



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT MISC. CIVIL CAUSE NO. (JR) 390 OF 2015

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

AND

GOVERNOR, CENTRAL BANK OF KENYA.....INTERESTED PARTY

EX PARTE: REUBEN NGILA KITONYI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 24th January, 2016, the *ex parte* applicant herein, **Reuben Ngila Kitonyi**, seeks the following orders:

1. An order of mandamus directed to the director of public prosecution to give the applicant, Reuben Ngila Kitonyi, certified copies of the result of investigation on Criminal Case No. 2881/1996 implicating the applicant in the criminal or categorical statement to the applicant, and to the Central Bank of Kenya, that there was no Criminal Act of the applicant Reuben Ngila Kitonyi and that if that was the cause for the discharge from his office at the Central Bank of Kenya, then he should be restored without loss of benefits.

Applicant's Case

2. I must say that the applicant's case from the affidavits filed herein is very difficult to understand as the affidavits filed are totally undecipherable. I however will attempt to make the best out of them and the material filed in this matter.

3. It would seem that the applicant was an accused person in Nairobi Chief Magistrate's Court Criminal Case No. 2881 of 1996. However the said case was terminated by way of withdrawal under section 87A pending further investigations but no fresh charges were brought subsequently. It would seem that the interested party herein was somehow connected to the said case though its connection has not come out clearly from the averments by the applicant.

4. According to the said affidavits the applicant's numerous attempts to secure information regarding the result of subject investigations from the Respondent failed to yield any fruits. In the applicant's view, though the Director of Public Prosecution was expected to liaise with the police investigating team, he

had however been kept in limbo.

5. It was however his view that the continued silence on the part of the respondent as to the outcome of the said investigations continued to haunt him unless this Court issues the orders sought herein to enable him clear his name.

The Respondent's Case

6. The application was opposed by the Respondent according to whom, police records have a duration for which they are kept and after 10 years they are normally destroyed in accordance with the Police Standing Orders.

7. It was therefore contended that this makes it impossible for the Respondent to trace the records being sought by the applicant hence the same cannot be supplied as sought.

Interested Party's Case

8. The interested party filed the following grounds of opposition:

- 1. That the Governor, Central Bank of Kenya has no capacity to be sued in his capacity under the provisions of the Central Bank of Kenya Act.**
- 2. That the notice of motion application does not disclose any cause of action against the governor, Central Bank of Kenya.**
- 3. That the second limb of the applicant's prayer that "...and that if that was the cause for the discharge from his office at central Bank of Kenya; then he should be restored without loss of benefits" us a mask, cloak sham and veil for a backdoor claim for reinstatement which this court does not have jurisdiction to grant.**
- 4. That the applicant's services with the Central Bank of Kenya were terminated on 26th September 1996 after an elaborate disciplinary process carried out in accordance with the Bank's Staff Rules, Regulations and Policies following which the applicant was found guilty of gross misconduct contrary to the Staff Rules, Regulations and Policies.**
- 5. That Criminal Case No. 2881 of 1996 was not the cause of termination of the applicant's employments.**
- 6. That the disciplinary hearing and termination under the bank's Staff Rules, Regulations and Policies is a separate process not underpinned by the criminal process.**
- 7. That the applicant having been dismissed from employment on 26/9/1996, his claim for reinstatement has been caught up by the Limitation of Actions Act hence time barred and this court has no jurisdiction to hear the same.**
- 8. That the application as against the governor, Central Bank of Kenya is otherwise frivolous, vexatious and an abuse of the process of this honourable court and the same should be struck out with costs.**

Applicant's response to grounds

9. To the aforesaid grounds the applicant filed a rejoinder in which he contended as follows:

- 1. What has been raised as grounds of opposition cannot be used to prohibit categorical statement required by the applicant, which are in any case specific to the criminal proceedings. They can only be used, separately, after the categorical statement required have**

been given and in any case, the party has not filed the proceedings of the purported disciplinary matter against the applicant, and the Central Bank's decision over it (the disciplinary matter).

2. That even if there were disciplinary proceedings against the applicant, the party and the respondent should clearly understand that, that cannot be used against the categorical statement required by the applicant in these proceedings for the criminal matter. They can only be raised in such proceedings in which the Governor, Central Bank of Kenya is the respondent, or a respondent. But in this application, they are only parties, to know the necessary issues, and that, the issue is specifically concerned with the Criminal Case No. 2881 of 1996, so that once this issue is out of the way, they will have to answer for restitution, and any other issue raised in the alleged disciplinary issues. But for now, it is that criminal case that is the issue, and the applicant did not make any specific application for the governor of the Central Bank of Kenya over the purported disciplinary matter. If the applicant did that application in these proceedings, it could only bring confusion. That application, on any other proceedings with the Central Bank of Kenya, will be taken only if necessary and only after this case is finalized; and indeed, the applicant expects finalization by this court in the next appearance as what has been filed by the respondent and the party do not amount to opposition to the application.

Determinations

10. Having considered the application, the affidavit both in support of the application and the submissions filed by the applicant, this is the view I form of the matter.

11. First and foremost, it is important to consider the circumstances under which judicial review order of mandamus do issue. The scope of the an order 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 (CAK) [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* 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.”

12. *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. See **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543.**

13. In this case the applicant has not disclosed with some measure of clarity the legal instrument which imposes a duty on the respondent to disclose the results of the investigation assuming that any such investigations were actually undertaken subsequent to the termination of the earlier proceedings.

14. In my view where a party seeks orders compelling an authority to undertake certain action, the burden rests upon the applicant to prove that the particular authority is actually in possession of the information sought. In this case there is no material on the basis of which this Court can find that there were in fact fresh investigations undertaken after the termination of the criminal proceedings and their results. This Court cannot be expected to grant orders compelling the furnishing of information unless the applicant shows that such information exists and is in possession of the Respondent as to do so would amount to granting orders based on speculation. The applicant has alluded to Article 35 of the Constitution in support of his application. That provision was the subject of the decision of this Court in **Njuguna S. Ndung'u vs. Ethic & Anti-Corruption Commission [EACC & 3 others [2014]** in which the Court it expressed itself *inter alia* as follows:

“... before the Court can order that the information be furnished, it is my view that the applicant ought to adduce evidence showing that the information sought by the applicant is in possession of the Respondent. In *Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others case* (supra), Mumbi, J held that “in order to enforce this right, a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed; the citizen must go further and show that the information sought is required for the exercise or protection of another right.” Although Mumbi, J's comments were directed at Article 35(1)(b), it is my view that the first part of the learned Judge's pronouncement that the applicant must prove that the information is held by the person from whom it is claimed applies both to the State and to another person.”

15. The applicant contends that he requires the said report to enable him seek his job back. In my view if the applicant's employment was terminated based on the terminated criminal proceedings, there is nothing stopping him from reclaiming his position assuming the law allows such remedy. In other words, it is my view that the applicant does not need the results of the investigations undertaken subsequent to his discharge under section 87A of the ***Criminal Procedure Code***, to enable him pursue his remedies, if any. This was the position in **Egbema vs. West Nile Administration [1972] EA 60**, where it was held:

“For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution...”

16. Having considered the application herein, it is my view that the Notice of Motion dated 24th January, 2016 lacks merit.

17. Consequently the said Motion fails and is dismissed but with no order as to costs.

18. Orders accordingly.

Dated at Nairobi this 21st day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kitonyi the applicant in person

Mr Ibrahim for Mr Malebe for the Interested Party

Cc Mwangi