



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISC. APPLICATION NO. 162 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE APPLY FOR JUDICIAL REVIEW  
ORDERS IN THE NATURE OF MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION OF KENYA (2010) SECTION 8  
AND 9 OF THE LAW REFORM ACT (CAP 26)**

**AND**

**IN THE MATTER OF FAIR AND ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

**AND**

**IN THE MATTER OF ORDERS OF CIVIL PROCEDURE RULES AND ALL OTHER  
ENABLING PROVISIONS**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**KENYA POST OFFICE SAVINGS BANK.....RESPONDENT**

**EX PARTE: TRUPHENA CHABEDA (suing as the administrator of David Anyalo Chabeda)**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 17<sup>th</sup> day of June, 2016, the applicant herein, **Truphena Chabeda** (suing as the administrator of **David Anyalo Chabeda**) seeks the following orders:

- 1. An order of mandamus to compel the board of directors and office of the managing director to return the documents to title for L.R. No. 209/7629 Kariokor, Nairobi.**

**2. An order of Monetary Compensation for the eighteen (18) years of unreasonable period of retention of the documents of title by the respondents.**

**3. Costs of and incidental to the application be borne by the respondents**

**4. Such further and other reliefs that the honourable court may deem just and expedient to grant.**

### **Applicant's Case**

2. According to the applicant, on or about 15<sup>th</sup> December, 1997, the respondent granted the late **David Anyalo Chabeda** (hereinafter referred to as "the deceased") at his request and in his capacity as a director of the said respondent an in house loan in the sum of Kshs 2,000,000/- which was to be secured by a charge on the plaintiff's title L.R. No. 209/7629 Kariokor Nairobi.

3. It was averred that the respondent attempted to charge the said title L.R. No. 209/7629 Kariokor but the registration was rejected and cancelled. The applicant however averred that though the loaned sum was paid in full, the respondent failed to keep up to date accounts as envisaged in the loan agreement and is not entitled to any interest on any monies whatsoever.

4. It was contended that the respondent lodged a civil suit in the Chief Magistrates Court Nairobi Milimani Commercial Division CMCC No. 9710 of 2005 - **Post Bank Ltd vs. David Anyalo Chabeda** for recovery of the loan amount to which suit the deceased filed a defence denying indebtedness to the defendant. Instead of prosecuting the suit, the respondent withdrew it on the 11<sup>th</sup> April, 2011.

5. It was revealed that the applicant having taken out letter of administration to the estate of the deceased came across documents by the deceased indicating the existence of the suit and that the title to the said parcel of land was held by the defendant/respondent. He then made a follow up on the suit already filed and discovered that the same had been withdrawn by the Respondent. The applicant proceeded to request in writing that the defendant do release the said title and received an unreasonable and unlawful demand by the defendant that it would only release the title upon payment of the outstanding loan and interest.

6. It was averred that the defendant is and has continued with no lawful or valid reason to retain the said documents of title to L.R. No.20/9/7629 for an unreasonable period of Eighteen (18) years to date causing the applicant untold pecuniary loss. In the applicant's view, the continued unlawful holding of the said title has interfered with the administration of the estate and unless the orders sought herein are granted, the said parcel of land will go to waste and or depreciate in value.

7. The applicant also sought an order of monetary compensation for the unreasonable period of Eighteen (18) years while the land was not in use.

### **Respondent's Case.**

8. The application was opposed by the Respondent.

9. According to the Respondent, the application herein is incompetent and an abuse of the process of court as the honourable court lacks jurisdiction to determine the dispute herein under the realm of judicial review or administration law.

10. It was the Respondent's view that from the applicants pleadings it is clear that the dispute is commercial in nature and best suited to be determined under the commercial division of the High Court. The Respondent however admitted that the deceased David Anyalo Chabed applied for a loan as a director of the respondent which facility was approved and a charge created under mistake of fact that the property was encumbered and not available for registration of a charge.

11. It was averred that the loan was processed before the security was perfected mainly as a result of the

fiduciary relationship the deceased had with the respondent even though at the time of registration the physical file was missing at the Lands Registry. However, the deceased did indeed receive the loan and acknowledged receipt of the same and was made duly aware of the imperfect security and appointed the firm of Mugo Otunga & Company advocates to lift the prohibition that had encumbered the land.

12. It was averred that the deceased faulted in repaying his debt before the security was perfected and the respondent held his title as a lien thereby creating an equitable charge. It was asserted that the deceased never honoured his promised hence the suit to recover the amounts loaned to him, which suit was withdrawn upon notice that the deceased had passed on.

13. According to the Respondent, the deceased's wife, the ex parte applicant, visited the respondent's offices and sought the title deed herein but the respondent made it clear that the debt had to be settled before the title released. Similarly, the ex parte applicant instructed her advocates to demand the title and upon the respondent's reiteration that there was a lawful debt, they requested for particulars and they were afforded the loan statement and a copy of the title deed. Instead of settling the debt, the ex parte applicant has cunningly packed the suit herein as an administrative suit to avoid repaying the debt owed to the respondent on the strength of withdrawal of the suit which did not bar the respondent from claiming an equitable charge over the suit property herein.

14. To the Respondent, the equitable charge created over Land Reference No. 209/7629 is lawful and enforceable against the estate of the deceased hence the suit herein discloses no reasonable cause of action against the respondent. Similarly, the prayer for monetary compensation is unfounded and would result in unjust enrichment as the respondent lawfully holds the title deed and there is a lawfully unpaid debt owed by the estate of the late **David Chabeda**.

### **Determinations**

15. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the rivalling submissions, this is the view I form of the matter.

16. In this case the only two substantive reliefs being sought by the applicant are *mandamus* and compensation.

17. 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.”

18. 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.”

19. Similarly, 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.”

20. 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 undertake is a task 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.

21. In this case the order of *mandamus* is sought on the basis that the respondent's attempts to charge the title in respect of L.R. No. 209/7629 Kariokor did not materialise. However, the sum advanced was paid in full. To the applicant, since the respondent failed to keep up to date accounts as envisaged in the loan agreement it is not entitled to any interest on any monies whatsoever. From the applicant's case, one can deduce that even if her position is taken to be correct, the only sum paid was the sum advanced since the applicant's case is that the Respondent is not entitled to interest

22. On the part of the Respondent, it is averred that the debt is still due and owing as the same has not been settled. It was therefore its case, that the title to the suit property is held as a lien for the unpaid debt and constitute equitable charge. The law is that a deposit of title deeds with intent to create a security gives an equitable charge. As between a debtor and his creditor the mere fact of possession of title deeds by the latter raises a presumption that they were deposited with him as security for his whole debt. An equitable charge over the title comes into existence by deposit of the title document with the bank by the application of Common Law of England. See **Guaranty Discount Co. Ltd vs. Credit Finance Corporation Ltd and Another [1963] EA 345; Kenya Commercial Finance Company Limited vs. Kipng'eno Arap N'geny & Another Civil Appeal No. 100 of 2001 [2002] 1 KLR 106.**

23. It would therefore follow that the Respondent's position that an equitable charge was created between the deceased and the Respondent notwithstanding the failure to register the charge may well not be farfetched.

24. In this case there are two versions presented by the parties herein. For the Court to grant the order of *mandamus* in the manner sought it would have to make a finding that the deceased did actually settle the debt in full. In my view the mere fact that the Respondent withdrew a suit it had filed against the deceased, does not amount to an admission that the debt was settled in light of the Respondent's explanation that the same was withdrawn as a result of the death of the deceased. Based on the material placed before me, it is not possible to possibly find that the deceased did in fact settle the facility advanced to him by the Respondent.

25. Where the determination of the dispute before the Court requires the Court to make a resolution on conflicting issues of fact, that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations and this may entail *viva voce* evidence and cross-examination thereon in order to resolve the case on the merits before the rights of the parties herein can be determined. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Here, there are serious factual issues which require to be resolved and which go beyond the Court's jurisdiction in judicial review proceedings. See **Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995.**

26. In my view, what the applicant seeks from this Court is a resolution of a contractual dispute. On the issue whether a contractual dispute can form the subject of judicial review proceedings, it was held in **Zakhem Construction (Kenya) Limited vs. Permanent Secretary, Ministry of Roads & Public Works & Another [2007] eKLR** that:

**“As we said at the beginning of this judgment, the matter between the Appellant and the Respondents was purely based on a written contract. There was even an arbitration clause for the settlement of any disputes that might arise between the parties. It was not suggested before us that the Government cannot enter into a contract with individuals or some other entities such as the Appellant herein. By their contract the parties had made all the provisions they thought sufficiently covered the interest of each of them. If the Appellant thought the Respondent was in breach of the contract by issuing the notice of intention to terminate, the Appellant's remedy did not lie in public law; the remedy lay in private law where the Appellant could be awarded damages if it proved that the contract was unlawfully terminated... If parties to a contract want to have the process of judicial review applicable to their contract there is nothing to stop them from expressly providing in the written**

**contract. We can find nothing in the provisions of Clause 44.1 which would make us think and hold that the parties intended that if one of them intended to terminate the contract the other party to the contract had to be heard first...Emukule, J was of the same view and that must be why he was prepared to hold, even without hearing the parties, that the matter lay in contract and the process of judicial review could not provide the Appellant with a remedy for an alleged breach of the contract. That holding was clearly correct and we can find no reason whatsoever for interfering with the same. ”**

27. It is therefore my view that this was not a proper case for judicial review.

**Order**

28. In the result the Notice of Motion dated 17<sup>th</sup> day of June, 2016 fails and the same is dismissed. As the applicant commenced these proceedings in a representative capacity, there will be no order as to costs.

29. It is so ordered.

**Dated at Nairobi this 14<sup>th</sup> day of December, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Miss Maswa for Mrs Madahana for the Applicant***

***Miss Otieno for Mr Odhiambo for the Respondent***

**CA Mwangi**