



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL, JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 49 OF 2015

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLE 22 AND ARTICLE 23(F)

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE RENT RESTRICTION ACT CAP 296

AND

IN THE MATTER OF: RENT RESTRICTION TRIBUNAL CASE NO. 158 OF 2015

AND

IN THE MATTER OF: BENEDICT WAMBUA KENZI SEEKING LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS

AND

IN THE MATTER OF: THE DECISION AND ORDER MADE EX PARTE BY THE DEPUTY
CHAIRMAN OF THE RENT RESTRICTION TRIBUNAL RESTRICTION CASE NUMBER 158 OF
2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DEPUTY CHAIRMAN RENT RESTRICTION

TRIBUNAL.....RESPONDENT

AND

JOYCE AWUOR OBENGELE.....INTERESTED PARTY

BENEDICT WAMBUA KENZI.....EX PARTE APPLICANT

RULING

1. Pursuant to leave granted on 26th October, 2015, the ex parte Applicant filed on 12th November, 2015 a Notice of Motion dated 3rd November, 2015 and sought -

(a) an order of certiorari to remove to the High Court and quash the ex parte orders made by the Deputy Chairman of the Rent Restriction in the Rent Restriction Case No. 158 of 2015, and all the consequential orders enumerated therein;

(b) an order of prohibition to prohibit the OCS of Bamburi Police Station from harassing, intimidating, visiting and arresting the applicant in the guise of enforcing the order made on the 8th October, 2015.

2. The Notice of Motion was based upon the Statutory Statement dated 23rd October, 2015 and the Affidavit Verifying the Facts of the Applicant Benedict Wambua Kenzi sworn on the 23rd October, 2015 and filed in support thereof and the application for leave annexed thereto, and the written submissions of counsel for the ex parte Applicant dated 10th May, 2016.

THE APPLICANT'S CASE

3. The Applicant's case is that the Respondent, the Rent Restriction Tribunal has no jurisdiction to issue the orders it did, in terms of Section 2 of the Rent Restriction Act, (Cap 296, Laws of Kenya). Counsel also relied upon the case of **THE MOTOR VESSEL "SS LILIAN" VS. CALTEX MOTOR OIL (K) LIMITED [1989] KLR**.

4. The ex parte Applicant also relied upon the case of **ISAAC VS. ROBERTSON [1984] 3 ALL ER 140**, that an order made in breach of the rules of natural justice is liable to be set aside in the interests of justice even without replying for its setting aside in the regular procedure for setting aside of judgments and orders.

5. For those reasons, the ex parte Applicant urged the court to exercise its discretion and grant the orders sought in the Notice of Motion.

RESPONDENTS'S CASE

6. The Respondent's counsel was of the view that the dispute was between the ex parte Applicant and the Interested Party, and urged the court to rule according to law.

THE INTERESTED PARTY'S CASE

7. The Interested Party's case is summed up in the Replying Affidavit of Joyce Awuor Obengele, the Interested Party, sworn and filed on 1st March, 2016, and the Further Affidavit sworn and filed by the Interested Party on 22nd March,, 2016. In addition thereto, the Interested Party also filed on 6th May, 2016 written submissions dated 5th May, 2016.

8. The Interested Party's case is that there is pending in the Rent Restriction Tribunal Case No. 158 of 2015, in which the Interested Party seeks orders to be declared a protected tenant, that the applicant evicted the Interested Party from the premises, and distrained her goods and had refused to return her goods to her. The Interested Party denied owing the ex parte Applicant any rent arrears, and that the ex parte Applicant's actions are not justified.

9. The Interested Party further argued that the Rent Restriction Tribunal has real power, that is, jurisdiction to determine that the Interested Party is a protected tenant, and that the ex parte Applicant has no right to challenge that jurisdiction, and that in any event the ex parte Applicant has opportunity to raise that challenge before the Tribunal itself.

10. The Interested Party also argued that the enforcement of the orders made by the Rent Restriction Tribunal through the Kenya Police is not a violation or infringement of the ex parte Applicant's constitutional rights. It was the ex parte Applicant, the Interested Party argued, who had violated the Interested Party's rights by evicting her and her newly circumcised son from the rented premises, and thus adversely affecting the boy's performance in school.

11. The ex parte Applicant also argued that the Interested Party would not be prejudiced in any way, if the orders sought are not granted, and that precious judicial time would be saved if the Rent Restriction Tribunal were allowed to determine the question before it whether the Interested Party is a protected tenant.

12. For those reasons the Interested Party urged the court to dismiss with costs, the ex parte's Notice of Motion first referred to above.

DETERMINATION

13. I have considered the respective arguments by counsel for the ex parte Applicant and the Interested Party. There is but one issue for determination, and that is, whether the Rent Restriction Tribunal had jurisdiction to grant the mandatory injunction orders against the ex parte Applicant and to determine whether the Interested Party is a protected tenant.

14. Jurisdiction the courts have echoed, times above number, is everything, and lack of it renders the proceedings a nullity and no amount of interpretation can give an institution jurisdiction that it doesn't have. In **MOTOR VESSEL "SS LILIAN"** (supra) Nyarangi JA said –

“Jurisdiction is everything without it, the court has no power to make one more step. A court lays down its tools in respect of the matter before it the moment it holds the opinion that it's without jurisdiction.”

15. The Supreme Court in its Advisory Opinion, in the **MATTER OF ADVISORY OPINION OF THE SUPREME COURT**, under Article 163(3) of the Constitution, Constitutional Application No. 2 of 2011, restated the principle in the **Motor Vessel "SS LILLIAN"**, in the following terms –

“The “SS” Lillian” case [1989] KLR, establishes that jurisdiction flows from law and the recipient court is to apply the same with any limitation embodied therein. Such a court may not arrogate to itself jurisdiction through craft of interpretation or by way of endeavour to discern or interpret the intention of Parliament where the wording of legislation is clear and there is no ambiguity”

16. In this regard the Rent Restriction Tribunal is a creature of the law and has only jurisdiction as has been specifically conferred upon it by law. Section 2 of the Rent Restriction Act provides that its provisions extend to all dwelling houses, other than –

- (a) excepted dwelling houses;
- (b) dwelling houses let on service tenancies;
- (c) dwelling houses which have a standard rent not exceeding two thousand, five hundred shillings (Kshs. 2,500/) per month, furnished or unfurnished.

17. Under Section 3 of the Rent Restriction Act “*Standard rent*” in relation to unfurnished dwelling house, means if on January, 1981, it was let unfurnished, the rent, at which it was lawfully so let, the

landlord paying all outgoings.

18. This means in my understanding that the **standard rent** that is established for a dwelling house is that which was there on the first of January, 1981. It seems to me therefore, that once this fact is known and established, the need for assessment of standard rent is eliminated. It becomes clear that the jurisdiction of the Rent Tribunal is specifically defined, and it relates to a standard rent which does not exceed Kshs. 2,500/= per month. There is no denial by the Interested Party that at the time the jurisdiction of the Rent Tribunal was invoked, the Interested Party was paying Kshs. 6,000/= per month. Consequently, the Rent Restriction Tribunal cannot appropriate or arrogate to itself jurisdiction where the standard rent is Kshs. 6,000/= per month. The tribunal thus acted in excess of its jurisdiction.

19. In **REX VS. ELECTRICITY COMMISSIONERS, ex parte London electricity Joint Committee Company Limited [1920]** the court said –

“If proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result into its final decision being brought up and quashed on certiorari, I think that prohibition will be to restrain it from exceeding its jurisdiction.”

20. It is thus clear that from the Interested Party’s own case that the Rent Restriction Tribunal has no jurisdiction to entertain her complaint. A discussion on the mandatory injunctive orders to reinstate the Interested Party into the premises which, according to the ex parte Applicant already had a new tenant, would end with the same condition that the Rent Restriction Tribunal had no jurisdiction to make such orders, and in any event mandatory injunctive orders are in the nature of final orders, were in breach of the rules of natural justice as they were ex parte, that is, without affording the ex parte Applicant an opportunity to be heard.

21. An order made in breach of the rules of natural justice is liable to be set aside in the interests of justice even without applying for its setting aside in the regular procedure for the setting aside of judgments and orders. As Lord Diplock said in the House of Lords in **Isaac vs. Robertson [1984] 3ALL ER 140** –

“...there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and to give to the Judge a discretion as to the order he will make. The Judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside save that specifically it includes orders that have been obtained in breach of natural justice.”

DISPOSITION

22. In summary, the Respondent had no jurisdiction to entertain the application in respect of the ex parte Applicant’s dwelling house. The entire ex parte order was irregular, fatally defective and bad in law, and would in ordinary civil procedure suit be liable to be set aside, discharged and/or vacated. An order of the Rent Restriction Tribunal in Tribunal Case No. 158 of 2015 made for the return of the Interested Party’s goods and reinstating the Interested Party into the dwelling house and enforcement of the orders by the local Police, without hearing the ex parte Applicant and therefore in breach of the rules of natural justice, and without jurisdiction, are **ex debito justitiae** later to be set aside.

23. For all those reasons, there shall issue an order of certiorari, to bring to this court and to quash the orders of Rent Restriction Tribunal made on 8th October, 2015 by the Rent Restriction Tribunal (the Respondent) in Rent Tribunal Case No. 158 of 2015.

24. There shall also issue an order of prohibition prohibiting the Respondent the said Rent Restriction Tribunal from hearing Tribunal Case Nol. 158 of 2015, and making any orders thereon, including orders

for enforcement of such orders through the OCS Bamburi Police Station in respect of the ex parte Applicant dwelling house.

25. Gratuitously, the Interested Party has other civil action remedies in respect of the goods distrained, and not these judicial review proceedings.

26. Save as aforesaid, the ex parte succeeds in its Notice of Motion dated 3rd November, 2015, and the ex parte Applicant shall also have the costs of Motion.

27. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 31st day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Mukomba holding brief Kenzi for Applicant

Miss Lutta holding brief Mr. Makuto for Respondent

Interested Party (Ms. Obengele) in person

Mr. S. Kaunda Court Assistant