REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 508 OF 2015

IN THE MATTER OF LANDLORDS AND TENANTS (SHOPS, HOTELS AND CATERING ESTABLISHMENT) ACT CAP 301

AND

IN THE MATTER OF LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA, SECTIONS 8 & 9

AND

IN THE MATTER OF APPLICATION BY WAY OF JUDICIAL REVIEW FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI AGAINST THE BUSINESS PREMISES RENT TRIBUNAL ESTABLISHED UNDER CAP 301 LAWS OF KENYA

REPUBLIC……...……...APPLICANT

VERSUS

BUSINESS PREMISES RENT TRIBUNAL…...…….RESPONDENT

AND

JOHN MWANGI MUTURI…….…….....…….1ST INTERESTED PARTY

MEDROS LIMITED……..…...…….2ND INTERESTED PARTY

WARLEEN TRADERS (K)……..……..3RD INTERESTED PARTY

THE HON. ATTORNEY GENERAL…….....4TH INTERESTED PARTY

RULING

Introduction

1. On 18th December, 2015, this granted leave to the applicant herein to apply for judicial review for the following orders:

(a). certiorari to remove the order of the Business Premises Rent Tribunal given on 20th

November 2015 for purposes of being quashed and that the said order be and is hereby quashed.

(b). mandamus and or prohibition prohibiting the Business Premises Rent Tribunal from issuing punitive orders against the ex-parte Applicants before the complaint filed in the Business Premises Rent Tribunal cause No. 630 of 2015 is fully heard and determined.

2. The Court also granted directed in the nature of stay that the said leave would operate as a stay of the decision which was under challenge.
3. Subsequently, the 1st and 2nd interested parties (herein referred to as "the objectors") by their Motion on Notice dated 23rd December, 2015 applied for an order striking out the said application for leave and for the variation and setting aside of the said orders. It is this application that is the subject of the present ruling.
4. According to the objectors, the ex parte applicant herein applied for a raft or injunctive orders against the objectors, who were the ex parte applicant's landlord, which orders were granted at the ex parte stage. It was averred that the said injunctive orders were issued without disclosure of the fact that the disputed rents for August, September and October were outstanding. Upon these suppressed facts being brought to the attention of the Tribunal by the landlord, the Tribunal directed that the same arrears amounting to Kshs 120,000.00 be paid on or before 6th December, 2015 and in default the landlord be at liberty to levy distress for the same. These facts, it was contended were not disclosed to the Court at the time the Court granted leave and stay aforesaid.
5. It was therefore contended that the current application was based on illegality and unconstitutionality as the ex parte applicant is now in arrears of Kshs 530,000.00. To the said interested parties, these proceedings lack substance and are brought with ulterior motive or for some collateral one to gain collateral advantages by failure to pay rent hence amounts to an abuse of the Court process.
6. It was submitted that the orders of the Tribunal made on 20th November, 2015 were issued by consent of both parties based on the agreed due rents.
7. It was submitted, apart from the foregoing issues, that this Court sitting as a judicial review Court does not have the jurisdiction to sit on appeal against the orders of the Tribunal and that it is only the Commercial Court that can properly do so. To the objectors, this Court cannot invalidate and stop private proceedings that are properly filed before the Tribunal between the two individuals.
8. In opposition to the application the ex parte applicant raised the following preliminary objections:

1. **The application is bad in law as it violates to the provisions of Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules.**
2. **The application violates the provisions of Order 51 of the Civil Procedure Rules.**
3. **Hearing of the said application may lead to the 4th Interested Party, the Hon. Attorney General being condemned unheard.**
4. **Leave has already been granted to file a substantive motion within 21 days and there is therefore nothing pending to be struck out before the substantive Notice of Motion is filed and served.**
5. **The issues raised in the application are matters of evidence which can only be dealt with after a substantive motion is filed.**

9. On behalf of the ex parte applicant it was contended that leave having been granted and the substantive Motion having been filed and served, the objectors have no role to play at this stage since the decision whether or not to grant leave is an exercise of discretion. It was submitted that the present application is an attempt to jump the gun instead of dealing with the already filed motion. To the ex parte applicant, the issues raised herein dwell on the merits hence it is an invitation for the Court to sit on appeal on its own decision.
10. I have considered the issues raised herein. According to the objectors, this Court sitting as a judicial review Court does not have the jurisdiction to sit on appeal against the orders of the Tribunal and that it is only the Commercial Court that can properly do so. To the interested parties, this Court cannot invalidate and stop private proceedings that are properly filed before the

Tribunal between the two individuals.

11. The Constitutional foundation of the High Court's jurisdiction sitting as a judicial review Court is Article 165(6) of the Constitution which provides as follows:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

12. Under Article 169(1)(d) of the Constitution, Subordinate Courts include:

any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).

13. The Business Premises Rent Tribunal is a Tribunal established pursuant to section 11 of the ***Landlord and Tenant (Shops, Hotels and Catering Establishment) Act***, Cap 301 Laws of Kenya. It is therefore a local tribunal established by an Act of Parliament hence subject to the supervisory jurisdiction of this Court.

14. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

"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...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...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."

15. Where therefore a statute donates powers to an authority, the authority ought to ensure that the

powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others and based on **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** the courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

16. Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**
17. It therefore does not matter whether the Tribunal is dealing with a dispute between two individuals. As long as it is alleged that the process adopted by the Tribunal is faulty for example by violating the rules of natural justice, the judicial review Court would be entitled to step in.
18. Accordingly I disabuse the objectors of the notion that this Court has no jurisdiction to inquire into the allegations which are the subject of these proceedings.
19. The next issue on jurisdiction was raised by the ex parte applicant to the effect that leave having been granted, the only option available to the objectors was to oppose the Motion itself and not to challenge the grant of leave. That this Court has jurisdiction to set aside leave and/or stay granted in judicial review proceedings is not in doubt. The Court of Appeal made this clear in **R vs. Communications Commission of Kenya & 2 Others ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it held:

"Leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the Court, to the Judge who granted leave to set it aside."

See also **Njuguna vs. Minister for Agriculture Civil Appeal No. 144 of 2000 [2000] 1 EA 184.**

20. However as was expressed in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR**:

"Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

21. Similar sentiments were expressed by the same Court in **Aga Khan Education Service Kenya vs. Republic & Others Civil Appeal Number 257 of 2003, the Cort of Appeal** where the court pointed out that:

"We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

22. On what amounts to material facts it was held in **Brink's MAT Ltd vs. Elcombe [1988] 3 All ER CA 188** that:

"…The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers…"

23. This position as appreciated by **Ibrahim, J** (as he then was) in **Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya [2005] 1 KLR 242** where he held:

"The requirement of full and frank disclosures by applicants in judicial review is the same as in injunction applications. There is no criteria for lowering of standards in the said statements. It does not matter the type of case or matter, once a matter is before the Court in the absence of another or other parties (*ex parte)* the duty of full and frank disclosures are imposed on applicants and the standard must always be fairly high considering the authorities. The rule of the court requiring *uberima fides* on the part of an applicant for an *ex parte* injunction applies equally to the case of an application for the rule *nisi* for a writ of prohibition and if there is suppression of material facts by the applicant, the Court would refuse a writ of prohibition without going into the merits of the case. It is the duty of a party asking for an injunction to bring under the notice of the court all the facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts, which he has omitted to bring forward. Every fact must be stated, or even if there is evidence enough to sustain the injunction, it will be dissolved. If the applicant does not act with *uberima fides* and put every material fact before the court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application. Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant and once that confidence is undermined, he is lost. The court must insist on strict compliance with the rules pertaining to non-disclosure to afford protection to the absent parties at the *ex parte* stage…An applicant and its counsel are required to carry out a diligent inquiry on all the facts including the applicable law before making an *ex parte* application and it is the duty of an applicant to inquire as to whether there exists an alternative remedy… It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant. This is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure; failure to do so will result, in appropriate cases, in the discretion of the Court being exercised against (a claimant) in relation to the grant of (a remedy)."

24. In this case, it was the ex parte applicant that invoked the jurisdiction of the Tribunal for injunctive orders, whose grant is an exercise of discretion which must be exercised judicially. In so exercising the jurisdiction the injunction may be granted on terms which are just. In this case the terms were with respect to payment of arrears. The Tribunal no doubt had jurisdiction to impose such conditions even at the ex parte stage of the proceedings before it. Whether or not the

same were just can only be challenged in an appellate Tribunal as that is an issue that goes to the merits of the decision.

25. Of concern however is the fact that the applicant presented his case and obtained the leave and the stay on the basis that the said orders were granted without him being afforded a hearing. It is now clear that that position was clearly incorrect and the ex parte applicant was no doubt aware of the fact but decided to conceal the same from the Court in order to obtain favourable orders. Such conduct in my view amounts to an abuse of the Court process.

26. Where the Court finds that its process is being abused, it has the inherent power to terminate the proceedings without going to the merits of the case. This position was appreciated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** where he expressed himself as follows:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

27. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005** held:

"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

28. What then should the Court do when at *inter partes* hearing it turns out that the applicant did not disclose material facts? It is trite that where a party, at the *ex parte* stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. This was the position adopted in **Hussein Ali & 4 Others vs. Commissioner of Lands, Lands Registrar & 7 others (2013) eKLR** where it was held that:

"It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it."

29. See also **R vs. Kensington Income Tax Commissioners, ex p. Princess Edmond de Polignac [1917] 1 KB 486** and **The Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited C.A. No. 50 of 1989** .
30. In **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others Civil Application No. Nai. 140 of 1995,** it was held that if the Court finds at the time of *inter-partes* hearing that there was lack of disclosure at the time of *ex-parte* application it should strike out the application. In **Margaret Nduati & Another vs. Housing Finance Company of Kenya Nairobi (Milimani) HCCC No. 307 of 2001** it was held that a person who makes an *ex parte* application to the Court is under an obligation to the Court to make the fullest possible disclosure of material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceeding and he will be deprived of any advantage he may have already obtained by means of the order, which has thus wrongly been obtained by him.
31. In **Johnson Kimeli vs. Barclays Bank of Kenya Ltd. Kisumu HCCC No. 171 of 2003**, it was held that:

    "Where the plaintiff is seeking an equitable remedy he must show a good account of himself for the Court would be reluctant to extend its hand to a person with dirty and unclean hands for he would soil the hands of justice. Secondly a Court would not allow a person to benefit from his own wrong for that would amount to judicial treason...The failure to make a candid disclosure of all material and essential facts would militate against the person concealing that evidence or facts from the Court...There is an obligation upon a person seeking an equitable remedy of injunction to make full disclosure and to show expression of good faith... The courts would be strict on non-disclosure of material facts by a party seeking an *ex parte* order more so when he has obtained the orders by concealing important material from the Court at the first instance."

32. For a party to fail to disclose material facts or to disclose them in such a way as to mislead the court as to the true facts, amounts to abuse of the Court process and the court ought, for its own protection and to prevent an abuse of the process, to refuse to proceed any further with the examination of the merits.
33. On the grounds of non-disclosure and abuse of the Court process alone this Court is entitled to set aside and vacate the orders granted herein on 18th December 2015 and to strike out these proceedings.
34. In the premises I set aside the orders granted herein on 18th December, 2015 and strike out the application dated 17th December, 2015. Without leave these proceedings are still-born. It follows that these proceedings are rendered incompetent and are struck out with half the costs to the 1st and 2nd interested parties.
35. It is so ordered.

Dated at Nairobi this 25th day February, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Omondi for the ex parte applicant

Mr Macharia for the Interested Party/Objector

Cc Patricia