



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION No. 641 OF 2016

(CONSOLIDATED WITH JR NO. 627 OF 2016)

BETWEEN

REPUBLICAPPLICANT

AND

THE CHAIRMAN,

BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

AND

AMBASSADEUR INVESTMENTS

(K) LIMITED.....1ST INTERESTED PARTY

JAYDIS INVESTMENTS LIMITED.....2ND INTERESTED PARTY

LLOYD MASIKA LIMITED.....3RD INTERESTED PARTY

EX-PARTE: MOBITEL EXPRESS LIMITED

JUDGEMENT

Introduction

1. This judgement arises from two applications which were consolidated.
2. One of the applications was dated 5th January, 2017 filed by **Investments (K) Limited Ambassadeur** (hereinafter referred to as “**Ambassadeur**”) in which it sought the following orders:
 - a. An order of Certiorari to remove to remove into this honourable court to be quashed the injunctive orders made by the Chairman of the Business premises Rent Tribunal on 7th December 2016, 13th December 2016, 14th December 2016 and 15th December 2016 in Business Premises Rent Tribunal Case No. 980 of 2016, Mobitel Express Ltd vs. Lloyd Masika, John Kanguma Maina & Charles Kanyuga Maina
 - b. An order of Mandamus compelling the respondent to reinstate the 2nd Interested Party as a tenant in the suit premise known as shop No. 3 on L.R. No. 209/8688 Nairobi pending the hearing and determination of the Tribunal Case No. 980 of 2016.
 - c. The costs of this application be borne by the respondent and 1st Interested Party.
3. According to **Ambassadeur**, which is contended to be a Hotel that forms part of the estate of **Samuel Maina Gatinga** (hereinafter referred to as “the Deceased”) on the 18th day of November, 2016, **Mobitel Express Limited** (hereinafter referred to as “**Mobitel**”), served it with an application under certificate of urgency dated 15th November 2016 in Chief Magistrate’s Civil Suit No. 7825 of 2016 - **Mobitel Express Limited vs. John Kaguma & Anor.** with an inter partes hearing set on 21st November 2016, in which **Mobitel** was seeking orders

of injunction against **Ambassadeur**.

4. It was averred that in the said suit **Mobitel** alleged that the Directors of **Ambassadeur** were interfering with his renovations and business in shop No. 3 situated within **Ambassadeur Hotel**. **Mobitel** further averred that the said Directors were strangers in an alleged lease signed between **Mobitel** and the managers of the property, **Messrs Lloyd Masika**.

5. According to **Ambassadeur**, **Mobitel** has never been in occupation and/or possession of the suit premises at any particular time and that instead the suit premises were being occupied by **Jaydis Investments Limited** (hereinafter referred to as "Jaydis") with whom **Mobitel** had earlier entered into a lease agreement dated 2nd November 2016.

6. It was averred that on 5th December 2016 when the matter came up for hearing, the **Hon. Wachira**, Senior Principal Magistrate, declined to grant **Mobitel** orders of injunction in Chief Magistrate's Civil Suit No. 7825 of 2016, after taking cognizance of the fact that **Mobitel** was not in possession and/or occupation of the suit premises.

7. It was **Ambassadeur's** case that **Lloyd Masika** as Estate Agents are vide a court order dated 29th May 2012 is tasked with the collection of rent with regard to the Hotel and the shops within it that are part of **Ambassadeur Investments (K) Limited**. However no lease agreement was ever signed as between the **Mobitel** and the **Ambassadeur**. It was further averred that all **Lloyd Masika** did was to issue **Mobitel** with a letter of offer in which **Lloyd Masika** informed **Mobitel** that the letter of offer contains the principal terms on which they would recommend to the landlord to grant the.

8. According to **Ambassadeur** it was clear that **Lloyd Masika** did not have authority to enter into a lease agreement with any tenant; their mandate being to only recommend to **Ambassadeur** any potential tenants, since **Ambassadeur** had the final decision in whoever occupied the premises.

9. It was averred that on the 9th day of December 2016, **Mobitel** appeared on the premises in the company of the OCS Central Police Station with an order of injunction issued by the Chairman, Business Premises Rent Tribunal (hereinafter referred to as "the Tribunal"). The said order barred **Ambassadeur**, **John Kaguma** its main director and **Lloyd Masika** from interfering with the renovations and occupations by **Mobitel**. However, the said order was misconstrued to be an eviction order by the OCS Central Police Station who proceeded to forcefully evict **Jaydis** who had already finished renovations on the suit property and had begun carrying on business.

10. It was averred that **Mobitel** had deliberately misrepresented to the Tribunal that it was in possession and/or occupation of the suit premise and concealed the fact that the renovations made therein were NOT made by it.

11. It was averred that on 9th December 2016, **Ambassadeur** filed a notice of motion dated the same date seeking to set aside, vary and/or discharge the orders of the Tribunal issued on 7th December 2016 on grounds that the orders were issued on account of material non-disclosure by **Mobitel** and that the Tribunal set aside the said orders of 7th December 2016 and scheduled the matter for inter partes hearing on 15th December 2016. However, on 13th December 2016 again **Mobitel** rushed to the tribunal under certificate of urgency and the Tribunal set aside our orders of stay dated 9th December 2016 ex parte. Once again on 14th December 2016, a day to the *inter partes* hearing, **Mobitel** filed another notice of motion under certificate of urgency dated 14th December 2016 seeking breaking orders which orders the respondent again issued to the detriment of the **Jaydis** and **Ambassadeur** without according the latter a chance to be heard. The breaking orders were issued a day before the inter partes hearing date.

12. According to **Ambassadeur**, the injunctive orders issued by the chairperson were *ultra vires* in nature as the Business Premises Rent Tribunal lacks the power to issue injunctive orders and that the chairperson of the tribunal overstepped his mandate by issuing injunctive orders against the applicants herein. It was further averred that the decisions of the Tribunal, especially with regard to issuing two concurrent orders ex parte despite the matter coming up for hearing within a two days period smacked of impropriety, was absurd, arbitrary, *ultra vires*, capricious, unjust and in flagrant breach of the rules of natural justice and occasioned a travesty of justice.

13. To **Ambassadeur** the injunctive orders of the Tribunal had no legal validity due to the fact that they fall outside the limit of law and are thus substantively *ultra vires* as the tribunal's powers under Section 12 Cap 301 do not include injunctive powers. Based on legal advice, **Ambassadeur** averred that under Order 40 rule 4(2) an *ex parte* order cannot be issued for more than 14 days, in this case ex parte orders were issued initially for a period of 58 days with an *inter partes* date of 3rd February 2017 hence the respondent clearly acted in excess of powers and unprocedurally. Based on legal advice **Ambassadeur** applied for the setting aside of the *ex parte* orders granted on 7th December 2016, but the Tribunal again unprocedurally vacated them ex parte.

14. It was therefore **Ambassadeur's** case that the actions of the Tribunal in further confirming the order of injunction on 15th December 2016 was tantamount to continuance of the nullity and that in issuing the orders of injunction ex parte for more than 14 days, the Tribunal's action was unprocedural and therefore null and void. Similarly, the act of the Tribunal in setting aside its order of stay dated 9th December 2016 *ex parte* was contrary to the rules of natural justice and furthermore the actions of the respondent in issuing breaking orders after setting aside its order *ex parte* was also marred with procedural improprieties.

15. Accordingly **Ambassadeur's** case was that it is therefore interest of justice that the injunctive orders issued on the 7th day of December 2016 and 15th December 2016 be hereby quashed with costs to the applicant. That additionally the orders dated 13th December 2016 and 14th December, 2016 be quashed with costs to the applicant.

16. The 2nd application was dated 1st February, 2017 and was filed by **Mobitel**.

17. According to **Mobitel**, sometimes in November, 2016, it expressed its interest in leasing out Shop No. 3 located on the property known as LR Number 209/8688 more commonly known as **Ambassaduer Hotel to Lyod Masika**, a court appointed agent of the Hotel, set out the terms of the lease upon which **Mobitel** was to occupy the said Shop, which terms **Mobitel** was agreeable to. Pursuant thereto **Mobitel** paid the rent and other money due in respect thereof and proceeded to occupy the said premises. However, its occupation was curtailed by **Ambassaduer** and **Jaydis** who obstructed them and denied them access thereto.

18. It was averred that **Mobitel's** right to occupy the said premises was confirmed by **Lloyd Masika** prompting **Mobitel** to seek the intervention of the Tribunal which granted it a restraining order against **Ambassaduer** and **Jaydis** from evicting them from the suit premises. However **Ambassaduer** and **Jaydis** moved the Tribunal seeking to stay the said orders on 7th December, 2016 which order was granted *ex parte* on 9th December, 2016.

19. According to **Mobitel**, the order of 9th December, 2016 staying the orders of 7th December, 2016 were obtained under falsehoods.

20. On behalf of **Lloyd Masika Limited**, it was averred that **Mobitel** are the lawful tenant after they successfully applied to **Lloyd Masika** who are the court appointed manager of the **Ambassaduer Investment (K) Limited** to occupy Shop No.3 located on L.R No. 209/8688 (**Ambassaduer Hotel**) and which after meeting the conditions set on term of the lease **Lloyd Masika** granted them vacant possession to go ahead to occupy the premises. Subsequently the **Mobitel** duly accepted the offer to lease the premises and paid all the rent and monies due as stipulated in the letter offer for lease and they took possession.

21. **Lloyd Masika** insisted that they have been managing and performing our duties as the court appointed managers without any interference since 1st June 2012 when they were appointed as such in Milimani High Court Case Number 394 of 2011 and appointed as Managers on the 29th May 2012 to manager, All the properties registered under the umbrella of **Ambassaduer Investment (K) Limited** with effect from 1st June 2012 hence mandated to manage and handle all matters emanating from the properties registered under **Ambassaduer Investment (K) Limited** which mandate constituted offering the vacant premises, leasing, collecting rent and ensuring that the properties are in the right and habitable condition.

22. On the strength of the said mandate **Lloyd Masika** averred that they have over the years been offering the vacant premises for leasing to interested parties with no interference from **Ambassaduer** and have never been under instructions of any director of **Ambassaduer** in course of our duties.

23. According to **Lloyd Masika**, it has never offered or entered into any lease agreement with **Jaydis** and who are strangers to them and how they came to claim that they have a valid lease or entered into lease agreement with the two directors of **Ambassaduer** without **Lloyd Masika's** involvement as the mandated managers with all matters touching on the premises and the other directors of **Ambassaduer** is null, void and unattainable.

24. On behalf of **Jaydis**, it was averred that on the 2nd December 2016 **Ambassaduer Investments (K) Limited** wrote a letter of offer to **Jaydis** for offer to let shop No. 3 (Moi Avenue) in **Ambassaduer Building** and on the same day, **Jaydis** acknowledged the terms set out in the letter of offer and signed the officer letter.

25. Pursuant to the letter of offer, **Jaydis** entered into a lease agreement with **Ambassaduer Investments (Kenya) Limited** over the said shop and having complied with all the requirements, took possession of the suit premises on the 5th November 2016 and commenced renovations. However, on the 10th November 2016 while undergoing renovation on the premises **Lloyd Masika** invaded and tried to gain entry by force claiming that it was the rightful owner of the suit premises.

26. It was disclosed that it was at this point that **Mobitel** filed an application in the CM's Court Civil Case No. 7825 of 2016 before **Hon. Wachira** Principal Magistrate seeking injunctive orders which application was declined and inter parties hearing given on the 21st November 2016 after the Court took cognizance of the fact that **Mobitel** was not in possession and/or occupation of the suit premises.

Determination

27. I have considered the issues raised herein.

28. It is not contended that the Respondent Tribunal has no jurisdiction to hear and determine the main issue between the parties herein. To the contrary, it is rather the manner in which the Tribunal is handling the dispute that has provoked these proceedings. It is contended that by granting *ex parte* orders in excess of the 14 days' period, staying the same *ex parte* and setting aside the same similarly *ex parte*, was unprocedural, contrary to the rules of natural justice and rendered its said decisions null and void.

29. I do agree that the procedure of granting *ex parte* orders in excess of the prescribed 14 days' period, staying the same orders *ex parte* and setting the same in a similar fashion does not inspire confidence in the judicial process. In my view once a court grants *ex parte* orders, setting the same aside *ex parte* ought to be done only in very exceptional circumstances where the Court is satisfied that the *ex parte* orders ought not to have been granted at all. Otherwise the usual manner of dealing with applications for setting aside *ex parte* orders should be at an inter partes hearing. To grant contradicting orders *ex parte* has the unpalatable effect of rendering court proceedings a circus.

30. In my view had the Tribunal proceeded in the usual procedural manner expected after *ex parte* orders are granted, these proceedings would have been rendered unnecessary.

31. In the premises, in the exercise of this Court's supervisory jurisdiction, pursuant to Article 165(6) of the Constitution, I hereby direct the Chairman of the Business Premises Rent Tribunal to, within 14 days of service of this order on the Tribunal, list the matter before the said Tribunal for the purposes of fixing a hearing date for the main cause before it on a priority basis.

32. Each party will bear own costs of these proceedings.

Dated at Nairobi this 16th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Maina for Mr. Muchiri for the applicant

CA Ooko