



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Miscellaneous Civil Application 78 of 2009

REPUBLIC.....APPLICANT

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....RESPONDENT

EX-PARTE

DAISY A. V. NAMIBAH.....SUBJECT

RULING

The applicant in this case has moved this court by way of Judicial Review under **Order 53** of the **Civil Procedure Rules**. She appeared ex-parte before this court praying that leave be granted to her

*“to institute judicial review proceedings in the nature of certiorari, mandamus and prohibition to bring to the High Court and be quashed the proceedings, and resolutions of the Municipal Council of Nakuru or the executive decision of the Town Clerk requiring the eviction of the subject from Moi Flats House No. 36.”*

and that the grant of leave

*“do operate as a stay of execution of the resolutions/executive decision of the Municipal Council of Nakuru and its Town Clerk”.*

Upon the grant of leave and a temporary stay the court ordered that the application be served for an interpartes hearing as to whether the leave herein given should operate as a stay pending the hearing of the substantive motion. Submitting in support of the application learned counsel Ms Omwenyo told the court that the exparte applicants’ suit is premised on an eviction notice issued on 15<sup>th</sup> June 2009 requiring the applicant to vacate the respondents’ house within 3 days. The said house had been initially leased to the applicants’ father who has since died. The applicant sought to take over the tenancy and the same was granted on condition that she continued to occupy the house at a monthly rent of Shs 3,000/= and that the arrears of rent owing as at the time of the applicant’s father’s demise be cleared. The applicant claims to have settled the said arrears, albeit, belatedly on 23<sup>rd</sup> June 2009.

The bone of contention is that no resolution was passed for the issuance of the eviction notice, something the applicant claims to be ultra vires the statutory powers of the respondent. Ms Omwenyo

cited **section 74(1)** of the **Local Government Act (Cap 265)** to support her argument that the respondent's housing committee ought to have met in order to pass a resolution to repossess the subject house. She also cited section 177(2) of the Act which prohibits the Council from disposing of land either by sale, lease or otherwise in breach of any agreement. Relying on the authority of **GUSII MWALIMU INVESTMENT CO. LTD & ANOR –vs- MWALIMU HOTEL KISII LTD (NRB C.A.) CIV. APPEAL NO. 160 of 1995** Ms Omwenyo submitted that the respondents' notice of three days was unfair and unjust and amounted to an extra-judicial exercise of the power of re-entry.

Opposing the application learned counsel Mr. Ndolo for the respondents' submitted that there was no dispute that the parties' relationship was governed by a lease agreement executed on 23<sup>rd</sup> October 2007 which stated, inter alia that the respondent would take over the suit premises at any time in the event that the agreed rent was not paid and if the default subsisted for a period of seven days. Counsel submitted that it was pursuant to this agreement that the respondent evicted the applicant on 20<sup>th</sup> May 2009 the applicant having failed to pay rent due as well as the outstanding arrears amounting to Shs 40,335. Upon the eviction, the house was leased to another person on 8<sup>th</sup> June 2009. Mr. Ndolo submitted further that the relationship between the parties herein being purely contractual, then the remedy of judicial review is not available, there being no proceedings or resolution for this court to quash as desired. Counsel pointed out that there being another suit in respect of the same subject matter, namely, CMCC No. 663 of 2009, wherein the applicant had obtained interim injunctive orders, then the present proceedings amount to an abuse of the process of court.

The power of local authorities to contract is clearly spelt out in section 143 of the Local Government Act (Cap 265). Under section 144 the respondent herein has the power to acquire and transact in land. As rightly stated by Ms Omwenyo, Section 177 of the Act makes provision for the manner in which a local authority is to deal in regard to the provision of housing for its inhabitants.

The said section provides inter alia, as follows:

“Section 177(1) A Municipal Council, Town Council or an urban council may, subject to any written law relating thereto

(a) ....

(b) ....

(c) ....

(d) Let any dwelling-house erected or provided by it and charge such reasonable rent for the tenancy or occupancy thereof as it may determine.

(e) Sell such dwelling house to a person undertaking to reside therein and recover the purchase-price thereof by such instalments as it may determine.”

The only restriction to the exercise of the above powers, as properly stated by Miss Omwenyo, learned counsel for the ex-parte applicant being as provided under subsection (2) which states that:

***“Nothing in sub-section (1) shall authorise the disposal of land by a local authority, whether by sale, lease or otherwise, in breach of any trust, covenant or agreement binding upon the local authority.”***

It is the same restriction imposed against a local authority in its exercise of its powers under section 144(5) which empowers it to

***“Let, grant to any person a licence to occupy, any land which it possesses.”***

It is not clear from Ms Omwenyo's submissions how the said restriction applies in the present case.

Under **section 143** of the **Local Government Act**, a local authority is empowered to enter into contracts necessary for the performance of its functions. It is not in dispute that one of the key functions of the respondent herein is to provide housing for its inhabitants in accordance with the provisions of section 177 of the Act. I do not consider this to be a general function though, for the purposes of section 74(1) of the Act which mandates local authorities to hold an annual meeting every year and least three other meetings at regular intervals for the transaction of general business. To require that meetings be held for the purposes of the provision, and management of individual tenancies would hamper the exercise of a local authority's functions under section 177 and curtail the authority's freedom to contract. For this reason the ex parte applicant's argument that a resolution ought to have been passed in this case cannot hold.

That there was a binding contract between the exparte applicant and the respondent is not disputed. The same is evidenced by the letter of offer or "*legalization (of occupancy) of council house*" dated 18<sup>th</sup> October 2007 and the rent card issued to the exparte applicant, pursuant thereto, on 22<sup>nd</sup> October 2007. The latter stated that the tenancy agreement would be cancelled automatically in the event that the rent due or part thereof remained unpaid for a period of 7 days from the normal paying period (*whether demanded or not*). The ex-parte applicant has stated in her supporting affidavit that she paid the monthly rent (*of Shs 2,500/=*), as it fell due, to the National Housing Corporation pursuant to a notice dated 30<sup>th</sup> June 2005 previously issued to all tenants with copy to the Town Clerk, Nakuru Municipal Council. She claims to have cleared her father's arrears in the same manner and has displayed a copy of the cheque and acknowledgement. The acknowledgement was communicated to the Town clerk as per annexure "**M**", citing the number of the receipt evidencing payment on 23<sup>rd</sup> June 2009. The same stated that she (*the house No. 36*) had "**cleared all his (sic) arrears including August 2009 rent all totalling Shs 165,500/=**" and under it, the Town Clerk was requested by the National Housing Corporation to assist where necessary. The respondent has said nothing about all this save that the monies were paid after eviction had taken place. The rent invoice exhibited before court, against which the arrears were paid, clearly shows that the late payment was in order and that a reversal of the status quo was possible. This is borne out of the fact that the same bears endorsements to the effect that:

**"2,000/= break in charges payable if broken into."**

and

**"500/= eviction charges payable if locked".**

Although the invoice stated that vacant possession was expected if the tenant failed to clear the outstandings by the 15<sup>th</sup> of May 2009, I am of the considered view that owing to the acceptance of the same after the said date estoppel came into operation against the respondent and the National Housing Corporation both of whom clearly acquiesced in the entire process. The ex-parte applicant applied for the house immediately after her father's death. She has demonstrated that she needed Estate funds to meet the conditions imposed for the continued occupancy in her name. This she could not do without obtaining letters of administration. As at 20<sup>th</sup> May 2005, when she says officials of the counsel demanded that she vacates, the grant of letters of administration had not yet been issued. Her advocates sought indulgence from the Town Clerk, Municipal Council of Nakuru, which does not appear to have been denied. The letter was copied to the National Housing Corporation. They were both made aware that as soon as payments from Kenindia Assurance were received the Estate would clear all the outstandings owing in respect of the subject matter. She did exactly that.

The respondent, by granting indulgence, did, in my view, vary the terms of the tenancy agreement on which it relies as it pushes for the eviction of the ex parte applicant. By accepting the rent and clearly not on a "**without prejudice**" basis, I am of the view that it waived any rights it may have had under the tenancy agreement to evict the ex parte applicant, who has to my satisfaction, fulfilled the obligations under the said agreement. In any event, and as I have already stated, the terms of the agreement as regards the period within which the conditions set out therein were to be met had been varied. That being the case, I am of the view that this case comes within the ambit of not only the **GUSII MWALIMU** case

(*supra*) but also the holding in **KADAMAS –VS- MUNICIPALITY OF KISUMU [1985] KLR 959** where the Court of Appeal, while holding that the remedy of judicial review is not available where the question in issue is purely private in nature without any public duty involved, went further to hold that the remedy of prohibition was still available where a public body acts or intends to act contrary to the rules of natural justice. While so holding the Court of Appeal distinguished the case before it from the leading case of **R –vs- EAST BIRKSHIRE [1985] QB 152** and its own authority of **REP –vs- KISUMU COUNTY COUNCIL AND MELKTZEDEK MINDO CIV. APPEAL NO. 29 of 1983.**

I am of the considered view that the facts and circumstances leading to the present situation where the ex parte applicant is properly positioned as a bona fide tenant militate against the purported eviction. I am satisfied that there is a real likelihood of her rights to shelter being unjustly taken away. The purported legalization of one Vincent Oduor was conditional upon his payment of the arrears which have now been paid by the ex parte applicant. There is no evidence that he complied. Even if he did and the Council accepted payment then the same would have been done contrary to the same council's acceptance of and acquiescence to the ex parte applicant's continued tenancy. The respondent cannot have its cake and eat it at the same time.

Taking all the above into consideration I am satisfied that the condition for staying the decision of the respondent have been established. I therefore order that the leave granted herein do operate as a stay pending the hearing and determination of the substantive motion in accordance with the rules. The ex-parte applicant shall continue to pay the rent due as per advises by the collecting body the National Housing Corporation of Kenya.

The substantive motion to be taken out within 21 days of this order.

Dated, signed and delivered at Nakuru this 23<sup>rd</sup> day of July, 2009

M. G. MUGO

JUDGE