



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Miscellaneous Civil Application 757 of 2005

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF KENYA CONSTITUTION

AND

IN THE MATTER OF NATIONAL HOUSING CORPORATION POLICE FOR KENYA SESSION PAPER NO.3

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP.265

AND

IN THE MATTER OF THE HOUSING ACT CAP 117 LAWS OF KENYA

BETWEEN

JAELYN LUKAI OPUNGA & 358 OTHERS..... EX PARTE APPLICANTS

VERSUS

THE MINISTER FOR LANDS AND HOUSING..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 2ND RESPONDENT

NATIONAL HOUSING CORPORATION..... 3RD RESPONDENT

THE CITY COUNCIL OF NAIROBI..... 4TH RESPONDENT

JUDGMENT

The ex parte applicants, (359 in number) are residents of Madaraka Estate in Nairobi. Construction of Madaraka Estate was financed by the National Housing corporation on direction by the Government. It was passed over to Nairobi City Council on loan. The Applicants have been paying rent to the council and it has been renewed over the years.

In 1998, the National Housing Corporation the (3rd Respondent) took over the management of the Estate. On 27/10/04 National Housing Corporation wrote to the Applicants informing them of the increase of rent by 105% with effect from 1/2/05. On 3/2/05 the houses were offered to the applicants for sale and they were allowed 14 days to accept the offer. Some of the Applicants were unable to pay increased rents on the price and hence this application challenging the decision of the 3rd Respondent. The Applicants seek the following orders:-

1. An order of prohibition to stop or prohibit any person or officer from charging increased rent or any housing units in Madaraka Estate in evicting the sitting Tenants of Madaraka Estate.
2. An order of Mandamus compelling the Respondents to sell the Housing Units in Madaraka Estate to the sitting Tenants through a Tenant purchase Scheme.
3. An order of certiorari to remove into the court and quash the decision of the 3rd Respondent as a subsidiary of the 1st Respondent on 27/10/04.
4. An order of certiorari to remove into the court and quash the decision of the 3rd Respondent in implementing the 1st Respondent's seasonal paper No.3 on Public Housing.

The Respondents are the Minister for Lands and Housing, the Hon. The Attorney General; The National Housing Corporation and the City Council of Nairobi – (1st and 4th Respondents).

The application was opposed. On 10/2/10 when it came up for hearing, Mr Nyamu, counsel for the Applicants submitted that the prayers had been overtaken by events and he sought the court to order that Applicant should not be condemned to pay costs. He urged that since the houses in issue have already been sold, prayer 1 cannot be granted. That prayer 2 has also been overtaken by events since the 3rd Respondents already received rents of the houses by the filing of a consent order on 15/5/06 before J. Emukule. That prayer 3 has also been overtaken by events since prices of the houses were reduced by Kshs.900,000/= which resulted on the consent of 18/5/06. That prayer 4 has also been overtaken by events since the sessional paper sought to be quashed has been implemented. That it is not the Applicants fault that the prayers have been overtaken by events. That the Respondents addressed the issues that prompted the application, if there are any costs to be paid, the 3rd Respondents should be asked to pay.

Mr. Menge Counsel for the 1st and 2nd Respondent relied on skeletal arguments and grounds on 24/11/07. He urged that the Respondents be paid their costs because the Applicants never informed them of the developments that have been alluded to by Mr. Nyamu in his submissions before the court.

Mr. Mwenda, counsel for 3rd Respondents opposed the application and relied on grounds of opposition and notice of Preliminary Objection dated 20/2/06 and a replying affidavit dated 11/10/06. He urged that no affidavit has been filed by the Applicant to include what the counsel told the court about the orders having been overtaken by events but that it has been stated from the bar. That the Applicants wish to withdraw the suit because they do not want to prosecute it. That in this case, Judicial Review being discretionary remedies, the conduct of the parties is relevant. That since the Applicants came to court under certificate of urgency, they have never been ready to proceed. That thereafter counsel tried to get off record for lack of instructions. That the Applicant's counsel had persuaded the 3rd Respondent to allow them withdraw the motion with no order as to costs but the 3rd Respondents insisted on being paid their costs. That in any event even if the applicant proceeded to hearing, the application lacked any merit. This is because a similar matter was filed by Madaraka Residents and it was dismissed with costs to Respondents in **MISC 580/05 R V CITY COUNCIL OF NAIROBI AND NATIONAL HOUSING CORPORATION**. Counsel urged that the application be dismissed with orders going to the 3rd Respondent.

Mr. Nderitu for 4th Respondent associated himself with Submissions made on behalf of the 3rd Respondent. He added that the

Applicants were aware that the 3rd Respondent came into the matter by virtue of S 12 of the Housing Act and once the rent was revised, the 4th Respondent ceased being a Landlord. But that they still joined the 4th Respondent to these proceedings that is why they should be paid the costs of the motion.

I do agree with the submission that all what the counsel for the Applicant has told the court is hearsay. No affidavit has been sworn or an application supported by evidence to demonstrate what he now tells the court from the bar. There is no evidence that the prayers were overtaken by events because of what happened. It is all hearsay.

Counsel has also urged that the events he alludes to took place in 2006. It is now 2010, about 4 years later. Why was this notice of motion left in obedience till today? The parties have been before this court very many times since 2006. In fact in 2009, the parties appeared before me ten times. There is no reason why the motion was not withdrawn in 2006.

Mr. Mwenda urged that there is HMISC 580/05 between some tenants from Madaraka Estate and the 3rd and 4th Respondents. In that case, the tenants sought similar prayers to the instant one. Issues were also the same. The court heard that application on merit and dismissed it for trying to create and enforce a contract between the parties and that the Applicant had not proved that the Respondents acted contrary to any statute of provision. This case would therefore have seen the light of day. It is not clear why the Applicants let this matter remain in court for so long and parties continued to incur costs.

Since the year 2008, Mr. Nyamu sought to be allowed to cease acting for the Applicants for lack of instructions. He is the same counsel who has urged this application. Why did he seek all these adjournments when he knew very well that the motion had been overtaken by events? The court mentioned and fixed this matter for hearing over 10 times, during that period till the motion was heard. There has been an unexplained delay in prosecution of this matter. I find no merit in the application submission that they should not pay costs of this application. It seems that the Applicants noticed that the application will not succeed long time ago. And for all the reasons stated above the Notice of Motion is hereby dismissed having been overtaken by events and the applicants will bear the costs of this application.

Dated and delivered at Nairobi this 22nd day of March 2010.

R.P.V. WENDOH

JUDGE

Present:

Ms Njagi holding brief for Mwenda for 3rd Respondent

Mr. Menge for 1st and 2nd Respondent

Muturi: Court clerk