



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 350 OF 2007

IN THE MATTER OF: AN APPLICATION BY BILHA WARUGURU WANJOHI

AND

**IN THE MATTER OF: ORDER LIII CIVIL PROCEDURE ACT AND RULES, THE LAW REFORM ACT CAP 26,
THE JUDICATURE ACT CAP 8, SECTION 3 A OF THE CIVIL PROCEDURE
ACT CAP 21 AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

AND

IN THE MATTER OF: HOUSE NO. HG 657A – KILELESHWA, NAIROBI

BILHA WARUGURU WANJOHI.....APPLICANT

- VERSUS -

THE REPUBLIC THROUGH

ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF

LANDS, NAIROBI.....2ND RESPONDENT

THE PERMANENT SECRETARY, MINISTRY

OF PUBLIC WORKS & HOUSING3RD RESPONDENT

ABRAHAM KAMAKIL.....INTERESTED PARTY

RULING

On 30/4/2007, the Applicant Bilha Waruguru Wanjohi, filed this Notice of Motion seeking an order of prohibition directed at the Commissioner of Lands, 2nd Respondent, to prohibit him from allocating and registering the House No. HG 657 A, Kileleshwa, to Abraham Kamakil, the Interested Party, herein; an order of mandamus compelling

the 2nd Respondent and the Permanent Secretary Ministry of Works (3rd Respondent) from irregularly or unlawfully allotting the said house to the Interested Party and lastly, an order of certiorari to quash the decision of the Permanent Secretary denying the Applicant an allocation of the said house and instead allotting it to the Interested Party. The Interested Party and Respondent duly filed their replies and submissions in preparation for the hearing of the said application. When leave was granted on 10/4/2007 the same was ordered to operate as stay. On 9/12/2010 the court issued a notice to show cause to the parties to show cause why the matter could not be dismissed for want of prosecution. On 1/2/2010, the Interested Party and Respondent counsels appeared but not the Applicants and the court directed the notice to show cause to be served and heard on 24/6/2010. Again the Interested Party and Respondent appeared but not Applicants. It was adjourned to 2/7/2010 and both the Interested Party and Respondent attended. Mr. Omangi, counsel for the Interested Party intimated to the court that the notice to show cause had been served. The court was satisfied that the Notice to Show Cause had been served it went ahead to dismiss the Notice of Motion dated 30/4/09 for want of prosecution. The Applicant has now filed the application dated 7/8/2010 under certificate of urgency asking this court to review its order of 2/7/2010 dismissing the Notice of Motion dated 30/4/2007 and have it reinstated. The main grounds on which the Applicant brings the application is that they were not aware of the court's orders of 2/7/2010 till 26/8/2010 when the Applicant was forcefully evicted from the suit premises. Secondly, it was counsel's contention that the matter was erroneously dismissed as it was already partially heard as they had filed all their papers and the matter was ready for hearing.

The Respondent and Interested Parties opposed the application for reasons that there was inordinate delay in seeking review of the courts orders, that the court has not been properly moved under the correct provisions of law to grant the orders and that in any case, the application dated 30/7/2007 is incompetent and even if the orders are granted they will not serve any purpose.

This is a court of record and the record does speak for itself. Since leave to commence these Judicial Review proceedings was granted on 10/4/2007, and the said leave was ordered to operate as stay, the Applicant went to sleep. At no time did the Applicant ever make any move towards the prosecution of her own application. Omangi & Musanga Advocates for Interested Party had the matter listed for mention on 29/7/2009 but the Applicants did not attend. The Interested Party again moved the court for mention of the matter on 9/2/2010 but none of the parties was in attendance. That is when the court issued a notice to show cause. On 1/3/2010, both counsel for Interested Party and Respondent attended. There was no appearance for the Applicant. The Notice to Show Cause was extended to 24/6/2010 and then 2/7/2010 when the court dismissed this matter. The court record clearly shows that, apart from filing the submissions on 3/8/2009, after the stay order was granted the Applicant totally took advantage of the stay order and has not taken any interest in prosecuting this matter at all until the court dismissed the application resulting in the Applicant's eviction from the suit premises.

I also wish to note that the Applicants counsel is not forthright in telling this court that the Applicant was not aware of the courts order till they were evicted from the premises. Before dismissal of this application on 2/7/2010, the court was satisfied that the Applicant's counsel, Mang'erere Ngisa advocates had been served with hearing notice. There is a hearing notice on the court file dated 30/6/2010 indicating that the service was done on 30/6/2010 at 3.51 p.m. It was received by Mang'erere Ngisa Advocates under protest. Even if the notice was too short and the Applicant's counsel was not ready to proceed the next day, he had a duty to ensure that he appeared personally through a representative to seek more time to prepare for the notice to show cause. Instead, counsel just kept away. To add to that, despite the fact the Applicant's counsel was aware that the matter was slated to proceed on 2/7/2010, he never bothered to find out what happened in the matter thereafter. Again, it seems counsel decided to sit back as the Applicant continued to enjoy the orders granted on 30/4/2007. Neither the Interested Parties nor the court can be blamed for the fate that later befell the Applicant. The counsel's conduct speaks volumes and what counsel has told the court just shows they are not candid. If the counsel has let their client down by not attending court or following up the matter for purposes of prosecution, they should admit and not lay blame on other any party. Before the court made its orders on 2/7/2010, it took into account the fact that counsel on record was not taking any steps towards prosecution of the Notice of Motion and yet the Applicant were enjoying stay orders to the disadvantage of the Interested Party who claims to have an interest in the house. Having been aware that the matter would come up for notice to show cause on 2/7/2009, I do find that there was inordinate delay in bringing this application and the said delay has not been justified. In addition the counsel did not act diligently.

On the contention by Mr. Manyaba that the court had partially heard this matter, that is incorrect. The court gives directions on when the matter is ready for hearing and gives dates. The Applicant's counsel had never attended court since 10/4/2007 in order to take dates for the hearing. It is evident from such conduct that the Applicant's counsel did not act diligently.

Judicial Review is a special jurisdiction which is governed by Sections 8 and 9 of the Law Reform Act, being the substantive Law and Order 53 CPR providing the procedure. In **KUNSTE HOTEL LTD – VS – COMMISSIONER OF LANDS CA 234/1995**, the Court of Appeal held that Judicial Review is a special jurisdiction to which the Civil Procedure Rules do not apply. Section 80, 3 A and Order 9 B, Order 44, the new amendments to the CPA under Section 1 A and B do not apply to Judicial Review. I find and hold that this court's jurisdiction is not properly invoked. Section 8 (3) of the Law Reform Act bars review or setting aside of Judicial Review orders and Sections 8 (5) provides that orders in Judicial Review are appealable to the Court of Appeal. Section 8 (3) and (5) provides as follows:-

***“S. 8 (3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.*”**

(5) any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.”

There is no provision for review or setting aside under Order 53, Civil Procedure Rules. However, in deserving cases the courts have sometimes exercised their inherent powers under Order 53 Civil Procedure Rules in order to do justice to the parties. This case is however not deserving of the exercise of the court’s discretion nor was the courts inherent jurisdiction been invoked.

Lastly, I do agree with counsel for the Respondent that granting of the order to review the court’s decision of 2/7/2010 would be acting in futility because a look at the substantive motion shows that it is incompetent. It is brought in the name of the Applicant instead of the Republic. It is trite law that Judicial Review applications are brought in the names of the Respondent on behalf of the aggrieved party. The Applicant has no capacity to bring the application in her own name. Even if the Notice of Motion is reinstated, it would still be dismissed for being incompetent. I adopt my decision in **LOISE MTOROGE – VS – REGISTRAR OF TILTES H.MISC. 71/2008**.

For all the reasons considered above, I find that the application is brought in bad faith and the same is an abuse of the court process and is also incompetent. It is hereby dismissed with counsel for the Applicant bearing the costs personally.

Dated, and Delivered in Nairobi this 24th day of September, 2010.

R.P.V. WENDOH

JUDGE

Present:

Mr. Mayamba - for Applicant

Mr. Sewe H/B for Mr. Oundo - for Interested Party

Muturi - Court Clerk