



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
JUDICIAL REVIEW NO.27 OF 2012

REPUBLIC.....APPLICANT

VERSUS

PERMANENT SECRETARY,
MINISTRY OF HOUSING1ST RESPONDENT

DISTRICT BUILDING SURVEYOR,
NYERI DISTRICT2ND RESPONDENT

EUSTACIA WACHIRA MACHARIA (*suing as the legal*
representative of the estate of Florence Warundu Wachira (deceased)....Exparte APPLICANT

J U D G M E N T

Eustacia Wachira Macharia (*hereinafter referred to as the exparte applicant*) filed this judicial review application dated 6/12/12 under certificate of urgency seeking leave to apply for the orders of **Certiorari**, **Prohibition** and **Mandamus** against the decisions of the Permanent Secretary, Ministry of Housing and the District Building Surveyor (*herein referred to as the respondents*), who made orders for the applicant to vacate government house no MG. 91 KR situated on LR. No. Nyeri Municipality Block 1/1456 (*hereinafter referred to as the suit property*) on 8th August 2012 by issuing a 2 months notice. When he failed to vacate after expiry of the notice, the 2nd respondent sent his agents to forcefully evict the applicant on 16th Oct 2012. The application is brought by the applicant as the administrator of the estate of Florence Warundu Wachira (*hereinafter referred to as the deceased*), a former health worker and wife to the applicant who had since retired.

The court granted leave to file the substantive motion and the said leave was to operate as stay, which motion was filed on the 19th Dec 2012, which is the mater for determination before the court.

The prayers sought in the notice of motion are;

- a. ***An order of Certiorari to remove into the high court for the purpose of quashing the decision made and vacation notice served upon the applicants family to vacate the suit premises by the 2nd respondent.***

- b. *An order of Prohibition prohibiting and restraining the respondents and their agents from further interfering with the applicants possession and ownership of the suit premises.*
- c. *An order of Mandamus compelling the respondents to reinstate the applicant to immediate occupation and possession of the suit premises.*
- d. *A declaration that the decision of the respondents requiring the deceased to vacate the suit premises was invalid, void and of no effect.*
- e. *A declaration that the applicant is the rightful owner of the suit premises.*
- f. *Costs of the suit.*

In the motion it is stated that the deceased was allocated the suit property on the 13th October 2000 and lived there in together with her family. However on 24th January 2007, government circulated a notice of intention to sell some of its non strategic houses to civil servants. It's stated the deceased applied for the suit property which she was occupying being among those intended to be sold whose price was quoted as Kshs 960,000/-. The suit property was allotted pursuant to which she paid the 10% deposit of Kshs 96,000/- and after that she started remitting installments towards completing the balance of the purchase price.

She however passed on in the year 2012 and the applicant obtained grant of representation. The 2nd respondent served a vacation notice addressed to the deceased stating that the house was to be occupied by civil servants which she was not, for by then she had retired from service. There was an attempt to forcefully evict the applicant's family from the house on 12th October which bore no fruit but the same convoy of heavily armed police officers returned on 16th October and successfully evicted the family destroying their personal property, the applicant pleads. The applicant laments that some of important documents in respect of the case were lost in the process.

The applicant faults the respondents decision on the basis that the relevant circumstances of the case were not considered, and that they were not consulted or heard fairly before that decision was made. He argues that the erroneous decision of the respondent was misinformed on the basis that the applicant had ceased to be a civil servant whereas he was occupying the house on the basis of a tenant purchaser, and that caused the applicant's family great prejudice.

From the pleadings the house was taken over by a District Officer on 1st December 2013 and who stays therein. The applicant believes that he will be greatly prejudiced if he is evicted. In his application dated 18th April 2013 for review of the orders of the court issued on the 6th Dec 2013, the 2nd respondent stated that the court wrongfully issued final orders of certiorari and prohibition before the substantive motion had been filed and and before hearing the respondents. These orders had been wrongfully extracted by the applicant and were reviewed by the court on that application to pave way for the hearing of the motion.

The respondents filed a replying affidavit sworn by **Lucy Gathata**, a County Housing Director. She states that the decision to finally evict the applicant was because he was not a civil servant besides being in rent arrears adding that government quarters are meant for civil servants. She further states that the deceased had been advised of the cancellation of the earlier intended sale of the suit property and was informed that she could collect her deposit. The cancellation has been done in the office of the Permanent Secretary in the Ministry of Housing by a letter dated 28th July 2008, and is stated to have been placed in the media print on the 30th July 2008.

It's the respondent's argument that the decision to evict the applicant was informed by the cancellation of the intention sell non strategic Government houses which returned the suit property back to be a government house for renting by civil servants and if the applicant was to stay there in he had to be a rent paying tenant and not a purchaser since that intention had been canceled. The respondent laments that the applicant was perpetually in rent arrears and has attached a letter in her affidavit where in the applicant

accepts he was in arrears dated 26/9/2011 as well as letter dated 7th September 2011 claiming rent arrears from the deceased amounting to Kshs 23,500/.

However the applicant states that there is malice on the action of the respondents because his neighbors who bought the houses under the same scheme are living in them and it is only the applicant who has been singled out. He has availed the deceased's application form.

The applicant faults the 2 months vacation notice dated 8th August 2012 claiming it arrived late after almost a month from the date it was issued and he was only availed with a single month notice. The applicant prays for the court to find that the move was void, and issuance of injunctive orders be granted contemporaneously to restrain the 2nd respondent activities in respect of the suit property and the applicants occupation to the suit property. The applicant seeks the court to find that he is the rightful owner of the suit property, and order the applicant to be reinstated as the rightful occupant of the suit property as well as issuing the orders sought in the application. He denies having any notice of the cancellation of the sale pleaded by the respondents.

I have looked at the application and the prayers sought therein. I have also looked at the submissions of each party and list of authorities as well as rival arguments.

The applicant in his submissions relies on the grounds of unreasonableness and malice on the part of the respondents in dealing with him and breach of duty of legitimate expectation to the applicant. The applicant relies on the decided cases of

- a. *Nyongesa & 4 Others -Vs- Egerton University College (1990) KLR 693,*
- b. *Council Of Civil Servants Union & Others Vs Minister Of The Civil Service (1983)3 ALL ER 936,*
- c. *Maina vs Nairobi Liquor Licensing Court (1973)ea 319-321.*

These cases emphasize on the importance of fair hearing before action is taken, good reasons be given for decision taken, the public body being careful not to deprive the citizens on legitimate expectations and ensuring proper and adequate notice to the affected citizens before action is taken by the public body.

On the other part, the **gravamen** of the respondents written submissions is that the right procedure was adopted, and that there was no valid sale of the suit property, and that the suit property belonged to the government. Each party has reiterated its pleadings in supports of the submissions.

From the totality of the suit and the arguments presented by the different parties I find the following issues arising for determination.

- a. ***Whether there was a sale of the suit property to the deceased and whose property is the suit property.***
- b. ***Whether the right procedure was followed in evicting the applicant***
- c. ***Whether the orders sought can issue.***

The main issue presented by the parties lingers on procedure followed in dealing with the applicant who deemed himself a beneficiary owner of the suit property, while the respondent deemed and dealt with him as a tenant. The prayers sought in the application were addressed in the case of ***Kenya National Examinations Council -Vs- Republic Exparte Gathenji Njoroje & 9 others (1997) eKLR.*** In it was held that the order of prohibition was held to look into the future preventing decisions from being made and does not seek to undo decisions made. Undoing decisions was held to be the effect of the orders of certiorari, which quashes decisions, while mandamus was held to be to have the effect of compelling a

performance of a public duty imposed on a person or persons by a statute, failure to perform which has caused detriment to a person who has a legal right to expect it performed. The same was reiterated in the case of **Jitesh Shah & Highland Textiles Limited V Nairobi District Lands Registrar [2013] eKLR**

The applicant has stated that the house was bought by his late wife, and that it was a purchase made in pursuance to a government circular for sale of certain houses. Receipts for the payment of the deposit has been exhibited. The applicant argues that his being evicted while he was a tenant purchaser of the house as a successor of her wife is unfair, arguing that this action affects his legitimate expectation to be a homeowner under the tenant purchase.

The respondents however argue that there was never a valid sale having been canceled by a notice similar to the one that had floated the houses for sale. The respondent state that the notice was placed in the print media on the 30th July 2008. The applicant denies service of the notice of cancellation of the sale by the government stating his wife was never served. The respondent state that the deceased was informed of the cancellation by a letter written to her in the letter addressed to her dated 6th May 2011 which is annexed to the affidavit of Gathata. The respondents are firm that the applicants and the deceased were aware of the notice all along.

I have looked in the print daily nation of the 30th July 2008 and I have confirmed there was printed notice similar to the one attached to the respondents affidavit as annexure LNG 5. The applicant in his further affidavit has vehemently denied any service. The respondents have also availed a letter written to the deceased in 2011 notifying her of the cancellation. Issue of service is raised in the matter, as the respondents argue when the notice appeared in the print media it amounted to service, in addition to the notice served to the deceased personally. I am of the view that this means of service is equivalent to the substituted service which is recognized in our laws. In the case of **Charles Muya Kabira v Jackson Sanko Kapande [2008] eKLR**, substituted service by print media was appreciated by the court as a means of service of summons. **Ord 5 Rule 17(4) Of The Civil Procedure Rules 2010** recognizes service by advertisement. The respondent has stated service was done personally on the deceased and not the the applicant. I am convinced that the deceased knew the position even if the applicant may not be aware being an administrator of her estate, and if there was any issue he would have challenged the same after the print media or the day of service of the letter served earlier.

Adequate notice of the cancellation of the sale was properly served upon the deceased in line with the respondents argument, the issue of ownership of the suit property was to revert to the government and the deceased to be refunded the purchase moneys paid. However the said cancellation amounted to a breach of contract of sale and the expectation of the deceased and other purchasers under that scheme.

However, the applicant has not brought any evidence to this court that the decision of the Permanent Secretary canceling the tenant purchase scheme was ever challenged in court. The cancellation having dispossessed the deceased of the right in the suit property as a tenant purchaser, there could not have been a legitimate expectation to the applicant which the deceased did not have, as when the contract was rescinded, the deceased never challenged it, or there is no proof of challenge. Moreover the applicant has never challenged the said decision in this application despite the fact the said decision is the genesis of this action.

Though the applicant challenges the eviction from the suit property, as I have already found, the ownership of the suit property had reverted to the government after the notice canceling the tenant purchase scheme was published and was not challenged. The applicant faults the manner in which the eviction was done, as he deemed himself as a tenant purchaser beneficiary. The applicant states in the motion that the notice was served upon him 1 month before the date the respondents agents arrived to evict him on the 12th September 2012. He states that the respondent were misguided by the fact that he was not a civil servant, whereas he was a tenant purchase beneficiary of former civil servant.

The respondents argues that the right occupants of government houses are civil servants, which the applicant is not. The sale having been halted, the respondent argue that they had no other relationship with the applicant other than that of landlord tenant. The applicant was relying on the status of the

deceased who had since retired before passing on, which the respondent, in their view ceased to be a civil servant upon retirement. The respondent agrees that government houses can be occupied by non civil servants when there is no demand from the civil servants, and in any other case the applicant was in rent arrears.

I have looked at the various notices and letters by the applicant on the issue of rent arrears. The applicant was aware of his arrears as per the letters availed by the respondents. It was evident to the applicant that eviction was imminent unless he cleared his arrears as he had variously prayed.

The last issue is whether the orders sought can issue. The orders of prohibition, mandamus and certiorari are discretionary orders which can be denied when requisite grounds for denial exist. This was held in the case of **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209.**

Order of mandamus is sought to reinstate the applicant to the suit premises. The respondent states there are so many people registered in the names of the suit property. Having found the earlier notice of the 1st respondent canceling the sale standing unchallenged, I am hesitant to issue these orders since the main concern of the applicant was to occupy the suit premises as a tenant purchaser beneficiary and not a rent paying tenant. It will amount to issuing orders in futility which the court has been cautioned against time and again. (See the case of Kenya national examinations council- supra).

The applicant seeks the orders of Prohibition in order to assure him enjoyable possession of the suit property once he is reinstated. it was held in Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354 that judicial review is only concerned with the reviewing of the decision making process. I have already found that the cancellation notice having been served, the proprietary rights in the suit property returned to the government and the applicant could not rely on tenant purchase which ceased to exist before he was an administrator. The reliance remains on the side of tenant landlord relationship with the respondent. Since the order of reinstatement does not appear proper to issue, the order of prohibition will also fail.

Order of certiorari is also sought. In Captain Geoffrey Kujoga Murungi Vs Attorney General Misc Civil Application No. 293 of 1993. It was stated; “Certiorari deals with decisions already madeSuch an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice...” The decision challenged is the one of notice and forceful eviction of the respondent. I have already found that the order to evict was informed by the notice of sale cancellation and the fact that the applicant was not qualified to occupy the house in current status and even though he could still occupy, he was in huge rent arrears of about 61,000/-. since his main interest was hinged on the purchase which has since been canceled unchallenged, then even if I was to issue the orders quashing the vacation notice and eviction, his main objective of being a tenant owner would not be met and these orders being discretionary, I find it will be futile to issue to reinstate him as a tenant when he had already been in rent arrears which he has not yet evidenced paying. Moreover he is not a civil servant and therefore not entitled to a government house.

The applicant has sought declaratory orders in addition to the usual orders of judicial review. These are the orders (d) and (e) in the motion. I am guided by the case of Republic V Njeru Githae Minister Of Finance & 2 Others Exparte Jackson Gichuki & Another [2013] eKLR, where it was held orders of declaration were not among the orders contemplated in sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya, and these two orders fail on that ground, and cannot issue.

The notice might have been short as served and eviction irregular, but I do find that this being a dispute purely based on breach of contract under private law hence judicial review does not apply. To understand the ambit of judicial review remedies of Certiorari ,Prohibition and Mandamus one has to firstly understand the origin of the same. The remedies originally took the form of prerogative writs in England but, by virtue of the Administration of Justice (miscellaneous Provisions) Act 1938, they had become prerogative orders. From the 1950s there was an increase in the use of private law remedies of

injunctions and declarations in prerogative remedies, and in appropriate cases, damages could be issued in England where a public authority was held liable in tort or contract. The position in England was materially affected by the introduction of “**application for judicial review**” with effect from January 11, 1978. In Kenya, Judicial Review was introduced by the Law reform act Cap 26 Laws of Kenya On 18th December 1956 by Legal notice no 48 of 1956. **Section 8(2)** of the Act provides that “**in any case in which the High Court in England is, by virtue of the provisions of Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of Mandamus, Prohibition or Certiorari, the High Court shall have power to make a like order.**”

This section has never been amended and therefore the Kenyan situation is that of The United Kingdom in 1938 thus **Certiorari** is available to quash a decision that is ultra vires or in breach of the rules of natural justice or affected by an error of law that was apparent on the face of record or that was procured by fraud. **Prohibition** is available lay to prevent action or continuing action in excess of jurisdiction or contrary to natural justice. **Mandamus** is available lay to compel performance of a public duty. Certiorari and Prohibition are available wherever any body of persons having a legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority.

This court holds that breach of contractual obligation like cancellation of the offer by the government to sell non strategic houses and failure to to give adequate notice of eviction was not a duty as envisaged in public law as the relationship between the applicant and the respondent was that of tenant and landlord hence the law of contract applies. This is the view taken by **Bailey, Jones & Mowbray in Cases on Administrative Law 3rd Edition at page 617 para 3.**

In R V British Broadcasting Corporation ex p. Lavelle(1983)1 W.L.R. 23, Miss Lavelle, a BBC employee, was charged with the theft of tapes from the BBC. Pending her trial at the Crown Court, the BBC instituted disciplinary proceedings against her, leading to a decision that she be dismissed. Only one hour's notice of the initial disciplinary interview was given, and she was unable to arrange to be accompanied by a union or other representative, as allowed by the BBC's disciplinary procedure. Although she still had the right to appeal to the Director General of the BBC, she applied for judicial review of the decision to dismiss her. The application was refused for reasons that Under RSC Ord.53 r 1(1), as confirmed by S.31(1) of the Supreme Court Act 1981, (**read Order 53 of the Civil Procedure Rules 2010 and Section 8(1) and (2) of the Law Reform Act Cap 26 Laws of Kenya**) certiorari and the other prerogative remedies were only available to impugn a decision of a tribunal which was performing a public duty, and were inappropriate to impugn a decision of a domestic tribunal such as an employer's disciplinary tribunal. Similarly, judicial review by way of an injunction or declaration under Ord.53, r 1(2), or S.31(2) of the 1981 Act, although wider in ambit than relief by prerogative order, was nevertheless confined to the review of activities of a public nature as opposed to those of a purely private or domestic character. Since the disciplinary procedure under which the applicant was dismissed arose out of her contract of employment and was purely private or domestic in character, the applicant was not entitled to relief by way of **Certiorari**.

Lastly, unless the law reform act which is archaic and therefore obsolete is amended to include the remedies of injunctions, declarations and damages in judicial review the court's hands will remain tied in this aspect.

The upshot of the above is that the application is dismissed with costs to the respondents. Orders accordingly.

Dated, signed and delivered on 14th day of November 2014.

A. OMBWAYO

JUDGE

