



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISC. APPL. NO. 648 OF 2005**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE PERMANENT SECRETARY,**

**MINISTRY OF LANDS AND HOUSING..... RESPONDENT**

**AND**

**CHRISTOPHER MUNGA CHIKA .....INTERESTED PARTY**

***EXPARTE***

**SAIMA JEPKEMOI ONDIMU**

**JUDGMENT**

**Introduction**

1. The *ex-parte* applicant (“the applicant”) is a civil servant. She resides in House, HG 580 ‘A’ (“the House”) situated in Kileleshwa. The House is the subject of her claim and in the Amended Notice of Motion as amended on 17<sup>th</sup> March 2011, she seeks the following reliefs;
  1. *An order of certiorari be issued to remove and quash the decision of the Permanent Secretary, Ministry of Lands and Housing contained in the Notice of 29<sup>th</sup> April 2005 offering House number HG/580 A for sale to one Christopher M. Chika.*
  2. *An Order of prohibition be issued prohibiting the Permanent Secretary, Ministry of Lands and Housing from offering for sale, transferring and or otherwise alienating house number HG/580A to the said Christopher M Chika or anyone else.*

3. *An Order of mandamus be issued to compel the Permanent Secretary, Ministry of Lands and Housing to issue the applicant with a Sale Agreement for the purchase of House No. HG/580A and to accept the balance of the purchase price from the Applicant towards the purchase of the house number HG/580A.*
4. *Costs of this application be provided for.*

### **The facts**

2. The facts giving rise to this matter are set out in the applicant's own affidavit sworn on 5<sup>th</sup> May 2005 and the replying affidavit sworn by the interested party. They concern the ownership of the House and are as follows.
3. By a circular dated 18<sup>th</sup> August 2004 (Ref: CON/LH/A/2/7/(13)) ("the First Circular"), the Government through the Ministry of Lands and Housing decided to dispose of non-strategic assets which included government houses. Under the circular, the material terms were, inter alia, as follows;

### **F. TERMS AND CONDITIONS OF SALE**

*The basic requirements for one to qualify under the tenant purchase scheme are as follows;*

- i. *Be a serving civil servant who should produce certified copies of Payslips for the last three months and letter of allocation for the Government quarter.*
  - ii. *First priority be accorded to occupying Civil Servants who are upto date on rent payments.*
  - iii. *Those interested are required to pay 10% deposit of the sale price within 60 days or provide documentary proof of previous deposit payment. Those who will not have paid the 10% deposit will have to vacate their houses within 30 days after the expiry of the 60 days.*
  - iv. *Serving Civil Servants who are not in occupation of Government houses offered for sale will be notified of the available houses at a later date under the following terms and conditions and therefore need not apply-*
    - a. *Offers to be made to officers for houses commensurate with their grades.*
    - b. *Where one house attracts several applicants, the point system will be applied in terms of seniority and in case two or more applicants tie in points, balloting will be done.*
4. The applicant concedes that she did not comply with the terms of the First Circular as she was unable to pay the deposit within the time stipulated. Nevertheless, she appealed to the Permanent Secretary but the appeal was rejected on 10<sup>th</sup> December 2004. She however contends that she was later allowed to pay the 10% deposit but she learnt that the House had been offered to the interested party.
  5. The interested party is also a civil servant. He contends that he purchased the House pursuant to a circular dated 26<sup>th</sup> November 2004 (Ref: CON/LH/A/2/7 Vol IV/39) ("the Second Circular") which was issued further to the First Circular. The material terms and conditions of sale were, inter alia, as follows;

### **B. TERMS AND CONDITIONS OF SALE**

*The following terms and conditions will apply for one to participate in the scheme.*

- (i) *Be a serving Civil servant who should produce certified copies of the following:- Payslips for the last three months, National ID Card and a Passport size photograph.*
- (ii) *Offers will be made to applicants who apply for houses commensurate with their grades.*

(iii) Where one house attracts several applicants, the point system will be applied in terms of seniority and in case two or more applicants tie in points, balloting will be done.

(iv) Those interested are required to pay 10% deposit of the sale price by 31st December, 2004, 5.00 P.M. or provide documentary proof of previous deposit payment made in December, 2002.

(v) In order to ensure fairness to all Civil Servants, offers will be limited to one house per Civil Servant family.

6. The interested party argues that he duly complied with all the requirements of the Second Circular, attended the balloting exercise and was allocated the House which he accepted on 17<sup>th</sup> May 2005. He thereafter issued instructions to the Permanent Secretary to make deductions from the salary to cover instalment payments for the purchase price. He avers that he has not moved into the House because of the stay orders issued by the court.

### **The Submissions**

7. Counsel for the applicant, Mr Masika, submitted that the decision challenged is the decision contained in a notice dated 29<sup>th</sup> April 2005 by which the respondent offered the House to the interested party. He submitted that applicant as an occupant of the House was entitled to it under the First Circular. The gravamen of the applicant's case is that her appeal to the Permanent Secretary to be allowed to pay the deposit late was rejected without giving reasons and that she was unfairly treated. She also alleges that she was discriminated against as there were other applicants whose deposits were accepted past the deadline.
8. Counsel further submitted that the applicant did not receive any communication regarding her offer and she was only notified that the House had been allocated to the interested party. The applicant contends that she had a legitimate expectation to be allocated the House as she had resided in it, paid rent and fulfilled all the conditions necessary to be allocated the House.
9. Mr Masika urged the court to hold that this matter was not merely a contractual matter but one which involved the exercise of public authority and hence amenable to orders of judicial review. He submitted that the decision to give the interested party the House was unreasonable, irrational and lacked procedural propriety in the circumstances and was therefore amenable to orders of judicial review. Counsel cited ***Associated Provincial Picture Limited v Wednesbury Corporation* [1947] 2 All ER 680**, ***Republic and Others v Attorney General and Another* [2006] 2 EA 265**, ***Muntu and Others v Kyambogo University* [2008] 1 EA 236** and ***Pastoli v Kabale District Local Government Council and Others* [2008] EA 300** to fortify the applicant's case.

### **Respondent's Case**

10. The respondent opposed the applicant's case on the basis that judicial review does not lie. The respondent submits that in substance the applicant's claim is for breach of contract and what she seeks is an order of specific performance which cannot be issued through an application for orders of judicial review. Counsel for the applicant, Ms Maina, cited ***Lilian Nkirote v The Permanent Secretary Ministry of Lands and Housing Nairobi* HC Misc. App. No. 433 of 2005 (Unreported)** and ***R v Commissioner of Police exp. Nicholas Githoho Karia Nairobi* HC Misc. Appl. 534 of 2003 (Unreported)** to support these arguments.

### **Interested Party's Case**

11. The interested party submits that the applicant has not shown that the respondent failed in its public duties in arranging the sale. His case is that the terms of the sale were contained in the Circulars which were different in material terms. He argues that the applicant did not comply with the First Circular and hence he was entitled to apply for and indeed applied for the House under

the Second Circular. That he complied with the terms of the offer and entered into a contract for its purchase.

12. Like the respondent, the interested party asserts that the matter at hand is a contractual matter that resulted in a binding contract between it and the interested party. He submits that the State did not owe the applicant an explanation after she failed to meet the terms of the sale contained in the First Circular.

### **Determination**

13. The issue for determination is whether the Court should quash the decision to sell the House to the interested party and thereafter direct the Permanent Secretary, Ministry of Lands and Housing to issue the applicant with a sale agreement. This calls for a factual analysis to determine the status of the parties rights vis-à-vis the House.

14. It is not in dispute that the House belonged to the Government and was offered for sale through the Circulars whose contents I have outlined above. The First Circular was directed at civil servants occupying Government houses. The applicant conceded that she did not meet the terms thereof. As she did not do so, she is not entitled to the House and a court cannot assist her in that respect. The only other term upon which she could acquire the House was to apply under the Second Circular which she did not. As a result there is no basis upon which the court can grant the orders to enforce what would amount to a contract in the absence of compliance with the terms thereof.

15. On the other hand, the interested party has demonstrated that he complied with the terms of the sale set out in the Second Circular. Under the terms of that Circular, offers were called from civil servants who were not in occupation of the houses presumably after the exercise under the First Circular had been completed. He has entered into a binding contract with the respondent and is entitled to take possession of the House. There no basis upon which the Court can deprive him of his contractually accrued rights in these proceedings.

16. This brings me to the contention by the applicant that the subject of these proceedings is a matter of public law and therefore amenable to judicial review. The facts I have outlined and the conclusions I have reached demonstrate that the respondent's intention was to sell the House upon certain terms and conditions. The fact that the respondent was acting on behalf of the Government does not make the transaction any less contractual.

17. The purpose of orders of judicial review is to control the exercise of public authority hence they apply in the sphere of public law. Judicial review does not provide relief for delictual or contractual wrongs. In ***Zakhem Construction (Kenya) Limited v Permanent Secretary, Ministry of Roads & Public Works & Another Nairobi CA Civil Appeal No. 244 of 2006 [2007] eKLR*** the Court of Appeal declined to set aside the order of the High Court declining grant of leave on the ground that the remedy for breach of contract does not lie in the process of judicial review. Adopting a similar stance Wendoh J., in ***Maurice Okello v Permanent Secretary, Ministry of Lands and Housing Nairobi HC Misc. App. No. 816 of 2005 [2008] eKLR***, in a case not dissimilar to the present one, observed that, "*The right sought to be enforced is a private contractual right of sale of a house, between two parties. If this court were to intervene, it would be seeking to create a contract, that the Respondent do allocate the house to the applicant. In my view, that would be forcing the Respondent to enter into contract, thus forcing an unwilling party to enter into a contract of sale. This is a matter of contract which is in the private law realm and cannot be subject to judicial review and therefore even if the applicant were qualified to get the house this court would not intervene.*" I also agree with the decision in ***Lilian Nkirote v Ministry of Lands and Housing (Supra)*** that this is purely a contractual matter where the Government offered for sale its houses on specific terms. Nothing turns on the fact that the Minister was exercising public authority as the terms of sale were clearly laid out in the Circular.

18. In an application for judicial review, the applicant's case is limited to the grounds set out in the statement of facts which are the basis upon which leave is granted (See ***Khobesh Agencies Limited and Others v Minister of Foreign Affairs and International Relations and Others Nairobi JR No. 262 of 2012 [2013] eKLR***). According to the statement of facts dated 5<sup>th</sup> May 2005, the grounds for relief are as follows;

- a. *The Permanent Secretary, Ministry of Lands and Housing refused and/or neglected to consider the applicants reasons for the apparent failure to meet the deadline of 31<sup>st</sup> March, 2004 in submitting 10% deposit of the purchase price.*
- b. *The said Permanent Secretary, Ministry of Lands and Housing refused to hear the applicant on the matter which affected here rights as the allottee and occupant of home number HG/580A.*
- c. *The said Permanent Secretary, Ministry of Land and Housing offered home no HG/580A to a third party for purchase without considering the applicant of the applicant and/or giving the applicant a hearing.*
- d. *The said Permanent Secretary, Ministry of Lands and Housing as a public officer owed the applicant a duty to act fairly which in the circumstances of the case he did not.*

19. In my view the applicant's case is misguided as the terms of acquisition of the House were clearly spelt out in the Circulars. These terms did not provide for a right of appeal to the Permanent Secretary for failure to meet the terms of purchase. Such a right cannot be implied in view of the contractual nature of the transaction. Once the applicant failed to meet the terms of the First Circular, no contract could be concluded and that was the end of the matter. There was no obligation on the respondent's part to give reasons or provide her an opportunity to contest the loss of the opportunity afforded by the Circulars.

20. Mr Masika valiantly argued that on the basis of the initial allocation of the House, continued occupation and payment of the deposit, the applicant was entitled to a legitimate expectation that she would be given an opportunity to purchase the House despite making a late deposit. Counsel cited the case of ***Republic v Attorney General and Another ex-parte Waswa and 2 Others [2006] 2 EA 265*** where the court held that a legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Unfortunately, such legitimate expectation cannot defeat the clear terms upon which the Government offered the House for sale and which sale was consummated with the interested party after the applicant failed to meet the terms of the sale set out in the First Circular. A legitimate expectation could only arise if the applicant met the conditions of sale.

21. As I have dealt with the substance of the applicant's claim, it is not necessary to deal with the technical objections to the Motion raised by the interested party.

### **Disposition**

22. The result of my findings above is that the amended Notice of Motion dated 17<sup>th</sup> March 2011 is dismissed with costs to the respondent and interested party.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> February 2014**

**D.S. MAJANJA**

**JUDGE**

Mr Masika instructed by Ochieng' Onyango Kibet and Ohaga Advocates for the ex-parte applicant.

Ms Maina, Litigation Counsel, instructed by the State Law Office for the respondent.

Mr Odhiambo instructed by Rachuonyo and Rachuonyo Advocates for the interested party.