



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Civ Appli 1759 of 2005**

**IN THE MATTER OF AN APPLICATION BY JAMES GICHATHI WACHIRA  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF CERTIORARI  
PROHIBITION AND MANDAMUS**

**REPUBLIC .....**  
**APPLICANT**

**VERSUS**

**THE PERMANENT SECRETARY MINISTRY OF LANDS AND HOUSING ... 1<sup>ST</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup>  
RESPONDENT**

**EX-PARTE**

**JAMES GICHATHI WACHIRA .....**  
**APPLICANT**

**JUDGMENT**

The application before the Court is dated 9th January 2006.

It seeks an order of certiorari to remove into this court and quash the decision of the 1<sup>st</sup> Respondent contained in a letter dated 22<sup>nd</sup> August 2005 addressed to the applicant ordering him to vacate his house in Ngara Desai Road Civil Servants Estate and in default be evicted.

It further seeks an order of prohibition in respect of the same letter that the Respondent be prohibited from enforcing the contents of the letter. The applicant relies on the grounds as set out in the Statement and the Verifying Affidavit. The Respondent relies on the affidavit of Mr Tirop Kosgey, the Permanent Secretary Ministry of Housing in the Government of Kenya.

The Applicants skeleton arguments were filed on 24<sup>th</sup> May 2006 and the Respondents filed their skeleton arguments on 8<sup>th</sup> September, 2006.

Briefly, the facts are that the Applicant is a civil servant in occupation of a Government House No

MG 190 Ngara Desai Road situate within Nairobi. The Applicant is in occupation by virtue of his employment. On 22<sup>nd</sup> August 2005, the Respondent who is in charge of Government housing stocks issued a Notice to the Applicant to give vacant possession of the house within 2 months of the Notice. The Applicant did not comply with the Notice but instead instituted this proceedings against the Respondent after 5 months contending that the Notice represented a decision and sought its quashing and the Respondent prohibited from evicting him.

The Respondent contends that the issues are:

- 1) Is there an issue of public law or justiciable interest
- 2) Is the decision of 22<sup>nd</sup> August 2005 capable of judicial review
- 3) Was the applicant entitled to a hearing before the issuance of the notice
- 4) Was the Applicant given reasonable notice to vacate
- 5) Is the Applicant entitled to relief sought
- 6) Who bears the costs.

On the other hand the Applicants claims:

- (1) That he had offered to buy the house and that other tenants were allowed to buy the house under the then existing Government Policy
- (2) That the notice to vacate is an afterthought by the Government and he was not giving notice
- (3) That he was entitled to a hearing as required under the Rules of natural justice
- (4) That he was discriminated against in the implementation of the policy
- (5) The decision affected the applicant adversely and therefore the Respondent's decision is amenable to judicial review.

I have considered the arguments as per the skeletons filed by each party including the verifying Affidavit and the affidavit in reply.

It is not in dispute that the relationship between the two parties is that of employer and employee and the occupation of the house the subject matter of the dispute is a matter regulated by the contract of service. Even taken to a higher level the relationship could be that of Landlord and Tenant. In other words I find that the relationship is a contractual one without any statutory underpinnings. Without statutory underpinning the decision falls outside the realm of public law. The nature of the power being invoked is purely contractual. The source of power is contract. Although the Respondent is the Government there is no element of public function in the decision making. I therefore agree with the Respondent that there is no issue of public law involved here.

I therefore follow the decision of the Court of Appeal in *R v MUNICIPAL COUNCIL OF MOMBASA CA 24/2001* unreported where it was held at page 2:

**“We are respectfully compelled to point out that the procedure of judicial review has no application, whatsoever to disputes arising out of contractual relationship. Those relations are all the time governed by the law of contract which offers the remedies of specific performance and damages ... There is never an occasion when a dispute arising out of these obligations may be redressed by means of the special orders of mandamus, certiorari or prohibition.”**

I would also reinforce this by citing the *R v BBC* ex-parte Lavelle which I have cited often in my rulings touching on contract where Lavelle Miss was denied judicial review relief against BBC in a matter involving a contract of employment.

### **RULES OF NATURAL JUSTICE**

In the circumstances the notice to vacate was a two months notice and was adequate. The applicant has been in possession. An oral hearing was not necessary. It is not in every situation that oral hearings must be accorded before a decision is made. There is no such requirement under the rules of natural justice. The notice given was reasonable.

### **LEGITIMATE EXPECTATION**

Although contractual relationships do not generally as set out above, call for judicial review remedies had the applicants offer to purchase been accepted and subsequently unilaterally withdrawn and he had pleaded legitimate expectation this court would have been sympathetic to him because the principle of legitimate expectation hinges on the principle LEGITIMATE BARGAINS OUGHT NOT TO BE THWARTED. It is a principle of fairness. However there was no such plea or ground set out in the statement. The case of *OLOO v MUNICIPAL COUNCIL OF KISUMU* (1982-88) IKAR 838 which is a Court of Appeal decision is distinguishable in that the applicants were never heard after a decision to reinstate them had been approved and letter of reinstatement had been given to them. In the *OLOO* case in my view, there was considerable legitimate expectation by the applicants although the court did not touch on this.

To my mind this case can now or in the future only be justified on the basis of legitimate expectation based on the letters of reinstatement.

As regards *R v DAVID NJOGU t/a MANYATTA AUCTIONEERS* CA 265 of 1997 to my mind is also distinguishable in that the Board was acting judicially. In this case the Respondent acted pursuant to a contract of employment in accordance with the Government policy to increase housing stock in the Estate from 80 to 700. The Respondent is acting in the public interest and even if the applicant had satisfied all the requirements sought this court would still have been entitled to exercise a judicial discretion. Judicial remedies are discretionary and in the circumstances such as prevailing here, I would have upheld the public interest in having more housing for the common good (increasing housing stock in the Estate from 80 to 700 units where the applicant could still be included.)

The application is dismissed but I give no order as to costs.

DATED at Nairobi this 17<sup>th</sup> day of November, 2006.

J.G. NYAMU

JUDGE