



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO. 194 OF 2019**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**REGISTRAR OF BIRTHS AND DEATHS.....RESPONDENT**

**EX PARTE APPLICANT:**

**GRACE WAIRIMU NDUNGU**

**JUDGMENT**

1. The application before this Court is a Notice of Motion dated 4<sup>th</sup> March, 2021 brought by Grace Wairimu Ndungu, the *ex parte* Applicant herein, seeking an order of mandamus directing the Registrar of Births and Deaths to issue a Certificate of Death in respect of Bernard Gitau Njoroge, the *ex parte* Applicant's deceased husband. The application is supported by a statutory statement dated 11<sup>th</sup> June 2019 and verifying affidavit sworn on the same date by the *ex parte* Applicant. The *ex parte* Applicant also filed two supplementary affidavits dated 12<sup>th</sup> September 2019 by herself and Simon Mwangi, her brother –in-law, who was also examined by the Court to verify the contents therein.

2. The *ex parte* Applicant averred that Bernard Gitau Njoroge died on 15<sup>th</sup> April, 2012 due to a drowning incident that occurred while he was swimming at the shores of the Indian Ocean around Mogadishu Airport. His body was then taken to Amison Level II Field Hospital in Mogadishu where he was declared dead, after being examined by the doctors. The said doctors however advised that they could not issue a Death Certificate, and that the body of the deceased be taken back to Kenya where a post-mortem could be conducted by a Forensic Pathologist. The *ex parte* Applicant annexed a copy of a medical report by the AMISOM Level II Field Hospital dated 16<sup>th</sup> April 2012 to this effect. It is the *ex parte* Applicant's averment that the body was brought back to Kenya where a post-mortem was done on 18<sup>th</sup> April, 2012 by Dr. Johansen Oduor, a Government Pathologist and a burial permit subsequently issued.

3. The *ex parte* Applicant contended that Dr. Johansen Oduor filled the register of death form commonly referred to as Form D1 on 9<sup>th</sup> May, 2012, and she was availed a copy which she annexed. However, that the efforts to obtain the deceased's death certificate have been rendered futile. It is further her contention that the Respondent has been demanding to be furnished with the original Form D1 which is not in her possession or custody. Furthermore, that in an effort to obtain the said Form D1 from the County Government, her advocates were issued with copies of letter dated 20<sup>th</sup> September, 2012 addressed to the Registrar of Births & Deaths Nairobi and a subsequent letter dated 1<sup>st</sup> October, 2012 addressed to the Registrar of Births and Deaths Somalia by the County Government requesting that she be issued with the death certificate, copies of which she annexed. Besides, she averred that her advocates have on several occasions requested the Senior Immigration Officer at Hass Plaza to intervene and request for the original copy of Form D1 serial no. 505454 from their records to facilitate issuance of the said death certificate to no avail. However, despite all these efforts, the Respondent has failed, refused and/or neglected to issue the Certificate of Death.

4. The Applicant also filed written submission dated 4<sup>th</sup> March, 2021 in support of the application. On the circumstances under which orders of judicial review can issue, counsel cited the Ugandan case of **Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300** where it was held that in order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Counsel argued that the Respondent acted illegally by failing to consider the evidence before it in accordance with Section 16A of the Births and Deaths Registration Act (hereinafter “the Act”). Indeed, counsel submitted that the Applicant attached a copy of Form D1 issued by the Government Pathologist Dr. Johansen Oduor and a post mortem report as proof that the death was attended to by a medical attendant in the country as provided under Section 16A (1)(ii) of the Act as well as a burial permit issued in accordance with Section 21 of the Act.

5. It was further submitted that the Respondent has refused to issue a certificate of death since 2012 and demanded that they must be furnished with the original copy of Form D1, the register of deaths which has never been in the Applicant’s possession but in the possession of Nairobi City County and which as per the letters dated 20<sup>th</sup> September, 2021, 1<sup>st</sup> October, 2012 and 15<sup>th</sup> October, 2012 have actually confirmed its existence and gone ahead to request the Registrar to proceed and process the certificate of death. Counsel also submitted that it is not in doubt that the Respondent was furnished with a copy of the Form D1 by the Applicant in line with the provisions of Section 16A 1(a)(ii) of the Act but the Respondent has still refused to issue a certificate of death terming their actions illegal.

6. To buttress that argument, counsel cited and the case of **L.N.W v Attorney General & 3 Others, Petition No. 484 of 2014** whereby the court held that the Act must be considered in accordance with the provisions of Section 7(1) of the Sixth Schedule to the Constitution which requires that legislations enacted prior to the promulgation of the Constitution be read with the adaptations and exceptions necessary to bring into conformity with the Constitution.

7. On whether the Respondent acted fairly, counsel relied on Article 47 of the Constitution as well as Section 4(3) of the Fair Administrative Actions Act to submit that the Respondent never gave written reasons for the impugned decision nor given the Applicant an opportunity to be heard before making the said decision. To that end, counsel cited the case of **Republic v Chief Justice of Kenya & 6 Others Ex-parte Moiwo Mataiya Ole Keiwa, Miscellaneous Civil Application No. 1298 of 2004** for the proposition that the rules of natural justice required the Respondent to act judicially when rendering its decision. Counsel also cited the case of **General Medical Council v Sparckman (1943) 2 All E.R 337** for the proposition that if indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice.

8. Counsel went on to submit that even though no specific procedure is provided for by the Act on what happens in case an original copy of the register of death (Form D1) cannot be availed by the person notifying the death of a citizen outside Kenya, Article 47 of the Constitution and the provisions of the Fair Administrative Actions Act import and imply a duty to act fairly by a decision maker in any administrative action. In addition, counsel relied on the case of **Republic v Director of Civil Registration Ex-parte Simon John Githieya Miscellaneous Applications No. 682 of 2017** which cited with approval the case of **Lloyd v McMahon (1987) AC 625** where it was held that where a statutory procedure is insufficient to ensure that the requirements of fairness are satisfied, courts will imply procedural steps to ensure the said requirements are met.

9. Counsel further relied on the Court of Appeal decision in **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** where it was held that the purpose of an order of mandamus is to remedy the defects of justice and it will issue to the end that justice may be done, in all cases where there is a 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. Counsel also cited the case of **Republic v Cabinet Secretary for Ministry of Interior and Coordination of National Government Director & Department of Immigration Services; Carlo Vanetti (Ex Parte), JR Application No. 276 of 2019** where the court held that the whole purpose of the order of mandamus is to compel public authorities to carry out its duties and where necessary, exercise its powers as provided by law and although mandamus enforces duties and not powers, there are cases where a power may be coupled with a duty so that the donee of the power would be obliged to exercise it. From the foregoing, counsel submitted that the Respondent is under an obligation to perform its duties and exercise its powers for the benefit of the Applicant and as such, urged that the application be allowed.

10. The Respondent did not file any response or submissions in respect to the Application, although the counsel indicated in correspondence and submissions to the Court that they had forwarded the Applicant’s documents to the relevant offices for processing.

### **The Determination**

11. Section 7 of the Births and Deaths Registration Act provides that a register of births and a register of deaths to be kept by the Registrar with particulars of the births and deaths notified to him or her, including one of the births and deaths occurring outside Kenya. For deaths that occur outside Kenya, section 16 A of the Act provides as follows:

**(1) A person notifying the death of a citizen of Kenya outside Kenya shall produce to the registrar the following evidence of the death—**

**(a) firstly, either—**

**(i) a certificate of death issued by the appropriate authority in the country abroad, with an English translation of the certificate if it is not in English; or**

**(ii) if certificates of death are not issued in the country abroad, a certificate of the death given by the medical attendant or other person who attended the death; and**

**(b) secondly, either—**

**(i) if there is a Kenya Mission in the country abroad, a certificate of a member of the Mission that he is satisfied, from evidence produced to him and inquiries which he has made, that the particulars of the death given in the death certificate are correct; or**

**(ii) if there is no Kenya Mission in the country, such other evidence as the registrar may require, and the person notifying the death shall certify in writing to the registrar the correctness and authenticity of the evidence which he produces.**

**(2) Upon receiving the evidence required by subsection (1) of this section to be produced, the registrar shall forthwith enter the prescribed particulars of the death in the register of deaths occurring outside Kenya.**

12. Lastly, Rule 5 of the Births And Deaths Registration (Births And Deaths Occurring Outside Kenya) (Forms And Fees) Rules, provides that a certificate of death shall be issued by the Registrar-General in the format that is provided in Form IV in the First Schedule upon payment of the fee specified in the Second Schedule of the Rules.

13. The *ex parte* Applicant in this respect produced various documents of the death and cause of death from authorities in Somalia and from a Kenyan pathologist in Kenya, as illustrated hereinabove, which met the requirements of section 16A of the Births and Registration Act. Her counsel also indicated that the said documents had been availed to the Respondent. In addition, it is evident from the dates of the documents that they were prepared and availed within the time limit of six months of the death provided for in section 8 of the Births and Deaths Registration Act.

14. It is thus my finding from the foregoing reasons and observations, that in the present case, the Respondents are under a duty to act on the *ex parte* Applicant's application, and having fulfilled the conditions set out in sections 16A of the Births and Deaths Registration Act, to grant her a death certificate in respect of her deceased husband. The Respondent have also acted unlawfully, unfairly and unreasonably in their refusal and delay in responding to the *ex parte* Applicant's application. Article 47 of the Constitution provides as follows in this regard:

**“ (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”**

It is indicated in Article 47, the situations where a duty to act fairly will apply is where the decision maker is taking a decision that will have a direct and specific impact on an individual.

15. Section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows in this regard:

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
  - (b) an opportunity to be heard and to make representations in that regard;**
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
  - (d) a statement of reasons pursuant to section 6;**
  - (e) notice of the right to legal representation, where applicable;**
  - (f) notice of the right to cross-examine or where applicable; or**
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**
- (a) attend proceedings, in person or in the company of an expert of his choice;**
  - (b) be heard;**
  - (c) cross-examine persons who give adverse evidence against him; and**
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”**

### **The Disposition**

16. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997)** e KLR explained the applicable principles for an order of mandamus to issue as follows:

**“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS”** Once again we turn to **HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89.** That learned treatise says:-

**“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 and 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.”**

At paragraph 90 headed “the mandate” it is stated:

**“The order must command no more than the party against whom the application is made 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.”**

**What do these principles mean" They mean that an order of mandamus will 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...."**

17. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, it was held that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.

18. Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of its discretion in a particular manner.

19. It is notable that all these requirements for the grant of an order of mandamus have been met in the present application as illustrated in the foregoing. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 4<sup>th</sup> March 2021 is merited, and I accordingly grant the following orders:

**I. An order of mandamus be and is hereby issued directed to the directing the Registrar of Births and Deaths to issue to Grace Wairimu Ndungu, the *ex parte* Applicant herein, and upon presentation by the e parte Applicant of the supporting documents filed in this suit and payment of the specified fee, a Certificate of Death in respect of Bernard Gitau Njoroge, the *ex parte* Applicant's deceased husband, in the specified format.**

**II. The Respondents shall meet the *ex parte* Applicant's costs of the Notice of Motion dated 4<sup>th</sup> March 2021.**

20. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 17<sup>TH</sup> DAY OF DECEMBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER 2021**

**J. NGAAH**

**JUDGE**



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