REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 478 OF 2002

REPUBLIC

VERSUS

THE MINISTER FOR LOCAL GOVERNMENT,

HON. UHURU KENYATTA…...…….……1ST RESPONDENT

NAIROBI CITY COUNCIL…2ND RESPONDENT/APPLICANT

Ex parte

RUMBA KINUTHIA, J.K. WAMUGI & MACHARIA MAINA (on

their own behalf and on Behalf of 17 Others)……APPLICANTS

RULING

1. The Application, the Prayers, the Depositions

The Applicant's Notice of Motion application dated 23rd April, 2004 was filed on 26th April, 2004. It was brought under Order LIII of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The substantive prayers in the application were as follows:

> (1) that, the Court be pleased to review, vary and/or vacate the Order made by the Honourable Mr. Justice Rimita on 28th January, 2003;
>
> (2) that, pending the hearing and determination of the present application or further orders of the Court, the Respondents do individually and/or severally pay into Court and continue doing so the future difference in monthly rents between the old and new rates;
>
> (3) that, the Court do issue such other and/or further Orders as it deems fit and expedient in the circumstances;
>
> (4) that, the costs of this application be provided for.

The grounds stated on the face of the Notice of Motion are as follows:

> (i) that, the amounts sought to be deposited in Court presently stand at the sum of Kshs.11,967,225/31 and continue accruing by the month, and if the Respondents' appeal does not

succeed, the Applicant will be unlikely to recover the said amount from the Respondents;

(ii) that, there is a danger and likelihood that pending he determination of the appeal herein, and if suitable Orders do not issue now, some of the Respondents may vacate the suit premises and the Applicant may fall into the risk of being unable to realise the disputed amounts;

(iii) that, the Applicant being a public body, it is fair and in the public interest that the Court issues the Orders sought, to protect the suit funds, which are essentially public funds, from loss;

(iv) that, no known prejudice will be visited upon the Respondents if the orders sought herein are granted;

(v) that, the Orders sought should be issued in the interests of justice, and to protect the legitimate interests of all parties, pending the determination of the intended appeal.

The evidentiary basis of the application is in the depositions of Franklin Magaju, Town Clerk of the City Council of Nairobi, sworn on 23rd April, 2004 and filed with the application. What are the material elements in this evidence?

(a) that, the proceedings had been commenced by way of Notice of Motion dated 8th May, 2002 by which the Respondents sought orders of prohibition to stop the Applicant from implementing increments of rent, service charge and parking bay charges in respect of the suit premises pursuant to a ***Gazette Notice*** dated 14th December, 2001; but their application was dismissed with costs on 4th October, 2002;

(b) that, pursuant to a subsequent application for stay on behalf of the Respondents dated 11th October, 2002, the Honourable Mr. Justice Rimita issued an Order of stay pending the determination of an intended appeal - and this had the effect of putting on hold the implementation of the aforesaid charges;

(c) that, the deponent believes information given by the Applicant's Advocates on record, that the Applicant's Civil Appeal No. 301 of 2002 is now set down for hearing on 18th November, 2004;

(d) that, by an application dated 9th April, 2003 the Applicant sought Orders for the deposit in Court by the Respondents of the disputed amounts, pending the determination of their appeal; but the said application was struck out on a technicality on 3rd October, 2003;

(e) that, there are compelling circumstances justifying the variation of the Order made by Rimita, J on 28th January, 2003 so as to impose a condition directing the Respondents to deposit the disputed amounts in Court pending the hearing and determination of the Respondents' appeal;

(f) that, the hearing date for the said appeal is 18th November, 2004 and by that date the amounts in dispute will have grown substantially, and there will be difficulties in realising the said amounts from the Respondents in the event that their appeal fails;

(g) that, some of the Respondents have vacated the suit premises, and others may vacate before the appeal is finalised; and this situation exposes the Applicant to a probable risk of not realising its monies in the event the appeal fails;

(h) that, the pendency of litigation has been capitalised upon by many tenants of the suit premises, to stop all payments of rents falling due.

J.K. Wamugi, as secretary of the duly registered City Hall Annexe Private Tenants Association, and acting on behalf of the tenants in question, filed his replying affidavit dated 28th April, 2004 on 3rd May,

2004. The substance of his depositions may be set out as follows:

(i) that, the Respondents' counsel on record has advised that an application of such a nature must be heard by the same Judge whose Orders are sought to be reviewed;

(ii) that, the Orders sought to be reviewed were made by the Honourable Mr. Justice Rimita who must have had good reasons for making them;

(iii) that, since the appeal has already been set down for hearing, the application has been brought in bad faith, mischievously and in abuse of the process of the Court;

(iv) that, one of the grounds for seeking to halt rent increments by the Applicant in the application of 8th May, 2002 was non-provision of essential facilities/services by the Applicant herein;

(v) that, the complaint has become even more serious today, as water has disappeared in the building, and ordinary cleansing services for toilets have also tailed off, and lifts have not worked reliably, leading to loss of clients and customers who find it too burdensome to walk up to the 16th Floor where the private tenants are based;

(vi) that, it is not possible for any tenant of the suit premises to move out with the Applicant's property, as the Applicant's authority is required for movement of all property;

(vii) that, it is not an ascertained fact that any of the tenants of the suit premises has moved out as claimed in the affidavit in support of the application;

(viii) that, the averment that there are outstanding rent arrears runs counter to the existence of a counterclaim by the tenants of the suit premises, against the Applicant;

(ix) that, by an order of this Court issued in January, 2002 part of the rent is payable by the tenants of the suit premises directly to the lift company, Schindler, and so this should not be treated as part of any rent arrears due to the Applicant.

2. Preliminary Matters, and Identification of Issues

At the hearing of 17th June, 2004 the second Respondent in the Miscellaneous Application, who was here the Applicant (the City Council of Nairobi) was represented by Mr. Omotii, while the Respondents in this application were represented by Mr. Ngala, and Mr. Bita held brief for Mr. Rotich of the Attorney-General's Office representing the first Respondent in the Miscellaneous Application, namely the Minister for Local Government.

Mr. Omotii began by giving his undertaking that the Hon. The Attorney-General had previously committed himself, on the record, that he would be supporting the position taken by the City Council of Nairobi, the Applicant herein. Mr. Bita concurred and took leave to appear in another matter before another Judge.

Mr. Omotii sought a rectification to the caption reference in the Notice of Motion to Order XIIV rule 1, noting it was wrong and should be struck out. As Mr. Ngala for the Respondent abandoned his objection on this pint, the reference to Order XLIV rule 1 was deleted.

Counsel then prayed for the variation of an Order made by the Honourable Mr. Justice Rimita on ***4th October, 2002***. What was the content of that Order?

The Applicants in that instance, who are the Respondents herein, had sought Orders -

"THAT, the Applicants be granted an order of prohibition to stop the Respondents from

implementing increments of rent, service and parking bay charges against the Applicants pursuant to ***Gazette Notice*** dated 14th December, 2001."

The learned Judge ordered:

> "THAT, the application dated 8th may 2002 be and is hereby dismissed with costs to the Respondent."

But the learned Judge granted a stay on the implementation of the new rates, pending a formal application to be presented by the Respondent. The anticipated application was heard on 11th October, 2002 its main prayers being:

> "THAT, the Court do stay the execution of its Orders of 4th October, 2002 pending the hearing of the ***appeal*** intended to be filed in the Court of Appeal;
>
> (b) THAT, the Court be pleased to stay the implementation of increments of rent, service and parking bay charges pursuant to ***Kenya Gazette Notice*** dated 14th October, 2001 by the Respondents against the Applicants pending filing and subsequent determination of the Applicant's intended appeal.

On this application, the Honourable Mr. Justice Rimita, on ***11th October, 2002*** ordered as follows: "THAT a stay of execution of the order dated 4th October, 2002 be and is hereby granted for 45 days."

It is apparent that, as the appeal by the Respondents herein has not yet been heard, and will not be heard by the Court of Appeal until ***18th November, 2004*** the stay of execution granted by Rimita, J on ***11th October, 2002*** has been kept in force to-date. Indeed the matter came before Rimita, J once again on ***28th January, 2003*** when he ordered: "*THAT, the status quo be and is hereby maintained until the appeal is heard and determined*." And this is the gravamen of the City Council of Nairobi in its Notice of Motion application dated 23rd April, 2004; it is seeking to have a variation to the status quo order, so that the Respondents, who will be Appellants before the Court of Appeal in C.A. No. 301 of 2002, are made to ***pay up-front such moneys as they will be obliged to pay up if their appeal should be unsuccessful***.

The purpose of this Ruling, therefore, is to resolve the question ***whether or not the Respondents (Appellants) must be made to pay up-front*** the enhanced money claims gazetted by the City Council of Nairobi in the ***Gazette Notice*** of 14th October, 2001.

3. Submissions for the Applicant

Mr. Omotii's submissions rested on the depositions in the supporting affidavit filed by the Town Clerk of the City Council of Nairobi. He submitted that the effect of the status quo order made by the Honourable Mr. Justice Rimita on ***28th January, 2003*** was that there was an unlimited stay on the City Council charging new rents as already gazetted, upon the ***ex parte*** Respondents who are all tenants of the Applicant at the suit premises, namely the 16th Floor of a building known as City Hall Annexe. Counsel stated as common ground the fact that there were 24 tenants now benefiting from the said Order of stay, and raised as statistics the point that, between 28th January, 2003 when Rimita, J made the status quo order, and today the rents payable to the City Council on the newly-gazetted rates would have cumulated to the substantial figure of ***Kshs.11,967,225/31.*** Counsel remarked that the said figure would keep growing by accretion right through up to the time of hearing Civil Appeal No. 301 of 2002, on 18th November, 2004 and indeed up to the time that matter will have been finally determined in a Ruling of the Court of Appeal. Counsel expressed the apprehension that if the arrears based on the gazetted rates continued to thus increase, the Applicant stood to make substantial losses if the appeal failed and the gazetted rates were upheld by the Court of Appeal. The prayer, therefore, is that the status quo order of 28th January, 2003 be varied to make it a condition that, pending the finalization of the appeal, the ex

parte Respondents do deposit in Court the rents in dispute, and continue doing so.

Learned counsel, Mr. Omotii, contended that the proposed variation to the said stay Order, will be in the interests of justice, as it will help to protect the legitimate interests of the parties to the proceedings. It will protect the Applicant in the sense that, if the ex parte Respondents failed on appeal (meaning that the proposed increments were, after all, lawful and proper), the Applicant will be able to obtain readily from the Court's custody the moneys which all along were due to the Applicant, but were kept away from it. Such an order, counsel submitted, would also be in the interests of the Respondents; for if they succeed on appeal, then they will be able to draw the money directly from the Court, or enter into an arrangement for the Applicant to give them credit as appropriate.

Counsel submitted that the proposed variation to the stay Order of 28th January, 2004 would be in the interests of justice; because some of the tenants might vacate the suit premises during the pendency of the appellate process, and if the appeal failed, then it would be difficult for the Applicant to recover what would have been lost under the increased rent, *vis-à-vis* those particular tenants. Counsel contended that if the current claims by the Applicant, which now stand at nearly Kshs.12 million, were allowed to attain stupendous proportions, they would prove forbidding to the purses of at least some of the Applicants; and so it was necessary that this money be paid upfront, and held with a stake-holder pending final resolution of the dispute.

Mr. Omotii also brought the public interest into the burden of his submissions in favour of a variation of the stay order of 28th January, 2003. He submitted that the City Council is a public body, and the moneys in dispute would fall under the portfolio of public funds; and so it is in the interest of justice that the Court grants the Orders sought. This, counsel submitted, would ensure that public funds are properly protected, pending the resolution of the issues in dispute.

Learned counsel submitted that, a variation to the stay order of 28th January, 2003 as proposed would cause no prejudice to the ***ex parte*** Respondents; for, whichever party succeeds in the appeal, will be able to fall back on monies safely held in the Court's custody.

Counsel also invoked the Court's inherent powers for ensuring the ends of justice are not defeated, provided for under Section 3A of the Civil Procedure Act (Cap. 21), as a basis for granting the Applicant's prayers.

Mr. Omotii noted that the Applicant's attempt to obtain a variation of the stay order of 28th January, 2003 was not new; a similar application (dated 9th April, 2003) had been struck out on 3rd October, 2003 but purely on technical grounds – it had been wrongly brought by Chamber Summons, rather than by Notice of Motion. Counsel submitted that since the said application of 9th April, 2003 had not been terminated on issues of merit, it was open to the Applicant to bring another application, and the rule of ***res judicata*** is not applicable to matters so struck out (Civil Procedure Act (Cap. 21), Section 7). Mr. Ngala for the Respondents, on that point, was in agreement and avowed that he would not seek to rely on the ***res judicata*** limitation to proceedings.

To the charge in the Respondents' grounds of opposition (dated 28th April, 2002) that "the Applicant is guilty of inordinate delay in filing the application", Mr. Omotii stated that the Applicant had not known that the hearing date for the appeal was set for 18th November, 2004 until the 19th of February, 2004. It had not also been possible, for some time, to forecast the rent arrears that would accrue, at the new gazetted rates, by the time the appeal would come up for hearing.

Counsel contested certain elements in the replying affidavit – those which attributed to the Applicant bad faith and lack of bona fides. He disputed paragraph 9 of J.K. Wamugi's affidavit of 28th April, 2004 which averred that the Applicant was seeking Orders with retroactive application, which would take away the protections that had been granted to the Respondents by the contested Order of 28th January, 2004. Counsel's argument here is, with respect, a logical one – that if any new Orders were to be made requiring the Respondents to make payment into Court, such monies only represent what would be well

and truly payable to the Applicant if the appeal were to be unsuccessful.

4. Submissions for the ex parte Respondents

Mr. Ngala made submissions based on the Respondents' grounds of opposition, which had been filed on 3rd May, 2004. These grounds were as follows:

> (i) that, the application is fatally and incurably defective;
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> (ii) that, the application is vexatious and an abuse of Court process;
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> (iii) that, the application is mischievous and has been brought in bad faith;
>
> (iv) that, the Applicant is guilty of inordinate delay in filing the application;
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> (v) that, the applicant is seeking Orders whose effect will be retrospective and highly prejudicial to the Respondents;
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> (vi) that, there is no valid affidavit in support of the application;
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> (vii) that, there are no sufficient grounds to support the orders sought;
>
> (viii) that, no case has been established for the urgency being attached to the application, ad the Applicant should wait for the decision which will emanate from the Court of Appeal.

Counsel submitted that, the moment counsel for the Applicant obtained the striking out of the caption reference in the application to Order XLIV rule 1, the whole application aborted, as the remaining foundation, Order LIII, has no provision for review as sought in the instant application; and such review is known only under Order XLIV. Mr. Ngala argued that the principle that Order LIII is self-sufficient could not assist the Applicant; because, though the application has a caption reference to Section 3A of the Civil Procedure Act (Cap. 21), counsel had not relied on it in his submissions.

I would resolve this point immediately by ruling that a caption reference in the Notice of Motion to Section 3A of the Civil Procedure Act (Cap. 21) is a sufficient recognition of the discretion of the Court which, in any case, is inherent and does not have to be verbally invoked in submissions. I am, besides, guided in this holding by a fundamental principle which must always attend the Court's constitutional obligations, ***namely, saving prima facie legitimate claims of parties so far as appears judicious, to enable the same to be resolved on the merits.*** I am not inclined, therefore, to strike out the application on the basis of the technicality relied upon by the Respondents.

The Respondents impugned the application on charges of bad faith, on the basis of the contention that "where a Judge has made a decision where a variation is required, the parties have to go back to the Judge who made the Order." Counsel proceeded with that argument as follows:

> "On 28th January, 2002 the Order sought to be reviewed was made. An attempt to review the Order was dismissed by the same Judge on 3rd October, 2003. We think 8 months passed before the present application was brought, because the [Applicant herein] did not want to face Rimita, J again, and thus his departure from the Bench was seen as a Godsend."

Although learned counsel, Mr. Ngala, made much of the requirement that variation of a judicial Order has to be done by the same Judge who made it, the point cannot, with respect, be one carrying any legal force especially where the Judge who made the Order, as in the case of the Honourable Mr. Justice Rimita, is no longer in service. The Court is a permanent constitutional agency for the resolution of disputes in litigious matters, and it must remain open, and clothed with full jurisdiction, to entertain complaints properly lodged before it including those for the review of judicial orders, even where the Judges who made such orders are no longer serving on the Bench. This contention by the Respondent, therefore, will

not dissuade me from considering the issues raised by the application on the merits.

Counsel also contested the propriety of the affidavit in support of the application, as it did not state, as required by Order XVIII rule 4, the place of residence of the deponent. Counsel attributed further improprieties to the said replying affidavit, in the unintegrated manner in which it bore its annexures. On these grounds, Mr. Ngala urged that the Town Clerk's supporting affidavit be struck out, in which event, counsel further submitted, the entire application would be "left completely dead."

I am not, with respect, inclined to take away the vitality of the application on such technical grounds, even though I do agree that errors on the part of counsel for the Applicants led to the defects indicated. As I noted earlier, I consider the Court to be under a duty to sustain litigious claims so far as is judicious, so as to enable the pertinent issues to be resolved on the merits. Besides, the Court is empowered under Order XVIII rule 7 to save an affidavit which may not be in the strict procedural form as prescribed.

Mr. Ngala submitted that the Applicant had not tendered sufficient grounds in support of the Orders sought. In particular, counsel contended that the Applicant's claim that large sums of money – to the tune of about Kshs.12 million – which would be due to the Applicant were at risk, had no basis, as it had not been shown how the calculation was done; and besides, the Applicant had not in any way endeavoured to show impecuniosity on the part of the Respondents such as would impede their compliance with such Orders as may be made by the Court of Appeal. Mr. Ngala submitted that on this important point, the Applicant was in effect, inviting the Court to review existing judicial Orders purely on the basis of presumptions.

The basis upon which the Applicant has calculated the monies it demands from the Respondent, is in my view, the most critical issue of merit that should determine the outcome of the instant application. Although this position is clear from the replying affidavit and from much of the documentation on file, strangely enough, Mr. Ngala did not develop his argument thereon, in as much detail as I would have expected. In cognate proceedings, in Civil Suit No. 464 of 1999, the Honourable Mr. Justice Mbito had on 30th January, 2002 ordered -

> "THAT, the Plaintiffs [who are Respondents herein] be allowed to pay for the monthly maintenance of the lifts directly to SCHINDLER LIMITED and the said costs be offset from the quarterly rent payable by the Applicants to the Respondents."

This, in my view, links up quite well with the averments in the replying affidavit, of disagreements on the provision of services by the Applicant, and on what is truly payable by the Respondents to the Applicant. On the information before me, I must conclude that there are sharp disagreements on what is to be paid for by the Respondents; and in these circumstances there clearly are contractual questions to be settled, and so I would not consider it proper that the Applicant will proceed to exact from the Respondents a particular amount of money merely directed in a ***Gazette Notice.***

Counsel disputed the claim in the supporting affidavit, that some of the tenants of the suit premises had vacated during the pendency of the appeal. This contention is, with respect, justified, as no letters of demand addressed to such departing tenants had been exhibited, nor was there any proof at all that tenants had vacated as alleged.

To the contention made for the Applicant that the Respondents stood to suffer no prejudice if they were required to deposit in Court the monies being demanded, learned counsel remarked that, the fact that the Respondents felt aggrieved enough to seek stay orders before proceeding to the Court of Appeal does indicate that he Respondents do stand to suffer prejudice. Mr. Ngala submitted that it would not be right to demand that the Respondents make payment into Court, without grounds of merit. As the kind of order being sought had been refused by the Honourable Mr. Justice Rimita, counsel submitted, the Applicant ought now to explain why the learned Judge did not grant such Order, and state proper grounds for a variation. Counsel submitted that since the Applicant had lived with the Order made by the Honourable Mr. Justice Rimita for some one-and-a-half years, good reasons ought to be given explaining the new urgency which prevents the Applicant from waiting up to 18th November, 2004 when the appeal is

scheduled to be heard.

5. Submissions for the Applicant, in Reply

As regards the capacity of the tenants of the suit premises to raise funds for any payments such as may be ordered against them by the Court of Appeal, counsel stated that he had not set out to make any empirical proof on the matter. He stated, however, that the Applicant did have reasonable apprehensions in the matter.

6. Orders

As I have noted in tis Ruling, I was concerned to see the basis of calculation which led the Applicant to demand, for the time being, a sum of money close to Kshs.12 million from the Respondents. It is the concern to secure these monies, I believe, that led to the present application. Those monies are attached to rental directions contained in a gazettement by the City Council of Nairobi, in exercise of public authority. But the relationship between the Applicant and the Respondents is one of ***private contract***, and contract attached to services properly and efficiently rendered. There is clear evidence on record, that the Applicant has not been able to satisfy the Respondents in respect, at least, of the provisions of lift services. Besides, the depositions in the replying affidavit – which have not at all been traversed – show that the Applicant has failed also to provide other essential services which form part of the equation in the prescription of rentals. The effect is that there can be no accrued and acknowledged money figures that the Respondents must pay to the Applicant, as of now. And therefore there is no justification for the imposition of burdensome rental figures upon the Respondents, in the run-up to the hearing and determination of their appeal which begins on 18th November, 2004. In coming to this conclusion I have taken note of the fact that the Applicant had made no attempt to show that the Respondents would lack the ability to pay up any rental figures such as might be assigned to them by Orders of the Court of Appeal. In effect then, there is no legitimate basis upon which the Applicant is demanding payments into Court by the Respondents, at this stage, of enhanced rental figures. In reaching this conclusion I have also been guided by one policy consideration which, I hope, will in the future guide not only the City Council of Nairobi but also all public service-delivery agencies. ***Members of the public, in the position of the Respondents, are entitled to quality services that fully incorporate the elements of convenience, efficiency, comprehensiveness, practicality, cleanliness and hygiene – especially when they have undertaken to pay for services bearing those descriptions.***

With such a clear persuasion, I must determine this application in favour of the Respondents, and against the Applicants. I will make the following specific Orders:

1. Prayers No. 2, 3, 4, of the Applicant's Notice of Motion application of 23rd April, 2004 are refused.

2. The costs of this application shall be borne by the Applicant.

DATED and DELIVERED at Nairobi this15th day of October, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Applicant: Mr. Omotii, instructed by M/s. E.N. Omotii & Co. Advocates

For the Interested Party (Minister for Local Government): Mr. Bita, instructed by the Office of the Attorney-General

For the Respondents: Mr. Ngala, instructed by M/s. Rumba Kinuthia & Co. Advocates