

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 82 OF 2017

IN THE MATTER OF AN APPLICATION BY VISTA MANAGEMENT

CONSULTANTS 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

VISTA MANAGEMENT CONSULTANTS LIMITED.....*Ex parte Applicant*

JUDGMENT

The parties.

1. The ex parte applicant is a limited liability company duly registered under the Companies Act.[\[1\]](#)
2. The Respondent is the Receiver Manager of Imperial Bank Limited (In Receivership).

The Orders sought.

3. 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 the Respondent to make payment to the ex parte applicant in the sum of Kshs. 1,500,000.00 from the sums held to the credit of its current account No. 012206XXXX with Imperial Bank Limited (In Receivership) within seven (7) days.

b. That an order of Mandamus compelling and directing the Respondent to make payment to the ex parte applicant in the sum of Kshs. 1,500,000.00 from the sums held in its fixed deposit account FDR No. 003DEP313059XXXX with Imperial Bank Limited (In Receivership) within seven (7) days.

c. That an order of Mandamus compelling and directing the Respondent to make payment to the ex parte applicant in the sum of

Kshs.450,668.62 being 10% of the deposits of the remaining sums held in its current account No. **01220XXXX** and fixed deposit account **FDR No. 003DEP313059XXXX** with Imperial Bank Limited (In Receivership) within seven (7) days.

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

Factual Background.

4. The *ex parte* states that it is a holds current account No. **012206XXXX** with a credit balance of **Kshs. 4,658,359.25** and fixed deposit account **FDR No. 003DEP313059XXXX** with a credit sum of **Ksh. 3,848,326.92** as at **16th** August 2016.

5. The *ex parte* applicant also avers that following the declaration of the initial phase of payouts for amounts not exceeding **Kshs. 1,000,000.00**, it applied for the payment of the amounts in its above accounts through DTB Limited and submitted all the required documents and the Respondent approved the payment of **Ksh. 1,000,000.00** on the applicant's deposits. He further 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 on deposits in his above accounts through NIC Bank Limited on **16th** August 2016, but the Respondent did not make the payment and no reason was given.

6. The *ex parte* applicant also avers that by its advocate's letter dated **19th** December 2016, it requested the Respondent to discharge its statutory mandate and pay to it the sum of **Ksh. 3,000,000.00** being the amount due to depositors during the second phase of payouts, but, despite the said request, the Respondent has failed, and/or refused to discharge its statutory mandate thereby denying him the said funds.

7. The *ex parte* applicant also states that on **28th** December 2016, the Kenya Deposit Insurance Corporation announced a further payment of sums up to **10%** of the current deposit of verified depositors of the Respondent subject to a minimum of **Kshs. 200,000/=** but the Respondent failed and or refused to disburse **10%** of the deposits in the *ex parte* applicants deposits amounting to **Kshs. 450,668.62**.

Legal foundation of the application.

8. The *ex parte* applicant's case is that the Respondent is under a statutory duty under sections **46** and **50** of the Kenya Deposit Insurance Act[2](herein after referred to as the Act) to make the said payments, and that, failure to effect the said payments is ultra vires the said sections.

9. The *ex parte* applicant also states that as a result of the Respondent's failure to discharge its statutory mandate under section **50** of the act, it has been denied portion of its deposits with the Respondent which it is entitled to as a matter of right.

Respondent's Replying Affidavit.

10. **Andrew Wamicwe**, the Respondent's Legal counsel swore the Replying Affidavit dated **4th** November 2017. He averred that exhibit **AJN 1** at pages **2** to **3** annexed to the *ex parte* applicant's application shows that the representatives of the *ex parte* applicant herein **Amool Jivraj Nathwani** and **Nirav Amool Nathwani** and that **Amool J. Nathwani** is a father and next of keen to the *ex parte* applicant's company representatives.

11. He also averred that the said next of kin executed a letter of offer dated **24th** December 2009 in favour of the Respondent where African Retail Traders Limited had an overdraft facility of **Ksh. 60,000,0000/=** . Further, he averred that under clause **10** of the said letter of offer, the securities to be held were the personal guarantees and indemnity (joint and several) to the tune of **Ksh. 60,000,000/=** guaranteeing the directors of African Retail Traders, namely, **Mohamed Farid, Sultan Karim, Abdulla Amny, Atul R. Shah** and **Amool J.K Nathwani**. He further averred that despite the directors undertaking to sign personal guarantees in favour of the Respondent, they declined, and, that, the undertaking given on **24th** December 2009 by the said directors still stands.

12. He also averred that the *ex parte* applicant and **Amool J. Nathwani** who is a brother in law to the *ex parte* applicant appear to be related parties in the transactions.

13. **Mr. Wamicwe** also averred that African Retail Traders owes the Respondent over **Ksh. 140,000,000/=**, hence, it will be unjust and unfair to the other depositors if the *ex parte* applicant is paid the sums claimed herein unless the issue of the *ex parte* applicant and the dishonored guarantee to African Retail Traders for **Ksh. 60,000,000/=** is explained. Additionally, he 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.

14. **Mr. Amooj Jivraj Nathwani** swore the further Affidavit dated **15th** December 2017. He admitted that **Nirav Nathwani** is his son, but, stated that he was not a party to the loan agreement between African Retail Traders Limited and the Respondent, hence, he is not liable for any monies under the said agreement. Also, he denied signing or undertaking to give a personal guarantee for **Ksh. 60,000,000/=** in favour of the Respondent. He averred that the Respondent has not produced evidence in the form of signed and or registered Deed of Guarantee before this court. He further averred that the *ex parte* applicant did not execute any Deed of Guarantee in favour of the Respondent.

15. Further, he averred that such an undertaking must be in writing, and, that clause **10(b)** of the said document is not and was not intended to be a personal guarantee by himself or any of the persons listed therein. He also averred that a Deed of Guarantee had to be executed to bind him as a guarantor.

16. Additionally, he also averred that without prejudice to the above, he is not personally liable to repay any monies owed to the Respondent by the said company since he did not execute a personal guarantee to secure the loan to the company from the Respondent.

17. **Mr. Nathwani** further averred that **Nirav Nathwani** is not personally liable to repay any monies owed to the said bank by the said company as he was neither a party to the loan agreement nor did he execute a personal guarantee to secure the said loan. Further, he averred that guarantees signed by directors in their personal capacity cannot be enforced against a limited liability company. He averred that in absence of a Deed of Guarantee executed by the *ex parte* applicant, the allegation of a dishonored guarantee has no basis. Also, he averred that the Respondent's claim has been extinguished by dint of section **4(a)** of the Limitation of Actions Act.^[3]

Issues for determination.

18. 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.***

19. The crux of the *ex parte* applicant's advocates' submissions as I understood it is that the Respondent acted *ultra vires* section **50** of the Act by refusing to pay the *ex parte* applicant on grounds that one of the *ex parte* applicant's directors, **Amool Jivraji Nathwani** allegedly undertook, among others, to sign a personal guarantee in favour of African Retail Trader Limited for a loan of **Kshs. 60,000,000.00**, and has dishonored the said guarantee, because the other director, **Nirav Nathwani** is the son and next of kin of **Amool Jivraj Nathwani**.

20. He submitted that no personal guarantee was signed by **Amool Jivraji Nathwani** to secure the loan to African Retail Trader Limited by the Bank, hence, it cannot in any way be liable for any monies owed by African Retail Trader (2005) Limited.

21. Citing the definition of a guarantee in Volume **20** of the *Halsbury's Laws of England*^[4] and *Kolaba Enterprises Limited v Shanshudin Hussein Varvani & Another*^[5] in which the court defined a guarantee as a separate contract, he submitted that a guarantee must as of necessity be in writing.^[6] Additionally, he argued that the Respondent's refusal is a violation of section **4** of the Fair Administrative Action Act.^[7]

22. The Respondent's counsel submitted that *Mandamus* lies when officials have a public duty to perform, and have refused to perform.^[8] He submitted that the proviso to section **50(2)** of the act allows the Respondent to offset deposits against loans and debts owed by the depositor to the institution, hence, the *ex parte* applicant's application is based on the misapprehension of the law.

23. He referred to Rule **37 (3)** of 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*" and argued that this suit is pre-mature. He argued that the Respondent is an institution under receivership and not liquidation, and, that, the statutory duty to pay insured deposits is yet to accrue. Also, he argued that these proceedings are a misapprehension of the law.

24. Counsel also argued that under section **36** of the Act, the Receiver may, where it deems it necessary, withhold payment to a third party in respect of any deposit with an institution until it has received an assignment in writing of all the rights and interests of the depositor in relation to the deposit. Additionally, he argued that in the event insured deposits are due, section **33(7)** of the Act provides that the corporation shall offset and withhold payment of such portion of the insured deposit of any depositor in any institution against any loans or debts due and owing by that depositor to the institution or against any claims for injuries or losses through negligence or other wrongdoing against any depositor who may be liable to the institution or the corporation as a director, shareholder, officer, employee, agent or other person.

25. He submitted that even though the Respondent allowed the depositors limited access to the funds, the same has been done on the basis of a verification process to ensure that the said depositor does not owe the Respondent either personally, or through registered companies. He argued that what makes the *ex parte* applicant's account of interest is the fact that its directors and shareholders **Amooj J. Nathwani**, through African Retail Traders Limited together with his fellow directors **Mohamed Farid, Sultan Karim, Abdullah Ammy and Atul R. Shah** are guarantors to the tune of **Ksh. 140,000,000/=** owed to the Respondent.

26. Further, he submitted that in the verification of depositors, their deposits and all their related transactions is essential because the ultimate duty of the Receiver is to ensure the protection of the institutions deposits for the benefit of all the banks customers. Additionally, he submitted that section **36** of the Act allows the Respondent to withhold payment under circumstances listed in the section, hence, it was necessary for the Receiver Manager to exercise the powers provided under section **33(7)** and **36** of the Act.

27. It is common ground 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.^[9] *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.^[10]

28. *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.**^[11]

29. *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.

30. *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)*,^[12] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[13] 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.*

31. 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.

32. The question that begs for an answer is whether the *ex parte* applicant has demonstrated the existence of the legal duty to act. The Respondent's counsel invoked the provisions of the proviso to section 50 (2)(a) of the Act. The Respondent states it acted pursuant to provisions of the act, and, that, there exists a debt. He cited the guarantee, and, the related transactions in the accounts for the persons cited above. The applicability or otherwise of the provisions cited by the Respondent's counsel and the relationship (if any) of the directors of the *ex parte* applicant and the directors named in the said document are matters that require serious interrogation by way of evidence in chief and cross-examination and re-examination. These are contested issues of fact which cannot be determined in a Judicial Review proceeding.

33. Additionally, the proviso to section 50(2)(a) of the act raises serious doubts as to whether a legal right exists in favour of the *ex parte* applicant capable of being enforced by way of *Mandamus*. The proviso reads that:- "Provided that the Corporation may offset the deposits or other liabilities owed by the institution to any depositor or other creditor against any loans or other debts owed by that depositor or creditor to the institution."

34. Also relevant is the Respondent's counsel's submission that this suit is pre-mature and/or the *ex parte* applicant's right is yet to accrue anchored on the provisions of section 37(3) of the Act. Determining this question involves merits, which is outside the scope of Judicial Review. It is sufficient to point out that it casts a serious doubt on whether the *ex parte* applicant has demonstrated that the Respondent has a legal duty to act under the circumstances of this case.

35. The provisions of section 36 of the Act will have to be brought into view and its relevancy to this case determined. This casts a thick cloud on the question whether the test of the existence of a legal right has been satisfied. The section provides that "the Corporation may, where it deems it necessary, withhold payment to a third party in respect of any deposit with an institution until it has received an assignment in writing of all the rights and interests of the depositor in relation to the deposit."

36. Also relevant is section 33(7) of the Act which provides that "the Corporation shall offset and withhold payment of such portion of the insured deposit of any depositor in an institution against any loans or debts due and owing by that depositor to the institution or against any claims for injuries or losses through negligence or other wrongdoing against any depositor who may be liable to the institution or the Corporation as a director, shareholder, officer, employee, agent or other person." The implication of this section is a matter that warrants interrogation by the court.

37. It is evident that one cannot talk of refusal to pay when such legal issues are yet to be settled. It was a serious error for the *ex parte* applicant to ignore the above provisions and invoke Judicial Review jurisdiction, and, pray for orders or **Mandamus** without ensuring that the conditions laid down in the above authorities are satisfied.

38. The other test 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. Differently stated, none of the above conditions has been satisfied for *Mandamus* to issue. *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 any of the above conditions. It follows

that there is no basis at all for the Court to grant the order of *Mandamus*.

39. More fundamental is the fact that the issues discussed above touch on the merits of the *ex parte* applicant's case and require the court to take evidence before it can decide. This is outside the province of Judicial Review jurisdiction. For example whether or not the *ex parte* applicant signed the guarantee in question is an issue that requires the court to hear evidence from both parties. If the document in question was not a guarantee, what is its legal effect if any? Again, this will require interrogating evidence and cross-examination of witnesses. Determining such issues will involve a merit review, a function which is outside the purview of Judicial Review jurisdiction. Whether a Deed of Guarantee existed or not in whatever form calls for evidence to be resolved.

40. This court is being invited to determine the question that if at all the said document was not a guarantee, then what was the intention of the parties?. The court cannot determine the parties' intention without venturing into evidence, hence, delving into merits. The *ex parte* applicant's counsel correctly submitted that the question of whether the document was a guarantee cannot be determined in this Judicial Review application. The reverse is true. The *ex parte* applicant's case cannot be determined by way of Judicial Review. He ought to have filed it at the Commercial Division. On this ground, this case collapses.

41. The legal relationship between the *ex parte* applicant's directors and the persons who signed the guarantee in question is also a matter to be interrogated. It may require the court lifting the corporate veil to ascertain the truth about the transactions, an exercise that cannot be achieved by way of Judicial Review.

42. 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* [14] 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. [15] 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. In view of my analysis of the law and the determination of the questions raised herein above, the conclusion becomes irresistible that this is not a proper case for Judicial Review orders of *Mandamus* to issue. 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] Cap 22, Laws of Kenya.

[4] 4th Ed. 2001.

[5] {2015}eKLR.

[6] Citing *Kenya Planters Co-operative Union Limited v Stephen Nyaga Kimani* {2005} eKLR.

[7] Act No. 4 of 2015.

[8] Citing *Republic v Attorney General & Another ex parte Ongata Works Limited* {2016}eKLR.

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

[10]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.

[11] *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. IJ. 19, 25-26 (1964).

[12] [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.

[13] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).

[14] {2016}eKLR.

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