



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)
PETITION 568 OF 2012

BETWEEN

RICHARD WERE.....1ST PETITIONER
SILPHIA OKEYO2ND PETITIONER
BENTA AKOTH OLWENY..... 3RD PETITIONER
MARGARET KWAMBOKA OGEKA4TH PETITIONER
PATRICK MWANIKI.....5TH PETITIONER
MARY NJOKI.....6TH PETITIONER
LYDIA WANJIKU.....7TH PETITIONER
JANE M. NYAGA.....8TH PETITIONER
ANASTASIA MUNEE9TH PETITIONER
LEONARD G. MUNGAI..... 10TH PETITIONER
EDWARD BUSURU.....11TH PETITIONER
PETER NDIKU..... 12TH PETITIONER

AND

PERMANENT SECRETARY
MINISTRY OF HEALTH1ST RESPONDENT
PERMANENT SECRETARY
MINISTRY OF MEDICAL SERVICES2ND RESPONDENT
PERMANENT SECRETARY

JUDGMENT

Introduction

1. The issue for determination raised by the petitioners in this matter concerns the right of access to housing guaranteed under **Article 43(1)(b)** of the Constitution which provides as follows;

43(1)(b) Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.

Facts

2. The facts giving rise to the petition dated 7th December 2012 are not in dispute. They are set out in the affidavit of Richard Were sworn on 7th December 2012 and the replying affidavit of Dr Jackton Azenga Kisivuli, the Medical Superintendent of Mathari Hospital sworn on 24th April 2013.

3. Mathari Hospital (“the Hospital”) is a National Referral Mental Health Institution which serves the entire East and Central Africa region. The Hospital has housing for its staff who are required to live near the facility in order to provide 24-hour services to the hospital.

4. All the petitioners, except the 1st petitioner, are civil servants and are currently residing at the Mathari Hospital Servants quarters by virtue of being employees of the then Ministry of Health and Ministry of Medical Services. The rent for the houses is deducted monthly from their salaries. In the year 2010, the 2nd to 12th petitioners were transferred from the Ministry of Medical Services to other Ministries as part of a reshuffle of junior civil servants. After the petitioners were transferred they were expected to vacate the house to enable hospital staff occupy the houses.

5. In 2012, the petitioners started receiving eviction notices from the Ministry of Medical Services requiring them to vacate the houses by 10th December 2012. The petitioners appealed to the Ministry to reconsider the decision. The Ministry responded by giving the final notices to vacate the houses failure to which, *“the hospital management shall have no alternative but to forcefully evict you from the said premises without reference to you. Please notice that this is the final or last notice concerning the matter.”*

The Petitioners’ Case

6. It is these notices that triggered these proceedings. The petitioners’ case is that they have school going children candidates whose studies risk being disrupted by the eviction. They contend that the net salaries are minimal and deductions having been made by the 1st and 2nd respondent for the benefit of securing housing, they cannot afford alternative housing. That even if they comply with the notices, the process of reversal of the pay deduction will take up to a year owing to administrative bottlenecks.

7. The petitioners submit that this conduct is a violation of **Article 43(1)(b)** their right to dignity enshrined at **Article 28** and also have their equal rights protected under **Article 27(1)**. The petitioners seek the following orders in the petition;

(a) A declaration that eviction notices issued to the petitioners be declared unconstitutional and the same be quashed.

(b) In alternative to the above the 1st, 2nd and 3rd respondents be ordered to provide alternative housing to the petitioners before effecting the said notices if found to be lawful.

(c) Any other order that this Honourable Court may deem fit for enforcement and protection of the petitioners' rights.

(d) The respondents and cited 3rd party do pay the costs occasioned by and of this petition jointly and severally.

8. In its submissions, the petitioner buttressed its case by making references to international instruments that buttress the right to housing, **Article 25** of the *Universal Declaration of Human Rights*, **Articles 7** and **11** of the *International Covenant on Economic Social and Cultural Rights*. The petitioners' case is that the respondents conduct amounts to forced eviction which is a violation of their rights. Counsel for the petitioners referred to the cases of *Government of RSA and Others v Grootboom CCT 11/00* and *Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security and Others Embu Petition No. 2 of 2011 (Unreported)*.

Respondents' Case

9. The petition was opposed by way of replying affidavit sworn by Dr Jackson Azenga Kisivuli. The crux of the respondents' argument is that the petitioners occupied the houses on the basis of the fact that they were deployed by the Ministry of Medical Service. As a result of their transfer, they respondents contend that the petitioners are not entitled to housing at the Hospital.

10. According to Dr Kisivuli, the houses at the Hospital are intended for hospital staff providing care for the patients and due to housing shortage for members of staff, the hospital management took the decision to issue notices to the petitioners, who though civil servants were no longer hospital employees. Once the notices were issued, some employees vacated the houses save for the petitioners.

11. The respondents contend that the petitioners' rights are not violated as they like all civil servants are entitled to apply for alternative accommodation if the same is available. Furthermore, they are like other civil servants paid a housing allowance to enable them seek alternative private accommodation.

12. Counsel for the respondent submitted that the petitioners rights have not been violated as it is not the State's responsibility to give houses but to provide a legal and policy framework as well as standards contemplated in **Article 21** for the progressive realization of economic and social rights provided for under **Article 43**.

Analysis and determination

13. The issue for determination is whether the respondents violated the petitioners' rights by issuing the eviction notices. The issue must be considered by reference to the State's obligation in respect of the right to housing guaranteed under **Article 43(1)(b)**.

14. The matter at hand is not novel and at this juncture is important to understand the relationship between the petitioners and the respondents. In the case of *Eric V. J. Makokha and Others v Lawrence Sagini and Others CA Civil Application No. NAI 20 of 1994[1994] eKLR*, the Court of Appeal was called upon to consider the relationship between a contract of employment and the benefit of housing that comes with it. In setting aside an interlocutory injunction, the court held that once a contract of employment was terminated, the benefit of housing that went with it also lapsed. Although the case concerned termination of the employment contract, the general principle that employment does not confer tenure to property was firmly established. At any rate, at common law, the employees' right to occupy the employees' premises is subject to the employment contract. In this case, the deployment of the petitioners to other ministries meant the benefit of housing that came with their association with the Hospital came to an end.

15. The provision of housing to government employees is governed by the *Code of Regulations (Revised 2006)* which state in part as follows;

SECTION L - GOVERNMENT HOUSING

Introduction

This section deals with the rules governing the provision of Government quarters and related matters. The long term policy of the Government is to gradually move away from the responsibility of housing civil servants with the aim of paying a consolidated wage. In this connection, the Government pays civil servants House Allowance pegged at market rates and charges market rates for its houses.

In addition, the Government intends to sell all non-institutional houses to civil servants through a tenant mortgage scheme. It will also provide mortgage to Civil servants to acquire houses. However, the Government will continue to provide institutional housing for staff working in essential institutions such as schools, hospitals and at remote stations.[Emphasis mine]

16. **Section L.1** of the **Code of Regulations (Revised 2006)** entitles the employee to House Allowance and it states as follows;

(i) All civil servants are eligible to automatic house allowance applicable to their grades as stipulated in Government Circulars issued from time to time.

(ii) An officer who has been allocated a Government owned quarter, by the appropriate Housing Allocation Committee or an institutional house by his Permanent Secretary or Head of Department, will be required to pay the market rent for the house allocated as determined by the Ministry responsible for housing.

(iii) Government housing will be restricted to officers whose housing will be considered to be strategic in view of the nature of their work. These include houses for disciplined services, institutional houses, State Houses, State Lodges and Staff quarters, houses situated in water supply/treatment works, forests stations, historical sites and other houses which the Government has identified as strategic.

(iv) Officers occupying institutional houses and whose services have been categorised as essential to the respective institutions will pay the market rents applicable to the quarters or surrender their house allowance whichever is lower.[Emphasis mine]

17. The provision of house allowance is consistent with provisions of the **Section 31** of the **Employment Act** which provides that;

31(1) An employee shall at all times at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment or shall pay to the employer such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee obtain reasonable accommodation.

18. I agree with the respondents contention that the State obligation under **Article 43(1)(b)** is not to give houses to specific applicants but to provide a framework under which citizen may have access to housing. In order achieve the objective of ensuring that a class of employed person access housing the State has through the **Employment Act** imposed a mandate on the employer to provide housing or an allowance to the employee to obtain housing in the market. The mandate imposed on every employer is consistent with the State obligations under **Article 43(1)(b)** to provide access to housing. The government, as employer, has provision for either housing or payment of house allowance and in the circumstances of this case, it is clear that the respondents are not in contravention of the law. **Regulation L.5** is clear as to whom government quarters are allocated to. It reads as follows, “Government quarters are allocated at the station where an officer is posted for duty on the basis of the points system as will be provided from time to time by the Ministry responsible for housing. In allocating a Government quarter, consideration will also be given to other general requirements such as the family size and proximity to the office.” Therefore, the petitioners having been transferred to another Ministry/station, they were no longer eligible to benefit under these rules.

19. The ***Code of Regulations (Revised 2006)*** I have cited clearly show that there is no right to a government House as such and once the petitioners cease to occupy government house, their right to house allowance which is guaranteed by statute will not be affected.

Conclusion and disposition

20. The right to housing under **Article 43(1)(b)** is framed in terms of “access”. Although, the petitioners, just like other citizens are have a right to ‘***accessible and adequate housing,***’ in the specific instances especially where such right springs from an employment contract with clear terms and benefits under the law, that right must be realised within the framework of the existent regulations and laws which include the Government Housing Regulations and employment statutes that I have referred to above. It is also fair to add that fundamental rights and freedoms are not absolute they must take into account the rights of others and in this case, the continued occupation of the former employees obviously prejudices the right of other incoming staff to secure the same right asserted by the petitioners.

21. In this case, I find and hold that the mandate imposed by the State on every employer fulfils and promotes the right to access. Payment of a sum in the form of housing allowance enables the employee to secure accommodation on the open market. To that extent therefore, I find that the petitioner’s rights under **Article 43(1)(b)** have not been violated as alleged by the petitioners.

22. As the petitioners are no longer entitled to remain in the hospital homes, they must now move out to give way to hospital staff. Having considered the various depositions and arguments and in order to secure the rights of the petitioners and their families, I direct that the petitioner to vacate the respective houses by 31st July 2013.

23. The final orders shall therefore be as follows;

(1) The petition be and is hereby dismissed with no order as to costs.

(2) The petitioners shall vacate the Staff houses at Mathari Hospital by 31st July 2013.

DATED and DELIVERED at NAIROBI this 31st day of May 2013.

D.S. MAJANJA
JUDGE

Mr P. Wambugu instructed by Lilan and Koech Advocates for the petitioners.

Mr Wamotsa, Litigation Counsel, instructed by the State Law Office for the respondents.