REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
JUDICIAL REVIEW NO. 1 OF 2010

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDIGNS FOR JUDICIAL REVIEW ORDERS

AND
IN THE MATTER OF LAW REFORM ACT (CAP 26) SECTIONS 8 & 9
BETWEEN

REPUBLIC …….……. APPLICANT

-VERSUS-
MUNICIPAL COUNCIL OF ELDORET.....RESPONDENT

AND
JOHN KIPKOSGEI KRUI
JACOB OMONDI OWITI
ANNE WASHUKA GATHITU
JOE LAGAT KIBEIGO
HELLEN JEPCHIRCHIR
JOSEPHE KIPKORIR TOMERENG
RODAH CHEPKEMOI MARU
SUSAN INGOZI
D.M. KIDOYA
CAREN C. ROP
MARGARET OTIENO
AICE OKELLO
JOSEPH K. ROTICH
MARYNORAH C. SAMBU
RUTH NGUGI
PAMELA BOIT
LAWRENCE MAYENGE
RISPER WANGO
EVERLYNE CHEPKURUI
GRACE MUGE
GEOFREY LELGO
ROSE KOMEN AND
HELLEN J. TALLAM .....EX PARTE APPLICANTS

JUDGMENT

On 10th February, 2010,the applicants were granted leave by

Osiemo J, (retired) to bring judicial review proceedings by way of:-

(a) An order of certiorari to quash the decision of the respondent, Eldoret Municipal Council, to increase house rent of Kapsoya Primary Teachers' quarters and Union Teachers' quarters.

(b) An order of mandamus to secure the performance of the respondent to repair the Teachers' quarters.

The grant of leave was to operate as stay of the said decision. The applicants then lodged this Notice Motion dated 26th February, 2010 seeking the orders for which leave had been obtained. The main grounds for the application are that the applicants are tenants of the respondent and the latter without prior consultations increased their rent; that the increase was made without according to the applicants a hearing and that the houses are in a deplorable state despite the respondent's promise to repair them.

The Notice of Motion is supported by a statutory statement dated 8th January, 2010 verified by an affidavit sworn by the first applicant **John Kirui**. From the statement and the affidavit, the following facts have emerged: That the applicants are the respondent's tenants at the Kapsoya Primary and Union Primary Teachers' Quarters; that the respondent increased the rents payable with effect from 1st September, 2009 without reference to them; that the increase was unconscionable and unjustified given that the respondent does not keep the said houses in good repair.

The application is opposed by the respondent who has filed a replying affidavit by its Deputy Town Clerk. There are also six (6) grounds of objection contained in a Notice of Preliminary Objection filed by the respondent's advocates. The said Deputy Town Clerk has deponed, *inter alia*, that the decision impugned is not exhibited; that the dispute between the parties is a private law dispute outside the purview of judicial review; that the rents and the fees were gazetted by the respondent without challenge; and that the application is incompetent and should be dismissed. The main objection raised in the Notice of Preliminary Objection is that the application is not validly supported and does not comply with the provisions of Order LIII of the Civil Procedure Rules.

When the application came up before me for hearing on 10th May, 2011, counsel agreed to file written submissions which were duly in place by 24th may, 2011. Those submissions reiterated the stand-points taken by the parties in their respective pleadings.

I have considered the application, the pleadings filed and the submissions of counsel. I have also given due consideration to the authorities cited to me. Having done so, I take the following view of the matter. The applicants seek two orders namely, an order of Certiorari for the purposes of quashing, the decision by the respondent to increase rents of Kapsoya Teachers and Union Teachers Quarters and an order of mandamus to secure the performance of the respondent to repair the said quarters.

It is settled that an order of Certiorari can issue to quash a decision of an inferior tribunal or body if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with. It will also issue if the decision is clearly contrary to the Law. What do the applicants allege in this case? They state that the decision to increase rent was taken without their being accorded a hearing which decision resulted in an excessive increment. They also aver that the respondent had promised to put the houses let to them in good state of repair but have not. The applicants therefore imply that if the respondent had kept the houses in question in good tenantable repair, they would not be complaining about the increase. Is this dispute therefore in the right forum? There is no gainsaying that the respondent is a creature of the Local Government Act. It can only do that which it is authorized to do by the Act and the rules made thereunder. If the allegation against it were that it is not doing what it is lawfully required to do, then obviously as a public body, it would be amenable to the orders of judicial review. It would also be so amenable if the allegation were that in doing what the law permits it to do, it has failed to comply with the rules of natural justice.

It would also be subject to the supervisory jurisdiction of the high Court if the allegation were that its decision is clearly contrary to the law or is perverse.

The applicants allege that the respondent has increased the rents payable in respect of the subject houses without consulting them. They cite no provision of the law upon which the allegation is based. The only provision cited in the supporting affidavit is Section 177 (d) of the said Act which permits the respondent to let any dwelling house erected or provided by it at reasonable rent. The applicants appear to suggest that the increase would have been reasonable if it was matched with repair of the houses. That acknowledgement is an admission that the respondent is not in breach of the cited provision. Even when determining what rent is reasonable, the Act does not require that the respondent consults its tenants. Take the ordinary LandLord and tenant situation under the Rent Restriction Act. Increase in rent, where the Act applies is resolved by a Tribunal established under the said Act. The LandLord has no statutory obligation to consult the tenant before increasing rent. I do not know the strength of the respondent's housing department. But it is expected to be reasonably sound with a large tenant base. Is it practical that a decision to increase rent be valid only after consulting each tenant? It is probably for that reason that the respondent gazetted the increase in rents pursuant to the provisions of Section 148 of the Local government Act. The gazette notice is exhibited by the respondent. The approval to increase the rents was given by the relevant Minister way back in May, 2009. The gazette notice has not been challenged by the applicants. They have not even alleged that the approval was irregularly given or that rules of natural justice were not observed before the approval was given. There is also no suggestion that the said gazette notice contravenes any revision of the law or that it is ultra vires the Act. It cannot also be said that in having the increases approved, the respondent took into account factors which it ought not to have taken into account or failed to take into account matters it ought not to have taken into account (See **Associated Provincial Picture House Ltd –vrs Wednesbury Corporation [1947] 2 ALL ER 680**.

I cannot also say that the increase as gazetted is so unreasonably high that no reasonable Local Authority could ever have approved the same.

How about the order of mandamus sought. The same is expressed as follows:-

"An order of Mandamus be …… issued to secure the performance of Eldoret Municipal Council to repair the Teachers' quarters as affirmed by the council in their letter to the applicants dated 10th November, 2009."

Halsbury's Laws of England 4th Edition vol. 1 at page III has the following passage on mandamus:-

" The order of mandamus is of a most extensive remedial nature, and is, in form a command issuing from the high Court of Justice directed to any person corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a pubic duty. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done; in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient beneficial and effectual."

There is also the following passage:-

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

The applicants herein occupy distinct houses of the respondent. Those houses cannot be in the same state of disrepair. In any event, as the LandLord, the respondents' obligation is limited to specific aspects of repair. The applicants have made an omnibus allegation of disrepair of the houses. They must have done

so because of the scope of the judicial review jurisdiction which is inappropriate for what the applicants seek. In my view, each individual applicant has a specific claim regarding specific disrepair of his or her house which claim may be adjudicated upon in the ordinary way. Then each of them will specify what he or she requires repaired failing which ordinary enforcement mechanisms may be applied. It is plain that a blanket order of repair may not be efficacious. In the end, I have come to the conclusion that judicial review order of mandamus is not available to the applicants.

Before concluding this judgment, I should comment on what in my view should have been determined as Preliminary issues. The first such issue relates to the supporting affidavit sworn by **John Kipkosgei Kirui**. As the respondent argued, that affidavit was filed without the leave of the Court. Under Order LIII, as it then applied, an application for judicial review order was to be accompanied by a statement and a verifying affidavit. The applicants herein filed a statement and a verifying affidavit as well as a supporting affidavit. Strictly speaking, it was the verifying affidavit which should have verified the facts relied upon. The verifying affidavit filed herein did not serve that purpose. The purpose was served by the supporting affidavit which was filed without the leave of the Court. In the premises, the Notice of Motion was liable to be struck out as incompetent. It was liable to be struck out for the further reason that the affidavit which supported the motion i.e the affidavit sworn on 26th February, 2010 had not accompanied the application for leave which was lodged on 14th January,2011.

The applicants therefore clearly contravened the provisions of order LIII Rule 4 (1) (1) of the Civil Procedure Rules.

Notwithstanding the lapses committed by the applicants, I have decided to consider their application on its merits given the provisions of section 1 (A) of the Civil Procedure Act and Article 159 (2) (d) of the Constitution.

The upshot of my consideration of the applicants' Notice of Motion is that the same has no merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS
27TH DAY OF JULY 2011

F. AZANGALALA
JUDGE

Read in the presence of:-
1. **Mr. Omusundi** for the respondent and
2. **Mr. Barasa** holding brief for **Mr. Kirui** for the applicant.

F. AZANGALALA
JUDGE.