REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Application 22 of 2012

IN THE MATTER OF: AN APPLICATION BY ROBERT

MAKAU & 279 OTHERS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAISNT MUNICIPAL COUNCIL OF MOMBASA

BETWEEN
ROBERT MAKAU & 279 OTHERS …… APPLICANTS
AND

MUNICIPAL COUNCIL OF MOMBASA …… RESPONDENT

RULING

1) The Municipal Council of Mombasa (the Respondent herein) is the owner of some houses in Tudor, Mombasa in which the Applicants are tenants. Through a notice dated 30th January 2012 the Respondent communicated to the tenants an increment of rent with effect from 1st February 2012. The new rent was contained in Gazette Notice No. 441 of 13th January 2012.

2) That decision to increase rent has met resistance by the Exparte Applicants who were granted leave by Court on 29th February 2012 to challenge it by way of these Judicial Review proceedings. In its discretion, the Court when granting leave directed that the question of stay raised by the Ex-parte Applicants be considered separately and in interpartes proceedings. In the application dated 28th February 2012 the Ex-parte Applicant seeks that the grant of leave do operate as stay of Gazette No. 441.

3) The Exparte Applicants are no fewer than 280 tenants. Their contention is that the increment is manifestly high, some 200% hike. That the increments cannot be justified and are infact unreasonable as the houses are in a shocking state of disrepair.

4) The Exparte Applicants also think that the increments are made in total disregard to The High Court decision in **Mbsa Misc. Application No. 1 of 2007 Republic –Vs- The Minister for Local Government & 2 Others Ex-parte Robert Makau & 182 Others** (hereinafter the 2007 proceedings) in which the Court quashed an earlier decision of the Respondents seeking to increase rent for the same premises.

5) The Respondent in answering the application sought to demonstrate that the increments were effected in compliance with the provisions of Section 148 of The Local Government Act. They sought to show how the Respondent duly met and resolved to make the increments, consulted stakeholders and then sought the approval of Minister for Local Government. Only after such approval was obtained that the increments were Gazetted and subsequently implemented.

6) On the 2007 Decision, the Respondents told Court that there would be some 97 persons in these Judicial Review proceedings who were not party to the 2007 proceedings. And it was argued that they cannot benefit from a decision "in personam" made only in favour of parties litigating. It was then pointed out that the 2007 Decision did not operate in perpetuity to bar the Council from ever revising its charges and other fees.

7) It is the view of the Applicants that they were able to persuade Court of the strength of their case hence the leave granted. In their view they demonstrated that they had a prima facie case with a reasonable chance of success and a stay order should be made to protect this good case. But that may not be quite so. At the leave stage the threshold to be met is low. What the Court does at that stage is to consider, on the material presented to it and without detailed analysis of the matter, whether there is an arguable case deserving of leave (**Njuguna –Vs- Ministry of Agriculture No. 144 of 2000**).

8) A party who passes this first hurdle should not suffer any illusion that stay will also be granted as a matter of course. The bar is raised and the test much more stringent. This Court had opportunity to discuss the nature of the applicable test recently in **Misc. Civil Application No. 80 of 2012 Republic – Vs- The Kenya Revenue Authority, Re Ex-parte Boaz Makomere & 3 Others**. Highlighted in that decision is that-

- The stay sought must be efficacious.

- The Court will be concerned about the effect of not granting stay-

(i) Will it render the application nugatory or academic?

(ii) Does it impose an onerous, impracticable or unreasonable burden on the Applicants?

- Where the stay involves a competition between individual rights and public interest, the Court must be astute to balance the competing interests.

Where the Court has reserved the question of stay to an interpartes hearing then it must concern itself with a little more in-depth examination of the strength of the Applicants case. Where, like here, the effect of the stay is to restrain a Public Authority from exercising it's powers the Court may be reluctant to grant the order unless the Applicant demonstrates a prima facie case. The other factors (see above) will be considered in the context of the strength of the Applicants case. This approach was suggested by Lord Goff of Chieveley in **Reg. -Vs- Sectary of State for Transport Ex-parte Factortame Ltd (No. 2) [1991]1 AC 603**. He said-

"In the end, the matter is one for the discretion of the Court, taking into account all the circumstances of the case. Even so, the Court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken."

9) I bear this in mind as I turn to determine the application.

10) The Court has looked at the Decision of Justice Sergon of 23rd July 2009 in the 2007 proceedings. This Court cannot see how that decision curtailed the Respondent from ever revisiting the question of rent. It seemed to specifically discuss the manner in which the Council sought to increase rent on that occasion i.e. vide Gazette Notice Number 5184 of 7th July 2006. This Court makes this observation as an interim view and relents from considering it in a manner that will lead it to prejudging this point.

11) I must also consider that the procedure in which the current increment has been effected has not been seriously challenged. The Grounds for challenge are outlined in the Statutory Statement as follows-

- **In revising the said rents the Respondent was exercising it's powers under the Local**

Government Act (Cap. 265 – Laws of Kenya) which powers are subject to Judicial Review.

- **The said increment is made 'mala fides' and in abuse of the powers donated to the Respondent by the Local Government Act (Cap. 265 – Laws of Kenya) in so far as the premises are not maintained by the Respondent and are in breach of the Applicant's Constitutional right to a clean and healthy environment under Section 42 of the Constitution of Kenya.**

- **The said increments have been made in total disregard of an earlier ruling of this Honourable Court and without bearing in mind that the Respondent is pursuing an appeal on the same issue or rent increment.**

- **The increments are harsh excessive and were not arrived at fairly as no stakeholders forum or proper stakeholders forum was held prior to the increment as envisaged in the Constitution of Kenya.**

- **The increments sought by the Respondent are in light of all attendant factors unreasonable and irrational.**

12)It would seem that a substantial complaint taken up by the Applicants is that the increments imposed by the Respondent are unreasonable and irrational. In support of their contention the Applicants commissioned a valuer Paul Wambua to advise them on the current rental value of the houses. He returned this opinion-

"RECOMMENDATION: The houses are in a deplorable state, if not un inhabitable. They are fit for condemnation and owing to the foregoing; we are not able to advise on any rent revision, if at all, not until they are restored to functional order/condition."

13) The Respondents answer is that no increment of rent has been made in the last ten years because of resistance by the tenants and states as follows in paragraph 18 of the affidavit of Tubman Otieno sworn on 5th April 2012-

"18. That in reply to paragraph 10 of the verifying affidavit, it is morally Callous for the Applicants, who have for a period of over 10 years now resisted all attempts by the Respondents to increase rent payable in respect of the subject premises, to turn around and accuse the Respondent of not maintaining the said premises to the level of standards that they require."

14)The issues for determination at the main motion may eventually come down to whether the Respondent was entitled to increase the rent at all and if so whether the increments are unreasonable. On the evidence and arguments presented by parties so far they seem to stand on even ground. That could change at the hearing. What this Court must determine for now is whether interim relief in the nature of stay is deserved. The Applicants chief concern from arguments of Counsel is that-

"In the event that the notice is quashed then the Applicants have to begin the cumbersome process of seeking to recover what they have already paid."

15)The argument is that the recovery process may not be plain sailing. Reasons why it would be cumbersome are not given. This, however, is not the same as saying that recovery is impossible. I must balance this against the loss the Respondent is likely to suffer if stay were to be granted and the main motion failed. Is it easier for the 280 people to pursue recovery from one public body or for the one public body to pursue recovery from 280 different individuals? The balance of convenience is in favour of The Public Body. It is for this reason that I dismiss the application for stay with costs.

Dated and delivered at Mombasa this 25th day of October, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Fwaya for the Applicants

No appearance for the Respondent

Court clerk - Moriasi

F. TUIYOTT
JUDGE