



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Misc. Appli. 816 of 2005

MAURICE OKELLO.....APPLICANT

Versus

THE PERMANENT SECRETARY

MINISTRY OF LANDS AND HOUSING.....RESPONDENT

JUDGMENT

The Applicant herein Maurice Okello filed the Notice of Motion dated 17th June 2008 seeking orders of Judicial Review against the Permanent Secretary Ministry of Lands and Housing. The Applicant prays that this court be pleased to remove into this court and quash the decision of the Respondent contained at page 19 of the Daily Nation Newspaper issue of 29th April 2005 in which he allocated HG 117 to one Gerald M. Ngari and ordered the Applicant to vacate the said premises by 27th May 2005 or at any other time; 2ndly that the court do grant an order of prohibition against the Respondent prohibiting him from evicting the Applicant from the premises known as HG 117, 3rdly an order of mandamus to issue to compel the Respondent to allow the Applicant to purchase the premises known as HG 117 and lastly that costs of the Application be provide.

The Motion is premised on the verifying affidavit of the Applicant and statement of facts both dated 3rd May 2005 and skeleton arguments filed in court on 14th May 2005.

The Motion was opposed and the Respondents filed a replying affidavit sworn by Tirop Kosgey the Permanent Secretary and grounds of opposition dated 10th April 2008 and skeleton arguments and further skeleton arguments on 29th May 2008. Gerald Muthigani Ngari was enjoined to these proceedings as an Interested Party and he too opposed the motion and filed skeleton arguments on 2nd April 2007.

Briefly stated, the Applicant's case is that the Applicant as a civil servant, employed as an Assistant Commissioner with Kenya Revenue Authority, Ministry of Finance and has been in occupation of HG 117 Mugoya Estate Nairobi having been allocated the house on 5th February 1993 under a letter of that date (NAO 1).

On 18th August 2004 the Permanent Secretary Ministry of Lands and Housing issued a circular to all Permanent Secretaries and heads of Government bodies offering sale of non-strategic Government Houses to Civil Servants who were then occupying the said houses (KAO2). The sale was to commence on 1st September 2004 and priority would be given to civil servants in occupation if their rents payments

were upto date. Application forms were available at the Ministry Office, Hill Plaza and purchased for 1000/= which was non-refundable (MAO 3). The civil servants were required to pay a 10% deposit within 60 days of 1st September 2004 or vacate the house within 30 days after expiry of 60 days. The Applicant deposed that on 30th October 2005, he paid Kshs.170,000/= under receipt MAO 4. He paid another 86,000/=. That rents were deducted from his salary by check off system and he was upto date with them. He contends that he should have been given priority but instead the house was allocated to the Interested Party as shown in the Daily Nation of 20th April 2005. The Applicants claims to be still in occupation of the house and that it should be sold to him.

In opposing the application, the Permanent Secretary deposed that he is the custodian of the Respondent's houses and maintains the register for all Government buildings. That he is aware that on 15th September 2004 the Respondent published a legal notice defining who a civil servant was, ie an employee of the Public Service Commission who is not covered by any other housing scheme. That the Applicants for the houses had to make a 10% deposit by 31st October 2004 or vacate by 1st December 2004. That the Applicant did not qualify because he did not pay the deposit of Kshs.256,000/= which was the required 10% deposit. That the 117 was declared as one of the available units for sale (TK 3). Date line for Applications for the available units was 31st December 2004 and the Interested Party qualified for it (TK 4). That the Applicant did not qualify in the 2nd of the sale as he did not qualify as a civil servant as he works for KRA and did not meet the definition under Section 2 of Housing Regulations 2004 governing the Civil Servants Housing Scheme fund. That the sale of the houses was done by tendering processes but the payment of 10% did not actually guarantee one a house. That no contract was concluded between the Applicant and the Respondent and the applicant has failed to collect his deposit despite notice of 29th April 2005. It is the Respondents contention that the Application has no substance and should be dismissed. Lastly, that, the Interested Party urged that the Applicant did not fall in the category of persons entitled to be allocated the houses as he was not a civil servant.

As correctly pointed out by the Respondent, this is a Judicial Review application and Judicial Review only concerns itself not with the merits of the decision but with review of the decision making process. The Supreme Court Practice rules 1997 001 53/1-4/6 reads:

“The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the Application for Judicial Review is made, but the decision making process itself.”

In the instant case this court will not be concerned with the merits of the Permanent Secretary's decision being rent or not allocate the house to the Applicant but whether the process followed by the Permanent Secretary in allocating house was tainted with illegality, irrationality or procedural impropriety.

It is not in dispute that the Applicant is an employee of Kenya Revenue Authority or that he had been in occupation of the said house prior to the offer of the house for sale. The house had been allocated to him under letter of 5th February 2003 (MAO 1). However some of the questions that linger on my mind are whether the Applicant fulfilled the terms of the contract of sale, which are contained in the letter of offer dated 18th August 2004.

The terms and conditions of sale are contained at para F of the said letter of offer. The ones that were applicable to the Applicant are F (i) (ii) (iii) and (iv). They were as follows:

“The basic requirements for one to qualify under the tenant purchase scheme are as follows;

- (i) Be a serving civil servant who should produce certified copies of payslips for the last three months and letter of allocation for the Government quarter;**
- (ii) First priority will be accorded to occupying civil servants who are upto date on rent payments;**

(iii) Those interested are required to pay 10% deposit of the sale price within 60 days or provide documentary proof of previous deposit payment. Those who will not have paid the 10% deposit will have to vacate their houses 30 days after the expiry of the 60 days.

(iv)

(v)

(vi)

(vii)

(viii)"

Did the Applicant meet all the above conditions?

The first condition, is that the Applicant should be a serving civil servant who should produce certified copies of payslip for the last 3 months and letter of allocation for the Government quarters I will later revisit the question of whether or not the Applicant is a civil servant. The Applicant has not demonstrated that he ever produced his payslip of the proceeding three months. He has not shown others he had certified copies of the payslip for 3 months to show that he paid rent. He only annexed one payslip for October 1994.

The other requirement was that 10% of the sale price be paid within 60 days and has to be paid of the same. In this case the Applicant deponed that he paid 170,000/= and was issued within a receipt dated 30th October 2004 (MAOK). On 3rd April 2004 the Applicant paid another Kshs.86,000/= bringing his total deposit to 256,000/=. The letter dated 26th November 2004 exhibited by the Interested Party to his Chamber Summons dated 20th July 2001 gives the prices to be paid for the different houses which were up for sale.

At No. 18 of the letter is house No. HG 117 and the cost was as Kshs.2,560,000/=. That Kshs.256,000/= is the 10% of the total sum to be paid for HG 117. Since the sale commenced on 1st September 2004 and it was to be completed within 60 days, that period expired on 31st November 2004. Since the Applicant paid the 10% before 31st November 2004 he was within the 60 days required and therefore complied with that condition. There is no doubt that the Applicant was in occupation of the premises as the shown in the allocation letter.

The only issue left is whether the Applicant is a civil servant and qualified to apply for the said house and whether order can issue. At paragraph 17 of his affidavit the Permanent Secretary deponed that the Applicant works with Kenya Revenue Authority and did not meet the definition of a qualifying civil servant defined in Section 2 of the Housing Regulations 2004 governing the Civil Servants House Scheme Fund. The said Regulations are contained in Legal Notice 98 of 15th September 2004. The civil servant (Housing Scheme Fund) Regulations, 2004 define "Civil servant" "means employee of the Public Service Commission who is not covered by any other housing scheme. Those regulations are made pursuant to S.27 (1) of the Housing Act.

Section 106 of the Constitution creates the Public Service Commission and under S.107, public service officers are appointed by the Public Service Commission. The Service Commissions Act, Cap 185 Laws of Kenya defines a public officer as a person holding a public office otherwise as a part time officer. S. 2 thereof defines a public office as

"paid office as a civil servant of the Government, not being the office of a member of a commission, or a part time office, or an office like emoluments of which are payable at an hourly or daily rate."

Section 3 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya, defines a Public Officer

“Public Officer” means a person in the service of, or holding office under, the Government of Kenya, whether that service or office is permanent or temporary or paid or unpaid.” The Applicant works with Kenya Revenue Authority, employment No. 84001070 as evidenced by his payslip (MAO6). Kenya Revenue Authority is a body corporate with perpetual succession and a common seal as per S.3(2). Kenya Revenue Authority Act Cap 469 S. 3(3) provides that it is a Government Agency for the collection and receipt of all monies under the supervision of the Minister. Section 6 of that Act establishes a Board of Directors which is the governing body of that authority. Under S.13 (1), it is the Board which appoints to service the Commissioner of Customs and Exercise, Income Tax and Value Added Tax (VAT). At S. 13 (4) it is the Board which sets the terms and conditions of all persons employed by the Authority. From a consideration of the above provisions it is evident that KRA is a public body performing public functions but S.13(3) of the Act is clear that the terms and conditions of employees are determined by the Board. The terms of employment will include salary, housing and leave. On the other hand public servants or civil servants terms and conditions are determined by the Public Service Commission. The Applicant’s terms which include housing and other emoluments are determined by the Board of Kenya Revenue Authority and therefore different from other civil servants whose terms are determined by the Public Service Commission. The term public officer was also considered in the cases of **SOUZA FIGUEIREDO & CO V GEORGE PANAGOPAULOS (1959) EA 756, at pg 764**, J. Windham said;

“The only helpful definition of a ‘public officer’ which I have been able to discover other than non applicable statutory definition, is contained in the judgment of the court of Criminal Appeal in R v Whitaker (11), (1914) 3 KB 1283 where at page 1286 he is defined as

“an officer who discharges any duty in the discharge of which the public are interested more clearly so if he is paid out of a fund provided by the public.”

Blackham’s Dictionary 8th Ed also defines what Civil Service and Public Service means.

It defines Civil Service as

- “ (i) the administrative branches of a Government**
- (ii) The group of people employed by those branches – civil Servants.”**

It defines Public Service as

- “(i) A service provided or facilitated by the Government for the general public’s convenience and benefit**
- (ii) Government employment; work performed for or on behalf of the Government.**

Udo Udoma CJ for Uganda in **TUMUIHEIRE V UG (1967) EA 326 (p 833)** had this to say;

“..... in my view the only reference to be drawn from the above definitions is that public office in the strict sense of the expression considered structurally must be an office which is maintained with public funds must mean a Government Department or office established for civic business in the interest of the national and maintained out of public or national and distinct from local funds, the occupiers or incumbents whereof being paid out of public or national funds.”

Having considered all the above definitions, I am of the view that the Applicant is a civil servant because his employer is a public body though described as a body corporate. The Applicant is paid from public funds and the Kenya Revenue Authority is an agency of the Government and hence a public body.

The Housing Regulations gazetted on 15th September 2004 Legal Notice 98 pursuant to S. 27 (1) of the House Act seemed to limit the term Civil Servant to only those employed by the Public Service Commission and secondly those not covered by any other housing scheme. These Regulations were

promulgated to provide housing loan facilities to civil servants and the capital of the fund was to consist of inter alia proceeds from sale of non strategic houses. In my view these Regulations were meant partially to facilitate the civil servants who wanted to buy the houses which had been offered for sale. It is the Applicant to demonstrate that he was not covered by any other housing scheme which he has not done. For purposes of that sale, the Applicant did not qualify because his terms are different from those of civil servants whose terms are determined by the Public Service; In this case his terms are determined by the Board of KRA. Besides his terms regarding housing are also determined by KRA not the Public Service Commission. I would therefore find that for purposes of this Housing project the Applicant though a public officer, was not entitled to benefit from this scheme because of his terms and conditions of employment are different.

A part from proof that he was a civil servant, to qualify for the house the Applicant was supposed to avail certified copies of his payslip for three months preceding the application for the house. The Applicant has not exhibited any payslips which should have accompanied the application for the house and this court cannot confirm whether or not he complied with that requirement. The payslip was to confirm that he was able to pay or that he was upto date with payment of his rent for that particular house.

The impugned decision of the Respondent is that dated 29th April 2005 appearing in the Daily Nation Newspaper issue of that day allocating the premises known as HG 117 Mugoya to Gerald M. Ngari and ordering that the Applicant vacate it by 27th May 2005. I do note that the Applicant did not lodge with the court the impugned decision sought to be quashed. Order 53 Rule 7 Civil Procedure Rules requires that the said decision be lodged with the court verified by an affidavit failing which the Applicant should give a satisfactory account for the failure to do so. No explanation was given by the Applicant.

However, I do note that the Respondent did exhibit the said extract from the Daily Nation of 29th April 2005 which clearly shows that the said house was allocated to Gerald Ngari (TK 4) so the existence of that decision is not in dispute and I will hold that failure by the Applicant to exhibit the decision would not be fatal to the Applicants case since the Respondents do not object to it and have availed the decision anyway.

The last issue to consider in this matter is whether Judicial Review Orders would be available to the Applicant.

The letter of 18th August 2004 (TK 1 MAO2) addressed to various Departments of Government clearly states the intention of the Ministry of Lands and Housing. It was to sell non strategic Government owned houses. When the Applicant filled the forms that were provided and paid the Kshs.1000/= and the 10% deposit he did make an offer as did many other Applicants do. The offer was to be considered by the Committee dealing with the sale of the houses to determine who would win the bid. The Applicant complains that even without giving him any hearing the Respondent rejected the Applicant's offer and allocated the house to another. By the applicant making the offer his intention was to enter into a contract of sale of the house with the Respondent. Had the Applicant met all the terms that were required there would have been a meeting of the minds of the parties and a contract of sale would have been birthed. The issue before the court is one of contract which is a private law matter. On the other hand Judicial Review is a public law remedy which only lies to supervise activities of public bodies or public officers when performing public duties and if the offices/bodies do so contrary to rules of natural justice or in breach of statutory provisions. That is why they are commonly known to issue for acts of **"illegality, where the decision making authority is guilty of an error of law e.g. by purporting to exercise a power it does not possess; (2) 'irrationality, where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision; procedural impropriety where the decision making authority has failed in its duty to act fairly."** See **CCSU V MINISTER FOR CIVIL SERVICE (1984) 3 ALL ER 935 (P 937).**

In the case of **BERKSHIRE ex parte WALSH (1985) QB 152**, a man who was dismissed from work for misconduct moved the court for Judicial Review orders and the court held that the Applicant was not seeking to enforce a public law right but a private contractual; right under his contract of employment and his application was an abuse of the court process. The court said:

“.....an application for Judicial Review had to show that a public law right which he enjoyed had been infringed: but a distinction had to be made between infringement of statutory powers giving rise to public law rights and those that arose solely from breach of contract of employment.”

In another case **R V THE COMMISSIONER OF POLICE ex parte NICHOLAS GITUHU KARIA HMISC APPLICATION 534/03**, which also involved a challenge to sale of Government houses like the present case Nyamu, Ibrahim and Makhandia JJJ said:

“if there is a tenancy or lease, Judicial Review remedies would be out of reach and unavailable because the performance of a public duty must arise from statute and not contract such as a tenancy or a lease”.

In the instant case, the Applicant seeks to enforce a private contractual right, that the Respondent has refused to sell to him the house in question. He has not pointed to any statute that the Respondent is in breach of. The right sought to be enforced is a private contractual right of sale of a house, between two parties. If this court were to intervene, it would be seeking to create a contract, that the Respondent do allocate the house to the Applicant. In my view, that would be forcing the Respondent to enter into contract, thus forcing an unwilling party to enter into a contract of sale. This is matter of contract which as in the private law realm and cannot be subject to Judicial Review and therefore even if the Applicant were qualified to get the house this court would not intervene.

The grounds upon which the Judicial Review orders are sought are inter alia that the Respondent was in breach of the contract of sale between the Applicant and Respondent. To that I would say that no contract had been entered into inter partes. The parties had the intention to create a contract which intention was never realized.

The other ground relied upon is that the applicants were denied a right to be heard. In this case people submitted their bids to the Respondent and the Committee that handled the matter I do not believe that all people who did not succeed in the bids had to be given a hearing. In this case the Respondent through the Committee had to exercise their discretion in deciding who had won the tender for the said house. None of the bidders were ever called upon to be heard. The fact that the Applicants bid was considered was sufficient hearing. Though the Applicant alleges that the decision is oppressive and discretionary, he has not demonstrated how the Permanent Secretary was biased against him or that anybody else was given preferential treatment to him. These are allegations that are unsubstantiated.

The Applicant seeks an order of certiorari to quash the decision of the Permanent Secretary not to allocate him HG 117 Mugoya Estate. I have found earlier that that order cannot lie in a purely private law transaction. Besides it seems the Applicant did not meet all the conditions of the contract set out in Paragraph F of the letter of offer. The 2nd prayer is to prohibit the Respondent from evicting the Applicant from the premises. These premises have already been allocated to the Interested Party since the notice of 29th April 2005. Unless the contract is rescinded the same has been sealed and the house now belongs to the Interested Party. Prohibition tries to stop that which has not been done. In the instant case there is already an existing contract between the Interested Party and Respondent (**KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/96**).

The third prayer is one of mandamus, to compel the Respondent to allow the Applicant to purchase HG 117. As noted above Judicial Review is a discretionary remedy so that if the court were to compel the Respondents it would be interfering with the exercise of the Permanent Secretary discretion. Besides the court cannot dictate the terms of a contract between two parties. It can only enforce the terms. So this court cannot force a marriage between two parties. That is what the court held in **ERIC MAKOKHA V LAWRENCE SAGINI CA 20/94**.

Even if mandamus were to be available, where statute leaves discretion as to the mode of performing a particular duty in the hands of the party to whom the obligation is laid, an order of mandamus cannot command the said duty to be done in a particular way. See the case of **KENYA NATIONAL EXAMINATION COUNCIL V REP ex part GEOFFREY GATHINJI CA 266/1996**. So that in this

case, even if there was a statute imposing the making of the contract, this court cannot compel the Respondent to sell the house to the Applicant and that order would not lie.

This court had occasion to consider a similar matter pertaining to the sale of a house in the same estate to an employee of Kenya Revenue Authority **SHADRACK KIBICHI BUNDOTICH V P.S MINISTRY OF LANDS & HOUSING MISC APPLICATION 1789/04** and the court arrived at the same decision that Judicial Review orders cannot issue in a private contract of sale of a house. I find as I did in that case that the Applicant has come to the wrong court for enforcement of his rights under a contract. If he has any redress, it lies in the ordinary Civil Courts where he can ask for specific performance, breach of contract or refund of his monies, or damages. I therefore find no merit in this motion and the same is dismissed with costs to the Respondent.

Dated and delivered this 18th day of July 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of

Mr. Kurgat for Applicant

Mr. Achoki for Interested Party

Mr. Menge for 1st Respondent

Daniel: Court Clerk