REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 360 of 2006

JAELYN LUKAI OPUNGA & 358 OTHERS………...................................…………..PLAINTIFF

VERSUS

1. **THE NATIONAL HOUSING CORPORATION….....................................…1ST DEFENDANT**
2. **THE CITY COUNCIL OF NAIROBI……………….................................….2ND DEFENDANT**

R U L I N G

This is an application for the review of orders which this court had issued on 31st July 2006. The application has been brought pursuant to the provisions of Order 44 rules 1 and 2 of the Civil Procedure Rules, as read together with Sections 3 and 3A of the Civil Procedure Act.

In order to have a better appreciation of the application, I believe that it is important to first get to know what had transpired on 31st July 2006.

On that date, the court had been scheduled to hear the 1st defendant's application dated 26th July 2006. That application was for the striking out of the plaint on the grounds that the verifying affidavit contains false, scandalous and oppressive averments. In the alternative, the 1st defendant sought the discharge of the injunction which had been granted on 24th July 2006.

When the application came up for hearing, Mr. Seda Advocate held brief for the plaintiff's advocate, Mr. Nyamu. Meanwhile, the 1st defendant was represented by Mr. Njoroge advocate, whilst the 2nd defendant was represented by Mr. Lilan advocate.

The court was notified that Mr. Nyamu was engaged in Civil Appeal No. 1159 of 2003, which was going on before the High Court, at Machakos.

As the date for the hearing of the application before me had been fixed in the absence of the plaintiff's advocates, and because the said advocates were only served with the Hearing Notice, on 27th July 2006, both the defendants did not object to Mr. Seda's application for an adjournment. Accordingly, the court did grant the adjournment.

However, the court also went further to order that the defendants would no longer be barred from selling the houses which are the subject matter of the suit herein. As the said order is the subject of the application herein, it is necessary, I believe, to set out the relevant portion thereof. It reads as follows;

"**However, in acknowledgement of the fact that in *Misc. Application No. 757 of 2005,* the parties herein did, on 18.5.06, consent to the sale of the housing units that were the subject matter of this**

suit, I hold the considered view that it is wrong for this court to hold a contrary position, even whilst the application is still pending. Therefore, to that extent, there shall not now be a bar to the defendants proceeding with the sales, in accordance with the terms of the consent order in *Misc. Application No. 757 of 2005."*

Soon after the plaintiffs had heard the pronouncement of the afore-cited order, they moved the court for a review thereof.

When canvassing the said application, the plaintiffs asked that there should either issue an injunction to restrain the defendants from selling the 600 housing units, or alternatively that the status quo that was prevailing as at 24th July 2006 be maintained.

The reasons advanced for that application were essentially that the defendants had procured the orders of 31st July 2006 through misrepresentations made to the court. It was the plaintiffs' case that the defendants had misled the court to believe that the orders made on 18th May 2006, directed that the sale of the housing units were to proceed.

As far as the plaintiffs were concerned, the orders of 18th May 2006 only lifted the "**sale at the prices offered on 3rd February 2005. The implication was that the issue of the price was not to be stayed any further."**

The reason advanced for that contention is that the prices for the two categories of the housing units were reduced. For the 3 bed-roomed units, the price came down from KShs. 3.0 million to KShs. 2.1 million. Whilst for the 2 bed-roomed units the price went from KShs. 2.5 million to KShs. 1.6 million.

In the light of those developments, the plaintiffs say that they saw no need to continue challenging the defendants on the issue of the sale price. It was for that reason that they then lifted the order that had effectively put a stop to the sales.

That notwithstanding, the plaintiffs then mounted a challenge against the time-span provided for the process of sale. They did so because in their view, the defendants ought to have given them fresh notices, spelling out the time-span for the intended sale, at the reduced prices.

In response to the application, the 1st defendant said that the applicants had failed to demonstrate that they were entitled to the orders sought. It was said that the applicants did not prove that there was "**sufficient reason"** to warrant review.

It is common ground that some 349 occupants of housing units within the Madaraka Estate, Nairobi, took out proceedings for judicial review. The said proceedings are **High Court Misc. Application No. 757 of 2005.** One of the reliefs sought in that case was an order of Mandamus, compelling inter alia, The National Housing Corporation and The City Council of Nairobi, to sell the housing units at Madaraka Estate to the sitting tenants.

It is also common ground that some 261 occupants of the housing units in issue filed yet another case for judicial review, being **High Court Misc. Civil Application No. 580 of 2005.** One of the reliefs sought in that case was an order of Mandamus, compelling The National Housing Corporation and The City Council of Nairobi (amongst others) to sell the housing units to the occupants.

In the two cases set out above, consent orders were recorded on 25th July 2006. For the purposes of the matter now before the court, the relevant portion of the consent orders, was to the effect that the interim orders previously in force would be varied:

"to the extent that the interim orders prohibiting the sale of the suit premises at the proposed terms be and are hereby lifted" –

as per the order in **Misc. Application No. 757 of 2005;** whilst in relation to **Misc. Application No. 580 of 2005**, the order was that:

"**the interim orders prohibiting the sale of Madaraka Estate be and are hereby lifted.**"

After giving due consideration to the orders made in those two cases, this court arrived at the decision that it would be wrong to stop the sales of the housing units in Madaraka Estate, whereas, in two other cases,the parties had consented to the sales proceeding. It is in those circumstances that I delivered my decision, which is now sought to be reviewed.

To my mind, the said decision, particulars of which are set out earlier herein, is very clear. Pursuant to the provisions of Order 44 rule 1 of the Civil Procedure Rules, the said order would only be amenable to review, if the applicants herein felt aggrieved; and

"**from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order,**"

and applied for review thereof, without unreasonable delay.

First and foremost, there is no doubt that the application has been brought without unreasonable delay.

And as regards the basis for the application, it has not been suggested that the applicants have discovered any new or important matter, or that there was an error apparent on the face of the record.

Therefore, I would agree with the defendants, that the application was founded on what the applicants construed as "**other sufficient reason.**" The said reason, as was submitted by the applicants, was that there had been a mis-representation, which resulted to the court being misled,. Although the applicants did not expressly accuse the defendants of the alleged mis-representation, in my understanding of this case there would have been nobody else, other than the said defendants, who could have misled the court, through their mis-representations.

However, the applicants failed to pinpoint the particulars of the alleged mis-representation. Therefore, I am unable to identify the same.

In any event, the record of the proceedings on 31st July 2006 have no indication, in my considered view, that the defendants made any misrepresentations to the court. Perhaps the only statement which the plaintiffs might have wished to cling to is the one in which Mr. Njoroge, learned counsel for the 1st defendant said:

"**The matter is extremely urgent, as there are two contradictory orders, both issued by the High Court.**"

In so far as this court had ordered that the status quo be maintained, that implied that the housing units could not be sold. To my mind, that was a negation of the consent orders in the other two cases, which had expressly enabled the defendants herein to proceed with the sales. I arrived at that assessment after my own analysis of the orders in the said two other cases, and a comparison of the said orders to the orders made in this case.

In the circumstances, I hold the view that the applicants have failed to satisfy me that there is any sufficient reason to warrant a review of the orders made on 31st July 2006. I therefore decline to order the said orders should be reviewed. Accordingly, the Notice of Motion dated 9th August 2006 is hereby dismissed, with costs to the defendants.

Dated and Delivered at NAIROBI this 2nd day of November 2006.

FRED A. OCHIENG

JUDGE