



**Republic v Public Trustee; Matathia & another (Exparte) (Application E123 of 2023)  
[2024] KEHC 9569 (KLR) (Judicial Review) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9569 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E123 OF 2023**

**J NGAAH, J**

**JULY 19, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PUBLIC TRUSTEE ..... RESPONDENT**

**AND**

**CHRISTOPHER NJOROGGE MATATHIA ..... EXPARTE**

**MARGARET WAIRIMU NJOROGE ..... EXPARTE**

**JUDGMENT**

1. The application before court is a motion dated 27 July 2023. The applicants pray for:

- “ a. an order of mandamus compelling the respondent by itself (sic) and/or its agents to remit to the applicant a sum of Kshs 285,967.80/- being the death gratuity due to the estate of Francis Njoroge Matathia (deceased)”

The applicants have also sought for the order that the respondent bears the costs of the suit.

2. The motion is expressed to brought under Section 8(2) and 9 of the *Law Reform Act* cap 26; Sections 3, 4, 7 and 9 of the *Fair Administrative Action Act*, 2015 and Order 53 Rule 3(1) of the *Civil Procedure Rules*. It is based on a statutory statement dated 31 August 2023 and an affidavit verifying the facts relied upon sworn on even date by Christopher Njoroge Matathia, the 1<sup>st</sup> applicant in this application. According to Mr. Matathia, he, together with the 2<sup>nd</sup> applicant, are the administrators of the Estate of Francis Njoroge Matathia (deceased).



3. He has sworn that by a letter dated 2 June 2017 the Director of Pensions awarded the deceased's estate a pension gratuity of Kshs 432,250/=. The gratuity was remitted to the respondent for onward transmission to the applicants. Sometimes in January 2022, the respondent released part of the gratuity to the tune of Kshs 146,282,60/= leaving a balance of Kshs 285,967. 80. When the applicants sought to be paid the balance, they learned that it allegedly been paid but that they had not received the sum paid. As a matter of fact, there was proof of payment by way of a cheque and a receipt.
4. According to the applicants, both the receipts and numbers indicated by the respondent as the applicants' national identification numbers, in proof of the fact that they had received the payment, were falsified or forged. To be precise, while the forged numbers were indicated as 1301158 and 8563881, the correct numbers for their national identification cards are 0563081 and 13031158 respectively. The applicants' case is that, if any money was paid in settlement of the balance of the gratuity due to the deceased's estate, it must have been paid to the wrong people. Despite having made demands for payment, the respondent has refused, ignored or neglected to make the payment, hence the instant application.
5. The respondent opposed the motion and filed a replying affidavit in that regard. The affidavit was sworn by Ms. Regina Nduku who has identified herself as an Assistant Public Trustee. According to the respondent, the applicants apparently presented two sets of the grant of letters of administration in respect of the deceased's estate; one set was issued on 23 March 2006 and another set issued on 3 April 2000. It is the respondent's deposition that the two sets of grant were different.
6. As far as the payments are concerned, the respondent received the sum of Kshs 146, 282, 60 on 29 September 2016 from the Ministry of Finance, Pensions Department. The respondent also received from the Ministry the sum of Kshs 285,967.50. Apparently, these monies were to be paid to the deceased's estate.
7. On 31 May 2001, the respondent wrote a letter to the District Commissioner, Kiambu District, requesting him to furnish the respondent with a list of the deceased's heirs. In response to this enquiry, the respondent received a letter dated 24 July 2001 from the District Commissioner, confirming the applicants as the administrators of the deceased's estate. Apart from the District Commissioner's confirmation, the applicants also wrote to the respondent, vide their letters respectively dated 24 July 2001 and 26 July 2001 also confirming that they were the administrators of the estate.
8. On 7 August 2001 the respondent issued a cheque No 008317 for Kshs 285,967.50 in the applicants' names, as part payment of the gratuity. The payment was made on the strength of the grant issued by the Senior Principal Magistrate Court in Kiambu in Succession Cause No 299 of 1999 on 3 April 2000. The cheque was collected by the applicants on 7 August 2001. They acknowledged receipt by signing a discharge receipt. Another cheque, No 063821, for the sum of Kshs 175,876.75 was made to the applicants on the basis of the same grant. As was the case with the first cheque, this second cheque was collected by the applicants who, once again, acknowledged receipt by signing a discharge receipt.
9. It is the respondent's case that upon receipt of the necessary documents for processing of the gratuity, the respondent processed the payments on 7 August 2001 and 4 January 2022, respectively, in accordance with the laid down procedure. The applicants, in turn, signed the discharge and indemnity undertaking to indemnify the respondent against any claims, actions, demands, suits and costs, of whatever nature, incidental or consequential to release and payment of the gratuity.
10. According to the respondent, the signatures on the discharge receipts acknowledging payments were the applicants' signatures because they are similar to the applicants' signatures in their petition to court for grant of letters of administration. As far as the discrepancy in the applicant's identification numbers



is concerned, the respondent has admitted that indeed the numbers as captured are different from the ones that appear in the applicants' identification cards but that this discrepancy is attributed to what he has described as a "typographical" error on the part of the officer who captured this information. It is not an act of fraud as suggested by the applicants. According to the respondent, the payment was made 21 years ago and it is in bad faith and a bit late in the day for the applicants to be filing a suit now claiming the payment.

11. Even then, the Public Trustee has written to the National Bank of Kenya to provide records in their custody, apparently to show who cashed the cheque in issue.

Finally, it is the respondent's position that he has discharged his duty and made the payment as required and, therefore, this suit should be dismissed.

12. I have considered the submissions filed by both the applicants' and the respondent's counsel. The dispute between the two parties is largely factual and turns on the question whether the respondent has paid the applicants the remainder of the gratuity due to the deceased's estate.
13. As far as I understand the arguments by the opposing sides, the applicants appear to say that the payment was made but it was made a person or persons who may have misrepresented themselves as the applicants. The respondent, on the other hand, is of the firm position that the applicants were paid and there is no evidence of fraud on his part. In short, the court is being asked to inquire into and determine the veracity of the documents which, according to the respondent were signed by the applicants but which the applicants deny having signed.
14. The question that immediately arises is whether this Honourable Court, being a judicial review court, is the best-disposed court to analyse the affidavit evidence and determine the veracity of the copies of documents presented before it allegedly showing that the gratuity was fully paid to the applicants.
15. A few decisions, both foreign and local, show that a judicial review court would not be inclined to take that route. In *R v Secretary of State for the Home Department, ex p Khawaja* (1984) AC 74, it was held that that the tool of cross-examination though available in judicial review proceedings, is rarely used in practice. This because a judicial review court is not in a position to find out the truth between conflicting statements. Lord Wolf was more apt in *R v Derbyshire County Council ex-parte Noble* (1990) I C R at P.8 BC-D where he held;

“The present application is one which is unsuitable for disposal on an application for judicial review- unsuitable because it clearly involves a conflict of fact and conflict of evidence which would require investigation and would involve discovery and cross-examination. Cross-examination and discovery can take place on an application for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those procedures”.

16. On the same point, Lord Diplock in *Hoffmann-La-Roche (F) & Co AG v Secretary of State for Trade and Industry* (1975) AC 295 was of the view that the procedure on a judicial review motion is unsuited to inquiries into disputed facts. Oral evidence and discovery, although catered for by the rules, are not part of the ordinary stock in trade of the prerogative jurisdiction.



17. Back home, our very own Supreme Court is of the same view. In *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) the court held as follows:

“It is the court’s firm view that the intention was never to transform judicial review into full-fledged inquiry into merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceeding is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on merits or demerits of the case”.

18. Based on these pronouncements, the applicants’ application would fail to the extent that it requires of this Honourable Court to interrogate and analyse the evidence before it and come to factual conclusions.
19. Turning back to the order for mandamus which, as noted, is the primary prayer in the applicants’ application, it is defined *Halsbury’s Laws of England*/Judicial Review (Volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689 where it is stated:

“A mandatory order is in form, a command issuing from the High Court, directed to any person, corporate or inferior tribunal requesting him, or them to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty. The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles”.

Narrowing down to a public officer on whom a public duty may be imposed, it is stated at paragraph 706 that;

“If public official or public bodies fail to perform any public duty with which they have been charged, a mandatory order may be made to compel them to carry out the duty.”

20. No doubt, and both parties agree, that payment of gratuity to the applicants is a public duty with which the respondent is charged. This duty is imposed upon him by Section 17 of the *Trustee Act* Cap. 168. The respondent, acknowledging his duty, posits that he has discharged his obligation under the Act and made the payments. The applicants, on the other hand, deny that they have received the payments that the respondent ought to make.
21. These contradictions, as noted, are based on contrasting evidence which for reasons I have stated, this Honourable Court is ill-equipped to determine its veracity. It follows that the order of mandamus would not issue if the determination of whether the public duty has been performed or not depends on a disputed fact or facts that can only be determined in an ordinary suit.
22. For reasons I have given, I am not satisfied that the applicants have made out a case sufficient enough to persuade me to exercise my discretion in their favour and grant them the judicial review relief of mandamus. Their application is hereby dismissed. I make no orders as to costs. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 19 JULY, 2024.**

**NGAAH JAIRUS**

**JUDGE**

