REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 134B OF 2015

IN THE MATTER OF: AN APPLICATION BY SURAJ HOUSING & PROPERTIES LIMITED, SURAJ PLAZA LIMITED AND SURAJ PLAZA MANAGEMENT LIMITED FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: SECTION 12 of THE BUSINESS PREMISE RENT TRIBUNAL AT, NAIROBI TRIBUNAL CASE NUMBER 55 OF 2015

AND

IN THE MATTER OF: SECTIONS 38 (1)(2) AND (3) OF THE SECTIONAL PROPERTIES ACT NO 21 OF 1987

BETWEEN

REPUBLIC…….APPLICANT

VERSUS

THE CHAIRPERSON, THE BUSINESS PREMISES

RENT TRIBUNAL AT NAIROBI..…..…….…….....……RESPONDENT

ROSEMARY WANGARI CHEGE…….....…..INTERESTED PARTY

EX PARTE:

1. SURAJ HOUSING & PROPERTIES LIMITED

2. SURAJ PLAZA LIMITED

3. SURAJ PLAZA MANAGEMENT LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 13th May 2015, expressed to be brought under the provisions of sections 8 & 9 of the ***Law Reform Act***, Cap. 26 Laws of Kenya, Order 53 Rule 1 (1), (2) and (4) of the ***Civil***

Procedure Rules, section 1A, 1B and 3A of the ***Civil Procedure Act***, the ex parte applicants herein, seek the following :

1. **<u>THAT</u> an order of Certiorari do issue to remove into this Honourable Court and quash the proceedings against, Suraj Housing & Properties Limited, Suraj Plaza Limited and Suraj Plaza Management Limited, in Tribunal Case Number 55 of 2015 at Nairobi and the order therein made on the 10th April 2015.**
2. **<u>THAT</u> an order of Prohibition do issue directed to the Chairperson of the Business Premises Rent Tribunal or his successor in title from continuing with the hearing of the said Tribunal Case Number 55 of 2015 and/or entertaining any matter between the Applicants and the Interested Party pertaining to the issues raised therein.**
3. **<u>THAT</u> the costs of this application be provided for.**
4. **<u>THAT</u> any other order or relief as this Honourable Court may deem fit and expedient to grant.**

<u>Ex Parte Applicant's Case</u>

2. According to the Applicants, they are the developer, lessee and manager respectively of the premises known as L.R No.209/1241 SURAJ PLAZA (hereinafter referred to as "the suit property") whereof they have constructed numerous units for sale therein. They averred that the aforesaid premises are governed by the ***Sectional Properties Act*** under which the 1st applicant offered units within the aforesaid suit property for sale and which were taken up by various individuals including the interested party. To the Applicants, the 3rd applicant upon registration of a sectional plan is and was contemporaneously constituted and is mandated under the ***Sectional Properties Act*** to *inter alia* control manage and administer the common property and do all things reasonably necessary for the enforcement of the by-laws in respect of the suit property.

3. It was deposed that vide a letter of offer dated the 28th October 2013 the interested party was offered for sale by the 1st applicant office space described as units 615,616 and 617 respectively situate within the aforesaid suit property at a consideration of Kshs 2,300,000/- per unit.

4. It was disclosed that on the 20th January 2015, the aforesaid Interested Party filed a complaint against the applicants before the Respondent under section 12(4) of the ***Landlord and Tenants, Shops, Hotels, and Catering Establishments Act***, Cap 301 ("**the Act**") and sections 38(1)(2) and (3) of the ***Sectional Properties Act*** No 21 of 1987 by way of a reference. To those proceedings, the Applicants filed a notice of preliminary objection on the ground that the respondent lacked the jurisdiction to entertain or grant the orders sought. To the Applicants, the jurisdiction of the respondent is specifically provided and or spelt out under the Act and is couched *stricto sensu* that no extrinsic provisions are permissible in its interpretation. To the Applicants, the plain reading of the preamble to the Act is clear that there must exist a landlord tenant relationship for which then jurisdiction follows. However, as the dispute between the Applicants and the Interested Party involved a sale transaction, it was the Applicants' case that the proper court would be a civil court and *in limine* the tribunal had no jurisdiction.

5. The Applicants therefore averred that in so far as the Tribunal entertained the said proceedings when it did not have jurisdiction, its action was void *ab initio* and constituted bad faith and was *mala fide* against the applicants.

6. Nevertheless, vide an order of 10th April 2015 the preliminary objection by the applicants was dismissed with costs in the sum of Kshs 20,000.00 which in effect meant that the tribunal had jurisdiction to entertain the matter pursuant to section 38 of the ***Sectional Properties Act***.

7. According to the Applicants, the said award of costs was not only exorbitant but also far out of scale which also demonstrated some bias. To the Applicants, in so ruling, the Respondent breached the principle of legality and thus proceeding with the matter as intended will further amount to illegality as it shall be using power in a manner totally different from that envisaged by the Act which creates it acted in

excess of jurisdiction.

8. To the Applicants, by so acting the respondent breached the principle of legitimate interests and or expectations of the Applicants as the applicants had expected that the Respondent would strictly follow and adhere to the law yet it opted not to follow the law.

9. It was submitted on behalf of the Applicants that from the clear provisions of the Act and taking into consideration that the Tribunal is a creature of a statute which statute had clearly spelt out the powers of the Tribunal under section 12 (1) thereof, the Tribunal ought to have downed its tools once it was brought to its attention that it had no jurisdiction to entertain the matter.

10. It was the Applicants' legal position ***Sectional Properties Act***, No. 21 of 1987 and in particular section 38(1)(2) and (3) thereof cannot by any stretch of imagination give power and/or extend the jurisdiction of the Tribunal to hear matters that are outside section 12 (1) of the Act. In their view, the fact that section 3 thereof defines a tribunal as a tribunal appointed under section 11 of the Act does not in itself empower the Respondent to entertain the matter which is outside the scope of section 12 (1) of the Act. In failing and/or refusing to down its tools so as to abide by the clear provisions of the Act, the Respondent was accused of having acted unreasonably hence the said order was procedurally *ultra vires*. In support of their submissions, the Applicants relied on **Republic -vs- Business Premises Rent Tribunal and Another, and Exparte Davis Motors Corporation Ltd [2013] eKLR**. Further reliance was placed on **Pritam vs. Ratilal and Another Nairobi HCCC No. 1499 of 1970 [1972] EA 560.**

11. On jurisdiction, the Applicants relied on the holding of **Nyarangi JA** in **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited [1989] KLR 1.**

12. It was submitted that by failing to construe the law under which the Tribunal is established and which led to the dismissal of the Preliminary Objection by the Applicants, the Respondent not only acted wrongly but also deprived the Applicants of a fair hearing before a competent tribunal as required under Article 47 of the Constitution of Kenya 2010 and an outright bias and mala fide against the ex parte Applicants. In this respect the Applicants relied on the findings of **Chesoni, J** (as he then was) in **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195. Respondent's Case**

13. In opposition to the application, the Respondent filed the following grounds of opposition:

1. **THAT Section 38(1) (2) and (3) of the Sectional Properties Act No. 21 of 1987 gives the Business Premises Rent Tribunal mandate to deal with the matter which is the subject of this Application.**
2. **THAT Judicial review cannot be used to curtail or to stop tribunals from the lawful exercise of power within their judicial mandates.**
3. **THAT the Application is an appeal disguised as a Judicial Review Application thus an abuse of court requiring dismissal with costs to the respondent.**
4. **THAT Judicial Review proceeding purely deal with the procedure and process of the decision making and not the merits and /or substance of the case.**
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**

14. It was submitted by the Respondent that the law confers upon the respondent the power to handle everything place upon it for determination. In support of this submission it was relied on sections 11 and 12(1) of the Act as well as sections 3 and 38(3) of the Sectional Properties Act No. 21 of 1987 and contended that since the Tribunal case No.55 of 2015 which is the subject if this Suit was instituted under the said provisions, this means that the respondents had jurisdiction to preside over the same.

15. According to the Respondent, the High Court's jurisdiction in judicial review is circumscribed by the provisions of the ***Law Reform Act*** which confers to the court the jurisdiction to issue any of the three judicial review orders of *Mandamus,* Prohibition or Certiorari the High Court shall have power to make like order based on well settled criteria. In support of the submissions on the grounds upon which such

orders are to be issued, the Respondent relied on **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43, Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR, Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR, Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited, Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR** and **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others (2012) e KLR.**

16. The Respondent's position was that in order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal and that its view, this Application is an appeal disguised as a Judicial Review Application and the same should therefore not be entertained since there is a clear distinction between an appeal and judicial review proceedings. In Judicial review the court is only concerned with the fairness of the process under which the impugned decision or action was reached. Once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision. It cited in support of its case **Municipal Council of Mombasa vs. Republic & another [2002] eKLR** and **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR**.

17. It was submitted that it is important to appreciate that judicial review orders of certiorari, mandamus and prohibition are public law remedies and the Court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant. Accordingly, the Court was urged to decline the issuance of the orders sought in the circumstances of the present case since the Courts while exercising their judicial review jurisdiction have been alive to considerations of public interests in declining the issuance of judicial review even where a party has made out a case of issuance of orders of judicial review. In support of this contention the Respondent cited **Republic vs. Judicial Service Commision Ex-Parte Pareno [2004] KLR 203 at 219** and submitted that the applicant had not demonstrated any breaches of the Law or procedure which would entitle this court to intervene in this matter and grant the orders sought; that it had not been demonstrated that the Respondent was in breach of any statutory provision or that it acted in excess or without jurisdiction or breached rules of natural justice envisaged in a particular statute. Thus, in the Respondent's view, the application did not meet the basic tenets of judicial review application and should be with costs to the Respondent.

Interested Party's Case

18. The interested party's position, on the other hand was that the jurisdiction of the Tribunal to adjudicate matters of sectional property is expressly provided for under the ***Sectional Properties Act***. To the interested party, the dispute between the Applicants and the interested party was on matters of statement of account that is expressly provided for under the Sectional Properties Act under which the Tribunal is mandated under the Act to adjudicate upon.

19. To the interested party, the dispute before the Tribunal was between the owner and the institutional manager over a statement of contributions due and payable in respect of a unit and which is the mandate of the tribunal under the relevant law to adjudicate upon.

20. To the interested party, the grievance of the applicants on the award of costs was not a matter for judicial review. It was contended that since there exist a right of appeal from decisions under the Act, the applicants' grievances did not warrant a remedy in judicial review proceedings..

21. It was therefore contended that the application before the Court was in bad faith, lacks merit and is an abuse of the process of court and prayed that the same be dismissed with costs.

22. It was submitted that under the ***Sectional Properties Act***, the Tribunal had the powers to entertain the dispute before it pursuant to sections 3 and 38(1), (2) and (3) of the said Act notwithstanding that there

was no tenancy relationship between the parties thereto.

23. Based on sections 23 to 25 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, the interested party submitted that since Cap 301 commenced in 1965 while the ***Sectional Properties Act*** commenced in 1990, the latter having provided expressly that the Respondent has jurisdi9ction under the said Act, Parliament must have been intended that jurisdiction of the Tribunal as constituted under Cap 301 was extended to cover the said Act when it provided so under the Act. Based on Meru High Court Petition No. 32 of 2014 – **Meru Bar, Wines & Spirits Owners Self Help Group (Suing through its Secretary) Ibrahim Mwika vs. County Government of Meru** and **John Kinyua Munyaka & 11 Others vs. County Government of Kiambu and 3 Others Petition No. 3 of 2014**, it was submitted that there is a presumption of constitutionality.

24. It was submitted that under section 15(1) of Cap 301, appeals from the decision of the Tribunal lie to the High Court and since a decision on jurisdiction is a question of law, the applicant's grievance with such a decision ought to be the subject of an appeal as provided under the Act and not by way of judicial review.

Determination

25. I have considered the issues raised by the parties to these proceedings in the preceding paragraphs.

26. The main issue for determination in these proceedings in my view is whether the Business Premises Rent Tribunal has the jurisdiction to determine disputes other than those disputes that arise in a landlord and tenant relationship and more so disputes arising from the provisions of the ***Sectional Properties Act***.

27. The jurisdiction of the Business Premises Rent Tribunal is provided for under section 12 of the Act which provides as follows:

1. ***A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—***

a. ***to determine whether or not any tenancy is a controlled tenancy;***
b. ***to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;***

> ***(c)to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;***
>
> ***(d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;***
>
> ***(e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;***
>
> ***(f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;***
>
> ***(g) where the landlord fails to carry out any repairs for which he is liable—***
>
> > ***(i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant;***

(ii) to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;

(ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;

(h) to permit the levy of distress for rent;

(i) to vary or rescind any order made by the Tribunal under the provisions of this Act;

(j) to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;

(l) to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;

(m) to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend, the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;

(n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.

(2) A Tribunal shall not have or exercise any jurisdiction in any criminal matter, or entertain any criminal proceedings for any offence whether under this Act or otherwise.

(3) A Tribunal may employ officers, valuers, inspectors, clerks and other staff for the better carrying out of the purposes of this Act:

Provided that, where a Tribunal has deputed a valuer, inspector, officer, or other person to inspect or view any premises, any report made in that behalf shall be communicated to the landlord or tenant or both.

(4) In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit.

(5) No matter or thing done by a Tribunal, or any officer, valuer or inspector or other person deputed by the Tribunal shall, if done bona fide in the execution or purported execution of the provisions of this Act or any subsidiary legislation made thereunder, subject such Tribunal, officer, valuer, inspector or other person to any action, liability, claim or demand whatsoever.

(6) Any person who, without lawful excuse, fails to comply with any order, requirement or summons given or issued under paragraph (j) of subsection (1) of this section, or who, having attended as a witness under summons, departs without the permission of the Tribunal or fails to attend after any adjournment after being ordered to attend, shall be guilty of an offence and liable to a fine not exceeding one thousand shillings.

28. It is clear that in exercising the powers conferred under the ***Landlord and Tenants, Shops, Hotels, and Catering Establishments Act,*** the Respondent Tribunal must restrict itself to the powers conferred under section 12 aforesaid. This, in my view is the sense in which the decision of **Madan, J** (as he then was) in **Pritam vs. Ratilal and Another Nairobi HCCC No. 1499 of 1970 [1972] EA 560** ought to be understood. In the said case, the learned Judge expressed himself as hereunder:

> **"As stated in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act itself, it is an Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto. The scheme of this special legislation is to provide extra and special protection for tenants. A special class of tenants is created. *Therefore the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply*. The applicability of the Act is a condition precedent to the exercise of jurisdiction by a tribunal; otherwise the tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it, the tribunal has no jurisdiction."** [Emphasis mine].

29. In my view, what the learned Judge was saying is that where a dispute is brought under the said Act, there must be in existence the relationship of landlord and tenant. The Judge did not say that in any other case where a dispute arises the same relationship must be in existence. In other words where other legislation clothe the Tribunal with jurisdiction to entertain certain specified matters, it cannot be said that the Tribunal has no jurisdiction since in that event the dispute would not fall within the ***Landlord and Tenants, Shops, Hotels, and Catering Establishments Act*** for the requirement of the aforesaid relationship to be a condition precedent before the Tribunal can have jurisdiction.

30. As was appreciated by **Sachdeva & Brar, JJ** in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981**:

> **"Where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature……It is recognised that each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration."**

31. Section 12(1) is clear that the Act provides for the powers of the Tribunal "***to do all things which it is required or empowered to do by or under the provisions of this Act"*** and is not concerned with any other Act. This position is reinforced by the fact that the preamble of the Act provides that it is:

> ***An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto***

32. Therefore the ***Landlord and Tenants, Shops, Hotels, and Catering Establishments Act*** does not purport to be the Act that confers jurisdiction on the Respondent in order for it to be held that the jurisdiction of the Tribunal cannot be conferred by any other Act. This was appreciated by **Chesoni, J** (as he then was) in **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195** when he held that:

> "…**Section 9 of the Act does not give any powers to the tribunal, but merely states what the tribunal may do within its area of jurisdiction."**

33. That brings me to the issue whether the ***Sectional Properties Act*** confers jurisdiction on the Tribunal. Section 38(2) and (3) of the said Act provides as follows:

> ***(2) Where a request is made under subsection (I) and the institutional manager fails 10 comply***

with provisions of that subsection the aggrieved person may seek an order that the institutional manager comply with such request.

(3) Where an aggrieved person takes proceedings before a tribunal pursuant to subsection (2), the tribunal shall have power to make an order against the institutional manager that it comply with subsection (1) and 'the tribunal shall also have power to award a penalty against the institutional manager of a sum not exceeding five hundred shillings per day for each day exceeding twenty clays after a request has been properly made under subsection (1).

34. That the Tribunal contemplated under the aforesaid provisions is the Respondent herein is not in doubt as section 3 of the said Act is clear in that respect. The only question therefore would be whether there were conditions precedent for the invocation of the afore-cited provisions. In this respect in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation to jurisdiction may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction. It is my view that where the Tribunal has made a factual finding, it is not for this Court in judicial review proceedings to interfere with such factual finding since such a decision would go to the merit of the decision and by interfering with such a finding this Court would be acting as an appellate court rather than a judicial review court. The Court would however interfere where such factual findings show that the Tribunal has no jurisdiction but the Tribunal erroneously finds that it in fact has jurisdiction.

35. Having considered the issues raised in this application, it is my view that the Respondent had jurisdiction under section 38 of the ***Sectional Properties Act*** to entertain the dispute that was before it.

36. With respect to the award of costs, the Court of Appeal in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** expressed itself as hereunder:

> **"The Board considered all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board"**

37. Similarly, whereas the award of costs in the sum of Kshs 20,000.00 may be deemed by another Tribunal to have been exorbitant, that is not an issue for a judicial review court as opposed to an appellate Court. Accordingly, I find that that issue is not properly before this court. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

38. The decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the orders granted to appeal against the same where there is a right of appeal would be less convenient or otherwise less appropriate, the adversely affected party ought to appeal against the said order rather than to challenge the decision in judicial review proceedings. In judicial review proceedings the mere fact that the Tribunal's decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an

appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of the case. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

> **"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."**

39. In **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003**, **Omolo JA** stated as follows;

> **"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."**

40. In the premises I find no merit in the Notice of Motion dated 13th May 2015.

Order

41. Consequently, I decline to grant the prayers sought in the said Motion on Notice which I hereby dismiss with costs.

Dated at Nairobi this 29th day of June 2016

G V ODUNGA

JUDGE

<u>Delivered in the presence of:</u>

Mr. Udoto for Mr. Kimondo Mubea for the ex parte applicant

Cc Muriuki