

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JR MISC APPLICATION NO. 22 OF 2012

IN THE MATTER OF: AN APPLICATION BY ROBERT MAKAU & 279 OTHERS FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE
MUNICIPAL COUNCIL OF MOMBASA

BETWEEN

ROBERT MAKAU & 279 OTHERS.....PETITIONERS

VERSUS

MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT

RULING

THE NOTICE OF MOTION

1. Following leave of court granted on 29th February, 2012, the ex parte Applicants herein filed a Notice of Motion (the Application) dated 20th March, 2012, and sought two judicial review orders:-

(a) an order of certiorari to remove into this court and to quash the decision of the Municipal Council of Mombasa contained in page 96 of the Kenya Gazette Notice No. 441 of 13th January, 2012 to increase the rent in respect of the Respondent's Tudor Estate premises (the premises); and

(b) an order of prohibition prohibiting the Respondent from demanding and collecting the new rents set out in the said Gazette Notice.

2. The ex parte Applicants' case is that, they have been tenants in the Respondent's Tudor Estate houses since the year 1989. They say that the Respondents increased their rents by over 200% under the Gazette Notice which also revised various fees and charges levied by the Respondent. The Applicants were notified of the increase by **Public Notice** dated 30th January, 2012, and which notice also warned the Applicants of a monthly penalty of Kshs. 5,000/= for rent arrears of three months and above. The increase was to take effect from 1st February, 2012. The Applicants' application for stay pending hearing of the main motion (the Application) was on 25th October, 2012 dismissed.

3. The Respondents had five years earlier in 2007 attempted to increase the rent which resulted in the Applicants filing a Judicial Review Miscellaneous Application No. 1 of 2007 which was dismissed and is currently subject of appeal. In the current application, the Applicants argue that the poor state of repair and condition of the premises, coupled with the fact that the Respondent attempted to implement another increment when the appeal was pending in court was an act of bad faith on the part of the Respondent. It is worth noting that a Valuation Report of the premises by Paul Wambua Valuers prepared on 15th February, 2012 observes that the buildings comprising the premises are in a state of extreme neglect and need a total overhaul, if not condemnation.

4. The Application itself is however supported by the Affidavit Verifying the Facts sworn on 20th January, 2012 by **Robert Makau** one of the ex parte Applicants and the Statutory Statement dated 28th February, 2012 and which may be summarized as follows:-

(a) that the Respondent in revising the said rents was exercising its powers under the Local Government Act (Cap. 265, Laws of Kenya) (now repealed), and which powers are amenable to judicial review;

(b) that the said increment was made **mala fides** and in abuse of those powers in so far as the premises were not maintained by the Respondent and in breach of the Applicants' constitutional right to a clean and healthy environment under Article 42 of the Constitution of Kenya.

(c) that the increments were made in total disregard of the court's Ruling in Judicial review Miscellaneous Application No. 1 of 2007 bearing in mind that the Respondent is pursuing an appeal on the same issue of rent increment therein;

(d) that the increments are harsh, excessive and were not arrived at fairly as no stakeholders forum or proper stakeholders forum was held prior to the increase as envisaged in the Constitution of Kenya;

(e) that the increments sought are in light of all attendant factors unreasonable and irrational.

5. On account of those reasons, the Applicants plead that their application be allowed with costs against the Respondents.

THE RESPONSE

6. In response and opposition to the Application, Mr. Tubman Otieno, then Town Clerk of the Respondent swore a Replying Affidavit on 5th April, 2012, in which he sought to distinguish the issues raised in Judicial Review Miscellaneous application No. 1 of 2007, and in the current application, the subject of this Ruling. In Judicial Review Miscellaneous Application No. 1 of 2007, the decision of the Respondent to increase the rent under section 148(2) of the Local Government Act was found by the court (Sergon J.) to have been made without either the consent of the Minister for Local Government or a Resolution of the Respondent's Council to authorize the increase of rent, and was consequently null and void. Hence the decision contained in Gazette Notice No. 5148 of July, 2007 quashed.

7. There was however no order prohibiting the Respondent from subsequently revising the rent provided that due process was followed. In addition, the Town Clerk deponed that the Respondent's appeal from the decision in Judicial Review Application Number 1 of 2007, was in connection with the Gazette Notice No. 5148 of 2007, and had nothing to do with the statutory execution of the Respondent's mandate exercised in accordance with its mandate under the law. The Town Clerk deponed that in proposing and obtaining approval for the rent increments sought and published in Gazette Notice Number 441 of 2012, the Respondent complied fully with the provisions of section 148 of the Local Government Act. The Town Clerk deponed that the application lacked merit and was ripe for dismissal. The Respondent accuses the Applicants of being morally callous to continue to resist all attempts by the Respondent to increase the rent over the premises for over ten years and then turn round and accuse the Respondent of failure to maintain the premises.

8. In support of these averments, the Town Clerk annexed to his Replying Affidavit a bundle of documents in support of the Respondent's case, including copies of minutes from the Respondent's Council and a Resolution approving the increase of rent among the proposed charges and fees, minutes of meetings with stakeholders prior to the proposal to increase of rents, as well as a letter from the Minister for Local Government approving the increments.

THE SUBMISSIONS

9. At the hearing of 14th May, 2015, Counsel for the two parties, agreed to proceed by way of written

submissions. The Applicants' counsel's submissions were filed on the same day (14th May, 2015), while the Respondent's counsel relied upon their earlier submissions dated 11th and 19th September, 2012.

10. On behalf of the Applicants, it was submitted that the tenancy between the Applicants and the Respondent was not merely contractual it went beyond a contractual obligation, to a statutory relationship. A statutory relationship is anchored in fairness not arbitrariness. The Respondent's power to increase rent is governed by the provisions of the Local Government Act. The premises belong to the Respondent, a public body, and its decision to review rent is subject to review.

11. In exercising its power to review rent, the Respondent has a statutory duty to ensure that the premises are in a fit state of repair and condition. The premises are maintained by public funds, and had not been kept in repair and tenable condition for a long time as evidenced by the Report by Paul Wambua Valuers. The Applicants' counsel therefore urged the court to find that for the Council to increase the rent when the premises were in a state of disrepair amounted to state of unfair administrative action. Counsel for the Applicants also argued that the Respondent's submission that if the Applicants' should vacate the premises if they were dissatisfied with its state of repair and condition, was promotion of impunity and avoidance of legal obligation by the Respondent.

THE RESPONDENT'S SUBMISSIONS

12. On their part counsel for the Respondent maintained that due process had been followed and observed on the decision to increase the rent as gazetted, and that the application had no merit and ought to be dismissed with costs.

DETERMINATION

13. The scope of Judicial Review was summarized BY Lord Diplock in the case for **COUNCIL FOR CIVIL SERVICE UNIONS VS. THE MINISTER FOR CIVIL SERVICE [1985] A.C. 324 at 401D** when he stated that:-

“Judicial review has I think developed to a stage today when ... one can conveniently classify three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality”, the second “irrationality” and the third procedural “impropriety” ...By illegality as a ground for review judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it... By “irrationality”, I mean what can now be succinctly referred to as “Wednesbury unreasonableness”... it applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness, towards the person to be affected by the decision.”

14. The question or issue to be determined is not whether the premises, the subject of the rent increase were in a state of repair or tenable condition. The question or issue is whether there was any illegality or procedural impropriety in the decision making process to increase the rent for the premises. The answer to the question is to be found in asking the same question differently, what does the law governing rental of premises such as the ones the Applicants occupy provide? That law is to be found in section 148 of the Local Government Act (now repealed) which provided –

“S.148(1) A Local Authority may”-

- a. **charge fees for any licence or permit issued under this Act or any other written law or in respect of any person or matter, premises or track, when or which the local authority is empowered to control or licence;**

- b. **impose fees or charges for any service or facility provided or goods or documents supplied by the local authority or any of its officers in pursuance of or in connection with the discharge of any duty or power of the local authority or otherwise;**

(2) All fees or charges imposed by a local authority shall be regulated by by-law, or if not regulated by by-law, may be imposed by resolution of the local authority with the consent of the Minister and such consent may be given either in respect of the specified fees or charges or may be given so as to allow a specified local authority to impose fees or charges by resolution in respect of a specified power or a particular matter.”

15. Charges, fees, include charges or fees for premises, commercial or residential. Section 148 puts it beyond any doubt that the Respondent had power to increase the rent. In my opinion, the Ruling in Judicial Review Miscellaneous Application Number 17 of 2007 was not a bar to the Respondents' subsequent exercise of its power to increase charges and fees for the premises occupied by the Respondents or any other person similarly situated. The Applicants' have not faulted the process, and by all accounts the Replying Affidavit of Tubman Otieno clearly shows that the Respondent complied with the requirements of the law, and in particular section 148 of the Local Government Act. The review of the rent and charges was sanctioned with the consent of the Minister conveyed in his letter dated 23rd November, 2011 under the hand of the Permanent Secretary in the Office of the Deputy Prime Minister and Ministry of Local Government and the resolution of the Respondent's Council duly convened and passed after a stakeholders meeting held on 19th July, 2007. The charges affect not merely the Applicants, but other houses of the Respondent situate in Buxton, Kisauni and Changamwe Estates. There is clear evidence of the resolutions, approvals and stakeholder involvement necessary to legitimize the process, annexed to the Replying Affidavit of Tubman Otieno, the Respondent's then Town Clerk.

16. In **MOMBASA HIGH COURT MISCELLANEOUS APPLICATION NO. 1 OF 2007 (Republic vs. Minister for Local Government & 2 others, ex parte Robert Makau & 182 others)** (the 2007 proceedings), the court set out the issue and held as follows:-

“... it is averred that the Mombasa Municipal Council did not pass a resolution before seeking the Minister's approval to increase the rent. Consequently, the decision is null and void hence amenable to be quashed by the order of certiorari.”

...it is obvious that the relationship between the applicants and the 3rd Respondent is that of a landlord and tenant....governed by lease agreement which is in essence a contract. In altering the terms of the contract i.e. by increasing the rent, the 3rd Respondent did so by invoking its powers under section 148 of the Local Government Act.... the contract was interfered with by the 3rd Respondent in exercise of a power donated by section 148(1) of the Local Government Act.”

“The 3rd Respondent failed to show that it passed a resolution before seeking the Minister's approval. The 3rd Respondent did not comply with the provisions of section 148(2) hence its decision is amenable to judicial review order of certiorari.”

17. Tuiyott, J on 25th October, 2012, while determining whether to grant a stay order in this case remarked with regard to the **“2007 proceedings”**.

“10. the court has looked at the decision of Justice Sergon of 25th July, 2009 in the 2007 proceedings. This court cannot see how that decision curtailed the Respondent from even revisiting the question of rent. It seemed to specifically discuss the manner in which the Council sought to increase rent on that occasion i.e. vide Gazette Notice Number 5184 of 7th July, 2006.”

18. Having perused the said case further, there is nothing to change the view expressed by Tuiyott J.

The Respondent has, in this case, provided evidence to prove that a resolution was made to review the rent, stakeholders were involved, and the Minister gave his consent. In this way, it is shown clearly, that the Respondent followed due process before gazetting the new rent. The Applicants failed to demonstrate any illegality or procedural impropriety on the part of the Respondent. The application therefore fails on these grounds.

19. The only question or issue which remains to be addressed is whether the Respondent's decision to increase the rent, was, in light of the deplorable condition of the premises, was **Wednesbury unreasonable** considering the Respondent's public duty to provide a clean and health environment under Article 42 of the Constitution of Kenya. The decision in the case of **MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC & UMOJA CONSULTANTS LIMITED (Civil Appeal No. 85 of 2001)** is instructive in this regard. The court said –

“Judicial review is concerned with the decision-making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, and whether in making the decision the decision maker took into account the relevant matters or did take into account relevant matters. The court should not act as the Court of Appeal over the decision maker, which would involve going into the merits of the decision itself or to whether there was sufficient evidence to support the decision.”

20. Similar sentiments were expressed in the English case of **CHIEF CONSTABLE OF NORTH WALES VS. EVANS [1982] 1WLR 1155** in which the court said *inter alia* that:-

“the court will not, however, on judicial review application act as a “court of Appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would under the guise of preventing abuse of power be guilty itself of usurping power.”

21. I set out hereunder, figures of previous, and increased rental for the premises, not by way of showing the merits of the Respondent's actions, but rather to emphasize the point that, after a period of ten years following the last review of the rents payable for the various premises, the decision of the Respondents to increase the rents to the extent it did, was not unreasonable, in the eyes of the common man living in the lesser fortunate areas of Mombasa City or unreasonable in the Wednesbury unreasonableness. The new house rents as contained in the Public Notice to the Applicants was as follows:

S/NO.	HOUSE TYPE	PREVIOUS RENT KSHS.	NEW RENT KSHS.
01.	1 Roomed D1-40	535/=	2,000/=
02.	3 Roomed terrace house	2,200/=	4,500/=
03.	Thorny Dyne houses per room	475/=	1,000/=
04.	2 Roomed DS houses	960/=	3,000/=
05.	3 Roomed DS houses	1,125/=	4,500/=
06.	4 Roomed DS houses	1,175/=	4,600/=

07.	2 Roomed Roman houses	685/=	2,000/=
08.	2 Roomed Alcon houses	685/=	3,000/=
09.	2 Roomed Norman houses	585/=	3,000/=
10.	Shop Block 4	2,150/=	9,000/=
11.	Shop Block 2	1,300/=	6,000/=
12.	Shop Block 3	2,150/=	3,000/=
13.	Shop Block 5	685/=	1,000/=
14.	Shop Block 2	685/=	1,000/=

22. The Applicants urge that the new rates are unreasonable considering the deplorable state of the houses. The Respondent on the other hand urge that the primary purpose and aim in seeking the increment in the rents is to enable the Respondent to obtain adequate funding to enable it to be in position to render adequate and quality services to the Applicants and other residents of the premises. To the extent of the court's judicial review function, that argument is eminently reasonable, in as much as the Respondent is under a duty to provide essential services. The court cannot be blind and shut its eyes and must take judicial notice of the economic principles of cost sharing embedded in the provision of many public services in Kenya, including education in public schools, and tertiary institutions.

23. In the circumstances therefore, I find and hold that the Applicants have not demonstrated any grounds for the issue of the judicial review orders of certiorari or prohibition. The Notice of Motion dated 20th March, 2012 is therefore dismissed with costs.

24. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 21st day of July, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Okanga holding brief Obura for Applicants

Mr. Mogaka holding brief Buti for Respondents

Mr. Kaunda Court Assistant