



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 87 OF 2017

IN THE MATTER OF AN APPLICATION BY DUNE PACKAGING LIMITED FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION & THE FAIR ADMINISTRATION ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER SECTIONS 46 AND 50 OF THE KENYA DEPOSIT INSURANCE ACT, CHAPTER 487C

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE RECEIVER MANAGER, IMPERIAL BANK

LIMITED (IN RECEIVERSHIP).....RESPONDENT

AND

DUNE PACKAGING LIMITED.....EX PARTE APPLICANT

JUDGMENT

The parties.

1. The *ex parte* applicant is a limited liability company incorporated under the Companies Act [1] and a current and fixed deposit accounts holder with Imperial Bank Limited (In Receivership). The Respondent is the Receiver Manager of Imperial Bank Limited (In Receivership).

The Orders sought.

2. By way of a Notice of Motion dated 3rd March 2017, the *ex parte* applicant seeks the following Orders:-

a.. *That an order of Mandamus compelling and directing the Respondent to set off the outstanding loan balances on term loan 012 TMLC121950001 being Kshs. 4,937,932.00 and hire purchase loan 003HPLC110730001 being Kshs. 308,222.75 as at 15th September 2016 owed to Imperial Bank Limited (In Receivership) by the applicant from the sums held in the applicant's fixed Deposit Accounts FDR No. 012DEP1152360001, FDR No. 012DEP315174001 and FDR No. 012DEP3150130001 held by*

Imperial Bank Limited (In Receivership) and to pay the surplus amount of **Ksh. 1,411,065.00** to the applicant within seven (7) days.

b. **That** an order of **Mandamus** compelling and directing the Respondent to make immediate payment of Kshs. 445,039.00 credited to the *ex parte* applicant's current account No. 7120000796 held by Imperial Bank Limited (In Receivership) to the applicant within seven (7) days.

c. **That** the costs of and incidental to this suit be awarded to the *ex parte* applicant.

Facts relied upon.

3. The *ex parte* states that he is a holder of current account No. **712000796** with a credit balance of **Kshs. 455,039.00** as at **12th** October 2015 and fixed deposit accounts with Imperial Bank Limited (In receivership) for which he was issued with Fixed Deposit Receipts as follows:-

i. FDR No. **012DEP3150130001** issued on **14th** July 2015 for a deposit of **Ksh. 2,084,583.26** at an interest rate of **10.15% p.a.** earning an interest of **Kshs. 52,751.38** upon maturity on **13th** October 2015;

ii. FDR No. **012DEP1152360001** issued on **20th** September 2015 for a deposit of **Ksh. 3,018,863.01** at an interest rate of **9% p.a.** earning an interest of **Kshs. 23,075.69** upon maturity on **21st** October 2015; and;

iii. FDR No. **012DEP3151740001** issued on **21st** September 2015 for a deposit of **Ksh. 2,553,774.14** at an interest rate of **10.15% p.a.** earning an interest of **Kshs. 64,624.48** upon maturity on **21st** December 2015;

4. The *ex parte* applicant avers that following the declaration of the initial phase of payouts for amounts not exceeding **Kshs. 1,000,000.00**, the *ex parte* applicant applied for the payment of the sums held as credit to its current account and on deposits in its fixed deposits accounts listed above through DTB Limited and submitted all the required documents, and, that, it subsequently received a payment of **Ksh. 1,000,000.00** from the said Bank.

5. The *ex parte* applicant avers that during the second phase of payouts to depositors for amounts not exceeding **Ksh. 1,500,000.00** which commenced on or about **27th** July 2016, it once again submitted its request for payment of sums held as credit to its current account and on deposits in its fixed deposit accounts through NIC Bank Limited, through a claim form dated **12th** August 2016, but, it is yet to receive the said payments.

6. The *ex parte* applicant further avers that it had taken out loan facilities with the Respondent with outstanding loan balances on term loan **012TMLC121950001** being **Ksh. 4,937,932.00** and hire purchase loan **003HPLC110730001** being **Ksh. 308,222.75** as at **15th** September 2016. Further, the *ex parte* applicant states that by a letter dated **13th** January 2016, it wrote to the Respondent requesting it to set off the outstanding loan balances with the amounts due to the applicant on their deposits with the Bank, but, the letter elicited no response, and, that, the *ex parte* applicant is lawfully entitled to the said sums.

7. The *ex parte* applicant further avers that vide his advocate's letter dated **19th** December 2016, it requested the Respondent to discharge its statutory mandate and set off the outstanding debts or loans from the sums held in the said accounts, but, despite the request, the Respondent has failed, and or refused to discharge its statutory mandate thereby denying it the said funds.

Legal foundation of the application.

8. The application is premised on the grounds that the Respondent is under a statutory mandate under section **50** of the Kenya Deposit Insurance Act[2](herein after referred to as the Act) to set off any outstanding debts or loans from the sums held in a borrower's deposit held by the Respondent, and, that, despite the said request, the Respondent has failed and or refused to exercise its statutory mandate, which failure is ultra vires the said section. As a consequence, the *ex parte* applicant avers it continues to be charged exorbitant interest rates on the said loan.

Respondent's Replying Affidavit.

9. **Andrew Wamicwe**, the Respondent's Legal counsel swore the Replying Affidavit dated **12th** March 2017. He averred that the *ex parte* applicant borrowed **Ksh. 10,000,000/=** from the Respondent secured by a guarantee and indemnity dated **30th** April 2012 in favour of the Respondent executed by its directors. He also averred that the *ex parte* applicant owes the Respondent **Ksh. 5,929,611.66** as at **30th** April 2017. **Mr. Wamicwe** further averred that it would be unfair to the other depositors if the *ex parte* applicant is paid the sums sought to be offset which is contrary to the provisions of the act. He also averred that Judicial Review orders are discretionary and that the *ex parte* applicant does not deserve this courts discretion.

Ex parte Applicant's further Affidavit.

10. **Mr. Rohin Chandaria**, a director of the *ex parte* applicant swore the further Affidavit dated **21st** June 2018. He averred that it is not denied that the *ex parte* applicant had borrowed money from the Respondent. He averred that the *ex parte* applicant's deposits held by the Bank aggregate to **Ksh. 8,252,710.76** which are more than sufficient to set off the outstanding loan amounts.

Issues for determination.

11. I find that only one issue falls for determination, namely:- ***whether the ex parte applicant has established any grounds for this court to grant the orders of Mandamus sought.***

12. The crux of the *ex parte* applicant's advocates' submissions is that the Respondent's failure to offset the said loans as requested is irrational and *ultra vires* section 50(2)(a) of the act, and, that, no reason has been advanced for the refusal. He argued that the sums held in the said accounts is more than the loan amounts. He also argued that the refusal is a violation of section 4 of the Fair Administrative Action Act.[3] Further, he argued that failure to give reasons is unreasonable.

13. The crux of Respondent's counsel's submission is that it is admitted that the *ex parte* applicant borrowed **Ksh. 10,000,000/=** from the Respondent, and, that, as at 30th April 2017, it owed the Respondent **Kshs. 5,929,611.66** and that the verification of depositors, their deposits and all their related transactions is essential for the sole reason that the ultimate duty of the receiver manager is to ensure the protection of the institutions deposits for the benefit of all the banks customers.

14. Counsel argued that section 33(7) and 36 of the act enables the Respondent to discount the possibility of a loss. Further, he argued that given the apparent indebtedness of the *ex parte* applicant, it was necessary for the Receiver Manager to exercise the powers provided under the above sections, hence, this suit is premature, and, that, its statutory duty to pay insured depositors is yet to accrue. He argued that as at this point there exists no statutory duty.

15. I have considered the submissions rendered by the parties together with the authorities cited and the relevant provisions of the law. The starting point is that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[4] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[5]

16. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**[6]

17. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

18. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *Mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*,[7] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [8] The eight factors that must be present for the writ to issue are:-

(i) *There must be a public legal duty to act;*

(ii) *The duty must be owed to the Applicants;*

(iii) *There must be a clear right to the performance of that duty, meaning that:*

a. *The Applicants have satisfied all conditions precedent; and*

b. *There must have been:*

I. *A prior demand for performance;*

II. *A reasonable time to comply with the demand, unless there was outright refusal; and*

III. *An express refusal, or an implied refusal through unreasonable delay;*

(iv) *No other adequate remedy is available to the Applicants;*

(v) *The Order sought must be of some practical value or effect;*

(vi) *There is no equitable bar to the relief sought;*

(vii) *On a balance of convenience, mandamus should lie.*

19. It is imperative that the above tests must be satisfied before an order of *mandamus* can issue. For *Mandamus* to issue, there must be a public legal duty to act and the duty must be owed to the Applicant. There must be a clear right to the performance of that duty, meaning

that the Applicant has satisfied all conditions precedent. There must have been a prior demand for performance; a reasonable time to comply with the demand, unless there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay.

20. It is not disputed that the *ex parte* applicant holds the said accounts and that it has sufficient funds to offset the loan. The Respondent's counsel submitted that under section 33(7) and 36 of the act, to enable the Respondent to discount the possibility of a loss given the apparent indebtedness of the *ex parte* applicant, it was necessary for the Receiver Manager to exercise the powers provided under the above sections, hence, this suit is premature, and, that, its statutory duty to pay insured depositors is yet to accrue. He argued that as at this point there exists no statutory duty.

21. The Respondents counsel has raised a valid issue, namely that this suit is pre mature. Despite the fact that this is a fairly dispositive issue, the *ex parte* applicant's counsel did not address it. It is premised on section 37(3) of the act which provides that "No action shall be taken against the Corporation in respect of the obligation of the Corporation to make payment in relation to an insured deposit unless the action is commenced within six years after the date of appointment of the Corporation as liquidator of the institution in which the deposit is held."

22. Determining the question whether this suit is premature will require the court to venture into merits which is outside the scope of Judicial Review. Further, the Respondent has in my view explained the basis for the refusal to offset the loan and pay the amounts as requested. It cannot be said that it has refused to act. It cannot be said that there is "an express refusal, or an implied refusal through unreasonable delay." I am unable to conclude that there was an express or implied refusal in view of the above provisions and the explanation offered. Differently stated, none of the above conditions has been satisfied for *Mandamus* to issue. Lastly, *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay. Applying the above tests to the facts and circumstances of this case, I find and hold that the *ex parte* applicant has not satisfied the above conditions. It follows that there is no basis at all for the court to grant the order of *Mandamus*.

23. I must also point out that the order(s) sought in this application amounts to inviting this court to enter judgment in a contested liquidated claim without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. It involves determining the Respondent's liability and make a finding whether the amounts are payable and effectively enter judgment for the amount. The case falls totally outside the province of Judicial Review. It is simply a misconceived shortcut designed to obtain a judgment in an otherwise civil dispute of commercial nature.

24. Judicial review is concerned with the decision making process and not merits. In *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others*[9] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact. [10] The issues raised in this case can only be determined in a forum where the litigating parties have an opportunity to present their evidence and also test the evidence of their opponents by way of cross examination.

25. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

26. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.* These two tests have not been established in this case. In my view, this is not a Judicial Review case but a civil dispute which ought to have been filed in the Commercial Division.

27. The discretionary nature of the Judicial Review remedy sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for Judicial Review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

28. In this case, compelling the Respondent to release deposits when the basic legal requirements are in doubt would in my view amount to impeding its mandate or directing it to act illegally. Further, as stated above, the *ex parte* applicant had the option of filing a civil suit instead of invoking Judicial Review jurisdiction of this Court.

29. In view of my analysis of the law and the determination of the questions raised herein above, the conclusion becomes irresistible that the *ex parte* applicant has not demonstrated any grounds to warrant this court to grant the Judicial Review orders sought. Accordingly, I find and hold that the *ex parte* Applicant's Application dated 3rd August 2017 must fail. Consequently, I hereby dismiss the application dated 3rd March 2017 with costs to the Respondent.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 17th day of January, 2019.

John M. Mativo

Judge.

[1] Cap 486, Laws of Kenya.

[2] Act No. 10 of 2012.

[3] Act No. 4 of 2015.

[4] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[5] W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[6] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. II. 19, 25-26 (1964).

[7] [1993 Can LII 3004 \(F.C.A.\)](#), [1994] 1 F.C. 742 (C.A.), aff'd [1994 CanLII 47 \(S.C.C.\)](#), [1994] 3 S.C.R. 1100.

[8] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).

[9] {2016}eKLR.

[10] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.