



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 457 OF 2014**

REPUBLIC.....APPLICANT

VERSUS

THE BUSINESS PREMISES RENT TRIBUNAL..... RESPONDENT

AND

MARKET FANCE EMPORIUM.....INTERESTED PARTY

EX-PARTE

ASHWIN ISHWARAL T/A BATIK HERITAGE

**JUDGEMENT**

1. Upon obtaining the leave of the court to commence these judicial review proceedings, the ex-parte Applicant (the Applicant) Ashwin Ishwaral t/a Batik Heritage filed the notice of motion dated 15<sup>th</sup> December, 2014. By the said notice of motion, as amended on 6<sup>th</sup> February, 2015, the Applicant prays for orders that:

**“1. An order of *certiorari* removing to the High Court for the purposes of quashing the decision of the Respondent delivered on the 28<sup>th</sup> day of November 2014 in Business Premises Rent Tribunal Case No. 668 of 2012 Nairobi and in particular the following orders;**

**(a) The Rent payable by the tenant is assessed at Kshs.43,000/= per month exclusive of site value tax, land rent, water, electricity and other outgoings with effect from 1<sup>st</sup> November 2012;**

**(b) The tenant shall pay the landlord costs of this reference to be assessed by the tribunal or agreed by the parties.**

**2. Costs of and incidental to the application be provided for;**

**3. Such further or other relief as the Honourable Court may deem just and expedient to grant.”**

2. The Business Premises Rent Tribunal (the Respondent) and the Market Fancy Emporium Limited (the Interested Party) opposed the application.
3. From the statutory statement, the verifying affidavit of Deepak Maru and the annexures thereto filed on 5<sup>th</sup> December, 2014 together with the chamber summons application for leave, the Applicant's case is that he is a tenant of the Interested Party.
4. Through a tenancy notice dated 17<sup>th</sup> August, 2012, the Applicant was informed by the Interested Party that monthly rent would be increased from Kshs.26,800/= to Kshs.55,000/=. The Applicant was aggrieved by the said tenancy notice and on 14<sup>th</sup> September, 2012 instituted **Nairobi BPRT Case No. 668 of 2012** before the Respondent.
5. In a decision delivered on 28<sup>th</sup> November, 2012, the Respondent assessed the monthly rent payable by the Applicant with effect from 1<sup>st</sup> November, 2014 at Kshs. 43,000/= exclusive of site value tax, land rent, water, electricity and other outgoings.
6. The Applicant seeks a review of the Respondent's decision on the grounds that it was unreasonable and based on an error of law.
7. According to the Applicant, the Respondent failed to take into account Section 9(3)(a) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 (the Act) which provides that no further tenancy notice shall be given prior to the expiry of two years in respect of premises over which the Respondent has made a determination upon a reference.
8. The Applicant states that the premises in question was the subject of a judgment delivered on 10<sup>th</sup> September, 2010 by the Respondent in **BPRT No. 189 of 2010, Ashwin Ishwarlal Maru t/a Batik Heritage v Market Fancy Emporium Ltd** and as such no tenancy notice could issue prior to 10<sup>th</sup> September, 2012. It is therefore the Applicant's position that the Respondent's decision was based on an error of law and ought to be quashed.
9. On the claim that the Respondent's decision was unreasonable, the Applicant avers that the decision to backdate the rent payable by the Applicant to 1<sup>st</sup> November, 2012 is manifestly unreasonable as the Respondent failed to take into consideration the fact that the Respondent could not operate for two years owing to the existence of a vacancy in the office of its Chairman. Thus, it was unreasonable for the Respondent to condemn the Applicant to bear the consequences of such vacancy, more so that the Applicant was not responsible for such vacancy. Further, that the Applicant was not responsible for the delayed delivery of judgment by the Respondent.
10. The first ground upon which the Respondent opposes the notice of motion is that the same is defective. In support of this assertion the Respondent states that the facts and grounds upon which the relief is sought by the Applicant are not specific nor clear thus rendering the application incompetent. The Respondent points to the chamber summons application dated 13<sup>th</sup> February, 2015 to demonstrate the incompetence of the Applicant's case.
11. It is also the Respondent's case that the said chamber summons does not disclose the orders sought even though the substantive notice of motion application dated 6<sup>th</sup> February, 2015 has identifiable prayers.
12. In addition, the Respondent asserts that the reliefs sought are not the same with those for which leave was granted.
13. Further, that the application is not brought in the name of the Republic as required by Order 53 of the Civil Procedure Rules.

14. The next ground upon which the Respondent opposes the application is that the Applicant has not established grounds for grant of judicial review orders. It is the Respondent's view that the decision to vary the rent payable by the Applicant was within its jurisdiction as granted by Section 12 of the Act.

15. The Interested Party supported the Respondent's position. It is the Interested Party's case that the Respondent had the requisite jurisdiction to determine the matter at hand and no grounds have been established to warrant the grant of an order of mandamus. Also that the application lacks specificity in terms of statutory or administrative laws allegedly breached by the Respondent.

16. In support of its position, the Interested Party relied on, among other decisions, the decisions in the cases of **Municipal Council v Republic and Umoja consultants Limited, Civil Appeal No. 185 of 2001; Republic v Permanent Secretary Ministry of Housing and another [2014] eKLR**; and **East African Railways Corporation v Anthony Sefu [1973] EA 327**.

17. Upon considering the pleadings and submissions before this court, I find the issues for determination are:

- a) Whether there is a competent application before this court; and
- b) Whether the Applicant has established grounds for grant of relief.

18. I have already set out the parties' positions on the identified issues. The Respondent has given various reasons as to why the Applicant's notice of motion should be declared incompetent.

19. In its further submissions, the Applicant asserts that his application is competent and it is the Respondent which is confusing issues.

20. The court record speaks for itself. On 5<sup>th</sup> December, 2014 I granted leave to the Applicant to apply for an order of certiorari as prayed in the chamber summons application dated the same date. The key prayer in the application for leave was:

**"2. Leave be granted to the applicant herein to apply for Judicial Review Orders, to wit; An order of certiorari removing to the High court for the purposes of quashing the decision of the Respondent delivered on the 28<sup>th</sup> day of November 2014 in Business Premises Rent Tribunal Case No. 668 of 2012 Nairobi and in particular the following orders:**

- a. The Rent payable by the tenant is assessed at kshs.43,000/= per month exclusive of site value tax, land rent, water, electricity and other outgoings with effect from 1/11/2012;**
- b. The tenant shall pay the landlord costs of this reference to be assessed by the tribunal or agreed by the parties."**

21. On 15<sup>th</sup> December, 2014 the Applicant filed the substantive notice of motion in which the prayer for an order of certiorari was reproduced as per the leave granted on 5<sup>th</sup> December, 2014.

22. On 30<sup>th</sup> January, 2015 the Applicant filed a notice of motion praying to amend the substantive notice of motion filed on 15<sup>th</sup> December, 2014. That application was allowed by my brother Odunga, J on 2<sup>nd</sup> February, 2015.

23. The grant of leave to amend was swiftly followed by the already reproduced amended notice of motion dated 6<sup>th</sup> February, 2015.

24. On the date of the filing of the amended notice of motion, the Applicant also filed a chamber summons application seeking, among other orders, stay of **BPRT Case No. 848 of 2014**. This particular chamber summons which was amended on 13<sup>th</sup> February, 2015 was withdrawn by the Applicant on 18<sup>th</sup>

February, 2015. This already withdrawn application is the one which the Respondent erroneously refers to as the chamber summons application for leave.

25. From the above chronology of the events, it follows that the Respondent's allegation of incompetence or defectiveness of the Applicant's case has no basis. The Applicant obtained the leave of the Court before amending his substantive notice of motion. The facts relied on and the relief sought are found in the statutory statement and verifying affidavit filed with the application for leave on 5<sup>th</sup> December, 2014. The relief sought through the amended notice dated 6<sup>th</sup> February, 2015 is the one for which leave was granted on 5<sup>th</sup> December, 2015.

26. The Respondent's attack on the Applicant's case on grounds of incompetency therefore fails.

27. On the second issue, I note that the Applicant is in essence alleging that the Respondent acted without jurisdiction by upholding a tenancy notice that had been issued in breach of Section 9(3)(a) of the Act. The Respondent and Interested Party insisted that the Respondent has the mandate to vary rent. The Interested Party went ahead and submitted that two years started running from the date the tenancy notice was to take effect namely 1<sup>st</sup> November, 2012 and not 17<sup>th</sup> August, 2012 when it was issued.

28. I have looked at the undated decision delivered by the Respondent in **BPRT No. 668/2012 Nairobi** and I find that the issue was not addressed despite the same having been clearly raised through the submissions filed before the Respondent on 10<sup>th</sup> September, 2014 by the Applicant's counsel.

29. The parties do not dispute the fact that the Respondent delivered a judgement in **BPRT No. 189 of 2010** on 10<sup>th</sup> September, 2010. The reference arose from a rent dispute between the Applicant (as a tenant) and the Interested Party (as the landlord) over the same premises, for which the Interested Party issued a tenancy notice to the Applicant on 17<sup>th</sup> August, 2012.

30. Section 9(3) (a) of the Act provides that:

**“(3) Where a Tribunal has made a determination upon a reference, no further tenancy notice shall be given in respect of the premises concerned, which is based on any of the matters affected by the determination -**

**(a) in the case of an assessment of rent, until after the expiration of two years;”**

31. The said Section is clear that once the Respondent determines a reference in respect of certain premises, no tenancy notice shall issue in respect of the premises concerning matters affected by the determination until after the expiry of two years.

32. The tenancy notice issued by the Interested Party was issued prior to 10<sup>th</sup> September, 2012 when the two years would have lapsed from 10<sup>th</sup> September, 2010 when a decision had been issued on a reference over a rent dispute between the same tenant and landlord over the same premises.

33. The Respondent ought not to have sanctioned the tenancy notice by varying the Applicant's rent as the same was issued in contravention of a clear provision of the law. By hearing the matter, the Respondent acted without jurisdiction. Its action was thus *ultra vires*.

34. In the circumstances I agree with the Applicant that the Respondent acted in error of the law. Its decision and the proceedings leading to that decision are therefore called into this court and quashed.

35. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of Feb., 2016

**W. KORIR,**

**JUDGE OF THE HIGH COURT**