



**REPUBLIC OF KENYA**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 339 OF 2015**

**IN THE MATTER OF AN APPLICATION BY KELLEN WANJERI KIMANI  
FOR AN ORDER OF MANDAMUS PURSUANT TO LEAVE GRANTED ON 14/12/2015**

**IN THE MATTER OF ORDER 53R 3 (1)**

**KELLEN WANJERI KIMANI.....APPLICANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY DOD.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. By an amended Notice of Motion dated 1<sup>st</sup> March, 2016, the *ex parte* applicant herein, **Kellen Wanjeri Kimani**, seeks the following orders:
  - a. **This honourable court be pleased to order the immediate release of all the benefits and emoluments which accrue to the estate of the deceased Peter Chege Kimani to the applicant.**
  - b. **This honourable court be pleased to order an account to be taken and the amount certified to be due to the applicant be paid to her within a certified time.**
  - c. **This application be consolidated with the one dated 15/12/2015.**

**Applicant's Case**

2. According to the applicant, who claims to be the administrator of the estate of **Peter Chege Kimani** (hereinafter referred to as "the deceased") of Kenya Defence Forces (KDF) Garissa base, before she was appointed administrator, there was a protracted HCC No. 180 of 2015 between herself and the KDF plus one **Beth Wangari Githinji** who through a fake marriage certificate was

- claiming the estate of the deceased. To the applicant the said marriage certificate was introduced into the file by the said **Beth Wangari** and the KDF in order to defraud the KDF and the insurance company of the benefits of the deceased.
3. Upon carrying out a search, the applicant averred that she discovered that no such marriage certificate had been registered and she reported the matter to the CID who upon investigations confirmed that no such wedding took place. Following various Court battles, the Court issued orders for the preservation of the estate and forbid e said **Beth** from accessing the money and eventually directed the applicant to file a succession cause which the applicant did leading to the grant of letters of administration.
  4. The said letters, the applicant averred were served on KDF headquarters but thereafter no communication was received therefrom. The applicant however learnt that KDF was in the process of sending the money to the Public Trustee in disobedience of the directions in the letters of administration. According to the applicant she had incurred over Kshs 20,000,000.00 in legal fees as a result of the respondent's actions.
  5. The applicant averred that on 5<sup>th</sup> February, 2016 received a demand notice for Kshs 2,715,505 from Unaitas Sacco Society Limited which loan she had guaranteed her son with 6 parcels of land. She then applied to the Family Division of this Court to confirm the grant before the expiration of 6 months in order to enable her get the deceased's benefits and clear the loan which application was allowed and the grant confirmed.
  6. The applicant therefore sought that an order be issued compelling the release to her of the deceased's benefits from his employer and from the insurance company plus any other emoluments or pension or any other monthly payments or salary arrears to enable her clear the said loan and take care of the estate. The applicant then proceeded to state in a rather incomprehensible terms that due to the support that the respondents give to **Beth Wangari** who they allege is the deceased's wife, she would also like them to immediately release the deceased's accounts to enable her calculate the exact amount due to her late son.

#### Respondents' Case

7. In response to the application, the Respondent averred that the Kenya Defence Forces requires personnel to submit marriage certificates in proof of marriages before the same is published in Unit Part II Orders and then entered in personal records. It averred that it is the deceased who presented the marriage certificate to **Beth Wangari** to his Unit Nairobi Regional Workshop in 2011 and the same was published vide Part II orders Serial No. 03/11 prior to being entered into his personal records.
8. In the Respondent's view, the grant issued to the applicant does not empower her to sue for the terminal benefits of the deceased nor constitute her as a personal representative for purposes of section 298(2) of the *Kenya Defence Forces Act* which requires that the sums then due to the estate of the deceased who died intestate be forwarded to the Public Trustee or a personal representative.

#### Determinations

9. Having considered the application, the affidavits both in support of and in opposition to the application, this is the view I form of the matter. The jurisdiction of the Court with respect to grant of judicial review orders of mandamus which are the orders sought herein was restated in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** where the Court of Appeal expressed itself 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* compels 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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

10. In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 Goudie, J eloquently, in my view, expressed himself, *inter alia*, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. 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.”

11. I have reproduced the aforesaid decisions in order to show the circumstances under which the Court exercises its supervisory or judicial review jurisdiction in granting an order of *mandamus*. What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due. In matters where the applicant claims that the Respondent ought to be compelled to pay a certain amount of money it does not suffice to simply aver that the Respondent is under an obligation to settle its liability to the Applicant. The Applicant must go a step further and prove that the sum claimed is actually due. Where therefore liability is admitted or proved, the next stage is to prove the actual quantum payable and where the said sum is yet to be determined an order of mandamus cannot for forth for payment of the said sum.

12. In other words where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore where there is a genuine dispute as to the exact sums payable, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. Whereas the Court may compel the performance of the general duty where such duty exists, it will however not compel its performance in a particular manner for example by compelling the respondent to pay a particular

- amount unless that amount has been ascertained.
13. In this case the only document exhibited by the applicant to show entitlement to the sum in issue is a copy of the Limited Grant of Letters of Administration *Ad Coligenda Bona*. It is expressed therein that the purpose of the said grant is for collecting protecting and accounting for the deceased estate. In other words the said grant does not entitle the applicant to distribute the estate.
  14. The applicant, from the affidavit, however seems to require the said money for the purposes of meeting the aforesaid obligation. It ought to be appreciated that the holder of the letters of administration is in the position of a trustee with respect to the beneficiaries of the estate. He does not necessarily become a beneficiary by the mere fact that he holds the said letters. Where it becomes necessary for him or her to disburse some of the funds belonging to the estate it is my view that he or she ought to obtain an order from the Court from which he or she obtained letters of administration. Otherwise, he must proceed to seek for and obtain a confirmation of the letters of administration. Although the applicant contended that the said letters were confirmed, there is no such evidence on record.
  15. In his further affidavit, the applicant herein clarified that her only interest is to ascertain the sum due to the estate and not to distribute the same. As an administrator, it is my view that the applicant is entitled to that information.
  16. Therefore whereas I decline to direct the respondent to release the said sum to the applicant, I hereby direct the Kenya Defence Force to furnish the applicant with the information on the total sum due to the Estate of the deceased from the Kenya Defence Force within 30 days from the date of this decision.
  17. I note that this application contrary to the procedure in judicial review applications was not brought in the name of the Republic. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

**“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**

**“REPUBLIC .....APPLICANT**

**V**

**THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT**

**EX PARTE**

**JOTHAM MULATI WELAMONDI”**

18. In addition as the order issued herein is not exactly the order which was sought by the applicant, there will be no order as to costs.

19. Orders accordingly.

**Dated at Nairobi this 8<sup>th</sup> day of August, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Macharia for the Applicant**

**Miss Maina for Miss Chilaka for the Respondents**

**Cc Mwangi**