



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. APPLICATION NO. 3 OF 2016 (JR)**

**IN THE MATTER OF AN APPLICATION BY MUGO HOLDINGS CO. LIMITED FOR LEAVE  
TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT (CAP 26 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE LANDLORD AND TENANTS (SHOPS, HOTELS AND CATERING  
ESTABLISHMENTS) ACT CAP 301 OF THE LAWS OF KENYA AND THE CIVIL  
PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF THE BUSINESS PREMISES RENT TRIBUNAL CASE NO. 4 OF 2016 AT  
EMBU**

**MUGO HOLDINGS LIMITED.....EX-PARTE APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....INTERESTED PARTY**

**EVANS MATHERI.....RESPONDENT/TENANT**

**RULING**

1. This is a ruling on an the application dated 11/3/2016 filed by the ex-parte applicant seeking that the order of Certiorari be issued to remove the proceedings dated 18/1/2016 and the orders made on the same day by the Chairman, Business Premises Rent Tribunal in Embu Case No 4 of 2016 as there is an error on the face of the record and the proceedings contravened the rules of natural justice.
2. The applicant also seeks an order of prohibition for purposes of prohibiting the Chairman of the Business Premises Rent Tribunal in Embu Case No. 4 of 2016 from hearing or making any further orders in the said case. The application is supported by the statement dated 8/3/2016 and the verifying affidavit of Njue Mugo sworn on 8/3/2016 in the verifying affidavit.
3. The deponent states that he is a director of the Exparte applicant and has authority to swear the same. He stated that the exparte applicant is a company authorized to lease, manage and collect rent for plot No. Gaturi/Githimu/7576 situated within Embu town and on which Mugo Holding Shopping Center is

located. The applicant in Embu Business Premises Rent Tribunal Case No. 4 of 2016 is a tenant therein occupying seven business premises and a residential house.

4. It is stated that the ex parte applicant entered into a tenancy agreement with the tenant for the eight premises on 15/2/2010 and the same lapsed on 28/2/2016. The tenant is said to have been uncooperative and irregular in the payment of rent prompting the ex parte applicant on numerous occasions to engage the services of auctioneers to distress for rent against the tenant in September 2014, February 2015, April 2015 and August 2015. The tenant in August 2015 issued cheques which were dishonored by the bank.

5. The auctioneers gave notice of the dishonored cheques and when he attempted to remove the distressed goods from the premises they were unlawfully obstructed by hired goons. The tenant later filed an application in court seeking that the distress be declared illegal. An order for stay was granted and the matter is still pending before court and the ex parte applicant has been unable to recover the arrears of rent owed by the tenant as at December 2015 amounting to Kshs.911,660/=. The tenant has not paid rent for January & February 2016 amounting to Kshs.279,840/=.

6. The Ex parte applicant states that he was surprised to learn that the tenant had filed Embu Business Premises Rent Tribunal case No. 4 of 2016 through the chamber summons dated 18/1/2016 and obtained an order of injunction the same day. It is argued that the Business Premises Rent Tribunal has no jurisdiction to hear the tenants application and the illegal ex parte orders issued by it should be quashed for the following reasons;

*(i) the eight tenancies were not controlled within the meaning of Section 2(1) of the Landlord and tenants (Shops, Hotels and Catering Establishments) Act because the tenant agreements were in writing and were for a period of six years.*

*(ii) the order of injunction is intended to subsist for over three months and not fourteen days contrary to the provisions of Order 42 of the CPR.*

*(iii) There is no reference filed in the tribunal by the tenant as required under section 6 of the Landlord & Tenants (Shops, Hotels and Catering establishments) Act.*

*(iv) The Business Premises Rent Tribunal has no jurisdiction to issue an injunction or similar orders against a landlord.*

*(v) The Chairman of the Business Premises Rent Tribunal acted ultra vires outside his mandate when he granted the orders.*

7. The ex-parte applicant contends that the proceedings before the the Business Premises Rent Tribunal were illegal for they were in the form of a chamber summons instead of a reference. The injunctive order issued facilitates a tenant who has no right to occupy the Ex parte Applicant's premises as he is still in arrears without offering the Ex parte Applicant any remedy thereby occasioning him great injustice as no security was deposited.

8. The interested party filed a replying affidavit stating that he is a lawful tenant o the suit premises by virtue of the tenant agreements entered into with the ex parte applicant. He stated that the ex parte applicant wanted to terminate the tenancy by issuing a notice to vacate the premises which is unlawful and irregular as the leases executed mutually had an option of renewing the lease upon such terms as would be agreed.

9. He argued that such an option was not given to him before the notice was issued. He said he has challenged the notice in Business Rent Tribunal case No. 4 of 2016 where he seeks a declaration that his tenancy of the suit premises is a controlled tenancy which is a periodic tenancy subsisting from time to time until determined by the parties in a manner set out in law.

10. The said matter is pending determination and the applicant has filed the said proceeding to frustrate

the said proceedings. Part of the suit premises was originally rented to his late father on a periodic tenancy where rent was payable on month to month basis. He accused the applicant of seeking to terminate the tenancy summarily but the Business Premises and Rent Tribunal determined that the tenancy was controlled and restrained the applicant from tenant from removing the tenant from the premises.

11. The mere fact that the tenancies were reduced in writing does not remove them from the purview of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The respondent argues that where a tenancy agreement provides for determination of a tenancy by way of a notice of the other party, the tenancy created thereon is a controlled tenancy which can only be terminated under the provisions of the law and not summarily as sought by the ex parte applicant. The allegations in paragraph 4 and 9 of the verifying affidavit are false and the applicant has refused to accept rent payment from the month of January 2016.

12. According to the respondent, the Business Premises Rent Tribunal should determine whether it has jurisdiction to handle the matter or not and whether the tenancy is a controlled tenancy or not under the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act. It is further contended that the applicant has never raised the issue of jurisdiction before the Tribunal.

13. It is further contended that the ex parte applicant has failed to demonstrate any bias and unlawfulness on the part of the tribunal. The tenant concludes that the tribunal had the power to make the orders and the ex parte applicant should have preferred an appeal if dissatisfied with the orders.

14. The respondent filed grounds of opposition stating that the application is frivolous an abuse of the court process and premature. He stated that the issue of jurisdiction can be ventilated before the respondent who acted within its jurisdiction.

15. The law applicable herein is Order 53 of the Civil Procedure Rules and Article 165(6) of the Constitution.

16. Order 53 of the Civil Procedure Rules provides for the procedure of filing an application for an order of prohibition, mandamus and certiorari.

17. Article 165(6) of the Constitution provides that;

*“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.”*

18. The nature of judicial review orders of certiorari and prohibition are illustrated in decided cases as follows:-

(i) The parameters of judicial review were set out by the Court of Appeal in **REPUBLIC VS KENYA NATIONAL EXAMINATIONS COUNCIL EX PART GATHENJI & OTHERS CIVIL APPEAL NO. 266 OF 1996** [cited in the case of **REPUBLIC VS CHIEF MAGISTRATE MILIMANI COMMERCIAL COURT & 2 OTHERS EX-PARTE VIOLET NDANU MUTINDA & 5 OTHERS [2014] eKLR** 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.....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.”*

(ii) In the case of **MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC & UMOJA CONSULTANTS LTD CIVIL APPEAL NO. 185 OF 2001** (cited in the case of **REPUBLIC V CHIEF MAGISTRATE MILIMANI COMMERCIAL COURT & 2 OTHERS EX-PARTE VIOLET NDANU MUTINDA & 5 OTHERS [2014] eKLR (supra)**) it was held:

*“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”*

19. The applicant seeks an order of Certiorari be issued to remove the proceedings dated 18/1/2016 and the orders made on the same day by the Chairman, Business Premises Rent Tribunal in Embu Case No. 4 of 2016. The applicant also seeks an order of prohibition for purposes of prohibiting the Chairman of the Business Premises Rent Tribunal in Embu Case No. 4 of 2016 from hearing or making any further orders in the said case.

20. The ex parte applicant's main ground is that the Chairman of the Business Premises Rent Tribunal did not have jurisdiction to hear the tenants application and to issue ex parte orders dated 18/1/2016 for the reasons that the tenancy was not controlled and that no reference was filed by the tenant as required by the law.

21. It was further contended that the injunctive orders were issued for a period longer than 14 days contrary to Order 42 of the Civil Procedure Rules.

22. From the foregoing, it is clear that the ex parte applicant raises an issue as to whether the chairman of the tribunal had jurisdiction to issue the orders that he issued. In view of the decision in the the case of **MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC & UMOJA CONSULTANTS LTD CIVIL APPEAL NO. 185 OF 2001** (cited in the case of **REPUBLIC VS CHIEF MAGISTRATE MILIMANI COMMERCIAL COURT & 2 OTHERS EX-PARTE VIOLET NDANU MUTINDA & 5 OTHERS [2014] eKLR (supra)**) the court held that in an application for judicial review *“.....the Court would concern itself with such issues as to whether the decision makers had the jurisdiction.....”* The ex parte applicant was therefore within the law in bringing this application.

23. The applicant has raised the issue of non observance of the rules of natural justice by the respondent and also seeks an order of prohibition for purposes of prohibiting the Chairman of the Business Premises Rent Tribunal in Embu Case No. 4 of 2016 from hearing or making any further orders in the said case. Judicial review is the right channel to seek this remedy.

24. An application for judicial review may rightly challenge jurisdiction of a tribunal in issuing orders and petition the high court to quash the said orders. Similarly, the high court may give orders of prohibition against the tribunal not to issue certain orders in which it lacks jurisdiction.

25. The issue which arises is whether the respondent acted within its mandate in issuing the ex parte orders of 18/1/2016. Section 2 of the Landlord and Tenants( Shops, Hotels and Catering Establishments) Act provides that;

*“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—*

*(a) which has not been reduced into writing; or*

*(b) which has been reduced into writing and which—*

*(i) is for a period not exceeding five years; or*

*(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or*

*(iii) relates to premises of a class specified under subsection (2) of this section:*

26. Subsection(2) provides that;

*The Minister may, by notice in the Gazette, specify, by reference to rent paid or rateable value entered in a valuation roll under the Valuation for Rating Act (Cap. 266), classes of shops, hotels or catering establishments tenancies of which shall be controlled tenancies regardless of the form or period of such tenancies.*

27. Section 12 (1) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act provides for the powers of the tribunal which include the power to determine whether or not any tenancy is controlled as provided for under Section 12(a). Other powers are set out in Section 12(1)(b) to (n) which I do not find relevant to the facts of this application.

28. Section 12(1)(a) of the Act empowers the tribunal to determine the question raised in the prayer in the application of the respondent dated 18/6/2015. However, for temporary orders issued in favour of the applicant must be grounded on the material presented to the court at that initial stage.

29. I have looked at the tenancy agreement effective from 1<sup>st</sup> March 2010 to 28<sup>th</sup> February 2016. The agreement is for a lease period of six (6) years and specifies how the rent shall be paid and provides for increment after the first half period of the lease.

30. The chairman of the Tribunal must have examined the material before him before issuing the temporary order. Section 2 of the Act describes “controlled tenancy” of a shop, hotel or catering establishment as:-

*(a) That which has not been reduced into writing; or*

*(b) which has been reduced into writing and which-*

*(i) is for a period not exceeding five years.*

*(ii) .....*

32. It is expressly provided in this section that any tenancy agreement reduced in writing and which exceeds five years is not a subject of the tribunal. The agreement annexed to the application of the interested party dated 18/6/2015 was for a term of six years which automatically knocks it off the jurisdiction of the Tribunal.

33. For the chairman of the Tribunal to issue the temporary orders dated 18/6/2016, he ought to have ensured that he had the jurisdiction to issue the said orders. It was clear from the documents supporting the application that the tribunal did not have the powers to issue such orders.

34. It follows that in the event that the Tribunal case No. 4 of 2016 Embu was to go to hearing, the tribunal will have to throw in the towel on the question of jurisdiction which would be expected to be raised by the exparte applicant.

35. The ex parte applicant is entitled by virtue of Order 53 of the Civil Procedure Rules and Article 165 of the Constitution to bring this application which if found merited, the applicant is entitled to a remedy. The parties do not have to go for full hearing before the Tribunal for it to conclusively determine that it lacks jurisdiction.

36. The ex parte applicant has raised issues of want of form of the application before the tribunal and that of non-compliance of Order 11 of the Civil Procedure Rules on the life of an interlocutory order. Those issues may be raised on an application for review before the tribunal or on appeal but are not the subject of judicial review. I decline entertaining any arguments pertaining to those issues.

37. I find that this application is merited and is allowed in terms of prayers 1 and 2 of this application.

38. The respondent/tenant to meet the costs of this application.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF SEPTEMBER, 2016.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Mrs. Kibe for ex parte applicant**