



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO. 44 OF 2012

IN THE MATTER OF: AN APPLICATION BY JANE J. OGOT FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF: THE NATIONAL HOUSING CORPORATION ACT (CAP 117) LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

PERMANENT SECRETARY

MINISTRY OF HOUSING.....RESPONDENT

AND

JANE JUMA OGOT.....EX PARTE APPLICANT

AND

NATIONAL HOUSING CORPORATION.....1ST INTERESTED PARTY

PAUL OMONDI MUGANDA.....2ND INTERESTED PARTY

THE HON. ATTORNEY GENERAL.....3RD INTERESTED PARTY

JUDGMENT

1. Before the Court is an application by way of a Notice of Motion dated 16th June, 2012, upon leave therefor having been granted on 6th June, 2012, for orders of Certiorari to remove into the Honourable Court and quash the decision of the 1st Interested Party made on 30th November, 2011 contained in a notice addressed to the Ex-parte Applicant. The Notice of Motion is supported by the Supporting Affidavit of one Christine Wanjiku Karanja, a donee of the Ex-parte Applicant’s Power of Attorney (a copy which Power of Attorney dated the 2nd February, 2011 is annexed to the Supporting Affidavit as CWK 1.)

2. The 1st Interested Party has on file a Replying Affidavit sworn by one Joash Onguko – the Officer in Charge of its Coast Region operations and dated the 21st August, 2012. In response to the Replying Affidavit, the Ex-parte Applicant also has on file a Supplementary Affidavit sworn by the same Christine Wanjiku Karanja on the 25th September, 2012 pursuant to leave of court issued on the 12th September, 2012.

3. In accordance with the direction of the Honourable Court on the 6th March, 2013, the Ex-parte Applicant, the 1st Interested Party and the Respondent together with the 3rd Interested Party have filed Written Submissions dated the 24th April, 2013, the 30th April, 2013 and the 1st July, 2013 respectively.

4. Statements in the Supplementary Affidavit of the Ex-parte Applicant dated the 25th September, 2012 (to wit paragraphs 2nd and 16 appear to suggest that the 2nd Interested Party filed a Replying Affidavit paragraph 8 whereof, it is alleged by the Ex-parte Applicant, the 2nd

Interested Party confirmed that he had not applied to be allocated the suit house.

5. The Respondent and the 3rd Interested Party did not file any affidavit.

The facts of the Case

6. From the Supporting Affidavit sworn by Christine Wanjiku Karanja on the 19th June, 2012, the facts relied on by the Ex-Parte Applicant are as follows:

i. The Ex-parte Applicant has been a tenant to the respondent in respect of the entire house known as House No. J8DR7 Jomo Kenyatta Estate since sometimes in 2008 (although in the Verifying Affidavit that accompanied the application for leave dated the 30th April, 2012, Christine Wanjiku Karanja deponed that the Ex-parte Applicant has been a tenant since sometimes in 2006). Attached as CWK 2 is a bundle of receipts being evidence of payment of rent by the Ex-parte Applicant.

ii. By a letter dated the 29th June, 2010, the 1st Interested Party offered to sell the said house to the Ex-parte Applicant at a sum of Ksh. 1,625,000/= with a further requirement that a down payment of 10% of the purchase price (Ksh. 162,000/=) be paid together Ksh. 10,000/= for legal fees. The letter is attached as CWK 3.

iii. By a cheque No. 828004, the Advocates of the Ex-parte Applicant on record (M/s Kanyi J. & Company Advocates) forwarded the 10% deposit and the legal fees to the 1st Interested Party (Letter from Advocates to the 1st Interested Party dated the 8th March, 2011 attached as CWK 5). The said advocates intimated to the 1st Interested Party of their intention to clear the balance of the purchase price on behalf of the Ex-parte Applicant as soon as the 1st Interested Party furnished them with completion documents.

iv. As of the 5th May, 2011 no response had been obtained from the 1st Interested Party regarding the transaction despite the fact that they had already received deposits as stated. A letter from the Advocates of the Ex-parte Applicant on record on the 5th May, 2011 seeking clarification is annexed as CWK 6.

v. By a letter dated the 30th November, 2011, without any prior notice to the Ex-parte Applicant, the 1st Interested Party purported to terminate its tenancy agreement with the Ex-parte Applicant and to reallocate the house to the 2nd Interested Party (said letter attached as CWK 7). The Ex-parte Applicant contends that the 1st Interested Party's action was a clear breach of the rules of natural justice followed by an unlawfully and/or un-procedural reallocation demonstrating an abuse of power on the part of the 1st Interested Party.

The Response

7. 1st Interested Party opposed the Ex-parte Applicant's case set out in the Supporting Affidavit of the 19th June, 2012 on matters of both law and fact as follows:

a) The Ex-parte Applicant's case is bad in law and an abuse of the court process and that it should be dismissed with cost to the 1st Interested Party, because the remedy of Judicial Review is only available where an issue of Public Law is involved. It is the assertion of the 1st Interested Party contends that the issue between itself and the Ex-parte Applicant is a contract for the sale of a house as described in the Supporting Affidavit of the 19th June, 2012 and as such whereas the Applicant's contention is that the said contract has been breached, the remedy for such breach ought to be damages or specific performance.

b) Breach of a contract is not a matter of Public Law and does not require Administrative Law remedies and that the dispute before the Court is enforceable under Private Law Procedure of the Law of Contract.

c) It was conceded that the 1st Interested Party offered the suit house to the Ex-parte Applicant for sale. However, the said Agreement was frustrated by events beyond the control of the 1st Interested Party which made it impossible for it to complete the transaction and the said decision was communicated to the Ex-parte Applicant by Notice dated 29th July, 2011 (copy of notice annexed as JO 1).

d) The events leading to the said cancellation of the transaction were set out as follows:-

i. During the period between 1967 and 1987, the 1st Interested Party dispersed a total of 66 loans to the Municipal Council of Mombasa totaling to Ksh. 182,754,636.13 which amount was inclusive of a capitalized interest sum of Ksh.7,509,789.00 and which loans were utilized in the development of various housing scheme for the Municipal Council.

ii. As at the 31st December, 2003 the total debt owed by the council to the 1st Interested Party stood at Ksh. 291,997,543.32 which debt was net of payments received from the Council amounting to Ksh. 125,556,108.16.

iii. Pursuant to a consultative meeting held on the 15th May, 2009 involving the Council and the 1st Interested Party the outstanding debt was determined at Ksh. 260,000,000.00.

iv. Through a series of subsequent meetings and negotiations between the Council and the 1st Interested Party it was agreed

to swap the Ksh. 260,000,000.00 debt with the Council's property known as Jomo Kenyatta Estate on Plot No. Mombasa/Block XIII/114 measuring 9.36 acres in settlement of the debt.

v. Unknown to the 1st Interested Party, the Council had already subdivided the aforesaid plot and allocated the third parties leases of 99 years.

vi. It became clear that the Council had misled the 1st Interested Party and had transferred a nonexistent Plot No. Mombasa/Bock XIII/114 to it and therefore the debt swap agreement was rescinded.

vii. There is now before the Court a dispute regarding the said plot between the 1st Interested Party and the Council – that is Mombasa High Court Civil Suit No. 241 of 2011.

e) As such, when the debt swap agreement was rescinded the property either remained with the person to whom it had been allocated or reverted to the hands of the Council, therefore, the 1st Interested Party is not in a position to proceed with the said transaction. The 1st Interested Party states that it is trite law that the court of law ought not to issue orders which are incapable of enforcement, and that in the present circumstances, the orders sought will not have any legal effect if granted.

f) Further to the cancellation of the debt swap agreement, the 1st Interested Party took over the management of various estates owned by the Council for purposes of recovering the outstanding debt amount; and, therefore, the relationship of the Ex-parte Applicant and itself at the time of the decision sought to be quashed was that of a landlord and a tenant. (A copy of a lease executed on the 1st February, 2004 is attached as JO 2.) The said premises were let to the Ex-parte Applicant at a rate of Ksh. 2,285/- per month.

g) It was a fundamental term of the said lease specifically in clause 10 of the Agreement that the tenant would not sublet or part with possession of the premise the subject of the lease, a breach of which term would entitle the 1st Interested Party to terminate the lease and re-enter the premises.

h) The Ex-parte Applicant, through her donee one Christine Wanjiku Karanja went ahead and sublet the suit premises to the 2nd Interested Party by an agreement dated 8th June, 2011 (attached as JO 3) contrary to the provisions of the lease between the Ex-parte Applicant and the 1st Interested Party. The Ex-parte Applicant proceeded to collect rent of Ksh. 10,000/= paid on a monthly basis by the 2nd Interested Party (Receipts attached as JO 4) The 1st Interested Party asserts that the actions detailed herein were illegal and as such the Ex-parte Applicant cannot use the court to sanitize illegal transactions.

i) The 1st Interested Party did indeed give the first priority in its offer to sell the suit premises to the Ex-parte Applicant by the letter dated 29th June, 2010 (also attached as JO 5) on the understanding that she was the current sitting tenant but on the discovery of the breach, it informed her of the consequent repossession and reallocation to the actual sitting tenant who was the 2nd Interested Party by the letter dated 30th November, 2011 (also attached as JO 6).

j) The Ex-parte Applicant had also failed, refused or neglected to pay her monthly rent of Ksh. 2,285/= resulting in arrears totaling to Ksh. 9,140/= as at the 28th August, 2011 despite having collected a monthly rent of Ksh. 10,000/= from the 2nd Interested Party (rent invoice attached as JO 7).

The Ex-Parte Applicant's Reply.

8. In response to the Replying Affidavits of the 1st Interested Party and 2nd Interested Party (not in the court file) the Ex-parte Applicant filed a Supplementary Affidavit in which she avers as follows: that it is not in dispute that the 1st Interested Party is a parastatal by law and thus is equipped with the powers to carry out Public Policies on behalf of the state and in the General Public Interest; that while providing the 1st Interested Party with the legal powers to enter into Contracts of Sale with private individuals, the Legislature has nonetheless imposed a measure of control since the parastatal is prohibited from going outside of its statutory powers; that the 1st Interested Party initially exercised those powers to lease the suit premises to the Ex-parte Applicant, on the 29th June, 2010 and still in exercise of those powers it entered into an agreement of sale with the said Applicant.

9. The Ex-parte Applicant asserted that upon receipt of the initial 10% deposit by the 1st Interested Party after acceptance of the offer made on the 29th June, 2010 by the Ex-parte Applicant the terms of the initial lease agreement lapsed as a matter of consequence. In other words, that upon entering into an agreement for the sale of the suit premises, subsequently submitting the required consideration and further expressing interest to clear the remaining amount, the Ex-parte Applicant cannot have been expected to continue being bound by the terms of the initial lease agreement. In that manner, at the time of the alleged subletting, the relationship between the Ex-parte Applicant and the 1st Interested Party was not that of landlord and a tenant, but one of a vender and a purchaser, and the purchaser was bound to deal with her property as she deemed fit. In exercise of the statutory powers entrusted in it, the 1st Interested Party must act in good faith and not corruptly and it must do so especially where its action adversely affects the rights of private individuals. As such, if indeed cancelled the purchase agreement as it claims in its Replying Affidavit, then a new tenancy agreement ought to have been entered into which is not the case.

10. As the factors leading up to the alleged cancellation were not within the Ex-parte Applicants' knowledge, it was argued, the 1st Interested Party withheld vital information, and the orders sought for the quashing of the 1st Interested Party's decision are well capable of being issued with the effect to revert the house back to the Ex-parte Applicant. The manner in which the premises was allocated to the 2nd Interested Party who by his own admission did not apply for it as per the Procedure Rules of the 1st Interested Party and without according the Ex-parte Applicant a fair hearing appears to be a calculated move to dispossess the said Applicant and it is against the principles of justice.

THE SUBMISSIONS BY THE PARTIES.

11. The Parties made submissions along the following issues.

Whether the matter was properly before the Judicial Review Court

12. The 1st Interested Party submits that the foremost issue for determination ought to be the Justiciability of the case. Noting that the term non-justiciable with respect to Administrative Law signifies that the matter is not capable or susceptible to Judicial Review or that there is no jurisdiction to entertain the issue or power to grant an appropriate relief, it is submitted by the 1st Interested Party that from the grounds of the Notice of Motion and the accompanying Supporting Affidavit the dispute emanates from an offer by the 1st Interested Party to sell the Ex-parte Applicant a house in Jomo Kenyatta Estate known as House No. J8DR7 which is a purely private contract between the Ex-parte Applicant and the 1st Interested Party.

13. It was contended that the remedy of Judicial Review is not available to a party who alleges that a contract or obligations under it has been breached. The 1st Interested Party submits that the remedy of judicial review is only available where an issue of public in nature is involved and not an issue of Contract Law with no Public Law element. In support of this assertion the 1st Interested Party cites the Court of Appeal in ***Kadamas v. Municipality of Kisumu*** [1985] KLR 954 wherein it stated at page 962 that:

“.....the remedy of Judicial Review is only available where an issue of a Public nature is involved...Certiorari might well be available if the health authority is in breach of a public law obligation but would not be if it is only in breach of a Private Law obligation....”

[Emphasis added]

14. Further, the 1st Interested Party submits that there is no element of Public Law in the Contract for Sale of a house between itself and the Ex-parte Applicant and not even the fact that it is a state corporation would make the issue one of Public Law. In ***Kadamas*** case, the court quoting the Master of Rolls in ***Malloch v. Aberdeen Corporation*** [1971] 1 WLR 1578 as follows:

“...Employment by a public authority does not per se inject any element of Public Law...”

15. The 1st Interested Party accordingly submits that the fact that it is a public corporation does not in itself inject elements of Public Law into the dispute and therefore contends that this case is non-justiciable for the reason that the dispute herein is not amendable to Judicial Review and prays that the case be dismissed with costs.

16. The Ex-parte Applicant on her part submits that the ***Kadamas*** case dealt with the enforcement of Labor Law in the corporate body in question wherein the Honourable Court delivered itself (and in the opinion of the Ex-parte Applicant, correctly so) that by virtue of the Applicants being employees of a state corporation, they were entitled to apply for judicial review if they felt that a decision to dismiss them without being given an opportunity to be heard was made by their employer. The Ex-parte Applicant points out further to the Courts appreciation that the relationship between an employer and employee was governed by Employment Laws.

17. In the instant application, the Ex-parte Applicant submits that it has been established that the 1st Interested Party is a state corporation. It therefore follows that the said corporation and all its activities must at all times be in accordance with the law. The Interested Party has the responsibility to show that while transacting with the Ex-parte Applicant it acted within the legal authority vested in it by implication of statute, particularly when its actions affected the rights of the Ex-parte Applicant, citing ***Constitutional and Administrative Law***, A. W. Bradley and K. D. Ewing 12th edition at p. 705.

18. Further to that, the Ex-parte Applicant submits that the Court of Appeal in the ***Kadamas*** case raised the standard for the Respondent seeking to dismiss the judicial review proceedings to show that the ‘question of whether the rights were of a Public or Private Law nature’ was not the only criteria to prevent the Court from questioning the extra judicial decisions made by the Interested Party in total disregard of the rule of natural justice.

19. Therefore, whereas the 1st Interested Party, in exercise of its statutory duties and in dealing with the general public has the capacity to enter into contracts, it follows that if any of its actions have adverse effects upon the rights of private individuals, the 1st Interested Party cannot be said not to be capable of having its draconian decisions challenged. The Ex-parte Applicant submits that the only available means for so challenging those decisions made without according the Ex-parte Applicant an opportunity to be heard is this forum and any attempt to derogate therefrom must be resisted. The Ex-parte Applicant relied on ***Republic v. Kenya Bureau of Standards and others*** [2006] 2 E.A 286 where ***Nyamu, J.*** (as he then was) stated that:

“...Thus a respondent could not and should not be allowed to use means that are strange or outside the judicial review to impair the court’s ability to review the decision making process without any fetters or hindrance.”

Whether the Ex-parte Applicant has a right to be heard

20. The 1st Interested Party submits that after the cancellation of the Tenant Purchase Agreement the relationship between itself and the Ex-parte Applicant reverted to that of a landlord and tenant pursuant to the lease executed between the parties dated 1st February, 2004 (attached as JO 2 in the Replying Affidavit). It was a fundamental term of the lease in question that the tenant would not sublet or part with possession

of the premises the subject of the lease and that should there be breach of any of the terms, the 1st Interested Party could terminate the lease and re-enter the premises. The said premise was indeed let out to the 2nd Interested Party as demonstrated by the agreement between Christine Wanjiru and the said 2nd Interested Party (attached as J O 4 in the Replying Affidavit).

21. The 1st Interested Party submits that this subletting was illegal and even criminal and that the lease was terminated on those grounds. Based on these facts, the 1st Interested Party submits that the issue for determination is whether a party who has engaged in a criminal act like the Ex-parte Applicant is entitled to approach the court for assistance. The 1st Interested Party submits that such a guilty party is not entitled to relief from the court citing **Standard chartered Bank of Kenya v. Intercom Services Ltd and 4 others** [2006] eKLR where the court of Appeal cited **Lord Mansfield CJ** in **Holman v. Johnson** [1775-1802] ALL ER 98 at p. 99 as follows:

“...the principle of public policy is this: Ex dolo malo no oritur action. No court will lend its aid to a man who found his cause of action on an immoral or illegal act. If from the plaintiffs own stating or otherwise the cause of action appears to arise Ex-turpi causa, or the transgression of a positive law of the country, the courts says that he has no rights to be assisted. It is on this ground that the court goes not for the sake of the defendant but because they will not lend their hand to such plaintiff.”

22. The 1st Interested Party further relied on **Lindley, LJ**'s dictum in **Scott v. Brown, Doering McNab & Co.** [1892] 2 QB 724,728 that:

“Ex turpi causa non oritur action. This old and well-known legal maxim is founded on good sense and expresses a well recognized legal principle, which is not confined to indictable offences. No court ought to enforce illegal contract or allow itself to make the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”

Whether the orders sought, if granted, are capable of enforcement.

23. The 1st Interested Party submit that due to the factors that led to the cancellation of the agreement for the sale of the premises herein, the orders sought by the Ex-parte Applicant are not capable of being enforced. As such, this case, the 1st Interested Party submits, has been overtaken by events because the plot on which the house is situate which was previously owned by the 1st Interested Party is not so owned anymore, and the 1st Interested Party in a position to complete the purchase agreement. It cites the case of **Environment Action Network Ltd v. Joseph Eryau** (Civil Application No. 98 of 2005) where the Uganda Court of Appeal when dealing with an issue that had been overtaken by events said:

“it is a well known principle of law that the courts adjudicate on issues which actually exist between litigants and not academic ones.”

24. The Ex-parte Applicant does not canvass this issue in her written submission, save for the indication that she wished to rely on her two affidavits where she has averred that the orders she seeks are with reference to the decision to evict her and reallocate the premises to the 2nd Interested Party herein without according her a chance to be heard. She has also averred that the orders she seeks are well capable of being enforced and the effect of a decision in her favour would be to reinstate the lease between herself and the 1st Interested Party.

The Respondent's and the 3rd Interested Party's Case

25. The Respondent and the 3rd Interested Party have filed brief joint written submissions wherein they adopt the position taken by the 1st Interested Party and state in addition that:

a) The position of the law is clear that one can only pass ownership of what he owns and the 1st Interested Party had made it clear that even though it made the offer to sell the suit premises, the said agreement was frustrated due to the fact that ownership did not pass from Municipal Council to the 1st Interested Party.

b) The Ex-parte Applicant herself has not come to the court with clean hands, having violated a term of the initial contract, upon which breach the offer to sell the house was rightfully rescinded and at which point it was the exclusive right of the 1st Interested Party to decide to whom to allocate the said premises.

c) The participation of the Respondent and the 3rd Interested Party in the present suit is unnecessary, since the 1st Interested Party is a body corporate capable of suing and being sued and it has in fact been enjoined and has defended its interest in the suit.

d) There is no proof of illegality, bias and/or irregularity in the actions of the 1st Interested Party and/or Respondent in exercising their duty to warrant the prerogative orders sought for.

e) The issues touch on matters that can be adequately addressed and/or redressed by way of civil suit for each party to prove their actions or claims to their suit properly.

26. The Respondent and the 3rd Interested Party therefore urge that the Notice of Motion for judicial review orders herein be dismissed for being frivolous and lacking in merit.

Determination

27. To paraphrase *Malloch v. Aberdeen Corporation*, a contract entered into by a public corporation does not *per se* inject any element of Public Law. With respect, the Ex-parte Applicant misapprehends the law on public authorities. It cannot be the law that public bodies, by reason only of being such public bodies, can *never* breach private rights arising under contract or other Statutory Provisions or Common Law obligations, or that if they so breach any such private rights a remedy must be sought in Public Law.

28. Public bodies have statutory authority to enter into contracts with other public bodies as well as private citizens. If they breach such agreements, the redress lies in the regular scope of remedies in the Law of Contract in Private Law. For this reason, a public body may, where appropriate, be restrained by injunction from breaching an agreement or be penalized in damages for breach of the agreement under the Law of Contract.

29. Where, as here, it is alleged that the contract has been frustrated by intervening events, how can a Judicial Review court compel performance of the contract by Public Law remedies? The Court would be acting in vain if the contract is incapable of performance because of the intervening event.

30. Most significantly, judicial review is not concerned with the private rights of the parties or disputes thereon. See *Kadamas* case, supra, *Kunste Hotel* decision cited in *Makupa Transit Shade Limited & another v. Kenya Ports Authority & another* [2015] eKLR of 12th March, 2015, where the Court of Appeal restated the principle that Judicial Review procedure cannot be used to enforce private law rights even involving public bodies, as follows:

“It should also be noted, that judicial review remedies cannot be used to assert private law, the very issues the appellants are attempting to do by trying to force a crystallisation of the 2002 negotiations into a formal lease agreement. In Commissioner of Lands v. Kunste Hotel Limited [1997] eKLR this Court held that:

“But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”

31. The Court in *Makupa Transit Shade*, declined to enforce by Public Law remedies an alleged agreement to enter into a formal lease on a public bodies' property which was leased to a third party in similar circumstances as in the matter before this Court.

32. In addition, Judicial Review procedure is not suited for investigation and determination of factual disputes that require oral evidence and production of documentary evidence as in the usual civil process of adjudication. In Mombasa JR No. 44 of 2012, *R. v. The Land Registrar, Kilifi and Anor., Ex Parte Cecilia Gathoni Wangare* of 30th June, 2015, this Court addressed the issue of proper procedure for adjudication of disputed facts and held as follows:

“The need for full trial of the question of existence and ownership of plot no.945 and its prior registration in the name of the ex parte Applicant before the subsequent registration of plot no.941 in the name of the Interested Party, which was the basis of these judicial review proceedings, requires direct evidence to be adduced viva voce with cross-examination for veracity of witnesses and therefore calls for a procedure amenable to full hearing on the merits such as a suit by plaint or originating summons or by constitutional petition before the Environment and Land Court or the Constitutional Division of the Court. The judicial review court is wholly unsuited for this type of inquiry/hearing.”

33. The same may be said of the allegations herein of tenancy between the Ex-parte Applicant and breach thereof by subletting the agreement for sale of the suit premises and the alleged subsequent frustration of contract by the intervening events of failure by the Council to complete the transfer of good title to the property to the 1st Interested Party, and the subsequent re-letting to the 2nd Interested Party and lack of notice and or opportunity to be heard.

34. The grant of the tenancy of the suit property or the specific performance of agreement for sale thereof as sought, *in effect*, by the Ex-parte Applicant is purely a matter of Private Law between the parties which is dependent on clear Principles of the Law of Contract. There is no Public Law element to justify intervention through Public Law Procedures and Remedies. It has not been shown by the Ex-parte Applicant that the 1st Interested Party is guilty of a Public Law obligation. There is no requirement for an opportunity to be heard to be given by the 1st Interested Party as a **landlord** to the Ex-parte Applicant as a **tenant** before termination of a contract of **lease** for breach of the terms and in accordance with the stipulations thereof.

35. Moreover, the Ex-parte Applicant cannot approbate and reprobate in her submission that upon the entry into the agreement for sale of the house, the tenancy agreement had “lapsed” and yet seek the reinstatement of the tenancy after the agreement for sale had become impossible when the transfer of the property by the Municipal Council of Mombasa to the 1st Interested Party failed to pass. If the tenancy agreement and its terms prohibiting subletting lapsed on the offer or agreement for sale, so that the Ex-parte Applicant could lawfully sublet the property to the 2nd Interested Party, how could the lapsed tenancy agreement be reverted to upon failure of the agreement for sale?

36. The judicial review court does not, however, go into the merits of the dispute on the questions of frustration of the contract for sale and the validity of the tenancy agreement with the Ex-parte Applicant, illegality of Ex-parte Applicant's subletting and validity of the subsequent tenancy with the 2nd Interested Party, taking the view that this is the province of a civil court in suitable proceedings in that behalf.

Orders

37. For the reason that the matter before the court is purely a private dispute for the enforcement of private rights under an alleged agreement for sale of the suit property and or prior tenancy agreement between the Ex-parte Applicant and the 1st Interested Party, the Court finds that the judicial review application herein is incompetent and an abuse of the process of the court, and the same is dismissed with costs.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 30th DAY OF April 2018.

E.K.O.OGOLA

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JUDGE

Appearances:

M/s Kanyi J. & Co. Advocates for the Ex Parte Applicants.

M/s Cootow & Associates, Advocates for the 1st Interested Party.

Ms. Ruth Lutta, Litigation Counsel for the Respondent and the 3rd Interested Party.