



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. (JR) APPLICATION NO. 44 OF 2013

**IN THE MATTER OF: AN ORDER ISSUED BY THE MOMBASA COUNTY DIRECTOR
DATED 10TH JUNE, 2013**

AND

**IN THE MATTER OF: ARTICLE 47, 39(3) AS READ TOGETHER WITH ARTICLE 21(1)
& (2), ARTICLES 10 AND 22 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT, 2012

JAMES OBURA OBONYO..... APPLICANT

VERSUS

MSA COUNTY DIRECTOR OF HOUSING.....RESPONDENT

RULING

1. By a Ruling dated and delivered on 27th April, 2005, this court dismissed the Applicant's Notice of Motion dated 22nd September, 2013 seeking an order of certiorari to quash the decision of the Respondent dated 10th June, 2013 giving the Applicant thirty (30) days to vacate a Government quarter No. MG/53/P situate in Mombasa Municipality.
2. Aggrieved with that decision the Applicant has come back to this court, by a way of a Notice of Motion dated 8th May, 2015, and seeks, not a review of that Ruling, but an injunction restraining the Respondent from evicting the Applicant from the suit premises pending the hearing of an intended appeal against the aforesaid Ruling of this court.
3. The Notice of Motion is purportedly brought under the provisions of Article 159 of the Constitution of Kenya, Order 42 rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, (Cap 21, Laws of Kenya), and the inherent jurisdiction of the court, and is supported by the Affidavit of the Applicant sworn on 8th May, 2015, and the grounds on the face of the Application.

4. The Application was however opposed by the Respondent who through the Attorney-General filed grounds of opposition dated 11th May, 2015.

5. When the application was argued **inter partes** on 12th May, 2015, counsel for the Applicant argued that the application of 8th May, 2010 sought a stay of the orders of the court in the Ruling of 27th April, 2015, pending an intended appeal.

6. Counsel for the Applicant urged the court to rely on the decision of the Court of Appeal in **MADHUPAPER INTERNATIONAL LIMITED VS. KERR [1980] KLR 840**, in which the court held **inter alia** that:-

“Where a Judge dismisses an application for an interlocutory injunction, he has jurisdiction to grant the unsuccessful an injunction pending an appeal against the dismissal, and that there is no inconsistency in doing so as the purpose of granting an injunction would be to prevent the decision of the appellate court being rendered nugatory should the appeal succeed.”

7. Counsel further argued, the Applicant would suffer real prejudice if he is evicted as the appeal would be rendered nugatory, that the Applicant has a right of appeal, the appeal is arguable, as it touches on matters which are weighty and that the stay would not prejudice the Respondent. Counsel relied on Article 159(2) that justice should be done to all irrespective of status. Counsel also relied on the decision of the court in **BUTT VS. RENT RESTRICTION TRIBUNAL [1982] KLR 417** that urged the court to allow the application.

8. On behalf of the Attorney-General, State Counsel relied on the Grounds of Opposition dated 11th May, 2015 and filed in court on 12th May, 2015 which I set out in essence the Respondent opposes the Notice of Motion on the following grounds:-

“1. Grant of stay order will impede re-allocation of the Government house to another officer currently stationed in Mombasa.

2. The Applicant’s continued stay in the Government quarters contravenes Civil Servants Code of Regulation Section L.5.

3. The Applicant has not demonstrated that he is not capable of accommodating his family in Mombasa through personal arrangements.

4. The Applicant is not precluded from making personal arrangements for accommodation of his family in Mombasa.

5. The Applicant being a Senior Executive Officer should be based in Malindi for his efficient deliverance of services and performance of his duties.

6. That the application is misconceived, frivolous, vexatious and an abuse of the process of the court hence should be dismissed with cost.

7. The orders sought are untenable and a nullity as Mombasa is not a duty station for the Applicant.”

9. In addition to the said grounds, counsel submitted, that the Applicant cannot seek an injunction in an application for stay, when such order was never sought in the original Judicial Review Application. In any event, counsel for the Respondent urged, the Applicant would benefit from a stay or injunction as he would not know when the appeal would be heard; and that there was no proof that the Applicant could not find alternative accommodation for his family in Mombasa. Counsel urged that the Application be dismissed.

ANALYSIS OF THE APPLICATION AND SUBMISSIONS

10. **Firstly**, it is trite law, and it needs to be restated that where a statute prescribes a procedure for approaching the court, that procedure should be adhered to. Under Section 8(3) of the Law Reform Act (Cap 26, Laws of Kenya) the orders of Judicial Review are final and are only subject to appeal under Section 8(5) of the Act. It is therefore incompetent for the Applicant to invoke the court's civil jurisdiction by applying for an injunction on a Judicial Review matter which the court has already determined, and which orders are only subject to appeal.

11. **Secondly**, the Application has absolutely no basis procedurally. It is not premised upon any subsisting pleadings. It is an application in *vacuo* and the case of Madhupaper International Limited vs. Kerr (supra), is of no avail to the Applicant. The orders in the Judicial Review application were final and not interlocutory. The application is therefore misconceived, frivolous, vexatious and an abuse of the process of the court. Proceedings of that nature have only consequence; they are liable to be dismissed.

12. For those reasons the Applicant's Notice of Motion dated and filed on 8th May, 2015 is hereby dismissed with costs.

13. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 3rd day of June, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Miss Murage for Applicant

Miss Kiti holding brief Namahya for Respondent

Court Assistant Kaunda