



REPUBLIC OF KENYA



KENYA LAW

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**Njuguna & another v Business Premises Rent Tribunal & 3
others; Maunji (Interested Party) (Miscellaneous Civil Application
1 of 2023) [2023] KEELC 16633 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16633 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION 1 OF 2023**

JA MOGENI, J

MARCH 29, 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE AN APPLICATION
FOR ORDERS OF JUDICIAL REVIEW AGAINST THE BUSINESS PREMISES
RENT TRIBUNAL AND BPRT VICE CHAIRPERSON HON. GAKUHI CHEGE**

AND

**IN THE MATTER OF THE TENANCIES OF SHOP NOS. A1 AND A3
SITUATED UPON L.R NO. 36/II/13 ALONG 1ST AVENUE, NEAR THE
JUNCTION OF 13TH STREET, IN EASTLEIGH, NAIROBI CITY COUNTY**

AND

**IN THE MATTER OF AN APPLICATION BY IRENE NYAMBURA NJUGUNA AND
ALLAN KIRONJI WANJOIKE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
AGAINST THE OFFICER IN CHARGE OF PANGANI POLICE STATION, NAIROBI**

BETWEEN

IRENE NYAMBURA NJUGUNA 1ST APPLICANT

ALLAN KIRONJI WANJOIKE 2ND APPLICANT

AND

THE BUSINESS PREMISES RENT TRIBUNAL 1ST RESPONDENT

MR.GAKUHI CHEGE 2ND RESPONDENT

**THE OFFICER IN CHARGE OF PANGANI POLICE
STATION 3RD RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

FRANCIS MWANGI MAUNJI INTERESTED PARTY



RULING

1. The *ex-parte* applicants moved this court through an *ex-parte* chamber summons dated November 1, 2022 under order 53 rule 1 (1), (2), (4) and 2 of Civil Procedure Rules and section 3A of the Civil Procedure Act; Fair Administrative Action Act; articles 10, 22, 25, 40, 47, 50 and 165 of the Constitution of Kenya and all enabling provisions of law. The applicants seek the following orders: -
 - a) Spent.
 - b) That this honourable court may be pleased to grant leave to the 1st applicant to institute, commence and bring an application of judicial review against a decision made by the 2nd respondent on October 12, 2022, in 1st respondent case No E730 of 2022 (Nairobi) in Irene Nyambura Njuguna v Francis Mwangi Maunji ordering That:
 1. Application is certified as urgent.
 2. The notice to terminate tenancy dated July 20, 2022 to declare the premises on LR No 36/II/13 Eastleigh Nairobi vacant be and is hereby allowed pending hearing of the application *inter-partes* on November 10, 2022.
 3. The OCS Pangani police station to enforce compliance with these orders.
 4. Applicant to serve and file affidavit of service.
 - c) That this honourable court may be pleased to grant leave to the 2nd applicant to institute, commence and bring an application of judicial review against decisions made by the 2nd respondent on October 12, 2022, in 1st respondent case No E732 of 2022 (Nairobi) in Allan Kironji Wanyoike v Francis Mwangi Maunji, ordering that:
 1. Application is certified as urgent.
 2. The notice to terminate tenancy dated July 20, 2022 to declare the premises on LR No 36/11/13 Eastleigh Nairobi vacant be and is hereby allowed pending hearing of the application *inter-partes* on November 10, 2022.
 3. The OCS Pangani police station to enforce compliance with these orders.
 4. Applicant to serve and file affidavit of service.
 - d) That this honourable court may be pleased to grant leave to the applicants jointly or separately to file an application for judicial review against the decision by the 3rd respondent to enforce the compliance with the above said order made by 2nd respondent in (b) and/or (c) above, made on October 12, 2022, and issued on October 13, 2022.



- e) Thata declaration do issue directing that the grant of the above orders for leave sought in paragraphs (b) (c) and (d) above do and hereby operate as a stay of proceedings in the 1st respondent's case No E730 (Nairobi), Irene Nyambura Njuguna v Francis Mwangi Maunji and case No E732 (Nairobi), Allan Kironji Wanyoike v Francis Mwangi Maunji, pending the lodging, hearing and determination of an application of judicial review of the abovesaid orders made and issued in the said tribunal proceedings.
- f) That grant of leave to lodge an application for judicial review herein do and hereby operate as a stay of the orders of the said 2nd respondent made on October 12, 2022, and issued on October 13, 2022, in the said proceedings before the BPRT, namely case No E730 Irene Nyambura Njuguna v Francis Mwangi Maunji and case No E732 Allan Kironji Wanyoike v Francis Mwangi Maunji, pending the lodging, hearing and determination of anticipated application for judicial review against the said order.
- g) That the grant of leave to lodge an application for judicial review herein operate as a stay of the decision by the 3rd respondent since the October 13, 2022, to enforce compliance with the above said decisions and orders of the BPRT given and issued by 2nd respondent on October 12, 2022, and October 13, 2022, respectively, relating to the said tenancy premises pending the lodging, hearing and determination of an application to be filed pursuant leave or further order.
- h) That the grant of leave hereby operate to restore the status quo ante obtaining and prevailing prior to the giving and issuance of the above orders of the 2nd respondent of October 12, 2022, and October 13, 2022, in relation to the tenancy premises known as shop No A1 known as Mirror Bookshop situated upon all that piece of land known as LR 36/II/13 along 1st Avenue, Eastleigh Nairobi be and are hereby restored, that is, in accordance and compliance with the orders of 2nd respondent given on September 12, 2022, and issued on September 19, 2022 requiring that:
1. The tenancy relationship between the parties relating the applicant's shop No A1 situated upon plot No LR36/II/13 is a controlled tenancy.
 2. The respondent/landlord whether personally or by any agent, employees or other person whomsoever, from committing any further breach of the covenant for quiet possession of the tenancy agreement pending the hearing of the references.
 3. The OCS Eastleigh North police station to enforce the orders herein.
 4. The landlord/respondent to accept rent of Kshs 30,000/= monthly payable through his bank account or telephone or in the alternative that the applicants is permitted to deposit the rent in the tribunal or a bank account to be opened for that purpose pending the hearing of reference.
 5. The reference to be heard on November 10, 2022.



6. Hearing notice to issue.

- i) That the grant of leave hereby operate to restore the status quo ante obtaining and prevailing prior to the giving and issuance of the above orders of the respondent by the 2nd respondent of October 12, 2022 and October 13, 2022, respectively in relation to the 2nd applicant's tenancy premises known as shop No A3 known as EL-Wak bookshop situated upon all that piece of land known as LR 36/II/13 along 1st Avenue, Eastleigh Nairobi be and are hereby restored, that is, in accordance and compliance with the orders of and respondent given on September 12, 2022 and issued on September 19, 2022, requiring the same particulars set out under paragraph (i) above, in relation to shop A3.
- j) That the OCS of Eastleigh North police station to enforce this order.
- k) That the costs of this application be provided for.

- 2. The application is premised on the grounds on the face of the application, the annexed verifying affidavit sworn by the *ex-parte* applicants and further, the statement of facts. I do not need to reproduce them.
- 3. The application is not opposed. Directions were given that the applicants file submissions to the said application. The applicants filed their submissions dated March 27, 2023 on the even date which I have considered.
- 4. I have carefully considered the application herein and further perused through the annexures thereto. I have further considered the applicants' submissions and, it is my considered view that the main issue for determination is whether the same is merited.
- 5. The gist of the application is leave by the applicants to commence judicial review proceedings. Under order 53 rule 1 of the [Civil Procedure Rules 2010](#), it is mandatory that an applicant in such an application must seek leave before he can file the substantive application.
- 6. It is trite that judicial review is more concerned with the manner in which a decision is made than the merits of the decision. The court is concerned with the lawfulness of the process by which the decision is made. The grounds upon which an order of judicial review can issue include where the decision complained of is tainted with illegality, irrationality and procedural impropriety (where there is failure to act fairly on the part of the decision-making authority in the process of taking a decision) or where the rules of natural justice are not complied with. It may also be issued where the decision is made without or in excess of jurisdiction. [See [Republic v National Land Commission & another ex-parte Farmers Choice Limited](#) (2020) eKLR].
- 7. The reasons for leave were explained by Waki J (as he then was) in [Republic v County Council of Kwale & another ex parte Kondo & 57 others](#), Mombasa HCMCA No 384 of 1996 and the dictum in that decision is that, leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.



8. The learned judge further held that leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant; the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judiciously.
9. Similarly in *Republic v Land Disputes Tribunal Court Central Division & another ex-parte Nzioka* (2006) 1EA 321, Nyamu J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the merit in depth, that there is an arguable case for granting leave and that the leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and the needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmentorious.
10. It is therefore clear from the above that in an application for leave such as the present one, this court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.
11. I note that the application was filed within the six months' statutory timeframe as provided for under order 53 rule 2 of the *Civil Procedure Rules, 2010* and section 9 (3) of the *Law Reform Act* and as such it's brought within the statutory timeframes.
12. Further, in the matter before me and in light of the evidence adduced, upon a cursory perusal of the evidence before court and without delving into the arguments by the ex-parte applicants, it is my view that the case is sufficiently meritorious to justify leave. It cannot be said to be frivolous or vexatious.
13. On the question of whether the said leave should operate as a stay of proceedings, the applicable principle is that the grant of such leave is discretionary, but the court should exercise such discretion judiciously. Order 53 rule 1(4) of the *Civil Procedure Rules* provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”
14. In *R (H) v Ashworth Special Hospital Authority* [2003] 1 WLR 127, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the status quo pending the final determination of the claim for judicial review. The main consideration is always whether or not the decision or action sought to be stayed has been fully implemented. In *Taib A Taib v The Minister for Local Government & others* Mombasa HCMISCA No 158 of 2006 the court held that:-

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act....”



15. It is therefore clear that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.
16. A perusal of the present application indicates clearly that the impugned decisions are still continuing to be implemented. There is need therefore to prevent the implementation of the said decisions until the legality of the respondents' decisions is established, in light of the prejudice pleaded by the ex-parte applicants. It is my view therefore that the orders of stay sought to be issued.
17. On the question of whether the leave granted can operate to restore the status quo ante, what the applicants intend to achieve by the grant of the said order is an order reinstating the tenancy premises and restore the same in accordance with the orders of the 2nd respondent given on September 12, 2022. However, from the pleadings before me, it appears that eviction from the tenant premises took place on October 13, 2022. That the 40x8 feet container was carted away to an unknown destination. The applicants aver that some of their books were thrown off their shelves, his locks vandalized and his CCTV cameras looted as well as Kshs 100, 000.00 stolen from his shop. That in my view is not the intention of granting a stay since by doing so the applicants shall have obtained the orders they seek in their motion before the motion is heard and determined. I associate myself with the decision in *Taib A Taib v The Minister for Local Government & others* (supra) that a stay order framed in such a way as to compel the respondents to reinstate the applicant before hearing the respondent cannot be granted.
18. It is therefore my view that to grant the stay at this stage would be an exercise in futility and it is trite that courts do not grant orders in vain. In deciding whether or not to grant an order the court must take into account the principle of proportionality in order to see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory that ultimate end of justice. The court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589. In the premises I decline to direct that the grant of leave herein do operate as an order to restore status quo ante as prayed under prayers (h) and (i).
19. In the premises aforesaid, I find that the application has merits and I do allow prayers (b), (c), (d), (e), (f), (g), (j) and (k) of the same.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2023.

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MOGENI J

JUDGE

In the Virtual presence of:-

Mr. Khamala for Ex-parte Applicant

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE

