



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. JUDICIAL REVIEW NO. 54 OF 2013

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION TO PROHIBIT THE RESPONDENTS FROM PROCEEDING WITH THE PROSECUTION OF OFFICIALS OF THE APPLICANT OVER MAKANDE ESTATE

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI TO QUASHING PROCEEDINGS IN CRIMINAL CASES NO. 1343 OF 2013 AND 1344 OF 2013

IN THE MATTER OF: SECTION 118(1) AND 119 OF THE PUBLIC HEALTH ACT

IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP 21 AND THE MAGISTRATE'S COURT ACT CAP 10 OF THE LAWS OF KENYA

BETWEEN

NATIONAL HOUSING CORPORATION.....APPLICANT

VERSUS

1. THE RESIDENT MAGISTRATE'S COURT MOMBASA

2. MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENTS

RULING

1. Pursuant to leave of court granted on 16th September, 2013, the National Housing Corporation (the *ex parte* Applicant), filed on 30th September, 2013 a Notice of Motion dated 26th September, 2013, and sought:-

(1) An order of certiorari to remove into this Court and quash the criminal proceedings and/or charges before Mombasa Resident Magistrate Criminal Case No.1343 of 2013, Republic vs. Joash Anguko, the Coast Regional Manager of the Applicant and Mombasa Resident Magistrate Criminal Case No. 1344 of 2013 Republic vs. Wachira Njuguna the Managing Director of the Applicant;

(2) An order of prohibition prohibiting the Respondents from prosecuting and/or proceeding in Mombasa RMC Criminal Case No. 1343 of 2013, Republic vs. Joash Anguko, and Mombasa RMC Criminal Case No. 1344 of 2013, Republic vs. Wachira Njuguna or

commencing any other charges under the Public Health Act over Makande Estate or in any manner whatsoever charging and/or prosecuting the said officials or other officials of the *ex parte* Applicant regarding the Makande Estate.

2. The Application was supported by the Statement of Facts (Statutory Statement) dated 11th September, 2013 and filed together with the Chamber Summons of even date therewith, the Affidavit of Joash Anguko Verifying the Facts sworn on 4th September, 2013, and the grounds on the face of the said Chamber Summons.

3. The *ex parte* Application is summarized in paragraphs 32-33 of the grounds of the Statutory Statement and reiterated in paragraph 35-37 of the Affidavit Verifying the Facts, that the *ex parte* Applicant is not the proper party to maintain the disputed properties to ensure compliance with the health standards, that the Applicant's duty is mainly to collect rents from the suit properties to enable it recover the debt owed by the Second Respondent to the *ex parte* Applicant, that prosecuting officials of the *ex parte* Applicant who are not owners of the property is clearly an abuse of the court process, and is unreasonable, that the criminal proceedings are being used to intimidate the officials of the *ex parte* Applicant, for allegedly rescinding the debt settlement agreement, and finally that the charges are designed to compel the officers of the *ex parte* Applicant to commit contempt of court as the *ex parte* Applicant is being forced to act contrary to express and/or specific court orders issued in Mombasa CMCC No. 31 of 2011 and Mombasa HCCC No. 8 of 2011.

4. In Mombasa CMCC No. 317 of 2011, the *ex parte* Applicant was restrained by order of an injunction from erecting, constructing and/or blocking access to MOMBASA/BLOCK XIII/416, while in HCCC 8 of 2011 the *ex parte* Applicant was restrained by way of injunction from entering, encroaching, removing and/or constructing a boundary wall on properties known as Plot Nos. Mombasa/Block XIII/393, Mombasa/Block/XIII/397, Mombasa/Block XIII/399, Mombasa/Block XIII/401 and Mombasa/Block XIII/420, all pending the hearing and determination of these suits.

5. On its part, the Second Respondent, in the Replying Affidavit of Mohammed Mummin Ridhwani, the Senior Legal Clerk of the County of Mombasa, sworn and filed on 27th June, 2014, avers in paragraphs 16-19, thereof that:-

(1) pursuant to the property swap, the Applicant has been paying the rates for the subject properties [and being the rateable owner is liable to maintain the premises in sanitary condition];

(2) that it failed to maintain the necessary sanitary conditions on the property, prompting the Second Respondent to issue the necessary notices under the Public Health Act (Cap 242, Laws of Kenya) and subsequently commenced prosecution of the Applicants.

(3) that being the collector of the rents, it is liable to maintain the estate in tenantable repair and condition including sanitary conditions.

DETERMINATION

6. What emerges from the above positions, and my entire reading and consideration of the Statutory Statement, the Affidavit Verifying the Facts, and the Replying Affidavit on behalf of the Second Respondent is clearly an entire failure at management levels, of resolution a commercial dispute between the *ex parte* Applicant and the Second Respondent. The First Respondent, (the court), has invariably no stand to take either way and remains neutral. This is however going into the merits of the case which is not the concern of a judicial review court. The concern of the judicial review court is the decision-making process, the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. An order of certiorari will issue where on the grounds of illegality, irrationality, and impropriety (the 3 "i's") are shown to exist.

7. The Applicant's case is not based upon either illegality or impropriety of the decision of the Second

Respondent to have charges preferred against them. The Applicant's case is that the decision of the Second Respondent to charge them is so irrational, that it defies logic. That principle was nunciated in the case of **ASSOCIATED PICTURE HOUSES VS. WEDNESBURY CORPORATION [1947] ALL E.R. 498**. In the words of Lord Diplock in **COUNCIL OF CIVIL SERVICE UNIONS VS. MINISTER FOR THE CIVIL SERVICES [1984] E ALL ER 935** –

“... a decision which is so outrageous in the defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

8. Indeed as observed by Nyamu J (as he then was, Judge of Appeal now), in **REPUBLIC VS. JUDICIAL SERVICE COMMISSION OF KENYA ex parte Pareno [2004] 1 KLR 203, 212**, applying the Wednesbury principle –

“Under the Wednesbury principle decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.”

9. The position in this case seem to be this, the *ex parte* Applicants being the registered owners of the relevant parts of Makande Estate, and being the recipients of rent therefrom are also liable to maintain the structural parts of the properties situate in that estate.

10. Under section 2 of the Public Health Act, “an owner” as regards immovable property includes:-

“Any person, other than the Government, receiving the rent or profits of any lands or premises from any tenant or occupier thereof, or who would receive such rent or profits if such land or premises were let whether on his own account or as agent for any other person, other than the Government, entitled thereto, or interested therein, the term includes any lessee or licensee from the Government and any superintendent, overseer or manager of such lessee or licensee residing on the holding.”

11. In this case, the *ex parte* Applicant admits that it is receiving rents from the premises in question. The premises in question would exclude the 17 plots (comprising 1.05 hectares (2.617 acres) but comprise Mombasa/Block XIII/434 of 2.729 hectares or 6.74 acres according to the Valuation Report by Tysons Limited, dated 30th July, 2009, attached to the Replying Affidavit of Mohammed Mummin Ridhwani aforesaid.

12. If the Notices sent upon the Applicant pursuant to section 119 of the Public Health Act, were sent in respect of any premises situate on Mombasa/Block XIII/334, then the *ex parte* Applicant was bound to remedy the nuisance in terms of the Notice by the Second Respondent dated 20th April, 2013. Failure to take remedial measures in terms of the notice attract prosecution in terms of section 120(1) of the Public Health Act, and penalty in terms of section 121(1) of the said Act.

13. The question which remains to be determined is whether the prosecution of the Applicant's Managing Director and the Regional Manager were motivated by malice on account of the dispute between the *ex parte* Applicant and the Second Respondent over the swap of the properties and payment of an additional sum of Kshs. 50 million, which agreements the *ex parte* Applicant is now disputing and wishes to have rescinded.

14. It is none of the concern of the judicial review court, but it seems to me that, that dispute has absolutely nothing to do with the duties of an owner/caretaker in terms of the definition of an “owner” for the time being to:-

- (i) empty all septic and sewerage pits of the estate.;

- (ii) unblock all drainage systems;
- (iii) refrain from discharging soil water waste into open ground and direct all effluent into a soak pit;
- (iv) replace all broken manhole and inspection chamber covers and make them airtight;
- (v) provide septic tanks and soak pits to ease this soakage load;

If therefore upon a valid notice being served or given, an owner fails to take steps as required under the notice, such failure will attract the application of the enforcement provisions of the Public Health Act aforesaid.

15. It would be perfect defence in the criminal suits to say that the works required to be carried out by the *ex parte* Applicant all relate to the seventeen (17) plots.

16. In the premises, I find and hold that the prosecution of the officers of the *ex parte* Applicant was not motivated by malice and is certainly not irrational in the Wednesbury principles of irrationality.

17. I therefore find no merit in, and dismiss the Notice of Motion dated 26th September, 2013, and filed on 30th September, 2013. The Respondents shall have the costs herein.

18. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 10th day of July, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Wafula for Applicant

Miss Lutta for 1st Respondent

Miss Egessa holding brief Kibara for 2nd Respondent

Mr. Kaunda Court Assistant