



Republic v Chairman, Business Premises Rent Tribunal & another; Carrington Complex Ltd (Exparte Applicant) (Environment and Land Judicial Review Case 29 of 2019) [2023] KEELC 16272 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 29 OF 2019
OA ANGOTE, J
MARCH 16, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

CHAIRMAN, BUSINESS PREMISES RENT TRIBUNAL 1ST RESPONDENT

DAVID WAKAHU NG'ANG'A 2ND RESPONDENT

AND

CARRINGTON COMPLEX LTD EXPARTE APPLICANT

JUDGMENT

1. Before the Court for determination is the Ex-parte Applicant’s Notice of Motion dated 19th October 2019 and brought under Order 53 of the Civil Procedure Rules. The Ex-parte Applicant is seeking for the following reliefs:
 - a) An order of Certiorari to call up to this Court for quashing the entire proceedings being Business Premises Rent Tribunal Nairobi BPRT Case NO. 826 of 2018 David Wakahu Nganga v Carrington Complex Limited (hereinafter ‘the BPRT Case No. 826’) together with the tribunal order of 15th October 2015 made by the Chairman, Business Premises Rent Tribunal, Nairobi.
 - b) The Court be at liberty to make such further directions as it deems necessary.
 - c) Costs of the application be provided for.



2. The application was accompanied by a Statutory Statement and a Verifying Affidavit sworn by Ibrahim Adan, a director of the Ex-parte Applicant, who deponed that the Ex-parte Applicant's purchased the suit property from Kenya Railways Staff Benefits Scheme (hereinafter 'the scheme') in 2018.
3. The Ex parte Applicant deponed that a handover meeting was held but the 2nd Respondent was not in attendance; that the 2nd Respondent then sought help from Kilimani Police Station and sought to rely on an expired Tribunal's order; that the Police realized that the order was unenforceable; that the suit property had already changed hands and that the 2nd Respondent then obtained another ex-parte order from the Tribunal.
4. The Ex-parte Applicant deponed that the 2nd Respondent is attempting to use this order to impose himself as a tenant of the Ex-parte Applicant; that the 2nd Respondent's licence to occupy the suit property was for a period of 10 years (1st June 2008 to 31st May 2018) which lease was not renewed and that the said lease ceased to have effect on 1st June 2018.
5. The Ex-parte Applicant deponed that he is not interested in granting the 2nd Respondent a fresh licence; that this notwithstanding, the 2nd Respondent moved to the Tribunal alleging that he was in a controlled tenancy and that the Chairman of the Tribunal gave ex-parte orders in the BPRT Case No. 826 on 15th October 2018.
6. It is the Ex-parte Applicant's case that this order was given in excess of jurisdiction because there was no controlled tenancy in place; that the tribunal gave injunctive orders which it does not have jurisdiction to grant and that the 2nd Respondent's licence to occupy the suit property expired on 31st May 2018 and yet the order was seeking to maintain a status quo that did not exist.
7. In a further affidavit sworn by Ibrahim Adan on 11th March 2019, the Ex-parte Applicant stated that the 2nd Respondent was a stranger to the Ex-parte Applicant as he was not part of the tenants handed over to it following the sale agreement between the Ex-parte Applicant and the Scheme.
8. Additionally, it was deponed, the Tribunal acted unreasonably in giving orders where no controlled tenancy existed; that the suit property was regarded as residential rather than a business premise as per the Nairobi City Council and that the Tribunal illegally granted orders to the 2nd Respondent without hearing the Ex-parte Applicant.
9. The 2nd Respondent deponed that he was a tenant on the suit property by virtue of a written agreement (for the period 1st June 2008 to 31st May 2018) between himself and the Scheme; that as per Clause 10 of the agreement, the same could only be terminated by one party giving the other 24 months' notice and that as per the same clause, the agreement created a controlled tenancy which could not be terminated without due regard to the provisions of The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
10. It was deponed by the 2nd Respondent that the change of ownership of the suit property did not terminate his tenancy; that he filed a complaint (BPRT 504 of 2018) before the Tribunal after the Scheme sought to unlawfully evict him from the suit property and that he filed another reference on 13th July 2018 (BPRT 564 of 2018) when the scheme gave him a notice to vacate the suit property.
11. It was the 2nd Respondent's deposition that the Tribunal issued an ex-parte order stopping his eviction from the suit property pending the inter-partes hearing; that before the inter-partes hearing, a representative of the Ex-parte Applicant sought to remove the 2nd Respondent's cars from the suit property and that this action prompted him to file BPRT 826 of 2018 against the Ex-parte Applicant on 15th October 2018 in which the Ex-parte injunctive orders were issued.



12. The 2nd Respondent averred that the Tribunal has authority to give injunctive orders and such authority is derived from statute; that the only injunctive order the Tribunal does not have authority to issue is one reinstating an evicted tenant back to the premises and that contrary to what the Ex-parte Applicant stated, he (the 2nd Respondent) was on the suit property when the orders were given.
13. According to the 2nd Respondent, while his vehicles had been removed by police officers from the suit property as instructed by the Ex-parte Applicant, his container office and office equipment remained on the suit property and that the Tribunal acted within its jurisdiction.
14. In conclusion, the 2nd Respondent deponed that the Ex-parte Applicant had not tabled any documentary evidence of the sale or change of ownership of the suit property; that the Scheme had invited bids for the purchase of the suit property but the bidding process had not been completed and that the advocate who had appeared for the Scheme in BPRT 564 of 2018 had on 6th August 2018 failed to disclose the identity of the purchaser of the suit property.

Submissions

15. In his submissions, the Ex-parte Applicant's advocate submitted that a ruling was delivered in ELC 112 of 2020 where similar issues came up between the same parties; that the court held that there was no landlord-tenant relationship by the time the 2nd Respondent approached the Tribunal and that the 2nd Respondent did not disclose this when he obtained ex parte orders from the Tribunal.
16. It was submitted that the 2nd Respondent's licence to occupy the suit property had expired four months before the Ex-parte Applicant had acquired the suit property and evicted the 2nd Respondent and that a Notice of Appeal had been filed but there was no appeal pending.
17. The Ex-parte Applicant's advocate submitted that no landlord-tenant relationship was created as the money the 2nd Respondent attempted to pay as rent to the Scheme was refunded. Counsel relied on the case of *Republic v Chairman Business Premises Rent Tribunal & 2 Others Ex-Parte Abdulkadir Hubess* [2017] eKLR.
18. Relying on the cases of *Municipal Council of Mombasa v Republic & Another* [2002] eKLR and *Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR, the Ex-parte Applicant submitted that the Court had authority to quash the impugned decision of the Tribunal as it had acted ultra vires.
19. According to counsel, the suit property was considered a residential property and should not have been used as business premises by the 2nd Respondent and that the Court should not reinstate the 2nd Respondent onto the suit property.
20. Relying on Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and the case of *Al-Riaz International Limited vs Ganjoni Properties Limited* [2015] eKLR, the 2nd Respondent submitted that the agreement entered into with the Scheme created a controlled tenancy rather than a licence as it was reduced to writing and contained a clause on termination.
21. It was submitted by the 2nd Respondent that the Tribunal held on 12th September 2017 that the agreement created a controlled tenancy and that pursuant to Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and the cases of *Republic vs Business Premises Rent Tribunal & Another Ex parte Albert Kigera Karume* [2015] eKLR and *John Mugo Ngunga v Margaret M. Murangi* [2014] eKLR, the Tribunal has authority to issue injunctive orders.



Analysis and Determination

22. Based on the foregoing, the following issue arises for determination:
Whether an order of Certiorari should be issued
23. In the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 2 Others* [1997] eKLR the Court stated as follows concerning an order of certiorari:

“Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”
24. In the instant case the Ex-parte Applicant has stated that the decision made in BPRT 826 of 2018 should be quashed as it was made without jurisdiction. The 2nd Respondent has argued that the Tribunal was clothed with jurisdiction to make the decision.
25. The preamble to the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides that it is “An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.”
26. The existence of a landlord-tenant relationship is therefore a pre-condition for the Tribunal to exercise its authority. Under section 12 of the Act, the Tribunal has the power, inter alia, to determine whether or not any tenancy is a controlled tenancy; and to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy.
27. The Ex-parte Applicant has stated that such relationship did not exist because the 2nd Respondent’s licence to occupy the suit premises expired on 1st June 2018 while the impugned orders were issued by the Tribunal on 15th October 2018 and that the 2nd Respondent was not among the tenants who were handed over to the Applicant by the Scheme following the sale of the suit premises.
28. According to the Ex parte Applicant, the 2nd Respondent was not in a controlled tenancy as alleged, the Scheme having reimbursed the money the 2nd Respondent had attempted to pay after his tenancy had expired and that the court had found that there was no landlord-tenant relationship in ELC 112 of 2020, which suit involved the same parties.
29. The 2nd Respondent responded by stating that the landlord-tenant relationship existed because he was a tenant following an agreement entered into with the Scheme; that the agreement created a controlled tenancy as it was in writing and could only be terminated with the issuance of a 24 months’ notice and that the controlled tenancy was not affected by the sale of the suit property to the Ex parte applicant.
30. According to the 2nd Respondent, while his cars had been removed from the suit property by the Ex-parte Applicant, his container office had remained and that he was therefore on the suit property when the Tribunal issued the Ex-parte orders. It is the 2nd Respondent’s case that he was not seeking to be reinstated on the suit property.
31. The agreement that the 2nd Respondent is seeking to rely upon to legitimize the landlord-tenant relationship was for the period 1st June 2008 to 31st May 2018. The 2nd Respondent has not put forth any evidence to show that the same was renewed on 15th October 2018 when the orders were made by



- the Tribunal. Although the 2nd Respondent has stated that he was in occupation of the suit property, that is not enough proof of a landlord-tenant relationship in the absence of a renewed and legitimate agreement.
32. Secondly, the 2nd Respondent has not disputed that the Scheme reimbursed him the money he had attempted to pay as rent after he had been asked to vacate the suit property at the lapse of his licence to occupy the suit property. Consequently, no landlord-tenant relationship can be inferred between him and the Scheme after the lapse of his previous tenancy.
33. Thirdly, the 2nd Respondent has failed to prove that he was amongst the tenants who were handed over by the Scheme upon the sale of the suit property. Such a handing over would have been proof of a relationship between him and the Ex-parte Applicant.
34. Fourthly, the tenancy the 2nd Respondent is seeking to rely upon is not a controlled tenancy as alleged. Section 2(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides as follows:
- “controlled tenancy” means a tenancy of a shop, hotel or catering establishment—
- (a) which has not been reduced into writing; or
 - (b) which has been reduced into writing and which
 - i. is for a period not exceeding five years; or
 - ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof”
35. The Court of Appeal in the case of *Khalif Jele Mohamed & another vs Republic & another* [2019] eKLR stated as follows when discussing the above stated provision of law:
- “That would be in line with the Mombasa High Court decision in *Melas vs. New Carlton Hotel Limited* [1976-80]1KLR 458, where Sheridan, J. held that a right to serve notice to determine the term of a tenancy on the expiration of five years does not bring the tenancy within the terms of Section 2 (1)(b)(ii) of the Act.”
36. Based on the foregoing, for a tenancy which has been reduced in writing to be a controlled tenancy, it has to be for a period not exceeding five years. The 2nd Respondent’s agreement with the Scheme was for ten years. The clause on breach that the 2nd Respondent is seeking to rely upon is also not applicable to this case as the material period was more than five years after the tenancy commenced. The material period is towards the tail end of the ten years.
37. Indeed, the 2nd Respondent has not denied the assertion by the Ex parte Applicant that a ruling was delivered in ELC 112 of 2020 where similar issues came up between the same parties; and that the court held that there was no landlord-tenant relationship by the time the 2nd Respondent approached the Tribunal. This fact was not disclosed to the Tribunal when the 2nd Respondent moved the tribunal.
38. In view of the foregoing, it is the finding of this court that there was no landlord-tenant relationship when the Tribunal issued the ex-parte orders of 15th October 2018. Consequently, there is nothing that clothed the tribunal with jurisdiction, and its actions were ultra vires.
39. For those reasons, the Ex parte Applicant’s application is allowed as follows:



- a) An order of Certiorari to call up to this Court for quashing the entire proceedings being Business Premises Rent Tribunal Nairobi BPRT Case NO. 826 of 2018 David Wakahu Nganga v Carrington Complex Limited (hereinafter ‘the BPRT Case No. 826’) together with the tribunal order of 15th October 2015 made by the Chairman, Business Premises Rent Tribunal, Nairobi be and is hereby issued.
- b) The 2nd Respondent to pay the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF MARCH, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ruto holding brief for Kiragu for Ex-parte Applicant

Mr. Anyona for Kanjama (SC) for 2nd Respondent

Court Assistant - June

