



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

J.R. MISCELLANEOUS APPLICATION NO. 230 OF 2018

Republic.....Applicant

versus

Inspector General, the National Police Service.....1stRespondent

The Attorney General.....2nd Respondent

JUDGMENT

1. The *ex parte* applicant seeks an order of *Mandamus* to compel the first Respondent to execute Warrants of Arrest issued in Nairobi Chief Magistrates Court Criminal case No. 907 of 2014 against a one John Mungai Nyakio. He also prays for costs of this case.
2. The grounds in support of the application are that the *ex parte* applicant is the complainant in the said case in which the said John Mungai Nyakio is the accused charged with the offence of obtaining money by false pretences.
3. The applicant states that the court issued the said warrants on 8th August 2016 after the accused failed to attend court. Further, the complainant states that it holds a decree against the said accused person issued in Mombasa Chief Magistrates Court Civil Suit No. 1267 of 2014 for Ksh. 2,785,210/= arising from a transaction the subject of the criminal case. That, there also exists unexecuted warrants against the accused issued in the civil case.
4. The applicant states that 18 months have lapsed since the unexecuted warrants were issued, and, that, the first Respondent has a legal duty to execute them, and, the failure to act is a breach of the said duty. He states the investigating officers informed the court that the accused person was traced in Mombasa.
5. At the hearing, Miss Chilaka, counsel for the Respondents informed the court that she had difficulties getting the police officer to sign the Repling Affidavit. She nevertheless asked to make oral submissions.
6. The applicant's counsel adopted the pleadings filed and submitted that the first Respondent has a statutory duty under section 8, 8A and 24 of the National Police Service Act.^[1] He relied on *Kenya National Examinations Council v Republic*^[2] and *Dorothy K. Mbaka v P.S. Ministry of Defence & Another*^[3] and argued that the applicant has established grounds for *mandamus* to issue.
7. Miss Chilaka opposed the application and argued that the officers have not neglected to carry out their functions. She also submitted that Judicial Review orders are discretionary in nature and urged the court to disallow the application.
8. *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]
9. *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]
10. *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 the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised based on evidence and sound legal principles. *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.

11. The test for *mandamus* was set out in *Apotex Inc. vs. Canada (Attorney General)*,^[7] and, was discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[8] I will list the eight factors laid down in the above two cases that must be present for the writ to issue and proceed to apply them to facts and circumstances of this case. The tests 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.*

12. The claim arises from alleged refusal to enforce Warrants of Arrest issued in a Criminal case. There is no dispute that the first Respondent has a statutory duty enforce the warrant. It is a duty placed upon the first Respondent by the law. The factual matrix is not in dispute. The warrants are said to have been unexecuted for 18 months as at the time of filing this suit. One of the requirements enumerated above is "a reasonable time to comply with the demand." In my view, 18 months as at the time of filing this suit is a long period. Differently put, the first Respondent has been afforded a reasonable time to enforce the warrants.

13. The other test is an express refusal, or an implied refusal through unreasonable delay. No cause has been shown as to why the warrants have not been enforced. As stated above, the Respondents opted not to file a reply; hence, the applicant's averments remain uncontested. "Unreasonable delay" has been established in the present case. Similarly, an express refusal or even implied refusal has been established. *Mandamus* can issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay in complying with the court order.

14. It is trite that the *ex parte* applicant cannot enforce the warrants, hence, hence there is no other adequate remedy is available to him. At the bottom of the first Respondent's refusal is a criminal case that remains un heard, an affront to the Rule of Law and due administration of justice. I have no doubt in my mind that the order sought herein is of some practical value or effect to the *ex parte* applicant. I find no equitable bar to the relief sought. Lastly, on a balance of convenience, *mandamus* should lie in this case because the law and the facts favour the granting of the order.

15. *Mandamus* is the most effective remedy in the circumstances of this case as opposed to a legal remedy. The classification of a remedy as equitable brings into play a number of special doctrines that are peculiar to equitable remedies. (Similarly, the classification of a remedy as legal brings into play other special doctrines, though they lack the systematicity of the equitable doctrines.) The following examples though not exhaustive are useful.

16. *First*, an equitable remedy may be given only if legal remedies are inadequate. I have already stated that there is no other available and effective remedy. The complainant in the case cannot enforce a warrant of Arrest issued in a Criminal Case.

17. *Second*, a claim for an equitable remedy is subject to special defences. These include laches, unclean hands, and undue hardship, a defence when the equitable remedy would be especially burdensome to the defendant (provided the defendant has acted equitably). None of these defences has been cited in this case. The submission that the first Respondent has not refused to act flies on the face of the long delay cited by the applicant.

18. *Third*, a claim for equitable relief is subject to a stricter ripeness requirement. The instant application meets this test. There is no contrary argument before me.

19. *Fourth*, equitable remedies are subject to a specificity requirement— the Warrants of Arrest embodying the claim must be worded specifically, to make clear what is required. I have no doubt that the Warrants of Arrest are clear and specific and what is expected from the first Respondent is not in doubt.

20. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has established grounds for the court to grant the order *Mandamus*.

21. Flowing from my above findings, the conclusion becomes irresistible that the application dated 30th November 2018 is successful. Accordingly, I allow the said application and make the following orders:-

a. An order of *Mandamus* be, and is hereby issued, compelling the first Respondent to enforce the Warrants of Arrest issued in Nairobi Chief Magistrates Court Criminal Case No. 907 of 2014 against the accused person John Mungai Nyakio within 90 days from the date of this order.

b. No orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 4th day of November 2019

John M. Mativo

Judge

[1] Act No. 11A of 2011.

[2] HCC Civil Appeal No. 266 of 1996

[3] {2017} e KLR

[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).