



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 281 OF 2013

REPUBLICAPPLICANT

VERSUS

NATIONAL MUSEUMS OF KENYA..... RESPONDENT

EX-PARTE

1. AHMED ABDIKADIR ABDI
2. HASSAN AHMED
3. AHSAH OWINO
4. ROSEMARY MUCHIMUTI
5. MARIA KIIO
6. JOSEPH G MUTANGAH
7. ZERUFA OPIYO
8. EDWARD NJAGI LINUS
9. IBRAHIM MOHAMED

10. DOROTHY NYINGI
11. MARY ALOGO
12. FARAH BASHIR

JUDGEMENT

The twelve ex-parte applicants led by Ahmed Abdikadir Abdi have through the Notice of Motion dated 5th August, 2013 prayed for orders as follows:

- a) An order of CERTIORARI to remove into this Honourable Court and quash the decision made by the Respondent on 29th April, 2013 to increase the rent from Kshs.30,000/= to Kshs.40,000/=.
- b) An Order of MANDAMUS compelling the Respondent to implement to the letter, its own Housing Policy issued on the 1st of April, 2013.
- c) Costs of and incidental to the application be provided for.

d) Such further and other reliefs that the Honourable Court may deem just and expedient to grant.”

The Respondent is the National Museums of Kenya.

The applicants' case is that they are residents of Ndemi apartment block which belongs to the Respondent who is their employer. Where houses are available, the Respondent provides housing for its employees and deducts rent on a monthly basis from the pay of the employees. The applicants aver that they moved into the Respondent's houses in 1997. At that time they were paying Kshs 18,000 per month. On 1st December, 2010 the Respondent increased the rent payable by the applicants from Kshs.18,000/= to Kshs.30,000/= per month.

Through a letter dated 29th April, 2013 the applicants were informed that the rent payable would increase from Kshs.30,000/= to Kshs.40,000/= with effect from 1st August, 2013. The applicants assert that the proposed increment is in contravention of the Respondent's Housing Policy which provides that the rent payable by employees would be subject to a 5% increment per annum. The applicants therefore claim that the Respondent's decision is *ultra vires* its own Housing Policy issued in April, 2013. The applicants assert that the decision to increase the rent is an abuse of the power conferred on the Respondent since the Respondent failed to take into consideration or ignored relevant factors prior to making the decision. The applicants also assert that the decision is unreasonable taking into account the fact that the applicants are given housing allowance of Kshs.20,000/= while the proposed rent increment is Kshs.40,000/=. The applicants submit that the Respondent's decision is untenable since they were not involved in the making of the decision.

The Respondent opposed the application through an affidavit sworn on 9th September, 2013 by its Director General, Mr. Idle Omar Farah. It is the Respondent's case that the rent increment was done with due regard to the law, procedurally and as set out in its Housing Policy. The Respondent asserts that there was no need to consult the applicants as long as the law and the Housing Policy were complied with.

In reply to the Respondent's affidavit, the applicants filed a supplementary affidavit sworn by the 1st Applicant on 10th October, 2013. Through the said affidavit the applicants assert that the housing of government employees is guided by the Harmonization of Terms and Conditions for Housing circular of 18th June, 2001 and according to that document the rent for government quarters in Kilimani area ranges from Kshs.20,000/= to Kshs 30,000/=. Further, the applicants assert that the Respondent's Housing Policy is *ultra vires* the Harmonization of Terms and Conditions for Housing circular of 18th June, 2001. The applicants also contend that there is no evidence that a valuation of the houses was conducted so as to establish the market rates and there was also no evidence that the Board of the Respondent indeed met and decided to increase the rents.

Looking at the papers filed in Court by the applicants, I find that the issue to be determined is whether the rent increase complied with the Respondent's Housing Policy. Under the title "Rent Review" it is provided that:

“The Board shall review rents at regular intervals of not more than three (3) years. Such reviews will be used to assess the market value for the premises. At each review period, tenants will be given at least three months' notice in case of upward review of rent. In addition, rent charged for NMK quarters shall have an annual escalation of 5%.”

It is the applicants' case that the said provision limits rent increment to 5% per annum. On its part the Respondent argues that the annual escalation of 5% is only applicable to commercial premises and not residential premises. I must state that both parties are wrong on their interpretation of the cited provision. The said provision is applicable to residential houses as the Housing Policy itself clearly deals with residential houses. It is therefore clear that the Respondent's claim that rent escalation at 5% annually is only applicable to commercial premises has no basis.

On the other hand, the applicants' assertion that the rent increase should not exceed 5% annually is not supported by the Housing Policy. The rent review which should be conducted at regular intervals of not more than three years is meant to assess the market rate. The rents for the houses are supposed to be at market rates. In addition to whatever is established by the review, the rent charged shall have an annual escalation rate of 5%. The rent increase proposed by the Respondent was therefore in accordance with the Housing Policy and the Respondent cannot be accused of having acted *ultra vires* the policy.

Another ground on which the decision is challenged is that the Respondent took into account irrelevant factors and/or ignored relevant factors. The applicants alleged that there is no evidence that the Respondent valued the property in question before reaching the decision that the applicants should pay monthly rent of Kshs. 40, 000/= for their houses. The Respondent responded to this allegation through the further replying affidavit sworn on 12th November, 2013 by Idle Omar Farah. The Respondent produced a valuation report prepared by Vineyard Valuers Limited which indicated that rent for each apartment should be Kshs. 50,000/= per month exclusive of utility bills. The Respondent also produced the minutes of a meeting held by the Directors' Executive Team in which the proposed rent increments were approved. The Respondent argued that the Harmonisation of Terms and Conditions of Service document referred to by the applicants was no longer applicable since the market rates for the houses had escalated since 2001 when the policy was made.

Looking at the application before this Court, it is apparent that the applicants are claiming that the Respondent's decision to increase rent contravened its Housing Policy. It is only later that the applicants by way of a further affidavit alleged that the Respondent's decision contravened the Government policy on housing as contained in the Harmonization of Terms and Conditions of Service in the Public Service circular issued on 18th June, 2001. Although the Respondent replied to this particular allegation, I am of the view that the applicants' attack on the legality of the Respondent's decision on this particular ground entirely changed their case. Leave granted to the applicants was to enable them question if the decision of the Respondent was legal in light of its Housing Policy. At the time leave was granted to the applicants, they had not talked of the rent increment being beyond the ceiling provided by the circular on housing for public servants issued in 2001.

The applicants' action contravened Order 53 Rule 4(1) which provides that:

“4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

The applicants ought to have resorted to Order 53 Rule 4(2) if they were of the view that they needed to amend their statement so as to indicate that the decision went against the circular issued in 2001 on the housing policy for public service employees. The said Rule provides that:

“(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.”

In my view the applicants submitted on issues that were not contained in their statutory statement and verifying affidavit. The Court will wade into murky waters if it decides to deal with matters not raised in the statutory statement and the verifying affidavit.

The other two grounds upon which the relief is sought is that the Respondent's decision is unreasonable since the applicants are paid housing allowance of Kshs. 20,000/= and that they were not consulted before the rents were hiked. In my view, the relationship between the applicants and the Respondent is that of a

landlord and a tenant. The applicants are paid house allowance and they therefore have the option of looking for houses elsewhere. A landlord is not under any legal obligation to consult a tenant before increasing rent. The market forces are in play as required by the Respondent's Housing Policy and public law has no role to play in such circumstances.

In conclusion, I find that the application before me has no merit. The application is dismissed with costs to the Respondent. I direct that the money deposited in pursuance of this Court's order of 29th July, 2013 be released to the Respondent.

Dated, signed and delivered at Nairobi this 31st day of March, 2014

W. KORIR,

JUDGE OF THE HIGH COURT