



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 223 OF 2014

REPUBLICAPPLICANT

VERSUS

KENYA VISION 2030 DELIVERY BOARD.....1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

THE COMMISSION ON

ADMINISTRATIVE JUSTICE.....INTERESTED PARTY

Ex-parte

ENG. JUDAH ABEKAH

JUDGEMENT

Upon obtaining the leave of the Court, the ex-parte Applicant, Eng. Judah Abekah, filed the notice of motion dated 6th June, 2014 in which he seeks an order of mandamus to compel the 1st Respondent, the Kenya Vision 2030 Delivery Board (“Board”), to comply with the recommendations of the Interested Party, the Commission on Administrative Justice (“Commission”). The Applicant had complained to the Commission against the Board’s refusal to renew his employment contract. The Applicant also prays for an order of compensation and assessment of damages. Finally, the Applicant asks to be awarded the costs of these proceedings.

From the papers filed in Court, the facts giving rise to this application are not disputed. The Applicant was on 16th March, 2009 appointed as a Director (Enablers and Macro) for three years at the Vision 2030 Delivery Secretariat under the Ministry for Planning and National Development and Vision 2030. As stipulated, six months prior to the conclusion of the contract he wrote to the Board asking for renewal of his contract. His request was rejected on the grounds that his performance was below par and the contract was subsequently terminated through a decision dated 23rd March, 2012.

The Applicant was aggrieved by the decision of the Board and he appealed to the Minister for Planning and National Development and Vision 2030 (“Minister”). The Minister renewed the Applicant’s contract for a period of one year but the Board did not allow him to go back to work. As a result, the Applicant sought the intervention of the Commission. After investigating the matter, the Commission in a report dated 10th October, 2013 concluded, *inter alia*, that the Board had “**impugned Articles 47 and 59 of the**

constitution and Sections 2 and 8(a),(b) and (d) of the Commission of Administrative Justice Act on fair administrative action.”

The Commission thereafter made recommendations to the 1st Respondent as follows:

- “i) Pay Eng. Abekah an equivalent of twelve months salary and allowances in compensation for the one year period of the reviewed contract.**
- ii) Facilitate Eng. Abekah to access his personal effects from his former office.**
- iii) Offer an unconditional apology to Eng Abekah for the treatment meted out to him.”**

The findings were forwarded to the 1st Respondent for implementation but the 1st Respondent failed or refused to implement the same. That is why the Applicant has approached this Court for an order of mandamus to compel the 1st Respondent to implement the recommendations of the Commission.

The Attorney General of the Republic of Kenya who was named as the 2nd Respondent did not participate in these proceedings.

Upon the perusal of the statutory statement dated 6th June, 2014 and the verifying affidavit sworn by the Applicant on the same date, it is apparent that the Applicant bases his application on a single ground namely that the **“1st Respondent’s decisions or actions herein are made in excess of its jurisdiction and are *ultra vires* as it is purporting to exercise powers or authority not conferred on it by the Constitution and the Commission on Administrative Justice Act, 2011 or indeed any other provision of the law whatsoever.”**

On its part, the Commission supported the application through a replying affidavit sworn by its Chairperson Mr. Otiende Amollo. I will revert back to the contents of his affidavit in due course.

The 1st Respondent opposed the application by way of a replying affidavit sworn by its Acting Director General, Gituro Wainaina. It is the 1st Respondent’s case that after the Applicant applied for renewal of his contract, the Director General and later an Ad hoc Committee appraised him and concluded that his contract should not be renewed. The decision of the 1st Respondent was communicated to the Minister who nevertheless went ahead and renewed the Applicant’s contract for one year by a letter dated 9th March, 2012. The Board, however, never enforced the renewed contract as it deemed it irregular.

It is the 1st Respondent’s case that the Applicant eventually complained to the Interested Party. The 1st Respondent replied to the Interested Party’s inquires and went ahead to form a new committee to check and review the process relating to the renewal of the Applicant’s contract. The new committee upheld the decision of the Ad hoc Committee. The Board also discussed the matter afresh and upheld its earlier decision not to renew the Applicant’s contract. The decision was communicated to the Minister and the Applicant. The Minister also communicated the decision of the Board to the Applicant.

It is the 1st Respondent’s case that it was responsible for the renewal of the Applicant’s contract after assessing his performance and this responsibility was discharged fairly and impartially. The 1st Respondent contends that the dispute between the Applicant and the 1st Respondent relates to the renewal of the Applicant’s contract of employment and the dispute ought to have been referred to the Industrial Court (now the Employment and Labour Relations Court) for determination as per **Section 87 (b)** of the **Employment Act, 2007** and **Section 12(1) (a)** of the **Industrial Court Act, 2011**. Consequently, the Respondent asserts that the Interested Party’s findings and recommendations were made *ultra vires* its mandate and the same cannot be enforced by way of an order of mandamus.

In the alternative, the Respondent submits that even if the Interested Party had the authority to make the findings and recommendations, the Court has no jurisdiction to grant the orders sought as the Interested

Party has mechanisms for enforcing its orders.

On the Applicant's prayer for compensation, the Respondent contends that this Court has no jurisdiction to award compensation in an application for judicial review.

I will now turn back to the detailed affidavit of the Chairperson of the Interested Party. Through the said affidavit, the mandate of the Interested Party is disclosed. The deponent also discloses the background of the matter and why the same was considered to have fallen within the jurisdiction of the Interested Party. The process the Interested Party used to arrive at its findings and recommendations is explained.

The Interested Party asserted that the 1st Respondent has neglected, failed, ignored and/or refused to implement the findings. It is the Interested Party's case that if the Applicant was aggrieved by the recommendations, then it ought to have moved the Court by way of judicial review to impeach those recommendations instead of refusing to implement them.

The Interested Party submitted that it has jurisdiction to handle the matter as it was not among those limited under **Section 30** of the **Commission of Administrative Justice Act, 2011 ("CAJA")**. The Interested Party contended that in the ordinary practice of administrative law as buttressed by **Articles 59(h) and (i) and 252** of the **Constitution of Kenya** as read together with **sections 2(1), 3, 4, 8, 26, 27, 28, 29, 30 and 31** of **CAJA**, the 1st Respondent is bound to implement the findings of the Commission unless it successfully moves the High Court in judicial review proceedings for orders against the findings.

The Interested Party argued that the spirit of **Section 8(f)** of **CAJA** behoves the Court to appreciate the adjudication of the case herein by the Interested Party through its specialized administrative justice system as an alternative mode of resolution of complaints relating to public administration and that the same ought to be enforced unless challenged by way of judicial review. It was the Interested Party's case that issuance of an order of mandamus would set a precedent on the Court's appreciation of the alternative mode of dispute resolution by way of the administrative system of justice as practiced by the Interested Party, which administrative system of justice is anchored in both the **Constitution** and **CAJA**. The Interested Party asserted that this matter is of great public importance as it touches on the Interested Party's core constitutional mandate to render administrative justice and also involves interplay between state organs being the respondents and Interested Party.

Citing the decision of the Supreme Court in **THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE [2012] eKLR**, the Interested Party urged this Court as the custodian of the Constitution to interpret it holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights are enabled to discharge their obligations as a basis for sustaining the design and purpose of the Constitution.

The advocates for the parties also filed submissions. Upon perusal of the submissions and the pleadings filed in this matter, I have identified the following issues for determination:

1. Did the Interested Party have jurisdiction to determine the matter which has given rise to these proceedings?
2. Can the decisions of the Interested Party be enforced by issuance of an order of mandamus?
3. Who should bear the costs of these proceedings?

The Applicant and the Interested Party hold the view that the Applicant was an employee of the Ministry of State for Planning, National Development and Vision 2030 and not the 1st Respondent. The Applicant exhibited the letter dated 3rd March, 2009 appointing him as the Director, Enablers and Macro, to show that the contract was between him and the Ministry. The 1st Respondent on the other hand was adamant that it was the employer of the Applicant and that is why it was tasked with the onus of recommending the renewal of the Applicant's contract. I do not think that much will turn on this argument. In my view,

this case is more about the powers of the Interested Party and the enforcement of its recommendations, findings, reports or decisions. Whether the Applicant was an employee of the Ministry or the 1st Respondent will not have a significant impact on the outcome of this case.

The question that really needs to be answered is whether the Interested Party had jurisdiction to investigate the Applicant's complaint. The functions of the Commission are set out in **Section 8** of the CAJA. The **Section** states:

“8. Functions of the Commission

The functions of the Commission shall be to—

- (a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;**
- (b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;**
- (c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;**
- (d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;**
- (e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;**
- (f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;**
- (g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;**
- (h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;**
- (i) publish periodic reports on the status of administrative justice in Kenya;**
- (j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;**
- (k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;**
- (l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and**
- (m) perform such other functions as may be prescribed by the Constitution and any other written law.”**

Those functions are far-reaching and include investigation of complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the

public sector. Whichever way one looks at the Applicant's complaint, it can be easily concluded that the same fell within the functions of the Commission.

Section 29 of CAJA gives investigative powers to the Commission over any complaint arising from the carrying out of an administrative action of a public office, a state corporation or any other body or agency of the State. When one considers the said provision, together with the functions of the Interested Party, it becomes clear that the Commission had jurisdiction to carry out investigations in respect to the Applicant's complaint. Whether the Applicant was an employee of the Ministry or the Board is immaterial as both the Ministry and the Board are state organs and they all fell under the jurisdiction of the Interested Party's investigative powers. Although the parties urged this Court to determine whether the Applicant was an employee of the Ministry or an employee of the Respondent, I do not see the need for making such a determination.

An administrative action is defined by **Section 2 of CAJA** "as any action relating to matters of administration and includes-

- a. a decision or an action carried out in the public service;
- b. a failure to act in discharge of a public duty required of an officer in public service;
- c. The making of a recommendation to a Cabinet Secretary; or
- d. an action taken pursuant to a recommendation made to a Cabinet Secretary;"

Looking at the **CAJA** in its entirety, I think it would be limiting the jurisdiction of the Commission if this Court is to hold that it did not have jurisdiction to investigate the Applicant's complaint. It is immaterial that the dispute may have fallen into the jurisdiction of the Court. So long as maladministration was alleged, the Applicant could look into the complaint. However, there is no doubt that the Applicant had other viable options for redressing his complaint. Whether it was prudent for the Commission to take up such a complaint is another thing altogether.

In my view, the core question in this matter is whether a public body can be compelled by way of an order of mandamus to implement the recommendations, findings or reports of the Commission. The Court of Appeal in the case of **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS, Nairobi Civil Appeal No. 266 of 1996** aptly summarized the purpose and reach of an order of mandamus as follows:

"The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

"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 and 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."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made 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."

What do these principles mean? They mean that an order of mandamus will 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.”

In **REPUBLIC v THE COMMISSIONER OF LANDS AND ANOTHER EX-PARTE KITHINJI MURUGU M'AGERE**, Nairobi High Court Misc. Application No. 395 of 2012, G.V. Odunga, J explored the circumstances under which an order of mandamus can issue. I beg to quote him at length as follows:

“11. The first issue is when can a Court grant an order of *mandamus* and what is an order of *mandamus*? In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543, it was held that:

“*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.”

12. It is an order sought under sections and 9 of the *Law Reform Act*, Cap 26 Laws of Kenya as read with Order 53 of the Civil Procedure Rules by person or body from the High Court of Kenya requiring any act to be done. In other words, *Mandamus* would issue from the alternative remedy, requesting that a statutory body etc. be compelled to fulfil its statutory obligation. So *Mandamus* order can issue from the High Court commanding a body or person to do that which it is its or his duty to do. It lies to secure that performance of a public duty, in the performance of which the applicant has a sufficient legal interest. The issue of *Mandamus* is discretionary and will only issue provided there is no other remedy available. See Tom Byakatonda on Behalf of Rushwa Growers Coop Society vs. The Board of Directors Banyankole Kweterana Coop Union Mbarara HCMA No. 29 of 1995 and Wade & Philips 9th Ed 607; Cephas Male vs. KCC [1992] KALR 159.
13. It is important to note, however, that an order of *mandamus* is not an order of specific performance, like in a contract situation. A party in a judicial review seeking an order of *mandamus* must show the existence of a statutory duty conferred or invested by statute upon some person, body of persons or tribunal which such person, body of persons or tribunal has failed to perform. See Republic vs. Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others Nairobi HCMCA No. 747 of 2006 [2008] 3 KLR (EP) 521.
14. Therefore, *mandamus* is a peremptory order requiring the Respondent to perform a specified public duty. It does not lie for breach of a private obligation even if such obligation is owed with other public law duties to an applicant but whether a duty is to be enforced by *mandamus* depends on whether the duty as expressed or implied gives the applicant the right to complain. Its purpose is to compel the performance of a public duty or any act contrary to or evasive of the law. It does not lie against a public officer as a matter of course. There are bars and limitations. Courts are reluctant to direct a writ of *mandamus* against the executive officers of a Government unless some specific act or thing, which the law requires to be done, has been omitted. Courts proceed with extreme caution for the granting of the writ, which would result in interference by the judicial department with the management of the executive department of the Government. The conditions for its grant are that it must be

shown that the public officer has failed to perform his duty; that the court would not grant *mandamus* where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will present problems like lack of adequate supervision. See Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.

15. It has further been held that *Mandamus* is first, employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. Secondly, it is used to enforce the performance of public duties, by public authority, and not when it is under no duty under the law. However, it would seem that *mandamus* may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms, and fall under the classic formula of “any body of persons having legal authority to determine questions affecting the rights of subjects” like non-statutory self-regulating bodies. Thirdly, *mandamus* may issue directing the concerned authority to act according to law. Fourthly, there must be a legal right, or substantial interest of the petitioner, the petitioner must satisfy the Court that he has a legal right, the performance of which must be done by the public authority. It must, however, be noted that by no means closing avenues for the issue of *mandamus* against an authority, the affected person, or persons, must have demanded justice, which must be refused. See the Tanzania Court of Appeal decision in Ngurangwa and Others vs. Registrar of The Industrial Court of Tanzania and Others [1999] 2 EA 245.
16. It is now trite that 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 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 made 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. See Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443; Halsburys Laws of England 4th Edition Vol 1 at 111 Paras 80, 90.”

From the cited decisions, it is apparent that an order of *mandamus* will issue to compel the performance of a statutory duty owed to an applicant. Therefore, the fulcrum of an order of *mandamus* is that a statutory duty must be owed to an applicant and the public officer or public body, after being asked to perform the duty, has refused or failed to discharge that duty and there is no other adequate remedy. In matters involving exercise of judgement and discretion the public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.

The question that follows therefore is whether the Board was obliged to implement the Commission’s recommendations. The Applicant and Interested Party powerfully submitted that an order of *mandamus* can issue to compel a public body to implement the Interested Party’s recommendations.

In order to stress the important role of the Commission in the current constitutional dispensation, Mr. Otiende Amollo referred this Court to the decision of the Supreme Court in **RE THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011] eKLR** where it was observed at paragraphs 59 and 60 that:

“[59] It is a matter of which we take judicial notice, that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such

Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause”.

[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to “*direction or control by any person or authority*”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the “independence clause” does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the *execution of their mandate*, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead “independence” as an end in itself; for public-governance tasks are apt to be severely strained by possible “clashes of independences”.”

It is clear from the decision that the Supreme Court did indeed emphasise that commissions and independent offices, and the Interested Party is one of them, should be given the leeway to discharge their mandates. The Supreme Court, however, cautioned that commissions and independent offices could only operate within terms of the Constitution and the law. I will add that they cannot exercise powers they do not have and their decisions cannot be conferred the status not bestowed on them by the Constitution or statute.

This calls for the interrogation of the **Constitution** and the **CAJA** in order to understand the Interested Party’s mandate and the weight to be given to its findings and recommendations. The Commission is an off-shot of **Article 59** of the **Constitution** which provides:

“59. (1) There is established the Kenya National Human Rights and Equality Commission.

(2) The functions of the Commission are—

(a) to promote respect for human rights and develop a culture of human rights in the Republic;

(b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;

(c) to promote the protection, and observance of human rights in public and private

institutions;

(d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;

(e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;

(f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs;

(g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;

(h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;

(i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;

(j) to report on complaints investigated under paragraphs (h) and (i) and take remedial action; and

(k) to perform any other functions prescribed by legislation.

(3) Every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(4) Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions.

(5) If Parliament enacts legislation restructuring the Commission under clause (4)—

(a) that legislation shall assign each function of the Commission specified in this Article to one or the other of the successor commissions;

(b) each of the successor commissions shall have powers equivalent to the powers of the Commission under this Article; and

(c) each successor commission shall be a commission within the meaning of Chapter Fifteen, and shall have the status and powers of a commission under that Chapter.”

By virtue of **Article 59(5)(c)**, the Interested Party is a commission within the meaning of **Chapter Fifteen** of the **Constitution**, and shall have the status and powers of a commission under that **Chapter**. The objects and powers of commissions and independent offices are found in **Articles 249, 252 and 254** of the **Constitution**.

The objects of the commissions and independent offices as found in **Article 249(1)** of the **Constitution** are:

“(a) protect the sovereignty of the people;

(b) secure the observance by all State organs of democratic values and principles; and

(c) promote constitutionalism.”

The investigatory powers of commissions and independent offices are found in **Article 252** which states:

“252. (1) Each commission, and each holder of an independent office—

(a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

(b) has the powers necessary for conciliation, mediation and negotiation;

(c) shall recruit its own staff; and

(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

(2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under Article 22 (1) and (2).

(3) The following commissions and independent offices have the power to issue a summons to a witness to assist for the purposes of its investigations—

(a) the Kenya National Human Rights and Equality Commission;

(b) the Judicial Service Commission;

(c) the National Land Commission; and

(d) the Auditor-General.”

Under **Article 254** the Interested Party, like the other commissions and independent offices, is required to submit a report each financial year to the President and to Parliament.

Pursuant to **Article 59** of the **Constitution**, Parliament enacted the **CAJA** which gave the Commission the functions found in **Section 8**. In addition to **Section 8**, **Section 26** gives general powers to the Commission as follows:

“26. General powers of Commission

In addition to the powers conferred in Article 252 of the Constitution, the

Commission shall have power to—

(a) issue summons as it deems necessary for the fulfilment of its mandate;

(b) require that statements be given under oath or affirmation and to administer such oath or affirmation;

(c) adjudicate on matters relating to administrative justice;

(d) obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any information from any person, including governmental authorities, and to compel the production of such information for the proper discharge of its functions;

(e) by order of the court, enter upon any establishment or premises, and to enter upon any

land or premises for any purpose material to the fulfilment of the mandate of the Commission and in particular, for the purpose of obtaining information, inspecting any property or taking copies of any documents, and for safeguarding any such property or document;

(f) interview any person or group of persons;

(g) subject to adequate provision being made to meet his expenses for the purpose, call upon any person to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing.”

After investigation, the Commission can act as per **Section 41** of the **CAJA**. **Section 41** states:

“41. Action after inquiry

The Commission may, upon inquiry into a complaint under this Act take any of the following steps

—

(a) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;

(b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;

(c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;

(d) provide a copy of the inquiry report to all interested parties; and

(e) submit summonses as it deems necessary in fulfilment of its mandate.”

After completion of investigations, the Commission will make a report to the organization concerned. In this respect **Section 42** of the **CAJA** states:

“42 (1) After concluding an investigation or an inquiry under this Act, the Commission shall make a report to the State organ, public office or organization to which the investigation relates.

(2) The report shall include—

(a) the findings of the investigation and any recommendations made by the Commission;

(b) the action the Commission considers should be taken and the reasons for the action; and

(c) any recommendation the Commission considers appropriate.

(3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission.

(4) If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action.”

Looking at the provisions of the **Act** I am of the opinion that the Commission is not given coercive powers over the organizations it investigates. Where an organization refuses to implement the recommendations of the Commission, the only action the Commission can take is to make a report to the National Assembly detailing the failure. Thereafter the National Assembly shall take appropriate action—see **Section 44(4)** of the **CAJA**.

Can the Court issue mandamus in view of the constitutional and statutory provisions? **Section 42** of the **CAJA** clearly provides that where a state organ, public office or organization fails or refuse to implement the recommendations of the Commission, the Commission shall report the matter to National Assembly for action. Had Parliament desired that the courts should enforce the recommendations of the Commission, it would have clearly stated so. One of the constitutional mandates of the is conciliation, mediation and negotiation—see **Article 252(1)(b)** of the **Constitution**. Force cannot be used to achieve such a function and I do not think that Parliament wanted the Commission’s findings and recommendations to have the force of court judgements. I doubt whether the Commission having been given investigative powers could also be given powers akin to those of the Judiciary. Elevating the Commission’s reports to the level of court judgments would mean that the Commission would act as a prosecutor, a judge and executor at the same time. It would end up steamrolling over state organs, public offices and organizations. My finding tallies with the practice in other jurisdictions. In Australia for example, the Commonwealth Ombudsman cannot override the decisions of state agencies, or compel those agencies to comply with his or her recommendations—see **www ombudsman.gov.au**.

As the Commission cannot compel a state agency to implement its recommendations, it follows that the Court cannot compel a government agency to implement such recommendations. Government agencies have no statutory duty to implement the recommendations of the Commission. They cannot therefore be compelled by way of mandamus to implement those recommendations. I therefore find that an order of mandamus cannot issue as prayed for by the Applicant.

Assuming that an order of mandamus can issue to compel a public body to implement the recommendations of the Commission, can such an order issue in the circumstances of this case? As already stated, a public agency may or may not act on the findings and recommendations of the Commission. A public agency can therefore exercise discretion when it comes to the implementation of the reports of the Commission.

As already pointed out, in matters of discretion mandamus can only compel the performance of a duty but it cannot direct the manner in which the mandate is to be executed. However, there is an exception to this rule as was pointed out by Panganiban, J in the Philippines case of **FIRST PHILLIPPINE HOLDINGS CORPORATION V SANDIGANBAYAN**, 253 SCRA 30, February 1, 1996 that:

“Ordinarily, mandamus will not prosper to compel a discretionary act. But where there is ‘gross abuse of discretion, manifest injustice or palpable excess of authority’ equivalent to a denial of a settled right which petitioner is entitled, and there is no other plain, speedy and adequate remedy, the writ shall issue.”

In the case before this Court, the Applicant has not demonstrated that the exception should be activated in his case. It is also noted that the Board has already exercised its discretion by deciding not to act on the Commission’s recommendations. There is therefore no basis whatsoever for the issuance of an order of mandamus.

The importance of complying with the findings and recommendations of the Commission cannot be over emphasised. If the role the Commission plays was not necessary, then the people of Kenya could not have given it constitutional existence. Whereas it is important for public organizations to implement the recommendations of the 1st Interested Party they cannot be forced by the courts to do so. In the circumstances the Applicant’s application fails in its entirety and the same is dismissed.

Although the Applicant’s application has failed, I am of the view that the application was not frivolous. In the circumstances I will order each party to meet own costs of these proceedings and it is so ordered.

Dated, signed and delivered at Nairobi this 26th day of February, 2015

W. KORIR,

JUDGE OF THE HIGH COURT