REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW APPLICATION NO. 165 OF 2013
REPUBLIC.....APPLICANT
-VERSUS-
PRINCIPAL SECRETARY, STATE DEPARTMENT FOR HOUSING & URBAN DEVELOPMENT.....RESPONDENT
ex parte:
KENYATTA PETER & 3 OTHERS.....APPLICANTS
AND
TOM NDECHE & ANOTHER.....INTERESTED PARTIES
RULING

The substantive motion in this matter and on which judgment was delivered as far back as 27 November 2014 was filed by the applicants in May 2012. In that motion, the applicants sought for judicial review orders of certiorari to remove into this honourable court and quash the respondent's directives respectively dated 14 November 2012 and 29 April 2013 to evict the applicants from what I gather was an informal settlement in Nairobi city, more particularly referred to as Kibera East Zone slums.

Besides the order for certiorari, the applicants also sought for the order of prohibition against the respondent restraining her from executing any order meant to demolish the applicants' dwellings or evicting them therefrom until they had been relocated to an upgraded settlement.

The applicants not only succeeded in obtaining these orders but the court (Odunga, J.) also directed the parties to convene a meeting within 30 days of the date of the judgment apparently to hammer out an eviction program that would generally take the interests of the applicants into account. The court also directed that a progress report be filed in court within 60 days of the date of the judgment.

The court also made an order in the following terms:

"*5) Liberty to apply granted."*

Mainly by reason of this particular order, parties have filed, and this honourable court has ruled on, several applications since the judgment was delivered six years ago. The latest application which is the subject of this ruling is the applicants' motion dated 20 February 2020. The prayers sought in this motion have been framed as follows:

"

1. ***This application be certified as urgent and be heard ex parte in the first instance.***

2. ***That this court grant (sic) leave to the firm of Messrs. Amukhale, Mirito and Company Advocates to come on record for the applicants after judgment.***

3. ***That the court grant (sic) leave to the applicants to withdraw the applications dated 16 December 2019, 11th December 2019 and 28th November 2019.***

4. ***That pending the hearing and the determination of the application inter party (sic) there be a stay of the respondent's decision to put up for sale market stalls subject matter herein until further orders of the court or as the court may direct.***

5. ***That this court be pleased to give directions for the implementation of the resolutions of the meetings between the Applicants and Respondent herein pursuant to the judgment delivered on the 27th of November 2014.***

6. ***That this court be pleased to give directions as to the validity of the status report filed by the respondent in this court on the 15th day of June 2017.***

7. ***That this honourable court expunge the status report filed by the respondent in this court on the 15th of June 2017 from the court record.***

8. ***That this honourable court vary its order number 4 on the judgment dated 27 November 2014 to the extent that a joint progress report be prepared by both parties and filed before this honourable court within 30 days from the date hereof.***

9. ***That parties appear in court after the filing of the progress report for directions on implementation of the said report.***

10. ***That this honourable court quash the decision of the respondent to put up for sale the market stalls subject matter herein.***

11. ***Costs of this application be awarded to the applicants***."

The application is said to have been brought under Article 23, Article 2(5) and (6) and Article 159 of the Constitution and is supported by the affidavit of Peter Kenyatta, the 1st applicant.

In the affidavit, Kenyatta has sworn that in disregard of the judgment of the Court, the respondent has commenced process of settling persons on the market stalls without any reference to the applicants.

Nonetheless, the applicant also swore that in a meeting held on 10 December 2014 chaired by the Principal Secretary, Ministry of Lands Housing and Urban Development, it was resolved that a technical committee would be formed to oversee the entire process. A further meeting was held on 19 December 2014 when a proposal of membership of the technical committee was made and following that proposal it was agreed that four of the members of the technical committee were to be state officials while the other four were to the applicants. There were to be two other members from Pamoja Trust and Umande Trust.

The committee was chaired by Gabriel Muli, a government officer, while Evans Khakame from the applicants' side was chosen to be the secretary of this technical subcommittee.

The subcommittee resolved to enumerate affected persons from 26 January 2015 to 30 January 2015 after which the eviction exercise would commence. The enumeration exercise was duly commenced at the end of which it was established that the eviction would affect 342 persons or entities. The persons or entities singled out were issued with unique identification cards. Construction works commenced on 30 March 2015 and as at the time the deponent swore his affidavit on 20 February 2020, the works had been completed.

The main technical committee met on 10 February 2015 under the chairmanship of the Director of Slum Upgrading department. The Committee received a report of the technical committee which also provided the necessary information for purposes of relocation and settlement. It was noted, however, that a report had not been filed in court as directed in the court's judgment.

Another meeting of the main committee scheduled for 8 April 2015 did not take off; it was rescheduled for 14 April 2015. It also never took off on this date but was instead postponed indefinitely. Meanwhile the respondent disengaged the applicants from further activities of the committee. It is for this reason that the applicants instituted contempt of court proceedings against the respondent. The application was dismissed but still the court ordered that a report be filed within sixty days of the date of the ruling. A report which the applicants claim was 'fabricated' was eventually filed in court on 15 June 2017.

The applicants claim that report was unreliable because it was neither signed nor dated; it was made up of minutes that were not confirmed or signed by members of the committee; and, that it refers to Kibera Soweto East Zone Cooperative Society as the vehicle for resettlement of the applicants yet this particular entity is not party to these proceedings.

A second application for contempt orders against the respondent was made on 3 August 2017 but just like the first one, it was dismissed on 25 January 2018.

On 2 July 2019, the respondent invited the applicants for a meeting which was held on 4 July 2019 but the meeting was inconclusive as the respondent is alleged to have reneged on the agreed process of enumeration and resettlement; it sought to rely on the data collected for a

different purpose in 2005.

Despite the applicants' complaints, the respondent proceeded and issued a notice on 8 February 2020 informing the general public that the Ministry of transport, Infrastructure, Housing, Urban Development and Public Works was putting up for sale the market stalls which are the very subject of the present suit. Among the conditions that those interested in purchasing the stalls were that their names must be in the 2005 register; that they must be residents of Kibera Soweto East Zone "A"; that they must have benefited from the allocation of kiosks or shops; and that they must be members of Kibera Soweto East Zone "A" Housing Cooperative Society.

Those interested were required to pick application forms from the Slum Upgrading Department of the respondent's ministry from 10 February 2020 to 14 February 2020 and submit them by 21 February 2020.

The applicants were not notified of the intended sale. Meanwhile, they had registered a society known as Soweto High Rise Co-operative Society Limited for purposes of facilitating resettlement of the affected persons yet, according to the criteria set by the respondent, the only persons who would qualify were members of Kibera Soweto East Zone "A" Housing Cooperative Society, an entity that is not and has never been party to these proceedings.

It is therefore the applicant's case that the respondent's actions are in breach of the judgment delivered by this honourable court on 27 November 2014.

The deponent also swore that he intended to have the applicants' earlier applications withdrawn because they had been overtaken by events.

The applicants' motion was slated for hearing on 11 November 2020 and it is on the same date that it was brought before me for the very first time. On the material date there was no appearance for the applicant; Ms. Chimau who appeared for the respondent informed the court that parties had complied with previous directions given by the court and had they had filed and exchanged their written submissions; all they were interested in was a date for the ruling on the pending motion.

I had no reason to doubt the learned counsel for the respondent and so I reserved this matter for ruling on 18 December 2020.

It is only when I retriated to write my decision that I noted that apart from the applicant's submissions, there were no other submissions by any other party. In fact, the record does not have any sort of response to the applicant's application.

The most reasonable step one would take in these circumstances is to have the matter mentioned again to confirm whether indeed parties had complied with the court's directions as far as filing their response and submissions is concerned.

But as I went through the record, I noted that despite having been given several opportunities to file and serve their response and submissions the respondent and the interested parties had not done so. In the directions given on 28 September 2020, the court appears to have been fed up with their recalcitrance and directed that the matter would proceed for hearing on 11 November 2020 with or without the respondent's and interested parties' response or submissions. Tobe precise, this is what the court said:

> ***"Despite this court's directions on 1st July 2020 and 15th June 2020, the respondent's and interested parties counsel have not filed their responses and submissions. I direct that the application dated 20th February 2020 and filed on 21st February 2020 shall proceed for hearing via video link on 11th November 2020 at 10.00 am.***
>
> ***Counsel for the respondent and interested party are granted the last opportunity to file and serve their responses and submissions within 10 days from today, in default the hearing shall proceed the failure notwithstanding. The applicant's counsel is directed to serve the respondents and interested party's counsel with a hearing notice and a copy of these directions and to file an affidavit of service."***

Having been given the last opportunity to comply on 28 September 2020 and the matter having been fixed for hearing, I found neither the reason nor the alternative of mentioning the matter any further except to work with the material on record which basically is the applicants' application and their submissions.

I must state at the outset that the 2nd and 3rd prayers on the face of the motion would ordinarily not evoke any dispute and indeed there is no

hint of any on record. Accordingly, the prayer seeking leave for the firm of Messrs. Amukhale, Mirito and Company Advocates to come on record for the applicants is allowed.

I need note, however, that by its very nature, the application for leave to come on record ought to be heard and determined first before a party's new counsel can file and have audience on any application his client intends to make. The application for leave to come on record is obviously made to pave way for a party's newly found counsel to act on behalf of his client; it is only after such counsel has been given the greenlight to act and is properly on record that he can take any further action on his client's behalf; this would include the filing of any necessary application for any other order or, generally, to prosecute his client's course, one way or the other. It follows that an application where, on the one hand counsel is praying to come on record and, on the other hand, he proceeds as if he is already on record and even seeks substantive prayers on behalf of his client, in the same application he is seeking to come one record, is an untidy application, to say the least; it is the kind of practice that I would discourage.

Having said that, there is no objection to the application for withdrawal of the applicants' applications respectively dated 16 December 2019, 11 December 2019 and 28 December 2019; they are hereby marked as withdrawn.

Thus, prayer (1) having been spent, prayers (2) and (3) are allowed. Although no response of any nature was filed in response to the applicants' application for the rest of the prayers I will, nonetheless, interrogate the application and ascertain whether the orders sought are available to the applicants.

In their written submissions, the applicants rightly focused more on the issues of law the first of which was whether, having delivered its judgment on 27 November 2014, this court still has jurisdiction to hear and determine this application. According to the applicant, the court has jurisdiction because of that order of 'liberty to apply' which, in the learned counsel's view is so open that there is no limit as to the number of applications that may be made whenever such an order is given. He relied on the decision in **Kenya Country Bus Owners Association & Others versus Cabinet Secretary for Transport & Infrastructure & 5 Others (2014) eKLR** where the court held that where a party is given liberty to apply, the order given is preliminary pending further action and the court retains general superintendence of the matter. In effect, parties are at liberty to make any application to give effect to the order. Again he cited the decision in **Banking Insurance and Finance Union (Kenya) versus Taifa Sacco Society Ltd (2018) eKLR** where orders were granted compelling the respondent in that case to comply with the judgment delivered in the same matter. As for the meaning of the phrase 'liberty to apply' the learned counsel relied on this court's decision in **Cereal Growers Association & Another versus County Government of Narok & 12 Others** where the court (Githinji, J.A.) invoked the decision in **Cristel versus Cristel (1951) 2 ALL ER 574** where it was held that 'liberty to apply' cannot be used to alter or vary the agreement of the parties but it is necessary for the working out of an order.

It is thus the applicants' position that their application is not only justified in law but also because the respondent could not proceed with evictions without further directions from this honourable court. The learned counsel for the applicants also cited the decision in **Titus Korir Komen versus Lake Basin Development Authority (2011) eKLR** where it was noted that in order to conclusively and effectively determine the dispute between the parties, the court ought to have given an interim decree and given parties liberty to apply in the event a disagreement arose in enforcement of the judgment.

Besides the question of liberty to apply, it was also submitted on the applicant's behalf that orders staying the respondent's action of evicting, relocating and settling people on the market stalls could still be granted because that exercise was not yet complete. If the exercise was not stayed, the applicants submitted, their application would be rendered nugatory. The decisions in **Attorney General versus Chief Magistrate, Milimani Law Courts & 3 Others ex parte Mohan Galot (2018) eKLR** and **Kakamega High Court Miscellaneous Application No. 29 of 2005, George Philip Wekulo versus The Law Society of Kenya & Another** were cited for the propositions a stay could be granted at any stage of the proceedings.

The applicants reiterated that the actions by the respondent offended the judgment of this court and to that extent, contemptuous of the court; these actions were also an abuse of the process of the court. For these reasons, the court should proceed to quash the respondent's decisions and issues fresh directions on conclusion of the dispute between the parties.

It was also urged that it was necessary that the report ordered by the court be filed so that fresh directions would be issued on conclusion of the dispute. Without these directions, the judgment of the Court has left the parties to their own devices and in an embarrassing position

which the respondent has taken advantage to frustrate the applicants and deny them the fruits of their judgment.

As far as the question of costs is concerned, the applicants submitted that they are entitled to costs since they have been forced to seek the intervention of the Court because the respondent is in contempt of the court's judgment. On this point, the learned counsel for the respondent relied on the judgment in **Kenya Country Bus Owners Association & Others versus Cabinet Secretary for Transport & Infrastructure & 5 Others** (supra).

So much for the applicants' submissions.

I could not readily get my hand on the applicants' substantive motion dated 2 May 2012 but the judgment of this court disposing of the motion leaves no doubt that its basis was the respondent's directives or notices of eviction respectively dated 14 November 2012 and 29 April 2013. The applicants wanted the notices quashed and, in broad terms, the respondent restrained or prohibited from implementing them and evicting the applicants.

The applicants were apprehensive that the respondent was bent on leasing the land on which they had settled for more than 20 years to private developers who would put up shops for their own gain yet the intended beneficiaries for such shops or stalls that were to be constructed by the Government of Kenya in collaboration with the United Nation were the applicants.

It goes without saying that the issues of eviction of the applicants, their resettlement and allocation of stalls or shops are issues which featured and which this court made a determination on in its judgment of 27 November 2014. The same issues have arisen in four or so other applications that have been filed subsequent to that judgment.

To my understanding, these issues are again at the fore in the present application; the applicants want the sale or allocation of market stalls held in abeyance and that, ultimately, the decision to sale or allocate them ; they want the court to direct how the resolutions of meetings between themselves and the respondent will be implemented; they want this court to weigh in on the validity of a report filed by the respondent, no doubt, following the directions of this honourable court in its judgment of 27 November 2014. They also want the same report expunged from the record because, in their view, it is invalid for various reasons. Talking about the same report, the applicants also want the directions given about the filing of the report varied to the extent that a joint report, apparently arrived at by the applicants and the respondent, be filed in court within a specified time and that once filed the court should give directions as to how it should be implemented.

Weighed against the judgment of this court, the several applications and rulings that were made, one cannot resist the conclusion that this application is, by and large, seeking to reopen issues that have been deliberated upon and determinations made.

It is appreciated that besides granting the orders of certiorari and prohibition which were the only prayers sought in the applicants' motion, the court went further and directed the parties to convene a meeting mainly to deliberate on the modalities of the then impending eviction of the applicants. And to ensure that this direction had been complied with, the court further ordered that "*the report of the progress shall be filed in this court within 60 days from the date of this judgment*."

As far as compliance with the court's judgment and, in particular, compliance with its directions is concerned, two applications have been filed in which it has been alleged that the respondent has defied the court and so ought to be cited for contempt and punished accordingly. As rightly put by the applicants themselves those applications were dismissed for reasons that were given in the rulings delivered by this honourable court.

The applicants must have moved the court for contempt because they were of the firm position that that was the best alternative to enforce the judgment of the court or to punish the respondent for having disregarded it altogether. When they failed in their bid, it is not, in my humble opinion, open to them to reopen the judgment and seek from the court fresh directions enjoining the respondent to act in a particular manner. The primary question is whether parties, and in this particular case, the respondent has complied with the judgment of the court delivered on 27 November 2014 or not; if the respondent defaulted, as the applicants have suggested, the proper course would be to take such steps as are necessary to punish the respondent for such default. This, as earlier noted, they have done, not once but twice; however, their bids have been dismissed in every of those occasions.

At any rate, the judgment of the court did not direct the respondent to allocate or sell market stalls or shops to any particular persons, including the applicants. If anything, the court appreciated that the applicants had to be evicted and all that the court was concerned with was the manner the evictions were to be carried out. The directions were given in the following terms:

> "***3) Pursuant to Article 23 of the Constitution which does not limit the remedies this court is empowered to grant in such cases, I direct that within 30 days of this judgment a meeting shall be convened by the respondent with the applicants where a program of eviction of the applicants shall be designed taking into account the following factors:***
>
> > "***i) that at the time of eviction neutral observers should be allowed access to the suit properties to ensure compliance with international human rights principles.***
> >
> > ***ii) that there must be a mandatory presence of governmental officials and security officers.***
> >
> > ***iii) that there must be compliance with the right to human dignity, life and security of the evictees.***
> >
> > ***iv) that evictions must not take (sic) at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.***
> >
> > ***v) that none is subjected to indiscriminate attacks."***

These directions were of course, as earlier noted, in addition to the orders of certiorari and prohibition which the court granted to the applicants.

Regardless of whether a meeting was held or not, a 'report of the progress' was to be filed within a specific time. I take this report to be the sort of report that would demonstrate, *inter alia*, the extent to which these directions had been complied with and if not the reasons for non-compliance.

The point, however, is, as much as the applicants may or may not have been entitled to 'shops and market stalls', there is nothing in the directions given by the court that suggests that they were to be given or sold the shops or the stalls such that if the respondent defaulted in this regard the applicants would have recourse back to the court to prevail upon the respondent to act in a particular way. In the absence of such suggestion, the court is not prepared to accept the applicants' invitation.

It must be noted that even where a party seeks an order for mandamus, compelling a person or body to perform a public duty, such an application will not be granted if the grant of the order would effectively require continuous supervision of the performance. **(see R versus Peak Park Joint Planning Board (1976) 74 LGR 376).**

To ask the court to effectively review its judgment and direct the filing of a fresh report alternative to that filed by the respondent so that the applicants can achieve their goal of buying or being allocated shops or market stalls would not only be out of the scope of the court's judgment but would also be tantamount to varying it in a way that is well beyond what a party could possibly be entitled to in an application filed on the strength of a court's order of 'liberty to apply'.

'Liberty to apply' cannot be taken to mean opening of new fronts in a case that has been determined; neither can it be used to vary a judgment in any material particular. And it is certainly not a window for review or regurgitation of issues that have been determined.

The phrase was discussed in detail by the court of appeal of England in **Cristel v Cristel - [1951] 2 All ER 574**. It was a case between a husband and his wife. The brief facts were as follows: The husband deserted his wife leaving her with their two children in the matrimonial home. The wife then took out a summons for the maintenance of herself and the children. The house where they lived was apparently larger than was necessary for the wife and the two children. Because he was in financial difficulties, the husband wanted to get possession of the house so that he could sell it with vacant possession. A consent order was eventually entered on a summons filed under s 17 of Married Women's Property Act, 1882; according to that consent, the wife was to:

> "***deliver up possession of 26 Ilmington Road, Kenton, in the county of Middlesex, to the [husband] but that such order be suspended until the [husband] provides suitable alternative accommodation for the wife by providing a two or three bedroomed house or bungalow in the Harrow area either by renting the same unfurnished or by purchase, the [husband] agreeing to pay the wife's expenses of removal. No order as to costs. Liberty to apply."***

Sometimes later, the husband took out the summons in which he sought that the consent order be varied, and an alternative order be given in the following terms:

> ***"that the wife deliver up possession of 26 Ilmington Road, the husband having secured a two bedroomed flat at Copthorn Court, 347 Alexandra Avenue, Harrow, Middlesex, as alternative accommodation."***

When the matter went to the High Court, the court (Devlin, J) allowed the variation of the order in terms proposed by the husband; however, when the case escalated to the Court of Appeal, the court held that the order could not be so varied. It held that the husband's version of the order was an attempt to enlarge the categories of alternative accommodation which were expressly limited by the order. In allowing the appeal, Somervell LJ who read the leading judgment stated as follows:

> ***It seems to me reasonably plain that Devlin J proceeded on the basis that the order could be varied as asked for in the summons. He was not, as a matter of construction, deciding that the word "house" in the original order covered "a flat." I have come to the conclusion that the word "house" in the original order cannot be construed as including "flat." I think that the fact that it was thought necessary to insert the words "or bungalow" indicates that "house" could not be given a wide meaning, as simply meaning any premises in which a woman with two children could live, but must be construed in its ordinary sense. (Emphasis added).***

And while explaining the circumstances and the extent to which the phrase 'liberty to apply' may be employed, the learned judge had this to say:

> ***The question, therefore, is whether the order can be varied as asked. If it can, the question would then arise whether it should, but the first question is whether it can, and reliance is placed by the husband on the words "liberty to apply." Prima facie, "liberty to apply" is expressed very often--and, if it is not expressed, it will be implied--where the order that is drawn up requires working out and the working out involves matters on which it may be necessary to get the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied.***

Thus, the expression 'liberty to apply' in an order or an order in which the phrase is implied would be necessary only if some 'working out' is required to effectuate the order or the decision of the court. Its purpose is not to vary or alter the order or the decision. Yet this appears to be what the applicants are inviting this court to do.

Needless to say, the law is fairly clear that 'liberty to apply' is not a carte blanche for opening up afresh of a case that is otherwise concluded. It cannot also be a reason for variation of the court's decision. Again, it cannot be used to introduce a new case or new issues that are outside the scope of a determination that has already been made.

This was well captured by Stirling LJ in **Poisson & Woods versus Robertson & Turvey (86) LT 304** where he stated as follows:

> ***"... such an application as the present cannot be made under the 'liberty to apply' ... The judgment contained a declaration as to the interests of the parties ... with 'liberty to apply.' But the insertion of those words ... does not enable the court to deal with other matters which do not arise in the course of working out the judgment."***

In short, 'liberty to apply' cannot be an excuse for endless litigation in any particular dispute. The substance of the applicants' original motion has been disposed of and this court will refuse any invitation to regurgitate issues that have either been determined or may well be a basis for a fresh cause of action. There must be an end to litigation. I find the applicants' application cyclic seeking to achieve what may not have been achieved in the original motion or in the subsequent applications filed but which have either been withdrawn or dismissed for reasons given in this honourable court's rulings. I find the present motion to be an abuse of the process of court. It is hereby dismissed; however, I make no orders as to costs since neither the respondent nor the interested parties filed any response. Orders accordingly.

Signed, dated and delivered on 22 December 2020

Ngaah Jairus
JUDGE