



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 287 OF 2020

JOHANA KIPTOO CHEPKECH.....APPLICANT

VERSUS

THE REGISTRAR OF COMPANIES.....RESPONDENT

JUDGMENT

1. Vide a Notice of Motion application dated 11th October, 2019, the Applicant seeks an order of mandamus or a mandatory order directed at the Respondent in the following terms:

“2. That an order of mandamus be directed to the Registrar of Companies to put Antow Trading Company limited Company online, make it accessible and provide the Applicant with Form CR12.”

The Application is supported by the grounds on its face, the Statutory Statement and Verifying Affidavit both dated 30 September, 2019.

2. The affidavit was sworn by the *ex parte* applicant and in his depositions he has stated that Antow Trading Company Limited (which I will henceforth refer to as “the Company”) is a company incorporated in Kenya; a copy of the certificate of incorporation exhibited to the

3. Affidavit shows that the company was incorporated a limited liability company on 16 January, 1987. However, it was dissolved on 14 September, 2007 through Gazette Notice No. 8949. This gazette notice was later to be revoked by the court in Miscellaneous Application No. 314 of 2015; the respondent was thus ordered to restore the company to the Register of Companies and indeed it was restored vide a gazette notice no. 5737 of 16 June 2017.

Subsequently, and more particularly on 18 December 2018, apparently upon a request by the applicant, the respondent provided the particulars of shareholders and directors of the Company as Jenneby Taita Too, Michael Lubuin Nenee, Mahmoud Tarus and Jacob Ngoletum Kikuru.

4. The Applicant bought two shares of the company; one share from Michael Nene and the other from Jacob Ngoletum Kikuru; the latter had on 1 November, 2018 written to the Company notifying it of his intention to sell his shares. On the same date, the company wrote to all the shareholders who are also the directors of the company notifying them of a special general meeting to be held on 14 November, 2018 to consider and ratify the resignation of Jacob Kikuru Ngoletum. On 29 November 2018 Jacob Kikuru Ngoletum wrote to the rest of the directors notifying them of his resignation and the transfer of his share to the applicant.

5. On 29 November 2018 the Company passed a special resolution to the effect that the resignation of Jacob Kikuru Ngoletum had been accepted with effect from the same date and accordingly his share in the company had been transferred to the applicant. Still on the same date, the company lodged with the respondent a notice of special or ordinary resolution notifying the respondent of the changes in the shareholding or directorship of the company. And on 10 January 2019, Jacob Kikuru Ngoletum lodged with the respondent a notice of cessation of office of directors.

6. As at 16 January 2019, the register of companies reflectd the following as shareholders or directors of the company:

(i) Jenneby Taita Too

(ii) Michael Lubuin Nenee

(iii) Mahmoud Tarus

(iv) Johanna Kiptoo Chepkech (the applicant)

7. On 3 December 2018, Michael Lubuin Nenee had written to the company notifying it of his intention to sell his shares in the company. On the same date, the company wrote to all the directors notifying them of the company's special general meeting to be held on 31 December 2018 to consider and ratify Nenee's resignation. On this latter date, Nenee wrote to the other directors notifying them of his resignation and the transfer of his share to the applicant. On the same date, the company not only passed a special resolution accepting Nenee's resignation and the same time accepting the transfer of his share to the applicant the company also lodged with the respondent a special or ordinary resolution informing it of these changes.

8. On 10 January 2019, Nenee lodged with the respondent a notice of cessation of directors; the respondent duly entered these changes in the register and these changes were reflected in the particulars provided online on 26 February 2019. To be precise, the directors and the shareholders of the company were indicated as the applicant together with Jeneby Taita Too and Mahmoud Tarus.

9. Somehow, the respondent removed the company from the online platform and it is therefore inaccessible. Despite the applicant asking for its restoration vide letters dated 30 July 2019 and on 13 August 2019 the respondent has either refused, ignored or neglected to act accordingly hence this suit.

10. In response to the application, Alice Mwendwa, the Assistant Registrar of Companies swore a replying in which she deposed and agreed with the applicant that indeed the company was incorporated as stated by the applicant in his affidavit. She also agreed that the company was dissolved but was again reinstated to the register of companies through a court order issued on 30 May 2017.

11. In the intervening period between the dissolution of the company and its restoration to the register, its original file went missing. In an attempt to reconstruct the file, the respondent asked the company to submit certified copies of incorporation and all statutory documents that had been filed in respect of the company.

12. In response to this request, she received a response from two different firms of advocates; one of these firms was Messrs. Maina Wachira & Company Advocates which provided the following information:

(a) A memorandum of articles of association for the company dated 13 January 1987 drawn and presented by Maina Wachira & Company Advocates indicating that the original subscribers to be as follows:

(i) Mahmoud C.A. Tarus with one share

(ii) Jeneby Taita Too holding one share

(b) A certificate of incorporation for the company dated 16 January 1987 bearing registration number C. 33605 signed by the deputy registrar.

(c) A Memorandum and Articles of Association for the Company dated 10 January 1987 drawn and presented by Maina Wachira and Company Advocates indicating that original subscribers to the memorandum and articles of the company are:

(i) Mahmoud C.A. Tarus (one share)

(ii) Jeneby Taita Too (one share)

(iii) Michael Lobuin Nene (one share)

(iv) Jacob Kikum Ngoletum (one share)

(d) A certificate of incorporation of the company No. C33605 dated 16 January 1987 signed by the deputy registrar.

13. The other firm that responded to the respondent's request was that of Messrs. V.V. Mule and Company Advocates; the information provided by this firm of advocates was as follows:

(a) A letter dated 6 November 2006 for reservation of name

(b) A memorandum and Articles of Association dated 8 November 2006 drawn and presented by V.V Mule and Company Advocates indicating the original subscribers to the memorandum and articles of association to be as follows:

(i) Jeneby Taita Too (20 shares)

(ii) Joseph Karuga (20 shares)

(c) Form 203 dated 8 November 2006 indicating Mahmoud Chemwor Tarus as a director with nil shares.

(d) Form 208 and 201 dated 8 November 2006 and statement of nominal capital for Antow trading dated 7 November 2006 indicating the nominal share capital to be Kshs. 100,000/= divided into 1000 shares of 100 each.

(e) A duplicate and original certificate of incorporation No. C130189 for the company dated 9 November 2006.

(f) Form BN/6 dated 11 January 2007 notifying the registrar general that the Company which was registered as number C130189 has ceased to conduct business as from 11 January 2007.

14. In view of this contradictory information, it became difficult for the respondent to reconstruct the company file. According to the respondent, he has not been able to ascertain the transfer of ownership of the company after the restoration of the company to the register of companies and it is not clear to him whether the transactions involving the company particularly with respect to the alleged transfer of shares to the applicant were genuine.

15. The Assistant Registrar of Companies also swore that the status reports of the company which the applicant attached to his affidavit are forgeries in view of the inconsistent information on the company from the two law firms.

16. Only the applicant filed written submissions. He began his submissions by citing the case of **Mark Lloyd Stephenson & Another v Registrar of Companies (2016) eKLR** in which the court cited with approval the Court of Appeal in **Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & Another CA 266 of 1996 (1997) eKLR**. In this latter case, the court held that an order of mandamus compels the performance of a public duty which is imposed on a person or a body of persons by a statute and where that person or body of persons has failed to perform that duty to the detriment of a party who has a legal right to expect the duty to be performed. Counsel also relied on the case of **Republic v Registrar of Companies & 2 Others; Ex Parte Schindler Limited (2020) eKLR** where the court made a similar proposition. Accordingly, counsel submitted that the applicant has demonstrated that the respondent has a public legal duty to act conferred on him by law and the applicant has a clear right to the performance of that duty.

17. On the issue whether the registrar can dissolve the company, counsel submitted that Section 89(4) of the Companies Act, the Registrar can dissolve the company on its own initiative if the company is neither carrying on business nor in operation. To that end, counsel made reference to **Re Antow Trading Company Limited (2017) Eklr** a ruling that reinstated the company to the register. It was therefore urged that court allows the application.

18. The Court of Appeal addressed, relatively extensively, what the order of mandamus (now referred to as mandatory order) entails in **Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & Another**; I need not say anything more about it expect to repeat what the court said; the court noted 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:

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“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. We can do no better than give examples. The Liquor Licensing Act, Chapter 121 Laws of Kenya, by section 4(1) creates a licensing court for every licensing area and provides that the licensing court, chaired by the District Commissioner of each area, is to consider and determine applications for and the cancellation of liquor licences. Section 8 of the Act provides the manner and procedure to be followed by those who desire to acquire liquor licences. The duty imposed on the licensing court is “to consider and determine applications and the cancellation of licences”-section 4(1)

Now, if a party applies for a licence under section 8 and the licensing court simply refuses or neglects to consider and determine the application such a party would be entitled to come and ask the High Court for a mandamus, and if the High Court is satisfied that the licensing court has simply refused or neglected to consider and determine the “application” the High Court would be entitled to issue an order of mandamus, compelling the licensing court to consider and determine the application as it is bound by the law to do so. The High Court would, in those circumstances, be compelling, through the remedy of mandamus, the licensing court to perform its public duty imposed on it by section 4(1) of the Liquor Licensing Act, and the public duty imposed by that section is the consideration and determination of the application for a licence. The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the licence. The power to grant or refuse a licence is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a licence. In fact the Act provides for appeals to the High Court by persons whose licences the licensing court has refused to renew or whose licences have been cancelled.

Another example is to be found in the Kenya National Examinations Council Act itself. Section 10(1) of that Act provides that:

“The Council shall have, for the furtherance of its objects and purposes, the following powers and duties.

(a) to conduct such academic, technical and other examinations as it may consider desirable in the public interest;

(b) to award certificates or diplomas to successful candidates in such examination;

(c);

(d);

(e);

Paragraph (a) above imposes on the Council a general duty to conduct academic, technical and other examinations as it may consider desirable.

It is public knowledge that the council conducts academic examination known as Kenya Certificate of Primary Education, which is the subject of the dispute before us, and the Kenya Certificate of Secondary Education. It is also public knowledge that these examinations are conducted towards the end of each year. If the Council were to refuse to conduct any of these examinations and there were candidates ready and desiring to take the examinations, we have no doubt the High Court would be perfectly entitled to compel it by mandamus to conduct the examinations as its failure to do so would constitute a failure to perform its statutory duty under section 10(a) of the Act. But the section does not specify when or how often the examinations are to be held in any one year and a candidate who is ready to take his examinations at a time when the Council is not conducting any would not be entitled to an order compelling the Council to conduct an examination for him alone. The times and frequency of the examinations are left to the discretion of the Council and it cannot be forced by mandamus to hold an examination at any particular time in the year.

Again as an incident of conducting the examinations, the Act imposes on the Council an obligation to mark the papers of the candidates. If the Council refuses or neglects to mark the examinations within a reasonable time, or having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the papers or to declare the results as the case may be. The same goes for awarding diplomas or certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b). But the High Court would not be entitled to order the Council, when carrying out the process of marking the examination papers, to award any particular mark to any particular candidate. That duty or function lies wholly within the province of the Council and no court has any right to interfere. To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly 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 made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter.

19. There is no doubt that the office which the respondent holds is a public office and for this very reason his duties are naturally public in nature; it is a fact that the respondent has not disputed.

But as **Halsbury’s Laws of England (4th Edition, Vol.1 page 111 paragraph 89)** says in the excerpt quoted by the judges of Court of Appeal in the Kenya National Examination Council Case that the purpose of the order of mandamus is ‘*to remedy the defects of justice...to the end that justice may be done, in all cases where there is no specific legal remedy for enforcing that right.*’

20. The respondent in the present case has been confronted with what in effect are competing claims from two sets of documents each of which purport to represent the record of directors of or subscribers to the memorandum and articles of association of Antow Trading Company Limited.

21. Each of the two groups of people presenting these documents claim to be genuine subscribers to the memorandum and articles of association. In these circumstances, registration of one group of subscribers rather than the other, would not only have been reckless on the part of the respondent but would, no doubt, expose him to litigation between what are obviously private individuals fighting for control of a private enterprise.

Before the respondent is compelled to register one group rather than the other, the underlying question of who are the genuine subscribers or directors of the company must first be resolved.

22. I wouldn’t consider a judicial review court to be the proper forum where such dispute can be resolved; in any event, this is not the dispute before court and the applicant has not even suggested that such is the contest that this honourable court has been asked to determine. Nonetheless, it is a question that has to be resolved before the court can consider the question at hand: whether the respondent can be compelled to enter any set of returns he has been presented with by any of the parties claiming ownership of the company in the register of companies with respect to Antow Trading Company Limited.

23. A civil court, exercising ordinary civil jurisdiction appeals to me to be the proper forum for consideration and determination of this

underlying question; the mode of redress by that court of the dispute between the contesting parties would be no less convenient, beneficial or convenient.

It is also worth remembering that whenever it is granted, the mandatory order must command no more than the party against whom the application is made is legally bound to perform. If the applicant's documents were the only documents the respondent was presented with in relation to the subscription to and directorship of the company in question, there would be no reason why the respondent would not have been compelled accept them and make appropriate entries or, to be more precise, to undertake his statutory duties.

24. It will be asking of the respondent too much if he was asked to prefer one group of the subscribers rather than the other and particularly so, when the other group of subscribers is not part of these proceedings.

25. As has been noted earlier, it is trite that *'where a statute which imposes a duty in the hands of the party on whom obligation is laid, a mandamus cannot command the duty to be carried out in a specific way.'*

For the foregoing reasons, I am not satisfied that the applicant is entitled to the mandatory order. His application is dismissed but I make no order as to costs. Orders accordingly.

DATED, SIGNED AND DELIVERED ON 5TH MARCH 2021

NGAAH JAIRUS

JUDGE