



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 23 OF 2016

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER
ORDER 53 OF THE CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF: THE LANDLORD TENANT ACT (SHOPS, HOTELS AND CATERING
ESTABLISHMENTS ACT) CAP 301 LAWS OF KENYA**

AND

**IN THE MATTER OF: THE BUSINESS PREMISES RENT TRIBUNAL CASE NO. 18 OF 2016,
MOMBASA, KHALIF JELLE MOHAMED & SALAT W. HUSSEIN VERSUS ABDULKADIR
HUBESS**

REPUBLIC APPLICANT

VERSUS

THE CHAIRMAN BUSINESS PREMISES

RENT TRIBUNAL RESPONDENT

AND

KHALIF JELLE MOHAMED

SALAT W. HUSSEIN INTERESTED PARTIES

EX-PARTE: ABDULKADIR HUBESS

JUDGMENT

BACKGROUND

1. The ex-parte applicant on 29th October, 2015 wrote to the interested parties herein giving them notice to vacate premises they had leased from him. They were required to hand over vacant possession on 31st March, 2016. The interested parties had signed separate lease agreements in respect to Plot No. Msa/Block/XLV/126. The leases were to run for a period of six (6) years from 1st April, 2010 to 31st March, 2016.

2. On receipt of the said notices the interested parties moved to the Business Premises Rent Tribunal (BPRT), Mombasa where they obtained *ex parte* orders restraining the ex-parte applicant either by himself, his servants, employee and/or agents from evicting, harassing and/or in any way whatsoever interfering with the tenants quiet enjoyment of the tenancy in the demised premises pending the hearing and determination of the suit.

3. It is the foregoing circumstances that moved the ex-parte applicant to seek leave of the court on 12th April, 2016 to commence judicial review proceedings against the respondent and the interested parties. The court on 3rd May, 2016 granted the ex-parte applicant leave to commence these proceedings.

THE APPLICATION

4. On 17th May, 2016, the ex-parte applicant filed a Notice of Motion application under the provisions of Order 53 rule 3 of the Civil Procedure Rules and Section 8 of the Law Reform Act seeking the following orders:-

(i) That an order of certiorari do hereby issue to bring into this court and quash the proceedings and order of the Chairman Business Premises Rent Tribunal made on 29th February, 2016 in BPRTC case No. 18 of 2016 Khalif Jele Mohamed and Salat Hussein vs Abdulkadir Hubess;

(ii) That an order of prohibition do hereby issue to prohibit the respondent from proceeding further with the hearing of the BPRTC No. 18 of 2016 Kahlif Jele Mohamed and Salat Hussein vs Abdulkadir Hubess; and

(iii) Costs of this motion be provided for.

The application was supported by the affidavit of Sultan Abdulkadir Hubess sworn and filed with the statement and application for leave to file for Judicial Review orders of certiorari and prohibition.

5. The respondent's Counsel filed his grounds of opposition on 24th May, 2016 to the following effect:-

(i) That the application is misconceived, frivolous, vexatious and an abuse of the process of court;

(ii) That the ex-parte applicant has not exhausted all the remedies available to him hence the application flies in the face of Section 9(2) of the Fair Administrative Actions Act;

(iii) That the applicant herein has not appealed from and/or applied to set aside the orders complained of;

(iv) That no application for exemption from the obligation to exhaust all other remedies available to the ex-parte applicant has been made;

(v) That in the absence of the exemption the Judicial review orders sought are not available to the applicant;

(vi) That the Business Premises Rent Tribunal has jurisdiction to hear and determine the suit; BPRT case No. 18 of 2016, Khalif Jele Mohamed and Salat Hussein versus Abdulkadir Hubess; and

(vii) That the orders of Judicial Review sought cannot issue. See the case of Nicholas Muchora and 5 Others vs SRM Commercial court [2011] eKLR.

Mr. Khalif Jele Mohamed filed a replying affidavit on behalf of the interested parties on 22nd June, 2016 to oppose the application.

EX-PARTE APPLICANT'S SUBMISSIONS.

6. Mr. Khatib, Learned Counsel for the ex-parte applicant submitted that section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 (hereinafter referred to as Cap.301), Laws of Kenya, does not grant power to the BPRT to issue injunctions. To propound the above submission, Counsel relied on the case of **Kanthilal Ramji Bhundia & 2 Others vs Joseph Waitiki Ndegwa** [2014] eKLR where the court held that section 12(4) of Cap. 301 does not grant power to the BPRT to issue injunctions. Counsel referred to the respondent's submissions and in particular to the decision of **Bernadette Magome Nyakabaria versus Bonareri Asiago and 3 Others** [2016] eKLR where the Judge granted an injunction in a matter that had initially been filed in the BPRT.

7. Counsel argued that in the case of **John Mugo Njunga vs Margaret N. Murangi** [2014] eKLR, the Court of Appeal held that the BPRT could grant an *ex parte* injunction pending hearing of an application *inter partes* but in the present case, the BPRT issued injunctive orders pending the hearing of the suit thus acted ultra vires. He further stated that section 12(4) of the Cap. 301 cannot grant a power that is not donated by parliament. He submitted that a temporary injunction can only be issued for fourteen (14) days and not more. He prayed for orders sought and for costs.

RESPONDENT'S SUBMISSIONS

8. Mr. Makuto, Learned Counsel appeared for the respondent. He submitted that the Section 2(a) and (b) of Cap. 301 provides that if an agreement has a termination clause, as in this case, it falls under the BPRT and as such, the tenancy was a controlled one. The tenancies herein therefore fell under the jurisdiction of the BPRT. He relied on the case of **Bernadette Magome Nyakabaria** (supra) where the court held that if there is a termination clause, the agreement falls under the BPRT.

9. He further stated that article 165 of the Constitution provides that a subordinate court includes a local tribunal as established by an Act of parliament under section 63 of the Civil Procedure Act and that subordinate courts are granted powers to issue orders of an injunction, thus the BPRT had authority to issue the orders it granted.

10. Counsel cited the case of **Republic vs Rent Tribunal & Another ex parte Albert Kigera Karume** [2015] eKLR which states that any Act of parliament must be read in conformity with the Constitution and that previous authorities must be read in tandem with the Constitution.

11. Counsel also relied on the Court of Appeal decision in **John Mugo Ngunga vs Margaret M. Murangi** (supra) where the court held that the BPRT had jurisdiction to issue an injunction but not a mandatory injunction that was issued *ex parte*. Mr. Makuto informed this court that it is bound by the Court of Appeal decision.

INTERESTED PARTIES' SUBMISSIONS

12. Mr. Siminyu, Learned Counsel for the interested parties submitted that the BPRT issued the orders restraining the landlord from evicting, harassing and interfering with the enjoyment of the tenancies of the interested parties. Counsel contended that the ex-parte applicant did not exhaust all avenues available to him under Cap 301. He argued that Sections 12(1) (i) and 15 of the said Act create remedies in instances where errors have been committed. He added that courts have frowned upon a party who does not follow procedures provided by the Constitution and the statutes. He referred to the case of the **Speaker of the National Assembly vs James Njenga Karume** [1992] eKLR.

13. Mr. Siminyu, stated that the applicant did not prefer an appeal or apply for review of the orders of the BPRT. He prayed for the application to be dismissed with costs.

EX PARTE APPLICANT'S RESPONSE

14. Mr. Khatib argued that in the case of **John Mugo Njunga** (supra) the Court of Appeal cited the case of **Shah Vershi Devshi & Co. Ltd. vs the Transport Licensing Board** [1970] EA 631 which provides that alternative remedy does not preclude the applicant from seeking relief by way of certiorari. He added

that the complaint filed in the BPRT does not conform to the nature of a suit so as to be within the confines of the BPRT. He prayed for the application to be allowed.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) the tenancy agreement in issue fell within the confines of a controlled tenancy; and
- (ii) If the ex-parte applicant is deserving of the Judicial Review orders of prohibition and certiorari.

15. The tenancy agreements entered into by the ex-parte applicant and the interested parties on 1st April, 2010 were to elapse on 31st March, 2016. They were thus to run for a duration of 6 years. Clause (b) of the special conditions of the said agreements was to the following effect ***“the tenancy can be terminated by either parties (sic) giving three calendar month (sic) notice in writing AND the lessee hereby agrees to accept this lease subject to the condition aforesaid.”*** The ex-parte applicant and the interested parties executed the said agreement subject to the foregoing term amongst others.

16. Section 2 of Cap. 301 defines ***“controlled tenancy”*** to mean 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 (emphasis added);***
 - (iii) *Relates to the premises of a class specified under sub section (2) of this Section; provided that no tenancy to which the Government, the Community or a local authority is a party; whether as landlord or as tenant, shall be a controlled tenancy.*

17. Although Counsel for the respondent and the interested parties argued that the tenancies in issue fell within the ambit of controlled tenancy, my view is to the contrary. Although clause (b) of the special conditions of the lease agreements in issue provided for termination of the tenancies by either party giving three calendar months' notice in writing, the clause did not expressly limit the duration within which notices could be issued to five years. The provisions of the said clause were open ended and not in consonance with the definition of what comprises a controlled tenancy. It therefore follows that the ex-parte applicant could give notice to the interested parties to vacate the premises within a period of five (5) years from the commencement of the lease agreements or after the commencement of the 6th year of the lease period. The the interested parties were also at liberty to issue notices to the ex-parte applicant.

18. The notices herein were issued on 29th October, 2015. The interested parties were expected to vacate the leased premises on 31st March, 2016, which means that the notice to vacate the premises fell within the 6th year of the lease agreement. The notices were issued five months to the expiry date of the lease agreements.

19. It is my finding therefore that no stretch of imagination can place the tenancies in issue within the ambit of controlled tenancies. It is my considered view that by virtue of the provisions of Section 2(a) (i) and (ii) of Cap. 301, the tenancies do not qualify to be controlled tenancies. Having so held, it follows that the BPRT had no jurisdiction to hear the application filed before it by the interested parties. Muchemi J. in the case of **Mugo Holdings Limited vs Attorney General & Another** [2016] eKLR held that a tenancy agreement that was for a duration of 6 years was not a controlled tenancy within the

meaning of section 2 of Cap. 301.

20. Counsel for the interested parties argued that the ex parte applicant should have moved the BPRT under the provisions of Section 12(1)(i) or appealed to the High Court under Section 15 of Cap. 301. In the case of **Bahaji Holdings Ltd. vs Abdo Mohamed Bahaji & Company Ltd & Another**, Civil Application No. Nai 97 of 1998 (UR) the court had the following to say:-

“.....without saying anything more, we would point out this court has recently as on 22nd April, 1998 held in the case of David Mugo t/a Manyatta Auctioneers vs Republic, Civil Appeal No. 265 of 1997 (unreported) that the remedy of Judicial Review is available, in appropriate cases, even where there is an alternative legal or equitable remedy. In his judgment in the said case Chesoni C.J. said; “with respect to the Learned Judge the existence of an alternative remedy is no bar to the granting of an order of certiorari”

21. In the case referred to by Mr. Khatib in **Shah Vershi Devshi & Co. Ltd. vs The Transport Licensing Board** [1970] EA 631, the Court of Appeal stated thus:

“.....The existence of an alternative remedy does not preclude the applicant from seeking relief by way of certiorari and although it can hardly be said that speedy justice, the object of certiorari has been achieved in this case. The remedy of certiorari appears nevertheless to be speedier than the alternative one of appeal to the appeals tribunal”

22. Following this Court’s analysis of the facts surrounding this case, I find that this was appropriate for the ex-parte applicant to move the court for Judicial Review orders. Taking a cue from the foregoing decisions on this issue, the ex-parte applicant cannot be faulted for opting to pursue the settlement of his grievance under the provisions of order 53 of the Civil Procedure Rules.

23. On the issue of grant of judicial review orders of certiorari and prohibition, the court had the following to say in the case of **Republic v Chief Magistrate Milimani Commercial Court & 2 others ex-parte Violet Ndanu Mutinda & 5 others** [2014] eKLR:-

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

24. The Supreme Court practice of England 1997 vol. 53/1-14/6 states:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision – making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a “Court of Appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power. Lord Brightman in Chief Constable of North Wales Police vs. Evans [1982] 1 WLR 1155 P 1173.”

25. To shed light on the Wednesbury principle; it states that -

“Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.” See Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223 per Lord Green MR.

26. In considering whether an order of certiorari should issue to quash the decision of the BPRT of 29th February, 2016 and if an order of prohibition should be issued prohibiting the respondent from proceeding further with the hearing of BPRTC case No. 18 of 2016, Khalif Jele Mohamed and Salat Hussein vs Abdulkadir Hubess, I am guided by the parameters of Judicial Review that were set out by the Court of Appeal in **National Examinations Council exparte Gathenji & Others**, Civil Appeal No. 266 of 1996. The Court of Appeal stated thus:-

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made....Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

27. Having considered the submissions of Counsel, the authorities cited and the applicable law, it is my finding that the BPRT abrogated upon itself powers it did not have by making a decision in the matter the subject of this application. In so doing, it acted ultra vires. The orders that commend themselves to me are that:-

(i) An order of certiorari is hereby issued to bring into this court and quash the proceedings and order of the Chairman Business Premises Rent Tribunal made on 29th February, 2016 in Mombasa BPRT case No.18 of 2016, Khalif Jele Mohamed and Salat Hussein versus Abdulkadir Hubess;

(ii) That an order of prohibition is hereby issued to prohibit the respondent from proceeding further with the hearing of BPRTC No.18 of 2016, Khalif Jele Mohamed and Salat Hussein versus Abdulkadir Hubess; and

(iii) The interested parties herein shall pay the costs of this application.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 23rd day of February, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the ex-parte applicant

No appearance for the respondent

Mr. Siminyu for the Interested parties

Oliver Musundi - Court Assistant