



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 472 OF 2014

NEWTON GIKARU GATHIOMI..... 1ST APPLICANT

KENNETH NJOROGE GATHIOMI.....2ND APPLICANT

VERSUS

THE ATTORNEY GENERAL/PUBLIC TRUSTEE.....RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th December, 2014, the *ex parte* applicants herein, **Newton Gikaru Gathiomi** and **Kenneth Njoroje Gathiomi** substantially seek an order of mandamus compelling the Respondent, the Public Trustee, to pay to the Applicants a sum of Kshs 922,040/- being sums allegedly received from the Pensions Department being the death gratuity due to the Estate of **Leonard Njongo Gathiomi** (the deceased).

Applicants' Case

2. According to the applicants they were appointed the administrators of the estate of the deceased in Succession Cause No. 2919 of 2008. According to them at the time of the death of the deceased, the deceased was an employee of the Government as a Senior Officer in the National Security Intelligence Service and was hence entitled to pension.
3. It was their case that the grant of letters of administration was confirmed on 23rd March, 2011 and according to the Certificate of Confirmation of Grant, the applicants were to be paid the said pension. According to the applicants, they obtained a letter from the Ministry of Finance (Pensions Department) indicating that the deceased's pension had been paid to the Respondent for onward transmission to the beneficiaries of the estate of the deceased.
4. It was their case that the Respondent forwarded to them PT form 1 together with Discharge and Indemnity Form for completion which documents were forwarded to the Respondent through the applicants' advocates August, 2012. However despite forwarding the said documents no payment has been made by the Respondent notwithstanding demand made by the applicants for the said payment hence these proceedings.
5. It was the applicants' case that by the time the Respondent allegedly paid the said sum, it was aware that there was a dispute regarding the proper administrators of the estate of the deceased and that **Anne Wanjiru Githogori** was not the deceased's widow.

Respondents' Case

6. In response to the application, the Respondent filed a replying affidavit sworn by **Eunice J. Sawe**, the Public Trustee.
7. According to the respondent, the Respondent received Kshs 922,040/= being the death gratuity due to the estate of the deceased in February, 2011 together with a letter naming **Anne Wanjiru Githogori** as the deceased's next of kin. It was averred that the Respondent received a list of the deceased heirs from the District Commissioner, Limuru on 22nd March, 2011 identifying the widow and four children as the beneficiaries. It was further disclosed that a Kenya Gazette was issued in the joint names of the intended administrators **Anne Wanjiru Githogori** and **Patrick Kariuki Njonge** on 30th March, 2007 and the Respondent was served with letters of administration dated 17th May, 2007 and Petitions in Nairobi High Court Succession Cause No. 328 of 2007 (hereinafter referred to as the first Grant) naming the said persons as the duly appointed administrators.
8. The Respondent, it was averred proceeded to hand over the funds to the said administrators in May, 2011 who indemnified the Public vide a Discharge Voucher dated 16th March, 2011 against any claims and suits consequent to the release of the said funds. However, on 15th August, 2012, the Respondent was served with another Grant in Nairobi Succession Cause No. 2919 of 2008 issued on 7th April, 2009 to the applicants as administrators of the estate of the deceased (hereinafter referred to as the second Grant) without any proceedings revoking the first Grant. By the time of receipt of the second Grant, the Respondent had already paid out the money pursuant to the first Grant.
9. It was therefore the Respondent's case that it was relieved of any liability once the funds were released to the administrators and it was indemnified in the said action. According to the Respondent, the orders sought herein if granted will be in futility as the funds have already been paid out.

Determinations

10. Having considered the application, the affidavits both in support of and in opposition to the application, this is the view I form of the matter. The jurisdiction of the Court with respect to grant of judicial review orders of mandamus which are the orders sought herein was restated in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** where the Court of Appeal expressed itself 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. It is clear that there exist two grants in respect of the same estate. The law in my view does not contemplate the issuance of two Grants in respect of the same estate. It is therefore clear that the issuance of the second Grant before the revocation or annulment of the first Grant was unprocedural. It is however not for this Court to determine which of the two grants was properly made. That is an issue for determination by the Succession Court.
12. As long as the two grants exist side by side, it would be preposterous for this Court sitting as a judicial review Court to compel the Respondent to in effect give recognition to one Grant and not the other. It is upon the parties who are laying claim to the administration of the estate of the deceased to take appropriate steps to ensure that one of the Grants is revoked or annulled.
13. It must be remembered that judicial review orders are discretionary. Since they are not guaranteed 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. Further, as 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 and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where 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. The applicants in effect urge this Court to ignore the effect of the first grant on the ground that one of the administrators therein was not a widow to the deceased. With due respect that is not an issue which can be determined in these proceedings. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.
15. Considering the fact that there are two Grants in existence and that the Respondent was in the circumstances entitled to exercise its discretion as to which of the Grants to comply with this Court cannot by an order of mandamus grant orders whose effect would be to compel it to exercise the discretion in a certain way. Whereas it may well be that that exercise of discretion was wrong, this Court in judicial review proceedings deals with the process rather than merits. This position was appreciated by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** where it expressed itself as follows:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

16. Accordingly, I decline to grant the orders sought in the Notice of Motion dated 30th December, 2014.

Order

17. In the result the Notice of Motion dated 30th December, 2014 fails and is dismissed. As the matter revolves around succession, there will be no order as to costs.

18. It is so ordered.

Dated at Nairobi this 8th day of April, 2015

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Richard