REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW DIVISION

JR MISC APP NO. 149 OF 2014

IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS IN THIS COURT

AND

IN THE MATTER OF: APPLICATION TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE RESPONDENT

AND

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 AND ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF: THE EXPORT PROCESSING ZONE ACT CAP 517 LAWS OF KENYA

AND

IN THE MATTER OF: REASONABLENESS AND LEGITIMATE EXPECTATION

AND

IN THE MATTER OF: PRINCIPLES OF PROPORTIONALITY AND LEGITIMATE EXPECTATION

AND

IN THE MATTER OF: SUCCINCT PRINCIPLES NATURAL JUSTICE AND FAIRNESS

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

EXPORT PROCESSING ZONES AUTHORITY ..... RESPONDENT

EX-PARTE

RICARDO EPZ INTERNATIONAL CO. LTD..INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th April, 2014, the *ex parte* applicant herein, **Ricardo Epz International Co. Ltd,** seeks the following orders:

> **1. That an order of certiorari be issued to bring into this court and quash the decision of the Respondent to close down, withhold license, bar the workers from the business premises, suspend and interference with the business operations of the Applicant.**
>
> **2. That an order of prohibition be granted to Prohibit and deter Respondent from threatening, intimidating, withholding license, closing down and/or in any way interfering the Applicant's business operations.**
>
> **3. Costs of this Application.**

Ex Parte Applicant's Case

2. In support of the application the applicants filed a verifying affidavit sworn by **Richard Ndubai**, the Applicant's Chief Executive Officer on 16th April, 2014.

3. According to the deponent, he met with the CEO of the Expert Processing Zone (hereinafter referred to as the Authority) and informed him that he was opening the company again after one year into receivership. The deponent then requested the said CEO for time to pay all the outstanding rent arrears in instalments and issued the Authority with Cheques from Equity Bank worth Kshs. 2Million as part payments towards the rent arrears but the Authority declined to bank the same and still holds on to them.

4. It was deposed that the Authority instead instructed Auctioneers with whom the applicant negotiated with regard to the settlement payments and to whom were released cheques worth Khs.3 Million.

5. However one week thereafter, the applicant received a letter from the Respondent threatening to suspend operations of the company and as result barring it from all benefits and incentives offered under the EPZ Programme. It was however deposed that the applicant had been in negotiations with the auctioneers by the Respondent and who had accepted the applicant's settlement plan. However, one week thereafter the Respondent revoked the arrangements and suspended the business operations of the company.

6. It was the applicant's contention that the move by the Respondent was dire and extremely adverse and detrimental to the company in view of the circumstances it underwent during the receivership which was beyond its control and authority. It was disclosed that the applicant is an employer of over 650 permanent employees and casual labourers whose livelihoods and families are at risk and will suffer immensely if the Respondent proceeds to suspend the operations of the company.

7. While acknowledging that there were rents arrears left unpaid by the Receiver manager – Trans National Bank, it was contended that the applicant was prepared to pay the same over a reasonable and agreeable period of time through instalments since it had not been in business for over one year and was not making any profit.

8. The deponent deposed that they since they had been in constant negotiation and talks with the Respondent with regard to the settlement of the arrears owed to it and after striking a deal, it would be unconscionable and un-proportional for the Respondent to singularly and without notice negate from

the arrangement and proceed to suspend the operations of the business of the Applicant.

9. This court was therefore urged to prevail upon the wheels of justice and restore and sustain the company and livelihoods of employees against the arbitrary actions by the Respondent suspending the business operations of the Company.

10. It was submitted that it was unreasonable on the part of the Respondent to have expected the applicant who had just come out of receivership to pay arrears to the tune of Kshs 20 million hence it was the respondent's action violate the applicant's legitimate expectations.

11. It was further submitted that the Respondent's actions were in bad faith and its decision to suspend the ex parte applicant is unreasonable, capricious and in bad faith hence the orders sought ought to be granted.

12. In support of the submissions, the applicant relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Republic vs. Kenya Railways & Another ex parte Inviolate ACIKE Siboe [2014] eKLR**, **Council of Civil Service Unions vs. Minister for Civil Service [1985] AC 374**, **R vs. Commissioner of Cooperatives ex parte Kirinyaga Tea Growers Cooperative Savings Society [1999] 1 EA 245**, **Republic vs. Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V BATT & Company Nairobi HCMA No. 285 of 2006**, **Republic vs. Minister of State for Immigration and Registration of Persons [2013] eKLR** and **Republic vs. Chief Magistrate's Court Nairobi & 4 Others ex parte Beth Wanja Njoroge [2013] eKLR**.

Respondent's Case

13. The respondent opposed the application by way of a replying affidavit sworn by **Cyrille Nabutola**, its Chief Executive Officer on 4th June, 2014.

14. According to the deponent, the Respondent is a Government of Kenya parastatal, governed by the ***Export Processing Zone Act*** Cap 517 whose main objective being; to provide for the promotion and facilitation of export oriented investments and to develop an enabling environment for such investments.

15. It was deposed that the Applicant herein applied for an CN (Manufacturing) license on or about 27th August 2008 which application was approved on or about 7th November 2008 and upon satisfying the condition set in the approval letter, it was issued with an annual license for the period 24th March 2009 to 23rd March 2010. Subsequently, upon fulfilling the conditions for the following year it was issued with a License for the period of 24th March 2010 to 23rd March 2011.

16. It was deposed that thereafter the applicant expressed interest to lease two industrial buildings and on or about 16th March 2009 the Respondent and the Applicant herein entered into a lease agreement for Go-Down number A5 and A6 for a period of six (6) years with effect from 1st April 2009 and rent payable was on a quarterly basis and upon signing the said lease agreement the applicant started off the business.

17. It was averred that on or about 31st March 2010 the applicant requested for additional premises (GO-Down) being A2 and it was allocated the extra premises (GO-Down) and on or about 25th February 2011 and a lease agreement was signed between it and the Respondent for a period of six (6) years commencing 1st March 2011, the rent was payable quarterly.

18. It was asserted that in both Lease agreements it was provided that *"if rent agreed or any part thereof shall at anytime remain unpaid for seven (7) days after becoming payable (whether lawfully demanded or not) or if at anytime there after the Applicant is in breach of any covenants or conditions referred to in the standard lease, it shall be lawful for the landlord to re-enter the*

premises or any part thereof in the name of the whole and thereupon the agreement of lease shall be terminated absolutely".

19. However, as early as October 2009 the Applicant had already accumulated arrears and was pleading with the Respondent to accept a proposal for it to pay Rent on a monthly basis as the applicant was having financial constraints. The applicant did not however honour the said proposal and by 11th November 2012 the Applicant had accumulated rent arrears to the tune of United States Dollars 74,360.71 for Go-Downs A5 and A6, and for Go-Down A2 it had accumulated United States Dollars 18,457.50.

20. It was disclosed that the Applicant had formed a habit of issuing proposals for payment and not honouring them and that the applicant had also been issuing Cheques that have issues; for instance, on or about December 2010 it issued two Cheques for Kshs.1,264,000/- both of which did not meet the requirement of the Central Bank of Kenya that any Cheques for amount above one Million or United States Dollars of 35,000 ought to be done by telegraphic transfer.

21. It was deposed that some of the Cheques issued by the applicant got rejected by the banks upon presenting them for banking on inter alia grounds that they had not been signed in accordance with the mandate held; hence the respondent was forced to return the rest of the cheques issued since they were signed in the same manner.

22. According to the deponent, all along the respondent has demanded the rent arrears and have been quite patient with the Applicant hoping that the Applicant will have its house in order soon, but the same has not been forthcoming at all. Despite the Applicant's failing to keep it's part of the bargain on the proposal it gives on clearing the rent arrears, the Respondent was very accommodating and patient. However, as of 30th April 2014 the Applicant had a debt of United States Dollars 166,648 for premises (GO-Downs) A5 and A6 and United States Dollars 59,216.76 for premises A2 and the last valid License the Applicant had was in 2011 as over the years the Applicant had not been able to meet the conditions required for renewal of a license; one of them being clearing all outstanding lease and license fees. It was disclosed that the amount so far outstanding in respect of the Trading License was United States Dollars 3,008.04. The Applicant had therefore been warned on operating the company without a valid trading license but the warning was not adhered to at all.

23. The deponent stated that on or about the year 2013 the Applicant was put under receivership by Trans-national Bank of Kenya which appointed Messrs **Farid Sheikh** and **Denis Musyoka** as receivers and during this period the Respondent wrote to the Official Receivers, indicating to them that the Applicant owed them rent and license fees. During the same period, the Applicant also demanded for rent from the Applicant.

24. It was therefore the respondent's case that the Applicants statement that the Respondent never demanded from it or from the receiver was not correct at all. Besides, the Applicant has an obligation to pay rent as and when it is due whether or not on demanded.

25. It was deposed that the Advocates for the Receivers Messrs Ochieng, Onyango, Kibet and Ohaga Advocates wrote to the Respondent informing them, that the Applicant had obtained Mandatory Injunctions stopping the Receivers from managing any assets of the Applicant and conducting any business at the Applicant's premises hence the Advocates advised that any issues relating to any obligations to be performed by the company should be directed to the Company not the bank (Receivers) which letter according to the deponent, shows that the Applicant's statement to the effect that, during the entire period of the receivership the Trans-National Bank was appointed the sole custodian to run and manage all the affairs of the company is also not correct. Further, in light of the mandatory injunction granted to the Applicant to manage its properties during the receivership, it is also not correct that it did not know that the Receiver manager was not remitting rent to the Respondent. Be as it may, it knew it had the obligation of paying rent as it fell due as long as it was still in occupation of the premises; whether or not it was under receivership.

26. It was reiterated that the Applicant had given the Respondent a number of proposals and even sought funding form financial institutions during which time the Respondent had indulged the Applicant but nothing had been forthcoming so far.

27. As far as the Respondent WAS concerned the Applicant has a total of 413 Employees as per the records submitted to it by the Applicant and not above 650 as claimed by the Applicant and that over the years the Applicant has had a problem paying its employees, as and when their salaries fall due, some of whom complained to the Respondent complaining about it.

28. It was therefore contended that the Applicant does not have any grounds for it to be granted the prayers sought as the said license cannot be issued unconditionally since that will be against the law as is provided under the ***Export Processing Zones Act*** Cap 517. It was deposed that it is no longer possible or viable to have the Applicant at the premises, and there is need for it to vacate the premises occupied as soon as possible and that the Respondent had communicated to the Applicant of its intention to terminate the Lease Agreement due to breach on the Applicant's part. To the deponent, there were other persons who had expressed interest in the properties hence it is not fair for them or the authority to be held at ransom, due to the Applicants failure to have its house in order over the years.

29. The relationship between the Applicant and the Respondent being a contractual one which the Applicant had breached over and over again, it was the Respondent's position that it was not in a position to indulge the Applicant any longer; it should therefore hand over the industrial premises so occupied and work towards paying the debt that has accumulated and is continuing to accumulate amounting to over United States Dollars 228,864.97. According to the Respondent, the Applicant had been accorded all fairness and reasonableness and the principles of natural justice had been observed but the same had not borne any fruit.

30. It was the Respondent's position that the applicant's continued occupancy of the premises without payment and without a valid trading license is depriving other Kenyans an opportunity to earn a living by making use of the premises and that due to the huge outstanding amount owing and the Applicant's refusal to vacate the premises, the Respondent has been forced to seek and pay for the services of auctioneers which have so far not borne fruit hence it is only fair after all the time taken and indulgence accorded, that the Applicant vacates the premises and make arrangement to pay the debt accrued.

31. To the respondent, the Applicant's application herein is a total abuse of the court process and courts time, it is vexatious and it is aimed at frustrating the Respondent and should be dismissed with costs.

32. It was submitted on behalf of the Respondent that the applicant was guilty of non-disclosure of material facts at the time it commenced these proceedings and obtained leave and stay in that the issue of accumulation of rents was never disclosed. It was therefore submitted that this application is an abuse of the process of the court.

33. According to the Respondent, judicial review cannot provide a remedy for an alleged breach of contract and since the applicant's complaints relate to contractual issues, judicial remedies are not available to it.

34. Without quashing the notice requiring the applicants to vacate, it was submitted that judicial review cannot be invoked to stop public bodies from executing their statutory functions.

35. It was the respondent's position that its actions were not unreasonable, capricious and did not violate the applicant's legitimate expectations.

36. In support of the submissions, the Respondent relied on **Re Kenya National Federation of Cooperatives Limited & Others [2004] 2 EA**, **In the Matter of Title Number Chembe**

Kinanamshe/406 [2013] eKLR and **Republic vs. Capital Markets Authority ex parte Francis Thuo & Partners Limited [2012] KLR** on the issue of non-disclosure; **Meixner vs. AG [2004] 2 KLR 189** and **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR** on the issue of merits; **Republic vs. City Council of Nairobi ex parte Meshack Mbuthia Macharia & 2 Others [2012] eKLR** for submission on contractual matters; **Republic vs. The Kenya Revenue Authority ex parte Beirsdorf East Africa Ltd [2011] KLR**; **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR**, **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR** and **Republic vs. The District Land Adjudication & Settlement Suba District & Another [2013] eKLR** on the issue of legitimate expectation.

Determination

37. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.

38. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** 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.....The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....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."

39. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** 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."**

40. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

41. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

42. In this case, the basis of the applicant's complaint is a contract entered into between the applicant and the respondent for the lease of premises from the respondent. Ordinarily matters relating to contractual issues are not elevated to found a cause of action in judicial review jurisprudence. As was held by **Visram, JA** in **Maseno University & 2 Others vs. Prof. Ochong' Okello [2012] eKLR** in which the learned Judge held:

> **"…orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties. The trial Judge appears to have been moved by the fact that the respondent is "a *senior citizen and a senior lecturer who has dedicated his service to the public by imparting knowledge to us and to our children*". This may well be so. Nonetheless, that fact does not make the contractual relationship between the respondent and the applicant which is governed by terms and conditions agreed by the parties a matter of public duty or matter governed by public law. Moreover, if one were to accept the reasoning of the trial Judge that the treatment of the respondent becomes a matter of public law because of the public expectation that the University would act lawfully and fairly towards the respondent, then it is not the respondent but the public who would have a right of action for orders of judicial review based on breach of their expectation. …[T]he breach or threatened breach of the appellants' contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the respondent and the appellants, governed by private law. It was not therefore an appropriate action justifying the granting of orders of judicial review. The respondent may well have had a**

genuine grievance. His remedy however, lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of judicial review as Prof. Ochong' did not have public law right capable of protection under the supervisory jurisdiction of the Court."

43. I also associate myself with the position taken in **Republic vs. City Council of Nairobi ex parte Meshack Mbuthia Macharia & 2 Others** (supra) that judicial review cannot provide a remedy for an alleged breach of contract.

44. It is not controverted in this case that the applicant whether by itself or through the receivers accumulated massive rent arrears. As stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account *the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief*. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders." [Emphasis mine].

45. As the Applicant is clearly in arrears of rent, this Court cannot in the exercise of its undoubted discretionary jurisdiction grant orders whose effect would be to aid the applicant.

46. With respect to legitimate expectation, in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** the Court held as follows:

"…….legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.…Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

47. In this case there is no contention that the Respondent made any promises or conducted itself in a manner which gave rise to legitimate expectation that the Applicant would retain possession of the suit premises.

Order

48. Accordingly I decline to grant the orders sought herein. In the result the Notice of Motion dated 30th April, 2014 fails and is dismissed with costs.

Dated at Nairobi this 17th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Ongaro for Dr Khaminwa for the Applicant

Mrs Kariuki-Owesi for the Respondent

Cc Patricia