



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 46 OF 2015

**IN THE MATTER OF: APPLICATION BY KENYA PORTS AUTHORITY FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF MANDAMUS**

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF
MANDAMUS TO COMPEL THE RESPONDENT TO INVESTIGATE THE CONDUCT OF
FOUR POLICE OFFICERS**

AND

**IN THE MATTER OF: SECTION 5, 6, 7, 24 AND 29 OF THE INDEPENDENT POLICING
OVERSIGHT AUTHORITY ACT**

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND THE LAW REFORM ACT

BETWEEN

KENYA PORTS AUTHORITY.....EX PARTE APPLICANT

VERSUS

THE INDEPENDENT POLICING OVERSIGHT AUTHORITY.....RESPONDENT

AND

1. DIRECTOR OF PUBLIC PROSECUTION.....INTERESTED PARTY

2. NATIONAL POLICE SERVICE.....INTERESTED PARTY

RULING

1. Pursuant to leave granted on 21st October, 2015 the ex parte Applicant, the Independent Policing Oversight Authority filed on 23rd October, 2015 a Notice of Motion dated 21st October, 2016 and sought

(a) an order of mandamus to issue compelling the Independent Police Oversight Authority (IPOA), the Respondent, to act on and/or investigate the complaint filed and/or forwarded by the Kenya Airports Authority relating to disciplinary offences committed by four Police Officers, namely Police Constable Aloise Ndile F/No. 66986, Police Constable Gitonga Muchiri F/No. 51111, Police Corporal George Ngumi F/No. 6831 and Police Constable Francis Mwaura F/No. 37735 concerning the said officers' involvement in theft and/or pilferage of container No. PCIU 999862 1X40 STC TYRES at Kenya Ports Authority Inland Container Depot (ICD Embakasi) reported at ICD Embakasi Police Station under Occurrence Book (OB) No. 17/12/7/2013

(b) An order of mandamus do issue compelling the Independent Policy Oversight Authority to forward recommendation to the Internal Affairs Unit to institute disciplinary action against Police Constable Aloise Ndile F/No. 66986, Police Constable Gitonga Muchiri F/No. 51111, Corporal George Nguru F/No. 68531 and Police Constable Francis Mwaura F/No. 37735 concerning the said officers' involvement in theft and or pilferage of Container No. PCIU 999862 1X40 STC TYRES reported under Occurrence Book No. 17/12/7/2013

(c) Costs of the proceedings

(d) Costs of the application be in the motion

2. The Notice of Motion was supported by the Affidavit Verifying the Facts, of Symon Kibira Wahome sworn on 15th October, 2015, and the Statutory Statement filed together with the Chamber Summons for leave to commence judicial review proceedings, all dated 15th October, 2015 and filed on 21st October, 2015.

The Applicant's Case

3. In brief the Applicant's case is that the Respondent, the Independent Policing Oversight Authority, a statutory body established under Section 3 of the Independent Policing Oversight Authority Act, (Cap 88 Laws of Kenya) with the primary objective under Section 5(a) of the Act to hold the Police Service accountable to the public in the performance of their functions, give effect to the provision of Article 244 of the Constitution providing for professionalism and discipline in the force and ensure Independent Oversight Authority of handling of complaints by the Police Service.

4. The Applicant contends that the Respondent in performance of its functions is under a duty to investigate any complaint related to disciplinary or criminal offences committed by any member of the Police Service whether on its own motion or on receipt of a complaint from any other person and make recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief and the Respondent is under a duty to make public the responses received to the recommendations made which includes informing the complainant.

5. The Applicant complains that sometime in July, 2013, tyres were stolen from Container No. PCIU 999862 IX40 STC while at the Kenya Ports Authority Inland Container Depot at Embakasi.

6. The Applicants contend that despite the report of the theft of the tyres to the Police at the ICD Embakasi Police Station by one Toni Omondi, and the report entered in Police Occurrence Book Ref No. 17 of 12th July, 2013 and implicating four Police Officers, and one employee of the Applicant, only the two civilian suspects have been arraigned in court, but the four Police Officers implicated in the theft have not been charged for their involvement in the pilferage of cargo and/or theft.

7. The Applicant contends that the refusal by the Respondent to investigate and take necessary disciplinary action against the offending Police officers, amounts to abuse of office and specifically designed to entrench impunity within the Police Force, and that this is against public policy requiring Police Reforms and therefore contradicts and defeats the express provisions of the Constitution, and the National Police Service Act (Cap 84) and the Penal Code (Cap 63, Laws of Kenya).

8. The Applicant contends that the decision not to investigate the named officers is unreasonable, *ultra vires* the functions of the Respondents and in particularly Section 5 of the Police Service Act, and Article 244 of the Constitution.

9. The Applicants therefore concluded that for the purposes of maintaining reforms in the Police Service, it is imperative that institutions like the Respondent that are critical in ensuring that the reforms take place in the Police Service it is important that the Police Service performs its functions as provided in its establishing statute, and in accordance with the Constitution without fear or favour, and it is therefore necessary that the orders of mandamus do issue compelling the Respondents to initiate investigations and commence disciplinary proceedings against the offending Police officers.

The Respondent's Case

10. The Notice of Motion was opposed by the Respondent through the Replying Affidavit of James Olola, an Advocate of this court, in the employment of the Respondent.

11. While acknowledging that the Respondent received the complaint from the Applicant, the Respondent contends that the Application had been filed prematurely. The Respondent was still awaiting a Report from its Internal Affairs Unit and which report was to be received on or before the 30th November, 2015, but that by the time the Application herein had been filed.

13. The Respondent also acknowledges receiving on 21st May, 2015 a complaint against Police officers stationed at the Kenya Ports Authority Inland Container Depot at Embakasi through a letter dated 7th May, 2015.

14. The Respondent however avers that the complaint was given careful consideration and determined to refer it to the Internal Affairs Unit of the National Police Service for investigation.

15. The Respondent contends that due process was accorded to the Applicant's complaint, and that after careful consideration of the complaint, the Respondent determined that the Internal Affairs Unit of the National Police Service was better placed to deal with the matter, and that the Applicant's Advocates were duly informed to follow up the matter with the said Unit.

16. Though the Internal Affairs Unit was expected to give its report by 30th November, 2015, no such report had been received by that date and according to the Respondent's knowledge, the matter was still under investigation, and that the Respondent was not yet in a position to recommend any disciplinary action against the said Police Officers.

17. The Respondent also contends that the Applicant's action is premature, and that the orders sought by the Applicant would be issued or made in vain. The Respondent therefore urged the court to dismiss the Application with costs.

18. In addition to the pleadings, counsel for respectively, the Applicant and the Respondent filed submissions together with lists of authorities. The Applicant's counsel's submissions dated 14th January, 2016 were filed on 15th January, 2016. Those of the Respondent's counsel dated 8th March, 2016 were filed on 9th March, 2016.

The Issues, Analysis of Submissions and Determination

19. The prerogative order of **mandamus**, like its sister orders of **certiorari** and **prohibition**, now accurately termed judicial review orders because unlike times before, when they were the prerogative of the Crown (King or Queen), they are now issued by the High Court of justice, has long been the means by which the ordinary citizen, Wanjiku, Kadzo, can enforce the performance of public duties by public authorities of all kinds. According to H.W.R. Wade & C.F. Forsyth the authors of Administrative Law, 7th Edition, at page 643 –

“The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds. Like the other prerogative remedies, it is normally granted on application of a private litigant, though it may equally well be used by one public authority against another. The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him. Certiorari and prohibition deal with wrongful action, mandamus deals with wrongful inaction. The prerogative remedies thus together cover the field of governmental powers and duties.”

20. Re-echoing the nature of the remedy of mandamus in **REPUBLIC VS. THE NATIONAL EXAMINATIONS COUNCIL, ex parte Gathenji & others** (Appeal No. 266 of 1996) the Court of Appeal said –

“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.”

21. Ringera J (as he then was) in **REPUBLIC VS. THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA, ex parte Welamondi [2008] 2KLR** said of the order of mandamus –

“On whether or not an order of mandamus could issue to compel the Electoral Commission to perform a duty imposed upon it by the Constitution I am in agreement with the submission by counsel for the applicant that it would be appropriate in the circumstances. The authorities cited show that mandamus is the appropriate remedy for compelling a person to perform a duty imposed by statute which duty he has refused to perform to the detriment of the applicant.[emphasis added]”

22. In this regard, the facts and decision in the English case of **PADFIELD & OTHERS VS. MINISTER OF AGRICULTURE, FISHERIES AND FOOD & OTHERS [1968] 1ALL ER 694**, are instructive.

23. In that case the milk producers sought judicial review of the minister’s refusal to exercise his powers to direct an investigative committee to be set up to examine the complaints by milk producers. The matter was litigated upto the House of Lords (now the Supreme Court of England and Wales). The House of Lords found that the refusal to establish an investigative committee, frustrated the policy of the relevant statute, and ordered the reconsideration of the matter by the Minister. The court issued an order of mandamus directing the Minister to set up the investigative committee to examine the complaint by the milk producers.

24. I have already given the background to the Application. On 12th July, 2013, the ex parte Applicant reported a theft that occurred at the Applicant’s Inland Container Depot at Embakasi to ICD Embakasi Police Station.

25. In the ensuing investigations and interrogation, the Clearing and Forwarding Agent, one Nobert Otieno, admitted having stolen tyres from a container and implicated one staff member of the ex parte Applicant, one Josiah C. Ong’ong’o and four Police Officers, namely –

- (1) No. 66986, Police Constable Aloise Ndile;
- (2) No. 51111, Police Constable Gitonga Muchiri;
- (3) No. 68531, Corporal George Nguru;
- (4) No. 37735, Police Constable Francis Mwaura

all of whom were stationed at the ex parte Applicant’s Embakasi Inland Container Depot.

26. The ex parte Applicant’s contention is that whereas the Clearing and Forwarding Agent, Nobert

Otieno, and ex parte Applicant's staffer, Joseck C. Ong'ong'o were promptly arraigned in court and prosecuted, the four implicated Police Officers were not charged for their involvement in the pilferage of the cargo and/or theft.

27. The ex parte Applicant also complains that despite its complaint to the Respondent by letter dated 18th October, 2013, the Respondent has not informed the ex parte Applicant of the action taken against those officers cited to have been involved and therefore accomplices in the theft of the tyres.

28. In response to these complaints and concerns of the ex parte Applicant, the Respondent contends through the Affidavit of James Olola, the Respondent's counsel, that upon receipt of the complaint, the Respondent referred it to the **Internal Affairs Unit** of the National Police Service, a unit established under the National Police Service Act, and whose main function is to receive and investigate complaints against the Police, to promote uniform standards of discipline and good order in the National Police Service, and to keep a record of the facts of any complaint or investigation referred to it.

29. It is one of the functions of the Internal Affairs Unit, under Section 87(4) of the National Police Service Act to investigate any misconduct and hear complaints at the request of the Police Oversight Authority (the Respondent herein) or any other body, organization and to impose the various penalties provided under Section 89 of the Act always depending upon the findings following its investigations.

30. Though the Internal Affairs Unit was expected to give its report by 30th November, 2015, no such report had been received by the ex parte Applicant by that date, and to the best knowledge of the Respondent's counsel, the matter was still under investigation, and that the Respondent is not yet in a position to recommend any disciplinary action against the said Police Officers.

Determination

31. I have considered the respective arguments for and against the Application. There is one issue for determination whether an order of mandamus should issue. Before determining that main issue, I set out in the next passages of this Ruling, the duties and/or functions of the Respondent under its establishing statutes, and consider whether in light of those statutory duties and obligations it has carried them out in response to the ex parte Applicant's complaint of 12th July, 2013.

32. Section 3 of the Oversight Authority Act, (Chapter 88, Laws of Kenya) establishes the Independent Policing Oversight Authority. The Authority's objectives are set out in Section 5 of the Act,

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

33. In addition, Section 6 of the Act sets out the Respondent's functions but the function most germane to this Ruling is Section 6(a) –

- (a) to investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion, or on receipt of a complaint and make recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations.”**

34. And, Section 7 of the Act grants the Respondent powers to **inter alia** –

“(1) (a) ...

(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-e)

(f) subject to the approval of the complainant, and only if it is not a serious complaint, reconcile or mediate on any matter within its mandate.

(2) the authority may in the exercise of its powers under this Act, request and receive such assistance from the Police Service or any other governmental or international body or person as it may in its opinion be necessary in the exercise of its powers.”

35. It is clear from Section 6(a) that the core function of the Respondent is to investigate complaints against members of the Police Service. Though it has power to delegate that function under Section 7(2) of the Act, such delegation is for purposes of investigation. The Respondent remains primarily responsible for the product of such investigation.

36. The duties and functions conferred upon the Respondent under respectively Sections 6 and 7 are in mandatory terms. The Respondent is bound to investigate complaints such as the one lodged by the ex parte Applicant. Failure to exercise its mandate and power is clear breach of the provisions of not only Sections 6 and 7 aforesaid, but also Sections 24 of its Statute which require the Respondent to inform a complainant of the outcome of investigations into any complaint.

37. Failure to carry out a duty or function imposed by statute has been a subject of many judicial pronouncements. I will refer to only a few pertinent ones in this Ruling.

38. In **REPUBLIC VS. CHAIRMAN, ELECTORAL COMMISSION OF KENYA, ex parte Welamondi** the court held **inter alia** –

“Mandamus looks to the present situation and aims at enforcing a duty which has not been done, unlike certiorari, mandamus does not quash that which has been done.

Mandamus is the appropriate remedy for compelling a person to perform a duty imposed by statute which he has refused to perform. A fortiori is the appropriate remedy to compel the performance of a constitutional duty.”

39. The nearly 70 year old English case of **ASSOCIATED PROVINCIAL PICTURE HOUSE VS. WEDNESBURY CORPORATION [1947] 1 ALL ER 498**, gave rise to the principle that some decisions are *“so absurd that no sensible person, body or authority could ever dream that it lay within their powers or authority.”* Such decisions are taken when such body charged with certain duty fails to properly direct its mind to the law by considering matters which is not bound to consider and taking into consideration irrelevant matters.

40. The Wednesbury principle was modified by the House of Lords decision in **COUNCIL OF CIVIL SERVICE UNION VS. MINISTER FOR THE CIVIL SERVICE [1984] 3ALL ER 935**, where Lord Diplock restated the principle as follows –

“A decision which is so outrageous in the defiance of logic or accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it.”

41. Nyamu J (as he then was) provided an answer as to what would amount to such a decision. In **REPUBLIC VS. JUDICIAL SERVICE COMMISSION, ex parte Pareno (supra)** the learned Judge held **inter alia** –

“Under the Wednesbury principle decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial

review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably would have reached that decision.”

42. If that be the position of the law and authorities, what are we dealing with in this Application? We are dealing with the Respondent, a civilian oversight body mandated under its constitutive statute to give effect to Article 244 of the Constitution which requires the Police Service to **inter alia** –

- (1) strive to the highest standards of professionalism and discipline among its members.
- (2) prevent corruption and practice transparency and accountability.
- (3) foster and promote relationships with the broader society.

43. The complaint herein was first made by a letter dated 1st October, 2013, followed by letter dated 7th May, 2015, although the events complained of took place nearly two years earlier, 12th July, 2013. The complaint was acknowledged by the Respondent per its letter of 21st May, 2015. The Respondent referred the complaint to the Director, Internal Affairs Unit, National Police Service Jogoo House, per the Respondent’s letter dated 30th September, 2015. As at 30th November, 2015, (when investigations were allegedly to be completed), no response to the complaint had been received from the Internal Affairs Unit. Feeling frustrated the ex parte Applicant filed these proceedings herein on 21st October, 2015, nearly some 2 ½ years following the initial complaint. The limitation of 6 months for institution of judicial review order of certiorari under Order 53 rule 2 of the Civil Procedure Rules does not apply to the judicial review order of mandamus.

44. There is no doubt in my mind that the Respondent has absconded its primary duty to investigate any complaint related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint and to make recommendations to the relevant authorities or to take over on-going internal investigations into misconduct or failure to comply with any law or such investigations are inordinately delayed or manifestly unreasonable.

45. Besides under Section 7(2) of its Act, the Respondent has authority to request and receive assistance from the National Police Service or any other governmental or international body or person as may in its opinion be necessary in exercise of its powers.

46. In the current case, it is not merely a case of misconduct, it is a complaint related to disciplinary or criminal offences for which the Police Internal Affairs investigation on the four officers seem to be saying – **“Upelelezi bado unaendelea, upelelezi bado unaendelea” “upelelezi bado unaendelea”** – as President Magufuli of Tanzania would put it.

47. In my humble opinion, that is a case of not merely bias, but also dereliction of duty on the part of the Respondent. The Respondent has a mandate under Section 7(1)(b) to take over on-going internal investigations into misconduct or failure to comply with the law if such investigations are inordinately delayed and make recommendations including for prosecutions.

48. It is not a little strange that the Respondent would see the prosecution of the Clearing and Forwarding Agent, and one staffer of the complainant, ex parte Applicant, but do not see the nexus in the commission of the offence between the four Police Officers and the accused Clearing and Forwarding Agent, and the Applicant’s staffer. There is the letter from Senior Principal Prosecution Counsel dated 27th January, 2014 recommending the prosecution of the two and not the officers who are implicated allegedly because the only evidence against them is that of the two civilian accomplices. But be that as it may, the mandate of the Respondent is not only to recommend prosecution, but also compensation, or internal disciplinary action but also any other appropriate relief, and in addition make public those recommendations.

49. I think the Respondent has neglected its duty by putting a blind eye to the never ending investigations

by the Internal Affairs Unit of the Kenya Police Service. It is no answer to the ex parte Applicant's complaint that we have referred the complaint to the Internal Affairs Unit for investigations. That sounds like asking a game poacher go investigate itself. What Section 6(a) of the Act clearly requires the Respondent to do is to carry out investigations into the complaint. How it does so is a matter of its internal arrangements. What a complainant expects and the law requires is an answer to its complaints – recommendation for prosecution, compensation or disciplinary action and publication of results, and if not, the reasons for deciding otherwise. No such reasons have been offered by the Respondent. This calls for the remedy of mandamus for wrongful inaction.

50. There shall therefore issue an order of mandamus directed at the Respondent to carry out investigations in terms of its mandate under Section 6(1)(a) and Section 7(1)(a) and (b) of the Independent Police Oversight Authority Act, (Cap 88, Laws of Kenya).

51. As this is purely litigation in the public interest, each party will bear its own costs.

52. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 28th day of April, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Wachiru for Applicant

Maina for Respondents

Mr. S. Kaunda Court Assistant