



**Republic v Business Rent Tribunal; Ligi Limited & another (Interested Parties);  
Unga Investment Limited (Exparte Applicant) (Miscellaneous Application  
E276 of 2022) [2023] KEELC 17694 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17694 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E276 OF 2022**

**JO MBOYA, J**

**MAY 18, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**BUSINESS RENT TRIBUNAL ..... RESPONDENT**

**AND**

**LIGI LIMITED ..... INTERESTED PARTY**

**PAUL MWANGI WARUTERE ..... INTERESTED PARTY**

**AND**

**UNGA INVESTMENT LIMITED ..... EXPARTE APPLICANT**

**JUDGMENT**

1. On the 19<sup>th</sup> December 2022, the Ex-parte Applicant herein filed Chamber Summons Application, accompanied with a Statement of Facts, Affidavit in Verification of the Statement of Facts and wherein the Ex-parte Applicant sought for Leave to commence Judicial Review Proceedings and in particular; the orders of Certiorari and Prohibition as against the Respondent herein.
2. Following the filing of the Chamber Summons Application (details in terms of the preceding paragraph) the Honourable court proceeded to and granted Leave in favor of the Ex-parte Applicant for purposes of seeking the Certiorari and Prohibition orders, in the manner alluded to and contained in the Statement of Facts.
3. Subsequently, the Ex-parte Applicant filed the Substantive Notice of Motion dated the 11<sup>th</sup> January 2023; and in respect of which same have sought for the following reliefs;



- i. An order of Prohibition to prohibit the Business Premises Rent Tribunal from hearing or continuing to hear Business Premises Rent Tribunal case No. E916 of 2022; Ligi Ltd versus Unga Investment Ltd.
  - ii. An Order of Certiorari to remove into this Honourable court for purposes of quashing the order made by the Business Premises Rent Tribunal on the 13<sup>th</sup> October 2022; restraining the Applicant either by itself or its agents, servants, employees and/or representatives from in any manner interfering with the Tenancy between the Ex-parte Applicant and Ligi Ltd in Business Premises Rent Tribunal case No. E916 of 2022; Ligi Ltd versus Unga Investment Ltd.
  - iii. Cost of the Judicial Review Proceedings herein.
4. It is instructive to point out that the Substantive Notice of Motion is anchored on the various grounds that are contained at the foot thereof. Furthermore, the substantive motion is also anchored on the Statement of Facts dated the 19<sup>th</sup> December 2022; the Affidavit in Verification of the Statement of Facts and the Supplementary Verifying Affidavit, the latter which was sworn on the 15<sup>th</sup> February 2023.
  5. Inevitably, upon being served with the Substantive Notice of Motion Application, the 1<sup>st</sup> Interested Party responded thereto by filing an elaborate Replying affidavit sworn by one Chris Amimo; on the 30<sup>th</sup> January 2023, and to which the deponent has attached various annexures.
  6. The Substantive Notice of Motion Application came up for Mention on the 17<sup>th</sup> January 2023, whereupon the Honourable court gave directions, inter-alia, directing that the Status Quo pertaining to and concerning the suit property be maintained, pending the hearing and determination of the Substantive Application. In addition, the Honourable court directed that the Substantive Notice of Motion Application be canvassed and disposed of by way of written submissions to be filed and exchanged within set timelines.
  7. Suffice it to point out that the Parties thereafter complied with the directions of the Honourable court and essentially filed their respective written submissions. For good measure, the Ex-parte Applicant filed written submissions dated the 16<sup>th</sup> February 2023 whilst the 1<sup>st</sup> Interested Party filed written submissions dated the 28<sup>th</sup> February 2023.
  8. On the other hand, the 2<sup>nd</sup> Interested Party filed written submissions dated the 1<sup>st</sup> March 2023, whereas, the Respondent herein, neither filed any Pleadings, nor written Submissions, at all.

### **Submissions by the Parties**

#### **a. Ex-parte Applicant's Submissions:**

9. The Ex-parte Applicant filed written submissions dated the 16<sup>th</sup> February 2023 and in respect of which same has raised, highlighted and amplified two (2) issues for consideration and determination by the Honourable court.
10. Firstly, Learned counsel for the Ex-parte Applicant has submitted that the Business Premises Rent Tribunal is devoid and divested of the requisite Jurisdiction to entertain and adjudicate upon the dispute which was filed by the 1<sup>st</sup> Interested Party, namely, Business Premises Rent Tribunal case No. E916 of 2022; Ligi Ltd versus Unga Investment Ltd.
11. In particular, Learned counsel for the Ex-parte Applicant has contended that the Ex-parte Applicant entered into and executed a Lease with the 1<sup>st</sup> Interested Party, which Lease relates to L.R No. 209/507



- (I.R No 17214/1), hereinafter referred to as the suit property. Further, Learned counsel has submitted that the Lease in question related to vacant land situate within the City of Nairobi.
12. Additionally, Learned counsel for the Ex-parte Applicant has submitted that the Lease which was entered between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party was to subsist for a duration of 5 years with effect from 1<sup>st</sup> November 2001. In this regard, counsel has contended that the impugned Lease lapsed and terminated vide effluxion on time in or about November 2007.
  13. Notwithstanding the foregoing, Learned Counsel has submitted that the Parties thereafter entered into a Mutual arrangement/agreement wherein the 1<sup>st</sup> Interested Party remained in occupation of the suit property, albeit, on the basis of a Mutual Agreement, which was never reduced into writing.
  14. According to Learned counsel for the Ex-parte Applicant, the mutual agreement which was entered into between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party constituted a periodic tenancy in terms of Section 57 of the Land Act, 2012; and thus same was terminable by way of issuance of a 30 days' Notice.
  15. Premised on the fact that what had hitherto been leased/demised to the 1<sup>st</sup> Interested Party was vacant land and coupled with the fact that the Lease term lapsed, culminating into the creation of a periodic tenancy, Learned counsel for the Ex-parte Applicant has submitted that the tenancy relationship between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party was not therefore a Controlled tenancy as defined by the provisions of Section 2 of The Landlord (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.
  16. To the extent that the Tenancy relationship between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party, was not a controlled tenancy, Learned counsel has thus submitted that the dispute between the 1<sup>st</sup> Interested Party and the Ex-parte Applicant does not fall within the Jurisdiction of the Business Premises Rent Tribunal.
  17. Owing to the foregoing, Learned counsel for the Ex-parte Applicant has therefore submitted that the dispute vide Business Premises Rent Tribunal case No. E916 of 2022; Ligi Ltd versus Unga Investment Ltd, which was filed before the Tribunal therefore ought not to have been filed, in the first instance.
  18. Furthermore, Learned Counsel has contended that insofar as the Tribunal was not seized of the requisite Jurisdiction to entertain the dispute in question, the entire proceedings and consequential orders issued by the Tribunal were therefore ultra vires and thus nullity ab initio.
  19. In support of the foregoing submissions, Learned Counsel has cited and relied on, inter-alia, the case of Postal Corporation of Kenya versus Gerald Kamondo Njuki T/a Geka General Supplies (2021)eKLR, Bachelors Bakery's Ltd versus Westlands Security Ltd (1992)KLR 356, P.N Gichoho Ngugi versus The County Government of Laikipia & Another (2017)eKLR, David Cullen v Samuel Kiptalai & 2 Others (2021)eKLR, Housing Finance Company of Kenya Ltd v Njuguna KLR 1176 (CCK), Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (2012)eKLR, Republic v Business Premises Rent Tribunal & Another Ex-parte Albert Kigera Karume (2015)eKLR and Re-Hebtulla Properties Ltd (1979)KLR 1996.
  20. Secondly, learned counsel for the Ex-parte Applicant has submitted that insofar as the tribunal is not seized of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute, the entire proceedings mounted before her are therefore a nullity.
  21. Premised on the fact that the tribunal is not seized of the Jurisdiction to entertain the dispute mounted before her, Learned counsel has therefore submitted that any actions and/or activities undertaken by the Tribunal would be in excess of Jurisdiction and thus same are amenable to Judicial Review.



22. Furthermore, Learned counsel for the Ex-parte Applicant has submitted that the orders of Certiorari would certainly issue to quash any proceedings and/or orders, issued by a Tribunal devoid and divested of Jurisdiction. In this regard, Learned counsel has cited and relied on the decision in the case of, inter-alia, Kenya Nation Examination Council versus Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others (1997)eKLR and Owners of Motor Vessel Lilian S versus Caltex Oil Ltd (1999)eKLR.
23. In respect of the prayer for Prohibition, Learned counsel for the Ex-parte Applicant has submitted that such an order would operate to prohibit a tribunal without Jurisdiction from further entertaining and/or adjudicating upon any dispute, in respect of which the tribunal is devoid of Jurisdiction.

**b. The 1<sup>st</sup> Interested Party's Submissions:**

24. The 1<sup>st</sup> Interested Party filed written submissions dated the 28<sup>th</sup> February 2023; and in respect of which same has raised, highlighted and canvassed one issue for consideration by the Honourable Court.
25. It is the submissions of Learned counsel for the 1<sup>st</sup> Interested Party that the Ex-parte Applicant and the 1<sup>st</sup> Interested Party herein entered into and executed a Lease Agreement dated the 2<sup>nd</sup> September 2002; and which Lease was to subsist for a duration of Five (5) years. Invariably, Learned counsel has posited that the said Lease indeed lapsed and or terminated by effluxion of time.
26. Nevertheless, Learned Counsel has submitted that despite the lapse and determination of the Lease, which was executed between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party, the Parties herein continued with their relationship albeit on the basis of a mutual tenancy/arrangements.
27. It is the further submissions of counsel for the 1<sup>st</sup> Interested Party that insofar as the Lease Agreement/relationship between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party, was not reduced into writing, same therefore falls within the purview of what is called a Control tenancy as defined by the provisions of Section 2 of The Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya.
28. In any event, Learned Counsel has submitted that at the time when the Ex-parte Applicant and the 1<sup>st</sup> Interested Party entered into the Lease agreement, dated the 2<sup>nd</sup> September 2002, the rented premises comprised of a Field, a Club House with offices, Changing Rooms and a Cafeteria. Further, Learned counsel has submitted that with time, the 1<sup>st</sup> Interested Party opened additional facilities within the premises, inter-alia, food selling outlet and parking facilities, for visitors albeit at a fee.
29. Premised on the foregoing, Learned counsel for the 1<sup>st</sup> Interested Party has therefore submitted that the nature of activities that are being carried out and undertaken within the Demised premises constitute and comprise of a shop as defined under the provisions of Section 2 of The Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya.
30. On the other hand, Learned Counsel has also submitted that to the extent that the tenancy was not reduced into writing, same therefore gives rise to a control tenancy, which can only be terminated by the Ex-parte Applicant, albeit, in accordance with the provisions of Section 4(2) of The Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya.
31. However, despite the fact that the tenancy between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party is a controlled tenancy, Learned counsel has submitted that the Ex-parte Applicant chose to terminate the tenancy albeit without compliance with the law and thus provoked the filing of the Reference before the Business Premises Rent Tribunal.



32. In a nutshell, Learned counsel for the 1<sup>st</sup> Interested Party has therefore submitted that the Business Premises Rent Tribunal is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the dispute vide Business Premises Rent Tribunal case No. E916 of 2022; Ligi Ltd v Unga Investment Ltd.
33. Premised on the foregoing, Learned counsel for the 1<sup>st</sup> Interested Party has therefore implored the Honourable court to find and hold that the tribunal has the requisite Jurisdiction to entertain the dispute; and further that the Judicial Review Proceedings herein is misconceived and legally untenable.

### **c. The 2<sup>nd</sup> Interested Party's Submissions**

34. The 2<sup>nd</sup> Interested Party herein filed written submissions dated the 1<sup>st</sup> March 2023 and in respect of which same has raised and canvassed two issues for consideration and determination.
35. Firstly, Learned counsel for the 2<sup>nd</sup> Interested Party has submitted that the relationship between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party, constitutes and amounts to a controlled tenancy, insofar as the nature of activities being undertaken on the demised premises falls within the definition of a shop. In this respect, Learned counsel has invited the Honourable court to take cognizance of the provisions of Section 2 of The Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya..
36. Furthermore, Learned counsel has also submitted that to the extent that the tenancy between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party was not reduced into writing, same thus became a periodic tenancy under the provisions of Section 57(2) of The Land Act, 2012. Consequently, counsel pointed out that by virtue of being a periodic tenancy but relating to Business, same can only be terminated in accordance with the provisions of The Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya.
37. In support of the foregoing submissions, Learned counsel for the 2<sup>nd</sup> Interested Party has cited and relied on the decision in the case of Ukwala Supermarket (Eldoret) Ltd versus Amritlal Sojpar Shah Wholesalers Ltd (2017)eKLR.
38. Secondly, Learned counsel for the 2<sup>nd</sup> Interested Party has submitted that Judicial Review Proceedings are limited in scope and purpose and that same can only be invoked and relied upon for purposes of challenging the Decision-making process and not to impugn the merits of the case.
39. Additionally, Learned counsel has submitted that the matters in dispute herein touched on and concerned disputed facts, which can only be resolved in an ordinary dispute resolution process; and not by way of Judicial Review, in the manner sought by the Ex-parte Applicant.
40. In support of the submissions touching on the scope, purposes and extent of Judicial Review Proceedings, Learned counsel has cited and relied on the case of inter-alia, Republic versus Kenya national Examination Council; Ex-parte Geoffrey Gathenji Njoroge & Others (1996)eKLR, Municipal Council of Mombasa versus Republic & Umoja Consultant Ltd (2002)eKLR, Zakaria Wagunza & Another versus Office of The Registrar, Academic; Kenyatta University & 2 Others (2013)eKLR and Commissioner of Lands versus Kunste Hotel Ltd (197)eKLR, respectively.
41. In short, Learned counsel for the 2<sup>nd</sup> Interested Party has therefore contended that the Tribunal is seized and possessed and with the requisite Jurisdiction to entertain and adjudicate upon the dispute vide Business Premises Rent Tribunal case No. E916 of 2022; Ligi Ltd versus Unga Investment Ltd.



## Issues for Determination

42. Having reviewed the Pleadings; essentially comprising of the Substantive motion, the Statement of Facts, the Affidavit in Verification of the Statement of Facts and the Responses filed by the Interested Parties; and upon taking into account the written submissions, the following issues do arise and are worthy of determination;
  - i. Whether the Business Premises Rent Tribunal is seized of the requisite Jurisdiction to entertain and adjudicate upon Business Premises Rent Tribunal case No. E916 of 2022; Ligi Ltd v Unga Investment Ltd.
  - ii. Whether the Ex-parte Applicant herein has laid a basis to warrant the grant of the Reliefs sought.

## Analysis and Determination

### Issue Number 1

Whether the Business Premises Rent Tribunal is seized of the requisite Jurisdiction to entertain and adjudicate upon Business Premises Rent Tribunal case No. E916 of 2022; Ligi Ltd versus Unga Investment Ltd.

43. Before venturing to address and resolve the critical question as to whether the tribunal has the requisite Jurisdiction to entertain and adjudicate upon the dispute beforehand, it is instructive to discern what are obtaining and background facts underlying the dispute.
44. Firstly, it is common ground that the Ex-parte Applicant and the 1<sup>st</sup> Interested Party herein entered into and executed a Lease dated the 2<sup>nd</sup> September 2002; and in respect of which the Ex-parte Applicant demised to and in favor of the 1<sup>st</sup> Interested Party the entire premises comprised of the suit property.
45. It is also imperative to state and observe that at the time of entering into and executing the Lease dated the 2<sup>nd</sup> September 2002; the demised premises comprised of, inter-alia, the vacant land as well as a club-house, which was to be used by the 1<sup>st</sup> Interested Party, albeit for a Fee. For clarity, the 1<sup>st</sup> Interested Party was under obligation to pay monthly rents, which were albeit payable on a Quarterly basis. See clause 3 of the written lease document.
46. On the other hand, it is also not in dispute that the Written Lease lapsed and determined by effluxion of time on or about November 2007. However, despite the determination of the written Lease, the Ex-parte Applicant and the 1<sup>st</sup> Interested Party maintained their relationship, albeit, on mutual arrangement/agreement.
47. Notably, the Ex-parte Applicant and the 1<sup>st</sup> Interested Party agreed to have their relationship to continue and the 1<sup>st</sup> Interested Party was to carry on and to continue with the Business which was being carried out on the Demised property.
48. Notwithstanding the foregoing, the Ex-parte Applicant contends that on or about the year 2022, same became aware of (sic) material breaches of both the tenancy and the Grant issued unto her by the 1<sup>st</sup> Interested Party. For clarity, the Ex-parte Applicant contends that the breaches included, inter-alia, the 1<sup>st</sup> Interested Party carrying out various trade/businesses; and setting up commercial business, including car dealership on the suit property.
49. Furthermore, the Ex-parte Applicant has also contended that same also became aware of a serious Environmental hazard post by the Commercial Business containers, whose waste water and suspected sewerage had collected and stagnated onto the suit property.



50. Premised on the foregoing, the Ex-parte Applicant therefore proceeded to and issued a 30 days termination Notice as against the 1<sup>st</sup> Interested Party. In this respect, the Ex-parte Applicant contends that the relationship between herself and the 1<sup>st</sup> Interested Party amounted to a Periodic tenancy; and therefore terminable in accordance with Section 57(2) of The Land Act, 2012.
51. On her part, the 1<sup>st</sup> Interested Party has posited that at the time of entering into and executing the written Lease, the suit property comprised of a Club-house with offices, changing rooms and a cafeteria. In this regard, the 1<sup>st</sup> Interested Party has taken the position that what was demised unto her fell within the definition of a controlled tenancy.
52. Furthermore, the 1<sup>st</sup> Interested party has contended that upon the lapse of the written lease, the Ex-parte Applicant and herself continued the relationship, albeit on the basis of a mutual understanding, which was never reduced into writing.
53. Additionally, it has been stated by the 1<sup>st</sup> Interested Party that by the time the written Lease determined, she had opened up additional facilities within the premises for selling food and other necessities to persons who are visiting the Football Academy or even the general public. In this regard, the 1<sup>st</sup> Interested Party has thus maintained that the activities being carried out and or undertaken on the demised property constitute and falls within the definition of a shop.
54. The foregoing constitutes the factual controversy that surrounds the dispute beforehand. Consequently, I am now called upon to determine whether the relationship between the Ex-Parte Applicant and the 1<sup>st</sup> Interested Party constitutes a controlled tenancy; and if so, whether such a dispute must be determined by the Business Premises Rent Tribunal.
55. From the onset, it is imperative to point out that the written lease between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party related to the suit property comprising of the land and the Club house. In this respect, there is therefore no gainsaying that the lease was in respect of a Business enterprise to be carried out by and on behalf of the 1<sup>st</sup> Interested Party. Simply put, the 1<sup>st</sup> Interested Party was conferred with the liberty to run the business on the suit property, albeit, at a fee.
56. In addition, it is not lost on this Honourable court that the written Lease was for a period of five years. Invariably, the five-year duration brought the written lease within the definition of a controlled tenancy as defined by the provisions of Section 2 of the Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya.
57. Nevertheless, there is no dispute that the written lease which was entered to and executed between the 1<sup>st</sup> Interested Party and the ex-party Applicant lapsed by effluxion of time. In this regard, the term of the said written Lease there ceased to subsist.
58. First forward, with effect from November 2007, the relationship between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party was therefore governed by the mutual understanding/agreement, which was however not reduced into writing. Consequently, there are no existing terms, save for the terms which are intrinsic and implied in a Landlord and tenant relationship.
59. To my mind, the Ex-parte Applicant therefore allowed the 1<sup>st</sup> Interested Party to carryout and/or undertake Business on the suit property, provided that the 1<sup>st</sup> Interested Party, met her part of the bargain by paying the mutually/agreed monthly rents.
60. In the foregoing circumstances, when a dispute does arise as to what were the terms of the tenancy relationship between the Ex-parte Applicant and the 1<sup>st</sup> Interested Party, the Honourable Court is called upon to interrogate inter-alia, the following;



- i. Whether the tenancy was reduced into writing,
  - ii. If not reduced into writing, whether the tenancy became periodic,
  - iii. What was the nature of activity being undertaken on the demised property; and
  - iv. Whether such tenancy relationship can be terminated in any other manner, without compliance with the Provision of the Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya.
61. Having itemized the foregoing, I beg to point out that the demised premises were leased to and in favor of the 1<sup>st</sup> Interested Party for business purposes and the 1<sup>st</sup> Interested Party operated a business thereon for purposes of rendering services for money or monies worth. In this regard, it is imperative to underscore that the nature of activity that was being undertaken on the demised premises falls within the definition of a shop.
  62. Furthermore, there is no gainsaying that the tenancy relationship was not reduced into writing and in this respect, the relationship falls within the purview of what is deemed to constitute a controlled tenancy.
  63. As concerns the manner of terminating a periodic tenancy pertaining to and concerning a Business it is important to underscore that despite the provisions of Section 57(2) of The Land Act, 2012; such a tenancy can only be determined in accordance with the provisions of Section 4(2) of Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya.
  64. Instructively, even though the Land Act, 2012, is a latter Act, the provisions thereof do not override and or supersede the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya. For good measure, it is important to take cognizance of Section 4(1) Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya, (supra) as hereunder;
    - (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.
  65. My understanding of the wording of Section 4(1) (supra) drives me to the conclusion that any tenancy/ agreement, in respect of a business, which is not reduced into writing and hence becomes a controlled tenancy, must be determined in accordance with the Act and not otherwise.
  66. In addition, it is also instructive to observe and underscore that the provision of 57(2) of The Land Act, 2012 which relates to determination of a periodic tenancy, must therefore be read alongside the provision of Section 4(1) of the Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya.
  67. Furthermore, I opine that where there is a contradiction and conflict between any other written law, touching on and concerning determination/termination of a controlled tenancy, then such other written law, save for the Constitution, must give way to the provisions of Section 4(1) (supra).
  68. In view of the foregoing discourse, I come to the conclusion that the factual situation, espoused by the affidavit in verification of the statement of facts and the Replying affidavit on behalf of the 1<sup>st</sup> Interested Party, establish and demonstrate an existence of a Controlled tenancy.



69. Having found and held that the factual situation establish and demonstrate the existence of a controlled tenancy, the outstanding issue which must now be addressed is whether the impugned Notice which issued by the Ex-parte Applicant and which gave the 1<sup>st</sup> Interested Party 30 days to vacate, complied with and or adhere with section 4(2) of the Landlord and Tenants (Shops, Hotels and Catering Establishment ) Act, Chapter 301 Laws of Kenya.
70. In my humble view, the impugned Notice was contrary to and in contravention of the named provisions of the Law and therefore the 1<sup>st</sup> Interested Party was within her statutory/constitutional right to approach the Business Premises Rent Tribunal for protection.
71. To my mind, the dispute which was presented before the Business Premises Rent Tribunal falls within her statutory mandate; and hence same was seized and possessed of the requisite Jurisdiction to entertain, interrogate and thereafter adjudicate upon the dispute beforehand.
72. In coming to the foregoing conclusion, I have had occasion to peruse the decision in the case of Ukwala Supermarket (Eldoret) Ltd versus Amritlal Sojpar Shah Wholesalers Ltd (2017)eKLR, wherein the Honourable court stated and observed thus;
50. Section 57(2) of the Land Act 2012 provided that if the owner of land permits to exclusive occupation of the land or any part of land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.
51. It would follow that the agreement between the plaintiff and defendant being not reduced in writing is a periodic tenancy and therefore, is a controlled tenancy under the provision of section 2(1) (a) of the Landlord and Tenancy Act (Shops, Hotels and Catering Establishment Act, Cap. 301, Laws of Kenya and therefore, should be terminated in accordance with the Act thus by an order of the Tribunal.
73. In addition, I am alive to the decision of the Supreme Court in the case of Samuel Kamau Macharia & Another versus Kenya Commercial Bank Ltd & 2 Others (2012)eKLR, where the court stated and held 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.
74. Inevitably, I come to the conclusion that the Business Premises Rent Tribunal is seized of the requisite Jurisdiction to interrogate the factual situation/controversy, surrounding the dispute herein, which



touches on the demised property wherein Business is being undertaken and services rendered for money or monies worth.

## Issue Number 2

### Whether the Ex-parte Applicant herein has laid a basis to warrant the grant of the Reliefs sought.

75. The Ex-parte Applicant herein has sought for the orders of Judicial Review in the nature of Certiorari and Prohibition. However, it is worthy to recall that even the Ex-parte Applicant herself acknowledges and confirms that there exist a factual controversy pertaining to and concerning the nature of activities being carried out and undertaken on the suit property.
76. In addition, the Ex-parte Applicant also concede that the relationship between herself and the 1<sup>st</sup> Interested Party is governed by a mutual understanding, which was however not reduced into writing.
77. Despite the foregoing, the Ex-parte Applicant is still desirous to implore the Honourable court to grant the orders of Judicial review, albeit on the basis of disputed and heavily contested facts.
78. Instructively, it is important to state that even though the scope and extent of Judicial Review has been expanded following the enactment of the Fair Administrative Actions Act, 2015, the Honourable court is still not conferred with the mandate to undertake the exhaustive merit review, even where the facts of the matter are in controversy.
79. In any event, the extent of merit review that a court can engage with and/or entertain will only relates to a merit review based on uncontested facts/evidence and thereafter discern whether the decision-making body discharged her statutory mandate in accordance with the prescription of the law.
80. To my mind, the forgoing legal position is highlighted, amplified and succinctly elaborated upon by the decision of the Supreme Court in the case of Saisi & 7 others versus Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), where the court stated as hereunder;

“In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v Lucy Muthoni Njora*, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

76. Be that as it may, it is the court’s firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a



matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.

81. Based on the foregoing ratio decidendi, I am afraid that the reliefs sought by and at the instance of the Ex-parte Applicant, which would entail undertaking an exhaustive merit review premised on contested factual controversy, cannot be issued and/or be granted, either in the manner sought or otherwise.

### **Final Disposition**

82. Having considered and addressed the two thematic issues, alluded to in the Body of the Judgment, I come to the conclusion that the Notice of Motion Application, ( The Substantive Application), dated the 11<sup>th</sup> January 2023; is devoid and bereft of merits.
83. Consequently and in the premises, the Notice of Motion Application dated the 11<sup>th</sup> January 2023; be and is here Dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties; and same to be agreed upon and in default, be taxed by the Deputy Registrar.
84. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

**In the Presence of;**

**Benson Court Assistant**

**Mr. Rao H/B for Mr. Muthui for the Ex-parte Applicant**

**Mr. S. N Ng'ang'a for the 1<sup>st</sup> Interested Party**

**Ms. Waceke Thindigua for the 2<sup>nd</sup> Interested Party**

**N/A for the Respondent**

