



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC JUDICIAL REVIEW NO. 53 OF 2017**

**REPUBLIC.....APPLICANT**

**AND**

**THE NATIONAL HOUSING CORPORATION.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

***EX-PARTE:***

**1. GITONGA AKOTHA**

**2. JACOB ALEIT**

**3. BENSON MILAMBO MWAKINA**

**JUDGEMENT**

1. The *Ex parte* applicants (“the Applicants”) filed the application dated 15/7/2017 seeking an order of mandamus to direct the 1<sup>st</sup> Respondent or its officers to issue to the Applicants and all other residents who have completed the purchase of residential units original titles for their units in their respective names which appear in the sale agreements and certificates to indicate their respective shares in the common property and subsequently make them members of the corporation envisaged by the Sectional Properties Act. Further, they sought to have the 1<sup>st</sup> Respondent compelled to pay the stamp duty costs relating to the transfer of the titles and for it to take steps as a developer to ensure that the property was in a good state of repair and for the Applicants’ access to clean and adequate drinking water as mandated under the Sectional Properties Act. They also sought to have the 1<sup>st</sup> Respondent compelled to disclose to the Applicants information concerning the management agreement entered into by the tenant purchasers and itself, the creation of a corporation to manage the entire estate, details showing how the 1<sup>st</sup> Respondent had been managing the estate without the existence of the corporation as well as other accounting issues relating to the estate.

2. The Applicants claimed that they were former tenant purchasers who had completed purchase of their respective residential units in the 1<sup>st</sup> Respondent’s Housing Scheme situated in Langata on land reference number 106/251 – 261 in Nairobi. That despite fully paying the purchase price for their respective residential units and being entitled to be conferred the rights and benefits that come with ownership, they had never been issued with titles to their respective residential units nor had they been given membership in the corporation charged with the management of the units contrary to Section 17 of the Sectional Properties Act. The Applicants were apprehensive that they would suffer escalated stamp duty payments due to the withheld transfer of titles because the value of the residential units had appreciated since the time of purchase. They claimed that they had been left in the dark on matters pertaining to the management of the residential units.

3. The application was supported by the affidavit of George Akotha who deponed that he was authorised to swear the affidavit and that he was among the tenants who had completed the purchase of their individual residential units in the 1<sup>st</sup> Respondent’s housing scheme situated in Langata in Nairobi. He averred that the belated transfer of the residential units would have adverse economic constraints because the stamp duty payable on the withheld transfers would increase. He claimed that the 1<sup>st</sup> Respondent had refused to divulge details regarding queries on whether the corporation and the fund for administrative expenses existed. He added that they had never participated in any annual general meeting of the corporation.

4. He averred that the 1<sup>st</sup> Respondent had neglected its duty of keeping the property and residential units in good repair and was therefore

infringing on their right to a clean and healthy environment. He added that without titles to their residential units they could not access financial facilities using the units as collateral and that they could not dispose of their property at will because they had no title to transfer. He expressed concern about the acute water shortage which he claimed was brought about by the 1<sup>st</sup> Respondent's negligence.

5. Mr. Akotha produced copies of sale agreements for some of the units dated 31/12/2010 confirming that the full purchase price had been paid; the letter dated 28/2/2017 from the 1<sup>st</sup> Respondent on the establishment of the management entity for NHC Langata Court Phase I which mentioned that the 1<sup>st</sup> Respondent had commenced the process of putting in place the management entity for Langata NHC Court Phase I and that the residents would be advised when the process of transfer of the titles commenced in due course. He also attached a copy of the letter dated 2/6/2016 requesting a meeting with the 1<sup>st</sup> Respondent.

6. He also produced copies of the 1<sup>st</sup> Respondent's letters dated 25/9/2015 in response to the issues raised by the residents association raised and the one dated 25/11/2011 on the excess service charge apportionment and notice of the increase of service charge from 1,500/= to 4,500/=. There was also correspondence regarding other repairs and lack of electricity in NHC Langata Court.

7. W.K.B Keitany, the Chief Legal Officer of the 1<sup>st</sup> Respondent swore its replying affidavit in opposition to the application for judicial review. He deponed that the housing units Langata Phase I were sold on tenant purchase terms and the sectional titles were in the 1<sup>st</sup> Respondent's name and that as the developer it had the responsibility of putting in place a management entity to cater for common services. He attached a copy of a certificate of incorporation certifying that NHC Langata Court One Limited was incorporated on 7/7/2017 as a public company limited by shares. He produced copies of sale agreements together with the respective service charge contracts over those flats.

8. He pointed out that under the sale agreements which the 1<sup>st</sup> Respondent and the Applicants entered into, the legal costs for the agreement and the transfer were to be borne by the purchasers and that the provision of water was not its duty as this was the responsibility of the Nairobi Water and Sewerage Company which connects water users in Nairobi and its environs.

9. He maintained that the 1<sup>st</sup> Respondent had been running the estate for the common good of the purchasers of the properties in a transparent and accountable manner. He denied that the Applicants were entitled to the information concerning other purchasers nor were they privy to the contracts with shop owners. He argued that the Applicants were satisfied as to the condition of the houses before they took possession. He attached a copy of a letter dated 1/8/2017 informing the purchasers that their respective titles had been secured and that they were required to meet the expenses for the transfer of the residential units to their names.

10. Mr. Keitany contended that this was not a proper case for judicial review because the dispute fell under the Law of Contract Act. He pointed out that orders of judicial review are issued by the court in its supervisory jurisdiction to review the lawfulness of acts or decisions relating to the exercise of public duties. He contended that the issue before this court did not relate to the exercise of a public duty. He argued that the contractual relationship between the 1<sup>st</sup> Respondent and the Applicants through the sale agreements, tenant purchase agreements and the service charge agreements was governed by the terms and conditions agreed to by the parties and that it was not a matter of public act or one governed by public law. He expounded that the allegations made by the Applicants were of breach of the contractual obligation to issue titles and maintain the premises in good order and that as such these were matters of a contractual relationship governed by private law and not matters of public law. He argued that the Applicants did not have a public law right capable of protection under the supervisory jurisdiction of the court.

11. Parties filed submissions which the court had occasion to consider. The Applicants submitted that they entered into sale agreements with the 1<sup>st</sup> Respondent for the purchase of leasehold interests in a housing scheme owned by the 1<sup>st</sup> Respondent along the Southern Bypass on Langata situated on L.R. No. 106/251 -256. They were aggrieved by the 1<sup>st</sup> Respondent's failure to issue to all the residents who had completed the purchase of their residential units titles in their respective names. The Applicants submitted that the failure to issue title documents to purchasers who had fully paid the purchaser price was a violation of their right to own property enshrined in Article 40 of the Constitution. They urged that under the Sectional Properties Act which governs their residential units, they ought to be registered and issued share certificates for each unit and to be furnished a copy of the sectional plan. They contended that by failing to provide information regarding the existence of the management company, it amounted to a contravention of Article 35 of the Constitution.

12. They relied on Section 3 of the Housing Act and the statutory mandate of the 1<sup>st</sup> Respondent as well as Section 3 of the Fair Administrative Actions Act. They argued that being a public body established under Section 3 of the Housing Act, the 1<sup>st</sup> Respondent was enjoined to adhere to the principles of good governance under Article 10 of the Constitution. They concluded their submissions by urging that the 1<sup>st</sup> Respondent had failed in its public duty to the Applicants.

13. The 1<sup>st</sup> Respondent submitted that the subject matter of this dispute was purely contractual and is to be resolved through a different forum and that this court lacked jurisdiction to hear the dispute. It submitted that the application before the court was one pursuing private rights disguised as a public law claim and contended that the Applicants were seeking to hv the court to re-write the contract.

14. The issue for determination is whether the court should grant the orders of mandamus sought by the Applicants. In **Kenya National Examinations Council v Republic, Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** the court addressed the scope and efficacy of an order of mandamus. The court stated that it was in the form of a command issuing from the High Court directing a person, corporation or tribunal to do something which appertains to his or their office in the nature of a public duty. Further, that mandamus will issue in all cases where there is a specific legal right and no specific legal remedy for enforcing that right.

15. Looking at the sale agreements exhibited by the Applicants and the 1<sup>st</sup> Respondent, this is clearly a case seeking specific performance and issuance of titles on completion of payment of the purchase price under the contracts of sale which the Applicants entered into with the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent did not enter into those contracts as a public body nor was it discharging any public duty. It entered into the agreements for the houses it had developed as any other willing seller. The Applicants should have filed ordinary suits for enforcement of

the terms of their contracts regarding non-issuance of titles by the 1<sup>st</sup> Respondent and the other issues relating to maintenance of the estate.

16. The court declines to grant the orders sought in the application dated 15/7/2017. Each party will bear its own costs.

**DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MAY 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. F. Muuo holding brief for Mr. A. Mulekyo for the 1<sup>st</sup> Respondent

Mr. V. Owuor- Court Assistant

No appearance for the Applicants, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents