



**Njuguna & another v Business Premises Rent Tribunal & 3 others;
Maunji (Interested Party) (Judicial Review Application 3 of 2022)
[2023] KEHC 345 (KLR) (Judicial Review) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION 3 OF 2022
AK NDUNG'U, J
JANUARY 19, 2023**

BETWEEN

IRENE NYAMBURA NJUGUNA 1ST APPLICANT

ALLAN KIRONJI WANYOIKE 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. By way of a Chamber Summon dated November 1, 2022 made under Order 53 Rules 1(1), (2), (4) and 2 of the [Civil Procedure Rules](#); Section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya); the Fair Administrative Action Act; Article 10, 22, 25, 40, 47, 50 and 165 of the Constitution of Kenya, the 1st and 2nd ex-parte Applicants sought for leave to institute judicial review proceedings against the decision/ orders of the 2nd Respondent made on the October 12, 2022 in BPRT Case No 730, Irene Nyambura Njuguna V Francis Mwangi Maunji and Case No E732, Allan Kironji Wanyoike V Francis



- Mwangi Maunji, at the 1st Respondent [Business Premises Rent Tribunal (BPRT)], and against the decision of the 3rd Respondent to enforce the compliance of the orders made by the 2nd Respondent.
2. Additionally, the ex-parte Applicants sought for (a) declaration that the leave so granted operate as a stay of proceedings in the 1st Respondent's Case no 730 (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 this Application; (b) Orders that the leave so granted operate as a stay of the orders issued by the 2nd Respondents in Case no 730 (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 this Application; (c) Orders that the leave so granted operate as a stay of the decision by the 3rd Respondent to enforce compliance of the orders made by the 2nd Respondent in the cases at the 1st Respondent (BPRT); (d) Orders that the leave so granted operate to restore the status quo ante obtaining and prevailing prior to the giving and issuance of the orders by the 2nd Respondent in the cases at the 1st Respondent (BPRT) and that the OCS of Eastleigh North Police Station to enforce this order, and the cost of this Application be provided for.
 3. The Application was supported by a statutory statement dated November 1, 2022, a verifying affidavit sworn by Irene Nyambura Njuguna, and another verifying affidavit sworn by Allan Kironji Wanyoike of even date.
 4. The Respondents in opposing the Chamber Summon Application, filed their Grounds of Opposition dated November 22, 2022, on the grounds that;
 - i. That the Chamber Summons Application is fatally defective and badly drawn and should therefore be struck out in limine.
 - ii. That the Application as presented offends Order 53 of the Civil Procedure Rules 2010.
 - iii. That the instant application discloses no judicial review orders of certiorari, mandamus or prohibition.
 - iv. That the Application as presented does not does not disclose any cause of action.
 - v. That the application further offends the statutory provisions of Section 9(2)(3) of The Fair Administrative Action Act, the legal principles of setting aside an order & exhaustion of alternative dispute resolution mechanisms and the only recourse available to the ex-parte applicants once an order is made is to either set aside, review or on appeal. See *Cortec Mining Kenya Limited vs Cabinet Secretary Ministry of Mining & 9 others {2015} eKLR* Mutungi J and *Megalith Mining Company Limited vs Hon AG & Cabinet secretary Ministry of Mining, Nrb ELC Misc (JR) Civil Application No 948 of 2015*.
 - vi. That this is an appeal disguised as a Judicial Review Application.
 - vii. That there are no orders sought against the Attorney-General and as such ought to be struck off the proceedings.
 5. As directed by this court on November 7, 2022, parties filed their respective written submissions in addressing the issue of leave. In this ruling, I have considered the Applicant's written submissions dated November 30, 2022, and the their further written submissions dated December 14, 2022, supporting the Application as well as the Respondent's written submissions dated December 6, 2022, opposing the Application.



6. The issue for determination at this stage is: Whether the Application for leave to commence judicial review proceedings is merited and if leave be granted, whether the same is to operate as a stay of the orders of the BPRT.
7. On the issue of leave, it is a requirement of the law under Order 53 Rule 1 of the Civil Procedure Rules 2010, that an Applicant must seek leave to institute judicial review proceedings.
8. 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. This reason for leave was discussed by Waki J, as he then was, in the case of *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No 384 of 1996.*
9. 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 parties 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.
10. From the foregoing, in an Application for leave, such as the instant one, this court ought not to delve deeply into the arguments of the parties; but should make cursory perusal of the evidence before it [court] and make the decision as to whether an Applicant's case is sufficiently meritorious to justify leave.
11. In *HCJR Case No E087 of 2021, AAR Insurance vs Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance Brokers Limited Interested Parties (unreported)*, Ngaah J aptly summed up the rationale for the requirement for leave where he stated;

' I must reiterate that that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is at that stage that, in exercise of its discretion, the review court will weigh between 'the legitimate requirement of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals.' If upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs. It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application of judicial review orders at which the discretion of this Honourable court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.'

12. In the exercise of its supervisory jurisdiction over judicial proceedings in the subordinate courts and tribunals, and in determining whether leave to mount such a challenge of judicial proceedings should



be granted, am of the greatest persuasion that extra vigilance and circumspection is called for on the part of the judicial review court. This for good reason. The courts and tribunals are mandated by the constitution and the various statutes to adjudicate upon disputes within their respective jurisdictions. The concept of judicial independence applies to these courts as much as it applies to the superior courts. Only clear infractions that stifle natural justice should pass legal muster to merit leave. I hasten to add that in majority of the cases, the constitution and the statutes creating the courts or tribunals provide for avenues of redress for parties aggrieved by decisions of these bodies. The judicial review court must however remain vigilant to ensure that such decisions are not marred by elements of illegality, irrationality and procedural impropriety and the court will not hesitate to intervene where there is a whiff of these elements.

13. In the instant matter, the gist of the Application before this court is that on October 12, 2022, the 2nd Respondent issued ex-parte decision and orders that: were illegal as the 2nd Respondent by ex-parte orders vacated earlier issued inter-parte injunctive orders given on September 12, 2022; were unreasonable and irrational as was made by taking into account irrelevant material; unprocedural, in that the ex-parte order was made as a result of procedural impropriety; were unfair and contravened the principles of natural justice as the parties were denied an opportunity to challenge the ex-parte Application. Further, that the order directing the 3rd Respondent to enforce the vacation of previous orders facilitated the ultra vires actions of the police.
14. The 1st Respondent, (BPRT) is an administrative tribunal established under section 11(1), and whose powers are elaborated under section 12 of the Landlord and Tenant Act (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya. The 2nd Respondent is the duly appointed vice Chairperson of the 1st Respondent (the BPRT). The 3rd Respondent is a public official commanding Pangani police station, established under the National Police Service Act No 11 of 2011.
15. It trite that Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the merits of a decision by a judicial or a quasi-judicial body is to be determined. The Court of Appeal summed up the jurisdiction of the judicial review court aptly in *Municipal Council of Mombasa v Republic Umoja Consultants Ltd, Nairobi Civil Appeal No 185 of 2007(2002) eKLR*, where it stated;

' The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power ie the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review'.



16. From the disclosed facts, the 1st Respondent exercised discretion in granting the impugned orders. It was within its power and discretion to issue ex parte orders based on the material before it. Such orders were by law challengeable by the ex parte Applicants through an inter parte hearing, an application for stay of execution of the orders, an application for review or through the lodging of an appeal.
17. It is obvious that the Applicants were aggrieved by the decision and orders of the 1st and 2nd Respondent dated October 12, 2022. On the material before this court, there is no demonstration that the proceedings of the court when the orders were issued were not regular. The *Landlord and Tenant Act (Shops, Hotels and Catering Establishments)* Act Cap 301 Laws of Kenya outlines a procedure for addressing such grievances where the party is aggrieved by the decision of the Tribunal (BPRT). This is the path that the Applicants ought to have taken.
18. In the premises, I reach the conclusion that the Applicants have failed to establish the necessary legal threshold for grant of leave to institute judicial review proceedings. The chamber Summons dated November 1, 2022 thus lacks merit and is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY, 2023.

.....

A. K. NDUNG’U

JUDGE

