



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW NO.16 OF 2014

IN THE MATTER OF APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF ENFORCEMENT OF WORK INJURY BENEFITS ACT 13/2007

BETWEEN

REPUBLIC OF KENYA.....APPLICANT

VERSUS

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF LABOUR AND SOCIAL

SECURITY SERVICES 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

AND

ISAIAH KIPNGETICH ROTICH.....EX PARTE APPLICANT

RULING

1. The *ex parte* applicant by application and Notice of Motion dated 7th February, 2017 is seeking for orders that the court do issue and order of Mandamus compelling the respondents and Director of Occupational Safety and Health service to make payment to the *ex parte* applicant as quantified by the director Occupational Health and Safety Services on 21st May, 2010 plus interest thereon at the rate of 18% per annum from the 21st May, 2010 till date of payment in full.

2. The application is supported by the affidavit of the *ex parte* applicant and on the grounds that his son, now deceased, died in the course of duty as an employee of the 1st respondent whereupon the Director of Occupational Health and Safety Services assessed the compensation due to Kshs.1,920,480.00. The 1st respondent was served and to date has not remitted the compensation in breach of the directive to pay. The *ex parte* applicant as the legal representative of the deceased is the right person to be paid. Pursuant

to section 6(1) of the Work Injury Benefits Act.

3. In response the respondents filed Grounds of Opposition on the basis that the applicant has not exhausted prescribed administrative procedures before seeking orders of mandamus and the reliance on a letter dated 21st May, 2010 makes the application defective. The claim for the payment of Kshs.1,920,480.00 cannot be enforced by an order of mandamus as the amount has no basis in law of in fact. The claim for interest is not justified. The court thus lacks jurisdiction to entertain the claim.

4. Both parties made oral submissions.

5. The application by the *ex parte* applicant is premised on the facts that he is the father of the deceased, Kipyegon Eric Koros who died on 7th January, 2009 in the course of his employment. He obtained letters of Administration over his estate and then approached the 1st respondent and where the Director of Occupational Health and Safety Services computed the work injury benefits of the deceased at Kshs.1,920,480.00 now the basis of the orders sought in form of mandamus.

6. In this regard the *ex parte* applicant is seeking for orders of mandamus to issue against the respondents. Does the court then have jurisdiction to grant orders of mandamus with regard to the application made under the Work Injury Benefits Act and with regard to a deceased property?

7. Orders of *mandamus* are specific in nature. Mandamus is first employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. The legal right which requires the specific performance of the public officer must exist or be demonstrated by an applicant. In essence, the applicant must have demanded justice, which must be refused by the public officer. In this case, the *ex parte* applicant has based the application on a letter of the 1st respondent. such letter dated 21st May, 2010 in my view was not directed at the deceased or to the *ex parte* applicant. In my view the computations made by the officer of the 1st respondent did not in them create a right or an invitation to enjoy any rights or benefits. In my reading of this letter, It was an internal communication by the officer of the 1st respondent and it remains unsigned.

8. The scope of the judicial review remedies of *Mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council versus Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court 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 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.

9. In this regard the *ex parte* applicant has applied under the Work Injury Benefits Act with regard to the recovery of the deceased property allegedly held by the 1st respondent. matters under the Work Injury Benefits Act are regulated under the statute and in their nature and vide gazette Notice No. 9243. And the Practice Directions of the Chief Justice published on 27th July, 2011 are to be heard by the lower courts. This as a Superior Court of record can only address any appeals arising thereto. In **Rwaken Investments Limited & another versus the Minister of Labour & 2 Others [2013] eKLR** the court in addressing the question whether this court should address matters relating to work injury made reference to Gazette Notice No.9243 and held as follows;

The jurisdiction of judges where magistrates or special courts are given powers do not abet until those powers are revoked by issuance of a gazette notice. Even with the coming into force of the industrial Court Act, 2011, the powers granted to the Senior Resident Magistrates to operate with relation to labour relations under the Labour Institutions Act, 2007, Employment Act, 2007, Occupational Safety and Health Act 2007 and Labour Relations Act 2007 have not been revoked and or repealed by the operation of the Industrial Court Act. These powers were specific to the provisions of these cited legislation regarding employer and employee offences outlined under the stated laws in their entirety.

10. As such, any matters of work injury and any claims arising out of the Work Injury Benefit Act in their nature and manner should be commenced before the lower courts. I find no justification why this matter commenced before this court. the orders of mandamus as set out above relate to a decision of a public officer who has acted in a quasi-judicial manner. The alleged decision of the officers of the 1st respondent does not meet the threshold of such an officer capable and at the level of being applied for enforcement in a judicial review manner. The decision of 21st May, 2010 was an assessment of terminal dues and where challenge is made that such was not a decision capable of enforcement, recourse for the *ex parte* applicant is not to file a Judicial Review Application. There is sufficient remedy under the applicable statute and the Work Injury benefit Act.

11. In **Wellingtone Wanzala Okwalo versus Laxmanbhai Construction Ltd [2015] eKLR** the court while citing the case **Rwaken Investment Limited**, cited above held that;

As the balance of matters in this case fall squarely within the remit of the Magistrate's Court vides Kenya Gazette Notice No. 9243, I refer the matter to the Chief Magistrates Court at Milimani for hearing and disposal of the WIBA claim. This Court is the appellate court in such matters and it would be remiss of the Court to determine the matter at appeal level while the parties have a proper forum for the same.

12. The matter in **Wellingtone Wanzala Okwalo**, cited above was filed through a Memorandum of Claim. The court referred the matter to the lower court. The matter herein by its nature cannot revert back to the lower court as it is in its nature a judicial review application.

In the case of **Republic versus Vice Chancellor Jomo Kenyatta university of Agriculture and Technology ex parte Dr Cecilia Mwathi and Mr Moses Muchina [2008] eKLR** the court held as follows;

... judicial review orders are discretionary in nature and the court may decline to grant them even if deserved particularly if the court is of the view that they are not the most efficacious in the circumstances of the case. Speed is the hallmark of judicial review. Time is of essence and an application for judicial review ought to be filed and prosecuted expeditiously. Indeed, the procedures governing the conduct of judicial review proceedings are designed to ensure speedier determination of those proceedings than ordinary civil litigation. The law acknowledges the need

for speedy certainty as to the legitimacy of target activities and requires an application for judicial review to act promptly to avoid frustrating a public body ...

13. The *ex parte* applicant filed the matter herein in 2014 following the death of his son in 2009. Time being of essence in an application for judicial review application, where the alleged decision of the officers of 1st respondent were taken in assessing terminal due is a time way out of what can be considered within the ambit of time to file an application as herein. The decision of 21st May, 2010 to be challenged though judicial review in 2014 I find to be a time way out of the requisite period for judicial review. In **Republic versus Vice Chancellor Jomo Kenyatta university of Agriculture and Technology ex parte Dr Cecilia Mwathi and Mr Moses Muchina [2008] eKLR** an application for judicial review filed after two (2) months from the date the decision was made was found to have been filed expeditiously.

Accordingly, application dated 7th February, 2017 is hereby dismissed. Each party to bear own costs.

Delivered in open court at Nairobi this 7th day of November, 2017.

M. MBARU

JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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