



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JUDICIAL REVIEW CIVIL APPLICATION NO. 5 OF 2014

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF AN APPLICATION BY GEORGE OTIENO OBONYO, GRACE MAIRURA OTIENO, HARUN OKOTH AND JOYCE NYANGWESO BROUGHT ON THEIR BEHALF AND ON BEHALF OF ALL THE TENANTS OF KIBUYE AND LUMUMBA ESTATES IN KISUMU FOR LEAVE TO APPLY FOR AN ORDER FOR JUDICIAL REVIEW IN THE NATURE OF PROHIBITION

BETWEEN

REPUBLIC PLAINTIFF

VERSUS

THE COUNTY SECRETARY 1ST RESPONDENT

THE COUNTRY GOVERNMENT OF KISUMU 2ND RESPONDENT

AND

EX-PARTE

- 1. GEORGE OTIENO BONYO }**
- 2. GRACE MAIRURA OTIENO }**
- 3. HARUN OKOTH }**
- 4. JOYCE NYANGWESO } INTERESTED PARTIES**

JUDGMENT

By the Notice of Motion dated 11th February 2014 the ex-parte applicants seek an order of judicial review in the nature of prohibition prohibiting the Respondents from unilaterally increasing or demanding increased rents from the residents of Kibuye and Lumumba Estates in Kisumu County or demanding what they call “Annual renewal fees”. The application which also seeks costs is premised on grounds that the ex-parte applicants are tenants of the respondents occupying house No. **R4/43** and **R4/9, R 1/15** and **R 1/6** respectively. That the houses are very old and unkempt (built in the colonial times) and no reason was given for the increment by 100%. Further that the respondent unilaterally hiked the rents without consulting the applicants and without hearing them in gross violation of the rules of natural justice and that the applicants have been denied their constitutional right to fair administrative action and their

economic and social rights. It is also contended that the increase in rent is unconscionable.

In his submissions Mr. Omondi, Advocate for the ex-parte applicants states that the orders sought are merited noting that the respondent is a public body that has clearly acted in excess of its jurisdiction by charging exorbitant rents of 5,000/= instead of the 4,000/= recommended in the gazette notice Vol. CIXIV No. 42 of 18th May 2012. Citing Article 47 of the Constitution he further submits that the Respondent acted unlawfully as it did not issue the applicants with written reasons for charging rent other than what is in the gazette notice. Its action was therefore unlawful, unreasonable and procedurally unfair and for that reason the application should be allowed with costs. Counsel put reliance on the decision of the Court of Appeal in **Kenya National Examination Council V. Republic ex-parte Geoffrey Gathenyi Njoroge & 9 Others (NRB) CACA No. 266 of 1996.**

The application was vehemently opposed with the 1st Respondent swearing an affidavit in which he disputes that the applicants are tenants of the 2nd Respondent and contends that their occupation of those houses is illegal. He deposes that payment of the annual tenancy renewal fee of Kshs.500/= which the ex-applicants contend is illegal is provided for in the tenancy agreement and that the rent charged was gazetted way back on 18th March 2013 and it cannot therefore be true that the applicants only became aware of the new rent when they went to pay their rent. He also deposes that the applicants have never complained about the state of repair of the houses and that all their averments are false. He further deposes that unless the gazette notice containing the new rents is quashed the orders sought cannot be granted and further that none of the constitutional rights of the applicants have been breached.

The respondents were represented by Mr. Otieno D. Advocate who in his submissions has raised several legal issues. First he argues that this is not a proper case for determination by way of proceedings in the nature of judicial review as the breach of a private right as is the case here is not to be redressed through judicial review. Here he relies on **Commissioner of Land V. Kunste Hotel Ltd. [1995 -1998] 1 EA 1.** He contends that the remedy for breaches such as are alleged by the applicants lies in a normal civil action for relief.

Secondly he submits that the acts complained of were undertaken when the 2nd Respondent existed as the Municipal Council of Kisumu whose authority was derived from the Local Government Act (now repealed) which under Section 148 permitted the Municipal Council to impose the fees.

Thirdly that the order of prohibition sought is not available to the applicants while the gazette notice remains in force as that would result in an absurdity. He states that the matters complained of were the subject of a decision that was made by the 2nd Respondent's predecessor and communicated to the applicants and the general public vide Gazette Notice No. 6910 of 2012 dated 2nd May 2012; that in their own evidence the applicants actually accepted the rent increments and started paying the revised rents before they filed this application. Citing the Kenya National Examination Council's case cited by Counsel for the applicants he argued that the applicants would only have obtained the order if they had sued before the decision to raise the rent took effect. He contents that the applicants must have realized that they could not obtain an order for certiorari as the six months period limited by the Law Reform Act had lapsed hence this application. He contends that they are trying to obtain certiorari through the back door and must be told as much by a dismissal order.

On the right to housing it is his submission that the respondents are not denying the applicants housing but only asking them to pay more rent in accordance with market trends and that the exercise of the contractual power by the Respondent cannot amount to a breach of a constitutional right. He urges this Court to take judicial notice that the houses are literally within town and tenants in similar residences would be paying seven to ten times more. As for the state of disrepair it is his submission that no evidence was availed that such a complaint was ever brought to the attention of the respondents and regarding the unconcionableness of the rent increase he states that under Order 53 of the Civil Procedure Rules this Court exercises a special jurisdiction in which it is concerned, not with the merits of the case, but with matters of procedural fairness and a case where the Court is asked to investigate the state of the homes and undertake an assessment of the fair rent payable is clearly misconceived.

It is now evident that the rents complained of came to be as a result of gazette Notice No. 6910 of 2012 dated 2nd May 2012. The 2nd Respondent then existed as the Municipal Council of Kisumu and all it was required to do when it wished to impose any fees was to gazette the same. Indeed it would seem that Counsel for the applicants took an about turn upon learning of this gazette as he has now changed tune to say that the acts of the Respondent are unlawful as the rent being charged is not what is recommended in that gazette notice. I agree with Counsel for the Respondents that this would not be the right forum to raise such an issue as the gazette notice still stands the same not having been quashed. As was stated by the Court of Appeal in the **Kenya National Examinations Council V. Republic C/Application No. 266 of 1996** (unreported):

“..... an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding is the efficacy and scope of an order of prohibition.”

I do also agree with Counsel for the Respondent that the right of the applicants to housing has neither been threatened nor breached. They had indeed started paying the rent complained of before bringing this application and as it was correctly pointed out by the Respondent's Advocate that is the rent that is due from 2012.

Provided they continue meeting their contractual obligation by paying the rent they should be entitled to quiet possession of the premises. As for the state of the houses they would do well to raise the issue with the Respondents as that too cannot form the basis for grant of an order for prohibition. They did also complain of lack of consultation in the increment. Under the previous regime of the law all the Municipal Council was required to do was to gazette the new fees, levies and rents. That was unlike the new regime where public participation is a requirement of the Constitution and many citizens have gone to Court on that ground albeit by way of Constitutional Petitions. (See **Stanley Kamere & 26 Others V. National Housing Corporation & 2 Others [2015] eKLR, Joseph Kiguru & 3 Others V. County Government of Laikipia [2016] eKLR, Nairobi Metropolitan PSV Saccos Union Ltd. & 25 Others V. County of Nairobi Government & 3 Others [2013] eKLR**. What is before me is an application for judicial review where as Counsel for the Respondent has rightly submitted I am concerned with the merits of the decision but with procedural fairness. Here I am not being asked to do either but rather to prohibit the Respondents from unilaterally increasing or demanding the increased rent. As I have stated and as was held by the Court of Appeal in the Kenya National Examination Council's case, an order for prohibition would not be available once a decision has been made. The rent increment that is the subject of these proceedings was increased way back in 2012 and as the gazette notice was not quashed prohibition cannot issue. The application is therefore dismissed with costs to the respondent.

Signed, dated and delivered at Kisumu this 31st day of October, 2016

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Applicants

N/A for the Respondents

CA: Serah Sidera