



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NUMBER 303 OF 2014**

**IN THE MATTER OF ARTICLES 22, 23, 25, 47, 48 AND 50 OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 8(2) OF THE LAW REFORM ACT, CAP 26 OF THE LAWS  
OF KENYA**

**AND**

**IN THE MATTER OF INCOME TAX ACT**

**AND**

**IN THE MATTER OF KENYA REVENUE AUTHORITY ACT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS BY KINGSWAY  
TYRES AND AUTOMART LIMITED**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA REVENUE AUTHORITY..... RESPONDENT**

**EX PARTE KINGSWAY TYRES AND AUTOMART LIMITED**

**RULING**

**Introduction**

1. By a Notice of Motion dated 12<sup>th</sup> August, 2014, the *ex parte* applicant herein, **Ex Parte**

**Kingsway Tyres and Automart Limited**, seeks the following orders:

- 1. An order of mandamus do issue compelling the respondent herein to provide the applicant with copies of all documents, records including computer records and books forcefully taken away from its premises after the raid carried out by the Respondent's officers on 5<sup>th</sup> February 2002.**
- 2. An order of mandamus do issue compelling the respondent herein to provide the applicant with copies of any report, findings and/or documents supporting the amount of tax claimed from the applicant.**
- 3. An order of mandamus do issue compelling the respondent herein to produce copies of all vouchers, cheques and authority for paying commission or fees regarding respondent's tax claim to any informer, auctioneer or any other person.**
- 4. An order of mandamus do issue compelling the respond herein to produce before this honourable court and to the applicant copies of any warrant of attachment notice including value of any such goods so attached by the respondent, whether by its officials, servants, agents and/or associates.**
- 5. An order of mandamus do issue compelling the respondent herein to produce before this court and to the applicant any statics or records it may have confirming the number of tyres imported into Kenya for the period covering 1994 to 2005.**
- 6. An order of mandamus do issue compelling the respondent herein to produce before this honourable court a report confirming the mount of income tax paid by each of the said tyre importing companies or individuals from the period 1994 to 2005.**
- 7. An order of mandamus do issue compelling the respondent herein to produce before this honourable court a report indicating the number of companies manufacturing tyres locally, a number of tyres manufactured by each company each year and the amount of tax paid by each of these companies from the period 1994 to 2004.**
- 8. An order of mandamus do issue compelling the respondent herein to produce before this honourable court a report confirming how many other companies the respondent raided and took away all books, records and computers from such companies between 1994 and 2005.**
- 9. An order of mandamus do issue compelling the respondent herein to produce before this honourable court a report indicating the total number of registered motor vehicles on Kenyan rods from the year 1994 and 2005, both years inclusive.**
- 10. An order of mandamus do issue compelling the respondent herein to produce before this honourable court records, vouchers, correspondences and copies of cheques confirming how it paid 64 million shillings to Speedman Commercial Agencies Limited on account of attachment referred to herein.**
- 11. An order of mandamus do issue compelling the respondent herein to produce before this honourable court comprehensive records, vouchers, copies of cheques and acknowledgements of all monies paid by the respondent to any informer and to any auctioneer, for period veering 1994 and 2013.**
- 12. An order of prohibition do issue prohibiting the respondent herein from refusing to return all documents, records and properties it took from the applicant's premises and further prohibiting the respondent form refusing or neglecting to provide the applicant with all correspondences, memos, copies of assessments, records and computer**

**print outs held by the respondents regarding the tax affairs of the applicant.**

**13. The respondent do pay costs of this application.**

**Applicant's Case**

2. The Application was supported by a verifying affidavit sworn by **Nitin Shah**, a Director of the Applicant on 1<sup>st</sup> August, 2014.
3. According to the deponent, on the 5<sup>th</sup> February 2002, the Respondent's officers raided the premises of the company without a valid court order and/or search warrant and took away documents, information and computer records, purportedly under the guise of investigating possible tax evasion by the company and despite demands the Respondent refused or neglected to return the Applicant's documents thereby rendering the Applicant incapable in responding to the faulty assessment.
4. It was averred that the company disputed the amount of tax claimed as owing by the Respondent; a dispute which has been in the public eye and has been the subject of both previous court and parliamentary proceedings and has now attracted other individuals resulting to Constitutional Petition number 347 of 2014 rendering the application even more urgent.
5. It was deposed that on 10<sup>th</sup> June 2014, the Applicant by its letter dated 10<sup>th</sup> June 2014 sought the information and documents subject of this application from the Respondent. The Applicant's case was that if the information sought is not granted, this dispute will continue evolving from time to time and will remain irresolvable as it was still subject of High Court Miscellaneous Application Number 1288 of 2004. It was asserted that the applicant has always been desirous to settle this matter amicably, but the Respondent has continuously shown recalcitrance and/or neglect to settle the same and that as things stand, the claim, including interest and penalties, stands at Kshs.2 Billion; a figure that the company does not understand how it was accrued in the first place.
6. The deponent was therefore apprehensive that the recalcitrance exhibited by the Respondent in settling this matter may herald some other action against the company which may be motivated by ill will, ulterior motives and/or bad faith.
7. To the deponent, as a government agency, the Respondent is bound by the National Principles of Governance enumerated in Article 10 of the Constitution, including, among others, the rule of law, good governance, integrity, transparency and accountability hence the instant application is meant to compel the Respondent to do its lawful duty and to enable the company to have sufficient information with which to settle any outstanding issues with the Respondent.
8. It was further deposed that pursuant to Articles 22, 23 and 159 of the Constitution of Kenya and Section 8(2) of the Law Reform Act, Cap 26 Laws of Kenya, the Honourable court can grant the reliefs sought in this application and/or any other reliefs that ensure that the ends of justice are met in the circumstances of these proceedings since the only way of bringing this matter to a close is for the honourable court to compel the Respondent to perform its functions and duties under the law under the guidance of the honourable. To the deponent, if the orders prayed for are granted the Respondent will suffer no loss or damage save for the fact that if the orders are granted, will facilitate fast and immediate settlement of the current dispute fairly and in accordance with the law. On the other hand unless the Honourable Court allows the Application as prayed and grants the orders sought therein, there is a real risk of the Company continuing to suffer irreparable loss and damage as the Respondent's acts and action hitherto have been done in bad faith, maliciously and are calculated to achieving ends which are not known to Kenyan Law.

**Determinations**

9. Having considered the application, the affidavit both in support of the application and the submissions filed by the applicant, this is the view I form of the matter.
10. First and foremost, it is important to consider the circumstances under which judicial review order of mandamus do issue. The scope of the an order 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 (CAK) [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* compels 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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

11. *Mandamus* is, essentially, English in its origin and development and it is therefore logical that the court should look for an English definition. *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. See **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543.**
12. I am, further, cognisant of the position stated in Apart from that it is stated in *Halsbury’s Laws of England* 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270 that:

**“The remedies of quashing orders (formerly known as orders of *certiorari*), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of *mandamus*)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may all result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment.**

**The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”**

13. Therefore the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order, even if would otherwise have been merited, where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa HCMA No. 96 of 2000.**
14. In this case what the applicant seeks is an order compelling the Respondent to produce certain documents and particulars itemised in the Notice of Motion either before this Court or to the applicant. As was held in the above case mandamus only issues to 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. Therefore the first issue which the Court would be obliged to ask is what public body is imposed on the Respondent in the circumstances of this case which the Respondent has failed to perform.
15. The applicant’ case is hinged on Articles 10, 22, 23 and 159 of the Constitution. However, none of the afore-cited Articles bind the Respondent to do what the applicant wants this Court to compel it to do. The nearest provision under which the application ought to have been brought is Article 35 of the Constitution which provides for the right of access to information. That provision provides:

***(1) Every citizen has the right of access to—***

***(a) information held by the State; and***

***(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.***

***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***

***(3) The State shall publish and publicise any important information affecting the nation.***

16. However that remedy ought to be made by way of a petition as provided under rule 10 of ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***, otherwise known as the *Mutunga Rules*. As was appreciated by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

**“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2**

**Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”**

17. This position is explained on the ground that *Mandamus* is neither a writ of course nor 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*. For example, if enforcement of the order will present problems like lack of adequate supervision the court might refuse to issue the order. See **The Republic vs. Director-General of East African Railways Corporation, ex Parte Kaggwa [1977] KLR 194; [1976-80] 1 KLR 654.**
18. In this case without the applicant showing the public duty imposed on the Respondents to order the Respondents to perform an act which they are not under any legal duty to perform may well amount to compelling them to act in excess of or without jurisdiction.
19. Apart from that most of the orders sought in the instant application seek that the Respondent produces the information and particulars sought before this Court. No reason has been advanced why the said information ought to be produced before this Court and for what purpose. Mere production of the said documents or particulars in Court without more in my view is unlikely to be of any assistance to the applicant.
20. In the premises the instant application is incompetent and is hereby struck out but with no order as to costs.

**Dated at Nairobi this 9<sup>th</sup> day of February, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Mugo for Mr Musyoka for the ex parte Applicant***

***Cc Patricia***