



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 3 OF 2018

REPUBLIC.....APPLICANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

ROMIKO CHANNELS LIMITED.....EX PARTE APPLICANT

RULING

1. What is before me is the Application by the Respondent dated 12th April, 2018 in which the Respondent is seeking for the following orders:

- a. That the Ex-parte order made on 22nd January, 2018 granting leave to the Applicant to take out Judicial Review proceedings by way of certiorari, prohibition and mandamus be set aside.*
- b. That the Ex-parte order made on 22nd January, 2018 granting leave to operate as stay of the decision of the Respondent dated 2nd August, 2017 be set aside and or discharged.*
- c. That the Applicant's Notice of Motion dated 9th February, 2018 be struck out.*
- d. That costs of this Application be awarded to the Respondent.*

2. The Application is supported by the Affidavit of the Respondent's Manager, Legal Services, who has deponed that the Notice of Motion dated 9th February, 2018 and the Chamber Summons dated 18th January, 2018 are not supported by a valid Verifying Affidavit contrary to the provisions of Order 51 Rule 4 and Order 53 Rule 1(2) of the Civil Procedure Rules.

3. The Respondent's Manager deponed that the Verifying Affidavit, in addition to being not executed, was not sworn in the presence of a Commissioner for Oaths; that the statutory statement dated 18th January, 2018, the Verifying Affidavit dated 18th January, 2018 and the Supporting Affidavit of the same date were not signed by the Applicant and that the Applications are fatally defective.

4. The Respondent's Manager deponed that the Respondent has never made a letter of offer dated 20th June, 2014 to the Applicant and that the offer by the Respondent was on condition that he would pay rent as agreed; that the parties never entered into any valid Lease or tenancy agreement; that the Applicant declined to take possession of the suit land and that the Applicant also declined to pay rent to the Respondent from July, 2014 to 2nd August, 2017.

5. It is the Respondent's case that due to the breach of the terms of the offer letter, the said offer was terminated by the Respondent; that the undated letter marked as MM3 purportedly issued by the Respondent was not issued by the Respondent and that by the time the Ex-parte orders were granted by the court on 22nd January, 2018, a Lease had already been issued to a third party.

6. The Respondent finally deponed that the Applicant did not make full disclosure of all the material facts within its knowledge and that the Application should be allowed.

7. In the Grounds of Opposition filed by the Ex-parte Applicant, the Ex-parte Applicant averred that the law does not confer any jurisdiction upon the court to grant the orders sought; that the name of the current Lessee has not been disclosed and that all the Affidavits were properly signed and commissioned.

8. The Respondent's/Applicant's advocate submitted that to the extent that the Application invokes the inherent powers of the court; this

court has the jurisdiction to hear the present Application. Counsel submitted that the relationship between the Applicant and the Respondent was a private one; that the said arrangement falls within the realm of private law; that a party who approaches the court Ex-parte has the burden and duty of making a full and frank disclosure of all material facts and that the Applicant did not make full and frank disclosure when it moved the court and obtained Ex-parte orders.

9. The Ex-parte Applicant's/Respondent's advocate submitted that the issue of grant of leave cannot be relitigated once the same has been granted; that the Respondent's only option would be to file an Appeal in the Court of Appeal and that the setting aside of the Ex-parte orders of the court can only be done sparingly and in very clear-cut cases. Both the Applicant's and the Respondent's counsels relied on numerous authorities which I have considered.

10. The Ex-parte Applicant commenced these proceedings by way of Chamber Summons dated 18th January, 2018. In the said Application, the Ex-parte Applicant sought for leave to apply for Judicial Review orders of certiorari, prohibition and mandamus. The said leave was also to operate as a stay of the decision of the Respondent dated 2nd August, 2017, which would in effect allow the Applicant to remain as a Lessee of the land to the exclusion of all other parties. The Applicant's Application, including the prayer for the leave to operate as a stay of the decision of the Respondent, was allowed by the court on 22nd January, 2018.

11. The present Application is challenging the order of leave to commence Judicial Review proceedings and for the said leave operating as a stay of the decision of the Respondent. The law relating to the circumstances under which an Ex-parte order for leave to commence Judicial Review proceedings can be challenged by an aggrieved party was laid down by the Court of Appeal in the case of *Njuguna vs. Minister for Agriculture (2000) 1E.A. 185* as follows:

“It cannot be denied that leave should be granted, if, on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by application by the Respondent under the inherent jurisdiction of the court to the Judge who granted leave, to set aside such leave. (See Halsbury’s Laws of England (4th edition) Volume 1(1) paragraph 167 at page 1276.”

12. In the case of *Aga Khan Education Service Kenya vs. Republic Ex-parte Ali Seif & 3 others, C.A 257 of 2003*, the Court of Appeal held as follows:

“We would caution practitioners that even though leave granted Ex-parte can be set aside on an Application; that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases...”

13. The above decisions of the Court of Appeal shows that indeed an Ex-parte order granting a party leave to commence Judicial Review proceedings can be set aside on Application in clear-cut cases. A priori, an order for leave to operate as a stay of the impugned decision can also be set aside by the court on Application, while leaving the grant of leave to commence Judicial Review proceedings intact.

14. The Applicant's Chamber Summons and the Notice of Motion is seeking to challenge the decision of the Respondent to terminate the “Lease dated 11th June, 2014; an order prohibiting the Respondent from terminating the Lease dated 11th June, 2014 or putting in occupation any third party and an order compelling the Respondent to extend the period of the Lease for five (5) years with effect from the date of payment of the land rates.

15. The Respondent has argued that there it has never entered into a Lease Agreement with the Applicant and that the issue raised in the Applicant's claim is purely a private transaction that does not fall in the purview of Judicial Review.

16. I have perused the Ex-parte Applicant's Affidavits and I have not come across the Lease Agreement between itself and the Respondent dated 11th June, 2014 or 20th June, 2014. What I have seen is a letter of offer by the Respondent dated 20th June, 2014 which was accepted by the Ex-parte Applicant on the same day. In the said “acceptance,” the Ex-parte Applicant undertook to “execute the Lease as prepared by the Landlord within fourteen (14) days.”

17. Whether the said letter of offer and acceptance constituted a contract between the parties is an issue which can only be dealt with when the main Notice of Motion is heard. Indeed, whether the dispute can be said to be a private transaction falling outside the purview of Judicial Review proceedings cannot be determined at this stage.

18. However, in the absence of a Lease Agreement between the Ex-parte Applicant and the Respondent, the issue of the leave that was granted by the court operating as a stay restraining the Respondent from leasing the property to another party cannot arise. I say so because the Respondent has stated that it has already leased the same land to another entity and that the order of stay should not have been granted in the first place. The Ex-parte Applicant has also not exhibited any Lease Agreement between itself and the Respondent.

19. Indeed, the fact that the suit land has already been Leased to a third party, either formally or otherwise was confirmed by the Ex-parte Applicant, who, upon obtaining the order of stay, filed an Application dated 23rd May, 2018 in which it alleged that the suit land had been all leased to a third party contrary to the orders of the court.

20. Of course, the main Notice of Motion will have to proceed to its logical conclusion. In the event that the Ex-parte Applicant proves that he is entitled to the orders of Judicial Review, then the existing lease between the Respondent and the third party will be terminated by this court.

21. The Respondent's/Applicant's Application dated 12th April, 2018 is therefore allowed partially in the following terms:

a. That the leave to commence Judicial Review proceedings that was granted on 22nd January, 2018 shall not operate as a stay of the decision of the Respondent dated 2nd August, 2017.

b. The costs of the Application to be in the cause.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE