



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 5 OF 2014

IN THE MATTER OF: THE LAW REFORM ACT, CAP 256

AND

IN THE MATTER OF: THE RENT RESTRICTION ACT, CAP 296

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

AND

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR THE
PREROGATIVE ORDERS OF CERTIORARI**

BETWEEN

MOHAMMED JAFFER.....,.....APPLICANT

VERSUS

RENT RESTRICTION TRIBUNALRESPONDENT

BIKHU RATILAL GHELA SHAH.....INTERESTED PARTY

JUDGMENT

THE APPLICATION

1. The applicant then represented by M/S Moses Mwakisha & Company obtained leave of court on the 12th of February 2014 to commence judicial review proceedings within 21 days. Upon the grant of leave to file the judicial review proceedings on 12th February 2014, the court directed that –

“3. As regards the leave granted operating as a stay, the court will in accordance with Order 53 rule 1 (4) of the Civil Procedure Rules hear the application inter partes on 19th February 2014.

4. In the meantime to prevent the imminent eviction of the applicant by virtue of the order of 13th January 2014, a limited stay for 7 days is granted.”

2. The application was supported by a sworn verifying affidavit and statement filed by MOHAMED JAFFER both dated the 12th of February 2014. The relief sought, the facts and grounds relied upon were set out in the said Statement dated 12th February 2014 as follows:

“2. RELIEF SOUGHT:

- a) *An order of **Certiorari** to bring up into this court for the purpose of quashing the order of the Rent Restriction Tribunal sitting at Mombasa as delivered 13th January, 2014.*
- c) *That the leave so granted to commence these proceeds does operate as a stay of execution of the said order of the Rent Restriction Tribunal dated 13th January, 2014.*

3. FACTS RELIED UPON:

1. *The applicant has been resident on premises now owned by the interested party herein since about 1976 and has since about 1996 been operating on a portion of the premises a small shop selling groceries which business the relevant authority has been duly licensing.*
2. *The premises are protected under the Rent Restriction Act, Cap 296.*
3. *The respondent has on 13th January, 2014 made an order requiring the applicant to cede possession of the premises within or at expiry of 30 days thereof.*
4. *The said order has been made on the basis of a complaint by the respondent relating to unlawful use of the premises by the applicant.*

4. GROUNDS RELIED UPON

- 1) *That the Tribunal’s power to make an order for possession in respect of premises that are subject to the Rent Restriction Act is mandatorily circumscribed by the provisions of Section 14 of the said Act which section specifies the sole grounds upon which a tenancy may be terminated or order for possession made in favour of a landlord.*
- 2) *That in respect of a complaint upon which the landlord’s action in this as was founded, Section 14 (1)(b) contemplates the situation and makes a conviction based on the alleged transgression a sine qua non for grant of any order for possession.*
- 3) *That in the circumstances, the Tribunal does not have the primary power of investigating the lawfulness or otherwise of any complaint that would found an action under section 14(1) (b) aforesaid, as that power would lie with the authority empowered to prosecute such matters, in this case the municipal court.*
- 4) *That insofar as the applicant has not been tried or convicted as aforesaid the Tribunal in making the order for possession acted without jurisdiction or contrary to law.”*

3.A Notice of Change of Advocates dated 27th February 2014 notified of the coming on record of M/s E. N. Waithera & Company Advocates for the ex parte Applicant in place of M/S Moses Mwakisha & Company Advocates. By a Notice of Motion dated 27th of February 2014, drawn by M/s E. N. Waithera & Co advocates upon the applicant herein seeks the following orders that:

***“a) An Order of Certiorari to remove into this Honourable Court and quash forthwith the ruling by the Honourable Chairman of the Rent Restriction Tribunal (Tribunal) in the RRAC No. 26 of 20112 at Mombasa ordering vacant possession of the premises occupied by the Applicant (premises).*”**

b) An Order of Prohibition prohibiting the Honourable Chairman of the Tribunal the enforcement thereof under section 31 of the Rent Restriction Act. (sic)

c) The costs of this application to be awarded to the Applicant.”

4. On 5th March 2014, a Notice of Motion dated 3rd March 2014 was filed by M/S Moses Mwakisha & Company, which must be expunged from record in view of the Notice of Change of 27th February 2014.

5. The effective judicial review Notice of Motion dated 27th February 2014 was shown to be based on a different Statement and Verifying Affidavit both drawn by the counsel then on record and dated 27th February 2014. No leave of Court had been obtained to amend the Statement originally filed with the Chamber Summons application for leave, and consequently, by virtue of Order 53 rule 4 from that ex parte applicant could only rely on the matters and grounds set out in the verifying affidavit and the Statement filed at the time of seeking leave.

6. It would appear that the interested party executed the impugned order of the tribunal and consequently, simultaneously with the Notice of Motion, for judicial review dated the 27th February the applicant filed an interlocutory Notice of motion of even date for orders that:

(i) The court issues an order to reinstate the Tenant into the suit premises situated at OLD TOWN VASCO DAGAMA Street known as Plot No. XXXI/62/M.I pending the hearing and determination of the application.

(ii) Costs of the application be provided for.

7. The application was based on the following grounds that:

(i)The applicant is a business man having operated a retail shop business since the year 2000.

(ii) On/ or around September 2013 the Landlord/ Respondent proceeded to the Rent Restriction Tribunal and irregularly obtained orders for vacant possession 14/01/2014.

(iii) The Landlord/Respondent proceeded to execute the irregular order on 14/02/2014 despite a High Court order restraining him

(iv)The applicant will suffer loss and damages and will continue suffering unless the orders sought herein are granted.

8. The applicant filed an affidavit of support application dated the 27th day of February 2014 and averred that;

(i) In 1976 he rented the suit premises herein being Plot No. XXXI/62/M.I situated at Old Town Vasco Dagama Street.

(ii) Since renting the premises, he has been renewing the single business permit with the relevant authorities.

(iii) In 2012 the landlord of the said suit premises proceeded to the Rent Tribunal Court and on 14/01/2014 the tribunal ordered that he vacate the premises.

(iv) He believed that the order of 14/01/2014 was irregularly obtained.

(v) The Respondent/ Landlord went to the Tribunal to conceal facts as the premises do not fall under Rent Restriction Tribunal.

9. The applicant filed another application dated 4th March 2014 whose prayers were the same as before but grounded on the following:

(i) That the tribunal's power to make an order for possession in respect of the premises that are subject to the Rent Restriction Act mandatorily circumscribed by the provisions of Section 14 of the said Act which section specifies the sole grounds upon which a tenancy may be terminated or order for possession made in favour of a landlord.

(ii) That section 14 (1) (b) contemplates the situation and makes a conviction based on the alleged transgression a sine qua non for grant of any order of possession.

(iii) That the tribunal does not have the primary power of investigating the lawfulness or otherwise of any complaint that would found an action under section 14 (1) (b) aforesaid as that power would lie with the authority empowered to prosecute such matters, in this case the municipal court.

(iv) That the tribunal in making an order for possession acted without jurisdiction or contrary to law.

This application was supported by a further affidavit dated the 24th day of February 2014 sworn by **MOHAMMED JAFFER** which restated in substance the grounds above.

THE RESPONSE

10. The Interested party filed a replying affidavit dated the 18th of March 2014 sworn by **BIKHU RATILAL GHELA SHAH** in which he stated that:

(i) He was served with the Applicant's application on 18th February, 2014 and that the applicant has already moved out of the suit premises and in his occupation.

(ii) From the proceedings the issue the applicant wants to raise before the court was raised as a Preliminary Objection at the Tribunal but was dismissed on 30th August 2012. The Applicant was given leave to Appeal but never appealed hence the issue of Section 14 (1) (b) has already been dealt with appropriately.

(iii) The applicant in the proceedings admitted that he converted the premises from residential to Business without his consent. Thus, the interested party had a right to apply for termination of his tenancy on account of change of use without his consent.

(iv) The orders sought cannot be granted as they have been overtaken by events and sub judice.

(v) The applicant be estopped from alleging that the tribunal court did not have jurisdiction to hear the matter.

(vi) The applicant has admitted to have committed an offence and the court should not assist a party to obtain orders in his favour.

(vii) There has been inordinate delay in filing of the application by the Applicant and the suit should be dismissed.

11. The Respondent filed a replying affidavit dated 31st March 2014 sworn by **WINNIE NAMAHYA** which stated that:

(i) The interested party herein filed a suit in the Rent Restriction Tribunal against the applicant seeking for orders that the applicant be ordered to vacate the suit property because of change of user from residential to business premises.

(ii) The applicant was ordered to vacate the premises within 30 days by the Ruling delivered on 13th January 2014 by the Rent Restriction Tribunal's Chairman.

(iii) The interested party herein proceeded to extract the orders on 14th January 2014 and execute the order as granted by the court on 17th February 2014.

(iv) This application has no basis as the applicant was given ample time to appeal against the ruling or look for alternative accommodation.

(v) The orders granted by the tribunal were regular as both parties participated in the proceedings to the conclusion of the suit.

(vi) That the application is vexatious, frivolous and should be dismissed with costs.

SUBMISSIONS

Applicant's submissions:

12. The applicant filed his written submissions on the 29th of May 2014, through M/S E. N. Waithera & Company advocates, therein reiterating that the proceedings before the Rent Restriction Tribunal were wrongly before it. He submitted that the Chairman of the Rent Restriction Tribunal (RRT) failed to notice that the suit premises is a business premise and falls under the Business Premises Rent Tribunal (BPRT). Hence the decision by the Rent Tribunal was improper and illegally executed. The applicant submitted that the interested party had always been aware of that he operated a business within the suit premises and thus this claim lies under the Business Premises Tribunal and not the Rent Restriction Tribunal. It was further contended that the Applicant is a protected tenant as the interested party inherited him as a tenant from the previous land owner. The parties have never entered into a tenancy agreement yet the interested party by its conduct allowed the Applicant to operate a business in the premises for 19 years.

Respondent Submissions:

13. The Respondent filed their written submissions dated 16th April 2014 through Ms. Winnie Namahya, Litigation Counsel, in which they opposed the application before the court as it was misconceived and an abuse of the process of the court. Reason given was that the applicant participated at the Tribunal proceedings until its conclusion. Once the decision was rendered, the applicant was given ample time to look for alternative accommodation before execution. It was the Respondent's submission that the applicant had therefore not demonstrated to the court how irregular the court order for vacant possession was. The Respondent asserted that if the applicant had any issues, the same were vindicated through the civil suit in the Rent Restriction Tribunal and was heard conclusively. It was further submitted that the applicant had not demonstrated the basis and/or ground to warrant the order prayed for.

Interested Party's submissions

14. The interested party filed written submissions dated the 1st of April 2014 through M/S Mogaka Omwenga & Mabeya Advocates. On the issue of whether the tribunal had jurisdiction to deal with the matter, it was his submission that the applicant had raised it before at the tribunal proceedings. That the same was now Res judicata and the Applicant should be estopped from raising the issue in these judicial review proceedings. That this issue had been dealt with to its conclusion thus the same should fail before this court. According to the interested party, judicial review is only meant to review the process of decision making where the process is considered to be illegal, irrational or improper. It was his submission that the orders for Certiorari and Prohibition cannot be granted against the interested party since it has not been established by the Applicant how his actions construe illegality, irrationality and procedural impropriety, citing the case of **Republic Vs Registrar of Titles & another Ex-parte David Gachina Muriithi & Another** (2014) eKLR, where Odunga, J. adopted the purview of judicial review set

by Lord Diplock in *CCSU v. Minister for Civil Service* (1985) AC 374. It was submitted that during the tribunal hearing of 19th July 2013, the applicant admitted to having changed the usage of the premises from residential to business without the consent of the interested party (the landlord). The applicant in the same proceedings further admitted to having known that the landlord was at liberty to apply for termination of tenancy on account of change of user without consent. He who comes into equity must come with clean hands. It was his submission that the applicant admitted to an illegality and therefore cannot turn to the court to protect his illegal acts. They relied on the case of *Patel vs Singh (No.2)* (1987) KLR 585 CA on illegality and it was submitted that the court cannot be used as an instrument to protect law breakers especially where a party admits that they are aware of their responsibility but chose to neglect it. That despite the applicant having paid for the business permits at the municipal council and renewal of the same issued, the nature of business is considered to be void ab initio because the applicant failed to inform the landlord. It was submitted that the prayer for reinstatement cannot issue since the judgment delivered by the Rent Restriction Tribunal was just and within the law. Further the order cannot issue since the applicant failed to disclose before this court the materials facts surrounding this matter. It was the interested party's submission that the tribunal decision had already been executed and the applicant had given vacant possession to the landlord. Consequently, the interested party prayed that the application be dismissed with costs.

ISSUES FOR DETERMINATION

15. The following issues arise for determination in the suit:

- a. *Whether the Chairperson of the Rent Restriction Tribunal acted beyond its jurisdiction in deciding in favour of the interested party that the applicant should vacate the interested party's premises.*
- b. *Whether the judicial review orders of orders of Certiorari and prohibition can be issued in the circumstances of this case.*
- c. *Whether the applicant may be reinstated into the suit premises.*

DETERMINATION

16. Under section 14 (1) (b) of the Rent Restriction Act, the power of the tribunal to order recovery of possession of premises to which the Act applies, is set out as follows:

"14. (1) No order for the recovery of possession of any premises or for the ejectment of a tenant therefrom shall be made unless –

(a); or

(b) *the tenant, or any person residing with him, has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, **or has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose**, or the condition of the premises has, in the opinion of the tribunal, deteriorated owing to acts of waste by, or the neglect or default of, the tenant or any such person;"*

17. In his paragraphs 2-4 of verifying Affidavit, the ex parte applicant gives the background of his tenancy on the suit premises as follows:

"2. That I have been a tenant on the premises situate on Mombasa /Block XXXI/62 where I have been resident since about 1976 the rent payable being Kes. 1,200/= pm.

3. That I have since about 1996 operated a small grocer selling cigarettes, sodas and confectionaries at the front of the premises, per copies of sample Single Business Permits annexed hereto as "A". There is in respect of some of those permits, been an error in the title

number of the premises where the business is tenable, as I do not carry any other business within Mombasa.

4. That from information available to me, the property was purchased by the Interested Party herein sometime in 1993, a fact not brought to the attention of the tenants until about the year 2006, as at no time did the interested party call on us at the premises to notify us of the change in tenure of the premises. Annexed as “B” is copy of the title top the premises.”

18. It is clear from the applicants own admissions that he had used the residential suit premises for illegal purpose in running a grocery of a commercial nature. However, as no conviction had been entered against him, the Tribunal could not, as stipulated in section 14 of the Rent Restriction Act, lawfully make an order for recovery of possession against him. The tribunal’s decision for recovery of possession of the suit premises herein having been made unlawfully was without jurisdiction and subject to be quashed by an order of certiorari.

19. While he could not lawfully be removed without a prior conviction for illegal user of the suit premises, the ex parte applicant could not benefit from his own wrong doing in change of user by suing for reinstatement when evicted therefrom pursuant to the order of the tribunal. In **Patel vs Singh (No.2)**, supra, the Court of Appeal (Nyarangi, Gachuhi and Apaloo, JJA) set down the three effects of illegality, as follows:

“The effect of an illegality upon a contract is three-fold:

a) If at the time of making the contract there is an intent to perform it in an unlawful way, contract although it remains alive is unenforceable at the suit of the party having that intent and where the intent is common, it is not enforce able at all.

b) The illegality may prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act. He may not recover even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal.

c) An illegality may also have the effect of making the contract void ab initio and that arises if the making of the contract is expressly or implicitly prohibited by statute or otherwise contrary to public policy.”

20. In seeking an order for reinstatement into the suit premises, the ex parte applicant would have to rely on the tenancy on the suit premises which though beginning lawfully as a residential user was unlawfully changed midstream into a partly residential and partly commercial tenancy. It is immaterial that the interested party had since his acquisition of the suit property, as submitted by the ex parte applicant been aware of the use to which the suit property was being put. It is cardinal principle of administrative law that there can be no estoppel or waiver to Statute, and the breach of the provisions as to change of user under the Rent Restriction Act retained its full force and effect in terms of statutory consequences, despite the Interested Party’s acquiescent conduct.

21. Moreover, the order for reinstatement sought in the interlocutory Notice of Motion of 27th February 2014, is in the nature of a mandatory injunction, which is not available under the Kenyan (unlike English) judicial review provisions under Order 53 of the Civil Procedure Rules.

22. In addition, the prayer for an Order of Prohibition is not competent, because it is not one of the reliefs for the filing of which leave was sought and granted herein. As shown in the paragraphs 2, 3 and 4 of the Statement dated the 12th February 2014, above, the only relief sought in the judicial review proceedings before the court is certiorari, and no leave to amend was obtained pursuant to Order 53 rule 4 of the Civil Procedure Rules. Order 53 rule 4 of the Civil Procedure Rules provides as follows:

*“4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and **no grounds shall, subject as hereafter in this rule provided, be relied upon or ANY RELIEF sought at the hearing of the motion except the grounds and relief set out in the said statement.***

*(2) **The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.***

(3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.”

In any event, the action sought to be prohibited by an order of Prohibition – the execution of the vacant possession order of the tribunal - did already take place on the 14th February 2014, and the Prayer is, even if it had been validly made, already overtaken by events.

ORDERS

23. Accordingly, for reasons set out above, the court makes the following orders:

1.The Notice of Motion for judicial review dated 27th February 2014 is granted in terms of prayer No. (a) thereof is granted.

2.The Prayer for an Order of Prohibition in terms of prayer No. (b) thereof is dismissed.

3.The Notice of Motion dated the 27th February 2014 for reinstatement of the ex parte applicant into the suit premises is declined.

24. As the parties have each been partly successful in their respective contentions, there shall be no order as to costs in the matter.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 21ST DAY OF JULY, 2016.

.....

JUDGE

In the presence of: -

Mr Omwenga for the Ex Parte Applicant

Mr Mukulo for the Respondent

No Appearance for the Interested Party

Mr S Kaunda - Court Assistant.