REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 209 OF 1977

BETWEEN

REPUBLIC.....APPLICANT

AND

DIRECTOR GENERAL OF EAST AFRICAN RAILWAYS CORPORATION.....RESPONDENT

EX-PARTE

GEORGE NUME KAGGWA

JUDGMENT

The applicant, George Nume Kaggwa, was employed by the East African Railways Corporation, having joined it in 1953, when it was known as the East African Railways and Harbours Organisation. On 23rd March 1976, he was dismissed with effect from 7th April 1976 from the services of the corporation. He successfully sued the corporation for general damages for wrongful termination of his employment when this Court found that he was wrongfully retired by the corporation and gave for him judgment for Shs 146,000 with costs and interest. That was on 11th August 1977. On the 17th September 1977, the applicant applied to this Court for leave, under the Civil Procedure Rules, Order III, rule 1, to apply for an order of *mandamus* and on 21st September 1977 leave was granted to apply for an order of *mandamus* directed to the Director-General of the East African Railways Corporation (hereinafter called "the respondent"), to pay to the applicant's advocate, Mr Mitra, Shs 164,389/50, being the decretal amounts plus taxed costs. On the second limb the applicant asked for an order of *mandamus* directed to the respondent, to permit in writing the attachment and sale of the property of the corporation in execution of the decree and, on the respondent's failure to obey the order of *mandamus*, the respondent's permission to be dispensed with.

In support of the application was an affidavit sworn to by Raghunath Kashinath Mitra, advocate. The Attorney-General of Kenya resisted the application and filed an affidavit sworn to by Davidson Karundi Ngini, the managing director of Kenya Railways, in support of the respondent's case.

According to the statement filed pursuant to order LIII, rule 1(2), certified copies of the decree and the certificate of costs were served on the respondent and yet neither the total decretal amount Shs 164,389/50 nor any part has been paid to the applicant or his advocate. Mr Mitra has deponed in his affidavit that on 15th August 1977 he wrote to the respondent asking for payment of the decretal amount and sent him, ie the respondent, an advance copy of the draft decree; and that he (ie Mr Mitra) received a

reply dated 24th August 1977, to his letter from the managing director of Kenya Railways. The reply, addressed to Mr Mitra, reads as follows:

We have apprehended within our premises a letter unreferenced dated 15th August 1977, addressed to the Director-General East African Railways Corporation, Nairobi by yourself.

I am unable to effect delivery of same due to the fact that the addressee's whereabouts are unknown to me and, in the circumstances, I can do no better than return the letter to you for action as you deem necessary.

The letter is on the letterhead of Kenya Railways. Mr Mitra depones further that to the best of his knowledge, information and belief, the East African Railways Corporation Act 1967 has not been repealed; so that the East African Railways Corporation and its Director-General still exist in law, although the former has (in Kenya) assumed the name of Kenya Railways and the latter that the managing director thereof.

Mr Mitra has also sworn that, owing to the imminent changes in the East African Community and its organisations, the assets of the East African Railways Corporation may be taken over by the Kenya Railways as soon as it has received legal recognition; and there is, consequently a serious risk of the decree-holder (ie the applicant) being deprived of the fruits of his decree. In a letter dated 6th September 1977 by Mr Mitra, addressed to the respondent, railways headquarters, Nairobi, Mr Mitra, among other things, said:

As regards the letter CPM/62974 dated 24th August 1977 from the managing director of the Kenya Railways it is futile to pretend that the Director-General of the East African Railways Corporation and its Director-General still exist in law although the former ... under the name of Kenya Railways and the latter the managing director thereof. These assumed names have so far received no legal recognition.

It is however clear from the letter dated 24th August 1977 that you are attempting to evade payment of the decretal amount and costs in contravention of section 91 of the East African Railways Corporation Act. I am, therefore, now constrained to apply for an order for a writ of *mandamus* for enforcement of (a) the payment of the decretal amount, and (b) written consent to attach railway property.

Mr Ngini in his affidavit deponed that before his appointment in January 1977 as the managing director, Kenya Railways, he was acting Director- General of East African Railways Corporation, having been appointed by the authority, but declined to accept the latter post. He attached the letter he wrote to the Secretary-General of the East African Community about the appointment. The letter dated 4th April 1975 shows that what happened was that Mr Ngini would not sign the service agreement until the terms of service, especially his emoluments, were improved. He further deponed that, to the best of his knowledge, the East African Railways Corporation Board is no longer in existence, and, that on 19th January 1977, when he was appointed managing director of Kenya Railways, he vacated the post of acting Director-General, and since then there has not been, to his knowledge, any appointment of a Director-General. He also has sworn that Mr J K Njoroge, the chairman of the interim management board of Kenya Railways, has informed him, and he verily believes the same to be true, that the Government of the Republic of Kenya has as an interim measure taken over all the fixed and other assets of the former East African Railways Corporation in Kenya and has directed that the railways continue to run properly without interruption in the greater public interest. The Republic of Kenya has formed a committee to discuss and deal with the assets and liabilities of the former East African Community and all its former institutions and corporations. The committee has already held its first meeting. In the last but two paragraphs Mr Ngini has deponed that he verily believes that the judgment obtained by the applicant against the former East African Railways Corporation is a liability against the corporation and that liability will be dealt with by the committee dealing with assets and liabilities of the former East African Community and its corporations. And, or in the alternative, the applicant can obtain satisfaction of his decree in Uganda where his dues can be and are payable to him.

The questions that emerge from the affidavits of Mr Mitra and Mr Ngini are: (a) Is the East African Railways Corporation still in existence? (b) If it is, is there a Director-General of the corporation to whom

the order of *mandamus* could be directed if it had to go?

The answer to the first question is in the affirmative. *De jure* the East African Railways Corporation still exists. The position of its Director- General is rather complicated. In practice, the East African Railways Corporation has, for all intents and purposes, ceased to function in Kenya. Although the post of Director-General is still provided for in the East African Railways Corporation Act there is no holder of the post. Indeed, we have no information that Mr Ngini was relieved of his duties as Director-General, but while this has not been done by the authority, events might have forced Mr Ngini out of the post; and, in my opinion, that is what has happened. A man may just leave his post unilaterally, regardless of whether it is contrary to his terms of appointment. If that happens this Court or the public cannot close their eyes and insist that the man remains holder of the appointment. A practical example is the former Court of Appeal for Eastern Africa. On the statute books that Court still exists, and the justices of appeal appointed by the authority have not been relieved of their appointments. Can it seriously be said that those justices of appeal who have taken up other appointments are still justices of appeal of the former Court of Appeal for Eastern Africa? What about the former Secretary-General of the East African Community? He took up an appointment as a Minister in one of the partner States. It has not been notified to the public or this Court that he has been relieved of his appointment as Secretary-General. Can this Court shut its eyes to the reality and insist that Mr Mutei is still the Secretary-General because the authority has not told anybody that he has ceased to be the Secretary- General since, under the treaty and in law, the East African Community still exists? In my view it would be most erroneous to hold so. As to question (b), therefore, in my opinion the post of Director-General of the East African Railways Corporation is still there as much as the corporation itself still exists in law, but there is no Director-General in that post for practical purposes, to whom an order of *mandamus* could be directed.

Mr Mitra has drawn our attention to the provisions of section 91 of the East African Railways Corporation Act. This is what that section says:

Notwithstanding anything to the contrary on any law:

(a)where any judgment or order has been obtained against the corporation, no execution or attachment, or process in the nature thereof, shall be issued against the corporation or against any property of the corporation; but the Director-General shall, without delay, cause to be paid out of the revenue of the corporation such amounts as may, by the judgment order, be awarded against the corporation to the person entitled thereto;

(b)no property of the corporation shall be seized or taken by any person having by law power to attach or distrain the Director-General.

Mr Mitra argued that the decretal amount in this case being a judgment against the corporation can be satisfied only by the Director-General paying out of the corporation revenue the sum due and payable to the applicant decree-holder. With respect, there is no dispute about that and I agree with Mr Mitra. He further, and correctly too, contended that if the decree is to be satisfied by attachment and sale of any of the corporation's property that can be done only with the written consent of the Director-General. There is no dispute about section 91(b) of the Act The question is whether there is any property of the corporation in Kenya which can, and should, be attached in view of the changed circumstances of the East, African Community. Mr Mitra said that the Director-General had been approached but he had refused to pay or permit the corporation's property to be attached. Mr Shield's view, for the respondent, is that there is no Director- General in office and so there has been no refusal to comply with section 91 of the Act. There is no doubt that Mr Mitra has complied with part of one of the requirements for an order of *mandamus*, namely that the applicant must have called for the fulfilment of the duty; but that is not enough for that calling must have been met with a refusal or noncompliance. I have already said that, in my opinion, there is no Director General for practical purposes. That being the case, and since only the Director General could be called upon to fulfil the duty of payment of the judgment sum, it cannot be said that Mr Mitra's letters of 15th August and 6th September 1977, addressed to the Director-General calling upon the latter to fulfil his duty of paying the decretal amount has met with refusal or non-compliance, because there was no-one in the post of Director- General to refuse or fail to comply with the applicant's call or request. Let

us look at *Shah v Attorney-General (No 3)* [1970] EA 543 to which we were referred. In that case Mr Shah had obtained a judgment in a civil suit against the Government of Uganda for Shs 67,500. The Government did not appeal, but failed to pay. Mr Shah applied for an order of *mandamus* directed to the officials responsible for making payment, in that case the Treasury officer of accounts, to pay the amount of the judgment. The Court held that *mandamus* could issue to the Treasury officer of accounts to compel him to carry out the statutory duty cast upon him by law (emphasis mine to substitute section 20(3) of the Government Proceedings Act) and that the Court should, in its discretion, make an order of *mandamus*. In that case there was a Treasury officer of accounts who refused to comply with the demand to pay. In the instant case there is no Director-General so no-one has refused to comply. While the order of *mandamus* may issue against the office of the Director-General (as opposed to the holder of the office), when considering whether the applicant has called for fulfilment of the duty, which in my opinion is a condition precedent to an application for an order of *mandamus*, we must look at the reality and practicability of the matter and establish whether there was a person or authority in existence at the time the request was made who refused to fulfil the public duty. At any rate the order of *mandamus* is an order to a person or body to fulfil a specific public duty enforced by law. *Shah v Attorney-General (No 3)* is in my opinion distinguishable.

As Lord Goddard CJ said in *R v Dunsheath, ex parte Meredith* [1950] 2 All E R 741, 743, *mandamus* is neither a writ of course nor a writ of right. It is 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*. Besides alternative remedies, there are other bars to granting 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. In the present case it is the Director-General who is required to supervise enforcement of the order against the East African Railways Corporation. He has in fact vacated the post which in my opinion remains vacant, the former acting Director- General having left. Mr Ngini has sworn that the Government of Kenya has formed and established a committee to discuss and deal with the assets and liabilities of the former East African Community and all its former corporations. The judgment which the applicant has obtained against the corporation in *Kaggwa v East African Railways Corporation* (unreported) which gives rise to the present application, is a liability against the corporation. It should be dealt with by the committee. This is an alternative remedy. There is a further alternative remedy, and that is when the corporation is wound up the applicant will be entitled, like any other creditor, to prove his claim against the corporation. This has happened in the case of the East African Airways Corporation where the liquidator has realised the assets of the Corporation in Kenya including selling the corporation's immoveable property and, from the proceeds, is paying the creditors. There is no suggestion that this legal procedure would not be followed in dealing with liabilities of the East African Railways Corporation. Indeed, it may be long before the winding-up takes place; but that only means that the applicant may have to wait long, and does not exclude the fact that he has alternative remedies. Kenya is a State with a stable Government and the rule of law is still observed here. There is, therefore, no doubt that liabilities of the East African Railways Corporation in Kenya will be dealt with according to the law. It is apparent that the applicant has alternative remedies. A serious risk, as stated by Mr Mitra in his affidavit, is not enough unless it extinguishes the alternative remedies, to cause an order of *mandamus* to go.

The fact that enforcement of the order cannot be adequately supervised, or would present problems that could make the order ineffective, is a bar or limitation to the granting of an order of *mandamus.* In the present case, enforcement of the order is supposed, by section 91 of the East African Railways Corporation Act, to be supervised by the Director-General. In practice and as a fact, there is no Director-General of the corporation as the post is, as I have already said, vacant. Even if I am wrong and the post of Director-General is still filled by Mr Ngini, he is at the same time a full-time managing director of the Kenya Railways. Before even the establishment of the Kenya Railways, when he was appointed Director-General he showed reluctance in accepting the appointment and remained, acting from 1975 until his appointment as managing director of Kenya Railways. As far as he is concerned, he has vacated the office of Director- General. I cannot see any possibility of his adequately supervising the enforcement of the order that may go, let alone his present appointment not allowing him time to do so.

Adequate supervision of enforcement is inter-related with the possibility of effective enforcement which must exist for the order of *mandamus* to go. Thus the person or authority against whom it is prayed must have the power to obey. If the results of granting the order would be futile the Court will, usually, refuse the order. In the English case of *Re Bristol and North Somerset Railway Co* (1877) 3 QDB 10, 13, the Court refused to enforce, by *mandamus* an order imposed on a virtually defunct company, a duty that was impossible for the company to discharge. The prayer was for an order to compel the company to replace a level crossing by a bridge when the company had no funds, and no power of raising any. If the circumstances have rendered the performance of something impossible, a *mandamus* will not go. Mr Ngini has deponed that the corporation received its revenue from the regions which were under a duty to remit sufficient funds to the headquarters to enable the headquarters to meet its financial obligations; but as time went by the regions totally failed to remit any funds to the headquarters and, as a result, the headquarters had been operating on bank overdrafts. The bank statements attached to Mr Ngini's affidavit showed that as at 1st September 1976, the corporation current account was overdrawn to the extent of Shs 12,216,525/25. There is no evidence that the position has improved or changed for better or that the regions have remitted, or are remitting, funds to the headquarters. The fixed and other assets of the corporations have been taken over by the Kenya Government as an interim measure. This may have been necessary for safe custody; and it is hoped that, when the question of dealing with liabilities of the corporation in Kenya arises, those assets will be taken into account. Thus, the Director-General has neither funds with which to comply and pay the judgment debt as required by section 91(a) nor any other assets in respect of which he can give written permission for attachment and sale to meet the judgment debt of the applicant under section 91(b) of the Act. In short, there is no possibility of effective enforcement of a *mandamus* if one were to go. If a mandamus would be futile in its result what useful purpose would be served for it to go? None at all.

Mr. Shields drew our attention to the passage in *Prem's Law of Writs in India, England and America* (2nd Edn), page 385 which was quoted with approval in *Shah v Attorney-General (No 3)* [1970] E A 543, 549, which says:

Mandamus does not lie against a public officer as a matter of course. The Courts are reluctant to direct a writ of *mandamus* against executive officers of a Government unless some specific act or thing which the law requires to be done has been omitted. Courts proceed with extreme caution for the granting of the writ which would result in interference by the judicial department with the management of the executive department of the Government

With respect I agree with the passage, although it must be remembered that the Court as a custodian of the rights of those under its jurisdiction must ensure that justice is done to those who come before it regardless of whether or not that interferes with the management of the executive arm of Government. That is why, where there is no other remedy open to the applicant, the Court has no choice but to grant the order of *mandamus (fiat justitia)* so that justice may be done and be seen to be done (see *R v Bishop of Sarum* [1916] 1 K B 466). The purpose of *mandamus* is to compel the performance of a public duty or an act contrary to, or evasive of, the law; as I said above, it does not lie against a public officer as a matter of course and where one or more of the bars or limitations which I have considered above exist the Court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the respondent and that it will result in interference by the judicial department with the management of the executive arm of Government. There are other bars, which are not relevant to this case, like delay in making the application. All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist. The first three limitations exist in the present case. The applicant has alternative specific remedies at law as I have already explained. The Director-General, if there is any now, of the East African Railways Corporation is, in practice, without power to obey an order of *mandamus* if one goes as he would have no money from which to pay the judgment debt since the corporation bank account appears to be heavily overdrawn, and the Director-General has no power of raising any funds for the corporation.

The corporation's assets in Kenya are in custodial possession of the Kenya Government; we do not know

about assets in the other two partner States. There appears to be no assets in respect of which the Director-General can give permission to attach. The Government of Kenya may later decide to takeover the assets and property of the corporation now in its temporary possession in Kenya. If that happened, one would hope, and I am inclined to think that it will be so, that a responsible and orderly Government like the one we have in this country, and one mindful of the rights and freedoms of every individual who is in Kenya which are enshrined in our Constitution would also assume the liabilities of the defunct East African Railways Corporation in the Kenya region. Nevertheless, the Court must in this matter proceed with extreme care and not exercise its discretion in a manner that would interfere and possibly prejudice dealings with the assets and liabilities of the corporation for the benefit of most, if not all, of its creditors. As the applicant in this case has alternative remedies at law no injury, hardship or injustice will be occasioned him if *mandamus* does not go. For these reasons I would refuse the application for an order of *mandamus* against the Director-General of the East African Railways Corporation. [His Lordship then invited the advocates for the parties to address him on the question of costs.]

Application refused.

Dated and Delivered at Nairobi this 22nd day of November 1977.

Z.R.CHESONI

JUDGE