



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS JUDICIAL REVIEW APPLICATION NO. 438 OF 2013

**IN THE MATTER OF AN APPLICATION BY JOCCINTA WANJIRU RAPHAEL FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW IN THE NATURE OF MANDAMUS**

AND

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES CAP 21 LAWS OF
KENYA**

AND

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, CAP 21 LAWS OF
KENYA**

AND

**IN THE MATTER OF: THE LAW REFORM ACT CAP 26 AND ALL THE ENABLING
PROVISIONS OF THE LAW**

AND

IN THE MATTER OF: ARTICLE 47 & 165 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: COURT ORDER BY THE CHIEF MAGISTRATE'S COURT AT
MAKADARA IN CRIMINAL CASE NO.3282 OF 2012**

BETWEEN

JOCCINTA WANJIRU RAPHAEL.....APPLICANT

VS.

WILLIAM NANGULU – DIVISIONAL CRIMINAL

INVESTIGATION OFFICER MAKADARA.....1ST RESPONDENT

METAL CROWNS LIMITED.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

JUDGEMENT

1. By a Notice of Motion dated 20th December, 2013, and amended on 16th January, 2014 the *ex parte* applicants herein, **Joccinta Wanjiru Raphael**, seeks the following orders:

1. **That the applicant be granted orders of Mandamus compelling the Respondents to release the applicant's goods of Trade which are in the custody of the 1st and 2nd Respondents.**
2. **That costs of this application be provided for.**

Ex Parte Applicant's Case

2. The said application is supported by a verifying affidavit sworn by the applicant on 20th December, 2013.
3. According to the applicant, she was arrested and charged with obtaining goods by false pretence contrary to Section 313 of the **Penal Code** in Criminal Case No.3282 of 2013 at **Makadara Law Courts**. However she was eventually acquitted under Section 215 of the said Code and the 1st Respondent was ordered to ensure that her goods of Trade which were used by the Police as Exhibits in the said criminal case were duly released to her immediately. According to her, the 1st and the 2nd Respondents were duly served with the Court order and the penal Notice. Despite that the said Respondents have refused to obey the Court Order.
4. Following the said refusal to obey, the applicant sought assistance of the inspector General and the Director of Prosecutions and in response to her Advocates' letter the **Director of Public Prosecution** requested for a copy of the said Court Order which was promptly supplied. However, when her advocate went back to Court to seek warrants of arrest against the 1st Respondent, the Court declined and directed that she seeks a remedy in the High Court.
5. The Applicant contended that despite the **Director of Public Prosecution's** advice to the Director of Criminal investigations Department, the **1st Respondent** has deliberately refused to obey the Court order.
6. The Applicant further deposed that prior to the charge of Criminal case No.432 of 2013 at Makadara Law Court, she had filed a civil suit at Milimani Commercial Courts CMCC No.345 of 2013 in which the Court ordered for the release of her goods of Trade but the 1st Respondent had earlier disobeyed the Court order on the allegations that the goods were subject to criminal case and the said goods were under his custody.
7. The Applicant asserted that she borrowed huge sums of money from Equity Bank Limited to purchase the said goods of Trade and is now unable to service her loans since the goods are still in the custody of the 1st and 2nd Respondents.
8. In a supplementary affidavit sworn on 14th April, 2014, the applicant deposed that the 2nd Respondent herein was filed out of time and should be expunged from the Court record.
9. According to her, there is no Court Order staying the proceedings in any Court of Law since she was charged in Criminal Case No.3282 of 2012 at Makadara Law Court on 27th day of June, 2012 which is after the Court Order dated 11th day of June, 2012. She further deposed that the purported Court order was for stay of Execution of the trial Court's Order in CMCC No.345 of 2012 – Milimani Commercial Courts and not to stay the proceedings as alleged by the 2nd Respondent. She reiterated that upon service of the trial Court's Order the 2nd Respondent refused to obey it on grounds that the goods were in the custody of the police and that a warrant of arrest had been issued against the Applicant as the main suspect. She therefore averred that the 2nd Respondent is not truthful by alleging that there is a Court Order staying the proceedings in any Court and yet as late as 20th day of March, 2014 filed a Notice of Motion dated 11th day of March, 2014 at Milimani Commercial Court in CMCC No.345 of 2012 seeking Court's leave to amend its defence and file counter claim. To her, if indeed the 2nd Respondent believes that there is a Court Order staying all proceedings in any Court in relation to the subject matter goods it could have not filed a Notice of Motion and take a Hearing date for the same.
10. She insisted that it is very clear from my annexures in the main application that the 2nd

- Respondent is in the habit of disobeying Court Orders and is trying to obstruct the Justice by making malicious allegations and that the 1st and 2nd Respondents have no objection with the release of the goods which are kept on their behalf by the 2nd Respondent.
11. To her, Court Orders are not given in vain and it was necessary to join the 2nd Respondent as a party herein so that the Court Order can be enforced since it is the confiscation of her goods in trade herein and the 2nd Respondent herein cannot hide in the “shadow” of the 1st Respondent to disobey valid Court Orders. She clarified that the application herein is in reference to the Court Order in Criminal Case No.3282 of 2012 – Makadara Law Courts and not CMCC No.345 of 2012 – Milimani Commercial Courts.
 12. To her the preliminarily Objection raised by the 2nd Respondent does not suffice and it is self defeating since the 2nd Respondent admits that the subject matter of goods herein are in its custody hence the Court Order cannot be enforced without involving it and the 2nd Respondent having accepted to be the custodian of the goods of trade herein qualifies to be an interested party hence a proper party for the purpose of enforcing the said Court Order. Further, the conduct of the 2nd Respondent after the 1st and 3rd Respondents agreed to release the goods is suspect and is purposely meant to deny her goods of trade which are in its Custody.
 13. Based on her advocate’s information, the Applicant deposed that there is no appeal against the judgment of the trial Court in Criminal Case No.3282 of 2012 hence the Response by the 2nd Respondent is an afterthought and the allegations therein are founded on malice.
 14. She reiterated that the 2nd Respondent’s refusal to release her goods of trade as Ordered by the Court on 15th day of August, 2013 has subjected her to untold suffering as she has since been served with a Demand Notice by her Lending Bank giving her a period of 14 days to repay her outstanding loan. The Applicant therefore was of the view that the 2nd Respondent should not seek preferential treatment by the Court yet it is in contempt of Court. Since the 2nd Respondent is keeping the goods on behalf of the 1st Respondent for safe custody and there is no harm in obeying the Court Order by allowing her access to her goods of trade which are in its premises. To her, the sanctity of Court Orders must be jealously guarded by this Honourable Court.

2nd Respondent’s Case

15. In response to the application, the 2nd Respondent on 14th February 2014, filed a notice of preliminary objection in which it was contended that the application is fatally defective and is bad in law to the extent that the 2nd Respondent has been joined as a party in the proceedings.
16. The 2nd Respondent also filed a replying affidavit sworn by **Stephen Murithi**, the 2nd Respondent’s Human Resource and Administration Manager on 12th February, 2013.
17. According to the deponent, the Applicant is forum shopping. To him the order of the Honourable Court in the criminal case No. 3282 of 2012 was directed upon the DCIO Makadara and not the 2nd Respondent. He further contended that the order of mandamus cannot be enforced as against a private company, the 2nd Respondent.
18. The deponent on 9th April, 2014, filed a further affidavit sworn on 8th April, 2014 in which he repeated that the application herein is bad in law, full of falsehood, fatally defective and the same should be dismissed with costs to the 2nd Respondent.
19. In the said affidavit it was deposed that the applicant filed a suit as against the 2nd Respondent on the 26th January, 2012 together with an application before the Chief Magistrates Court that is CMCC No.354 of 2012 which application came up for hearing when the Chief Magistrate allowed the same at the ex-parte stage. Thereafter, the 2nd Respondent instructed their Advocates herein to appeal against the said order of the Chief Magistrates Court and pursuant thereto High Court Civil Appeal No.114 of 2012 was filed together with and an application dated 18th April, 2012.
20. The said application came for *inter partes* hearing severally culminating to 25th April, 2013 when the Honourable Judge delivered her ruling to the same which order stayed any proceedings (in the Chief Magistrates Court and any other court) with regard to the goods the subject matter of the applicant’s application. To him, applicant herein has never appealed the said order of the

Honourable Judge neither has he taken any step to set the same aside and having failed to appeal the Order she is thus bound by it and cannot purport to wiggle out of it through forum shopping hence it is in the interest of justice that the application herein be dismissed with costs to the 2nd Respondent.

Applicant's Submissions

21. On behalf of the Applicant it was submitted that the refusal by the Respondents to release the Applicant's goods violated the Applicant's legitimate expectation.
22. It was further submitted that the Respondents are under public duty to obey Court orders since Court orders are not given in vain and their sanctity must be protected by the Court.
23. It was further submitted that since the 1st and 3rd Respondents have no objection to the release of the subject goods, that should put the matter to rest since they are the legal custodians of the same which were used as exhibits in the criminal case.

2nd Respondent's Case.

24. On behalf of the Respondent, it was submitted that since there is in place an order staying the execution of the trial Court's orders pending the hearing and determination of the main appeal, to grant the orders sought herein would amount to indirectly appealing against the orders of this Court yet the Court in a judicial review proceedings does not act as a Court of Appeal. To the said Respondent, the Applicant is guilty of forum shopping.
25. It was further submitted that judicial review proceedings are a special jurisdiction and is a machinery set aside by the State to check the excesses of its officers or authorities and are therefore sought in the name of the state at the instance of the affected party, a private individual or organization cannot and should not in essence be made a party save as an interested party. In the 2nd Respondent's view, the application must collapse.
26. It was submitted based on **Republic vs. Registrar of Societies and 5 Others ex parte Kenyatta and 6 Others NBI HCMisc. Appl. No. 747 of 2006** that the existence of a statutory duty conferred or invested by a statute upon some person, body of persons or tribunal; such a person or body must have failed to perform the same; and that it is not an order of specific performance like a contract situation. In the 2nd Respondent's view, the application has failed to meet the foregoing threshold hence ought to fail.

Determination

27. The first issue for determination is whether judicial review orders can be granted against private individuals as opposed to public officers and authorities.
28. In **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005**, Nyamu, J (as he then was held):

“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That is why it is said prohibition looks to the future so that if a tribunal were to arrange in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However where a decision has been made ... an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made it can only prevent the making of a contemplated decision. There is nothing the respondents have failed to do, as matter of statute law or legal duty. The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5th

and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual.”

29. An order of *mandamus* has been held, in form, a command directed to any person, corporation or inferior tribunal, requiring him to do some particular thing (therein specified) which appertains to his (or their) office and is in the nature of a public duty. An order of *certiorari* is an order, directed to an inferior tribunal, requiring the record of the proceedings in some cause or matter to be transferred to the High Court to be dealt with there. See Muriuki Kimondo vs. Maina [1977] KLR 120; [1976-80] 1 KLR 554; Halsbury's Laws Of England (3rd Ed) Pages 52 to 145.

30. This position was reaffirmed by the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 (supra) where it was 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.”

31. It follows that the order of *mandamus* sought herein cannot be granted as against the 2nd Respondent which from its name seems to be a limited liability corporation.

32. However in 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. "

33. Therefore where there is an alternative remedy which is more convenient, beneficial and effectual the court in the exercise of its undoubted discretionary power would decline to grant an order of *mandamus*. Similarly, it must always be remembered that judicial review orders being

- discretionary 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. What comes out from the material presented is that the physical custody of the goods in question is with the 2nd Respondent. To grant the orders against the other Respondents would be an exercise in vain. Such an order would not be efficacious. 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 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, even if merited. The 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. See **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209**, **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000** and ***Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508.***
34. Sound legal principles, in view, dictate that where to grant the orders sought would not lead to a realisation of the ultimate goals targeted by the applicant but that there is availability of another remedy through which that goal may be achieved without a multiplicity of proceedings, the court ought to exercise its discretion by disallowing the orders sought in the judicial review proceedings and let the parties to pursue the said remedy in order to save valuable judicial time from being spent on one case to the detriment of other cases. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000** and **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209.**
35. In this case, it is the applicant's case that despite an order having been made for the release of her goods of trade the Respondents have declined to do so. In my view, if that position is correct, then instead of making an application seeking order that the Respondents release the same goods, the applicant's best bet is to apply for committal of the Respondents for disobedience of the said order. Judicial review proceedings ought not to be invoked as a substitute for execution proceedings. Since there is an alternative remedy available which is more convenient, beneficial and effectual an order of Mandamus ought not to issue. In **Re Preston [1985] AC 835 at 825D** Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. The same position was taken by Ochieng, J in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, where the learned Judge held that 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.
36. In her ruling dated 28th March, 2012, **Ang'awa, J** held that since the orders issued by the magistrate compelling **Metal Crown Ltd**, the 2nd Respondent in this matter, is incapable of being enforced since the goods in question were being held by the police, there would be a stay of execution of the said order pending the hearing of the main appeal. There is no indication that the said order has been vacated. Therefore to grant the orders of mandamus as sought against the 2nd Respondent assuming the same are capable of being granted would amount to overturning the decision of **Ang'awa, J** through the backdoor by this Court and that this Court cannot do. That however does not mean that the Court if properly moved cannot compel the other respondents to release the said goods if the same are in their possession.

Order

37. In the circumstances it is my view and I hold that the Notice of Motion as against the 2nd Respondent is incompetent as the orders sought cannot be granted against the 2nd Respondent and

there is in place an order staying execution against him while the application as against the 1st and 3rd Respondents is equally incompetent since there is a more convenient, beneficial and effectual remedy available against them. Apart from that the remedy sought herein is not the most efficacious remedy in light of the decision made by the trial court.

38. Accordingly, Notice of Motion dated 20th December, 2013, and amended on 16th January, 2014 is hereby dismissed. There however will be no order as to costs as the application was not opposed by the 1st and 3rd respondent and the 2nd respondent's version as to the whereabouts of the said goods seems to be inconsistent and vague.

Dated at Nairobi this 6th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Masese for the Applicant

Mr Ngetich for 1st and 3rd Respondents

Cc Kevin