



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JR MISC APPLICATION NO. 366 OF 2017

IN THE MATTER OF AN APPLICATION BY EVANS NYAHORO AND PAUL KINUTHIA KILUNDI FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE RENT RESTRICTION TRIBUNAL CASE NO. 562 OF 2017 (NAIROBI)

AND

IN THE MATTER OF RENT RESTRICTION TRIBUNAL AND THE RENT RESTRICTION AC (CAP 296) LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE RENT RESTRICTION TRIBUNAL RESPONDENT

AND

SHEILLA WANJIKU1ST INTERESTED PARTY

STEPHEN OCHIENG DANCUN.....2ND INTERESTED PARTY

EX PARTE:

EVANS NYAHORO

PAUL KINUTHIA KILUNDI

RULING

Introduction

1. By a Notice of Motion dated 22nd June, 2017, the *ex parte* applicants herein, **Evans Nyahoro** and **Paul Kinuthia Kilundi** seek the following orders:

1. An order of Certiorari quashing the decision of the Rent Restriction Tribunal at Nairobi in Rent Restriction Case No. 562 of 2017 – Sheilla Wanjiku and Stephen Ochieng Duncun–vs- Evans Nyahoro and Paul Kinuthia Kilundi.
2. An order of Prohibition prohibiting the Rent Restriction Tribunal from proceeding with the Rent Restriction Case No. 562 of 2017 (Nairobi) for want of jurisdiction to deal with the matter.
3. That the costs of this application be provided for.

Ex Parte Applicants' Case

2. According to the Applicants, from the agreement entered into between the parties herein, the monthly rent for the residential unit occupied by the tenants is Kshs 17,500/-. However the tenants (the interested parties herein) filed the Rent Restriction Case No. 562 of 2017 simultaneously with a notice of motion and the Respondent proceeded to grant the orders in excess of its jurisdiction.
3. It was therefore the applicants' case that the said orders were null and void as the Respondent lacked the jurisdiction to deal with the case for want of pecuniary jurisdiction.
4. It was further averred that as of 5th April, 2017, the said tenants were in rent arrears of Kshs 28,500/- which amount they acknowledged and presently, the same stand at Kshs 63,500/-.
5. It was the applicants' case that if the orders granted by the Respondent are implemented the applicants stand the real risk of not recovering the same from the said tenants as the applicants have been blocked by the impugned decision from blocking or detaining the tenants and/or preventing them from vacating the suit premises with their household goods.

Respondent's Case

6. The application was opposed by the Respondent based on the following grounds:

- 1. That the application is frivolous, vexatious and an abuse of the court process.**
- 2. That the current application is an appeal disguised as a judicial review application and ought not to be entertained by this Honourable Court. The grounds upon which this application is premised are grounds of appeal and not judicial review.**
- 3. That the ex parte applicant did not raise any preliminary objection or file responses with regard to the jurisdiction of the tribunal during the hearings at the tribunal and failed, neglected or ignored to demonstrate the basis that their premises are standard as defined by the Act and should be exempted.**
- 4. That the application is an abuse of the principles of judicial review and is meant to ground the operations of the Rent Restriction Tribunal.**
- 5. That the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any judicial review determination.**
- 6. That in the circumstances and based on the foregoing reasons the notice of motion is therefore devoid of any merit and the orders sought should not be granted.**

Interested Parties' Case

7. In opposition to the application, the interested parties averred that they filed the subject suit seeking leave to vacate the suit premises in order to take possession of a house offered to them by their friend since they were unable to keep up to date with the rent payments.
8. While conceding that the monthly rent payable in respect of the suit premises was Kshs 17,500/- it was their view that their application before the Respondent was consistent with the provisions of the **Rent Restriction Act**, Cap 296 Laws of Kenya.
9. According to the interested parties the said monthly rent was not standard rent as envisaged in Cap 296 Laws of Kenya as the premise have never been assessed to determine standard rent.
10. It was therefore their view that the Respondent acted within its mandate and powers in making the decision in the matter before it.

Determination

11. I have considered the issues raised hereinabove and this is the view I form of the matter.
12. It is clear that the only ground upon which these proceedings were commenced is that the Respondent had no jurisdiction to entertain the matter before it as the monthly rents in issue exceeded the amount for which the Respondent can invoke its jurisdiction.
13. It is however not disputed and this came clearly from the applicant's submissions that the order being challenged in these proceedings was an *ex parte* order. That order was given on 12th June, 2017 and the matter was fixed for inter partes hearing on 24th July, 2017. Before that date, these proceedings were commenced on 21st June, 2017. Clearly therefore the Respondent was not given an opportunity to make a decision on whether or not it was seized of jurisdiction in the matter.
14. In my view, the Tribunal ought to have given an opportunity to make a determination on jurisdiction as soon as the issue was brought to its attention. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.” [Underlining mine].

15. It is therefore clear that a party challenging the jurisdiction of a Court or Tribunal ought to raise the issue before the Court or Tribunal whose jurisdiction is under challenge for consideration though the decision thereon does not bar this Court from entertaining judicial review proceedings if in fact the Tribunal had no jurisdiction. In other words the mere fact that a Court or Tribunal lacks jurisdiction to entertain a matter does not bar it from hearing and determining the issue of jurisdiction which ought to be determined in the initial stages of the proceedings.

16. Section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 provides:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

17. Subsection (3) thereof provides:

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

18. Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

19. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. One of the remedies available to a party aggrieved by an *ex parte* decision is to apply for setting aside the same before the Court or Tribunal that granted the order since generally *ex parte* orders are provisional in nature. Such *ex parte* orders can and do invariably get set aside at the *inter partes* hearing where found to be unmerited.

20. In this case the interested parties have not admitted that the Respondent has no jurisdiction. To the contrary, they contend that the Respondent was properly seized of the matter as no assessment had been made with respect to the suit premises in order for a determination to be made that they were not standard premises. Therefore this case must be distinguished from **Republic vs. Chairman, Rent Restriction Tribunal & 2 Others exp Agatha Njoki Mwangi [2015] eKLR** where the Court expressed itself as hereunder:

“In this case where it is clear from the interested party’s own case that the Tribunal has no jurisdiction to entertain her complaint, it would be unjust to subject the Applicant to endure the agony of going through the motion when the Tribunal lacks jurisdiction to entertain the matter placed before it.”

21. In my view the issue whether or not the premises in issue were standardised or not ought to have been determined by the Respondent. As this Court appreciated in **Republic vs. Business Premises Rent Tribunal & Another ex parte The Davie Motor Corporation Limited [2013] eKLR**:

“...the issue whether or not the interested party was still in possession/occupation of the premises was a matter of fact whose finding was prerequisite to a determination of whether or not there was a landlord-tenant relationship and hence whether the Respondent had jurisdiction. Without a determination of that fact, this Court cannot assume that the Tribunal would have found it had no jurisdiction and it is not for this Court to make a finding on that disputed issue of fact. Accordingly I am unable to find that the Respondent had no jurisdiction to entertain the dispute based on non-existence of a landlord-tenant relationship.”

22. In other words the finding on jurisdiction will depend on the factual determination of the issue of whether the premises ought to attract standard rent or not, a matter which is still at large. These are matters which ought to be taken up before the Respondent at the *inter partes* hearing of the application. This Court cannot usurp that jurisdiction and stop the Respondent in its tracks before it hears the parties on the issue.

23. Apart from attending the Tribunal and opposing the application, the applicants were entitled to apply for setting aside the said *ex parte* orders. In this case the applicants have not shown the reason why the Court ought to exempt them from seeking to set aside the *ex parte* orders of injunction granted by the Respondent or opposing the extension thereof at the *inter partes* hearing whose date had been fixed by the Respondent.

24. Judicial review it ought to be remembered is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.

25. It is therefore my view that these proceedings were prematurely instituted. In the premises, I decline to exercise my discretion in favour of the applicants as sought herein.

Order

26. Consequently, this application is incompetent and is struck out but as the issue of rent arrears is not contested, there will be no order as to costs.

27. It is so ordered.

Dated at Nairobi this 16th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Gikonyo for Mr Kabue for the applicant

CA Ooko