



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISCELLANEOUS APPLICATION NO. 11 OF 2013

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW OF REFORM ACT CHAPTER 26 LAWS
OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR THE JUDICIAL REVIEW
ORDER OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF

AGRICULTURE, LIVESTOCK & FISHERIES.....2ND RESPONDENT

EX PARTE APPLICANT:

RACHAEL MUMBE MUNA

JUDGEMENT

Background

Sometimes in the month of May 2010, the Ex parte applicant supplied 300 bags of maize of 90 kilogrammes each to the National Cereals and Produce Board (NCPB) at Mwingi Depot. Before she was paid for this consignment, the officers from the then Ministry of Health and Sanitation seized, on 14th June 2010, the consignment on suspicion that the maize was contaminated with aflatoxin. Tests conducted on the maize samples at the Government Chemist tested positive for aflatoxin. Decisions were made, as contained in the letters dated 4th July 2011 and 30th August 2011 (both letters marked RMM5), to compensate the Ex parte applicant. However, this was not done necessitating the Ex parte applicant to come to this court.

The Ex parte applicant sought leave from this court to seek the order of mandamus to compel the Respondents to pay her Kshs 300,000 being the price of maize at Kshs 1,000 per bag.

The Respondents filed grounds of opposition listing two grounds, that the application is unmeritorious due to non-disclosure of cause of action against the Respondents and secondly that the application is an abuse of the court processes and the same should be dismissed with costs.

Ex Applicant's Submissions

The Ex parte applicant has submitted that it is not disputed that she supplied maize to the NCPB Mwingi Depot and that the then Ministry of Agriculture was responsible for compensation of the farmers whose maize supplies were affected; that the duty to compensate the Ex parte applicant is a public duty which falls within the powers of the Permanent Secretary Ministry of Agriculture; that the Permanent Secretary is the chief accounting officer of the Ministry; that following the re-organization of the ministries, the 2nd Respondent is the successor in title of the 2nd Respondent whose duty it is to compensate the Ex parte applicant; that the ex parte application has merit. The Ex parte applicant relied on **Permanent Secretary, Ministry of Lands and Settlement, ex parte the Commissioner of Lands and Others, Nakuru HC RJ No. 22 of 2010** and **Republic v. Municipal Council of Mombasa in Mombasa HC Misc. Civil Application No. 512 of 2008** to emphasize the point that mandamus is an order issued by the High Court to compel performance of a public duty by a person or body of persons that has failed to do so.

Respondents' Submissions

The Respondents through their legal representative identified one issue for determination, namely, whether there was a statutory duty imposed upon the Respondents to pay compensation to the Applicant. Counsel for the Respondents submitted that the Ex parte applicant has not established that the Respondents had a statutory duty to pay compensation and where such duty is not demonstrated, mandamus cannot issue.

Counsel submitted that there is no public duty imposed by statute in this case because the purported minutes produced by the Ex parte Applicant have no evidentiary value since they have not been signed and the author is unknown. Counsel cited **Republic v. Attorney General & Another Ex parte: Aberdare Engineering Limited (2007) eKLR** where the court observed that mandamus cannot issue where a public duty imposed by statute does not exist. Counsel further cited the case of **Prabhul Gulchab Shah v. Attorney General and Erastus Gathoni Miano, Civil Appeal No. 24 of 1985** where the court said: **"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 a public rather than private nature."**

It is further submitted that the Ex parte applicant has not shown that a demand for performance was made but instead produced a request letter which is not a demand. Counsel cited **Wamwere v Attorney General [2004] 1 KLR 166** where the court stated **that a public officer cannot be compelled to do something when there is no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing. Even if such refusal has been shown, it must be shown to be unlawful.**

The Respondents submit that where there is an alternative remedy, an order of mandamus cannot issue and that the Ex parte Applicant never pursued any other remedy before approaching the court. Counsel relied on **In the matter of An Application by Printing Industries Limited for Orders of Mandamus (2013) eKLR** where the court while applying **R (Regina) v Dudsheath, Ex parte, Meredith (1950) 2 ALL ER** stated, **"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 specifically 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....."**

Further submissions are that the maize was found to be contaminated with aflatoxin B1 poison and a certificate issued and therefore it was against public interests and health regulations to compensate maize found to be unfit for human consumption.

For these reasons Counsel submitted that this case must fail because the Ex parte Applicant has failed to demonstrate that a public duty exists on the Respondents.

Determination

- i. Does a public or legal duty exist on the part of the Respondents?
- ii. Did the Ex parte Applicant have an alternative remedy?
- iii. Was any demand for compensation made?

In my view, once this court determines the central issue whether the Respondents had a statutory duty to compensate the Ex parte Applicant and finds that no such duty exists, this matter will have been settled.

I wish first to distinguish this case and the cases relied on by the Ex parte Applicant, **R. v. Permanent Secretary, Ministry of Lands and Settlement** and **R v. Town Clerk, Municipal Council of Mombasa** (above). In those cases, the Applicants had already obtained judgements and certificates of taxation had issued. The matter before me is different.

The Ex parte Applicant claims to have supplied maize to the NCPB Depot when the maize was wholesome. She claims that the maize was contaminated while in the custody of the NCPB Depot at Mwingi. It seems that the said maize, while under investigation by Health Officials and in full knowledge that it was contaminated was released to her leading to investigations into the circumstances under which the maize was released to the Applicant. This court has seen copies of the following documents: Seizure form 14th June 2010; request for examination to determine level of contamination; results of the examination confirming maize was contaminated with aflatoxin dated 17th August 2010; letter from the Senior State Counsel referring to a recommendation for compensation dated 14th June 2011 and a copy of a letter dated 26th January 2012 from the Permanent Secretary, Ministry of Public Health to the Permanent Secretary, Ministry of Agriculture also referring to compensation of the Applicant. It is on the basis of these documents that the Ex parte Applicant is seeking the order of mandamus.

The Ex parte Applicant has come to this court to seek the order of mandamus and not to determine the liability of the Respondents. This court would therefore be overstepping its mandate if it were to determine liability between the parties.

It is obvious that the cases cited by the Ex parte Applicant do not help her case. They are different in that in them the legal duty is clearly established. In this case, the Ex parte Applicant has failed to demonstrate that the Respondents have a statutory or legal duty to compensate her.

After my careful analysis of the facts before me and the cited cases I find that I agree with the Respondents that mandamus cannot issue where a public duty imposed by statute does not exist and that the Ex parte Applicant has failed to show that she has a legal right to performance of a legal duty by the Respondents. The learned counsel for the Respondents was right in highlight the singular issue for determination of this case to which this court responds in the negative. I find I have no alternative but to dismiss this matter for lack of merit. I make orders accordingly.

Dated, signed and delivered this 17th March 2014.

S.N.MUTUKU

JUDGE