REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW 313 OF 2009

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION

AND

IN THE MATTER OF: LOCAL GOVERNMENT ACT, CAP 265, LAWS OF KENYA

AND

IN THE MATTER OF: THE CITY COUNCIL OF NAIROBI AND PRIVATE/PUBLIC SECTORS PARTNERSHIP STRATEGY

AND

IN THE MATTER OF: NOTICE TO RELOCATE ISSUED ON 30TH APRIL 2009

BETWEEN

REPUBLIC.....……...……..……APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI……...…..……RESPONDENT

DR. JOHN NYAMU t/a VINE YARD HOLDINGS...……INTERESTED PARTY

EXPARTE

NAIROBI CITY MARKET STALL HOLDES ASSOCIATION

(Suing through)

MESHACK MBUTHIA MACHARIA - CHAIRMAN

MARY ELSA ACHOLA - SECRETARY

SAMUEL MBUTHIA NGOKONYO - TREASURER

J U D G M E N T

By way of a Notice of Motion dated 29th June 2009, the Exparte Applicant the Nairobi City Market Stall Holders Association suing through its officials namely – the Chairman - Mechack Mbuthia Macharia, the Secretary - Mary Elsa Achola and the Treasurer - Samuel Mbuthia Ngokonyo (hereinafter referred to as the applicants) moved this court seeking an order of prohibition in the following terms:

(a) <u>THAT</u> an order of prohibition do issue directed to the 1st Respondent to prohibit the Respondent from any further actions and/or proceedings acting either by itself, and/or through the Interested Party, its agents servants, employees or assignees pursuant to the Notice to relocate dated 30th April, 2009 threatening to remove the Applicant\'s members from their trading premises on Land Reference Number 209/1855/1 situate between Muindi Mbingu Street and Koinange Street, Nairobi pending the hearing and the determination of the intended application by the Applicant for judicial review orders prayed for herein.

(b) <u>THAT</u> the Interested Party, whether by himself, his servants, agents or whosoever be restrained from commencing and/or proceeding with the proposed development on Land Reference Number 209/1855/1 situate between Muindi Mbingu Street and Koinange Street, Nairobi pending the hearing and final determination of the intended application by the Applicant for judicial review orders prayed for herein.

The Applicants also prayed that costs of the application be borne by the 1st Respondent and the Interested Party.

The City Council of Nairobi is named as the Respondent while Dr. John Nyamu T/A Vineyard Holdings is named as the Interested Party.

The application was filed pursuant to leave granted on 11th June 2009. It is supported by the statutory statement dated 27th May 2009 and the verifying affidavit sworn by the Applicants\' chairman on even date.

The application is opposed by both the Respondent and the Interested Party. The Respondent opposed the motion through the replying affidavit sworn by Karisa Iha on 15th October 2009 and a further replying affidavit sworn by Aduma J. Owuor on 24th October 2011. The Interested Party opposed the motion through a replying affidavit sworn by Dr. John Karungai Nyamu.

Briefly, the facts giving rise to these proceedings are that the members of the Applicant who according to facts stated in the statutory statement are about 100 in number are tenants of the Respondent. They are traders duly licensed to conduct various businesses in the permanently developed stalls within the City Market located on LR. No.209/1855/1.

On 24th May 2006, the Respondent advertised for tenders for renovation of the markets in the City of Nairobi including the City Market infill where the stalls in which the applicant\'s members conducted their businesses were located. After the tendering process was completed, Vineyard Holdings Ltd. whose director is named as the Interested Party was awarded the tender to renovate the City Market infill.

On 30th April 2009, the Respondent served each trader to be affected by the renovation exercise with a notice to relocate or vacate from the premises to facilitate the planned renovation.

By letter of even date (30/4/09) referenced "**promissory note**" both the Respondent and the Interested Party made an undertaking to give the affected traders first priority in the allocation of the renovated stalls once the exercise was complete.

Aggrieved by the relocation notice which the Applicants\' members claim amounted to a termination of their tenancies with the Respondent, the Applicants moved to court and obtained leave to

commence the instant judicial review proceedings. The Applicants complain that the Respondent had failed or refused to give the Applicants\' members a hearing on the proposed development affecting their business premises and which would affect their welfare.

They also contend that it would be unfair, inequitable and unjust for the Respondent to proceed with the planned renovation of the stalls at the expense of its member\'s welfare.

The Interested Party supported the Respondent\'s case. The Respondent\'s case is summarized in the affidavits sworn on its behalf by Karisa Iha and Aduma J. Owuor.

The Respondent\'s case is that it is the custodian of all public land and property on LR. No.209/1855/1 being the Local Authority having jurisdiction over where the suit property is situated.

The Respondent contends that pursuant to its mandate to maintain the suit property, it issued the relocation notice to the Applicants\' members inorder to facilitate the planned renovation of the premises they occupied since it was impossible to carry out the renovation exercise when the traders continued to carry on their businesses some of which involved the selling of foodstuffs. The Respondent further claimed that the relocation was meant to be for the period taken for the renovation of the premises after which the Applicants would be allowed to reoccupy the upgraded stalls.

Both the Respondent and the Interested Party denied the Applicants\' claim that they had not been given a hearing prior to being served with the relocation notices.

They averred that their representatives and those of the Applicants held a meeting on 16th April 2009 in which it was agreed that the traders would re-locate for 1½ months to give room for the renovation to take place and once it was completed they would be given first priority in the allocation of the new stalls.

To further advance their respective positions, the parties filed written submissions which their advocates on record briefly highlighted before me on 16th July 2012.

Having considered the pleadings filed in this case, the authorities cited together with the submissions made by counsels on record for the respective parties, I find that two main issues emerge for determination by this court namely:

(1) Whether the application as drawn is incompetent and incurably defective

(2) Whether the court has jurisdiction to grant the reliefs sought.

(3) What order should be made on costs.

Mr. Wanjohi, learned counsel for the Interested Party submitted that the Applicants\' Notice of Motion was incurably defective as it contained serious procedural omissions which went directly to its root and could not be ignored by the court. He submitted that the Notice of Motion was drawn in exactly the same way as the chamber summons which had been used to seek and obtain leave the only difference being that of change of title. Mr. Wanjohi pointed out that the prayers for orders of Prohibition in Prayer 1 and 2 end with the words

"pending the hearing and determination of the intended application by the Applicant for judicial review orders prayed for herein".

The motion also contains prayer (c) which seeks that leave granted operates as stay of the

"proposed development by the 1st Respondent and Interested Party on Land Reference Number 209/1855/1 situate between Muindi Mbingu Street and Koinange Street, Nairobi pending the hearing and final determination of the intended application by the Applicant for judicial review orders prayed for herein".

He submitted that as the chamber summons seeking leave was spent when leave was granted, there was no application pending hearing and determination by the court on which Prayer 1 & 2 could be grounded.

It was also submitted on behalf of the Interested Party that the application offends Order 53 Rule 1(2) of the Civil Procedure Rules as the Applicant has tendered all the evidence supporting their application in the statutory statement instead of doing so in the verifying affidavit.

Finally, Mr. Wanjohi submitted that the order of prohibition is not available to the Applicants as subject matter of suit is termination of a contractual relationship which is not justiciable under judicial review. Mr. Mutiso, learned counsel for the Applicants in answer to these submissions conceded that both the chamber summons application and the notice of motion filed herein had not been properly drawn. He however argued that the irregularities in the face of the Notice of Motion amounted to procedural technicalities which the court was empowered to disregard under Article 159(2)(d) of the Constitution. He urged the court to disregard the same and find that the application was properly before the court.

I have carefully considered the pleadings filed in this case and the rival submissions by counsel on record.

Having scrutinized the notice of motion filed on 29th June 2009, the statutory statement and the verifying affidavit filed in support of the application, I am persuaded to concur with Mr. Wanjohi for the Interested Party that the notice of motion is indeed incompetent and incurably defective. A look at the Notice of Motion shows clearly that it is drafted as an interlocutory application seeking orders of prohibition in the interim pending the hearing and determination of an intended application for judicial review. The wording of the application illustrates that the Notice of Motion was not the application commencing judicial review in pursuance to leave granted on 11th June 2009.

Mr. Mutiso, learned counsel for the Applicants sought to explain this anomaly by claiming that the drafting of the application as filed was a mistake which should be excused as a procedural technicality and disregarded under Article 159(2)(d) of the Constitution.

It should be noted that the application was filed in June 2009 and if the wording in the prayers thereof was a mistake, no attempt was made to rectify the said mistake for the 3 years or so that the case has been pending by applying for leave to make appropriate amendments on the Notice of Motion or by taking any other appropriate action.

It is my view and finding that what is described by Mr. Mutiso as a mistake is not a procedural technicality or a mistake that merely affects the form of the application. It is a fundamental mistake which goes to the substance of the application which cannot be ignored or excused under Article 159(2)(d) of the Constitution. The application on the face of it shows that it is not intended to be the substantive notice of motion commencing judicial review proceedings which is contemplated under Order 53 Rule 3(1) Civil Procedure Rules (CPR).Order 53 Rule 3(1) of the Civil Procedure Rules requires that when leave to apply for orders of mandamus, prohibition or certiorari has been granted, an application for orders in respect of which leave had been granted should be filed to the High Court by way of a notice of motion within 21 days. The notice of motion filed herein shows clearly that the substantive motion commencing judicial review proceedings is yet to be filed.

The law is that parties are bound by their pleadings. The court can only rely on pleadings as filed since they form the foundation of a litigant\'s claim. Any substantial error on pleadings should be rectified by way of amendment by the concerned party at the earliest opportunity. This does not off course apply to errors which go to the form of the pleadings say for example citation of the wrong provisions of the law in the title of applications, typographical errors, or using wrong procedure in filing applications for example filing a chamber summons when procedural law requires filing of a Notice of Motion in a given situation. Prayers sought for in pleadings go to the substance of the application or a party\'s case and that is why a court cannot grant orders which are not sought for in the pleadings.

In the circumstances, I am persuaded to find that the notice of motion before the court does not constitute a proper and valid application for judicial review as and it is therefore incompetent.

Further to the above, I find that the application is also defective since no evidence was adduced by the Applicants in support thereof.

The Applicants filed a four paragraphed verifying affidavit which did not contain any facts supporting the application. Instead, the applicants heaped all evidence in the statutory statement. This contravened Order 53 Rule (1)(2) of the Civil Procedure Rules which provides that the statement shall set out the name, description of the Applicant, the relief sought, the grounds upon which the Application is brought and shall be accompanied by affidavits verifying the facts relied on. I am guided in this finding by the decision of the Court Appeal in **Commissioner General, Kenya Revenue Authority -Vs- Silavard Onema Owaki CA 45/00** where the Court of Appeal said

"***We would observe that it is the verifying affidavit not the statement to be verified which is of evidential value in an application for judicial review" .***

This means that the facts and evidence supporting an application for judicial review should be contained in the verifying affidavit and not in the statutory statement. This is so because facts which have not been stated under oath cannot amount to evidence. In the circumstances, there is no evidence in this case to support the Notice of Motion. The Notice of Motion has no legs to stand on and it cannot therefore be sustained.

My finding on the competence of the notice of motion would have been sufficient to dispose off this proceedings but I wish to briefly comment on the merits of the application.

By their own admission, the Applicants confirmed that they were tenants in the premises leased to them by the Respondent. They also admitted that the notice to vacate the premises amounted to a termination of their tenancies and that it is the Respondent\'s failure to withdraw that notice that prompted the filing of these judicial review proceedings.

It is clear from the foregoing that what existed between the Applicants and the Respondent is a contractual relationship of Landlord and Tenant and if there was a breach of terms of that contract, the Applicants remedy was in the realm of private law which could be redressed in conventional civil courts and not through judicial review which is concerned only with matters related to public law. Judicial review is a public law remedy that issues to supervise public bodies and public authorities in the performance of their administrative duties to ensure that their decisions or actions are in accordance with the law.

In the case of **Zakhem Construction \'K\' Ltd Vs Permanent Secretary, Ministry of Roads and Public Works C/A 244/06** the Court of Appeal confirmed that judicial review cannot provide a remedy for an alleged breach of contract. Since the Applicants complaints related to an alleged breach of contract governing their tenancy with the Respondent, it is my finding that the same are not justiciable under the judicial review jurisdiction of this court. The judicial review remedy of prohibition is therefore not available to the Applicants.

It is also worth noting that the Applicants have not challenged the validity of the notice dated 30th April 2009 directing them to vacate their leased premises. They have not sought its quashing by orders of certiorari. They have not also claimed that it was issued without jurisdiction or that it was issued in contravention of the law. The order of prohibition, issues to prohibit public bodies or public authorities from undertaking actions or making decisions which are either in excess of or outside their jurisdiction or actions or decisions which if carried out would be contrary to the law.

Judicial review remedies cannot be used to stop or prevent public authorities or public bodies from executing their statutory functions and mandates if the same are executed within the confines of the law.

In this case, the Respondent had a statutory mandate under Section 145 (viii)(i) of the Local Government Act to establish, maintain, let and manage public markets and market buildings.

It is not disputed that the premises (stalls) leased by the Applicants from the Respondents were an extension of what is commonly referred to as the City Market which the Respondent was statutorily obligated to maintain and upgrade for the benefit of all city residents who included the members of the Applicants.

Since there is evidence that the Respondent heard members of the Applicants through their representatives before serving them with the notice to vacate the premises (see averments to that effect in the Respondents and Interested Party\'s replying affidavit which have not been controverted by the Applicant) and there is no claim that the intended renovation of the suit premises would be ultra vires the powers and mandate of the Respondent under the Local Government Act, I find that the Applicants have not laid out any basis upon which this court can issue orders of prohibition.

In view of the foregoing, I am satisfied that the Applicants\' Notice of Motion is not only incompetent but is also devoid of merit. It is consequently dismissed with each party bearing its own costs.

DATED, DELIVERED and **SIGNED** this 16th day of October 2012.

C.W. GITHUA
JUDGE

In the presence of

Florence – Court Clerk

N/A for the Applicants

Mr. Wanjohi holding brief for Omotti for the Respondent

Mr. Wanjohifor Interested Party