



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC CIVIL APPLICATION NO. 252 OF 2012**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF THE REGISTERED SOCIETY ACT CAP 108 LAWS OF KENYA**

**BETWEEN**

**MARIN KIOI.....1<sup>ST</sup> APPLICANT**

**DAVID MWAZIA MUTISO.....2<sup>ND</sup> APPLICANT**

**JOSEPH OTIENO OSOO.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**JOHNSON GATU MIANO.....1<sup>ST</sup> RESPONDENT**

**MOSES NJEKA ENOCK.....2<sup>ND</sup> RESPONDENT**

**MICHAEL MUMBO SEWE.....3<sup>RD</sup> RESPONDENT**

**PATRICK SERRO.....4<sup>TH</sup> RESPONDENT**

**JOHN KIBUNGA.....5<sup>TH</sup> RESPONDENT**

**ISSAC AMUMA.....6<sup>TH</sup> RESPONDENT**

**RAPHAEL OMONDI.....7<sup>TH</sup> RESPONDENT**

**JULIUS NGANGA.....8<sup>TH</sup> RESPONDENT**

**THE CEO. ASSOCIATION OF**

**KENYA RAILWAYS RETIREE.....9<sup>TH</sup> RESPONDENT**

**THE CEO. KENYA RAILWAYS STAFF BENEFIT SCHEME.....10<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 3<sup>rd</sup> July 2012, the applicants herein seek the following orders:
  1. That an order of Certiorari do and hereby issues removing into this court and quash the decision of the respondents appointing themselves as leaders of the 9<sup>th</sup> Respondent association herein and a declaration thereto that the current officials of the 9<sup>th</sup> respondent Association are all in the office illegally and unlawfully.
  2. That an order of mandamus compelling the 1<sup>st</sup> – 8<sup>th</sup> Respondents to immediately vacate the offices of the 9<sup>th</sup> Respondent Association and a court appointed committee be ordered to call for a general meeting in accordance with the 9<sup>th</sup> Respondent association constitution.
  3. That an Order of Prohibition do and is hereby issued against the respondents prohibiting the respondents from conducting any business of the Association and restrain all the Respondent from interfering with the 9<sup>th</sup> Respondent association accounts.
  4. That the Honourable court be pleased in the Interim to Freeze all the bank Accounts of the Akerare association at the equity bank Nairobi account Number 035014539755 or any other Bank Account wheresoever’s domiciled until further orders of this Honourable Court.
  5. That the cost of this application be in favour of the Applicants.
2. Before dealing with the merits of the case, it is important to deal with the issue of intitulement of the application herein. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**
3. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellants’ advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

4. 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”

5. It is clear from the title of the proceedings herein that the Motion herein is not an epitome of impeccable, elegant or paragon drafting. The applicants are indicated as individuals rather than the

Republic.

6. Apart from the foregoing, it is clear the orders sought herein are directed against the 1<sup>st</sup> to the 8<sup>th</sup> respondents who are individuals. In **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005**, Nyamu, J (as he then was held:

**“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That is why it is said prohibition looks to the future so that if a tribunal were to arrange in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However where a decision has been made ... an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made it can only prevent the making of a contemplated decision. There is nothing the respondents have failed to do, as matter of statute law or legal duty. The other reason why the claim must fail is that the 5<sup>th</sup> and 6<sup>th</sup> respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5<sup>th</sup> and 6<sup>th</sup> respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual.”**

7. With respect to prayer 4 it is clear that that prayer is neither a prayer for *certiorari* nor of prohibition. Under sections 8 and 9 of the ***Law Reform Act*** the High Court in the exercise of its judicial review jurisdiction can only grant orders of *certiorari*, prohibition and *mandamus*. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**, judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. It is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the ***Law Reform Act*** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. 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.
8. *Mandamus* however 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 HCMC No. 31 of 1969 [1970] EA 543.**

9. It is my view that the orders sought herein are incapable of being granted in these proceedings.
10. In the result the Notice of Motion dated 3<sup>rd</sup> July 2012 is incompetent and is struck out with costs to the Respondents.

**Dated at Nairobi this 27<sup>th</sup> day of November 2013**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of 1<sup>st</sup> and 2<sup>nd</sup> respondents.**