REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 277 of 2012

IN THE MATTER OF APPLICATION BY WILFRED OBIERO FOR JUDICIAL REVIEW ORDERS CERTIORARI, MANDAMUS AND PROHIBITION

AND

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

BETWEEN

REPUBLIC……………..........………………………………APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI..................................RESPONDENT

AND

KENNEDY ODHIAMBO...........................1ST INTERESTED PARTY

GEORGE LIHUMI.................................2ND INTERESTED PARTY

JAMES MUGWIMA...............................3RD INTERESTED PARTY

MIRIAM WACERA................................4TH INTERESTED PARTY

EX PARTE
WILFRED OBIERO

JUDGEMENT

1. By his Notice of Motion dated 19th September 2012 filed in this Court on 28th September 2012, the *ex parte* applicant herein, **Wilfred Obiero**, seeks the following orders:

(a) THAT orders of certiorari do issue and bring into this Honourable Court and to quash the decision of the Respondents to revoke the Applicant's Management Agreement and Licence to carry out the business of the public toilet at Kenyatta Market.

(b) THAT orders of Mandamus do issue to remove all the locks and gadgets placed hindering the

Applicant access to the public toilet at Kenyatta Market placed under his management.

(c) THAT prohibition do issue against the Respondents from signing any management agreement or issuing any licences to any other person other than the Applicant to operate the public toilet in Kenyatta Market.

(d) Costs be in the cause

2. The Motion is based on the grounds set out in the statutory statement and verifying affidavit filed herein on 11th July 2012. According to the *ex parte* applicant, following a successful bid he had lodged for the management of a public toilet at Kenyatta Market, he was on 10th July 2009 invited to sign a management agreement with the Respondent (hereinafter referred to as the Council) which he did sign charging the members of the public a fee for use of the said toilet. According to him, he has always paid the monthly management fee of Kshs 7,000.00 to the Council and is up todate in the said payments. The said toilet management was allocated to him through his business name of ***Manga Tailoring Outfitters*** and he made numerous improvements to the toilet and invested heavily in the same. According to him the said toilets were assigned to him by the Director of Environment of the Council.

3. However, sometime in November 2009 he did receive a demand note for arrears from the Chief Revenue Officer on instruction from the Director of Social Services and Housing and when he went to inquire he was given a copy of a memo dated 5th June 2009 from the Director of Environment to the Social Housing in which the former clarified that it was his department that was in charge of managing toilets and officers from the latter should be informed to stop misleading operation and demanding payment in this regard. He was assured that this being a "tuff war" between the two departments at the Council the same would be resolved internally. He therefore continued making due payments without any interference and was in fact issued with a business permit for the material year. Once again on 3rd May 2012 he received a letter dated 26th March 2012 demanding rent arrears amounting to Kshs 369,000.00. He thereafter instructed an advocate to seek clarification and assurance from the Council. However, on 5th June 2012 officers from the Council went to the premises and locked the same purporting that the same had been repossessed and relocated to the interested party herein who the following day went thereto and damaged some of the installations on the said premises.

4. It is therefore contended by the *ex parte* applicant that it is necessary for the court to issue orders quashing the decision by the Council to repossess the said toilet and prohibit it from issuing letters to the interested party or any other party for the toilet and restraining the council from interfering with his management thereof. In his view the actions of the Council are in bad faith hence the Court ought to grant he orders sought herein in order to protect the sanctity of the law.

5. In opposition to the application, the 1st interested party herein, **Kennedy Odhiambo**, filed a replying affidavit sworn on 2nd November 2012. According to him, the *ex parte* applicant is known to him as a tailor carrying on business as such at Kenyatta Market, Ngumo Estate, Nairobi in Stall 265. The interested parties are similarly traders at the same market and are officials and/or members of Kenyatta Market Welfare Group which is a bona fide representative of the traders in the said market in which the deponent is the Chairman. According to the deponent all the Stalls in the said market are owned by private individuals after having purchased the same from the Respondent on tenant/purchase terms and that the *ex parte* applicant is not one such owner but is a mere tenant of the Stall in which he runs his said tailoring business. Toilets, however, do not belong to any individual and were to be run and managed by the market community through the Welfare Group on behalf of the traders and stakeholders in the Market. According to the General Purposes Committee Meeting of the Council held on 13th September 2012 the Council resolved that the management of Public Toilets in the Market be left to the traders. The interested parties, it is contended being stakeholders are unaware how the *ex parte* applicant obtained the running of the said public toilets in his individual capacity. However, from the information from the Council, the latter granted to the *ex parte* applicant a one (1) year Management Contract of the said toilet from 1st March 2009 to 28th February 2010 subject to monthly rent payment of Kshs 7,000.00. It is further deposed that as a result of accumulation of arrears by the *ex parte* applicant, the Council in May

2009 repossessed the said toilet from the *ex parte* applicant at a time when the contract had expired by effluxion of time way back on 28th February 2010 as per the said Contract. In the deponent's view, following the said resolution the present application has been overtaken by events. Further, the *ex parte* applicant is not challenging the resolution but the decision to remove him from running the said Toilet. Further these proceedings were commenced on 11th July 2012 long before the said Resolution was passed on 13th September 2012.

6. It is the interested parties' position that the decision sought to be challenged by the *ex parte* applicant has not been identified, specified or produced in Court hence the suit is misconceived and an abuse of the due process of the Court. Therefore, it is deposed that the *ex parte* applicant's rights have not in any way been infringed or violated since he did not comply with the terms of the contract with the Respondent and in any event, the term of the contract expired and has since been overtaken by events and the Kenyatta Market Welfare Group has since September, 2012 taken over the running of the Public Toilet thereby rendering useless the *ex parte* applicant's application. In the deponent's view, the rights of the *ex parte* applicant as an individual should not override those of other stakeholders in the Market and public interest in general but should be subject thereto.

7. Since the Courts do not act in vain, the Court has no jurisdiction to grant the reliefs which have been overtaken by events, it is contended. It is further contended that the ex pate applicant is a vexatious litigant who has filed numerous suits in a bid to grab land and/or stalls at the said Market forcing the interested parties to institute legal proceedings to restrain him from committing acts of trespass. It is therefore the interested parties' position that the *ex parte* applicant does not deserve the orders ought.

8. The *ex parte* applicant on 12th February 2013 filed a further affidavit sworn on 12th February 2013 in which it is deposed that the said Group, Kenyatta Market Welfare Group is not a bona fide Group running the affairs of the said market but a disgruntled group which broke away from the legitimate group Kenyatta Welfare Committee. According to him he is in legal occupation of his stall and that is not an issue herein and that the interested parties have never been privy to the management agreement between the Council and him. According to him the said Group cannot claim the said public toilets while the Department of Environment is the one mandated to run the affairs of the same. The General Purposes Committee, according to him, is not mandated to allocate, manage or terminate a management contract entered into by or on behalf of the Council whose allocation is the Council. It is further deposed that he has made extensive improvements therein and that the contract was not a term contract but a renewable one which was duly renewed. While reiterating the contents of his first affidavit, he similarly accuses the interested parties of having instituted several suits against him but, however, denies that his suits involve the issue herein. According to him the Court ought to find that the interested parties are in illegal occupation of the said toilet, quash the decision of the Respondent and prohibit it from issuing letters to the interested parties or any other party.

9. While reiterating the contents of the affidavits in support of the *ex parte* applicant's Motion, it is submitted on behalf of the applicant that the Respondent has without any colour or right proceeded to allocate the toilet to the interested party without according the applicant a hearing or giving any reasons for their action. It is further submitted that it is instructive that despite being served the Respondent has not responded to this suit.

10. Citing ***The Supreme Court Practice 1997 vol 53/1-14/6***, it is submitted that "the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute by law the decision in the matter in question....The Court will not, however, on a 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 was not within that body's jurisdiction." According to the applicant, when a decision is unreasonable (or the decision is what has come to be known as "Wednesbury unreasonableness) the court ought to step in and rectify the actions of the statutory body and that the

function of the Court is to see that lawful authority is not abused by unfair treatment. In the present case it is submitted that the applicant is not asking the court to step in and re-do the Respondent's decisions. Citing **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] KLR 203 at 204**, it is contended that "under the Wednesbury principle decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body directing itself on the relevant law and acting reasonably could have reached the decision". Since it is the Director of Environment that is mandated to award and terminate management contracts, for any department to come in and terminate the contract will be an ultra vires act and an abuse of discretion. It is therefore submitted that the Respondent's action was an abuse of discretion; was exercised for an improper purpose; was in breach of duty to act fairly; was not exercised reasonably; was carried in a manner meant to frustrate the purpose of the Act donating the power; and was irrational and unreasonable. Relying on **Republic vs. Judicial Service Commission & Another *ex parte* Joyce Manyasi [2012] KLR J R Application No. 299 of 2011**, it is submitted that once the court has clarified the law the public body may decide to retake the decision or abandon the decision altogether hence the application should be allowed.

11. On behalf of the interested parties, it is submitted that a Court of law ought to grant judicial review orders when the authority in charge acts in excess of its legal authority, jurisdiction or ultra vires. The *ex parte* applicant, it is submitted. Has failed to identify, with certainty, or exhibit or bring to this Court the decision challenged. This, it is submitted is a fatal omission that goes to the jurisdiction of the Court hence the application ought to be dismissed.

12. It is further submitted that the applicant has failed to demonstrate that the Respondent acted in excess and abuse of its powers and the case of **Suba vs. Egerton University [1995-1998] 1 EA 303** is cited in support of this submission. It is, however submitted that the *ex parte* applicant's legal rights were contained in the Management Agreement which is not exhibited and under whose terms the rights were limited for one year from 1st March 2009 to 28th February 2010 and which expired by effluxion of time and there was no evidence of renewal. It is further submitted that the receipts annexed do not prove that payments were made by the applicant. Since the Management Agreement expired, it is submitted that based on **Municipal Council of Kisumu vs. Madowo [1986-1989] EA 362**, mandamus cannot issue. Since no decision has been annexed, certiorari similarly, it is submitted, cannot issue. Since there is an alternative remedy by which the *ex parte* applicant can sue the Respondent for breach of contract and injunction, it is submitted that the prerogative orders sought herein are not available to the *ex parte* applicant. The interested parties further submit that leave to commence these proceedings was granted on 11th July 2012 and the Notice of Motion was filed on 28th September 2012 well beyond the 21 days period contemplated by Order 53 rule 3 of the Civil Procedure Rules, 2010 hence the application is incompetent and must be dismissed as there is no order extending the said period.

13. Having considered the foregoing, this is the view I form of the matter. The first issue for determination is whether these proceedings were commenced within the time provided under Order 53 rule 3 of the Civil Procedure Rules and if not the consequences therefor. Order 53 rule 3(1) provides as follows:

When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

14. In this case the leave to apply for judicial review proceedings was granted by this Court on 11th July 2012. In granting the said leave the Court reiterated the foregoing provisions and directed the *ex parte* applicant to file and serve the substantive Notice of Motion within 21 days from the date of the grant of the said leave. Section 57(a) of the ***Interpretation and General Provisions Act Cap 2 Laws of Kenya*** provides as follows:

In computing time for the purposes of a written law, unless the contrary intention appears a period of

days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.

15. In my calculation the Notice of Motion ought to have been filed by latest 1st August 2012. The Motion was, however, not filed until 28th September, 2012 which was way out of time. Since the said period of 21 days is stipulated under the Civil Procedure Rules and under Order 50 rule 6 time limited under the Rules may be enlarged, the Court, in my view if properly moved may enlarge the said period of 21 days. Although on 24th September 2012, learned counsel for the applicant informed the Court that the Notice of Motion had not been filed, there was no specific order extending time for doing so. It follows that the Notice of Motion herein was filed out of time without an order extending the time hence the application is incompetent.

16. The next issue is the omission to exhibit the decision sought to be quashed. Under Order 53 rule 7 the applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. However, in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held thatthe decision to alienate land or to allocate is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law.

17. On my part, I am of the view that where the *ex parte* applicant for any reason is unable to exhibit the decision sought to be quashed, he ought to satisfy the Court on his failure to exhibit the decision which decision is required to be verified by affidavit with the registrar. Failure to comply with this mandatory provision similarly rendered the application incompetent.

18. On merits, however, in **Republic vs. Kenya National Examinations Council *ex parte* Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996** it was held:

"the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment. The nature and scope of certiorari was discussed in the case of Captain Geoffrey Kujoga Murungi Vs Attorney General Misc Civil Application No. 293 of 1993 where it was stated; "Certiorari deals with decisions already made ….Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice..."

19. In this case, it is contended by the *ex parte* applicant and not controverted by the Respondent who has opted not to oppose these proceedings that there was a management Agreement between the *ex parte* applicant and the Respondent by which the *ex parte* applicant was to operate a public Toilet in the subject market at a monthly rental which the *ex parte* applicant complied with. Although the applicant has not exhibited a copy of the said agreement, it is deposed on oath that the said agreement was renewable. In the absence of any affidavit sworn by the Respondent disputing the *ex parte* applicant's depositions, the Court has no option but to believe what is deposed by the *ex parte* applicant since the interested parties' contentions that the said Agreement lapsed is based on inadmissible hearsay.

20. The decision to terminate the *ex parte* applicant's management of the said toilet was clearly an administrative action on the part of the Respondent. Whether or not the *ex parte* applicant was in arrears he was entitled, under Article 47 of the Constitution, to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In **Pastoli vs. Kabale District Local Government Council**

and Others [2008] 2 EA 300 the Court held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

21. By not affording the *ex parte* applicant the opportunity of being heard before terminating his management and handing over the same to the interested parties, it is my view that the Respondent's action was tainted with procedural impropriety and went against the *ex parte* applicant's legitimate expectations. Whereas the interested parties contend that the subject Management Agreement expired on 28th February 2010, there is evidence on record that the Respondent received some payment from the *ex parte* applicant as late as May 2012. Without an explanation coming from the Respondent, there is no material upon which the Court can conclude that the said Agreement did expire in 2010.

22. The interested party has, however, contended that the *ex parte* applicant's individual interest ought not to be prioritised over that of the Group. I wish to emphasise that this Country operates under a capitalist system hence group or communal interest cannot always override individual's rights. There is no law which permits the society to ride roughshod over the rights of an individual. What the court is expected to do when confronted with a conflict between public and individual interest is to balance the two and determine where the justice of the case lies. In this case, I do not agree that the said Groups interests ought to have been given an upper hand as compared to the *ex parte* applicant's interests. There was no overriding consideration that demanded that the said *ex parte* applicant's interests be sacrificed as these were competing commercial interests and the public's interests in the subject of dispute was limited to reasonable access to the premises in question for relief purposes.

23. However, the decision whether or not to grant judicial review orders is an exercise of discretion. As stated in ***Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508***, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. In **Republic vs. Judicial Service Commission of Kenya *Ex parte* Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 [2004] 1 KLR 203,** it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.

24. In this case, to grant the orders sought in the Motion herein without an order compelling the Respondent to fulfil its side of the Management Agreement which order is not sought would only serve academic purposes. In other words such an order would not be efficacious. Section 9(1)(c) of the ***Law Reform Act*** Cap 26 Laws of Kenya provides that any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made. The provision of this section is operationalised by Order 53 Rule 4(1) which provides that 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.

25. I have further considered that the *ex parte* applicant has an alternative remedy for breach of contract.

26. In the foregoing premises I am unable to grant the orders sought in the Motion dated 19th September 2012 which I hereby disallow. Since the Respondent never filed any response and since the interested parties' purported acquisition of the suit premises is anything but fair, there will be no order as to costs.

Dated at Nairobi this 29th day of April 2013
G V ODUNGA
JUDGE

Delivered in the presence of Miss Nyagah for Mr Mutuli for the Interested Party: