



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 78 OF 2017

DR. ROBERT AYISI, COUNTY SECRETARY,

NAIROBI CITY COUNCIL.....PLAINTIFF/APPLICANT

- V E R S U S -

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY 1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

RULING

1) The Nairobi City County Government, the plaintiff/applicant herein took out the summons and motion both dated 7th April 2017. In both applications the applicant sought for similar orders namely:

- 1. application be certified urgent and service thereof be dispensed within the first instance.***
- 2. A mandatory injunction do issue compelling the respondents herein to grant the Nairobi City County Executive Access to the Northern Wing of City Hall solely for the purposes of retrieving the records of the Rates and Audit Departments pending the hearing and determination of this application and suit. IN THE ALTERNATIVE,***
- 3. The Nairobi City County Executive be granted leave to break into the premises (Particularly Northern Wing of City Hall) in order gain access to the premises therein solely for the purposes of retrieving the records of the Rates and Audit Departments the hearing and determination of this application.***
- 4. The Nairobi City County Executive be granted leave to break into the premises (particularly Northern Wing of City Hall) in order to gain access to the premises therein solely for the purposes of retrieving the records of the Rates and Audit Departments pending the hearing and determination of this suit.***
- 5. The access and/or breaking in order be supervised and enforced by the O.C.S Kilimani Police Station.***
- 6. Cost of this application be provided for.***

2) Both applications are supported by the affidavit of Dr. Robert Ayisi, the applicant's county secretary. When served with the applications, the Speaker, Nairobi City County Assembly and the Nairobi City County Assembly, the 1st and 2nd respondents herein, filed a notice of preliminary objection and grounds

of opposition to resist the applications. When the applications came up for interpartes hearing, learned counsels were invited to make oral submissions. I have considered the grounds stated on the face of the applications and the facts deponed in the supporting affidavit of Dr. Robert Ayisi plus the grounds stated on the face of the applications.

I have further considered the grounds stated on the notice of Preliminary Objection and the grounds of opposition. I have also considered the rival oral submissions of learned counsels.

3) It is the submission of the applicant that the Nairobi City County Executive was allocated the Northern Wing of City Hall Building wherein, its staff serving in the Rates and Audit departments used to serve the residents of Nairobi. The applicant further submitted that all the records of both Rates and Audit departments were kept and are still locked up in the Northern Wing of the Nairobi City Hall. By gazette Notice no. 6614 vol. CXVII dated 8th September 2016, the 1st respondent declared that part of the City Hall building used by the Rates and Audit departments belonged exclusively to the 2nd respondent. It is the applicant's submission that the gazette Notice deprived the Executive's staff access to the records kept by the Rates and Audit departments. The applicant aver that the respondents have completely barred its staff from accessing and retrieving the records that had been kept in the aforesaid premises thus depriving the executive its proprietary interest to the rates and audit records thus bringing all conveyancing and audit transactions to a complete halt. The applicant further aver that talks with the respondents to have the applicant's staff to access the Northern Wing of the City Hall to retrieve the crucial records have bore no fruit. For this reason, the applicant is seeking for an interim order of mandatory injunction to compel the respondents to grant it access or in the alternative, the applicant be granted breaking in orders to retrieve its Rates and Audit records pending the hearing and determination of this suit.

4) I have already stated that the respondents filed grounds of opposition and a notice of preliminary objection to oppose the applications. It is the submissions of the respondents that the applications and the suit herein are subjudice. It is said that the subject matter in issue in this suit relates to the ownership and or use of the Northern Wing of the City Hall which is also directly and substantially in issue in Nairobi H.C. Misc. Civil application no. 575 of 2016 involving the same parties. It is said that Nairobi H.C. Misc. No. 575 of 2016 is currently pending before the Hon. Mr. Justice Odunga. This court was urged to rule that it has no jurisdiction to further entertain this pursuant to the provisions of Section 6 of the Civil Procedure Act. The respondents further argued that the applicant is guilty of material non-disclosure. It submitted that the applicant failed to make a full and frank disclosure of the following facts. First, the existence and pendency of Nairobi H.C. Misc, application no. 572 of 2016 where similar applications had been made and dismissed by this court.

5) Secondly, that a site visit had been undertaken by the Deputy Registrar of this court pursuant to the directive issued by Mr. Justice Odunga vide Nairobi H.C. Misc. Application no. 575 of 2016. It is further alleged that the Deputy Registrar's report on the site visit controverted the applicant's allegations in both suits. This court was urged to stay further proceedings in this suit to avoid this court issuing conflicting decisions over suits with similar facts and issues involving the same parties. The respondents also beseeched this court to find that the applications do not meet the threshold for granting orders of mandatory injunction. In response to the respondents' submissions, the applicant acknowledged the existence and pendency of Nairobi H.C. Misc. Application no. 575 of 2016. It however argued that the two suits raised totally different issues. In the first suit i.e. Nairobi H.C. Misc. Application no. 575 of 2016, the main issues in dispute were over ownership and use of the Northern Wing of the City Hall building while this suit relates to access to documents in respect of Rates and Audit.

6) Having considered the material placed before this court plus the rival submissions of learned counsels, the following matters emerged undisputed.

7) First, that Nairobi H.C. Misc. Application no. 575 of 2016 involving the parties to this suit is still pending for determination before Hon. Mr. Justice Odunga. The material placed before this court shows that in Nairobi H.C. Misc. Application no. 575 of 2016, the applicant herein seeks for *inter alia*:

1. An order for *certiorari* to quash Gazette notice no.6614 Vol. CXVII dated 8.9.2016 and issued

on 11.9.2016 by the speaker, Nairobi City County Assembly to the extent that it states that from the basement parking to the 5th floor of the Northern Wing, City hall Building and any other office space therein to form part of the County Assembly of Nairobi.

2. An order of prohibition to prohibit the respondents, staff and members of the County Assembly of Nairobi City from blocking or interfering with the count executive committee's staff access and use of that part of City Hall main building particularly the Northern Wing from the basement parking to the 5th floor, ordinarily used as office space by Rating and Audit departments of the Nairobi City County Government.

Basically, Nairobi H.C. Misc. Civil application no. 575 of 2016 is a Judicial Review Application in which the application is seeking for staff access and use of the Northern Wing of City Hall building.

8) Secondly, in this suit, the plaint dated 7th April 2017, sought for judgment against the respondents in the following terms:

a) A declaration that the Records of the Rates and Audit departments belong exclusively to the Nairobi City County Executive.

b) An order of Specific Performance be issued against the defendants compelling them to grant access to the Nairobi City County Executive in order to enable it retrieve the records belonging to the Rated and Audit Departments.

c) An order of mandatory injunction compelling the defendants a mandatory injunction do issue compelling the respondents herein to grant the Nairobi City County Executive access to the Northern Wing of City Hall for the purposes of retrieving the records of the Rates and Audit departments.

d) An order of permanent injunction restraining the defendants herein from illegally exercising proprietary interests with respect to the records of the Rates and Audit departments.

e) An order of permanent injunction restraining the defendants herein from illegally stopping the Nairobi City County Executive from accessing its' records of the Rates and Audit Departments.

f) General damages for wrongful conversion of property.

g) Costs of the suit.

9. I have already set out the sort of temporary orders the applicant is seeking vide the applications dated 7.4.2017. The applicant is simply seeking for an order for a mandatory injunction to compel the respondents to allow the applicant's staff to access the aforesaid wing to retrieve records relating to Rates and Audit departments and in default the applicant be permitted to break in the premises to obtain the aforesaid documents under the supervision of the police.

10) Thirdly, the first suit (i.e Nairobi H.C. Misc, civil application no.575 of 2016 seeks to question the decision making process of the respondents while this suit seeks to determine the merits of the respondents decision over the same property. In the first suit the applicant seeks public law remedies while in the second suit (this suit) the applicant is seeking private law remedies.

11) The respondents have raised a preliminary objection arguing that this suit is *resjudicata*. I have already given a thin distinction between these two suits. The first suit seeks to question the validity of the respondents' decision making process while in the second case the applicant is seeking to have the decision of the respondents to be impugned on its merits. In the first case the applicant seeks to have the decision to bar the applicant from accessing and using the Northern Wing City Hall building quashed and for a further order to prohibit the respondents from barring the applicant's staff from accessing the

aforesaid section of the building. In the second suit, the applicant is seeking a myriad of remedies in the plaint. However, in the two applications, the subject matter of this ruling, the applicant seeks for *inter alia* an order for a mandatory injunction to compel the respondent to allow the applicant access to the aforementioned wing of the building to collect its records in respect of Rates and Audit Departments and in default the applicant be permitted to break in under police supervision.

12) The question which this court has been left to determine is whether or not this suit is res subjudice?

13) In order for a matter to be regarded as res subjudice the following features must manifest themselves from the pleadings:

a) matter in issue is also directly and substantially in issue in the previously instituted suit or proceedings between the same parties.

b) The matter in issue between the parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

There is no doubt that the two suits relate to a dispute over the Northern Wing, City Hall building. I have already discussed in detail hereinabove the different issues raised in both suits. The orders sought in H.C. Misc. Appl. No. 575 of 2016 are judicial review orders. Such proceedings are limited in their nature and are restricted to questioning the decision making process and no more. In this suit, the applicant has sought various orders which are so wide and this court will be required to go into the merits of the dispute. It is therefore apparent that this suit may not strictly be regarded as res subjudice.

14) Having taken into account the above principles, I am of the humble view that this suit cannot be regarded as res subjudice. The court in this matter will be approaching the dispute using two different law regimes as alluded earlier in this suit. Consequently the respondents' preliminary objection is dismissed.

15) Having disposed of the preliminary objection, let me now consider the merits of applications. The respondents have argued that the application for mandatory order of injunction does not meet the requisite requirements for issuance of the order. The test whether to grant a mandatory injunction or not is restated in **Vol. 24 Halsbury's laws of England 4th Edition, para. 948** as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application.”

16) The applicant is of the view that its application meets the threshold for the grant of such orders. The applicant is simply saying that it needs to gain access to the Northern Wing, City Hall building collect documents or records in respect of Rates and Audit. The respondents have not denied that such records were kept in the Northern Wing City hall. They do not also claim ownership of those records. The respondents do not also deny that they have taken over the aforesaid wing of the building to the exclusion of the applicant. There is no dispute that the Nairobi City County Executive is assigned by law the duty to assess and collect rates payable within Nairobi City County as per the Fourth Schedule of the constitution of Kenya, 2010, valuation of Rating Act Cap 266 Laws of Kenya and the Rating Act Cap. 267, Laws of Kenya. The applicant is also mandated by the constitution of Kenya, 2010 and the Public Finance Management Act to have an Audit department that audits how revenue is used by it.

17) With respect, I agree with the applicant that it will not be able to satisfactorily perform its constitutional and statutory functions unless it is able to access the Northern Wing of the City Hall to retrieve the crucial records in respect of Rates and Audit departments. In my view the applicant's request

appears to be clear and therefore it ought to be decided at once. It is apparent that the act sought to be done is simple and summary in nature. I am satisfied that this is one of those cases which a mandatory order of injunction should be granted.

18) In the end, I find the applications to be well founded.

Consequently the same is allowed as follows:

a) A mandatory order of injunction is issued to compel the respondents to permit the applicant to access the Northern Wing, City Hall building to solely retrieve records relating to Rates and Audit Departments within 10 days from the date of this ruling.

b) If at the expiry of 10 days the respondents will not have complied with the aforesaid order [i.e (a) above] the applicant is granted leave to break into the premises to gain access to the Northern Wing, City Hall building to solely retrieve the records of its Rates and Audit Departments.

c) The O.C.S, Kilimani Police Station is directed to offer security and supervise the enforcement of the breaking in order.

d) Costs of the motion to abide the outcome of this suit.

Dated, Signed and Delivered in open court this 9th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent