



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 3 OF 2018

REPUBLIC.....APPLICANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

AND

EX PARTE APPLICANT.....ROMIKO CHANNELS LIMITED

JUDGMENT

1. On 22nd January, 2018, this court granted to Romiko Channels Limited, the Ex-parte Applicant, leave to commence Judicial Review proceedings against the Respondent. The Ex-parte Applicant (*the Applicant*) then filed a Notice of Motion dated 9th February, 2018 in which he sought for the following orders:

a. An order of certiorari to bring into this court for the purposes of being quashed the Respondent's decision dated 2nd August, 2017 to terminate the Lease between itself and the Applicant herein.

b. An order of prohibition restraining the Respondent from terminating the Lease dated 11th June, 2014 and or putting in occupation any third party pending the determination of this suit.

c. An order of mandamus compelling the Respondent to extend the period of the Lease for five (5) years with effect from the date of full payment of the land rates and other outgoings to the Machakos County Government.

d. A declaration that the Applicant herein is not liable to pay rent for the period of time before the date when the Respondent shall have paid land rates and all other outgoings to the County Government of Machakos hence making the leased property tenatable.

e. Any other appropriate order or direction as this Honourable Court may deem just and fit to grant.

f. An order for costs.

2. The Application is supported by the Applicant's Statutory Statement and Verifying Affidavit. In his Affidavit, the Applicant's Director deponed that the Respondent is the Lessor while the Applicant is the Lessee in respect of an unsurveyed plot number 443 Machakos town measuring 0.82 acres; that the Applicant entered into a Lease Agreement with the Respondent on 20th June, 2014 and that the Respondent was to make a payment of Kshs. 2,314,410 in respect of the land rates before the Applicant could obtain the necessary approvals.

3. The Applicant's Director deponed that the Applicant paid Kshs. 316,000 to the Respondent being three months' rent, three months' security deposit, VAT, legal fees and stamp duty as requested by the Respondent; that the Respondent failed to pay the rates that were due and owing and that the Applicant was therefore unable to take possession of the suit property despite having its development plans approved by the County Government of Machakos.

4. It is the Applicant's case that despite failing to make the payment in respect of the rates that were due and owing, the Respondent terminated the Lease on the ground that the Applicant had failed to make payments for rent and took over possession of the leased property; that it has emerged that the Respondent is keen on leasing the land to a third party and that the Respondents' actions are unfair, unreasonable, irrational and illegal.

5. In response, the Respondent's Manager, Legal Services, deponed that the Notice of Motion of 9th February, 2018 and the Chamber

Summons of 18th January, 2018 are not supported by a valid Verifying Affidavit; that the Verifying Affidavit and the Statutory Statement have not been signed or executed by the Applicant and that the said Applications are nullities.

6. The Respondent's Director deponed that the Applicant is relying on a letter of offer dated 20th June, 2014 which does not exist and that the Respondent intended to offer a Lease of the demised property to the Applicant vide a letter of offer dated 11th June, 2014.

7. According to the Respondent, it was a condition of the letter of offer that the Applicant would pay rent as agreed; that it was also a condition of the offer that the Applicant would take possession of the suit property as it is and that notwithstanding the fact that the Respondent did not issue an acceptance letter on the terms of the offer, the Applicant paid Kshs. 316,800 in order to be allowed to take possession of the demised property.

8. It is the Respondent's case that despite allowing the Applicant to unconditionally have possession of the suit land subject to satisfaction of all the conditions in the letter of offer, the Respondent declined to take possession of the demised property; that the Applicant also declined to pay rent to the Respondent from July, 2014 to 2nd August, 2017 and that due to the Applicant's breaches, the Respondent terminated the tenancy relation, vide its letter dated 2nd August, 2017.

9. The Respondent denied owing the County Government land rates to the tune of Kshs. 2,312,410 as alleged by the Applicant. According to the Respondent, the demand letter of 24th February, 2014 was addressed to Kenya Post and Telecommunication, a different entity from the Respondent and that remedies that the Applicant is seeking have been overtaken by events by reason of default on its part.

10. The Respondent's Manager finally deponed that the Application is incompetent; that the dispute herein falls in the realm of private law and ought to be determined thereunder and that in any event, the Applicant has failed to discharge the duty of good faith. Neither the Applicant nor the Respondent filed their respective submissions despite the court giving those directions.

11. The Ex-parte Applicant (*the Applicant*) is a limited liability company which was incorporated on 28th August, 2012. On the other hand, the Respondent is a State Corporation responsible for postal services in Kenya. The Kenyan Post System was formally part of the Kenya Post and Telecommunication Corporation, which was split into Posta, the Communication Commission of Kenya and Telkom Kenya in 1999.

12. The evidence before the court shows that on 11th June, 2014, the Respondent offered to the Applicant a vacant plot situated next to Machakos Post office which was described as "unsurveyed Plot No. 443" (*the suit land*). In the said letter of offer, the Respondent described itself as a Landlord while the Respondent was described as a Tenant.

13. Clause 8 of the letter of offer stipulated that the Applicant will be allowed to erect semi-permanent structures on the plot for purposes of carrying out business subject to the approval of the Landlord.

14. The letter of offer further stipulated that the Applicant shall be responsible for paying the Landlord's Advocates legal costs of registering the Lease, the stamp duty and the registration fee. Annexed on the Letter of Offer was the "Tenant's Acceptance of Offer" which read as follows:

"We confirm that we accept and agree to all the above terms and conditions. We also hereby undertake to execute the Lease as prepared by the Landlord within fourteen (14) days of their presentation to the Tenant. We shall pay the sum of Kenya shillings three hundred and sixteen thousand eight hundred only (316, 800/-), made up as follows to the Landlord on execution hereof:-

First Quarter Rent - Kshs. 120,000

16% VAT on Rent - Kshs. 19,200

Security Deposit - Kshs. 120,000

Legal fees and Stamp

Duty deposits - Kshs. 57,600

Total Kshs. 316,800

15. The Applicant executed the "Tenant's Acceptance of Offer" on 20th June, 2014 and paid the Kshs. 316,800.

16. Indeed, in its letter dated 30th June, 2014, the Respondent acknowledged receipt of the Applicant's cheque number 034137 for Kshs. 316,800. In the said letter, the Respondent stated as follows:

"Please note that all necessary authorities must be sought from the County Government Offices to facilitate the set-up of your proposed operations."

17. According to the Applicant, the Respondent was required to make a payment of Kshs. 2,312,410 in respect of land rates and other outgoings before the Applicant could obtain the necessary approvals from the County Government of Machakos. The Applicant has exhibited the demand note that was issued to the Respondent by the County Government of Machakos demanding for Kshs. 2,312, 410 being ground rent from the Respondent's predecessor, Kenya Posts & Telecommunication. The demand letter is dated 24th February, 2014.

18. It is the Applicant's case that the Respondent having failed to pay the ground rent of Kshs. 2,312,410 to the County Government of Machakos, it was unable to take possession of the suit land. This was despite having its development plans approved by the County Government.

19. There is no evidence before this court to show that the demanded amount of Kshs. 2,312,410 or at all was ever paid by the Respondent to the County Government of Machakos to enable the Applicant take possession of the suit land. Indeed, in its letter dated 7th November, 2016, the County Government of Machakos informed the Applicant that it could not release to the Applicant the approved plans "*until your Landlord clears rates arrears owing to the County Government.*"

20. Indeed, the Respondent was aware that the Applicant could not take possession of the suit land until it gets the approved plans from the County Government. In an undated letter reference number DF: 720/FM/11/11/2014, the Respondent informed the Applicant as follows:

"You will be required to construct the stalls with temporary materials for ease of removal and demolition upon expiry of Lease... Further, you will be required to submit all the drawings and documents to the relevant authorities for approval before implementation. All the approved drawings and documents will be submitted to our office for our appreciation before commencement of works."

21. The evidence exhibited by the Applicant shows that while waiting for the Respondent to pay the requisite land rent to the County Government of Machakos so as to enable it take possession of the suit premises, the Respondent, without any notice, terminated the offer that had been duly accepted by the Applicant. In the said letter of termination dated 2nd August, 2017, the Respondent informed the Applicant that it had re-entered the premises and taken possession pursuant to Clause 17 of the Letter of Offer. This is the letter that the Applicant wants this court to quash. The Applicant also wants the Respondent to be prohibited from entering into a Lease Agreement with any other entity.

22. It is trite that Judicial Review is a special procedure through which the superior courts review the actions of administrative agencies, tribunals and inferior courts to ensure legality and fairness in their actions and decisions. Where such bodies exceed boundaries of their jurisdiction, abuse their power, violate the rules of natural justice, act in bad faith or in an unreasonable manner, the superior court may make an appropriate Judicial Review order to remedy the situation.

23. Initially, the writ of certiorari and prohibition was limited in quashing and prohibiting actions which are *ultra vires* or violating the rules of natural justice. However, the scope of Judicial Review has since expanded to include numerous grounds including unreasonableness, proportionality, legitimate expectation, bad faith, abuse of power, abuse of discretion, bias, amongst other grounds. In the case of *Pastoli vs. Kabale District Local Government Council & others (2008) 2 EA 300*, irrationality and procedural impropriety was defined as follows:

"...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision."

24. The Respondent in this matter has averred that it terminated the Applicant's offer to Lease because the Applicant failed to take possession of the suit land since June, 2014. However, the Respondent has not stated if it ever paid the ground rent of over Kshs. 2 million that the County Government of Machakos demanded before it could release to the Applicant the approved building plans.

25. The evidence before me shows that the Respondent was made aware by the Applicant of the reluctance by the County Government of Machakos to allow the Applicant to take possession of the demised property until the ground rent is paid. The Respondent has stated in the Affidavit of its Legal Manager that the demand of Kshs. 2,312,410 by the County Government of Machakos was not addressed to the Respondent but to a different, separate and distinct entity known as Kenya Post and Telecommunication.

26. The response by the Respondent's Legal Manager that the payment of Kshs. 2,312,410 to the County Government should be made by a body that was abolished in 1999, and whose operations were taken over by the Respondent is not only mischievous but also unreasonable. Indeed, the demanded Ground Rent being in respect of the suit land, it was the obligation of the Respondent to either pay it or negotiate with the County Government with a view of having it written off.

27. To the extent that the Applicant had informed the Respondent that the County Government of Machakos had declined to release to the Applicant the approved development plans due to the non-payment of ground rent by the Respondent, it was unfair, unreasonable and an act of bad faith on the part of the Respondent to terminate the Letter of Offer that had been duly accepted by the Applicant.

28. Indeed, even before terminating the Letter of Offer vide its letter dated 2nd August, 2017, the Respondent did not bother to inform the Applicant the nature and extent of the breach complained of and whether such breach was capable of being remedied by the payment of a stated amount of money owing under the Letter of Offer. In a nutshell, the Applicant was never heard before the Applicant took the decision of terminating the contract it had with the Applicant, contrary to the rules of natural justice.

29. The Respondent's Legal Manager deponed that the Applicant has come to court with dirty hands because the actions it seeks to remedy have been overtaken by events, and that there are already two Lessees in respect of the suit land who have already taken possession of the

suit land. However, the purported Lease Agreements between the Respondent and the third parties have not been exhibited. Consequently, that ground cannot be a basis of denying the Applicant the remedies prayed for in the Application.

30. For those reasons, I allow the Applicant's Application dated 9th February, 2018 as follows:

a. An order of certiorari to bring into this court for the purposes of being quashed the Respondent's decision dated 2nd August, 2017 to terminate the Lease between itself and the Applicant be and is hereby issued.

b. An order of mandamus be and is hereby issued compelling the Respondent to extend the period of the Lease between itself and the Applicant for five (5) years with effect from the date of full payment of the land rates and other outgoing to the Machakos County by the Respondent.

c. The Respondent to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE