



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 823 of 2005

SAMUEL MBAKA MONDESTO.....PLAINTIFF
Versus
PERMANENT SEC. MINISTRY OF LANDS & HOUSING.....DEFENDANT

JUDGMENT

This is an application for Judicial Review dated 22nd June 2005 brought by way of Notice of Motion. It is filed in court on the same date. The applicant seeks the following orders;

- 1) An order of certiorari to be issued to remove to this court and quash the decision and order of the Permanent Secretary Ministry of Lands and Housing dated 29th April 2005 asking the applicant to vacate House No. A4 F28 Nyayo High Rise Estate Nairobi.
- 2) An order of Prohibition prohibiting the respondent by themselves, their servants and/or agents from removing/evicting the applicant from House No. A4 F28 Nyayo High Rise Estate Nairobi and/or allocating the said house to a third party.
- 3) Costs of the application to the respondent.

The application is supported by a statutory statement dated 31st May 2005 and an affidavit sworn by Samuel Mbaka Mondesto sworn on the same day.

The application was opposed and the Permanent Secretary Ministry of Lands and Housing, Kiriinya Mukiira swore an affidavit in reply and grounds of opposition dated 11th October 2005 were filed. In the grounds, the Respondent contends that the application is misconceived, incompetent, bad in law incurably defective, wanting in material facts and lacks any basis and merit.

The grounds upon which the application is premised are that the decision and orders of the 1st respondent dated 11th March 2005 and 29th April 2005 are ultra vires and made in contravention of the Rules of natural justice, were irrational, capricious, malicious and unfair in the circumstances.

It is the applicants case that he is an employee of the Government in the Ministry of Labour and Human Resources Development as a manpower planning officer. He was allocated House No. A4 F28 Nyayo Highrise for rental and in year 2004 he went for a training course in India which course ended on 31st October 2004. When he was away the 1st respondent advertised the house for sale amongst others, giving priority to the tenant who was occupying it. When he arrived back in Kenya on 1st November 2004, he learnt of the intended sale. He wrote to the respondent on 2nd November 2004 explaining his predicament and between 1st to 8th December 2004 he paid the 10% deposit towards the purchase of the said house but on 11th March 2005 he received a letter from the respondent asking him to vacate the house as he had not qualified to buy the house having paid his 10% deposit after 31st October 2004. He appealed to the

relevant authorities dealing with housing but he learnt through the Daily Nation Newspaper of 29th January 2005 that the house was allocated to one Jacinta Musyoki and he was further ordered to vacate by 27th May 2005. The applicant contends that the 1st respondent has denied him a chance to be heard which offends rules of natural justice and that the decision that was reached was arbitrary, capricious and unmerited.

The application was opposed and the Permanent Secretary in Ministry of Lands and Housing deponed that he is the custodian and trustee of all Kenyan Government Houses and that the House A4 F28 belongs to the Government. He admitted that the said house among others was advertised for sale. The applicant was accorded a chance on priority to purchase it being a tenant, but he lost the chance when he failed to apply for the purchase by 31st October 2004 which was the deadline and that Jacinta Musyoki who had applied succeeded and that the Government was not bound to sell the house to the applicant as the offer to sell was contractual and the notice to evict him was therefore justified and lawful.

The first point that the respondent counsel raised was that the application is fatally defective because there was no affidavit sworn in support of the application for Judicial Review in that the affidavit filed on 31st May 2005 was only 4 paragraphs and of no evidential value.

I have perused the court record and find that on 31st May 2005 the applicant filed two affidavits one titled ‘**affidavit**’ which is made of 29 paragraphs and a “**verifying**” affidavit to which he annexed orders of 11th March 2005 and 29th April 2005 which are the subject of his application.

It is the respondent’s contention that the verifying affidavit does not verify the facts and that the other affidavit filed on same date does not amount to a verifying affidavit, and that it should have been filed with the leave of the court. Respondents counsel purported to rely on Order 53 Rule 4(2) which talks of one filing further affidavits in the event that new matters arise. On the contrary, it is my view that it is Order 53 R 1(2) that is applicable here. It provides that the Chamber Summons for leave shall be accompanied by a statement, and by affidavits verifying the facts relied on. In the instant case, the 2 affidavits filed on 31st May 2005 were filed along with the Chamber Summons. The applicant can file with the Chamber Summons as many affidavits as he deems necessary. Although it is not clear why he separated the verifying affidavit and ‘affidavit’ of 31st May 2005, I find that the affidavits are properly on record having been filed with the Chamber Summons. In the case **REP V COMMISSIONER OF POLICE EX PARTE NICHOLAS GITUHU KARIA MISC APP 534/03** the court found that the Notice of Motion had no proper verifying affidavit and the Notice of Motion was just hanging in the air. The case is not relevant to this case and facts are different in that there are affidavits filed with the Chamber Summons in support of the Notice of Motion.

One of the issues raised by the applicant is whether the applicant is entitled to the orders sought. There is no doubt that the house in question belongs to the Government. The applicant had become a tenant on account of the contractual relationship that existed between him and the Government as his employer. That is why he was offered to purchase the house on priority. The applicant has agreed that he did not make his application for allocation in the stipulated period. The applicant has not exhibited any evidence by way of an air ticket that he arrived in Kenya on 1st November 2004. Even after he arrived, it was not until December that he purportedly made his deposit for the house. It is not clear whether the deposit was made known to the Permanent Secretary. Having made a general offer to all Civil Servants, the court wonders whether it would have been fair that the Permanent Secretary Housing only awaits the return of the applicant in order to allocate the house or ignore those who had complied with the offer to give the house to the applicant. I believe that those who had made offers by 31st October 2004 had a right to be considered for allocation of the house. The applicant, though out of the country cannot convince this court that he could not have known of the respondent’s offer to sell the houses before his return considering the new technological advancement.

His family was in that house and it was likely that the applicant was aware of the offer and did nothing before expiry of the offer. His appeals to the various bodies were made well after the offer was closed.

The Government made an offer, it was upto the applicant to accept it or not.

The acceptance of the terms would have created a contractual relationship between the applicant and the Government. The Government was in no way bound to sell the house to the applicant and the court cannot force such a contract or relationship which is supposed to be mutually agreed. The court cannot compel the Government to accept the applicant's terms or even force it to receive money. Even if the court made such an order it would be doing so in vain and courts do not act in vain. Judicial Review is a public law remedy and in my view the applicant is trying to enforce his own private remedy i.e. a contract through Judicial Review and that is available. In the case of **REPUBLIC VS. B.B.C ex parte LAVELLE (1983) I N LR 223** the court held that Judicial Review under Order 53 could not be used to challenge the decisions of purely private or domestic tribunals even as the disciplinary body of the BBC which derives its power solely from the contract between BBC and Lavelle. Judicial Review would not therefore be available to situations arising from a lease or tenancy. The above case was considered in the case of KARIA which has already been considered above.

In another case of **R. V. EAST BERKSHIRE EX PARTE WALSH** a nurse had been dismissed for misconduct and he moved the court for Judicial Review orders to quash the decision and the court held that the applicant was not seeking to enforce a public law right but his private contractual right under his contract of employment and therefore, his application was a misuse of the Judicial Review process under Order 53 Civil Procedure Rules.

The court held:

“An applicant for Judicial Review had to show that a public law right which he enjoyed had been infringed; where the terms of employment by a public body were controlled by statute, its employees might have rights both in public and private law to enforce these terms but a distinction had to be made between an infringement of statutory provisions giving rise to public law rights and those that arose solely from a breach of the contract of employment.”

Though in the present case, the applicant is not trying to enforce breach of contract of employment, the emphasis I wish to make here is that it is upon the applicant to show that he enjoyed a public law right which has been infringed. In the instant case, it is my view that the applicant is trying to impose terms of a contract on the Respondents and if he is entitled to any remedy it would be under the ordinary law of contract and Judicial Review being a public law remedy would not apply.

Can an order of prohibition be available to the applicant? What does an order of prohibition do or when does it issue? Halbury's law of England 4th Edition Vol. 5 states:

“It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct the cause, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings”.

In the present case, it is admitted that the house in question has already been allocated to one Jacinta Musyoki. The applicant saw the allocation in the Daily Newspapers. I do agree with Respondents submission that the order of prohibition is sought too late in the day and the court cannot prohibit what is already done.

The applicant alleges breach of rules of natural justice by the Respondents because he was not given a hearing to articulate his case. In a letter dated 11th March 2005 (SME) the then Permanent Secretary Ministry of Lands and Housing, Engineer Mwongera addressed a letter to the applicant whose contents were that he had not qualified for the award of the Government House because of his failure to pay the 10% deposit by 31st October 2004 and he was asked to vacate the house. He again appealed to the same Permanent Secretary through his own Permanent Secretary in the Ministry of Labour & Human Resources (SMF &H) and to the Director of Human Resources Management And Employment seeking

his intervention in the matter (SMJ), then the Permanent Secretary/Secretary to the Cabinet & Head of Public Service (SMK). These letters were addressed in March, April and May 2005 when the offer had closed on 31st October 2004. As the Respondent ably argued, the parties addressed in these letters were not enjoined to these proceedings. These letters were written well after the transaction was concluded and the house was allocated. It is a wonder how the applicant wanted to be heard when it was so late in the day. It would have been unfair to cancel the allocation of the house to a person who had successfully applied and had been allocated the house.

Though the rules of natural justice do imply that one will be given a hearing before a decision affecting him is made yet it is not mandatory that such a hearing will be granted in all cases, it will depend on the circumstances of each case. In this case, there is no way a hearing would have been considered after the transaction had been concluded and the applicant had not complied with the offer. In the case of **CHARLES KANYINGI KARIMA V TLB MISC APP 1216 /04** Justice Nyamu held that it was not necessary to give a hearing in each and every case. In my own decision in **MUSA KINGORI GAITA V KWS MISC. 1581/05** this court declined to quash the decision of KWS barring the applicant from entering the National Parks though he had not been given a hearing by KWS because the circumstances of the case did not allow it.

In conclusion, I do find that the orders sought by way of Judicial Review cannot be granted for reasons addressed in this judgment. The application dated 22nd June 2005 is hereby dismissed with each party bearing their own costs.

Dated and delivered this 12th day of July 2005.

R.P.V. WENDO

JUDGE