

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Application 1 of 2007

REPUBLICAPPLICANT

AND

THE MINISTER FOR LOCAL GOVERNMENT1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE MUNICIPAL COUNCIL OF MOMBASA3RD RESPONDENT

ROBERT MAKAU & 182 OTHERSEXPARTE

RULING

Pursuant to the provisions of Sections 8 (2) of the Law Reform Act and under Order LIII rule 3(1) of the Civil Procedure Rules, Robert Makau and 182 others, hereinafter referred to as the applicants took out the notice of motion dated 20th January 2007 in which they applied for an order of certiorari to have the decision of the Municipal Council of Mombasa, the 3rd Respondent herein published in the Kenya Gazette notice no. 5184 of 7th July 2006 to be quashed. The motion is accompanied by a statement of facts and verified by the affidavit of Robert Makau sworn on 20th January 2007. The Minister for Local Government and the Attorney General are named as the 1st and 2nd Respondents respectively. The Mombasa Municipal Council opposed the motion by filing the replying affidavit of Tubman Otieno sworn on 19th November 2008. Learned Counsels appearing in this matter recorded a consent order which was approved by this court to dispose of the motion by written submissions.

I have considered the grounds set out on the face of the motion plus the statement of facts and the facts deponed in the verifying and the replying affidavits. I have also considered the written submissions and the authorities cited by learned counsels. It is not in dispute that the applicants herein are tenants occupying premises owned and or managed by the 3rd Respondent. There is also no dispute that the 3rd Respondent with the approval of the 1st Respondent increased rent payable by the applicants vide Kenya Gazette notice no, 5184 of 7th July 2006. The 3rd Respondent is said to have made the decision under Section 148 of the Local Government Act. It is the contention of the applicants that the powers conferred on the 3rd Respondent under S.148 of the Local Government Act are not absolute. It is argued that where the Minister gives consent to local authority to increase rent or otherwise, the consent must be preceded by a resolution of the local authority. Consequently, the applicant argued that the Minister cannot give consent where there is no resolution under S.148 (2) of the Act. It is averred that the Mombasa Municipal Council did not pass a resolution before seeking the Minister's approval to increase rent. Consequently the decision is null and void hence amenable to be quashed by an order of certiorari.

The 3rd Respondent on the other hand vehemently opposed the motion on the basis that the dispute arose out of a tenancy (contractual) relationship between the applicants and the 3rd Respondent hence such a dispute cannot be subject of judicial review proceedings. It is argued that the issue relating to the increase of rent can only be dealt with within the contract. It is said that the 3rd Respondent entered into a tenancy relationship with the applicants under s.177 (d) of the Local Government Act whereupon the parties bound themselves by the terms of the contract. It is argued that the tenancy agreement does not enjoy statutory protection. The 3rd Respondent contended that they only sought for the approval of the Minister to increase rent as an administrative procedure but not in compliance with a statutory obligation. The 3rd Respondent also urged this court to find that the motion has no merit because the decision sought to be quashed has not been exhibited. After anxiously taking into account the material placed before me. I am of the view that the only serious issue which was brought to my attention is whether or not the dispute between the 3rd Respondent and the applicants is a contractual relationship. It is obvious that the relationship between the applicants and the 3rd Respondent is that of a landlord-tenant relationship governed by a lease agreement which in essence is a contract. In altering the terms of the contract i.e. by increasing the rent, the 3rd Respondent did so by invoking its powers under

section 148 of the Local Government Act. It cannot be true therefore that the 3rd Defendant made an administrative decision. In my view and on the basis of the Gazette notice no. 5184 of 7/7/2006, the 3rd Respondent exercised a statutory power. I agree with the submission of Mr. Obwa, learned advocate for the applicants that the powers of the 3rd Respondent are not absolute but regulated by S.148(2) of the Local Government Act. The 3rd Respondent has said that the dispute should have been dealt with within the lease agreement. In my view that is a contraction, because the contract was interfered with by the 3rd Respondent in exercise of a power donated by S.148 (1) of the Local Government Act. The 3rd Respondent failed to show that it passed a resolution before seeking the Minister's approval. It would appear the discretion to increase or reduce rent was left out of the lease agreement. In my view the 3rd Respondent knew that such discretion could only be exercised under S.148 of the Local Government Act hence there was no need to introduce the same into the lease agreement. In making a decision whether to increase or decrease rent chargeable, the 3rd Respondent would in effect be exercising a statutory function. The 3rd Respondent did not comply with the provisions of S.148 (2) hence its decision is amenable to judicial review order of certiorari.

In the end I am convinced the motion dated 20th January 2007 is well founded. It is allowed as prayed with costs to the applicants.

Dated and delivered at Mombasa this 23rd day of July 2009.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Obura for Applicant.

Mrs. Kamwere Kibara for 2nd & 3rd Respondent

Mr. Maliro h/b Mr. Umara.