



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW NO. 314 OF 2018

(Coram: Odunga, J)

REPUBLIC.....APPLICANT

VERSUS

COUNTY CO-OPERATIVE COMMISSIONER, MACHAKOS.....RESPONDENT

AND

HENRY NZOMO.....1ST INTERESTED PARTY

MICHAEL MUTISO MBUVI.....2ND INTERESTED PARTY

PYLES MUMBUA MATHEKA.....3RD INTERESTED PARTY

JAMES MUSYOKA MULANDI.....4TH INTERESTED PARTY

BERNARD MBATHA MBITHI.....5TH INTERESTED PARTY

PETER MUINDI.....6TH INTERESTED PARTY

BENJAMIN MUSEWA.....7TH INTERESTED PARTY

EXPARTE APPLICANT

1. KATHEKAKAI FARMERS CO-OPERATIVE SOCIETY LIMITED

2. NDETO KALAA

JUDGMENT

Introduction

1. The 1st ex parte Applicant, **Kathekakai Farmers’ Co-Operative Society Limited**, (hereinafter referred to as “the Society”) is a farmers’ cooperative society registered by the Ministry of Industrialization and Enterprise Development - State department of Cooperative Development while the 2nd ex parte applicant is a member of the Society.

2. According to the ex parte applicant, the Society was a respondent in Co-operative tribunal case No 24 of 2014 where vide ruling delivered on 21st March, 2014 an injunction was issued against it restraining it from processing and issuing titles of parcels of land belonging to members and non-members of the Society without approval of the members pending the hearing and determination of the said suit. The said applicant then instituted proceedings in Co-operative tribunal case No 189 of 2017 against the 1st to 6th interested parties herein, in which a ruling was delivered against it based on a preliminary objection that the suit was premature and the matter was referred to the commissioner for cooperatives on 20th September, 2017.

3. Pursuant to leave granted by this Court, the ex parte Applicants filed an application in this Court by way of a notice of motion dated 21st September 2018 in which they seek the following orders:

a) **THAT** an order of Mandamus do issue to compel the Respondent to act pursuant to the Cooperative tribunal orders given on 20th September, 2017 and issued on 19th October 2017 and to inquire into the conduct of the 1st to 7th interested parties as by law mandated.

b) **THAT** an order of Mandamus do issue compelling the Respondent to inquire into the conduct of the 1st to 7th interested parties pursuant to the 2nd ex-parte applicant's written application by letter dated 31st August 2017 and the act as by law mandated

c) **THAT** the costs of this application be provided for.

Ex Parte Applicants' Case

4. The application was supported by the grounds on its face and by verifying affidavits sworn on 17th September 2018 by **Amos James Kimuli**, who described himself as the chairman of the Society and **Ndeto Kalaa**, the 2nd ex parte applicant. It was the applicants' case that the 1st to 6th interested parties were replaced from office by new officials including **Amos James Kimuli**. However, the interested parties only partly handed over on 26th August, 2016 and refused to hand over the Certificate of Incorporation of the Society, the original members register, 3 title documents discharged from Cooperative Bank of Kenya Limited, to wit; IR 874, IR 17536, IR 14796 and IR 19866, management committee minutes and society resolutions, society survey documents, other society assets and expenditure, all the society's records and documents in their possession and other items due under the handing over checklist.

5. According to the ex parte applicants, despite extracting a copy of the tribunal orders and serving the respondent with the same, the respondent failed to act as by law mandated as a result of which the operations of the Society were paralyzed. It was however, the ex parte applicants' case that though the Respondent has a statutory duty to carry out investigations and ought to have done the same upon request from a member of the society he neglected to do despite service of the court order and receipt of the members' request.

The Respondent's Case

6. The application was opposed by the Respondent vide replying affidavit deposed to on 22nd October, 2018. The deponent averred that the application is an abuse of court process, the allegations are false because the said order is directed to the Commissioner of Cooperative Development and not the County Cooperative Commissioner. He averred that he advised the current management on the procedure to be followed qua to convene a members meeting seeking to pass a resolution referring the matter to the commissioner and the same was not done and therefore the application is premature and the court is devoid of jurisdiction to handle the application. He also averred that an inquiry was conducted and the same was not acted upon by the management, a copy of the inquiry report was attached to the affidavit.

The 1st to 6th Interested Parties' Case

7. On their part, the interested parties averred that the Society was registered on 31st August 1965 and the membership was drawn from amongst the employees of a white settler by the name of Peter Weber who owned the weber farm with the main objectives being firstly to acquire land from a British settler who was the members employer and subdivide it amongst themselves and secondly to collectively undertake economic activities mainly being livestock/dairy farming and coffee farming. It was averred that when the British settler wanted to dispose of his land, the first priority was given to his employees who are the founder members of the Society. It was contended that the 1st to 5th Interested Parties are members and comprised immediate former office bearers of the Society having been duly elected on 5th April 2007 as follows; Paul Wambua Mulungu - Chairman (Deceased); Henry Nzomo - Vice Chairman; Michael Mutiso Mbuvi – Secretary; Pyles Mumbua Matheka – Treasurer; James Musyoka Mulandi, Bernard Mbatha Mbithi (Deceased), Nzioka Nthakyo, Kiio Mueke and Anna Mwololo were committee members whereas Kinyao Vutu, Syokau Kilonzo and Peter Mundi were Supervisory Committee members.

8. According to the interested parties, the immediate former chairman, Mr. Paul Wambua Mulungu died on 6th November 2015 while the 5th Interested Party herein died on 18th October, 2017. During the Society's Annual General meeting held on 26th July 2016, the newly elected officials/office bearers / committee members of the 1st Ex parte Applicant were Amos James Kimuli –Chairman; Dominic Musembi Muema-Secretary and Mutuku Nzioka Ngotya- Treasurer. They however averred that though no request was made for the handing over either from the applicants or from the County Co-operative Officer or from the Society's advocate, the memorandum of handing over/ typed handover notes was signed by the newly elected officials. It was disclosed that sometimes in 2015, a break in and theft occurred at the Society's offices/premises whereby several documents and records were stolen and the then Chairman now deceased, was mandated by the committee to prepare a report which he made with the area local Chief but before he could make a report with the police he got ill and soon thereafter passed on therefore no report of the theft was ever made with the police. Therefore, when the interested parties took over as the officials of the Society in the year 2007, none of the documents indicated by the applicants and specifically:

a. Original Certificate of Incorporation for the 1st Ex parte Applicant.

b. Original Members Register.

c. Three title documents discharged from Co-operative Bank of Kenya Limited described as Title Numbers; IR 874, I.R 17536, I.R 14796 and I.R.19866.

were ever handed over to them by the former officials/ committee members.

9. It was added that the management committee minutes and society resolutions on disposal of various society assets were some of the

Society's documents that were stolen during the theft; there was no survey document handed over to the new committee by the previous committee and that the ex parte Applicants have not established any basis for the demand of the listed items hence the same amounted to a fishing expedition as against the former officials. It was disclosed that the various copies of official search exhibited indicated transfer of 521.3 Ha to Muambi Properties Limited on 10th December, 1992 and a Caveat by the Registrar of Titles claiming an interest under section 65(1) (f) of the RTA registered on 28th September, 2016 and there is no indication of any transaction made them during their tenure in office.

10. It was their case that the alleged letters of complaint from District Co-operative Officer and Ministry of Co-operative Development were addressed to the former committee members /officials who preceded them for they are dated 28th April 1994 and 13th August, 2002 and that the Ruling in CTC No.24 of 2014, **David Muema & Anor Versus KathekaKai Farmers Co-operative Society Limited** made no finding of irregularity on part of the Interested parties herein and found that 158 members attended and made a resolution adopting the report on society land which included issues of title deeds and also found that there was no merit in the allegation that the current management of the Society (the Interested Parties herein) had disposed of the Society land to non-members without consulting the members. It was contended that there was no cogent evidence of irregularity in the management of the Society's assets by the former officials as similar issues had even been before the Co-operative Tribunal as evident in the Ruling annexed as "AJM-12 " and they had been exonerated. Accordingly, there are no details of paralyzed operations of the 1st ex parte applicant.

11. It was averred that on 9th May, 2018, the Society's former and current committee members/officials held a meeting at the County Co-operative Commissioner's offices chaired by the County Co-operative Commissioner whose main agenda was handing over/taking over matters and the meeting was attended by the former and the current officials which meeting was convened by the County Co-operative Commissioner pursuant to the orders by the Co-operative Tribunal in CTC No.189 of 2017 Kathekakai Co-operative Society Limited Versus Henry Nzomo & Others where the county commissioner advised the committee to arrange for a meeting for purposes of reading the Memorandum of handing over showing those received and those not received and subsequently, on 28th May, 2018, the Memorandum of handing over was read, filled and duly signed. Thereafter, on 22nd October, 2012, the Commissioner for Co-operative Development prepared an inspection report Ref. CS. No.1556 dated 22nd October, 2012, appointing Mr. Suleiman Wandati, Legal Officer, Ministry Headquarters' and Ms. Phillis Njoki Co-operative Officer, Nairobi County to carry out inspection into the operations and affairs of the Society with a view of establishing the nature of complaints as raised to the Commissioner by a section of the members. In the Inspection Report, the following were highlighted:

a) Poor record keeping by the committee members that preceded them.

b) There was livestock was disposed of by the previous management committee.

c) There are resolutions passed and adopted in a previous meeting to support the disposal of the Society's property to meet other liabilities such as payment of statutory fees for institutions such as NSSF, the Municipal Council, to settle part of the loan the Society had acquired at the Co-operative Bank, as well as the STF (Settlement Trust Fund), rates that had accumulated at the Ministry of Lands.

d) The land that had been sold by the current management (1st to 6th interested parties) is Kaseve Kanini, Kisiiki, Masungwani, Kivaini was pursuant to minutes dated 5/4/07 that resolved the sale of the same.

e) There was also sale of the Society's compound that is plot 116 through sale agreement dated 28th May, 2010 pursuant to resolution passed by members on 21st May, 2010.

f) a total of 5,284 acres was disposed of to Muambi Properties Limited by the previous committee members which parcels number include some of the title documents being sought by the Ex parte Applicants from the interested parties.

g) due to poor record keeping by our predecessor management committees, the inspection committee could not get the minutes of members' meetings of the year 2006 backwards.

12. It was the interested parties, position that the 2nd ex parte applicant's application was unprocedurally made to the County Co-operative Commissioner instead of the Commissioner for Co-operative Development in contravention of clear provision of Section 73 of **Co-operative Societies Act**, Cap 490 Laws of Kenya.

13. It was their case that the instant application is fatally defective and a non-starter having been commenced as against the County Co-operative Commissioner, Machakos as opposed to the Commissioner for Co-operative Development and that the same sought enforcement of orders made by the Co-operative Tribunal which jurisdiction this Court sitting as a judicial review court lacks. They averred that the issues alleged herein were substantially determined and or inquired by the Commissioner in the inspection report alluded above and therefore the orders sought herein had been overtaken by events hence the instant suit was misconceived, frivolous, vexatious and Res judicata.

The 7th Interested Party's Case

14. The 7th interested party vide replying affidavit deposed on 6th November, 2018 averred that he was a surveyor previously employed by Geo Info Surveyor who conducted the survey work in respect of the Society's parcels of land that was concluded in 1996 and is not in possession of any of the land or survey records. He averred that due to the doctrine of privity of contract the ex-parte applicants lack capacity to claim any documents from him in respect of the subdivision and survey services because the firm Geo Info Surveyor was taken over by Gachanja Kagu following the death of Joshat Mboko who died in 1996. He added that he was not a person contemplated under Section 73 of the **Cooperative Societies Act** for he has never taken part in the management of the 1st ex parte applicant or been a past or present officer or member of the society. He averred that the instant application sought enforcement of orders made by the Cooperative Tribunal and the

court had no jurisdiction to entertain the instant suit and urged that he same be dismissed.

15. In rejoinder the 2nd ex parte applicant vide affidavit deposed on 7th March, 2019 averred that he had never received the letter mentioned by the respondent. He further averred that the 7th interested party having admitted to have participated in survey works and subdivisions of the 1st ex-parte applicant's parcel of land therefore could not claim not to be falling among the persons contemplated under Section 73 of the **Cooperative Societies Act** and that the application is properly grounded and the court has jurisdiction to handle the same.

16. Based on **Republic vs. Commissioner for Cooperative Development & 69 Other Others Ex parte Katelembo Athiani Maputi Ranching & Farming Cooperative Society Ltd (2016) eKLR** the ex parte applicants maintained that the powers and functions set out in the Cooperative societies Act including those of the Commissioner of Cooperatives were in the present case to be exercised by the County Government of Machakos through its officers and specifically through the 2nd Respondent who was the Machakos County Cooperative Commissioner. They averred that the respondent had not denied service of the order from the tribunal and cast doubt on the authenticity of the annexed copies of the minutes as well as the memorandum of handing over checklist and averred that the same were forged and falsified.

17. Though the Court directed the parties to file submissions, no submissions were filed on behalf of the ex parte applicants.

18. On behalf of the interested parties, it was submitted that the ex-parte Applicants herein are asking this court sitting as a Judicial Review Court to not only help them enforce the orders made by the Cooperative Tribunal in **CTC No 189 of 2017, Katheka Kai Farmers Cooperative Society Limited vs Henry Nzomo and others** but have proceeded to require this court to open up the substance of the issues therein. Based on **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** and **Republic vs. Attorney General & 4 Others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR**, it was submitted that in order to succeed in a Judicial Review proceeding, the applicant will need to show either that 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 that a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it. In their view, an administrative or quasi-judicial decision can only be challenged for illegality, irrationality and procedural impropriety. Such a decision is considered flawed if it is illegal and a decision is illegal if it: - (a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.

19. It was argued that this court cannot legally delve into the determination of the issues raised by the Ex-parte applicants regarding the handover process without touching and dwelling on matters of substance under determination in **CTC No 189 of 2017, Katheka Kai Farmers Cooperative Society Limited vs Henry Nzomo and others** and the procedures that were undertaken by the Respondent herein in an attempt to inquire into the conduct of the interested parties herein. In their view, the applicants seemed to be asking the court to direct the respondent on how to perform his statutory duties and cited the decision of this court in **Republic vs. Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & Another [2018] eKLR**.

20. It was counsel's view and submission that whether or not the handing over was partially or fully performed cannot constitute an issue for determination in this court for it will amount to delving into issues of substance and not procedure. According to them, the Respondent herein inquired into the activities of the interested parties conclusively therefore an order of mandamus directing the respondent to re- inquire into the said activities of the interested parties will amount to directing the Respondent on how to perform its statutory duties.

21. It was further contended that one of the prayers couched in this instant application brings out an element of disobedience of court orders wilful or otherwise therefore the issue that must be determined in line with the conditions precedent in granting an order of mandamus as a compelling order is "whether or not there exists another forum which the applicants could have addressed the said disobedience of Tribunal order(s)". According to them, if the applicants were legitimately of the view that the Respondent was in disobedience of the Tribunal orders then they would have instituted Contempt of court proceedings in lieu of judicial review proceedings and they relied on **Republic vs Principal Secretary, Ministry of Internal Security & Another Ex-Parte Schon Noorani & Another [2018] eKLR**.

22. The Court was therefore urged to deny to grant the prayers as sought on the ground that there was surely another better forum to deal with the applicant's grievances.

23. The interested parties' position was that since the orders in question had been complied with, the applicants are not deserving of the order of mandamus. On the authority of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** it was submitted that there was no commission of an illegality, nothing irrational observed, and added that the Respondent not only convened the said meeting but also inquired into the alleged complaints and claims by among other persons the 2nd Ex-parte Applicant and made an inspection order **Ref. CS. No. 1556 dated 22nd October, 2012**, in which he appointed a number of persons to hold an inspection into the operations of the ex parte applicant with a view of establishing the nature and validity of complaints as raised by among other persons the 2nd ex parte applicant. This to counsel amounted to the Respondent's faithful discharge of its mandate and its duty to the public as required under the law.

24. According to the interested parties, Mandamus in its very nature, 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. It was submitted based on **Apotex Inc. vs. Canada (Attorney General) and Dragan vs. Canada (Minister of Citizenship and Immigration)** that seven 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. It was submitted that the Applicant has not fulfilled at all, the conditions precedent for the grant of an order of mandamus as held in the aforementioned case.

25. The interested parties' position was that they complied with the orders of the Tribunal as given in CTC No.189 of 2017, Henry Nzomo versus Katheka Kai Farmers Cooperative Society Limited for on 9th May, 2018 in line with the law and in compliance with the said orders of the Cooperative Tribunal.

26. On the test of the availability of any other adequate remedy to the applicant, counsel submitted that the legal machinery that ensures compliance of court orders is referred to as "Contempt of Court proceedings" and concluded that the applicants have failed to satisfy all the requirements for the grant of the orders being sought.

27. The Respondent's submissions were substantially similar to those of the interested parties.

Determination

28. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions filed and authorities relied upon.

29. The scope of the judicial review remedy of Mandamus was the subject of the Court of Appeal decision in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR in which the said Court held inter alia as follows:

"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 or 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. The order must command no more than the party against whom the application 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...These principles mean that an order of mandamus 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. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully 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 without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

30. Similar position was adopted in Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, inter alia, as follows:

"Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice."

31. It was therefore held in Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441, that:

"The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the mandamus order using this method. There is only one rider – an officer can only be committed

where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution”.

32. Similarly, in Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707 it was held:

“A mandamus issues to enforce a duty the performance of which is imperative and not optional or discretionary...The order of mandamus is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon 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 remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual.”

33. In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393, it was held that mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant.

34. It is however clear from Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others (supra) that mandamus is a command requiring a person to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty and its purpose is to remedy the defects of justice. It is issued so that the ends of justice may be done in all cases where there is a specific legal right or no specific legal remedy for enforcing that right. It is therefore my view that even where there is no statutory provision obliging an authority to act, where the case meets the criteria hereinabove, mandamus may go forth.

35. It is therefore clear that a person seeking an order of mandamus must satisfy the Court that the action he seeks to compel the respondent to perform is a duty which the respondent is under an obligation, whether at common law or by statute, to so perform. Where there is no such a duty or it is not clear to the Court that such a duty exists the Court would be reluctant to grant such an order.

36. It was therefore held by the Court of Appeal in Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano; Civil Appeal No.24 of 1985 that:-

“The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.”

37. However, in The Republic vs. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194, Chesoni, J (as he then was) stated that:

“Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government...All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist.”[Emphasis added].

38. In the English case of R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J. said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

39. The same position was adopted in the case of The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194, in which Chesoni, J (as he then was) stated:

“Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists,

the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government...All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist.”

40. Since the decision whether or not to issue an order of mandamus is an exercise of discretion, I associate myself with the position in **Republic vs Principal Secretary, Ministry of Internal Security & Another Ex-Parte Schon Noorani & Another [2018] eKLR** that:

“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.”

41. In this case, the cause of action is that the Respondent has failed to comply with the orders of the Tribunal.

42. Section 79(3) of the **Cooperative Societies Act** Cap 490 provides that

Where the Tribunal enters judgment in terms of the award together with costs, it shall issue a decree which shall be enforceable as a decree of a court.

43. Section 83 provides of the same Act which deals with disobedience of the orders of the Tribunal provides that:

It shall be an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish any such person for contempt in accordance with the provisions of this Act.

44. It therefore follows that the ex parte applicants could have gone the route of contempt rather than opening another front in the litigation.

45. In the premises and in the absence of any reasons advanced by the ex parte applicants why they never opted for that remedy, in the exercise of this Court’s discretionary powers, I decline to grant the orders sought herein.

46. In addition, since the applicant has to show that there is a duty imposed on the respondent to act and the respondent as failed to act in accordance with that duty, it has therefore been held that generally a demand for the actions to be taken is a prerequisite to the grant of an order of mandamus though there may be exceptions to this general rule. See **The District Commissioner Kiambu vs. R & Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109.**

47. In **S. I Syndicate vs. Union of India AIR 1975 SC 460**, the Supreme Court of India stated as follows:

“As a general rule the order would not be granted unless the party complained of has known what it was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that the demand was met with refusal.”

48. There is no evidence that such a demand was made and the ex parte applicants have not made out a case to justify this court in absolving them from complying with the said requirement.

49. It is therefore my view and I find that this Court cannot issue the orders sought in the instant Motion.

Order

50. The Motion dated 21st September, 2018 fails and is therefore dismissed. As the dispute herein pits the members of a Co-operative Society amongst themselves, in order to promote reconciliation there will be no order as to costs.

51. It I so ordered

Read, signed and delivered in open Court at Machakos this 15th day of July, 2019

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kasyoka for Mr Nyandieka for the applicant

Mr Chengo for Mr Ochieng for the 1st to 7th interested parties

