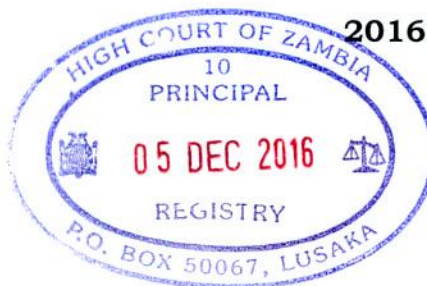


IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



2016/HP/2107

IN THE MATTER OF: **ORDER 53 OF THE 1965 RULES OF THE**
SUPREME COURT (RSC), WHITE BOOK (1999
EDITION) VOL 1

AND

IN THE MATTER OF: **AN APPLICATION FOR JUDICIAL REVIEW**

AND

IN THE MATTER OF: **CIRCULAR NO 2 OF THE 1996 AND THE**
HANDBOOK ON THE CIVIL SERVICE HOME
OWNERSHIP SCHEME OF 1996

AND

IN THE MATTER OF: **AN ORDER QUASHING THE DECISION OF**
THE PERMANENT SECRETARY BY
CERTIORARI TO EVICT FRANCIS KAMANGA
FROM HOUSE 35C LEOPARD LANE
KABULONGA

B E T W E E N :

FRANCIS KAMANGA

APPLICANT

AND

THE ATTORNEY GENERAL

RESPONDENT

J U D G M E N T

CASES REFERRED TO:

1. *R V Epping and Harlow General Commissioners Ex-parte Goldstraw* 1990 COD 107
2. *Nyampala Safaris (Z) Ltd and Others V Zambia Wildlife Authority and Others* 2004 ZR 49

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court, 1999 Edition*

On 1st November 2016 the Applicant applied ex - parte for leave to commence judicial review proceedings, pursuant to Order 53 of the Rules of the Supreme Court, 1999 Edition.

The application is supported by an affidavit and a Notice containing a statement in support of the ex - parte application.

The reliefs sought in the application are;

1. *An order of certiorari quashing the decision of the Permanent Secretary to evict the Applicant from House No 35C Leopard Lane Kabulonga.*
2. *A declaration and order that the decision made by the Permanent Secretary in his letter dated 10th October, 2016 is null and void ab initio*
3. *If leave is granted as prayed, it should operate as a stay of the decision of the Respondents to request the Applicant to vacate the house until full determination of the matter or further order of the honourable court.*
4. *If leave is granted, the direction that the hearing of the application for judicial review is expedited.*

The facts leading to the application as outlined in the affidavit in support of the application are that on 15th November, 2011, the Applicant was employed as Permanent Secretary in the Ministry of Transport, Works, Supply and Communication, by the Respondent. That on 1st October 2012, the President of the Republic of Zambia retired the Applicant in the public interest, with immediate effect.

The affidavit further states that the Applicant on 8th April 2014 commenced an action in the Industrial Relations Court challenging the retirement on the ground of unlawful dismissal as shown on the exhibit marked 'FK1'. In that action he also claims an order that he purchases House No 35C Leopards Lane Kabulonga, which he occupied by virtue of his employment as Permanent Secretary.

It is also deposed in the affidavit that the judgment in the Industrial Relations Court has not been delivered by Hon Mr Justice Chinyama despite submissions having been filed on 14th December 2015. That despite the matter pending judgment, the Permanent Secretary in the Ministry of Works and Supply on 16th October, 2016 wrote a letter to the Applicant giving him 90 days to vacate House No 35C Leopard Lane, Kabulonga.

The grounds upon which the leave to commence judicial review is sought are that the decision by the Permanent secretary to evict the Applicant from the house when the matter is sub judice is procedurally improper, as the Applicant has a right to have his matter heard and determined by the courts.

The other is that the decision by the Permanent Secretary is also challenged on the ground of legitimate expectation, as in allocating the house to him, the Respondent conducted itself in a manner suggesting that the Applicant was entitled to purchase the house in line with Circular No 2 of 1996 and the Handbook on the Civil Service Home Ownership Scheme.

Order 53 Rules 1 and 2 of the Rules of the Supreme Court, 1999 edition provides for what cases are appropriate for judicial review. It states that;

“(1) an application for -

- (a) an order of mandamus, prohibition or certiorari, or***
- (b) an injunction under section 30 of the Act (»»text) restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Order.***

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to -

- (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,***

- (b) *the nature of the persons and bodies against whom relief may be granted by way of such an order, and*
- (c) *all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review”.*

With regard to the purpose of judicial review, Order 53/14/19 of the Rules of the Supreme Court, 1999 edition provides that

“the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. "It is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question".

This position has been reiterated in a number of cases among them **NYAMPALA SAFARIS (Z) LTD AND OTHERS V ZAMBIA WILDLIFE AUTHORITY AND OTHERS 2004 ZR 49**. Therefore the question in this case is whether the Applicant in seeking leave to commence judicial review proceedings, seeks a review of the decision making process and not the merits of the decision?

In order for an Applicant to be eligible to apply for judicial review, they must show that they have sufficient interest in the matter, that the application has been made within three months of the grounds of the application arising, and that the Applicant has shown a prima facie arguable case.

With regard to the requirement of sufficient interest being shown, my view is that this has been demonstrated as the Applicant occupied the house, subject of the Permanent Secretary's decision by virtue of his employment. The second requirement has also been met as the Applicant has within three months of the 16th October 2016, when the Permanent Secretary wrote the letter giving him the notice to move out of the house, made the application. On the face of the facts the Applicant has demonstrated an arguable case, as he has shown that there is a matter pending judgment before the Industrial Relations Court, which judgment will among other matters, decide if he is eligible to buy the house in question.

However a further reading of Order 53 shows that there are instances where judicial review will not be granted even when an Applicant has met the above requirements. On such instance is in Order 53/14/27 which states that;

"The courts will not normally grant judicial review where there is another avenue of appeal. It is a cardinal principle that, save in the most exceptional circumstances [the jurisdiction to grant judicial review]

will not be exercised where other remedies were available and have not been used".

In the case of ***R V EPPING AND HARLOW GENERAL COMMISSIONERS EX-PARTE GOLDSTRAW 1990 COD 107***, Sir Donaldson M.R reiterated this principle stating that:

"It is a cardinal principle that, save in the most exceptional circumstances (the jurisdiction to grant judicial review) will not be exercised where other remedies were available and have not been used."

The Applicant in this matter states in the affidavit that among the reliefs he seeks in the matter before the Industrial Relations Court, is an order that he buys the house. While it can be said that he has used the remedy of the court, as there is a matter pending judgment, the notice of eviction has come after judgment in the matter is pending.

Thus the question that arises is whether this is a case that is fit for further investigations in the name of judicial review proceedings, despite the matter before the Industrial Relations Court division still pending? If I were to grant the Applicant leave to commence the judicial review proceedings, it would effectively mean that I would be opening up the question of whether the Applicant is eligible to buy the house to the possibility of two conflicting decisions being made over the same subject matter.

I say so because the main relief sought if the judicial review proceedings were to be granted, is an order of certiorari quashing the decision of the Permanent Secretary to evict the Applicant from the house. It is not known whether the Industrial Relations court will sustain the claim to buy the house, and the order of certiorari sought if granted, may conflict with the Court's judgment. Even in the event that the Court were to dismiss the claim, there is an appellate process available to the Applicant. Thus while the Applicant may have met the requirements to be satisfied in order for him to commence judicial review proceedings, there is a matter pending judgment over the said house.

As such I find that this is not a proper case where leave to commence judicial review should be granted, and I accordingly decline to grant the application. Leave to appeal is granted.

DATED THE 5TH DAY OF DECEMBER, 2016

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**

