate the purpose of the legal instrument donating the discretionary power; (6) the decision-maker fetters the discretion given; (7) the decision-maker fails to exercise discretion; (8) the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

22. Otherwise as was held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others (supra)** 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.

23. In my view to compel the Respondents to remove the interested parties from the entrance to the Ex parte applicant's business when the interested parties themselves contend that they have been licensed by the Respondent to ply their trade thereat would amount to compelling the Respondents to exercise their discretion in a particular manner.

24. However, I agree that where a trader complains that he cannot carry out his business in the manner licensed by the Respondents, the Respondents have a duty to investigate such a complaint and make a decision one way or the other. In this case there is uncontested evidence that the ex parte applicant complained to the Respondents. There is no evidence that the Respondents acted on his complaint.

Order

25. In the premises the order which commends itself to me and which I hereby issue is that the Respondents do consider the ex parte applicant's complaint and make a decision thereon within 30 days from the date of service of this decision.

26. As the applicant has not succeeded in the relief he sought to be granted, there will be no order as to costs.

27. It is so ordered.

Dated at Nairobi this 23rd day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwai for the 1st and 2nd Respondents

Miss Jin for Mr Achila for the interested party

CA Ooko