



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 45 OF 2013

REPUBLIC..... APPLICANT

VERSUS

THE CHAIRPERSON,

BUSINESS PREMISES RENT TRIBUNAL RESPONDENT

AND

MUSTAFA FAZALABBAS MOHAMED ALI1ST INTERESTED PARTY

ZAFFER EBRAHIM TAYABALI..... 2ND INTERESTED PARTY

EX PARTE IBRAHIM SHEIKH ABDULLA

JUDGMENT

INTRODUCTION

0. The ex parte applicant as a tenant trading as Gulshan Restaurant on the suit property Mombasa/Block XVI/137 filed a suit in the Business Premises Rent Tribunal, BPRT Case No. 163 of 2009 *Ibrahim Sheikh Abdulla t/a Gulshan Restaurant v. Bukiyabaali Lukmanji and 4 Others* challenging the authority of the 2nd Interested Party to act as landlord following a notice by the latter to increase rent on the suit property, which in the ex parte applicant's view belonged to landowners who were not resident in Kenya.
0. By a consent order dated 23rd April 2013 and adopted as an order of the Tribunal on the 24th April 2013, the parties to the tribunal case agreed as follows:

IT IS HEREBY ORDERED THAT: -

1. By consent the order made by consent on 21.1.2010 and filed 22.1.2010 be and is hereby vacated.
2. The tenant shall continue to pay rent for the premises on MOMBASA/BLOCK XVI/137/MBA ISLAND to the BPRT at Mombasa at the expense of the landlord.
3. The parties shall respectively have liberty to apply should there be a change in circumstances warranting a repeal or setting aside of this order.
4. There shall be no order as to costs.
0. In purported exercise of the liberty to apply granted in clause 3 of the Consent order the 1st Interested Party who was not previously a party to the suit filed an application dated 24th May 2013 seeking orders that

1. **That this Honourable Court orders the rent deposited by the tenant/respondent in the Court be released to the applicants forthwith that is in any of the names of Zaffer Ebrahim Tayabali Karimjee and or Gulamabbas E. T. Karimjee and/or Tayabbhoy and/or Aftab M. Karimjee and/or Mustafa F. M, Karimjee through account Number 7200011836 at Imperial Bank Branch in the names of Ebrahim Tayebali Karimjee, Gulamabbas Ebrahimjee, Taibali Ebrahimjee and Aftab Mustafa Karimjee.**
 2. **That all future monthly rent from the tenants be paid directly to the landlords.**
 3. **That costs be in the cause.**
0. On 31st May 2013 upon hearing ex parte of the application dated the 24th may 2013, the Tribunal made orders as follows:

“IT IS HEREBY ORDERED THAT: -

1. The rent so far deposited in the tribunal to be released to **A/C 7200011830 Imperial Bank Mombasa** in the names of the registered owners.
2. The tenant is ordered to deposit in the **A/C No. 7200011836 Imperial Bank Mombasa** effective **1.6.2013**.
3. This matter be marked as finally settled.”

THE JUDICIAL REVIEW APPLICATION

0. Being aggrieved by the turn of events, the ex parte applicants by Notice of Motion dated 30th July 2013 with leave of court granted on 17th July 2013, the ex parte applicant sought the following orders:
1. An order of certiorari to call up to this court for quashing, the proceedings taken on and order of 31.5.2013 made by the Chairperson, Business Premises Rent Tribunal in Mombasa BPRT Case (Complaint) No. 163 of 2009 ***Ibrahim Sheikh Abdulla v. Rukiyabhai Lukmanji and 5 Others.***
 2. An order of prohibition prohibiting the Chairperson of the Business Premises rent Tribunal from entertaining an application to set aside or vary the order of 23.4.2012 as the tribunal is *functus officio*, and cannot regularly do anymore than enforce the order recorded by consent of parties on 23.4.2012, which enforcement is in the domain of another court.”
0. The grounds of the application as set out in the Notice of Motion are that:
- in setting aside a consent order made on a complaint on 23.4.2012, the tribunal acted without jurisdiction as it was already *functus officio* and could only entertain an application in furtherance of the order, and even then, concurrence of all the parties involved was necessary;
 - in setting aside the consent order of 23.4.2012, the tribunal acted in contravention of a cardinal principle of natural justice, to wit, *audi alteram partem*;
 - the tribunal set aside or varied ex-parte, to the detriment of the ex-parte applicant, a consent order made on 23.4.2012, without hearing all the parties concerned, or at the very least, ensuring the parties were served with the application;
 - in setting aside ex-parte the consent order made on 23.4.2012, the tribunal further compromised the ex-pare applicant's no-right-of appeal position;
 - the unilateral variation and setting aside of the order of 23.4.2012 is an error apparent on the face of the tribunals record, amenable to judicial review order of certiorari;
 - the impugned order facilitates fritter and waste of money deposited in the Rent Deposit Account of the tribunal, to the grave prejudice of the ex-parte applicant and the landowners as the accounts mentioned in the order of 31.5.2013 are not operated by the land owners who are reportedly out of jurisdiction;
 - the tribunal has no jurisdiction to misapply, by a unilateral order of payment out, rent deposited in the tribunal. It can only order payment of money to a landowner or landlord entitled to receive the rent.”
0. The Notice of Motion was supported by the verifying affidavit of Ibrahim Sheikh Abdulla sworn

on 16th July 2013. For the Interested Parties, a replying affidavit by the 2nd Interested Party, Mustafa Fazalbbas Mohammedali, was filed on 25th September 2013.

0. The applicant's cause of action is set out in paragraphs of the submissions filed on its behalf by counsel M/s Ahmednasir, Abdikadir & Co. Advocates, as follows:

"EX-PARTE APPLICANT'S SKELETON SUBMISSIONS"

4. The dispute herein is with regards to orders made by the Respondent in respect to a landlord/tenant dispute in **Mombasa Business Premise and rent tribunal Number 163 of 2009, Ibrahim Sheikh Abdulla v Rukiyabali Lukhmanji & Others** where the Ex-parte Applicant filed the dispute against the actions of the Interested Party ("**BPRT 163 of 2009**").
5. The premises involved are known as MOMBASA/BLOCK XVI/137. The Ex-parte applicant operates a restaurant known as Gulshan Restaurant.
6. The Applicant is the tenant of in respect to premises on MOMBASA/BLOCK XVI/137 where he trades as *Gulshan Restaurant*.

The Consent Order

7. On 23rd April 2012, the Ex-parte Applicant and the Interested Party recorded a consent order in BPRT 163 of 2009 which provided that the Ex-parte Applicant was to continue paying the rent to the Business Premises and rent Tribunal at Mombasa at the expense of the Landlord and that either party was at liberty to apply in the event of a change of circumstances ("**Consent Order**").

Ex-parte variation of the Consent Order by the Interested Party

8. On 24th May 2013, the 2nd Interested Party moved to court ex-parte by an application seeking to have all the rent deposited in the Business Premises and Rent tribunal released to the landlords through an account number held at Imperial Bank and to have all future monthly rent for the ex-parte Applicant said directly to the landlords. *See page 25.*
9. Pursuant to the application of 24th May 2013, the Respondent made an ex-parte Order on 31st May 2013 which provided that the rent deposited in the tribunal be released to an account at Imperial Bank, being Account Number 7200011830 alleged to be in the name of the registered owners and that the future rent as from 1st June 2013 be deposited in Account Number 7200011836 and proceed to mark the suit as settled. (**Ex-parte Order**) *See page 37.*
10. Notably, the 2nd Interested Party was not a party in BPRT 163 of 2009.
11. The Ex-parte was aggrieved by the Ex-parte Order hence the present suit. In doing so, the Respondent:
 - a. Varied a consent order ex-parte obtained by a person who was not a party to the matter and without an application to have him joined as a party.
 - b. Effectively determined the matter by marking it as settled, ex-parte.
 - c. The security afforded to the Ex-parte Applicant by deposition the rent in the tribunal was rendered nugatory.
 - d. Decided on the application by the Interested Party without notice to the ex-parte."

Counsel for the ex parte applicant then submitted that the order of the tribunal made without hearing the ex parte applicant as a party to the tribunal proceedings was liable to be set aside *ex debito justitiae* and that the proceedings and order of the Tribunal made on 31st May 2013 fell foul of the principles of judicial review of illegality, irrationality and procedural impropriety, citing *Pastoli v. Kabale District Local Government* (2008) 2 EA 151, among others.

0. Counsel for the respondent, Ms. Ruth Lutta filed Grounds of Opposition dated 19th November 2013 asserting, principally, that the tribunal had jurisdiction and that the tenant applicant was obligated to pay rent to the Interested parties who had proved their ownership of the suit property.
0. The Interested Parties' case was, principally, that they had become registered owners of the suit property by transmission upon the death of the owner and that the application was *sub judice* as

the ex parte applicant had already filed a suit seeking similar relief, (citing **R v. Chairman District Alcoholic Drinks Regulation Committee & 4 Ors ex p. Detlef Heter and Anor.** (2013) eKLR) as set out in written submissions filed by M/s Mogaka Omwenga & Mabeya Advocates as follows:

“1ST AND 2ND INTERESTED PARTY'S WRITTEN SUBMISSIONS”

5. *The Interested Parties herein sought the order for review on grounds that they were the court registered owners of the land reference MOMBASA/XVI/137 where the Ex-parte's Applicant's business is situated. They further furnished the court with the power of Attorney enabling the Interested parties to deal with the suit property, a copy of the official search and title deed.*
6. *The Business Premises Rent Tribunal having Jurisdiction and after considering the application dated 24th May 2013 filed ex-parte by the Interested Parties, the Tribunal reviewed the orders granted 24th April, 2012.*
7. *Initially when the order directing the Ex-parte Applicant to pay the rent to the Tribunal was filed the issue of ownership emerged since the owner then had passed on intestate and the Interested Parties herein being the beneficiaries had not acquired Grant of Letters of Administration.*
8. *However, by the time the Interested Parties filed the ex-parte application dated 24th May 2013 the Letters of Grant of Administration had been acquired by the Interested Parties thus they had met the condition that had been set by the tribunal. Therefore, the rent was payable to the Interested Parties since they were the owners and they had proved the same.*
9. *The Interested Party having proved that they were the registered owners of the suit property they had a right to receive rent from the Ex-parte Applicant and the accumulated rent that was paid to the tribunal released to the Interested Parties. This mandate could only be enforced by the Business Premises Tribunal since it had jurisdiction having adopted the consent order on 23rd April, 2012.*
10. *Clause (3) of the order which provided that “parties shall respectively have liberty to apply should there be a change in circumstances warranting a repeal or setting aside of this order” the Interested Parties being guided by this clause moved the court ex-parte. It was agreed that a party was at liberty to repeal or set aside the order and notification was not agreed.*
11. *The Interested Party argued the application ex-parte and served the order dated 30th May, 2013 upon the Ex-parte Applicant's Advocate. It was the Ex-parte Applicant's Advocate (Mr. Kimani) to inform the Ex-parte Applicant of the order issued on 29th May 2013 and this cannot be blamed on the Interested Party for non-disclosure.*
12. *My Lord the Ex-parte Applicant is abusing the court process, he has admitted in his supporting affidavit that he filed a suit in Civil Case No. 78 of 2013 vide a Notice of Motion dated 23rd June, 2013 in which the orders sought herein were granted therein. However, before the suit in Civil Case No. 78 of 2013 was finalized the Ex-parte Applicant again rushed to court to file an application of judicial review that is now before you.*
13. *It is our submission that the Ex-parte Applicant has been abusing the court process in filing suits in separate courts; this amounts to an abuse of the court process as he does not allow the court to deal with the matters filed expeditiously and conclusively.*
14. *The issues [raised] in support of the application for Judicial Review orders all amount to the merits of the case which can only be determined in appeal and not in Judicial Review proceedings. It is only in appeal that the court can re-evaluate the evidence presented during the proceedings at the tribunal yet these are the issues that the Applicant has based his grounds upon in seeking Judicial Review Orders. We wish thereof on the case of John Fitzgerald Kennedy **Omanga vs The Post Master General Postal Corporation of Kenya & 2 others Nairobi HCMA No. 997 of 2003** where Ochieng, J. held that for the court to require the alternative procedure to be exhausted prior to resorting to Judicial Review is in accord with Judicial Review being regarded as a remedy of the last resort; the applicant however will not be required to resort to some other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the ex-parte orders granted to appeal against them would be less convenient or otherwise less appropriate, the Court would decline to grant the orders sought due to the availability of that alternative remedy since judicial review jurisdiction ought not to be disguised as an appellate jurisdiction.”*

The Issues for determination

0. The issue for determination is whether the order of the Tribunal made on 30th May 2013 without hearing the ex parte applicant should be set aside *ex debito justitiae* and whether the application meets the tests of judicial review on grounds of illegality, irrationality and procedural impropriety.
0. As conceded by counsel for both parties, the court in judicial review is concerned not with the merits of the decision of the inferior court or tribunal but with the decision making process. I have also recently so observed in Mombasa HC Misc Appl. No.35 of 2014, **R. v. Hon. V.J. Yator and 2 Others ex parte Abdi Samad Ibrahim Hussein**:

*“As held in the Court of Appeal decision in **Commissioner of Lands v. Kunste Hotel Ltd.** (1995-98) EA 1, judicial review proceedings are not concerned with the merit of the challenged decision but with the decision making process. This position has been followed in subsequent decisions including recent **Makupa Transit Shade Ltd & Anor. v Kenya Ports Authority** [2015] eKLR of 12th March 2015, where the court (Okwengu, Makhandia and Sichale, JJA.) on an application by the applicant for mandamus directing the respondent to grant it a lease on a property said:*

*“Finally, though the Public Procurement and Disposal Act was in force in year 2008, they are indirectly inviting the court to consider the merits of the refusal yet judicial review only concerns itself with the process of reaching a decision and not its merits. It should also be noted, that judicial review cannot be used to assert private law, the very issues the appellants are attempting to do by trying to force a crystallization of the 2002 negotiations into a formal lease agreement. In **Commissioner of Lands v. Kunste Hotel Limited** (1997) eKLR this court held that:*

“But it must be remembered that judicial review is concerned not with private rights or 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 is subjected.”

0. It is also a fundamental principle that there is no requirement that an applicant for judicial review must exhaust all other available remedies. Again, I observed in **R. v. Hon. V.J. Yator and 2 Others ex parte Abdi Samad Ibrahim Hussein**, supra:

*“Although I subscribe to the view that non-exhaustion of alternative remedies is no bar to judicial review, where an application requires a reconsideration of the matter on the merits, judicial review would be ill-suited as it only deals with the process of decision making rather than the merit of the decision itself. Where the decision itself is sought to be challenged, the proper procedure should be appeal on the merits. I have, respectfully, noted the decisions of Odunga, J. in **Jacinta Wanjiru Raphael v. William Nangulu- DCIO, Makadara & 2 Ors.**, [2014] eKLR and **AG v. Inspector General of Police & Anor. ex p. Raphael Mungai Goko Nginya** [2014] eKLR to the same result but differently reasoned that the judicial review process is a remedy of last resort.”*

0. The court has discretion under the rules of court both to make an order ex parte, where circumstances so require, and to set aside an order made ex parte. Order 51 rule 3 of the Civil Procedure Rules provides as follows:

“3. No motion shall be made without notice to the parties affected thereby:

Provided, however, that the court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the court seems just, and any party affected by such order may move to set it aside.”

It may be argued that the procedure under Order 51 rule 3 would appear to offer an alternative remedy and the judicial review court should as a remedy of last resort refrain. However, as the challenge herein is on the process of decision making, judicial review is in my view more efficacious.

0. Of Course, an order made in breach of the rule of natural justice to hear the other side is liable to be quashed by certiorari. The question therefore becomes whether this court, direct the ex applicant to seek the setting aside of the ex parte order under the procedure of Order 51 rule 3 of the Civil Procedure Rules for the setting aside of order made ex parte? Apart from the cost in time and expense that would be occasioned by such a direction, certainly inconsistently with the Article 159 principle of substantial justice, the **ex parte** order made without hearing a party is in a special category that attracts setting aside in the interests of justice, so that an aggrieved party need not go through the procedure for setting aside.
0. This is the category of orders which Lord Diplock in **Isaacs v. Robertson**, [1984] 3 All E.R. 140 at 143 held to be liable to be set aside **ex debito justitiae** without need to applying in accordance with the Rules of court for setting aside:

"there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice."

For such an order made in breach of the rules of natural justice, a judicial review court is obliged to quash for want of an opportunity to be heard – breach of the rule of natural justice *audi alteram partem* - whether or not the ex parte order is also subject to be set aside on an application before the court that made it or on appeal *ex debito justitiae*.

0. See also Civil Appeal No. 59 of 1993, **Omega Enterprises (Kenya) Limited v. Kenya Tourist Development Corporation and 2 Ors. where** Gicheru, JA. (as he then was), with whom Tunoi JA (as he then was) and Pall JA. agreed, said:

*"Hence, the order of the superior court dated 15th January, 1993 that the public auction of the property known as **L.R. ELDORET MUNICIPALITY/BLOCK 4/69** together with the improvements thereon including the business carried thereon under the name of **ELDORET SIRIKWA HOTEL LIMITED** was illegal, invalid and of no effect and the confirmation of the certainly irregular **ex parte** injunction order of 18th December, **determination of the substantive suit was, as it affected the interests of and without the appellant being given an opportunity to be heard, clearly in breach of the rules of natural justice and attracts ex debito justitiae the right to have it set aside.**"*

[Emphasis mine]

0. In Mombasa HC JR No. 78 of 2013, **Republic v. Principal Magistrate's Court, Mombasa & Anor. Ex-Parte Ali Sheikh & Sons Limited**, I recently upheld the right to be heard in granting an order of Certiorari to quash proceedings and order of the Magistrate's Court which were held without hearing the ex parte applicant, and said:

"This court does not make any findings on the merits of the case because that is not the province of judicial review proceedings and also so that it does not embarrass the trial court when the matter comes up for hearing before the court. Having found that the magistrate's court in SRMCCC NO. 2369 of 2013 made the order for the return of goods

and reinstatement of the status quo of 24th November 2013 without hearing the ex parte applicant and therefore in breach of the rules of Natural Justice, the said orders were made without jurisdiction and are ex debito justitiae set aside.

0. In this case, it is indefensible that a final order of the Tribunal in terms that monies deposited into the tribunal upon a consent order held as rent by the tribunal be released to the interested Parties who were not parties to the tribunal proceedings and for the payment of rent into an account held by the interested parties and the marking of the suit as settled could be made without hearing the ex parte applicant who was a party to the suit and the consent order made therein. It is an order that must be set quashed ***ex debito justitiae*** without requiring the ex parte applicant to follow the Order 51 procedure for setting aside ex parte orders or any other remedy available including a related suit.
0. The court is unable to determine whether the suit is ***sub judice*** because other than the mere statement in paragraph 11 of the replying affidavit that “*the matter is sub judice due to the existence of case NO. HCCC 87 of 2013 still pending in court over the same issue*”, no documents on the suit were placed before it to enable it consider the cause of action and reliefs sought in HCCC No. 78 of 2013.
0. I find that my decision of the question whether the order of the Tribunal should be set aside ***ex debito justitiae*** is sufficient to dispose the dispute before the Court and there is no need to determine the other issues of illegality and irrationality raised in the application. I, however, do not agree that the Tribunal became *functus officio* upon the adoption of the consent order of 23rd April 2013 as the order itself contemplated further proceedings upon a liberty to apply reserved under clause 3 of the said consent order. Accordingly, the Tribunal may proceed to determine an application filed pursuant to the liberty to apply under the consent order.
0. I would agree with the general mood of the contention by both Counsel for the Respondent and Interested Parties that the ex parte applicant must pay rent to the premises that he occupies and whose possession as a tenant he acknowledges. The Tribunal is, however, the appropriate forum for demonstration of the ownership right of the Interested Parties and for obtaining consequential relief and not this judicial review court which has no to examine the merits of the case.

Orders

0. Accordingly, I grant the ex parte applicant’s Notice of Motion dated 30th July 2013 to the effect that the proceedings and order of the 31st May 2013, purporting to review the consent order of 24th April 2013, made in the Business Premises Rent Tribunal in Mombasa BPRT Case (Complaint) No. 163 of 2009 ***Ibrahim Sheikh Abdulla v. Rukiyabhai Lukmanji and 4 Others*** are quashed by an order of Certiorari for having been taken without hearing the ex parte applicant who was a party to the suit and consent order filed therein. The Court does not make any findings on the merits of the case before the Business Premises Tribunal, which is hereby directed to hear the application of 24th May 2013 on its merits with notice to all the parties.
0. The ex parte applicant will have the costs of the proceedings in this court.

DATED AND DELIVERED THIS 13TH DAY OF APRIL 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Miss Abdi for Ms. Asli for the Applicant

Mr. Ngari for the Respondent

Mr. Monari for Mr. Omwenga for Interested Party

Ms. Linda - Court Assistant.