



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 157 OF 2014

INVOLLATE WACIKE SIBOE.....APPELLANT

AND

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi, (Odunga, J.) dated 11th February 2014 in MISC. APP. NO. 10 OF 2009)

JUDGMENT OF THE COURT

In this first appeal the appellant, ***Invollate Wacike Siboe***, seeks to overturn the judgment and decree of the High Court (***Odunga, J.***) dated 11th February, 2014 dismissing her application for judicial review.

In that application the appellant, a former employee of the 1st respondent, ***Kenya Railways Corporation***, prayed for an order of *certiorari* to quash a decision of the 1st respondent, which would have resulted in her eviction from a house that she occupied by virtue of her former employment. She also wanted the court to compel the 1st respondent by an order of *mandamus* to sell the house to her at concessionary rates, as it had earlier undertaken to do.

Upon hearing the parties, the learned judge held that the doctrines of equitable estoppel and legitimate expectation, the foundation of the appellant's application, did not apply in the circumstances of the case because the Treasury, which was legally bound to approve disposal of the 1st respondent's assets, had declined to approve the sale of the house to the appellant at concessionary rates. Accordingly he dismissed the application but made no orders on costs. That judgment aggrieved the appellant, leading to this appeal.

By way of background, the 1st respondent employed the appellant in 1982 initially as a draughtsman and by the time she left employment in 2007, she had risen to senior levels. By virtue of her employment, the appellant was entitled to and was in fact provided with housing by the 1st respondent. In or about 2007, the appellant was retrenched from employment while living in ***House No. WK 14*** on ***LR No. 2009/644*** in Kilileshwa, Nairobi (the suit property) registered in the name of the 1st respondent.

On 7th November 2006, before the retrenchment, the 1st respondent's Board of Directors approved a proposal to sell some of its non-strategic assets. Included among those assets were residential houses, which were to be sold to members of staff at subsidized rates of 40% of the prevailing market value. The first priority was to be given to members of staff to purchase the houses they occupied so long as they met the set grading criteria based on their pay and the value of the house. The Ministry of Transport subsequently approved the proposal for implementation. It is common ground that the appellant met the set criteria for purchase of the suit property.

There is no agreement between the appellant and the 1st respondent on why the Board of Directors took that decision. To the appellant, the decision was taken to ameliorate the situation of the 1st respondent's staff who faced imminent retrenchment because they had suffered various disadvantages such as low salaries, lack of regular review of salaries and failure by the 1st respondent to remit deductions from their salaries to their savings and credit society. To the 1st respondent on the other hand, the decision had nothing to do with the impending retrenchment of staff. On the contrary, it was dictated by economic factors and affected non-strategic assets of the 1st respondent beyond the houses occupied by members of staff.

Be that as it may, the appellant was retrenched before the proposal could be implemented. She however continued in occupation of the suit property under an annual lease entered into between herself and the 1st respondent, yielding the monthly rent of Kshs.30,000 with an escalation clause of 5% upon renewal of the lease or on mutually agreed terms. The appellant avers that the 1st respondent subsequently and unilaterally increased the monthly rent in breach of the lease and on 6th January 2009 demanded that she vacate the premises on or before 10th January 2009, in total disregard of the offer to sell the suit property to her.

To forestall her eviction, on 9th January, 2009, the appellant commenced judicial review proceedings in which she applied for an order of *certiorari* to quash the notice requiring her to vacate the suit property; an order of *mandamus* to compel the 1st respondent to sell the suit property to her as resolved by the Board of Directors; and an order of *prohibition* to restrain the 1st respondent from terminating her occupation of the suit property or evicting her therefrom. On 14th January, 2009 the High Court granted the appellant leave to apply for judicial review and directed the leave to operate as stay of eviction of the appellant from the suit property pending the hearing and determination of the application.

The 1st respondent opposed the application vide an affidavit sworn on 11th December, 2009 by **Stanley Gitari**, its legal officer. The substance of the 1st respondent's case was that although the 1st appellant's Board of Directors had proposed disposal of non-strategic assets, that proposal was countermanded by the Treasury vide a letter dated 23rd April, 2008 because the disposal would realise only Kshs 3.2 billion against the 1st respondent's debt of Kshs 25 billion. That letter also noted that the 1st respondent did not have enough houses to sell to all retiring employees at concessionary rates, which would be inherently unfair. Consequently the Treasury advised the 1st respondent to sell the assets at market price through a competitive process.

On his part the 2nd respondent opposed the application through grounds of opposition dated 11th May, 2012 challenging the competence of the application for failure to issue a pre-litigation notice as required by section 87 of the Kenya Railways Corporation Act and contending that the application did not disclose a cause of action against the 2nd respondent.

As already intimated, after losing the application the applicant moved to this Court in a memorandum of appeal that impugns the judgment of the High Court for holding that the doctrine of equitable estoppel and legitimate expectation were not applicable in the circumstances of this case; for holding that the Treasury had declined to sanction the proposal by the 1st appellant's Board of Directors; and by dismissing the application.

Prosecuting the appeal, **Mr Karuku**, learned counsel for the appellant submitted that the High Court erred in holding that the 1st respondent was not estopped from resiling from the resolution by its Board of Directors to sell the suit property to the appellant. Counsel further submitted that the appellant had relied on the resolution and therefore had a legitimate expectation that indeed the suit property would be sold to her. Counsel pressed the view that the resolution to sell houses to members of staff at concessionary rates was based on the impending retrenchment and was also a soft cushion due to irregular payments which made it difficult for the 1st respondent's staff to access credit facilities.

Relying on **section 120** of the **Evidence Act**, counsel submitted that the 1st respondent, having represented to the appellant that it would sell the suit property to her at concessionary rates and having led her to believe and act on the representation, the respondent could not later turn round and deny the truth of the representation. As regards the role of the Treasury, the appellant submitted, if we understood him right, that the resolution by the 1st respondent's Board was by a Government entity and was binding even without approval by the Treasury. Section 3 of the Kenya Railways Corporation Act was relied upon to support the submission that the 1st respondent was a body corporate and had the power to acquire and dispose of moveable and immovable property. In any case, the appellant contended, the Treasury was represented in the 1st respondent's Board Directors.

As regards legitimate expectation, the appellant relied on **De Smith, Woolf & Jowell's Judicial Review of Administrative Action, Sweet & Maxwell, 6th ed., In R (Bibi) v. Newham London Borough Council [2002] 1 WLR 237** and **Republic v. Attorney General & Another ex parte Waswa & 2 Others [2005] 1 KLR 280** and submitted that legitimate expectation was a principle of fairness and the rule of law which arises, as in this case, where a person responsible for making a decision induces another to reasonably expect to receive a benefit or advantage. In such cases, for the sake of certainty and predictability of action by public authority, the decision maker is not allowed to resile from his representation.

Ms. Nduta, learned counsel for the 1st respondent opposed the appeal contending that estoppel did not apply in this case because the Board of Directors of the 1st appellant only made a proposal rather than a promise to the appellant. In any event, it was contended, the appellant had not adduced any evidence of having acted on the proposal to her detriment. Even if there was a promise, which the 1st respondent denied, it was between the 1st respondent and its employees, not former employees like the appellant.

Lastly the 1st respondent argued that it was not able to implement the proposal of the Board due to lack of approval by the Treasury as communicated in the letter dated 23rd April 2008. To continue otherwise, it was urged, would have amounted to the 1st appellant acting in violation of the law. It was also contended that the appellant had not produced any evidence to show approval of the Board's proposal by the Treasury. The 1st respondent relied on the judgment of this Court in **James Mbatia Thuo & Another v. Kenya Railways Corporation & Another, CA No. 329 of 2012**, which involved facts very similar to those in this appeal and where the Court held, among others, that in the absence of authority from the Government the 1st respondent had no authority to sell houses to its staff at subsidized rates.

The 2nd respondent did not file any written submissions, opting instead to rely on its submissions in the High Court. Mr Bitta, learned counsel in a brief address added that the appellant could not rely on estoppel in the circumstances of this appeal because it is a shield rather than a sword; that legitimate expectation cannot arise contrary to the law; that orders of judiciary review are discretionary; that the appellant had not showed the manner in which the High Court erred in the exercise of its discretion; and that on the authority of **Mbogo & Another v. Shah, (1968) EA 93** there was no basis for this Court to interfere with the exercise of discretion by the trial court.

We have anxiously considered the record of appeal, the judgment of the High Court, the memorandum of appeal, the submissions of learned counsel, the authorities cited and the law. It is common ground that on 7th November, 2006 the Board of Directors of the 1st respondent approved a **proposal** to sell to its

employees the houses that they occupied at subsidized rates, subject to satisfying some conditions. The evidence on record convinces us that the proposal for sale of the houses was part of a wider proposal to dispose of the 1st respondent's non-strategic assets. **Section 11** of the Kenya Railways Corporation sets out the powers of the Board of the 1st respondent. It is however noteworthy that in some respects the powers of the Board are fairly circumscribed. For example, it can only approve **minor** alterations to salaries, wages or other terms and conditions of service of the 1st respondent's employees and individual capital work not exceeding Kshs 5 million or such other sums as the Minister responsible for railways may determine. By **section 8(2)(c)** of the

Act, the financial administration of the 1st respondent must be conducted in accordance with **Part V** of the Act which, among other things provides that the 1st respondent may only borrow money or obtain credit with the concurrence and subject to the limits imposed by the Minister for Finance. Section 25(1) otherwise prohibits the 1st respondent from giving or executing any mortgage or charge over or assigning any of its property.

It is also important to advert to **section 13** of the **State Corporations Act** dealing with disposal of assets of State Corporations, of which the 1st respondent is one. By that provision, the 1st respondent can only dispose of its assets with the approval of the Minister and the Treasury where such disposal has not been taken into account in the annual estimates. Pursuant to the above provisions, on 19th February 2008, the 1st respondent applied for Treasury's approval to dispose of its non-strategic assets. By a letter dated 23rd April 2008, the Permanent Secretary, the Treasury, responded and declined the approval for the reasons that we have set out earlier in this judgment. Under these circumstances, can the appellant invoke the doctrines of estoppel and legitimate expectation to compel the 1st respondent to sell the suit property to her at concessionary rates?

In ***Nurdin Bandali v. Lombank Tanganyika Ltd* [1963] EA 304**, the former Court of Appeal for Eastern Africa set out the conditions under which equitable estoppel arises as follows:

“The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in belief of the truth of the representation, acted upon it.”

As far as we can discern from the evidence on record, there was no clear and unequivocal representation by the 1st respondent that it would sell the suit property to the appellant at concessionary rates. All that the evidence discloses is a **proposal**, which in light of the provisions of the law that we have cited above, required the approval of the Treasury before the disposal of the 1st respondent's assets could be actualized. That proposal was considered and denied by the Treasury vide the letter of 28th April 2008. Without approval, the 1st respondent could not dispose of its non-strategic assets, including the suit property. To do so it could have been acting in violation of the law. So too, any court order that purported to compel the 1st respondent to sell the suit property to the appellant without the approval of the Treasury.

It is trite law, and decisions abound, including by this Court, that estoppel cannot be raised against the provisions of a statute. See ***Tarmal Industries Ltd v. Commissioner of Excise* [1968] EA 471; *Manchester Outfitters (Suits Division) Ltd & Another v Standard Chartered Financial Services Ltd & Another* [2002] 2 KLR 590; *Niazons (K) Ltd v China Road & Bridge Corporation (K)*, CA No 187 of 1999; and ***Henry Muthee Kathurima v Commissioner of Lands & Another*, CA No 8 of 2014**.**

The same position applies to legitimate expectation; no legitimate expectation can arise if effectuating the expectation would result in violation of a statute. The contours of the doctrine are well mapped. Legitimate expectation arises where representation by a decision maker has created a genuine expectation that it is within his power to honour and make good. The law however does not protect every expectation; it protects only legitimate expectations. Where the representation is one, which the decision maker is not

competent to make, reliance on it cannot in law give rise to legitimate expectation. Hence legitimate expectation cannot arise when the decision maker is acting *ultra vires* his or her powers. In addition, where the words of a statute are clear and express, they must override any expectation to the contrary that a party may claim to have. On the same note, where a public authority has made a representation that it does not have power to make, it is not estopped from asserting the correct position in law. (See Communications Commission of Kenya & 5 Others v. Royal Media Services & 5 Others, SC Pet. No. 14, 14A, 14B, & 14C of 2014; Justice Kalpana H. Rawal v. Judicial Service Commission & Others, CA No 1 of 2016; Republic v. Nairobi City Council & Another ex parte Wainaina Kigathi Mungai, HC JR Misc. C. No 356 of 2013; and Republic v. Kenya Revenue Authority ex parte Aberdare Freight Services Ltd [2004] 2 KLR 530).

We agree too with the 1st respondent that the appellant did not adduce any evidence of reliance on the proposal by the Board of Directors, if indeed it was possible to rely on a mere proposal. As this Court stated in Justice Kalpana H Rawal v. Judicial Service Commission & Others (*supra*):

“A pre-requisite to successful invocation of the doctrine of legitimate expectation is that the person who bases his or her claim on the doctrine has to satisfy that he or she has relied on the decision-maker’s representation to his or her detriment. In the instant case, the appellant has not demonstrated how she relied on the 1st respondent’s decision to her detriment. A claim based on mere legitimate expectation, without anything more in the form of suffered detriment, cannot ipso facto sustain an action founded on the doctrine of legitimate expectation. (See Sethi Auto Service Station & Another v. Delhi Development Authority & Others, (2009) 1 SCC 180).

Having carefully considered this appeal, we are satisfied that the learned judge did not err by dismissing the appellant’s application for judicial review. There was no basis for invoking the estoppel or legitimate expectation Accordingly this appeal is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR