



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 92 OF 2017

In the matter of an application by Kaushik Natwarlal Thakkar 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

Kaushik Natwarlal Thakkar.....*Ex parte* Applicant

JUDGMENT

The parties.

1. The *ex parte* applicant is a fixed deposit accounts holder with Imperial Bank Limited (In Receivership). The Respondent is the Receiver Manager of Imperial Bank Limited (In Receivership).

The reliefs sought.

2. By way of a Notice of Motion dated 20th February 2017, the *ex parte* applicant seeks the following Orders:-

a. **That** an order of *Mandamus* compelling and directing the Respondent to make payment to the *ex parte* applicant in sum of **Ksh. 1,500,000.00** from the sums held in his fixed account **FDR No. 003DEP31620004** with Imperial Bank Limited (In Receivership) within (7) days.

b. **That** an order of *Mandamus* compelling and directing the Respondent to refund the **Ksh. 81,686.40** wrongfully deducted from the *ex parte* applicant's payment during the first phase of payouts for amounts not exceeding **Kshs. 1,000,000.00** by the Respondent 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 **Ksh. 200,000.00** being 10% of deposits of the remaining sums held in his fixed deposit account **FDR No. 003DEP3131620004** 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 matrix.

3. The ex parte applicant avers that he is a fixed deposit account holder with Imperial Bank Limited (In receivership), with a credit of the sum of **Ksh. 3,410,456.87** as at 13th October 2015 for which he was issued with a fixed deposit receipt **No. 002DEP3131620004**. He further avers that following the declaration of the initial phase of payouts for amounts not exceeding **Kshs. 1,000,000.00**, he applied for the payment on deposits in his fixed deposit accounts through DTB Limited and submitted all the required documents. He avers that the Respondent approved a payment of **Ksh. 1,000,000.00** less **Ksh. 81,686.40** which was deducted to settle the outstanding credit card bill for one **Amool Jivraj Nathwani** who is not a joint account holder with him bringing the account balance to **Kshs. 3,410,456.87**.

4. Further, 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, he submitted his request for payment on deposits in his fixed deposit account through NIC Bank Limited on 10th August 2016, but, the Respondent did not make the payment and no reason was given for the same.

5. The ex parte applicant also avers that he wrote to the Respondent through his advocate on 19th December 2016 requesting it to discharge its statutory mandate and pay him the sum of **Ksh. 1,581,686.40** being the amount due to depositors during the first and second phase of payouts to the depositors and a refund of the sum of **Kshs. 81,686.40** wrongfully deducted in the previous payout to settle the outstanding credit card bill for a person who was not a joint account holder with him.

6. Lastly, the ex parte applicant avers that on 28th December 2016, the Kenya Deposit Insurance Corporation announced a further payment of sums of up to 10% of the current deposits of the Respondent's verified depositors subject to a minimum of **Ksh. 200,000.00**, but, the Respondent has failed and or refused to disburse 10% of the deposits in his fixed deposit accounts amounting to **Ksh. 200,000.00**.

Legal foundation of the application.

7. The ex parte applicant states that the Respondent is under a statutory mandate under 50 of the Kenya Deposit Insurance Act^[1](herein after referred to as the Act), to make payments in respect of any insured deposit with the Bank where it is appointed as a receiver, but, the Respondent has failed and or refused to discharge its aforesaid statutory mandate.

8. Additionally, the ex parte applicant states that the Respondent's failure to perform its statutory duty has denied him a portion of his deposits which he is entitled to as a matter of right, and, that, unless the orders of Mandamus are granted, the Respondent will continue with its blatant refusal to carry out his statutory mandate to make the payment.

Respondent's Replying Affidavit.

9. **Andrew Wamicwe**, the Respondent's Legal counsel swore the Replying Affidavit dated 4th November 2017. He averred that a casual look at exhibit **KNT 1** at page 2 annexed to the ex parte applicant's application shows that **Amool J. Nathwani** is named as the ex parte applicant's next of kin. He also averred that the aforesaid next of kin had executed a letter of offer dated 24th December 2009 in favour of Imperial Bank Limited where African Retail Traders Limited had an overdraft facility of **Kshs. 60** Million. Additionally, 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) of the following directors of African Retail Traders for a maximum principal sum of **Kshs. 60** Million, namely; **Mohamed Farid, Sultan Karim, Abdulla Amny, Atul R. Shah** and **Amool J.K. Nathwani**.

10. **Mr. Wamicwe** also averred that African Retail Traders owes the Bank over **Ksh. 140,000,000/=** and despite the directors undertaking to sign personal guarantees in favour of the Respondent, they declined to do so. Also, he averred that the undertaking given on 24th December 2009 by the said directors still stands, and, that, **Amool J. Nathwani** who is a brother in law to the ex parte applicant appear "to be related parties in the transactions."

11. He also averred 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. He also averred that Judicial Review orders are discretionary and that the ex parte applicant does not deserve this courts discretion.

Issues for determination.

12. 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.**

13. The crux of the ex parte applicant's advocates' submissions is that the Respondent acted *ultra vires* section 50 of the Act by refusing to pay the ex parte applicant on grounds that the ex parte applicant listed **Amool Jivraj Nathwai** as his next of kin and a brother in law which does not translate to him assuming responsibilities, hence, the refusal is unreasonable, and irrational.

14. He also submitted that the ex parte applicant was not a party to the loan agreement between African Retail Trader Limited and the Respondent, nor did he execute a deed of guarantee to secure the loan to the said company, hence, he cannot be liable for the loan, and, that,

the refusal to pay is a violation of section 4 of the Fair Administrative Action Act.[2]

15. The Respondent's counsel submitted that *Mandamus* lies when officials have a public duty to perform, and have refused to perform.[3] 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.

16. 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. Also, 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, and, that, these proceedings are a misapprehension of the law.

17. Further, counsel 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 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.

18. He submitted that even though the Respondent allowed the depositors limited access to the funds, the same has been done on the basis of verification. He argued that **Amooj J Nathwani** together with his fellow directors through African Retail Traders are guarantors to the tune of **Ksh. 140,000,000/=** owed to the Respondent. Further, he submitted that 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 33(7) and 36 of the Act enables the Respondent to discount the possibility of a loss of the **Kshs. 140 Million**. Lastly, he argued that given the apparent beneficiary status of **Amool J. Nathwani** to the funds held in the *ex parte* applicants account, it was necessary for the Receiver Manager to exercise the powers provided under section 33(7) and 36 of the Act.

19. 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] It 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]

20. *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.

21. *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.*

22. 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.
23. The question that begs for an answer is whether the *ex parte* applicant has demonstrated the existence of the Respondent's legal duty to act. The Respondent's counsel has invoked the provisions of the proviso to section 50 (2)(a) of the Act. The contest here is that the Respondent wrongfully deducted a sum of **Ksh. 81,686.40** from amounts payable to the *ex parte* applicant. The Respondent's rejoinder is that a one **Amool J. Nathwani** is named as next of kin to the *ex parte* applicant, and, that, the next of kin had 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. 60,000,000/=** which amounts now stands at **Kshs. 140,000,000/=** and remains un paid and the directors have declined to sign persona guarantees.
24. The Respondent's position is that the verification of depositors and their deposits is necessary and that it exercised its powers under section 33(7) and 36 of the act to enable it to discount the possibility of a loss to the tune of **Ksh. 140,000,000/=**.
25. The first test is whether the Respondent in the circumstances of this case has refused to perform its legal duty. In my view, it has not refused to act. It acted and has given a reason for its decision. The reason offered is that it invoked sections 33(7) and 36 of the Act. Judicial Review does not deal with merits of a decision. It deals with legality of a decision and the process of arriving at the decision. The Respondent cannot be accused of refusal to pay when it acted pursuant to the above provisions. It was a serious error for the *ex parte* applicant to ignore the above provisions and invoke Judicial Review jurisdiction. **Mandamus** cannot issue against clear provisions of the law. Differently stated, mandated cannot issue where a party has acted legally.
26. The other test is "an express refusal, or an implied refusal through unreasonable delay." *First*, as I have concluded above, I am unable to conclude that there was an express or implied refusal in view of the circumstances discussed above. 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 and where a legal right is clear or has been established. 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*.
27. More fundamental is the fact that the issues raised in this case touch on the merits of the *ex parte* respective party's case and require the court to take evidence before it can decide which is outside the province of Judicial Review jurisdiction. The relationship (if any) between the said next of kin and the *ex parte* applicant is a contested issue which requires oral evidence to be established. To determine this issue, the court will require to hear evidence from both parties. Whether the said next of kin executed the guarantee in question is a contested issue. This requires evidence to be resolved. The court will be required to determine if at all there is any linkage or relationship however remote between the accounts mentioned in this case. This question requires the parties to present evidence and be cross-examined. Determining the foregoing 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 is a contested issue which calls for evidence to be resolved. Additionally, the name of **Amool J.K. Nathwani** appears as one of the directors who allegedly executed the guarantee or letter of offer. The implication of this (if correct) is a matter for determination.
28. The court will be required to determine the question whether the said document was a guarantee, (if not), the court will have establish the intention of the parties. All these in my view will require oral evidence and cannot be determined by way of Judicial Review.
29. The *ex parte* applicant seeks drastic orders whose effect is to determine liability against the Respondent and enter judgment on a contested liquidated amount without hearing evidence. That can never happen in a Judicial Review proceeding. 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 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.
30. 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.
31. 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.
32. 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.
33. 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, the ex parte applicant had the option of filing a civil suit instead of invoking

Judicial Review jurisdiction of this Court.

34. 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 March 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] Act No. 10 of 2012.

[2] Act No. 4 of 2015.

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

[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. IJ. 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.