



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

MISC CIV APPLI 1789 OF 2004

SHADRACK KIBICHI BUNDOTICH.....APPLICANT

Versus

PERMANENT SECRETARY MINISTRY OF LANDS & HOUSING.....RESPONDENT

JUDGMENT

On 7th January 2005, the ex parte Applicant, Shadrack Kibichi Bundotich filed a Notice of Motion pursuant to Order 53 Civil Procedure Rules, in which he seeks an order of certiorari to quash the decision of the Permanent Secretary Ministry of Lands and Housing, the Respondent herein, requiring the Applicant to vacate the premises known as House No. HG/34 Mugoya Estate Phase IV by 31st December 2004 or any other date; an order of prohibition to issue against the Respondent prohibiting him from evicting the Applicant from the suit premises; and an order of mandamus compelling the Respondent to allow the Applicant to purchase the premises known as House No. HG/34 Mugoya Estate Phase IV.

The Application was premised on a Statement of facts dated 31st December 2004 and a Verifying Affidavit of the Applicant of the same date. The Applicant also filed skeleton arguments on 26th April 2007. The Respondents did not file any Replying Affidavit save for grounds of opposition filed in court on 10th May 2005.

Mr. Wati urged the Application on behalf of the Applicant whereas Mr. Atanda appeared for the Respondents. Mr. Wati informed the court that he relied on a Statement dated 7th January 2005 and a Verifying Affidavit dated 10th January 2005. I note that those documents were filed with the Notice of Motion. However, the court record shows that on 11th May 2005, the court struck off the record the statement dated 7th January 2005. On 29th June 2005, the court made further orders and allowed the Applicant to file an amended Statement and on 26th October 2005, the court further ordered the amended Statement filed in court on 6th July 2005 to be retrieved from the Registry. At the hearing of the Motion, the Applicant's Counsel, Mr. Wati never made any reference to any amended Statement but instead relied on the Statement of 7th January 2005 which had been struck off. I have perused the record and the only Statement that is properly on record is the one dated 31st December 2004 and filed along with the Chamber Summons seeking leave. That is the Statement that the court will deem to be supporting the Notice of Motion together with the Verifying Affidavit sworn on the same date.

I note the presence of another Verifying Affidavit on record, filed with the Notice of Motion and dated 10th January 2005. Though the Applicant was granted leave to file a Supplementary Affidavit on 29th

June 2005, the Affidavit dated 10th January 2005 had been filed without the leave of the court. Order 53 Rule 4 (2) Civil Procedure Rules provides that use of further affidavits will be allowed with the leave of the court and the further affidavits are only a reply to new matters arising from the Affidavits filed by opposing parties. The Affidavit of 10th January 2005 by seeking of leave of court to deem it as properly on record was not regularized and I find that, that affidavit of 10th January 2005 is irregularly on record and is hereby struck off. The Verifying Affidavit dated 31st December 2004 is what the court will consider in this Notice of Motion.

A brief recapitulation of the facts is as follows;

The Applicant is an employee of Kenya Revenue Authority (KRA) in Job Group G and occupies HG/34 in Mugoya Estate Phase IV. He claims to have been allocated the House vide letter dated 2nd May 2002 (SKB 1). That by a circular of 18th August 2004, the Respondent indicated that the Government houses would be sold as from 1st September 2004 and priority would be given to occupying civil servants that were upto date with rent payments. The Applicant collected the Application form upon payment of Kshs.1000/= and was issued with a receipt (SKB3). He had earlier paid Kshs.880,000/= to the Government towards the purchase of the said house (SKB 4). He paid Kshs.256,000/= on 24th September 2004 within the time stipulated in the Application forms, as per official receipt (SKB 5). But by a letter dated 16th December 2004, the Applicant's Application was rejected and he was asked to vacate the house by 31st December 2004 (SKB 6). That was the reason why he moved this court for Judicial Review orders. Mr. Wati further submitted that the Applicant complied with all the requirements in the letter of offer, SKB 2 at paragraph F (i to iii) in that he was a civil servant, had a letter of allocation and was upto date with the rent payments and he paid 10% deposit of the sale price within 60 days of the offer as required.

It is the Applicants contention that the decision of the Permanent Secretary was unreasonable in the sense of the "Wednesbury unreasonableness" which was considered in the case of **REP V JUDICIAL SERVICE COMMISSION ex parte PARENO 2004 IKLR 203** which is that put in the shoes of the Permanent Secretary, no reasonable person would have reached such a decision. That the Permanent Secretary being a public officer, he was required to give reasons for his decision which he failed to do and that his decision was therefore arbitrary. This is because the Permanent Secretary did not abide by the procurement rules and that by the letter of 20th December 2004 signed by the authorized officer, the house had been allocated to the Applicant (SKB 4). That the Applicant had in 2002 paid Kshs.884,000/= following a circular for the sale of the houses but he paid the Kshs256,000/= to mitigate his losses because the earlier sum was not acknowledged. That he had therefore paid over ½ of the purchase price already.

Mr. Wati urged that by virtue of S. 123 of the Constitution, S. 3 of the Interpretation of General Provisions Act, Chapter 2, Laws of Kenya, and Black's Law Dictionary 8th Ed page 263, the Applicant fits the description of a civil servant. Counsel made reliance on **TUMUHEIRE V UGANDA (1967) EA 328** which held a public office to be that maintained by public funds. In the case of **SOUZA FIGUEIREDO & CO LTD V GEORGE PANAGO PAULOS (1959) EA 756** the court considered who a public officer was and said, that he is one paid from public funds. Counsel urged the court to grant the order because the decision was irrational, unfair and the sums that had already been paid to the Government be taken into account.

Mr. Atanda in opposing the Motion argued that the Application is premature, misconceived and bad in law. That the Government cannot be compelled to sell its house to the Applicant as the sale of the house was contractual.

That a public officer is defined in S. 107 of the Constitution, and S.2 of the Service Commission Act. That Kenya Revenue Authority has its own scheme of service and its employees are not civil servants.

Further, that the Applicant did not comply with the terms of the circular of 18th August 2004 which are

contractual. For example the Applicant did not demonstrate that he had paid rents before the 10% deposit; that letter of 10th June 2004 signifying acceptance of the house is not referenced and the source of the letter is unknown.

There is no doubt these proceedings emanate from the offer made by the Permanent Secretary Ministry of Lands and Housing offering Government Houses for sale to Civil Servants (SKB 2), in the circular dated 18th August 2004.

The terms and conditions of the offer are contained at paragraph 'F' of the said letter. They are 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 payment;**
- (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 expiry of the 60 days.**
- (iv)**
- (v)”**

The other terms and conditions under paragraph 'F' did not apply to the Applicant. The question is whether the Applicant met all the above terms and conditions to be entitled to the allocation.

Is the Applicant a civil servant? The Respondent's submission seems to be that the Applicant did not qualify because he was not a civil servant. However, the Respondent did not tell the court who indeed is a civil servant and who is not. Section 106 of the Constitution creates the Public Service Commission and under S. 107, holders of Public Service office are appointed by the Public Service Commission.

The Service Commission Act, Chapter 185, Laws of Kenya defines a public officer as a person holding a public office otherwise than as a part-time officer and under Section 2 a public officer means;

“.....a paid officer 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 the emoluments of which are payable at an hourly or daily rate.”

Section 3 of the Interpretation and General Provisions Act, Chapter 2 Laws of Kenya, defines a public officer as a person holding office in the Government of Kenya, whether on permanent or temporary or paid or unpaid. The Applicant works with the Kenya Revenue Authority, a body corporate with a common seal and subject to the Kenya Revenue Authority Act, Cap 469 Laws of Kenya. Under S. 5(1) of the said Act, the Authority describes itself as an agency of the Government for collection and receipt of Revenue.

From the above descriptions, Kenya Revenue Authority is a public body performing public functions. However, it seems that the employees of the Kenya Revenue Authority are not subject to the Public Service Commission Act but under S. 13 (3) of the Kenya Revenue Authority Act, the terms and conditions of all employees are determined by the Board established thereunder. The terms and conditions of the Applicant are therefore different from those of a civil servant who is in the main stream civil service. I believe that the Applicants terms on salary, housing and other emoluments are different and most likely higher than those of a civil servant in the mainstream civil service. In this case however,

it was upto the Respondent to draw the difference between employees of parastatals like the Applicant and those in the mainstream civil service and spell out their terms to the court. The Respondent having failed to do so, this court will presume the Applicant to be a civil servant because he is a public servant.

A part from being a civil servant, the Applicant was supposed to produce certified copies of payslips for the three months preceding the Application for the house. The Applicant has not exhibited any certified copies of payslips that accompanied the Application. He has however exhibited a letter of allocation of the quarters dated 2nd May 2002 and an allocation advice note dated 10th June 2002. It is however noteworthy that both the letter of allotment of 2nd May 2002 signed by a M/s. K. Osoro for the Permanent Secretary, and the advice note dated 10th June 2002, are not referenced. It is unlike all other documents from the Ministry, like the letter of 18th August 2004 and that of 16th December 2004, which are all referenced. The authenticity of the letter of allocation and the advice note SKB 1 is questionable. Are they genuine documents? I therefore find that the Applicant did not fully meet the 1st requirement.

As regards the 2nd condition, that the occupying civil servants be upto date with their rent payment, the Applicant has not demonstrated that he was upto date with the rent payments as of that date of the Application. As observed above, the allocation of the house to the Applicant if at all, is questionable and therefore the Applicant's occupation of the house. The 2nd condition of the offer was not fully met.

The third requirement was that 10% deposit of the sale price be paid within 60 days or the Applicant was required to provide documentary proof of previous payment. The applicant seems to have complied with this requirement in that there is deposit of Kshs.256,000/= having been made on 24th September 2002 which was within the 60 days allowed. In fact the deposit was made after 30 days of the letter of offer. The Applicant also claims to have made an earlier deposit of Kshs.884,000/= pursuant to the circular that had been issued on 20th April 2002 but which was suspended. A receipt of the said deposit dated 19th December 2002 was exhibited. However, it is not clear why that deposit slip was not available upon the 2nd Application. The letter supporting the said deposit like the other letters referred to, the letter of 20th December 2004 headed Internal Memo (SKB 4) is not referenced and that makes its authenticity come into question. All in all, I find that the Applicant did not meet all the conditions prerequisite to the concluding of the contract between the Applicant and the Respondent.

The Applicant has challenged the decision of the Respondent of 16th December 2004 in which he was advised that his Application to purchase HG/34 was not successful and he was asked to vacate the house by 31st December 2004. As per the contents of paragraph 2 of the letters of 18th August 2004, the Government decided to sell some of its non-strategic houses. The Government therefore made an offer to the Applicant for sale of HG/34 and the Applicant made a proposal by paying the deposit of 10% of the sale price. However, the Respondent without giving any reasons, rejected the Applicant's counter offer. Had the Applicant complied with all the terms and if the Respondent had been satisfied that there was a meeting of the minds, a contract of sale of the house would have been concluded between the Applicant and the Respondent. The issue before the court is a pure private law issue. The question is therefore, does Judicial Review apply to private contractual rights of sale? Judicial Review is a public law remedy which lies to supervise inter alia, the activities of public bodies or public officers.

In the case of **BERKSHIRE ex parte WALSH (1985) QB 152**, a man was dismissed from work for misconduct and moved the court for Judicial Review orders. 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.”

Again in **REP V BBC ex parte LAVELLE (1983) 1 ALL ER 241** an employee of **BBC** challenged his dismissal by way of Judicial Review and the court held that the court had no jurisdiction to interfere

with an employee's dismissal in a purely master and servant situation while there was no protection of the employment beyond that offered by Common Law. In the case of **R V THE COMMISSIONER OF POLICE ex parte NICHOLAS GITUHU KARIA HC MISC APPLICATION 534/03** which also involved challenge of sale of Government Houses, Nyamu, Ibrahim and Makhandia JJJ had this to say: **"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 a statute and not a contract such as a tenancy or a lease."**

In the instant case, the Applicant has not pointed to any statute that has been breached by the Permanent Secretary in this matter. The relationship between the Applicant and the Respondent as relates to the sale of houses was a contract of sale of a house, a private arrangement between the two parties. If the court were to intervene, it would be seeking to enforce the contract which amounts to specific performance. This would be forcing an unwilling party to contract with another which is an unknown remedy in Judicial Review. Under S.8 of the Law Reform Act, the only remedies available in Judicial Review are orders of certiorari, mandamus and prohibition but not specific performance. A contract of sale is a purely private law issue and does not fall within the purview of Judicial Review.

Under Order 53 Rule 4 (2) Civil Procedure Rules, no grounds shall be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the statement. In the statement, the Applicant set out the following grounds:-

- (1) The Applicant has made substantial deposit payments towards the purchase of the house he occupies so far amount of Kkshs.1,156,810/= at various instances the Government advertised the houses for sale;
- (2) The Applicant was not accorded equal treatment with other civil servants contrary to the Constitution and the rules of natural justice in the sense that priority was accorded to senior civil servants thus prejudicing the rights of the Applicant;
- (3) The Exchequer and Audit Regulations which require non discrimination of bidders in relation to the disposal of Government assets were violated to the prejudice of the Applicant as a bidding civil servant.

Though Counsel for the Respondent did not object, Mr. Wati went on a fishing spree and argued grounds that had not been pleaded in the statement. Counsel submitted that the decision of the Permanent Secretary was so unreasonable that the '**Wednesbury Principle**' applied in that that decision was so bad that no person or body properly directing itself on the relevant law and acting reasonably could have reached such a decision. No such ground was pleaded in the statement. Mr. Wati also raised the issue of the Permanent Secretary's decision having been arbitrary but it was not pleaded in the Statement. Counsel also submitted on the Permanent Secretary's failure to give reasons for his decision. Again that was pleaded.

In the Statement, the Applicant alleged breach of rules of natural justice in affording Senior Civil Servants priority to the Junior officers and prejudicing the Applicants rights. That particular ground was not addressed in his submissions. In alleging discrimination contrary to the Exchequer and Audit Rules, I believe the ground that the Applicant wanted to raise is one of bias, but the Applicant did not demonstrate how the Permanent Secretary was biased against the Applicant. It is not enough to allege without substantiation and proof.

Can any of the orders lie? The first prayer is for an order of certiorari to quash the decision of the Permanent Secretary. I have found that an order of Judicial Review cannot issue in a purely private law transaction. Besides, it was apparent that the Applicant did not meet all the conditions of the contract and the same could not have been enforced anyway.

The 2nd prayer was for prohibition to restrain the Respondent from evicting the Applicant from the house HG/34. That prayer cannot be granted because, again, prohibition is a public law remedy. The contract

was concluded between the Applicant and Respondent and to grant a prohibition would be forcing the parties into a contract which is not the purview of Judicial Review. Act cannot force a marriage between the two contracting parties. See the case of **ERIC MAKOKHA V LAWRENCE SAGIN CA 20/94**. That prayer cannot lie.

Lastly, the Applicant seeks an order of mandamus to compel the Respondent to allow the Applicant to purchase the house. As earlier observed the court would be making an order of specific performance which is not available in Judicial Review. Besides for an order of mandamus to issue, the Applicant has to demonstrate that the Respondent is charged with performance of a statutory duty which he has refused or neglected to perform and the court should compel him to perform it. There is no statutory provision or duty alluded to that has been breached by the Permanent Secretary. The Permanent Secretary considered the offer made by the Applicant and exercised his discretion within the terms of offer, and declined to allow the Applicant to purchase the house. The Permanent Secretary cannot be directed on how to make his decision. As regards the internal memo dated 20th December 2004, I have noted that it is questionable as it is not referenced. Besides it is not made by the accounting officer of the Ministry and it is made after the decision of the Permanent Secretary. It is of no consequence. An order of mandamus cannot lie.

In sum, I find that the Applicant has come before the wrong forum for enforcement of his rights. He should pursue his rights in an ordinary Civil Court by suing for specific performance, or breach of contract or refund of his monies. For all the reasons stated above, the Notice of Motion is hereby dismissed with costs to the Respondent.

Dated and delivered this 7th day of December 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:-

Mr. Nyandieka for Applicant

Daniel: Court Clerk