REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR. MISC. APPLICATION NO.166 OF 2011

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW SEEKING FOR AN ORDER OF PROHIBITION BY JAPHETH MS. MUSEE & ZEPHYLINE MWIKALI MUSEE

AND

IN THE MATTER OF: THE EVICTION BY THE DIRECTOR OF THE ESTATES DEPARTMENT, MINISTRY OF HOUSING

AND

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF PROHIBITION BY WAY OF JUDICIAL REVIEW

BETWEEN

JAPHETH MS. MUSEE.……………….…….....................…….....………………1ST APPLICANT
ZEPHYLINE MWIKALI MUSEE.………….................................…………………2ND APPLICANT

-VERSUS-

THE HON. ATTORNEY GENERAL...............................……........……...........…….1ST RESPONDENT
PERMANENT SECRETARY MINISTRY OF HOUSING……….………………..2ND RESPONDENT
DIRECTOR ESTATES DEPARTMENT MINISTRY OF HOUSING….......……….3RD RESPONDENT

R U L I N G

The two exparte Applicants herein Japheth MS Musee ***(1st Applicant)*** and Zephyline Mwikali Musee ***(2nd Applicant)*** approached this court through a Chamber Summons dated 15th July 2011 seeking the following Orders:

1) THAT this Honourable Court do grant leave to the Applicants to file proceedings for an Order of prohibition by way of Judicial review prohibiting the Respondents from evicting, removing or in any other way interfering with Applicant's quite possession of Government Quarters they are occupying in Flat No.1F, Highrise Flats-Upper Hill in Nairobi, as indicated in the Notice to Vacate dated 12th July, 2011.

2) THAT the leave so granted do operate as a stay of execution of Notice to Vacate dated 12th July,

2011.

3) <u>THAT</u> the costs of this Application be provided for.

The application was supported by the statement of facts dated 15th July, 2011 and the verifying affidavit sworn by Japheth MS Musee, the 1st applicant on 15th July, 2011. The application was placed before Musinga, J on 15th July, 2011 who directed that the same be served for hearing interpartes.

The application is opposed through a replying affidavit sworn by P.M. Bucha, the Director of the Estates Department in the Ministry of Housing on 16th September, 2011.

Following directions from the court, the parties filed written submissions which their advocates highlighted before me on 6th December, 2011 and which I have carefully considered.

Briefly, the case for the applicants as can be deduced from depositions in the verifying affidavit sworn by the 1st Applicant and annextures thereto is that he was allocated a government house Flat No.1F, Highrise Flats Upper Hill in 1976 and has lived in the premises together with his wife who is also a civil servant upto the time of filing the instant application.

That he retired from the Ministry of Water in the Year 2004 but he was subsequently appointed to serve as a member in the National Council for people with Disabilities for 3 years from 1st November, 2004.

The 1st applicant claims that after his retirement from the public service, his wife the 2nd applicant applied to be allocated the same house in his stead as he was a person living with disability but her application was not allowed by the 3rd respondent though it had been recommended by the Nairobi Provincial Commissioner who was the chair of the Nairobi Housing Committee.

It is his contention that instead of allocating the house to the 2nd applicant as recommended by the Provincial Commissioner, the 3rd respondent without any authority or jurisdiction issued the applicants with a 7 days notice to vacate the said premises in default of which they would be evicted. It is the applicants position that the said notices dated 6th and 12th July, 2011 were illegal, arbitrary and unjustified and the respondents ought to be restrained from evicting them from the said house by this court granting leave to the applicants to apply for orders of prohibition and directing that the said leave do operate as stay of the 3rd respondent’s aforesaid decision.

The Respondents on their part claim that the instant application is made in bad faith and is calculated to delay the government from rightfully taking possession of its house and allocating it to another deserving physically challenged civil servant.

They oppose the application on grounds that the applicants have no right to continue occupying the said government house since the 1st applicant has already retired from the public service and the 2nd applicant’s application for allocation of the said house was rejected on grounds that she did not qualify for allocation of such a house given her house allowance scale.

It is also the respondent’s case that the applicants were first issued with a notice to vacate the premises way back on 10th June, 2010 and that the letters annexed to the 1st applicant’s verifying affidavit said to contain the notice to quit and threat of eviction were only reminders of the notice of 10th June, 2010 and the conditions contained in the letter dated 31st August, 2010 extending the applicants period of stay in the government house upto 30th June, 2011 which the 1st applicant had willingly accepted. The said letter is annexed to the replying affidavit and marked SMK4.

Having considered the application in its entirety and the submissions by counsel for the respective parties, I find that it is not disputed that the 1st applicant retired from the public service on 1st November,

2007 after his term as a member of the National Council for people with disability expired.

It is also not disputed that the 2nd applicant's application to be allocated the same house was rejected by the Permanent Secretary, Ministry of Housing and this was communicated to her vide letter dated 10th June, 2010 which also spelt out reasons why her application was unsuccessful mainly because she did not qualify to be allocated the category of the house previously allocated to her husband, the 1st Applicant – see annexture **marked SMK 3**.

Though it may be correct for the applicants to argue that the 2nd applicant is equally entitled to government housing like other civil servants, I find that this in itself does not mean that she was entitled to be allocated the same house that her husband was bound to relinquish upon retirement from the public service especially when she did not qualify for that category of government house. In all the correspondence addressed to the Ministry of Housing annexed to the applicant's verifying affidavit, appeal to the Minister and the Permanent Secretary to have the said government quarter allocated to the 2nd applicant, the applicants did not question the validity of the reasons given in rejecting the 2nd applicant's application.

It is not disputed that the Code of Regulations on Government housing require that government houses allocated to public servants be surrendered to the government 60 days after the officer retires from service.

Now that it is common ground that the 1st applicant retired from the Civil Service in 2004 but the period of service was extended upto 1st November, 2007 after his term in the National Council for persons with Disabilities expired and considering that his prayer to have his wife allocated the said house was rejected with good reasons, I find that the applicants has not demonstrated what further right they had to continue occupying the said government house.

Though the court accepts that the applicants have a constitutional right to adequate housing just like any other Kenyan citizen, this right in my view does not translate into automatic entitlement to government housing which is provided on a certain criteria set by the Ministry of Housing as shown in the aforesaid Code of Regulations and obviously to serving public servants.

The claim by the applicants that the 3rd respondent had no mandate or jurisdiction to issue them with eviction notices as only the Housing Committee was legally entitled to allocate and remove tenants from government houses is untenable since it is clear from all the documentation availed in this case by the parties that it is the Permanent Secretary in the Ministry of Housing that was responsible for allocation and main tenance of government housing. If this were so, then the 2nd applicant would not have addressed her application to the Permanent Secretary, Ministry of Housing and the Housing Committee would have either approved or rejected her application. Instead its Chair, the Nairobi Provincial Commissioner made a recommendation to the Permanent Secretary to have 2nd applicant's application approved which the Permanent Secretary declined. It is not disputed that the 3rd respondent is a department in the Ministry of Housing.

Besides, the applicants have not pointed to any law that supports their claim that the 3rd respondent was not mandated to issue them with quit notices and that therefore the notices served on them by the 3rd respondent were illegal. It is interesting to note that though the applicants maintained in their pleadings and in submissions before the court that the 3rd respondent's action in serving them with notices to vacate the government quarter was illegal as it was made without jurisdiction and was made without observing the rule of natural justice, they did not apply for leave to apply for orders of certiorari to bring into the High Court the said notices for quashing.

They only applied for leave to apply for orders of prohibition. If the said notices are illegal, then naturally they would require to be quashed and the orders of prohibition would thereafter follow to restrain the

respondents from following up on their contemplated illegal action.

Even if the applicants are granted the leave they seek to apply for orders of prohibition, it is difficult to see how such an order would eventually be issued and implemented when the notices to vacate remain in force and effective since there will be no orders of certiorari to quash them.

In my considered view, even if leave was granted to the applicants as prayed, there will be no basis to issue the order of prohibition at the substantive hearing since the notices to vacate the government quarters would still be in place. I agree with J. Khamoni when he stated in Olkiombo Ltd –vs- The County Council of Narok & Others Misc. App. No.1271/02 that prohibition issues to prevent a future event. It does not issue to correct a wrong decision already made or to correct anything allegedly wrong the respondent had done in the events complained of. Illegal or wrong decisions can only be corrected by the court by way of issuing orders of certiorari to quash the said decisions.

Though it is common ground that the three respondents are public officers whose actions are amenable to Judicial Review, I find that ***prima facie*** the applicants have failed to satisfy the court that the three main grounds upon which this court exercises judicial control of administrative action exists in this case. These are illegality, irrationality and procedural impropriety which includes breach of the rules of natural justice.

I make this finding because the applicants have not demonstrated that the respondents have violated any law and though they had claimed that they had been given 7 days notice to vacate a house they had lived in for 30 years, there is evidence which is not controverted to prove that the applicants had been given more than sufficient notice to vacate the premises from 10th June, 2010 and had successfully sought extension to continue occupying the house upto 30th June, 2011 – see annexture marked SMK4. There is therefore no basis for holding that the respondents' action was either irrational or unreasonable.

In the case of Re: Samuel Muchiri W. Njuguna & The Tea Act C/A. No.144 of 2000, the Court of Appeal when discussing the test to be applied by the court in deciding whether or not to grant leave to institute judicial review proceedings stated:

"It cannot be denied that leave should be granted, if on the material available, the court considers, without going into the matter in depth that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the court to the Judge who granted leave, to set aside such leave"

In this case, this court is satisfied that on the material placed before me, the applicants have not made out an arguable case for granting of the leave sought.

In the circumstances, I decline to grant leave to institute judicial review proceedings as prayed in the chamber summons application dated 15th July, 2011. The application is not merited and it is hereby dismissed. Each party will bear its own costs.

Dated, **Signed**and**Delivered** by me at Nairobi this 9th day of February, 2012.

C. W. GITHUA
JUDGE
In the presence of:

Florence – Court Clerk
1st Applicant present in person
Mr. Momanyi holding brief for Mr. Koikai for Respondents