REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC APPLICATION NO. 435 OF 2012

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF LAW REFORM ACT

(CHAPTER 26 LAWS OF KENYA)

AND

IN THE MATTER OF THE BUSINESS PREMISES RENT TRIBUNAL ACT

(CHAPTER 301 OF LAWS OF KENYA)

REPUBLIC..APPLICANT

VERSUS

BUSINESS PREMISES RENT TRIBUNAL..........1ST RESPONDENT

ATTORNEY GENERAL....................................2ND RESPONDENT

AND

JOHN MWANGI KARURI............................INTERESTED PARTY

EX PARTE

ALBERT KIGERA KARUME

JUDGEMENT

Introduction

1. By a Notice of Motion dated 8th January 2012, the ex parte applicant herein, **Albert Kigera Karume** seeks the following orders:

> **1 That an order of Certiorari does issue to quash the injunctive orders of the 1st respondent issued on the 17th of October 2012.**

2 That the respondents be condemned to pay costs of this application.

Ex Parte Applicant's Case

2. The application was supported by Statement of Facts filed on 10th December 2012 and affidavit verifying facts sworn by the said **Albert Kigera Karume** on the same date.

3. The *ex parte* Applicants' case was that he is and has at all material times been the landlord of the premises known as LR. No. 209/6492 in Kandara Road, Kileleshwa Nairobi (hereinafter referred to as the suit land) while the Interested Party has been the tenant thereof. On the 17th of October 2012 the chairperson of the Business Premises Rent Tribunal (hereinafter referred to as the Tribunal), **Mrs. Mochache D.** made the following orders touching on the said premises:

a. The tenant is directed to forward monthly rent to the landlord's advocate on due dates for onward transmission to the landlord.

b. The landlord either by himself, his servants and/or agents be and is hereby restrained and prohibited from evicting the tenant and/or in any other manner whatsoever interfering with the tenant's quiet possession and enjoyment of the business premises known as (Boyz to Men salon and Barber Shop).

c. Costs to the tenant assessed in the sum of Kshs. 73,715/=

d. The tenant's rent account is credited with Kshs. 73,715/=

4. The aforementioned orders were made in Tribunal case No. 160 'B' of 2012 (hereinafter referred to as the said case), wherein the Interested party herein was seeking relief against the Applicant for allegedly unlawfully threatening to evict him from the said premises. It was the parte applicant's case the injunctive orders issued by the chairperson were *ultra vires* in nature as the Tribunal lacks the power to issue injunctive orders and that the chairperson of the Tribunal overstepped her mandate by issuing injunctive orders against the Applicant herein. According to legal advice received by the applicant, the power, mandate and functions of the Tribunal have been clearly spelled out in the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act***, Cap 301 (hereinafter referred to as the Act) and such power, mandate and function does not include the power to issue an injunction.

5. It was therefore contended that in view of the foregoing, the decision of the 1st Respondent herein smacks of impropriety, is absurd, arbitrary, *ultra vires*, capricious, unjust and in flagrant breach of the rules of natural justice and the applicant is certainly apprehensive that he shall be occasioned a travesty of justice if the said orders continue in place unless application is heard and dispensed with urgently. In his view, he stand to suffer immense injustice and irreparable harm hence it is only fair and in the interest of justice that the said application be heard.

Respondents' Case

6. In opposition to the application the interested parties filed the following grounds of opposition:

i. The respondent has and had the requisite jurisdiction to hear, determine the matter in question and grant the ex parte injunctive orders as it did and the applicant has not demonstrate any case as to why an order of certiorari should be issued as against the respondent's decision.

ii. That Judicial review proceedings purely deal with the procedure and process of decision making and not the merits and or/substance of the case.

iii. The applicant has failed to pursue the available remedies in law and is only

abusing the court process.

iv. **The application is scandalous, frivolous and vexatious.**

The interested party's case

7. The interested party, **John Mwangi Karuri**, swore a replying affidavit on 15th May, 2014.

8. According to him, he was a tenant of the ex parte applicant in respect of a Barber shop on a portion of the suit land.

9. According to him, on 26th March 2012, he filed a complaint against the ex parte applicant at the Tribunal being BPRT No. 160"B" of 2012 based on the fact that the ex parte applicant had threatened to evict him from the said shop and was demanding payment of rent that had not yet become due and payable. The said complaint, according to him was on 17th October, 2012 determined in his favour and the orders the subject of the instant application issued by the said Tribunal.

10. According to him, he enjoys a controlled tenancy in respect of the suit premises in terms of section 2 of the Act. According to him, where a landlord wishes to terminate a controlled tenancy or alter the terms to the detriment of the tenant, the landlord must proceed in terms of mandatory requirements of section 4(2) of the Act whereupon the tenant may refer the matter to the Tribunal in terms of section 6(1) of the Act which reference is then determined in terms of section 9 of the Act.

11. It was his contention that the use of the phrase "make such order thereon as it deems fit" cannot justify the view that the Tribunal's powers do not include the grant of orders of injunction. This position according to the interested party is reinforced by Form F in the schedule to the Act under which orders amount to injunctory orders hence the impugned orders were in compliance with Form F.

12.According to the interested party, there is no way the Tribunal would be able to give effect to the preamble to the Act if it cannot issue orders of prohibition and or injunction to restrain a landlord from breaching the requirements of the Act.

Ex Parte Applicant's Submissions

13.On behalf of the ex parte applicants it is submitted while reiterating the contents of the verifying affidavit that the respondents acted in excess of their powers by issuing the impugned orders since the mandate of the chairman of the 1st respondent under Cap 301 does not include the power to issue an injunction. In support of this submission the applicant relied on **Paul Imison vs. AG & 3 Others Misc. Civil Application No. 1604 of 2003**, **R vs. LCC ex parte Entertainments Protection Association [1931] 2 KB 215**, **Re Gilmores Application [1957] 1 QB 574**, **Captain Geoffrey Kujoga Murungi vs. The AG**, **Kenneth Stanley Njindo Matiba vs. Daniel Toroitich Arap Moi** and submitted that the injunctive orders of the 1st respondent have no legal validity due to the fact that they fall outside the limit of law and are thus substantively *ultra vires*.

14.It is submitted that the Tribunal's powers under section 12 of the said Act do not include injunctive powers and reliance for this submission is placed on **Josephat Thuo Githachuri T/A Kiagiri Building Contractors vs. Parkview Properties [2005] eKLR**, **Sammy Kipruto Tonui vs. Jeremiah Koech & Another Civil Suit No. 43 of 2008**.

15. The applicant contends that though under Order 40 rule 4(2) an ex parte order cannot be issued for more than 14 days, in this case ex parte orders were issued for a period of 44 days hence the respondents acted in excess of powers and unprocedurally.

16.It is therefore submitted that the application ought to be granted.

Respondents' Submissions

17. On behalf of the respondents it was submitted that since the main purpose of the Act is to ensure protection of tenants of a controlled tenancy, the 1st respondent had the powers under section 12 of the Act to adjudicate the matter before it. It is submitted that what will be the purpose of entertaining and investigating a complaint if the tribunal cannot issue orders to preserve the status quo pending the hearing and determination of the suit? In support of this submission reliance is placed on **Republic vs. The Chairperson Business Premises Rent Tribunal exp Baobab Beach Resort Ltd & Another Mombasa HCMA No. 26 of 2010**, **Republic vs. The Chairman Business Premises Rent Tribunal exp Velji Premchand Shah [2012] eKLR**, **Republic vs. The Chairman Business Premises Rent Tribunal exp Kenya Safari Lodges & Hotels Ltd [2012] eKLR**, **Republic vs. Chairman Business Premises Rent Tribunal & 2 Others exp Piedmont Investment Ltd [2012] eKLR** and **Kenya Safari Lodges vs. Business Premises Rent Tribunal and Hotels Limited [2012] eKLR**.

18.It is further submitted that the orders of judicial review being discretionary, the court may refuse the same even if merited if the court finds that the same are not the most efficacious in the interest of justice and citing **Republic vs. Business Premises Tribunal ex parte Jubilee Insurance Company of Kenya Ltd [2012] eKLR** and **Republic vs. Commissioner of Customs Services ex parte Africa K-link International Ltd [2012] eKLR**, it is submitted that a party dissatisfied with the Tribunal's findings is at liberty to either seek a review or lodge an appeal against the same.

Interested Party's Submissions

19.According to the interested party, the decision of the Court of Appeal in **Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No. 205 Of 1995** did not deal with the jurisdiction of the Tribunal to grant injunctions. What the Court did, it was submitted was to re-affirm the position in **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195, to the effect that where a tenant has been disposed of the suit premises an injunction cannot issue.**

20. It was further submitted that under the current constitutional dispensation a Tribunal is a subordinate Court and therefore has the same powers as the Magistrate's Court which include the power to grant injunctions. It was reiterated that to hold otherwise would defeat the purpose for which the Tribunal herein was established. In support of this submission, the interested party relied on the decision of Court of Appeal sitting at Nyeri in **John Mugo Ngunga vs. Margaret M. Murangi [2-14] eKLR**.

21.On the issue of the lifespan of the orders of injunction it was submitted that the orders in question were not ex parte since the hearing date was taken in presence of the advocates for the parties.

Determination

22. The issues which fall for the determination in this application have for along time been the subject of litigation in this Court with resultant contradictory decisions. The main source of divergence in judicial opinions has been whether or not the Tribunal has powers to grant orders of injunction.

23. In this case, the orders which the applicant seeks to quash were were injunctive orders. **Simpson and Chesoni, JJ** (as they were) in **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195** dealt *in extenso* with the provisions of section 12 of the said Act. **Chesoni, J** on his part expressed himself as follows:

"The tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied…. …. The powers of the tribunal are contained in section 12(1) of the Act and anything not spelled out to be done by the tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under section 12(1)(a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the tribunal is to hear and determine references made to it under section 6 of the Act. 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…… It would be erroneous to think that section 12(4) confers on the tribunal any extra jurisdiction to that given by and under the Act elsewhere. For example it is not within the tribunal's jurisdiction to deal with criminal acts committed in relation to any tenancy nor is it within its jurisdiction to entertain an action for damages for trespass. These are matters for the courts and the tribunal cannot by way of a complaint to it by the landlord or tenant purport to deal with such matters. Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy…. The Act uses the words "any complaint" and the only qualification is that it must be "relating to a controlled tenancy".

24. In **Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No. 205 Of 1995,** the Court of Appeal held that a controlled tenant confronted with an illegal threat of forcible eviction cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. It is true that in that case the Court of Appeal cited the decision in **Republic vs. Business Premises Rent Tribunal and Others ex parte Karasha [1979] KLR 147** and **Re Hebtulla Case**.

25. I however agree with the interested parties that the cases cited by the Court of Appeal did not expressly state that the Tribunal had no jurisdiction to grant orders of injunction. To the contrary what the said decisions held was that the Tribunal had no powers to grant orders whose effect would be to reinstate a dispossessed tenant to the suit premises which orders are ordinarily mandatory in nature.

26. The interested party submitted that to hold that the Tribunal has no powers to grant injunctions would defeat the purpose for which the Act was enacted as expressed in the preamble to the Act under which it is provided 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."

27. In my view the decision of this Court would depend on the binding effect of the decision in the **Narshidas Case,** otherwise known as the doctrine of *stare decisis*. The said doctrine is so sacrosanct in our jurisprudence that even the highest court in the land will not lightly ignore the same as was recognised by **Sir Charles Newbold, P** in **Dodhia vs. National & Grindlays Bank Limited and Another [1970] EA 195**, where he pronounced himself as follows:

"A system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own. But there is a great difference between a final court of appeal and a subordinate court of appeal. If it is considered that a decision of a subordinate court of appeal was wrong it would always be open to

have it tested and if necessary rectified in the final court of appeal. Thus, on the face of it, there is a need for greater flexibility in a final court of appeal than there is any other court in the judicial hierarchy. Further, the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. It should, moreover, be borne in mind that too strict an adherence to the principle of *stare decisis* would, in fact, defeat the object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it. The result of distinguishing a decision when there was no real difference results in uncertainty, an uncertainty which would not exist if it were clearly stated that the old decision was nolonger the law. It must also be remembered that the Privy Council, when it was the final court of appeal for Kenya, Tanzania and Uganda, never considered itself bound by its previous decisions. It would seem a retrograde step for the court, now that it has taken over the functions of a final court of appeal for these countries, to discard the flexibility previously possessed by the final court of appeal and instead adopt a position of rigidity."

28. **Duffus, VP** on his part held:

"The adherence to the principle of judicial precedent or *stare decisis* is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State."

29. Whereas the current Constitution in Article 163(3) seems to deal only with the binding force of the decisions of the Supreme Court, it is my view that good order and proper administration of justice as well as the common law doctrine of *stare decisis* dictate that lower courts adhere to the decisions of courts of superior hierarchy where legally acceptable circumstances exist. As was appreciated by **Musinga, J** as he then was in **Rift Valley Sports Club vs. Patrick James Ocholla Nakuru HCCA NO. 172 of 2002 [2005] eKLR**:

"The learned magistrate trashed such a forceful decision of the Court of Appeal by failing to give it any consideration at all and proceeded to grant an injunction in a ruling which was devoid of any legal reasoning. A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of *stare decisis* is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five judge binding decision without citing any reasons for doing so."

30. A similar position was taken by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** when it held that:

"Adherence to precedent should be the rule and not the exception....the labour of judges would be increased almost to breaking point if every past decision could be reopened in

> **every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."**

31. However there are circumstances under which a Court may decline to follow a decision which would otherwise be binding on it and these are (a) where there are conflicting previous decisions of the court; or (b), where the previous decision is inconsistent with a decision of another court whose decision is binding on the court which is considering the issue; or (c) where the previous decision was given *per incuriam.* As a general rule though not exhaustive the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness or some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. See **Lalitmohan Mansukhlal Bhatt vs. Prataprai Luxmichand and Another Civil Appeal No. 70 of 1963 [1964] EA 414.**

32. Whereas Article 163(3) binds this Court to a decision of the Supreme Court and based on the Common Law doctrine of *stare decisis*, those of the Court of Appeal, it does not necessarily mean that this Court must agree with the decision of the Supreme Court. This was appreciated by a five judge bench of the Court of Appeal in **Mwai Kibaki vs. Daniel Toroitich Arap Moi Civil Appeal Nos. 172 & 173 of 1999 [2008] 2 KLR (EP) 351; [2000] 1 EA 115** where it was held that:

> **"The High Court, while it has the right and indeed the duty to *critically examine* the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that *obiter dictum* if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers. Even in the same tier, where it has taken the freedom to review its own decisions, it will do so cautiously. Precedent is regarded as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as an orderly development of legal rules…"**

33. A similar view was expressed by the Court of Appeal in **National Bank of Kenya Ltd vs. Wilson Ndolo Ayah Civil Appeal No. 119 of 2002 [2009] KLR 762** where it was held:

> **"It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter."**

34. It follows that even in circumstances where this Court is bound by the decision of the Courts superior to it, there is nothing to stop it from expressing its opinion thereon. Nevertheless as was held by **Ringera, J** (as he then was) in **Deposit Protection Fund Board vs. Sunbeam Supermarket Limited & 2 Others Nairobi (Milimani) HCCC No.3099 of 1996 [2004] 1 KLR 37** under the doctrine of *stare decisis* the High Court is bound by the decisions of the superior courts other than the High Court or Courts of the same status regardless of whether the decisions are agreeable.

35. With due respect the decisions of the High Court cannot override the decision of the Court of Appeal and unless it is shown that the decision of the Court of Appeal was made *per in curium* or that the facts are distinguishable, the Court of Appeal decision is binding on this Court despite the misgivings this Court might have with respect thereof. As was stated by **Omolo, JA** in **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 Others Civil Appeal No. 238 of 2003**:

> **"The learned judge of the High Court had no jurisdiction to over-rule a decision of the Court of Appeal even if she disagrees with the decision and the comments in her**

judgement must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. Like all other judges in her position, under the doctrine of precedent, she is bound by the decision of the Court of Appeal even if she may not approve of a particular decision and any attempts to over-rule or side-step the court's decisions can only result in unnecessary costs to the parties involved in the litigation."

36. This position was restated in **Cassell & Co. Ltd vs. Broome & Another [1972] AC 1072** in which the Court held:

> **"The fact is and I hope it will never be necessary to say so again, that in the hierarchical system of the courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of higher tiers. Where decisions manifestly conflict, the decision in *Young vs. Bristol Aeroplane Co. Ltd [1944] KB 718* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously".**

37. One cannot bring this discussion to an end without referring to the wise words of **Sir Charles Newbold** in the case of **Dodhia vs. National & Grindlays Bank Limited and Another [1970] EA 195.** The learned President of the East African Court of Appeal had this to say:

> **"I accept that a system of law requires a considerable degree of certainty and uniformity and that such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision".**

38. In my view the decisions handed down before the promulgation of the current Constitution must of necessity be looked in light of the provisions of the Constitution and where such decisions seem to go contrary to the letter and spirit of the current Constitution, those decisions even if they are decisions of Courts of Superior hierarchy would no longer be binding on the Court. In other words a decision handed down based on certain legislative lapses cannot be said to be binding where the legislation is amended.

39. In terms of Article 169(1)(d) of the Constitution:

> ***(1) The subordinate courts are—***
>
> > ***(a) the Magistrates courts;***
> >
> > ***(b) the Kadhis' courts;***
> >
> > ***(c) the Courts Martial; and***
> >
> > ***(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).***
>
> ***(2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).***

40. It is therefore clear that the jurisdiction of the subordinate Courts can be limited by an Act of Parliament. To that extent it is incorrect as contended by the interested party that the Tribunal necessarily has the same powers as the Magistrates Court. However, where the powers of the Tribunal have not been limited by a statute, it is my view that there is nothing to prevent the Tribunal from exercising the powers conferred on the subordinate Courts such as the Magistrate's Courts. Section 63(c) of the ***Civil Procedure Act*** provides:

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed-

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.

41.The Court under section 2 of the said Act is expressed to mean "the High Court or a subordinate court, acting in the exercise of its civil jurisdiction". These provisions when read together clearly supports the view that under the current Constitutional dispensation in the absence of express limitation of the jurisdiction of the Tribunal, the Business Rent Tribunal is clothed with the jurisdiction to grant temporary injunctions.

42. I therefore associate myself with the decision of the Court of Appeal in **John Mugo Ngunga vs. Margaret M. Murangi** (supra) that:

> **"On the jurisdiction of the Tribunal to issue an order of injunction, it is clear the Judge was right, the jurisdiction is provided for by the Act and that was further fortified by the aforesaid decision of this Court. We however part company with the learned Judge regarding the issuance of what was a mandatory order of injunction ex parte as well as the order directing the enforcement through the use of the local police. The provisions of Rules 19 and 21 of the Act clearly provide for fixing a hearing date and service of hearing notice upon the parties. Section 14 of the Act provides for the applicable procedure for the enforcement of the order by the subordinate court. On this issue we agree that the Chair of the Tribunal acted in excess of the powers granted by the Act and thus the appellant was entitled to seek for orders of certiorari.**

43. It is therefore my view and I so hold that until Parliament enacts legislation limiting or restricting the powers of the Tribunal the Tribunal has the powers to grant orders prescribed under section 63(c) of the ***Civil Procedure Act*** including orders of temporary injunction.

44. The other issue raised was whether the Tribunal was in order to grant *ex parte* orders whose lifespan was in excess of 14 days. Order 40 Rule 4(2) of the ***Civil Procedure Rules*** provides:

> ***An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.***

45. In **Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332,** the Court of Appeal held that *ex-parte* injunction orders if granted for more than 14 days are of no legal effect and cannot be extended. It follows that even if the 1st Respondent had powers to grant the orders of injunction, it would have had no powers to grant such orders *ex parte* for a period of more than 14 days under Order 40 rule 4(2) of the ***Civil Procedure Rules*** because to do so would without jurisdiction.

46. In this case however it is contended that the orders in question were not *ex parte* orders since the hearing date was fixed in the presence of the counsel for the parties. I have perused the grounds in the statement and I must agree that the issue of the lifespan of the ex parte orders was not one of the grounds relied upon by the ex parte applicant. Order 53 rule 4(1) of the ***Civil Procedure Rules*** provides that:

> ***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.***

47. It follows that the ex parte applicant is precluded from relying on the said ground.

48. Apart from that none of the parties exhibited the proceedings before the Tribunal to enable the Court make an informed decision whether or not the orders had a lifespan of more than 14 days. It must be stressed that in judicial review applications the burden is always on the ex parte applicant to prove his allegations to the satisfaction of the Court. In light of the state of the record I am unable to find that the provisions of Order 40 rule 4(2) aforesaid were applicable.

49. What do *ex parte* proceedings connote? In ***Black's Law Dictionary***, 9th Edn. at page 657 the word "ex parte" is defined as:

> **"Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, usu. for temporary or emergency relief"**

50. If as the interested party contended, the hearing date was taken in the presence of the counsel for the parties, then whereas the non-attendance of the *ex parte* herein applicant would nevertheless render the proceedings which took place *ex parte* in the sense that the *ex parte* applicant was not represented thereat, it would not subject the said proceedings to the provisions of Order 40 rule 4(2) of the ***Civil Procedure Rules*** which in my view apply to situations where the proceedings take place without notice to the other party.

Order

51. In the premises I find no merit in the Notice of Motion dated 8th January 2012 which I hereby dismiss with costs.

Dated at Nairobi this 27th day of January, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Wambugu for the Applicant.

Cc Patricia