REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Misc Civil Appli 25 of 2009

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS BY HENRY NGIGI, BENSON IRUNGU MWANGI AND 15 OTHERS

AND

IN THE MATTER OF DECISION OF THE DIRECTIORS OF SOCIAL SERVICE AND HOUSING OF THE MUNICIPAL COUNCIL OF THIKA ON THE 29TH DECEMBER 2008 TO INCREASE THE RENTS PAYABLE BY ALL TENANTS OCCUPYING RENTAL HOUSES AND SHOPS BCR (U – SHOPS) FROM KSH3,600/= TO KSH.7,000/= AND FROM KSH.9,000/= TO KSH.12,000/= AND DECLARING THEM AS EFFECTIVE FROM 1ST JANUARY 2009

BETWEEN

HENRY NGIGI & 16 OTHERS..... APPLICANTS

MUNICIPAL COUNCIL OF THIKA.....1ST RESPONDENT

DIRECTOR OF SOCIAL SERVICES AND

HOUSING.....2ND RESPONDENT

JUDGMENT

This notice of motion was filed by seventeen Applicants namely:-

Henry Ngigi, Benson Irungu Mwangi, Andrew Maguru Mwangi, Virginia Wairimu Kamau, Stanley Njoroge, Rosemary W. Mwangi, Diana Mukuhi Kamau, Francis Kamau Karenge T/A Wagaka Hotel, Bernard Mugambi Muriuki, Lawrence Gitau Mwai, Zarae Mohamed, Madoe Abdalla, Moses Mburu Karangoi, Mary Wambui Kamau, Agnes Waringa Gitau, Virginia Njeri Kamau, and Alice Nyakirima T/A

Kagambo Bar. They are tenants of the Municipal Council of Thika and they seek Judicial Review orders against that Council and the Director of Social Services and Housing of the Council. The orders sought are as follows:-

a. That an order of certiorari do issue to remove into the High Court and quash the decision of the Director of Social Services and Housing of the Municipal Council of Thika on the 29/12/08 to increase the rents payable by all tenants occupying Thika Municipal Council houses and shops known as BCR (V – Shops) from Ksh.3,600/= to Kshs.7,000/= and Kshs.9,000/= to 12,000/= and declaring them as effective from 1st January 2009.

b. That an order of prohibition do issue against the Director of Social Services and Housing or any other person prohibiting them from increasing and holding that the rents were validly increased and further to prohibit them from holding that the same are effective and are validly enforceable.

c. That an order of mandamus do issue against the Respondents to commission an independent valuer jointly with the Applicants to evaluate the correct rate of increment if at all so that any increase can be based on the current market rates.

d. Costs of the application be provided for.

Mr. Kaburu counsel for the Applicants said that the motion is based on facts found in the affidavits of Benson Irungu Mwangi and Henry Ngigi, both dated 24/2/09 and a statutory statement of the same date.

It is the Applicants' contention that they are tenants of the 1st Respondent and the decision to increase the rents was arbitrary, illegal and unjustified as the Applicants were not consulted. That they were not even notified of the increment but saw it advertised in the Daily Nation Newspaper of 29/12/08. That the increment offends S 148 of the Local Government Act Cap 265 Laws of Kenya and the By-laws of the Council.

The application was opposed and Johnson Kariuki, the Town Clerk of the 1st Respondent swore a replying affidavit dated 24/3/09. The Respondent contends that the Applicants being tenants of the Respondent, their relationship is governed by the law of contract, as each pays different rent as shown in the affidavit of Benson Irungu Mwangi. That the amount of rent is dictated by the fees and charges approved by the Minister for Local Government and forms part of the Council's income. That the Respondent had not increased rents since 2000 and after consultation with various stake holders, a review of the rents upwards was agreed on. That they were passed and approved in a special Finance and General Purpose Committee meeting and at the Full Council meeting held on 29/4/08 (NIM/FC/73/2008 (b)) in accordance with S 148 (b) of the Local Government Act. Ministerial approval was granted on 27/11/08 and it was advertised in gazette notice 12226 of 19/12/08 (JK 3 (a) and (b)) all true copies of the approval. That the process leading to approval and gazettement of the rents, fees and charges was in accordance with the law, was not arbitrary or ultra vires the powers of the Respondent as alleged by the Respondent and that there is no basis for granting the orders sought. Mr. Kahonge further submitted that the impugned gazette notice is made by the Minister and the Minister has not been made party to these proceeding and it would be futile granting an order to quash the decision of the 2nd Respondent. That under S 12 of the Local Government Act, the person to be sued is the Municipal Council of Thika.

Section 148 of the Local Government Act does authorize a Local Authority to impose certain fees and charges to enable it fund its activities. S 148 reads as follows:-

"***148 (1) A Local Authority may***

(a) exchange fees for any licence for permit issued under this Act or in respect of any person or matter, premises or trade whom or which the local authority is empowered to control or license;

(b) Impose fees or charges for any service or facility provided or goods or documents supplied by the Local Authority or any of its officers in pursuance of or in connection with the discharge of any duty or power of the local authority or otherwise.

***(*2) All fees or charges imposed by a Local Authority shall be regulated by by-law, or if not regulated by law, may be imposed by resolution of the Local Authority with the consent of the Minister and such consent may be given either in respect of specified fees or charges or may be given so as to allow a specified Local Authority to impose fees or charges by resolution in respect of a specified power or particular order.**

(3) Save where the contrary is expressly or by necessary implication in any written law provided, a Local Authority may authorize the revision in whole or part of any fees due to it or charges imposed by it under this Act or any other written law,"

It is the Respondents contention that they complied with S 148 to the letter. The Respondent exhibited JK 1 (a), an extract from minutes of the Finance and General purpose Committee held on 29/7/08 in which the Town Treasurer tabled the proposed fees and charges for approval. A resolution was passed that the fees be reviewed in terms of the schedule and the same be recommended to the office of the Deputy Prime Minister and Minister for Local Government for approval. On 29/7/08 at the Full Council meeting, the Minutes of the Finance Committee was tabled and it was resolved that the minutes of the Finance and General purpose Committee be adopted (JK 1 b). The proposed new charges and fees were presented to the Minister for approval and as per the Permanent Secretary's letter dated 12/8/08, the said fees and charges were approved (JK 2). By another letter dated 27/11/08, the Minister indicated that the fees and charges were approved but the request to charge Single Business Permit from column 12 – 13 was not approved and the Council was requested to consult with the Committee before reviewing it upwards. Following the approval by the Minister, the new fees and charges were approved vide gazette notice No.12226. The notice reads:-

"***In exercise of the powers conferred by S 148 of the Local Government Act, the Municipal Council of Thika has with the approval of the Minister for Local Government imposed the following revised and approved fees and charges with effect from 1st January 2009."***

It is the Applicants contention that they should have been consulted prior to the increment. It seems to me that the Respondent did comply with the procedure under S 148 of the Local Government Act Cap 265 Laws of Kenya. The Applicants have not shown in what way due process was not complied with. The Applicants contend that they were not consulted, but the said section does not provide that any consultations be done before the increments. I believe this is because the Applicant's interests are deemed to have been represented by their Councilors who were present in both meetings when proposals to increase rents, fees and charges were made and passed. The Applicants were well duly represented and they can not complain of not having been heard.

The Applicants also complain that they were not given sufficient notice of the rents increase. The approval by the Minister was given to the Council on 27/11/08 and the new rents were gazetted on 19/12/08 and were supposed to be effective as from 1/1/09 hardly a month after the gazette notice. In my view, that notice was too short. The increments were substantial and the Applicants needed time to adjust or look for alternative accommodation or business premises. Even if the increment was justified and arrived at in the proper manner, the period within which the increments were to be effected was unfair and punitive.

I do agree with the Respondents argument that the nature of the Applicant and Respondent's relationship was one of landlord and tenant and therefore contractual. Such agreements are governed by individual agreements between the parties. Each of the Applicant should have demonstrated that they are indeed tenants of the 1st Respondent and have a proper tenancy agreement with the Respondent. Failure to demonstrate that there exists that relationship would not entitle the Applicants to any orders.

In addition to the above, the relationship between the Applicants and Respondents being contractual, the issues raised would best be addressed in private law by the Applicants challenging the said decision in the Tribunal or the ordinary civil courts where the parties can be heard on viva voce evidence. This is because the Applicants contend that there was no fair assessment of rent. They are even urging the court to compel the Respondents by way of mandamus, to commission an independent valuer to evaluate what the correct increment should have been. For this court to determine what the fair rent payable by each person would be, it would require viva voce evidence. If this court were to declare that the rents are not fair, it would really be determining the merits of the Respondent's decision which Judicial Review is not concerned with. Judicial Review is all about the fairness of the decision making process. Orders of Judicial Review would not lie in such a claim where parties need to be heard on via voce evidence.

The applicant has named the Municipal Council of Thika and the Director of Social Services as the Respondents. S 12 of the Local Government Act provides that a Municipal Council is a body corporate, with perpetual succession and a common seal and shall by such, be capable of suing and being sued. In the instant case, there was no reason to drag the Director of Social Services and Housing into these proceeding. It was enough that the Municipal Council of Thika is sued because the decision was that of the Council. Further to the above, the proposals made by the Finance Committee and the Full Council meeting would not have seen the light of day had the Minister not approved the said increments. Though the 1st Respondent gazetted the new rates of fees and charges, the Minister is part of the decision to increase the fees and charges. I do agree with the Respondents that the Minister should have been enjoined as a party to these proceedings. Failure to enjoin the Minister renders the same to be incompetent. On the other hand, since the Minister was a person interested in the outcome of this matter he should have been served with the noitce of motion. Order 53 Rule 3 Civil Procedure Rule (1) requires that all persons directly affected by the court order be served and an affidavit of service be filed under Order 53 Rule 13 (3). It would be against the rules of natural justice to render the Minister unheard

Before I conclude, I wish to point out that when the Applicant approached the court ex parte on 6/2/09 the court granted only prayer (a), (b), (c) of the chamber summons and declined to grant prayer (d) which sought leave to apply for an order of mandamus. That prayer for mandamus should not have been included in the notice of motion. However it is one of the prayers that the Applicant seeks and should therefore be struck out.

Another anormally I noted is the fact that the Applicant relied on two affidavits dated 24/2/09 which

were filed along with the notice of motion. In Judicial Review, the affidavits which are relied upon in support of the notice of motion are those filed with the chamber summons at the time leave is sought. If any other affidavits are filed, they must be filed with the leave of the court. The Applicant never relied on any of the affidavits filed with the chamber summons and dated 15/1/09. Order 53 Rule 4 (1) Civil Procedure Rules requires that the notice of motion be served with the affidavit filed in support of the application for leave. Rule 4 (2) then requires leave to be sought in the event one wishes to file further affidavits. Reliance on the affidavits filed with the notice of motion is improper and was without leave of the court. I have noted that the affidavit sworn by Henry Ngigi on 15/1/09 is materially different from that sworn on 24/2/09. The orders would not be granted for the above reason.

Judicial Review remedies are discretionary and the court may decline to grant them even if they were deserved. In this case, procedure was followed in accordance with S 148 of the Local Government Act. What the court finds as unfair was the issue of lack of adequate notice to the Applicants on the new rent charges. The notice was too short. But that notwithstanding, it seems the proper forum for the Applicants to ventilate their grievances if any, is in the Civil Court or Tribunal. This application is therefore dismissed with the Applicants bearing the costs.

Dated and delivered this 13th day of November 2009.

R.P.V. WENDOH

JUDGE

Presence of:

Applicants

Mr. Kahonge for Respondent

Court clerk - Muturi