



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 446 OF 2009

REPUBLIC APPLICANT

VERSUS

**THE RENT RESTRICTION TRIBUNAL
RESPONDENT**

AND

AL NASHIR DHANJIINTERESTED PARTY

EX PARTE

1. SADRU NANJI

**2. JUBILEE BUILDING CO-OPERATIVE SOCIETY LIMITED
.....APPLICANTS**

JUDGMENT

Introduction

1. The suit property herein, Flat No. 5, Block K on Plot No. 407 Section XI, MI (“the suit premises”) is built on (Plot No. 407 Section XI, MI registered in the name of the 2nd ex parte applicant, a cooperative society whose membership consists of persons professing the Ismaili faith. Members of the said Society are permitted to occupy the flats on the premises as lessees upon payment of premium and execution of a lease agreement with the 2nd ex parte applicant, and thereafter an agreed service charge for the upkeep and maintenance of common areas.
2. The 1st ex parte applicant purchased the suit premises from one Shamsher Tarmohamed, attorney of Zarin S. Rajan and Yasimin B. Jamal by agreement dated **12th March 2009**, with the consent of the 2nd ex parte applicant.
3. On 26th August 2008, Alnashir Dhanji, the Intersted Party herein, instituted Mombasa Rent Tribunal Suit No. 115 of 2008 (Alnashir Dhamji vs Zarin S. Rajan, Yasimin B. Jamal (suing on behalf of the estate of Khatuna A. Alibhai and Hamza Jeneby t/a Jeneby Limited). The claim before the Rent Tribunal was that Zarin S. Rajan & Yasimin B. Jamal, relatives of Khatuna A. Alibhai – the deceased landlord of the suit premises - and strangers to the premises, had unlawfully received Kshs.309,000/- from the interested party on or about 1st October 2007 and on

- 12th August 2008 purported to proclaim and attach his property for Kshs.164,990/- over alleged rent arrears of Kshs.137,800/- as at 11th August 2008.
4. The Interested Party's suit in the Rent Restriction Tribunal suit was filed by the firm of Osoro Omwoyo & Company Advocates for the Plaintiff and it was sought an order of injunction restraining Zarin S. Rajan, Yasimin B. Jamal and Hamza Jeneby, the auctioneer ("the defendants") from interfering with the interested party's enjoyment of the suit premises, an assessment of the standard rent of the suit premises, a refund of Kshs.309,000/-, an order that the interested party do pay the monthly rent of Kshs.2,500/- to the Public Trustee, interest and costs of the suit.
 5. The defendants were served by substituted service with leave of the Tribunal following application on behalf of the Plaintiff. The application and publication were made by **D. N. Omari & Company Advocates** for the plaintiff.
 6. The ex parte applicants herein were not party to the Rent Tribunal matter. The Interested Party on **17th June 2009** obtained orders for the eviction of the 1st ex parte applicant from the suit premises. The eviction orders were executed with the help of the police and the suit premises were left vacant and padlocked, a situation which was confirmed to subsist as at 18th February 2010. This prompted the ex parte applicants to seek judicial review of the Tribunal's orders.

The Notice of Motion dated 16th October 2009

7. The High Court (Ibrahim, J. as he then was) on 29th September 2009 granted leave to the ex parte applicant to institute the judicial proceedings herein. The court in granting leave directed that the status quo obtaining as at 29th September 2009 be maintained pending further particulars. Upon such leave, the ex parte applicant herein filed Notice of Motion dated 16th October 2009 seeking that:
 - a. *An order of certiorari be given to bring to this Honourable Court the rulings and Orders made by the Rent Restriction Tribunal in Mombasa Rent Tribunal Suit No. 115 of 2008 (Alnashir Dhamji vs Zarin S. Rajan, Yasimin B. Jamal (suing on behalf of the estate of Khatuna A. Alibhai and Hamza Jeneby t/a Jeneby Limited) on 17.6.2009 for purposes of quashing them.*
 - b. *An order of prohibition be given to prohibit the Rent Restriction Tribunal from enforcing or executing or purporting to enforce or execute the orders it gave in Mombasa Rent Tribunal Suit No. 115 of 2008 (Alnashir Dhanji vs Zarin S. Rajan, Yasimin B. Jamal (suing on behalf of the estate of Khatuna A. Alibhai and Hamza Jeneby t/a Jeneby Limited on 17.6.2009.*
 - c. *An order be made that leave given by the Honourable Court on 29.9.09 do operate as a stay of execution of the orders given by the Rent Restriction Tribunal in Mombasa Rent Tribunal Suit No. 115 of 2008 (Alnashir Dhanji vs Zarin S. Rajan, Yasimin B. Jamal (suing on behalf of the estate of Khatuna A. Alibhai and Hamza Jeneby t/a Jeneby Limited on 17.6.2009 and a further order to direct the Officer Commanding Station, Makupa Police Station to cease entering or remaining upon plot no. 407, Section XI, MI and to bar Mr. D. N. Omari from acting or continuing to act as an advocate in Mombasa Rent Tribunal Suit No. 115 of 2008 (Alnashir Dhanji vs Zarin S. Rajan, Yasimin B. Jamal (suing on behalf of the estate of Khatuna A. Alibhai and Hamza Jeneby t/a Jeneby Limited on 17.6.2009.*
 - d. *Costs of this application and of the Chamber Summons application dated 25.9.09 be paid to the ex parte applicants.*

The application was said to be supported by the verifying affidavits of Sadru Nanji.

The Applicant's case

8. The 1st ex parte applicant, Sadru Nanji, on 25th September 2009 swore Verifying Affidavit stating that he purchased the suit premises from Zarin S. Rajan and Yasimin B. Jamal with the consent of the 2nd ex parte applicant on 12th March 2009. The suit premises was vacant at the time and had remained so for a long time. He said that he received a call from D. N. Omari Advocates on 13th August 2009 asking for a bribe so as not to throw him out of the suit premises. It was at this

- prompting that he unearthed the pleadings and orders of the Rent Restriction Tribunal proceedings. These were annexed as “SN2”.
9. The 1st interested party emphasized that he was not a party to the tribunal proceedings, had not been notified by the tribunal or by D. N. Omari Advocates to file any pleadings before the tribunal, and despite the tribunal being aware that he was the owner of the suit premises, it issued adverse orders against him effectively evicting him from the premises thus condemning him unheard. The tribunal was further faulted for making orders directing the Officer Commanding Police Station (OCS) Makupa Police Station to enforce its orders without jurisdiction, instead of forwarding the order or record to the court for enforcement. As a result, the police and the interested party on 8th September 2009 forcefully broke into the suit premises and applied their own padlock evicting the 1st ex parte applicant.
 10. From the 1st ex parte applicant’s affidavit, D. N. Omari, the person who had conduct of the matter before the Rent Restriction Tribunal for the plaintiff (the interested party) may not have been a qualified advocate. When confronted with this fact, the said counsel on 2nd July 2009 replied stating that the firm of Osoro Omwoyo & Company were in conduct of the matter for the plaintiff, and that he was only holding brief for Mr. Osoro who is based in Nairobi.
 11. This was contested by counsel for the ex parte applicants who produced correspondence, dates of appearance before the tribunal and a copy of the notice of substituted service which were all in the name of D. N. Omari & Company Advocates. Further, there was a letter dated 22nd June 2009 from Adraya E. Dena, Programme Director in charge of Compliance and Ethics at the Law Society of Kenya secretariat, confirming that no firm in the name of D. N. Omari & Company is registered with them, and while Denis Nyangweso Omari is an advocate of the High Court of Kenya, he had not taken out a practicing certificate since his admission in 2004.
 12. The Chairperson of 2nd ex parte applicant, Jubilee Building Cooperative Society Limited, one Gulshan Alibhai swore a Further Affidavit on 18th February 2010 accusing the Rent Restriction Tribunal of allowing a stranger into the property of Jubilee Building Cooperative Society Limited, the 2nd ex parte applicant without notifying them of the case, and ordering the use of police in private property of the society without hearing the society. In any event, the interested party, it was stated, was not a member or a shareholder of the 2nd ex parte applicant and did not have capacity or authority to occupy the premises, or sublet it.

Responses to the Application

13. Alnashir Dhanji, the interested party herein filed affidavit in reply sworn on 28th April 2010 stating that he had been tenant in occupation of the suit premises paying monthly rent of Kshs.2,500/-. He was made to pay Kshs.309,000/- in October 2007 by Zarin S. Rajan and Yasimin B. Jamal through Shamser Tarmohamed as outstanding rent and was issued with a receipt. Fearing further disagreement, he filed the suit at the Rent Restriction Tribunal on 26th August 2008 and got orders in his favor restricting the defendants from interfering with his possession of the suit premises. The applicants emerged in the course of the tribunal proceedings claiming to have bought the house and were advised to file appropriate pleadings, which they refused or neglected to, hence the tribunal came a decision in their absence.
14. The Interested Party accused the applicants of breaking into the suit premises and damaging his property despite there being an order restraining them. He denied any knowledge of the alleged sale of the suit premises and opined that the present application is malicious, and aimed at denying him the right to occupy the suit premises. He claimed that he would suffer irreparable loss should the court grant the orders sought.
15. The Respondent tribunal opposed the Notice of Motion by Grounds of Opposition dated 14th September 2010 and maintained that it acted within its powers and jurisdiction to issue the orders in view of the pleadings and documents in the court record.
16. The counsel for parties (excepting the Respondent) – M/S Kinyua Muyaa & Co. advocates for the applicants and M/S Khatib and Co. advocates for the Interested Party - filed written submissions, respectively, on 9th March 2011 and 29th March 2011, but original file herein went missing on 30th March 2011. Upon an application to the Court on 3rd April 2014 the parties agreed that a skeleton

file be reconstructed with Photostat copies of the documents as annexed to the affidavit of D. Muyaa, advocate, and the matter was reserved for judgment.

The Issues for determination

17. The Issues for determination before the court are:

- a). Whether the Rent Restriction Tribunal in granting an injunction and subsequent eviction orders acted illegally, irrationally and or with procedural impropriety; and
- b) Whether in the proceedings before the Tribunal in which the plaintiff, the Interested Party herein, was represented by an unqualified person and, consequently, whether such proceedings and order of the Tribunal emanating therefrom would be quashed.

DETERMINATION

Whether the Rent Restriction Tribunal acted with any illegality, irrationally or with procedural impropriety:

18. The handwritten record of the proceedings before the tribunal attached to the application is as follows:

“[26.8.2008]

Order

Having heard the counsel for the plaintiff/tenant and having read the plaint, application in supporting affidavit I hereby grant orders 1 and 2 pending the hearing of the application inter partes. The tenant to deposit the rent at the tribunal court on 5.9.2008 and on the 5th day of each succeeding month pending the hearing of the suit for the orders.

The O.C.S. Makupa Police Station do ensure compliance of these orders.

The Defendants to be served with the plaint, application of

The application chamber summons within the next 15 days.

The application shall be heard inter partes during he next session.

Signed

11.2.2009

Mr. Waweru from E.N. Omari Advocate for the Plaintiff/Tenant present in person

No appearance for the Defendants

Hearing date fixed ex-parte for 31.3.2009 at 8.30 am.

Signed

[31.3.09]

Angima holding brief for Omwoyo for the Applicant

Appearing with Momanyi

*We were unable to serve the defendant. We pray for substituted service. The Defendants have since moved out of the premises and their whereabouts is not known. We pray for substituted service. We also pray for extension of the orders. **One Mr. Sadu Nanji 3rd party claims that he bought the property from Shasher Tarmohamed for 1.1 million on 12.3.2009.***

Court

Stood over generally.

The third party to file an application to be enjoined in the proceedings. Hearing during text court session. The Defendants to be served by way of substituted service. Interim orders on record are extended till then.

Signed

24.4.2009

Angima Advocate for the Plaintiff present

No appearance for the Defendants

Hearing date fixed ex-parte 17.6.2009 at 8.30 am.

Signed

17.6.2009 of case RRC 115/08

Coram

Mr. H.K. Korir – Chairman

Mr. D .Marami – Member

Mrs. Musina- Member.

Court Clerk Njoroge

Plaintiff/Tenant – present

Defendant/Landlord – Absent

Plaintiff states that his counsel is coming. Matter put aside to await counsel.

Later

Omari for the Plaintiff/Tenant. The defendant was served by way of substituted service vide Nation newspaper dated 25.3.2009.

The application is dated 26.8.2008 seeking for restraining orders from evicting and/or selling the suit property.

Interim orders were issued on 27.8.2009. The Defendants have never filed their papers. They were served through substituted services. We pray that the orders be confirmed. We also pray for a braking order to enable us regain access to the premises. That is all.

Court

In the absence of any replies from the Respondents who were directly served the interim orders granted on 27th August 2008 are hereby confirmed.

The plaintiff is granted leave to break into the premises in order to regain access to the same.

The breaking order is to be supervised and enforced by the O.C.S Makupa Police Station.

Signed”

19. The interested party had obtained an injunction over the suit property on 26th August 2008. The evidence adduced before the court, including hand written proceedings indicate that the tribunal was informed from the Bar on 31st March 2009 that there was a party purporting to have purchased the suit premises. The tribunal directed that the said third party make an application to be enjoined. There is no indication that this directive was served on the said third party – the 1st ex applicant herein, requiring him to join the case. The advert in the Daily Nation newspaper of May 25 2009 which is shown to have been prepared by D. N. Omari & Co advocates for the Plaintiff was addressed to the defendants named as Zarin S. Rajan, Yasmin B. Jamal and Hamza Jeneby for the substituted service on the said defendants in the case before the tribunal, and not the ex parte applicant herein. Indeed, the tribunal order was that “*The Defendants to be served by way of substituted service*” despite having been informed of the interest of the 1st ex parte applicant as a purchaser of the suit property.
20. The tribunal on the on 17th June 2009 heard submissions by the applicant's counsel, Mr. Omari and ordered that

“In the absence of any replies from the respondents, who were duly served the interim orders granted on 27th August 2008 are hereby confirmed. The plaintiff is granted leave to break into the premises in order to regain access to the same. The breaking is to be supervised by the OCS Makupa Police Station.”

21. Having been made aware of the existence of a third party with proprietary interest in the suit as a purchaser, the tribunal ought to have ensured that the said party was given an opportunity to be heard before the orders adverse to it were made. The failure of the tribunal to afford the ex applicant an opportunity to be heard means that the tribunal order was made in breach of the rules of natural justice and therefore in excess of jurisdiction.
22. It is clear from the order of tribunal that it was given in default of reply by the defendant, the tribunal holding that “***In the absence of any replies from the respondents, who were duly served the interim orders granted on 27th August 2008 are hereby confirmed***”. Except for liquidated claims where a court or tribunal would be allowed to enter judgment in default, where the defendant in a suit for eviction defaults in filing a reply, the applicant must still urge his application and prove his case so that the court is satisfied that the orders sought are warranted. Otherwise, by granting mandatory injunction or eviction orders without full hearing of the application on the merits, the court or tribunal may end up as here making absurd orders such as where a proprietor is evicted from his own property.
23. Most significantly, in ordering the eviction of the applicants from the suit premises, the Tribunal exercised pretended powers and, therefore, the order of the Tribunal was ***ultra vires*** and illegal. Section 31 of the Rent Restriction Act requires that the enforcement of the orders of the Tribunal will be done before the civil court, and the Tribunal was therefore obliged to refer the matter for execution by the Resident Magistrate’s Court. Section 31 of the ‘Rent Restriction act is in the following terms:

“31. Enforcement of Orders

A copy of any determination or order of a tribunal, certified by the Chairman of the tribunal or by a public officer authorized by the Minister by notice in the gazette to certify such copies, to be a true copy, may be filed in a court by any party to the proceedings which gave rise to it, and thereafter, if notice in writing of the filing has been given to the tribunal by the party filing it, the determination or order may be enforced as a decree of the court.”

24. In addition, the Tribunal’s direction for execution of order with use of police offends the law the role of the police in civil litigation as laid down since ***Kamau Muchuha v. Ripples Ltd. 1990-*** [1994] 1 EA 388 (CAK) where Kwach, JA. said:

“The only valid criticism of the order of the judge which I can see as of now but which does not swing the scale one way or the other in this application, is the direction that assistance of the police should be enlisted to secure compliance by the applicant. The police should never be involved in such matters as there is specific provision for the enforcement of an injunction under Order XXI, rule 28 of the Civil Procedure Rules.”

See also my decision in this regard in ***Republic v. The Registrar of Societies and Ors.. Ex-Parte, Tom Mboya Memorial Hall Development Association Registered Trustees***, Mombasa HC Misc. Civil Application (JR) No. 24 of 2014.

Whether the proceedings before the tribunal will be quashed for the reason of appearance for the interested party by an unqualified person

25. Mr. Omari's participation in the matter before the tribunal went beyond holding brief. The notice in the newspaper for substituted service on the defendants was signed by the said person as advocate for the plaintiff. On the material day, the 17th June 2009, he personally argued the application that resulted in the order of the Tribunal the subject of the judicial review proceedings. It has not been denied that he was unqualified at the time. The firm of D. N. Omari was served with a hearing notice of 3rd May 2010 for this matter at the address on the letter head produced by the applicants. There was return of service sworn by James Mugunda Kimaguti in that regard. In preparing the application and acting as counsel before the tribunal acting for the interested party herein on the 17th June 2009 the said advocate D.N. Omari was unqualified and, therefore, may have committed offences under sections 31 and 34 of the Advocates Act.

26. Section 31 of the Advocates Act is in terms as follows:

“31. Unqualified person not to act as advocate

(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

(2) Any person who contravenes subsection (1) shall—

(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

(c) in addition be guilty of an offence.

27. Section 34 (1) of the Act provides that –

“34. Unqualified person not to prepare certain documents or instruments

(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

(a) relating to the conveyancing of property; or

(b) for, or in relation to, the formation of any limited liability company, whether private or public; or

(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or

(d) for the purpose of filing or opposing a grant of probate or letters of administration; or

(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or

(f) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to— (i) any public officer drawing or preparing documents or instruments in the course of his duty; or (ii) any person employed by an advocate and acting within the scope of that employment; or (iii) any person employed merely to engross any document or instrument.

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to— (a) a will or other testamentary instrument; or (b) a transfer of stock or shares containing no trust or limitation thereof.”

28. Moreover, as held in ***National Bank of Kenya vs Wilson Ndolo Ayah*** (2009) eKLR, Civil Appeal No. 119 of 2002 (Tunoi, Bosire, O’Kubasu, JJA) cited by the applicants, “*it is public policy that courts should not aid in the perpetuation of illegalities....a failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal act.*” The court will therefore quash the proceedings and orders emanating therefrom on account of the illegal representation of the Interested Party by an unqualified person contrary to sections 31 and 34 of the Advocates Act.

29. Accordingly, for the reasons set out above the Notice of Motion dated 16th October 2009 is granted in terms of prayers (a) and (b) thereof with costs to the applicants.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 20TH DAY OF MARCH 2015.

M. MUYA

JUDGE

In the presence of: -

Ms. Muyaa for the Applicant

No appearance for the Respondent

Mr. Khatib for the Interested Party

Mr. Musundi - Court Assistant.