



**Republic v Business Premises Rent Tribunal; Ama Industries Ltd (Exparte Applicant);
Nairobi Transformer manufacturers (EA) Co Ltd (Interested Party) (Environment and Land
Judicial Review Case E005 of 2023) [2023] KEELC 16647 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E005 OF 2023**

**JO MBOYA, J
MARCH 23, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

BUSINESS PREMISES RENT TRIBUNAL RESPONDENT

AND

AMA INDUSTRIES LTD EXPARTE APPLICANT

AND

**NAIROBI TRANSFORMER MANUFACTURERS (EA) CO LTD .. INTERESTED
PARTY**

JUDGMENT

1. The Ex-parte Applicant herein is the lawful and legitimate owner/proprietor of all that parcel of land otherwise known as L.R No. 9042/121, (hereinafter referred to as the suit Property), comprising of inter-alia, go-downs No’s. 7 and 8, respectively.
2. On the other hand, it is worthy to note that the Ex-parte Applicant entered into a Lease Agreement with the Interested Party herein, whereupon the Ex-parte Applicant leased and/or demised to the Interested Party go-downs numbers 7 and 8, respectively.
3. Despite the existence of the Lease Agreement between the Ex-parte Applicant and the Interested Party, it appears that the Interested Party lapsed into substantial rent arrears, culminating into the Ex-parte Applicant instructing a nominated Auctioneer, with a view to recovering the substantial rent arrears, which is indicated to be in excess of kes.5, 278, 246/= only.



4. Confronted with the action by and on behalf of the Ex-parte Applicant to levy distress for purposes of recovering the substantial rent arrears, the Interested Party proceeded to and filed a Reference before the Business Premises Rent Tribunal, seeking to prohibit the Ex-parte Applicant from actualizing/levying the distress.
5. Contemporaneously with the Reference, the Interested Party also filed an application under Certificate of Urgency wherein same sought inter-alia, orders of Temporary Injunction to bar and/or prohibit the Ex-parte Applicant from inter-alia, evicting same from the demised premises or otherwise interfering with her (Interested Party's tenancy) pending hearing of (sic) the Reference.
6. It is imperative to note that upon the lodgment of the application seeking for orders of Temporary Injunction, the Vice- chair of the Business Premises Rent Tribunal proceeded to and indeed certified the Application for temporary injunction as Urgent and there after granted an Ex-parte Interim Injunction for a period in excess of 14 days.
7. For coherence, the impugned orders of Interim injunction were granted to last upto and until the inter-partes Hearing. In any event, the Vice chair of the Business Premises Rent Tribunal thereafter scheduled the application for Inter-partes hearing on the 27th March 2023.
8. Aggrieved and dissatisfied with the impugned orders and directions of the Vice- chair of the Business Premises Rent Tribunal, the Ex-parte Applicant herein sought for and obtained Leave to commence and originate the current judicial proceedings herein. For completeness, leave was obtained on the 7th March 2023.
9. Subsequently, the Ex-parte Applicant proceeded to and filed the Substantive Notice of Motion dated the 9th March 2023; and which Application was scheduled for hearing on the 23rd March 2023, with the concurrence/consent counsel for the Interested Party.
10. On the other hand, upon being served with the Substantive Notice of Motion Application, counsel for the Interested Party filed Grounds of opposition dated the 21st March 2023, and in respect of which, same raised various grounds, inter-alia, that the suit/entire proceedings vide Judicial Review herein are incompetent, bad in law and otherwise legally untenable.
11. Notwithstanding the foregoing, the instant application was canvassed and ventilated by way of oral submissions by and on behalf of the Ex-parte Applicant and the Interested Party.
12. Suffice it to point out that the Respondent herein, despite having been duly served, neither entered appearance nor filed any response to the Substantive Notice of Motion Application.

Submissions By The Parties:

a. Ex- Parte Applicant's Submissions:

13. Learned counsel for the Ex-parte Applicant adopted the contents of the Notice of Motion Application dated the 9th March 2023, the Statement of Facts dated the 17th February 2023, as well as the contents of the Affidavit in Verification of the Statement of Facts.
14. Having duly adopted the contents of the documents (details in terms of the preceding paragraph) learned counsel for the Ex-parte Applicant thereafter raised, highlighted and amplified two issues for consideration and ultimate determination by the Honourable court.



15. Firstly, learned counsel for the Ex-parte Applicant submitted that upon the filing of a Complaint, by way of Reference, before the Business Premises Rent Tribunal, the Interested Party herein thereafter proceeded to and also filed an application for Temporary Injunction.
16. In addition, learned counsel for the Ex-parte Applicant has submitted that upon the filing of the Application for Temporary Injunction, the Vice chair of the Business Premises Rent Tribunal proceeded to and entertained the impugned Application for Temporary Injunction.
17. Furthermore, learned counsel added that the Vice- chair of the Respondent also proceeded to and indeed granted interim orders of injunction, restraining the Ex-Parte Applicant from levying distress against the Interested Party and/or in any manner interfering with the Interested Party's tenancy over and in respect of the suit property.
18. In this regard, learned counsel for the Ex-parte Applicant has submitted that by venturing to issue and/or granting the orders of Interim Injunction, the vice chair of the Respondent acted contrary to and in contravention of the provision of the Landlord and Tenants (Shops, Hotels and Catering establishment) Act, Chapter 301 Laws of Kenya.
19. In any event, it was the further submissions of counsel for the Ex-parte Applicant that the orders of interim injunction which were issued on the 14th February 2023, were ultra vires and hence void ab initio.
20. To support the submissions that the Business Premises Rent Tribunal is not seized of the requisite Jurisdiction to grant an order of Temporary Injunction or at all, learned counsel for the Ex-parte Applicant cited and quoted the case of inter-alia, Narshidas & Co. Ltd versus Nyali Air Conditioning & Refrigeration Service Ltd (1996)eKLR and Ali Abdala Sheikh Omar & Another v Haji Sharif, Mombasa Civil Appeal no. 151 of 2019 (UR), respectively.
21. Secondly, learned counsel for the Ex-parte Applicant also submitted that even if the vice chair of the Respondent herein was seized of the requisite jurisdiction to grant an order of injunction, (which is not the case), same could not grant Ex-parte orders of Injunction for more than 14 days.
22. Additionally, learned counsel contended that by granting and/or issuing the Ex-Parte/interim orders of injunction for a period in excess of 14 days, the impugned orders of temporary injunction were therefore rendered illegal, unlawful and void for all intents and purposes.
23. As a result of the foregoing, learned counsel for the Ex-parte Applicant has therefore submitted that the entirety of the proceedings, as well as the orders, which have since been issued by the tribunal, are illegal, unlawful and constitutes an abuse of the Due process of the Honourable court.
24. Consequently and in the premises, learned counsel for the Ex-parte Applicant has therefore implored the Honourable court to grant and issue orders of Judicial Review in the nature of Certiorari and Prohibition, directed against the Respondent herein, to avert any further proceedings being undertaken, albeit without the requisite Jurisdiction.

b. Interested Party's Submissions:

25. Learned counsel for the Interested Party adopted and relied on the Grounds of opposition dated the 21st March 2023; and thereafter same raised and amplified four salient issues for consideration by the Honourable court.



26. First and foremost, learned counsel for the Interested Party submitted that the Affidavit in Verification of Facts, which is a critical document in respect of Judicial Review proceedings was incompetent and thus invalid.
27. In this regard, learned counsel contended that the deponent of the Affidavit in verification of facts has neither attached nor exhibited the source of authority, which same has alluded to in the body of the named affidavit.
28. Consequently and in the premises, Learned counsel has contended that the absence of the requisite authority/ Resolution by the Company, rendered the entire affidavit in verification of facts incompetent and fatally defective.
29. To vindicate the submissions alluded to in view of the preceding paragraphs, learned counsel for the Interested Party has invited the Honourable court to take cognizance of and to apply the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules 2010.
30. Secondly, learned counsel for the Interested Party has submitted that the Interested Party was required to serve the substantive Notice of Motion Application upon all the Parties, inter-alia , the Respondent herein prior to and before the setting down of the Application for hearing.
31. To this end, counsel has contended that no affidavit of service has been placed before the Honourable court to show and/or establish that indeed the substantive Notice of Motion application was duly served upon the Respondent, either as required under the law or at all.
32. Thirdly, learned counsel for the Interested Party has submitted that the Ex-parte Applicant has also failed to lodge the impugned order of the Business Premises Rent Tribunal and to verify same with the requisite affidavit. In this regard, counsel has invoked and relied upon the provisions of Order 53 Rules 6 of the Civil Procedure Rules 2010.
33. Finally, learned counsel for the Interested Party has submitted that the impugned orders, which were made by the Vice- chair of the Tribunal, were issued and/or made in exercise of discretion. In this regard, counsel has therefore pointed out that insofar as the orders were issued in exercise of discretion, this Honourable court should exercise caution and deference, before interfering with the named orders.
34. Be that as it may, learned counsel for the Ex-parte Applicant and in answer to a question by the Honourable court, readily conceded and admitted that the Business Premises Rent Tribunal is neither seized nor possessed of the statutory Jurisdiction to grant an order of Temporary Injunction.
35. Similarly and in answer to yet another question by the Honourable court, learned counsel for the Interested Party admitted that the Ex-Parte orders of Injunction, by law and in practice, cannot be issued and or granted Ex-parte, for a duration in excess of 14 days.
36. Notwithstanding the foregoing, learned counsel for the Interested Party insisted that because the subject proceedings are (sic) incompetent and fatally defective, the Honourable court cannot venture to handle and determine same on merits. In this regard, counsel impressed upon the court to strike out the substantive Notice of Motion.
37. In a short rejoinder, learned counsel for the Ex-parte Applicant submitted that both the chamber summons application, which sought for Leave of the Honourable court, as well as the substantive Notice of Motion, were duly served upon all the Parties, including the Respondent. In any event, learned counsel added that same thereafter filed the requisite affidavit of service, which is stated to be on record.



38. Secondly, learned counsel for the Ex-parte Applicant has submitted that same has duly complied with and or adhered to the provisions of Order 53 Rules 6 of the Civil procedure Rules, 2010. For clarity, counsel has pointed out that the impugned order of the Respondent has been duly lodged with the Honourable court and same is duly verified by an appropriate affidavit.
39. Lastly, learned counsel for the Ex-parte Applicant has submitted that the provisions of Order 53 of the Civil Procedure Rules 2010, are not amenable to the provisions of Order 4 Rules 1(4) of the Civil Procedure Rules, 2010, either as alleged or at all.
40. Notwithstanding the foregoing, learned counsel for the Ex-parte Applicant has added that the Honourable court cannot sanction/ countenance gross and flagrant abuse of the law by the Vice chair of the Respondent, either at the alter of procedural technicalities or otherwise.
41. In view of the foregoing, counsel reiterated that sufficient basis has been placed before the Honourable court to warrant the grant of the orders contained and alluded to at the foot of the substantive Notice of Motion.

Issues For Determination

42. Having reviewed the substantive Notice of Motion, the Statement of Facts and the affidavit in Verification of Facts and having taken into account the contents of the Ground of opposition; and upon considering the submissions ventilated on behalf of the respective Parties, the following issues do arise and are thus germane for determination;
 - i. Whether the Affidavit in Verification of the Statement of Facts is Incompetent and Invalid for want of the requisite authority.
 - ii. Whether the Business Premises Rent Tribunal is seized of the requisite statutory Jurisdiction to grant an Equitable remedy of Temporary Injunction.
 - iii. Whether an Order of Interim Injunction, granted Ex-parte for more than 14 days, is a nullity in law.

Analysis and Determination

Issue Number 1

Whether the Affidavit in Verification of the Statement of Facts is Incompetent and Invalid for want of the requisite authority.

43. Learned counsel for the Interested Party has contended that the affidavit in verification of the Statement of Facts, which was filed on behalf of the Ex-parte Applicant, is fatally defective, incompetent and thus invalid.
44. In particular, learned counsel has pointed out that the defect in question relates to the fact that the deponent of the impugned affidavit has neither exhibited nor displayed the source of authority, which mandates same to swear the impugned affidavit.
45. Consequently and in the absence of the requisite authority, learned counsel for the Interested Party has therefore submitted that the impugned affidavit therefore contravenes and violates the provisions of Order 4 Rules 1 of the Civil Procedure Rules 2010. In this regard, counsel has therefore implored the Honourable court to strike out and expunge the impugn affidavit.



46. Even though learned counsel for the Interested Party has placed undue premium on the relevance and importance of Order 4 rule 1(4) of the Civil Procedure Rules, 2010, it is not lost on this Honourable court that the current proceedings are actually guided by and anchored on the provisions of Order 53 of the Civil Procedure Rules.
47. Additionally, it is common ground that the provisions of Order 53 of the Civil Procedure Rules 2010, actually derive their existence from the provisions of Sections 8 and 9 of the Law Reforms Act, Chapter 26 Laws of Kenya and not otherwise.
48. On the contrary, the provisions of Order 4 Rule 1 of the Civil Procedure Rules as well as the remainder of provisions of the Civil Procedure Rules, derives their existence from the provision of Section 81 of the *civil Procedure Act*, Chapter 21 Laws of Kenya.
49. Having provided the foregoing background, I beg to state and underscore that the provisions of Order 53 of the Civil Procedure Rules 2010, are neither subordinate to nor affected by the provisions of Order 4 Rules 1 of the Civil Procedure Rules, whatsoever.
50. To the extent that the provisions of Order 53 of the Civil Procedure Rules, 2010, are not affected by or subordinate to the provisions of Order 4 of the Civil procedure Rules, one cannot therefore seek to defeat Judicial Review proceedings by invoking and relying upon the ordinary Civil Procedure Rules, inter-alia, Order Rules 1(4) of the Civil Procedure Rules, 2010.
51. Secondly, Judicial Review proceedings are now anchored on the provision of *the Constitution*, 2010, in terms of Article 47 thereof, as well as the provisions of the Fair Administrative Actions Act, 2015. Consequently, the provisions of Order 4 Rule 1 of the Civil Procedure Rules, being cited and relied upon by the Counsel for the Interested Party are irrelevant and inapplicable.
52. To this extent and to be able appreciate the hallowed place occupied by Judicial Review proceedings, (which are proceedings sui generis), one needs to take into account the holding of the Honourable Court in the case of Republic versus Chief Magistrate’s Court at Milimani Law Courts; Director of Public Prosecutions & 2 others(Interested Parties); Ex-parte Applicant: Pravin Galot [2020] eKLR, where the court stated and held as hereunder;
 46. Article 47 of *the Constitution* provides for the right to a fair Administrative Action. To give effect to Article 47, Parliament enacted the *Fair Administrative Action Act*.^[33] Section 2 of the act defines an “administrative action” to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
 47. Additionally, the right to access justice is guaranteed under Articles 48 of *the Constitution*, the right to enforcement of the Bill of Rights is guaranteed under Article 22, and the authority of the court to uphold and enforce the Bill of Rights is provided under Article 23, of *the Constitution*. The question that arises is whether a citizen citing violation or threat of rights requires to annex a copy of the impugned decision as required by Order 53 of the Civil Procedure Rules, 2010.
 48. Judicial Review in now entrenched in *the Constitution*. The concept of Judicial Review under *the Constitution* of Kenya is similar to that under *the Constitution* of South Africa where the South African Court held in Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others^[34] that “the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under *the Constitution* and, insofar as they might continue to be relevant to Judicial Review, they gain their force from *the Constitution*. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts.”



The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by *the Constitution* which is the supreme law, and all law, including the common law, derives its force from *the Constitution* and is subject to constitutional control.

53. Lastly, I beg to state and underscore that the issue of absence of (sic) the authority/ Resolution mandating the deponent to swear the affidavit in verification of facts, is certainly of no consequence. In this regard, I beg to point out that the deponent of the affidavit in question has clearly stated under oath that same has the requisite authority to swear the impugned affidavit.
54. Furthermore, the deposition by the deponent under oath, alluding to the fact that same has the requisite authority, has not been challenged and/or impugned. In this regard, there is no gainsaying that authority cannot be challenged from the bar, in the manner adverted to by learned counsel for the Interested Party.
55. In addition and while still on the question of authority to depone an affidavit on behalf of a Company/ Body Corporate, it is imperative to recall and underline that the issue has received considerable Judicial deliberation(s) and same is now settled.
56. In this respect, it is sufficient to recall and reiterate the holding of the Court of Appeal in the case of *Ardhi Highway Developers Ltd versus Westend Butcheries Ltd & 6 Others (2015)eKLR*, where the Honourable court stated and held as hereunder;

44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147*. The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

45. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the *Bugerere* case has since been overruled by the Uganda Supreme court. The authority is *Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000*.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the *Bugerere* case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998*. The latter case restated the law as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”



The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others*[2014] eKLR.

57. In my humble view, the legal issue adverted to by learned counsel for the Interested Party is irrelevant and inconsequential. In any event, the deponent of the affidavit in verification of the statement of facts has pointed out and duly alluded to the source of his authority, which has not been impugned.

Issue Number 2

Whether the Business Premises Rent Tribunal is seized of the requisite statutory Jurisdiction to grant an Equitable remedy of Temporary Injunction.

58. Having disposed of the procedural issue, which was addressed and ventilated by learned counsel for the Interested Party, it is now appropriate to venture forward and to consider whether the Business Premises Rent Tribunal is seized and or possessed of the requisite statutory Jurisdiction to grant the Equitable order of Temporary Injunction.
59. First and foremost, it is imperative to state and underscore that the Business Premises Rent Tribunal is a creature of statute, namely, the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.
60. Consequently and to the extent that the Respondent herein is a creature of statute, there is no gainsaying that its jurisdiction is derived and derivable from the parent statute and not otherwise. Consequently, the Respondent must at all times comply with and adhere to the statutory limitations and legal strictures, put in place by the named statute.
61. In any event, it is imperative to recall at all times that jurisdiction can only be derived from *the Constitution* or the parent Charter/statute that establishes the named court/tribunal. In this regard, if the statute grants the Jurisdiction, then the court/tribunal can venture forward and appropriate the Jurisdiction.
62. Conversely, where the statute/charter does not grant the requisite Jurisdiction, then the named court/tribunal cannot by craft and/or innovation arrogate unto herself a Jurisdiction that has not been donated under the law.
63. As pertains to the foregoing exposition of the law, it is appropriate to take cognizance of and to reiterate the succinct holding of the Supreme Court of Kenya in the case of *Samuel K Macharia versus Kenya Commercial Bank Ltd & Others* (2012)eKLR, where the court stated as hereunder;

(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to



set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

64. Back to the instant matter, the question as to whether the Respondent herein is possessed of the Jurisdiction to grant an order of Temporary Injunction has hitherto been dealt with and addressed by the Honourable Court of Appeal.
65. To start with, the case of *Narshidas & Company Limited v Nyali Air Conditioning and Refrigeration Services Limited* [1996] eKLR, is paramount and same articulates the question beforehand with due clarity and necessary exposition, so much so that the Vice chair of the Respondent, only needed to apply her legal mind to the obtaining Jurisprudence.
66. For coherence, the Honourable court stated and held as hereunder;

We does a controlled tenant confronted with an illegal threat of forcible eviction do? He cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. That Tribunal has no jurisdiction to do so as was held by High Court in the case of *The Republic vs Nairobi Business Premises Rent Tribunal & Others, ex parte Karasha*, (1979) K.L.R. 147 and also in the case of *Re: Hebtulla Properties Limited*, (1979) K.L.R. 96.

67. Most recently, the Honourable Court of appeal re-visited the question in the case of *Ali Abdala Sheikh Omar & Another versus Haji Sharif Mombasa Civil Appeal No. 151 of 2019* (unreported), where the Honourable court stated as hereunder;

“16: The decision of this court in *Narshidas & Company Limited v Nyali Air Conditioning and Refrigeration Services Limited* [1996] eKLR, to which counsel referred his authority for the preposition that the business premises rent tribunal has no jurisdiction to issue an injunction or similar remedy against a landlord”.

17: The Business Premises Rent Tribunal was therefore not the forum to which the Appellant could turn to for the remedy that they were seeking. We conclude therefore that there is merit in the complaint that the learned judge erred in holding that the ELC lacked jurisdiction to entertain the Appellant suit”

68. From the foregoing decisions, it is crystal clear that the Business Premises Rent Tribunal could not have granted the impugned orders of Temporary Injunction for lack of Jurisdiction.
69. In this regard, the impugned orders were therefore ultra vires.

Issue Number 3

Whether an order of Interim Injunction, granted Ex-parte for more than 14 days, is a nullity in law.

70. Other than the fact that the tribunal was not seized of the requisite jurisdiction to grant the impugned orders of injunction, the vice chair nevertheless proceeded to and granted the temporary injunction.
71. Worse still, the Vice chair of the Respondent indeed granted the Ex-parte interim orders of injunction to last between the 14th February up to and including the 27th March 2023. For clarity, the Ex-parte/ interim orders of injunction was meant to last for whopping 45 days.



72. In my humble view, an order of Ex-parte/interim injunction can only be issued to last for a maximum duration not exceeding 14 days. See the provisions of Order 40 Rules 4 of the Civil Procedure Rules, 2010, which provides as hereunder;

Notice of application [Order 40, rule 4.]

- (1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte.
- (2) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.
- (3) In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.
- (4) All applications under this order shall be heard expeditiously and in any event within sixty days from the date of filing unless the court for good reason extends the time.

73. In view of the explicit and unequivocal provisions reproduced in the preceding paragraph, there is no gainsaying that the impugned Ex-parte injunction granted by the vice chair of the Respondent was Ex-facie, illegal, unlawful and thus void.

74. In any event, the Legal position pertaining to an Ex-parte injunction issued to subsists for a duration beyond to what is legally circumscribed was deliberated upon and canvassed by the Court of Appeal in the case of Omega Enterprises Ltd versus Kenya Tourist Development Corporation Ltd (1997)eKLR, where the Honourable Court stated and observed as hereunder;

“Mr. Gautama also referred to that part of my judgment in which I fully agreed with the judgment of Akiwumi, J.A. when I said:-

“Though the Court had jurisdiction to grant an ex-parte interim injunction even though it is ultimately discovered that the application may not be meritorious such grant is mandated by Order 39 rule 3 (1) to be based on reasons to be recorded by the Judge otherwise the object of granting the relief of injunction would be defeated. It is doubtful whether the ruling made by Githinji, J. did incorporate any recorded reasons at all.”

Order 39 rule 3 (2) is in the following terms:

“No injuries may be granted ex-parte for longer than is shown to be necessary and in the case shall it be for more than 14 days.”

Thus, the ex-parte order made by the learned Judge was made without jurisdiction since the maximum period for the validity of the interim order of 14 days was exceeded. I think, also, that the said order must be without any legal basis and hence null and void.



75. Without belaboring the point, the impugned orders of Ex-parte injunction, granted by the Vice-Chair of the Business Premises Rent Tribunal, was clearly a nullity.

Final Disposition

76. Having duly considered and analyzed the issues arising from the subject proceedings, I come to the conclusion that the impugned proceedings and the resultant orders which was issued by the Vice chair of the Respondent, were clearly issued without Jurisdiction.

77. Consequently and in the premises, same are amenable to be set aside and vacated Ex-Debito Justitiae.

78. In the circumstances, I find and hold that the Notice of Motion Application dated the 9th March 2023, is meritorious. Consequently, same and is hereby allowed with costs as against the Interested Party.

79. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2023.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Moses Mwakhisa for the Ex-parte Applicant.

Mr. A K Kiluva for the Interested Party.

N/A for the Respondent.

