IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC APPLICATION NO. 212 OF 2012

MATTER OF AN APPLICATION BY SIMON G. NDEGWA, EMMANUEL WAWERU KIRAGU, NAOMI W. KAMAU, JOSEPH KWAMUNA, FELISTAS WANGARI NGANGA AND LUCIA WANJIKU KAMAU FOR ORDERS OF PROHIBITION

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265 OF THE LAWS OF KENYA

REPUBLIC .....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE TOWN CLERK CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

NANCY NYAGUTHII MACHARIA..... 3RD RESPONDENT

AND

SIMON G. NDEGWA,

EMMANUEL WAWERU KIRAGU

NAOMI W. KAMAU

JOSEPH KWAMUNA

FELISTAS WANGARI NGANGA

LUCIA WANJIKU KAMAU.....EX PARTE APPLICANTS

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 24th May 2012 filed in this Court on 25th May 2012, the ex parte applicants herein seek an order of Prohibition to issue prohibiting the 2nd respondent from putting up additional stalls at Kahawa West Tenant Purchase Market at Kahawa West in Nairobi.

EX PARTE APPLICANT'S CASE

2. The application is based on the Statement of Facts filed on 17th May 2012 and the affidavit verifying facts sworn by **Simon G. Ndegwa**, the 1st ex parte applicant herein on 12th May 2012.
3. According to the deponents the plaintiffs herein are and have been all members of Kahawa West market at the tenant purchase market since 1981. On 23rd January (sic) the 3rd respondent, who is the area councillor decided to add stalls to the said market without consulting the applicants and has already marked the areas. The applicants have, however, been managing the market as a private entity since the 26th June 2007. According to the applicants the areas marked for marked for extension are legally occupied by workshops and machines plus finished products while one of the said areas has water tank from Nairobi Water Company which the applicants use for their daily needs. It is therefore the applicants' position that if the stalls are added the market will be so congested that in the event of a calamity like a terrorist attack or fire there will be on escape avenues. In their view already the market is facing a drainage problem and this will worsen if the stalls added which will affect the whole market yet they have all paid our rates to the 1st respondent. According to the applicants the front areas are used by their members for holding meetings, loading and off-loading goods and if the stalls are added their members are going to incur heavy losses in their income hence the orders sought herein.

RESPONDENTS' CASE

4. The 2nd respondent opposed the application by way of an affidavit sworn **Aduma J Owuor** on 27th June 2012. According to him no act or omission has been alleged against the 2nd respondent council hence there is no cause of action against the Council's Clerk and hence the said Clerk has been wrongly joined. In any event, it is deposed that if there was any wrongdoing by the Council the said Clerk cannot be held liable for the acts of the Council against whom the proceedings ought to have been brought. In the absence of a signed authority empowering the deponent to the verifying affidavit to swear the same on behalf of the other applicants, it is deposed that the said purported authority is inadmissible hence the affidavit is not sworn by authority of the other applicants and the said authority ought to be struck out. In his view there is no evidence that the applicants are tenants at the said market or that they hold property therein and that the letter they rely on does not amount to a decision or resolution of the Council. According to the deponent, the market is the property of the Council and is subject to the Council's statutory control. According to the deponent, the Council by a resolution in which the applicants' representatives in the Council participated, decided that the suit market be extended and that the said resolutions have not been challenged. The said extension according to the deponent is to ensure conducive and adequate facilities at the market in unallocated areas/spaces wherein the applicants have no basis for pitching a claim on and which in any case the applicants have no claim over. In his view, the applicants' opposition to the said extension is driven by their selfish attitudes and is bent on defeating the equitable sharing and use of limited land resources. In his view there is no cause of action disclosed by the applicants hence the orders sought ought to be refused with costs.

SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANTS' APPLICATION

5. While reiterating the contents of the supporting affidavit, the *ex parte* applicants submitted that whereas the disputed property belongs to the Council, that does not give the Council the power to make decisions which violate the rights of the tenants which are safeguarded by the Constitution. It is submitted that since the applicants were not made aware of the resolutions made at the council meeting on the 14th September 2004 and hence could not challenge the same. Since the councillor who was supposed to represent the applicants did not inform them of the said developments, the applicants have resorted to the Court. In their view, every citizen of this country deserves a right to work and earn a living him a good working environment.

2ND AND 3RD RESPONDENTS' SUBMISSIONS

6. On the part of the 2nd and 3rd respondents, it is submitted that this being a representative suit, the provisions of Order 1 rule 13 ought to have been complied with and in support of their submissions they rely on **John Mungai Njoroge & 8 Others Nakuru HCCC No. 152 of 2003**, **Ndungu Mugoya & 473 Others vs. Stephen Wangombe & 9 Others [2005] eKLR** and **Law Society of Kenya vs. Commissioner of Lands & 2 Others [2001] KLR 706**.
7. In the respondent's view, the applicants are seeking to enforce alleged right to property under Article 40 of the Constitution and in order to do so, they must demonstrate that they are entitled to the property in issue and the proprietary interest sought to be protected as defined by the existing laws and the case of **Philma Farm Produce & Supplies & 4 Others vs. Attorney General & 6 Others [2012] eKLR** is cited in support of the said submission. It is further submitted that there is no evidence adduced in support of the applicants' alleged proprietory rights and the respondents rely on **Fredrick Gitau Kimani vs. Attorney General & 2 Others [2012] eKLR**. It is further submitted based on the steps outlined in the said replying affidavit that the Council followed the procedures set out for arriving at the impugned decision.
8. In the respondents view the Town Clerk of the Council cannot be lawfully joined in these proceedings hence there is a misjoinder of the respondents since it is the Council that ought to have been sued. Finally it is submitted that the applicants cannot use the Court to curb the Council's power donated to it by the statute hence the application should be dismissed with costs.

DETERMINATIONS

15. The first issue I wish to deal with is the effect, if any, of the joinder of the Town Clerk in these judicial review proceedings. Section 12(3) of the Local Government Act provides:

Every municipal council shall, under the name of "The Municipal Council of .....", be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time), and shall by such name be capable in law of suing and being sued, and of acquiring, holding and alienating land.

16. It follows that generally all suits by or against local authorities ought to be instituted in the name of the Local Authority concerned. The question, however, is whether the joinder of the 2nd respondent in these proceedings rendered the proceedings incompetent. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** in which the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

17. It follows that the joinder of the 2nd respondent in these proceedings even if irregular did not render the proceedings incompetent.
18. The second issue for determination is whether the provisions of Order 1 rule 13 of the Civil Procedure Rules ought to have been complied with. In **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983** the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the Civil Procedure Act and Rules do not apply unless expressly provided by such an Act and the provisions of the Civil Procedure Act and rules cannot be applied merely because the special procedure does not exclude them. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the Civil Procedure

Rules render the application wholly incompetent and fatally defective since a representative suit can only be brought in an ordinary action under the Civil Procedure Act and rules.

19. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"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 relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

20. In this case what the applicants seek is an order prohibiting the 2nd respondent from putting up additional stalls at the market. The 2nd respondent's position is that the right procedure was followed and that a representative of the applicants in the council participated in the resolution that gave rise to the impugned decision. The resolution itself has not been challenged. Whereas the merits of the decision may be questionable, this Court in these proceedings does not concern itself with the merits of the decision but the process. In the light of the fact that the resolution itself is not under challenge the implementation of the said resolution cannot be the subject of judicial review proceedings. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra):

"Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law."

9. The applicants' position, however, is that they could not challenge the resolution since they were not made aware of the same. The Court is well aware of the decision in **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**, in which **Pall, J** (as he then was) held:

"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s. 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads "unless the High Court considers that there is good reason for extending the period within which the application shall be made" is ultra vires section 9(2) of the Act. Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose…As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the

meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred."

21. In my view it is high time the provisions of Section 9 of the Law Reform Act were amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period. Whether the Court would be entitled to "read in" a provision for extension of time in line with the new Constitutional dispensation, is outside the scope of this decision since the matter before me is not an application for extension of time.
22. The Court is however, of the opinion that in order to uphold the values of the Constitution, the Court would be perfectly entitled where an Act of Parliament exhibits certain deficiencies which make it insufficient to properly realise the Constitutional aspirations to "read in" the omitted words so as to bring the Legislation in line with the Constitutional aspirations without the necessity of declaring the Legislation unconstitutional. This remedy was invoked by the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others vs. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17** in which the said Court the expressed itself *inter alia* as follows:

"Attention needs to be given to the situation that would arise if Parliament fails timeously to cure the under-inclusiveness of the common law and the Marriage Act. Two equally untenable consequences need to be avoided. The one is that the common law and section 30(1) of the Marriage Act cease to have legal effect. The other unacceptable outcome is that the applicants end up with a declaration that makes it clear that they are being denied their constitutional rights, but with no legal means of giving meaningful effect to the declaration; after three years of litigation Ms Fourie and Ms Bonthuys will have won their case, but be no better off in practice. What justice and equity would require, then, is both that the law of marriage be kept alive and that same-sex couples be enabled to enjoy the status and benefits coupled with responsibilities that it gives to heterosexual couples. These requirements are not irreconcilable. They could be met by reading into section 30(1) of the Marriage Act the words "or spouse" after the words "or husband", as the Equality Project proposes. Reading-in of the words "or spouse" has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal. The long-standing policy of the law to protect and enhance family life would be sustained and extended. Negative stereotypes would be undermined. Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience. If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word. Before I conclude this judgment I must stress that it has dealt solely with the issues directly before the Court. I leave open for appropriate future legislative consideration or judicial determination the effect, if any, of this judgment on decisions this Court has made in the past concerning same-sex life partners who did not have the option to marry. Similarly, this judgment does not pre-empt in any way appropriate legislative intervention to regulate the relationships (and in particular, to safeguard the interests of vulnerable parties of those living in conjugal or non-conjugal family units, whether heterosexual or gay or lesbian, not at present receiving legal protection. As the SALRC has indicated, there are a great range of issues that call for legislative attention. The difficulty of providing a comprehensive legislative response to all the many people with a claim for legal protection cannot, however, be justification for denying an immediate legislative remedy to those who have successfully called for the furnishing of relief as envisaged by the Constitution. Whatever comprehensive

legislation governing all domestic partnerships may be envisaged for the future, the applicants have established the existence of clearly identified infringements of their rights, and are entitled to specific appropriate relief. In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples."

23. As was recognised by this Court in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR:**

"The defunct Constitution, as we have already observed was very limited in terms of scope of the remedies available. The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises… We are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables as to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights."

24. The matter before me, however, is not an application for extension of time to challenge the resolution of the Council.

ORDER

25. Consequently, I find no merit in the Notice of Motion dated 24th May 2012 which I hereby dismiss but with no order as to costs.

Dated at Nairobi this day 13th day of March 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties.