REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 302 of 2012

IN THE MATTER OF LAW REFORM ACT, CHAPTER 26, LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY MARY NYACHAMA NDEGE FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION AND CERTIORARI

REPUBLIC…….....…….....……APPLICANT

VERSUS

MINISTRY OF HOUSING.....1ST RESPONDENT

PERMANENT SECRETARY(MINISTRY OF HOUSING).....2ND RESPONDENT

PROVINCIAL BUILDING SUPERVISOR.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

1. By her Notice of Motion dated 15th August 2012 filed in this Court the same day, the *ex parte* applicant herein, **Mary Nyachama Ndege**, seeks the following orders:

(a) An order of certiorari, to remove into this Honourable Court for the purposes of being quashed and quash, the eviction notices from the Government quarters more specifically known as LG 399/B, Starehe, Nairobi, dated 18th January 2012, and 12th June 2012, respectively by the 1st, 2nd and 3rd Respondents or in the alternative prohibit the 1st, 2nd, and 3rd respondents from evicting the applicant M/s Mary Nyachama Ndege or in any other way interfering with her quiet possession of the suit premises hereinabove specifically described.

(b) THAT costs of this application be provided for.

2. The Motion is based on the grounds set out in the Statutory Statement and verifying affidavit sworn on 24th July 2012 and filed herein on 25th July 2012. According to the *ex parte* applicant, she is a tenant in a government house at Starehe Estate Nairobi known as LG 399/B (hereinafter referred to as the suit premises) which was allocated to her on 28th June 1995 and in which she currently pays monthly rental in the sum of Kshs 1,500.00 deductable from her salary. However the 3rd Respondent has in the past made

two attempts to have her evicted from the suit premises on the ground that she has assigned the suit premises to a third party an allegation which she denies. She has, however, learnt that the 3rd Respondent intends to allocate the suit premises to a friend of his. She further avers that the 3rd respondent has formed a habit of visiting the suit premises in her absence when she is either at work or in church without notice absence in order to justify his allegation that she has assigned the suit premises. According to her the intended eviction will render her homeless and traumatise her children despite the fact that she is a Government employee with the Ministry of Defence at the headquarters and the house was allocated to her in her capacity as a civil servant in the Ministry of Defence.

3. In opposing the said Motion the Respondents filed an affidavit sworn by **David Mundia Nguyo**, the acting Country Director on 18th September 2012. According to the deponent, the *ex parte* applicant has been a tenant in the government quarters since 1995 but around December 2011 informed was received that the *ex parte* applicant was nolonger in occupation of the suit premises but that instead the same was in occupation of two men. Thereupon, he issued a letter to the applicant to surrender the said premises due to the said reasons. The *ex parte* applicant explained that the said two people were her sick father and a person assisting him and since her tradition did not permit her to stay therein together with her father and her spouse she had to temporarily move out. In the deponent's view the *ex parte* applicant was not condemned unheard. Despite being informed to move back into the suit premises the *ex parte* applicant did not do so and that the respondents received information that the same were in occupation of someone else. The *ex parte* applicant was hence required to vacate since she had in the past contravened terms of her tenancy. In the deponent's view, the reason for eviction of the *ex parte* applicant was not non-payment of rent but breach of the conditions of the house allocation by subletting the same to a third party. Hence the Motion ought to be dismissed with costs.

4. On 6th November 2012 the *ex parte* applicant filed a supplementary affidavit sworn by herself on 6th October 2012 in which she denied the allegations made by the respondent and invited the Court to visit the suit premises to ascertain that she and her family are in occupation and that apart from the perimeter fence which she put up for security reasons and which all the tenants put up with the consent of the estate supervisor she has never constructed any permanent structure on the suit premises thereon. According to her the only reason why the deponent of the replying affidavit is pursuing her is his interest in the suit premises.

5. In the submissions filed on behalf of the *ex parte* applicant it is contended that the 3rd respondent has failed to adduce any evidence to prove the allegation that the *ex parte* applicant has abused the terms of the tenancy at all. According to the reasons contained in the impugned notices the reason for requiring her eviction are that she has vacated the premises and not that she has erected a fence around the premises yet the allegations that she has assigned the premises to a third person have not been proved. Since the *ex parte* applicant has not disobeyed any terms of the tenancy, it is submitted that the 3rd respondent's decision to terminate the applicant's tenancy is unlawful. It is the *ex parte* applicant's position that this Honourable Court has unfettered jurisdiction to grant the orders sought herein.

6. On behalf of the respondent, it is submitted that the *ex parte* applicant has been in breach of the terms of the tenancy which breach is admitted hence the respondents were within their rights to evict her. Even if the *ex parte* applicant is now in occupation, it is submitted that this does not take away the respondent's authority to evict her because at the material time she was in breach. According to the respondents the *ex parte* applicant is undeserving of the prayers she seeks as the Provincial building surveyor had the authority to issue the eviction notice and followed the rules of natural justice.

7. The decision to terminate the *ex parte* applicant's tenancy was clearly an administration action on the part of the Respondent. Whether or not the *ex parte* applicant was in arrears she 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."

8. In **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. In **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, it was held that:

"Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century."

9. In this case the *ex parte* applicant contends that despite her complying with the conditions for her tenancy, the 3rd respondent due to some ulterior motives intends to evict her from the suit premises. That public bodies are expected to exercise their powers bona fide and not to abuse the discretion conferred upon them for some collateral or irrelevant considerations is trite. Therefore, if the 3rd respondent's reason behind the eviction of the *ex parte* applicant is to accommodate a third party. In this case although the respondents contend that the *ex parte* applicant has assigned the suit premises to third parties, the source of the said information has not sworn any affidavit in support of the same hence the said allegation amounts to hearsay. As was held in **Kentainers Limited vs. V M Assani and Others Nairobi HCCC No. 1625 of 1996** evidence law applies to affidavits and therefore in an interlocutory proceeding the Court will only accept proof of facts on information received if it constitutes admissible hearsay and not otherwise as rules of the Court cannot nullify substantive enactment.

10. In the absence of an affidavit from the person who supplied the information that the *ex parte* applicant had assigned the suit premises the said allegation does not have any probative value and the said is ignored by the Court. The fact that the *ex parte* applicant temporarily vacated the suit premises to give room to her sick father ought not to be aground for evicting her. To evict her on the basis of such ground is, in my view, unreasonable taking into account the fact that the law frown upon forfeiture in cases where the breach is capable of being remedied.

11. The end result is that I find that to evict a tenant based on the fact that the tenant has given room

temporary to a sick father for purposes of treatment amounts to Irrationality and 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 make such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

12. As was held in **Republic vs. Kenya National Examinations Council *ex parte* Geoffrey Githinji and 9 Others Civil Appeal No. 266 of 1996**:

"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."

13. In the result the Notice of Motion dated 5th August 2012 succeeds and an order of certiorari is hereby issued removing into this Court for the purposes of being quashed the eviction notices from the Government quarters more specifically known as LG 399/B, Starehe, Nairobi, dated 18th January 2012, and 12th June 2012, respectively by the 1st, 2nd and 3rd Respondents pursuant to the said notices. As the prayer for prohibition was in the alternative there is no need to deal with the same. The *ex parte* applicant will have the costs of this suit

Dated at Nairobi this day 26th of April 2013
G V ODUNGA
JUDGE

Delivered in the presence of Mr Nyaribo for Mr Mariaria for the applicant and Miss Kenyani for the Respondent