



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 171 of 2011

**IN THE MATTER OF AN APPLICATION BY LAWRENCE B. KEITANY FOR AN ORDER OF
CERTIORARI & MANDAMUS**

AND

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

AND

IN THE MATTER OF RETIREMENT BENEFITS APPEAL TRIBUNAL

BETWEEN

LAWRENCE B. KEITANY.....APPLICANT

VERSUS

RETIREMENT BENEFITS APPEALS TRIBUNAL.1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE TRUSTEES OF KENYS POWER AND LIGHTING

STAFF RETIREMENT BENEFIT SCHEME.....INTERESTED PARTY

JUDGEMENT
INTRODUCTION

1. By a Notice of Motion dated 20th January, 2012 filed on 27th January 2012, the *ex parte* applicant herein, **Lawrence B. Keitany**, seeks the following orders:

- a. **THAT an order of certiorari be issued to quash the decision of Retirement Benefits Appeal Tribunal dated 23rd June 2011 in Tribunal Appeal No. 3 of 2002 – Lawrence B. Keitany versus Retirement Benefits Authority**
- b. **THAT for an order of Mandamus be issues to compel the Retirement Benefits Appeal Tribunal to decide the case Tribunal Appeal No. 3 of 2003 Lawrence Keitany versus Retirement Benefits Authority in accordance with the Trust Deed Rules.**

c. **THAT the costs be borne by the Respondent.**

EX PARTE APPLICANT'S CASE

2. Although the said Motion has annexed to it Statement of Facts and a Supporting affidavit, Order 53 rule 4 provides:

(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

(3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.

3. Therefore unless leave of the Court is sought to amend the Statement and/or file further affidavits the *ex parte* applicant is bound to rely on the statement and verifying affidavit filed in support of the application for leave. In the premises I will rely on the said Statement and verifying affidavit.

4. The application is therefore based on the Statement of Facts filed on 21st July 2011 and a verifying affidavit filed the same day and sworn on 18th July 2011 by the *ex parte* applicant, **Lawrence B. Keitany**. According to the *ex parte* applicant, the 1st Respondent in its ruling dismissed his application in which he was seeking to have his pension be computed in accordance with the Interested Party's Trust Deed and Rules. According to him, in reducing the monthly pension payable to him did not take into account the ratio of the lumpsum paid to him and the residual pension from which monthly pension is drawn. The residual pension, according to him, was set at Kshs 158,709.00 with effect from 1st February 2006 instead of Kshs 202,000.00 after the enhanced sum of Kshs 7,056,152.00 aforesaid was paid on 3rd November 2007 which action he contends was in violation of the express provisions of the Trust Deed and Rules. While admitting that the Respondent paid him the sum of Kshs 7,056,152.00 on 3rd November 2007, he contends that from the calculation on tax, this sum was treated as lumpsum payment and hence there is need to address the excess premium paid in the sum of Kshs 214,076.00, which would have been refunded to him on the 1st June 2001 after retirement. After the Tribunal's said ruling, it is deposed that the residual pension was set at Kshs 158,709.00 with effect from 1st February 2006 subject to annual increment of 3%. He further contends that since 1st February 2006b his monthly pension was Kshs 202,000.00 which was however reduced to Kshs 158,709.00 without any computation being availed to him. According to him, the Tribunal ought to have directed a recalculation to be done as per the Trust Deed to ascertain pension but not to direct that the same be reduced without considering the ratio of the lumpsum paid vis-à-vis the maximum lumpsum payable as per the Trust Deed and Rules. He deposes that no calculation methodology was given to show how this figure was arrived at yet the calculation based on the Trust Deed and Rules in force at the time of the attainment of retirement age would have left after the above lumpsum payment a monthly pension of Kshs 195,315.00 from 1st February 2006 with the annual increment of 3% standing and *Mandamus* granted. It is therefore his view that it is only logical, reasonable and sensible that the application for Certiorari and *Mandamus* be heard since the Tribunal's decision to disregard the Trust Deed and Rules of the Scheme was arbitrary and without basis and was *ultra vires* the powers conferred upon it by law to operate within the confines of the law and legal documents establishing a scheme.

1ST RESPONDENT'S CASE

5. In opposition to the application the 1st Respondent filed the following grounds of opposition dated 1st December 2011:

1. **The application is bad in law, incompetent, misconceived and amounts to an abuse of the court process and should be dismissed with costs.**
2. **The 1st respondent arrived at its decision dated 23rd June 2011 based on the facts presented before it and in accordance with the relevant Trust Deed and Rules.**
3. **The ex parte applicant ought to have sought review of the said decision in accordance with section 52 of the Retirement Benefits Act and Order 45 of the Civil Procedure Rules 2010 but instead seeks leave to compel the 1st respondent to in essence vacate a decision arrived at by the 1st respondent in accordance with its statutory mandate and instead arrive at a decision that is self-serving and favourable to the applicant.**
4. **That in the alternative the ex parte applicant ought to have appealed against the said decision in accordance with section 52 of the Retirement Benefits Act and Order 42 of the Civil Procedure Rules 2010.**
5. **The ex parte applicant's application has therefore not complied with the provisions of Section 52 of the Retirement Benefits Act, Order 42 and Order 45 of the Civil Procedure Rules 2010, Laws of Kenya which provide for the procedures to be followed when a party is aggrieved by the decision of the 1st respondent.**
6. **The application filed herein is technically fatally defective and should be dismissed with costs.**

6. The 1st respondent also filed a replying affidavit sworn by **Boniface Mwangangi**, the Tribunal's Clerk. According to him, since the Tribunal is established by an Act of Parliament and its members appointed by the Minister, the joinder of the Tribunal in these proceedings is wrongful. It is deposed that the Notice of Motion dated 1st March 2011 sought to review a ruling of the Tribunal issued on 26th October 2007 which ruling was premised on the consent by and which was binding on all the parties and was premised on the Trust Deed and Rules of the Scheme. Since the consent judgement or order has a contractual effect on the parties involved, it is deposed that the same can only be set aside on grounds which would justify setting aside a contract. The application for review itself, it is submitted, was made after 3 years without justifiable cause and no reasons were given for seeking the review sought. In the deponent's opinion, the Motion dated 20th January 2012 was meant to embarrass and prejudice the 1st Respondent and should be dismissed. Since the Motion is an abuse of the Court process and contravenes the provisions of the **Retirement Benefits Act, No. 3 of 1997** and the **Civil Procedure Act and Rules**, it is deposed that the application is incurably defective and should be struck out.

2ND RESPONDENT'S CASE

7. On the part of the 2nd respondent, a replying affidavit sworn by **Edward Odundo**, its Chief Executive Officer on 12th March 2012. According to him, the Notice of Motion dated 11th March 2011 sought to review a Ruling of the Retirement Benefits Appeals Tribunal issued way back on 26th October 2007 which Ruling was based on a consent freely and mutually entered into before the Tribunal by the affected parties including the Applicant and the 1st Interested Party on 23rd April 2007 hence the same was binding on the parties involved. According to him the applicant did not show any evidence of misrepresentation, fraud and mistake or any discovery of some new evidence which the applicant did not know or could not with reasonable diligence have known at the time of reaching the agreement hence no circumstances warranting the review were shown. The Tribunal, according to him, did find as a fact that the reduced monthly pension was as advised by the actuary of the 2nd to 6th Respondents (in the Tribunal) and in the premises the reduced sum of the monthly pension was arrived at rationally. Further, the applicant provided neither the Tribunal nor this Court any expert basis and or report for the calculation of

the reduced pension and this Court therefore should not act in vain. In his view, the applicant ought to have appealed against the ruling of the Tribunal as opposed to seeking orders under judicial review hence the application lacks merits and is an abuse of the process of the court and is merely meant to embarrass and prejudice the 2nd interested party herein.

1ST INTERESTED PARTY'S CASE

8. Similarly the 1st Interested Party filed the following grounds of opposition dated 2nd December 2011:

1 The application is incurably defective and without any legal foundation or merit and the only option available is to strike out these proceedings in its entirety.

2 The applicant seeks to quash the decision upon the merits and not the process in which event this court does not have jurisdiction to grant leave.

3 The plaintiff's remedy, if any, is to file an appeal against the decision of the 1st respondent.

4 The application herein is therefore bad in law, incompetent, misconceived and is an abuse of the process of this Honourable Court.

9. The same Interested Party also filed a replying affidavit sworn by **Henry Kyanda**, the 1st interested party's Trust Secretary. According to advice from his advocates, the application as filed is defective and incompetent and misconceived as it purports to question the merits of the decision of 23rd February 2011 and not the process leading to that decision. It is deposed that the 1st Respondent delivered a ruling on 23rd June 2011 disallowing the *ex parte* applicant's application for review of a ruling delivered on 26th October 2007 by which ruling the *ex parte* applicant was awarded an enhanced principal sum of Kshs 7,056,152.00. It is contended that the decision of 26th October 2007 took consideration of the consent of parties on the enhanced principal sum and consequently directed that the monthly pension payable to the *ex parte* applicant be proportionately reduced to such sum as may be determined by the 1st interested party upon advice by the Scheme's Actuary and that the same was accordingly reduced to Kshs 158,709.00. It is the deponent's view that the review was therefore an afterthought made in an attempt to resile from the terms of the said consent. The said application, according to the deponent, was dismissed as it did not demonstrate any error or mistake apparent in the decision of 26th October 2007 and/or any sufficient reason for seeking to upset the said decision that was informed by the consent of the parties in the appeal. Further the *ex parte* applicant was also found culpable of unreasonable delay having made the application after 4 years without offering an explanation. Apart from the foregoing it is contended that the application was dismissed for lack of merits. It is contended that the 1st Respondent judiciously exercised its discretion to dismiss the said application for review. The applicant, according to the deponent, was well aware of the circumstances under which the said consent was agreed and did not raise any concerns thereto. The 1st Respondent, it is contended, had a legal obligation to the Government by dint of Rule 19 of the Trust Deed Rules to deduct and pay tax duty on money payable to the *ex parte* applicant hence the *ex parte* applicant's allegations and application are misconceived and without any basis in law. In the interested party's view the decision of 26th October 2007 finally determined the Appeal hence the 1st Respondent is consequently *functus officio* in respect of the matters relating to the appeal in so far as the said decision has not been set aside.

10. With respect to the prayer for *mandamus*, it is the interested party's position that it is not available and may in any case occasion an absurdity in the administration of justice since it purports to seek another parallel incongruent and contradictory decision to that of 26th October 2007 without quashing the latter. In so far as the said prayer seeks to substitute a decision of a competent forum, it is deposed that the same is incompetent. In the 1st interested party's view the application should be dismissed with costs.

EX PARTE APPLICANT'S SUBMISSIONS

11. The application was prosecuted by way of written submissions. On the part of the *ex parte* applicant, it is submitted that whereas the Tribunal was expected under the Interested Party's Pension Scheme Rules to apply rule 7(b) and (c) thereof in computing the pension benefits for the applicant, this did not happen hence relevant factors were not taken into consideration but that extraneous matters were considered and reliance is placed on **Keroche Industries Ltd vs. The Kenya Revenue Authority and 5 Others Misc. Civil Application No. 743 of 2006**. It is further submitted that the Tribunal did not take into account the ratio of lumpsum paid to the applicant and the residual pension from which monthly pension is drawn in violation of the express provision of the Trust Deed and Rules stipulating the ratio to be applied for the applicant who worked for 28 years. While reiterating the contents of the supporting documents, it is submitted that procedurally an actuarial computation should have been required before a decision was arrived at by the Tribunal and that this procedure was not followed as the Tribunal directed an actuarial computation after making a decision with a specific order that after the actuarial computations his pension be reduced. In support of his submissions, the *ex parte* applicant relies on **Elizabeth Wainaina and others vs. Board of Governors of Pangani Girls School Miscellaneous Cause No. 818 of 1992** and **Stephen Mutuku Muteti vs. Director of Land Adjudication and Settlement and 3 Others Miscellaneous No. 246 of 1998**.

12. It is therefore submitted that it is not only logically reasonable and sensible but also the ends of justice demands that the Application for certiorari and *mandamus* be allowed to quash the 1st respondent's decision dated 23rd June 2011 in Tribunal Appeal No. 3 of 2002 and to compel the Retirements Benefits Authority to decide the same case in accordance with the Trust Deed Rules respectively.

1ST RESPONDENT AND 2ND INTERESTED PARTY'S SUBMISSIONS

13. On behalf of the 1st Respondent and the 2nd interested party, it was submitted that when issued the order of certiorari restores the situation that existed before the decision quashed was made and since the applicant wishes to quash the decision that dismissed the application for review dated 23rd June 2011, if the court were to quash that decision the substantive decision dated 28th October 2007 that ordered the monthly benefits of the applicant to be proportionally reduced would still stand hence the Court would be acting in vain. In support of this submission reliance is placed on **Republic vs. The Head Teacher, Kenya High School & Another ex parte SMY (a Minor suing through her mother and next friend A B) [2012] eKLR**.

14. It is further submitted that the Tribunal having delivered its ruling dated 28th October 2007, it satisfied its duty as prescribed by law and was rendered *functus officio* and therefore even if the Court was to grant the first prayer and quash the decision, an order of *mandamus* compelling it to make another determination cannot issue as there is already a decision in place dated 28th October, 2007 that has not been challenged, reviewed or set aside. What the applicant is seeking is that the Tribunal should arrive at a different and specific determination on the matter. The case of **R VS. Minister for Local Government & Another ex parte Mwahima [2002] 2 KLR 557** is relied on in support of this line of submission.

15. Judicial review, it is submitted is available to someone who is aggrieved with the decision making process and not the merits of the decision. The applicant's case is that there was a procedural impropriety by the Tribunal on the grounds that the Tribunal ought to have directed a recalculation to be done before ordering the reduction of the monthly. It is however, submitted that there is no law which stipulates that the Tribunal shall in all matters pending before it order for an actuarial computation before it makes a decision and the applicant has also not stated any law that requires that. Tribunals such as the Retirement Benefits Appeals Tribunal are constituted by experts in the particular discipline and are to bring matters to closure without undue regard to technicalities and where in its expert wisdom it determines that there is need for some actuarial intervention then it would so order. It is submitted that whereas the applicant is in agreement with the Tribunal that the amount ought to have been reduced his unhappiness is with respect to the amount of reduction hence is unhappy with the merits of the decision arrived at and as there is no provision for an appeal, he has clothed his appeal in the coat of a judicial review application hence the application should be dismissed. Again **Republic vs. National Environmental Management Authority**

& Another [2006] KLR and **Chief Constable of North Wales Police vs. Evans [1982] 3 All ER** are cited.

1ST INTERESTED PARTY'S SUBMISSIONS

16. According to the 1st interested party, the original *ex parte* applicant **Lawrence B Kaitany** having died on 11th March 2012 during the pendency of these proceedings, and was substituted by **Lily Chekorir Keitany, Edward Keitany** and **Caroline Jelagat Keitany** who have, however failed to reflect the change of status on the title of the proceedings despite the order of the Court on 26th September 2012. According to the 1st interested party these proceedings are brought in the name of **Lawrence B Keitany**, the deceased rather than the Republic and as juridical review proceedings are sui-generis in nature, are to be instituted in the name of the Republic hence there is no applicant in the instant case and based on **Sanghani Investments vs. officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 353 at 359** and **Farmers Bust Service & Others vs. Transport Licensing Tribunal [1959] EA 719**, the application is fatally defective and incompetent.

17. It is further submitted that the ruling of the 1st respondent was in accordance with the Scheme Rules where a lump sum payment has been made and in the absence of any contrary calculations put forward by the deceased, this Court has no jurisdiction to re-open the calculations made and take upon itself to rehear the merits of the decision hence the ruling of 26th October 2007 is still binding on the parties and no action can arise to quash the decision since 6 months limitation period has expired. It is submitted that the applicant has not demonstrated in his application that the Tribunal in reaching the decision dated 23rd June 2011 breached any law, rules of natural justice or acted in excess of its jurisdiction so as to invite the jurisdiction of this Court. Since all the matters were considered in the said ruling it is submitted that there was no error to warrant judicial review. In the 1st interested view, having failed to review the Tribunal's award, the deceased seeks to unlawfully challenge the effect and consequences of the consent by attacking it under the guise of a judicial review and the case of **E T vs. Attorney General & Another [2012] eKLR** is relied on. It is therefore submitted that the application is not concerned with the due process of the decision but the underlying findings and hence the attacks on the merits is misconceived and the prayer for certiorari has no basis.

18. With respect to *mandamus*, it is submitted since the matter in issue in the Appeal was finally determined by the ruling delivered on 26th October 2007 the said ruling is binding on the parties in this matter as the Tribunal is *functus officio*. It is further submitted that if the Court were to set aside the decision of 23rd June 2011 and grant a prayer for *mandamus* the result would be an absurdity in administration of justice as the Court will be asking the 1st Respondent to make two decisions since it would be asking the Tribunal to deliver another in addition to the one made on 26th October 2007 and yet litigation must come to an end. Since the power of review is discretionary, it is submitted that the authority cannot be commanded to exercise the discretion in a specific way and this submission is based on **Halsbury's Laws of England** vol. 1 page 111 para 98-90.

19. According to the 1st interested party, the order of *mandamus* as sought in the application is frivolous, as the Tribunal has no jurisdiction to make computations on the monthly pension payable hence the ruling of 23rd June 2011 cannot be faulted or challenged by way of judicial review and the application should be dismissed.

DETERMINATION

20. I have considered the foregoing and this is the view I form of the matter.

21. It is true that on 26th September 2012 the Court made an order allowing the application for substitution. From the record there was no further order made with respect to the title of the proceedings. Accordingly, the *ex parte* applicants cannot be faulted for not amending the title though procedurally where substitution is effected the title of the proceedings should reflect that fact. Failure to do so,

however, is not, in my view fatal to the application.

22. The next issue on the competency of the proceedings is that the application is brought in the name of the deceased rather than the Republic. It is correct that judicial review proceedings are brought in the name of the Republic and not in the name of the individual and the title ought to be properly intitled. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

23. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intitled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

24. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** Ringera, J (as he then was) expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intitled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

“REPUBLIC.....APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI”

25. It is clear from the title of the proceedings herein that the Motion herein is not an epitome of impeccable, elegant or paragon drafting. However in **Republic Ex parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

26. I however must state that the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.

27. It is clear that in these proceedings, the *ex parte* applicant seeks to quash the decision of the Tribunal dated 23rd June 2011. It is not in dispute that the impugned decision arose from a ruling from the

Notice of Motion dated 1st March 2011 in which Motion the *ex parte* applicant sought a review of an earlier ruling issued on 26th October 2007. In effect the *ex parte* applicant was unhappy with the ruling issued on 26th October 2007. In its ruling dated 23rd June 2011 the Tribunal dismissed the *ex parte* applicant's application for review. Consequently the effect of granting the order of certiorari sought herein would be to revert to the decision issued on 26th October 2007 since the said decision is not under challenge in these proceedings. It is the law that the decision whether or not to grant the remedy of judicial review is discretionary. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that 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 and hence the Court will 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 Mombasa HCMA No. 96 of 2000.**

28. To grant the orders of certiorari sought would have the effect of quashing the orders of the Tribunal dated 23rd June 2011 without quashing the earlier orders 26th October 2007 which are the orders which in effect the applicant is unhappy with. The effect of that would be that the orders which the applicant is aggrieved with would be left intact and would remain in force. Accordingly no use will be served by granting the order of certiorari sought herein.

29. With respect to the prayer for *mandamus* what is sought by the *ex parte* applicant is that the Court compels the Tribunal to decide the case in accordance with the Trust Deed and Rules. Even if the Court had jurisdiction, that order can only properly be made if the decision of 26th October 2007 is quashed. As already stated there is no prayer seeking the quashing of the said decision and as was held in **Anthony John Dickson & Others vs. Municipal Council of Mombasa** (supra) orders of judicial review being discretionary ought not to be granted where it would cause administrative chaos and public inconvenience. In this case, to grant the *mandamus* sought would have the effect of having two conflicting decisions of the Tribunal a situation which would lead to a theatre of the absurd.

30. Apart from that fact the decision whether or not to review an earlier decision is clearly an exercise of discretion. The law as I understand it is where what is sought is an exercise of discretion, *mandamus* will not issue and it will not issue where it is sought to compel a body to act in a particular manner. Here it is sought that the Court should compel the Tribunal to act in accordance with the Trust Deed and Rules. The Court has not been shown the provision which mandates the Tribunal to act in that manner. The Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** expressed itself as follows on this point:

“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* 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. 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.....Courts do not, or ought not to act in vain by making futile orders and it has always been the policy of the law to prevent a multiplicity of suits on one issue.”

31. Having reached the decision that it is not efficacious to grant the orders sought herein, there is no need for me to deal with the other issues raised since the said issues, not being the subject of the impugned decision are not properly before me.

ORDER

32. In the result the Notice of Motion dated 20th January, 2012 filed on 27th January 2012 fails and is dismissed with costs to the 1st respondent and 1st and 2nd interested parties.

Dated at Nairobi this 8th day of May 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Aisi for Mr Koceyo for the applicant and Mr Litoro for Mr Gachui for the Interested Party