



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**JUDICIAL REVIEW APPLICATION NO. 13 OF 2017**

**IN THE MATTER OF:AN APPLICATION BY: DORINE YVONNE WANGARI KARANJA, FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI & PROHIBITION.**

**AND**

**IN THE MATTER OF :THE FAIR ADMINISTRATION ACT (2015) LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**NATIONAL HOUSING COOPERATION .....RESPONDENT**

**AND**

**MOSES MURIITHI WACHIRA ..... INTERESTED PARTY**

**AND**

**DORINE YVONNE WANGARI KARANJA... EX-PARTE APPLICANT**

**JUDGEMENT**

1. The exparte applicant moved this court via her Notice of Motion application dated 15<sup>th</sup> December 2017 under Order 53 rule 3 & 4 of the Civil Procedure Rules and Section 8 & 9 of the Law Reform Act. The orders sought are;

(a) That this Honourable Court be pleased to grant a writ of certiorari to bring to this court for the purposes of being quashed, the decision of the Respondent made on 24<sup>th</sup> January 2017 terminating the exparte applicant’s tenancy in respect to all that house known as Makande Estate House No. J4 Door 9.

(b) That this Honourable Court be pleased to grant an order of prohibition directed to the Respondent prohibiting him from enforcing the said decision or demanding the said termination of tenancy by the exparte applicant.

(c) That the cost of this application be in the cause.

2. The application is supported by the statement, verifying and supporting affidavit of Dorine Yvonne Karanja. Ms. Dorine deposed that the Respondent issued an expression of interest on 29<sup>th</sup> June 2010 to all its tenants among them Fredrick Kalama to purchase its houses situated within Jomo Kenyatta, Makande Estate. That Mr. Kalama accepted the offer to buy the suit house on 9<sup>th</sup> July 2010. That later on 22<sup>nd</sup> October 2010, Mr Kalama nominated the applicant to complete the sale process.

3. The applicant stated that after payment of the deposit and legal fees, the Respondent kept quiet and after several reminders, the applicant learnt that by a letter dated 24<sup>th</sup> January 2017, the Respondent terminated the lease. That alongside this letter, she also saw the letter dated 24<sup>th</sup> January 2017 addressed to Moses Muriithi Wachira who is her tenant being offered a lease for the suit premises., the applicant contends that such action by the Respondent is contrary to the rules of Natural Justice as;

- (a) The Respondent received her deed of nomination, power of attorney and deposit but has never responded.
- (b) The Respondent is aware she is in possession of the suit premises.
- (c) She has been faithfully paying rent.
- (d) She has not been afforded any hearing prior to termination of the lease.

4. The Respondent opposed the granting of the orders being sought through the replying affidavit of Dorine Wawira sworn on 4<sup>th</sup> June 2018 and the grounds of opposition filed on 9<sup>th</sup> April 2018. Ms Wavua deposed that the Respondent is the owner of houses at Makande Estate where Mr Fredrick Kalama was a tenant for house no J4 door 9 pursuant to a standard lease. The Respondent admitted issuing the letter dated 29<sup>th</sup> June 2010 to Mr. Fredrick Kalama to purchase on the basis that he was a bonafide sitting tenant.

5. That the lease did not allow for sub-letting but Mr Kalama through the exparte applicant subletted the same to Mr Moses Wachira-the Interested party and annexed the sub-lease as annexure DK-5. The Respondent avers further that since the applicant was not a party to their lease, she has no legal right to enforce as against the Respondent. That the purported deed of nomination nominating the applicant to accept the offer to purchase has no legal effect and is void. The Respondent also stated that the issues raised in this motion are purely contractual and the remedies of Judicial Review is not available to the exparte applicant. The Respondent urged the court to dismiss the motion with costs.

6. The exparte applicant filed her submissions on 26<sup>th</sup> July 2018 while the Respondent filed hers on 11<sup>th</sup> October 2018 and the Interested Party filed none. The exparte applicant reiterated the facts contained in her pleadings. She further submitted that the Respondent while allocating houses is to be guided by;

- (a) Staff Housing Policy of 2005.
- (b) Finance Manual of 2007.
- (c) ISO Procedures of 2009.
- (d) Housing Development Policy of 2010.
- (e) Estate Management Policy of 2010.

7. The applicant submits that the Respondent being a State Corporation must at all times conduct its activities in accordance with the law. That in the case of Council of Kisumu (1985) KLR 954, the Court of Appeal held that the question of whether the rights were public or private in nature were not the only criteria to prevent a court from questioning the extra judicial decisions made by the Respondent in total disregard to the rule of law. That the Respondent's act of terminating the Applicant's lease without giving her a hearing casts alot of mischief. That this happened without the Respondent mentioning the deposit paid. That the applicant is entitled to a fair administrative action afforded to her by Article 47(1) of the Constitution. She urged the court to grant her the orders.

8. From the pleadings filed the following facts are not in dispute;

- (a) That house no J4 Door 9 was leased to Mr Fredrick Kalama by the Respondent.
- (b) That the Respondent issued the said Fredrick with an offer letter dated 29<sup>th</sup> June 2010 to purchase the suit premises.
- (c) At the time the offer to purchase the premises was made, Mr. Kalama had an existing tenancy/lease with the Respondent.
- (d) Mr Kalama accepted the offer to purchase (DK-4) and a deposit was paid and received by the Respondent.

9. The exparte applicant has pleaded that she was nominated by the said lessee to complete the sale transaction. She included the deed of nomination as DK-5 to her affidavit. The applicant annexed correspondences to show that the deposit was paid as per the offer letter (annex DK 7 & 8). In the letters sent to the Respondent, Messrs Kanyi J listed the names of his clients which included Mr Fredrick Kalama Kassim. The advocate indicated that his clients would pay the full purchase price as soon as the completion documents requested were provided.

10. The Respondent never replied to any of these letters nor did they state that they had declined the deposit paid to them by the tenants including Mr Kalama. There was no problem in the use and occupation of the house until the letter of 24<sup>th</sup> January 2017 was issued by the Respondent terminating Mr Kalama's lease. The termination read thus;

**“We have noted that you have contravened clause no 10 of the lease agreement which states that no tenant shall assign or sublet the demised premises without the provisions written consent of the corporation being first sought and obtained.”**

11. The Respondent through his submissions in file no JR Case No. 14 of 2017 consolidated with this file submitted that the application for leave to apply for the orders sought was made out of time contrary to the provisions of Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, 2010. He fortified this proposition by several decisions. Inter alia **Roseline Tubei & 8 Others –versus-**

**Patrick K. Cheruiyot & 3 Others (2014) eKLR.** That in this case, the applicant's Chamber Summons for leave was filed 11 months after the letter complained of was issued.

12. The second issue the Respondent took up is that the remedy for Judicial Review is only available where an issue of a public nature is involved and not available where the breach is a private law obligation (Kadamas –versus- Municipality of Kisumu Supra). That the case before court is purely a contractual relationship thus not amenable to judicial review. The Respondent buttressed this submission by citing the case of **Zakhem Construction (Kenya) Ltd –versus- P. S Ministry of Roads & Public Works & Anor (2007) eKLR.** That the fact that the Respondent is a public body does not make the issues arising between them that of a public nature.

13. From the submissions and pleadings filed by the parties, I frame the following for determination;

- (a) Whether the application for leave was brought out of time and if yes, what is the status of the current application?
- (b) Whether the orders of judicial review are available to the exparte applicants given the nature of .
- (c) If the application before court is regular whether or not it is merited.

14. The substantive motion was brought under the provisions of Sections 8 & 9 of the Law Reform Act and Order 53 Rule 3 & 4 of the Civil Procedure Rules (2010). Order 53 Rule 2 provides timeline for applying for certiorari in certain cases as six (6) months after the date of the proceeding or any such shorter period as may be prescribed by law. Section 9(3) of the Law Reform Act also provides that an application for leave for order of certiorari is to be made not later than six(6) months after the date of judgment, order, decree or other proceeding or such shorter period as may be prescribed by any written law.

15. In this case, the letter in JR case No. 13 of 2017 was issued on 24<sup>th</sup> January 2017 while in J.R Case No. 14 of 2017, the letter was issued on 18<sup>th</sup> January 2017. In paragraph 12 of the affidavit in support of the summons for leave, the exparte applicant does depose that it has come to her attention that the Respondent has issued the letter dated 24<sup>th</sup> January 2017 (and 18<sup>th</sup> January 2017) respectively. The time of receipt or being made aware of the letter is not specified in the affidavits. The exparte applicant also did not address the court on why the application was brought late. Since the application for leave was filed more than six months after the order complained there was no valid application before the court. The leave granted was thus of no consequence as the proceedings were null & void *ab initio*.

16. The second issue is whether the facts of this case does allow the applicant to seek orders of Judicial Review as a remedy. As already summarized in the paragraphs above, the cause of action revolves around a lease and or sale of the Respondent's houses in Makande Estate. The exparte applicants' case being that the letter terminating the lease did not make mention of the deposit already paid towards purchasing the house and the opportunity to be heard before the termination was issued.

17. In her submissions, the exparte applicant argues that the Respondent being a State Corporation is under obligation to act in accordance with the law. That in the Kadamas case, the court found that whether the rights were public or private should not be the only criteria for dismissing the application questioning extra judicial decisions made by the Respondent.

18. This court is alive to the principle that the remedy of judicial review is concerned with the decision making process and not the merit of the decision. The case before court relates to question the merit of the decision in two respects. First, what the Respondent issued was a letter. There was no proceedings/hearings that were undertaken before the letter was issued. It becomes difficult for the court to determine how the applicant's right to be heard was breached when there is no provision cited that before such a letter is issued a hearing must be conducted. Secondly, the applicants referred the court to evidence to wit the proof of payment of deposit and the non-responsive nature of the Respondent in acknowledging the letters sent to it. The evidence presented was intended to demonstrate to the court that the Respondent was in breach of a contractual obligation.

19. Although the court may interfere with decisions even if they relate to private rights under Judicial Review proceedings (R –versus- Kenya Bureau of Standard & Others (2006) 2 E. A 286). The issues raised by this dispute in my opinion require evidence to be adduced to determine the question of who between the two parties is in breach whether breach of the lease or breach of the letter of offer to purchase the house dated 29<sup>th</sup> June 2010 and whether the house was still available to the Respondent to allocate to the Interested Party as she did. All these questions cannot be determined within the perview of judicial review proceedings.

20. Consequently I am of the opinion based on the provisions of the statutes and case law cited and I so hold that the exparte applicant cannot be granted the reliefs in the manner she has approached the court. For this reason, I will not delve into the 3<sup>rd</sup> question on merits of the application.

21. In conclusion, the orders which commend themselves to be given in the circumstance of this case and pursuant to the order of this court of 13<sup>th</sup> June 2018 which I give are;

(a) The Notices of Motion both dated 15<sup>th</sup> December 2017 in J.R Cases No. 13 of 2017 (**R –versus- National Housing Corporation exparte Dorine Yvonne Karanja**) and No. 14 of 2017 (**R –versus- National Housing Corporation exparte Jane Njeri Karanja**) be and is hereby struck out.

(b) **Each party to meet their respective costs of the motions**

**Dated, Signed and Delivered at Mombasa this 26<sup>th</sup> day of July 2019.**

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**A. OMOLLO**

**JUDGE.**