



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 283 OF 2011

IN THE MATTER OF AN APPLICATION BY BARCLAYS BANK OF KENYA LIMITED FOR JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS DIRECTED TO THE TOWN CLERK OF THE CITY COUNCIL OF NAIROBI

AND

IN THE MATTER OF THE FAILURE AND/OR NEGLECT OF THE CITY COUNCIL OF NAIROBI TO AMEND ITS APPROVAL/CONSENT GRANTED ON 11ST JULY, 2007 IN FAVOUR OF THE APPLICANT, FROM “EXTENSION OF LEASE” TO READ “RENEWAL OF LEASE” OVER LAND REFERENCE NUMBERS 209/4361/1 AND 209/4361/2 NAIROBI (SHAURI MOYO)

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP 265 OF THE LAWS OF KENYA AND THE REGISTRATION OF TITLES ACT, CAP 281 OF LAWS OF KENYA

BETWEEN

REPUBLICAPPLICANT

AND

THE TOWN CLERK CITY COUNCIL OF NAIROBI1ST RESPONDENT

SAILUS MIGOSI BOGONKOINTERESTED PARTY

EX-PARTE

BARCLAYS BANK OF KENYA LIMITED

JUDGEMENT

This judgement is in respect of the notice of motion dated 17th November, 2011 brought under Articles 23(3)(f) and 40 of the Constitution, Section 8(2) of the Law Reform Act and Order 53 Rule 3 of the Civil Procedure Rules by the Ex-parte Applicant (Barclays Bank of Kenya Limited). In the application the Applicant prays for orders as follows:-

1. THAT an order of MANDAMUS do issue directed to the TOWN CLERK, CITY COUNCIL OF NAIROBI to compel him to amend the Consent/Approval of the City Council of Nairobi dated 11th July, 2007 authorising a renewal for a further forty (40) years of the (expired) Sub-Leases over L.R. No. 203/4361/ 1&2 Shauri Moyo, Nairobi, in favour of M/s BARCLAYS BANK OF KENYA LIMITED from “Extension” of the said leases to read ‘RENEWAL “ of the subject matter Sub-Lease(s).

2. THAT this Honourable Court be pleased to give such other or further orders and reliefs as may be deemed just and expedient.

3. THAT the costs of this Application be borne by the Respondent and be paid to the ex-parte Applicant.

The application is supported by grounds on its face, a statutory statement dated 14th November, 2011 and a verifying affidavit sworn on 14th November, 2011, together with exhibits annexed thereto. Sailus Migosi Bogonko who is named as an Interested Party in the application supports the application by way of a supporting affidavit sworn on 17th January, 2012. The Town Clerk, City Council of Nairobi who is the Respondent opposed the application through a replying affidavit sworn by Aduma J Owuor the Acting Legal Affairs Director of the City Council of Nairobi.

A brief statement of the facts will do in this case. On 13th September, 1957 the City Council of Nairobi being the Head Lessee from the Crown (now the Government of Kenya) granted to Barclays Bank D.C.O (now Barclays Bank of Kenya Limited) a 40 year sub-lease of the properties known as L.R. No. 209/4361/1 and L.R. No.209/4561/2 with effect from 13th June, 1955. As such the term of leases expired on 12th June, 1995 or thereabouts. The Applicant did not take any action immediately after the leases expired but on 25th October, 2006 the Applicant applied for extension of the said sub-Leases. The application was approved and the sub-leases were extended for another 40 years with effect from 13th July, 1995. Following the extension of the sub-leases the Applicant with the consent of the City Council of Nairobi sold the two plots to the Interested Party. In January, 2009 the Registrar of Titles refused to register the transfer of the sub-leases on the ground that since the initial 40 year sub-Leases had expired what the council ought to have done was to renew the sub-Leases instead of extending them. The Applicant went back to the Council and applied for an amendment so that the sub-leases would be renewed instead of being extended. The Respondent failed to take action and on 14th November, 2011 the Applicant filed this cause in court.

The Applicant is through this cause asking this court to direct the Respondent to amend the document extending the sub-leases so that the sub-leases are instead renewed.

I have read the papers filed by the parties in this cause and find that the Respondent is opposing the application on the following grounds:-

- (a) The dispute herein is in the nature of a contractual dispute and redress if any lies in private law;
- (b) The application is incompetent;
- (c) No legitimate expectation lies in favour of the Ex-parte Applicant or Interested Party; and
- (d) Mandamus cannot issue in the circumstances of the case.

The issues are best framed using the grounds of opposition raised by the Respondent. The first issue would then be whether this is matter for private law and not public law. It is submitted on behalf of the Respondent that this being an issue about lease of land then the same ought to be dealt with by way of private law. It is further submitted that the Applicant has an alternative remedy and can sue for specific performance of the contract. The Applicant argues that the Respondent has refused to take action upon an application made to him. He has refused to perform his statutory duties. I have considered the submissions on this issue and conclude that this is a matter for disposal by way of public law. The Respondent owes a duty to the Applicant of making a decision on the application to amend the sub-leases. That duty is placed on the Respondent by statute. The Applicant is therefore before the right forum.

The second issue for determination is whether this application is incompetent. In this regard the Respondent attacks the merits of the Applicant's application for extension of the sub-leases. The Council has already extended the sub-leases and it is not the duty of this court in its judicial review capacity to look into the merits of the Council's decision. The Council has to carry the cross of the consequences of its decision. It cannot use its incompetence, if any, as an excuse for saying that the Applicant's application is incompetent. I therefore find that the Applicant's application is proper.

The third issue is whether legitimate expectation lies in favour of the Applicant and the Interested Party. Every person in this country who approaches any public organisation has a legitimate expectation that such an organisation will treat him/her fairly and in accordance with the law. The Applicant therefore had legitimate expectation at the time it applied for an amendment of the sub-leases that the Respondent would respond to the application to amend the sub-leases without unnecessary delay.

The fourth issue is whether an order of mandamus should issue in this cause? The Respondent submitted that the Applicant did not establish that he was under a statutory duty to amend the sub-leases. The Applicant and the Interested Party told the court that the extension or renewal of leases was the duty of the Respondent. When does an order of mandamus lie? The Court of Appeal in the case of **KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS, CIVIL APPEAL NO.266 OF 1996** stated that:-

“.....an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

After stating when mandamus may issue, the Court used the Liquor Licensing Act, Chapter 121 Laws of Kenya to demonstrate the scope of an order of mandamus. The Court stated that:-

“Now, if a party applies for a licence under Section 8 and the licencing court simply refuses or neglects to consider and determine the application such a party would be entitled to come and ask the High Court for a mandamus and if the High Court is satisfied that the licencing court has simply refused or neglected to consider and determine the “application” the High Court would be entitled to issue an order of mandamus, compelling the licensing court to consider and determine the application as it is bound by the law to do so. The High Court would, in those circumstances, be compelling through the remedy of mandamus, the licensing court to perform its public duty imposed on it by section 4(1) of the Liquor Licensing Act, and the public duty imposed by that section is the consideration and determination of the application for a licence. The High Court cannot, however, through mandamus compel the licensing court to either grant or refuse to grant the licence. The power to grant or refuse a licence is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a licence.”

Applying the law as expounded by the Court of Appeal to the facts of the case before me, I find that the Applicant is asking me to direct the Respondent to perform his duty in a particular way. The Applicant wants the court to direct the Respondent to renew the sub-leases in question. This court can only compel the Respondent to consider the Applicant's application and make a decision on the same. The court cannot direct the Respondent to perform his duties in a given manner or to reach a particular

decision. This court would therefore be exceeding its judicial review mandate were it to grant the 1st prayer in the application.

The logical outcome would therefore be the dismissal of the Applicant's cause but in an era where substantive justice is of paramount importance, I find it unfair to turn away the Applicant from the temple of justice. The Applicant has clearly established unexplained lethargy on the part of the Respondent. The Respondent has for no apparent reason failed, refused and/or neglected to make a decision on the Applicant's application for amendment of the sub-leases.

In the 2nd prayer the Applicant prays for “**such other or further orders and reliefs as may be deemed just and expedient.**” The Applicant has successfully demonstrated that the Respondent has refused and or neglected to execute his statutory duty. The Respondent has a duty to make a decision on the application placed before him by the Applicant. He has not rendered any decision on the Applicant's application. In the interests of justice I therefore issue an order of mandamus directing the Respondent to make a decision on the Applicant's application for amendment of the sub-leases. The Respondent is directed to make the said decision within sixty days from the date of the delivery of this judgement. The Applicant has established through this cause that it had a genuine complaint against the Respondent. The Applicant will therefore get the costs of this application from the Respondent.

Dated and signed at Nairobi this 8th day of May, 2012

W. K. KORIR
JUDGE