



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO. 14 of 2018**

**MA PANJU & BROTHERS LIMITED.....APPLICANT**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**R U L I N G**

1. The Notice of Motion before the court is dated 24<sup>th</sup> March 2018 filed pursuant to leave granted on 27/2/2018.

The motion prays for the following orders:-

1. An order of certiorari to issue to remove to this Honourable Court for purposes of quashing the Respondent's decision and/or letter dated 17<sup>th</sup> July, 2017 reviewing the annual rent at 2% of the unimproved site value after every 10 years effective from 1<sup>st</sup> July 2017.
2. An order of mandamus do issue directing the Respondent to endorse consent to transfer Plot No. MOMBASA/BLOCK 1/218 as applied by the Applicant
3. Costs of the proceedings be provided for.

2. However, a Preliminary Objection has been raised by the Respondent on the grounds that:

- (a) On 26/2/18, the Applicant was granted leave to file and serve an application for Judicial Review order of Mandamus within 14 days.
  - (b) Thereafter, the Applicant filed and served the application for Judicial Review Order of Mandamus on 26/3/18 and 27/3/18 respectively. This was one month from 26/2/18 when the leave to file for Judicial Review order of Mandamus was granted.
  - (c) The leave granted by the court on 26/2/18 lapsed on 2/3/18 being the 14<sup>th</sup> day of 26/2/18.
  - (d) Consequently, on 26/3/18, the Applicant did not have the leave to file for any orders of judicial review before this court.
- 2 (a) As pleaded in paragraphs 1, 2 and 3 of the grounds upon which the order of judicial review are sought contained in the Statutory Statement dated 23/2/18, the applicant is a Tenant of the Respondent.
- (b) The relationship between the Applicant and Respondent is a contractual.
  - (c) The applicant is not seeking to enforce a public law right but a private contractual right and as such his remedy lies in private contract law and not public law in the nature of judicial review.
  - (d) Further, the decision to consent or not to consent to the transfer of the suit property is a matter of Respondent's discretion. Judicial Review order cannot be granted against the Applicant in exercise of his discretion.

3. The court directed that the Preliminary Objection would be heard first, and parties made oral submissions thereto, which I have carefully considered.

**Disposition**

4. It is clear that the court on 27/2/18 granted the Ex-parte applicant leave to file a substantive notice of motion for judicial Review remedies within 14 days. There are two notices of motion filed by the Ex-parte applicant, one on 1<sup>st</sup> March 2018 – which is filed within the said 14 days and another filed on 26<sup>th</sup> March 2018 is filed out of time and cannot be considered by this court. Further the Ex-parte applicant has not moved the court to admit that application out of time. So it is the holding of this court that the motion dated 21<sup>st</sup> March 2018 and filed herein on 26<sup>th</sup> March 2018 is invalid and is herewith struck out.

5. That leaves the court with the motion dated 23<sup>rd</sup> February 2018 and filed herein on 1<sup>st</sup> March 2019. That motion was filed within the time stipulated in the leave granted on 27<sup>th</sup> February 2018.

That notwithstanding, I have looked at the orders sought herein. The issues raised in the application are issues of lessor and lessee and those that affect rights over occupation of land, rent, lease etc. The issues raised would best be dealt with in the Environment and Land Court which also has jurisdiction to issue prerogative orders of mandamus and Certiorari. That does not mean that this court has no such jurisdiction. However, the issue is dispute about terms of the lease agreement and increase of rent, issues which cannot be effectively determined by way of affidavits. Judicial Review forum is a restricted forum which does not admit oral evidence. Those issues would best be conversed in the Environment and Land Court.

For the foregoing reason I uphold the Preliminary Objection but on different grounds, and direct the Ex-parte applicant to move to Environment and Land Court.

Accordingly the motion herein is dismissed.

Parties to bear own costs

Dated, Signed and Delivered in Mombasa this 31<sup>st</sup> day of January 2019

**E. K. O. OGOLA**

**JUDGE**

**31. 01. 2019**

In the absence of Parties