



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 44 OF 2014

**IN THE MATTER OF: AN APPLICATION BY KINGFISHER PROPERTIES LIMITED
FOR JUDICIAL REVIEW ORDERS OF PROHIBITION**

AND

**IN THE MATTER OF: THE LANDLORD AND TENANT (SHOP, HOTEL AND
CATERING ESTABLISHMENT) ACT CHAPTER 301 LAWS OF KENYA**

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES, ORDER 53

KINGFISHER PROPERTIES LIMITED.....APPLICANT

AND

1. THE BUSINESS PREMISES RENT TRIBUNAL

2. NANDLAL JIVRAJ SHAH

VIMAL NANDLAL SHAH

MEHUL NANDLAL SHAH (ALL TRADING AS) JIVACO AGENCIES.....RESPONDENTS

RULING

1. By Orders granted to the *ex parte* Applicant on 28th August, 2014, the Applicant filed on 15th September, 2014 a Notice of Motion dated 11th September, 2014 wherein it sought the Judicial Review order of prohibition to issue restraining the First Respondent (the Business Premises Rent Tribunal) from hearing any matter referred to it by the Second Respondent pertaining to the tenancy of the property known as Manyara Building Msa/Block 1/351, (the suit premises) and costs of the Application.

2. The Application was based upon the Statutory Statement, the Affidavit Verifying the Facts sworn by AASHEET K. SANGHRAJKA on 28th August, 2014 and upon the grounds on the face of the Motion.

3. The facts relating to the Application are not disputed. The suit premises were leased by the Applicant to the Second Respondents (Interested Parties). It is also common ground that the premises fell within the class of tenancies known as controlled tenancies. There was no lease in writing for a period of five years. The tenancy therefore fell under the regime regulated by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (Cap 301, the Laws of Kenya) and the 2nd Respondent's enjoyed a controlled tenancy.

4. It is also not disputed that the Applicant gave the Interested Parties a Notice to terminate the tenancy in terms of the Landlord and Tenant Act, but the Interested Party failed to object to the notice of termination, and upon the expiration of the notice, the Applicant moved to the High Court in HCCC No. 6 of 2011 for orders for vacant possession of the premises.

5. In a Ruling delivered by the High Court on 23rd August, 2013, the High Court granted the Applicant possession of the suit premises and entered Judgment for the Applicant against the Interested Parties in the sum of Kshs. 232,000/= plus mesne profits until the Interested Parties vacate the suit premises. In her Ruling the learned Judge made the following findings:-

(a) the Applicant had issued the Interested Parties with a valid termination notice,

(b) the Interested Parties had failed to file a reference with the Respondent (Tribunal) before the notice to vacate had taken effect,

(c) that the notice to vacate had taken effect and the tenancy had terminated,

(d) the Respondent/Tribunal does not have jurisdiction to deal with the dispute.

6. It is also not disputed that in total disregard of the said Ruling, the Interested Parties (Second Respondents) have refused to vacate and give vacant possession of the suit premises to the Applicant.

7. It is also not disputed that on 28th July, 2014, the Applicant's Advocates were served with a hearing notice dated 15th July, 2014 requiring the Applicant to appear before the Respondent (Tribunal) in Tribunal Case No. 226 of 2012 filed by the Interested Parties.

THE APPLICANTS' CASE

8. The Applicants' submit that the purported proceedings are in relation to the Interested Parties Notice of Motion dated 7th September, 2012 seeking leave to file a Reference out of time to the tenancy termination notice issued by the Applicant dated 2nd March, 2010, and that the Respondent/Tribunal does not have jurisdiction to hear any Reference by the Interested Parties in relation to the suit premises, as there is no landlord-tenant relationship, between the Applicant and the Interested Parties as determined by the Ruling of this court dated 23rd August, 2013.

9. The Applicant concluded that the proceedings before the Respondent-Tribunal are an abuse of the quasi-judicial powers of that Tribunal, and the proceedings thereat are being used to frustrate the Applicant from enforcing the orders issued by this court.

10. The Applicant's counsel reiterated that the jurisdiction of the Respondent/Tribunal is solely premised on the existence of a Landlord-Tenant relationship which, per this court's said Ruling does not exist. Counsel contended that this is a proper case which warrants the grant of an order of prohibition against the Respondent/Tribunal.

11. My understanding of the submissions of counsel for the Interested Parties was that since the relationship between the Applicant and the Interested Parties was that of landlord and tenant subject to a controlled tenancy, having given notice to the Interested Parties for termination of that relationship, the Applicant ought to have itself filed a notice with the Respondent-Tribunal for vacant possession of the

suit premises. For this proposition counsel relied and wanted the court to look at the provisions of sections 4 and 6 of the Landlord Tenant (Shops, Hotels and Catering Establishments) Act. Counsel consequently submitted that the action before and the court's Ruling in HCCC No. 6 of 2011 was a nullity on grounds of lack of jurisdiction. Counsel relied on the Privy Council decision of **BENJAMIN LEONARD MACFOY VS. UNITED AFRICA COMPANY LIMITED [1962] AC 152** and the Kenyan Court of Appeal decision in the **OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS. CALTEX OIL KENYA LIMIED [1981] KLR1**.

12. For those reasons counsel invited this court to make a specific finding that this court's Ruling in the civil suit was a nullity for lack of jurisdiction and thus dismiss the Applicants' application.

13. I have considered the rival arguments and render my opinion in the subsequent paragraph of this Ruling.

14. **Firstly**, I refuse on the outset to look at the provisions of sections 4 and 6 of the Landlord and Tenant/Shops, Hotels and Catering Establishments) Act for to do so would be going over by way of review or appeal over the decision of a cognate court which this court has no jurisdiction to do. Section 8 of the Law Reform Act specifically prohibits this court from issuing any of the Judicial Review orders in exercise of its civil or criminal jurisdiction. In any event this is not an appellate court.

15. **Secondly**, the issue is not whether or not this court had jurisdiction, but rather whether the Respondent/Tribunal had jurisdiction to consider a Reference in respect of the termination of the tenancy of the suit property, a matter which had already been determined by this court.

16. It is this court which has supervisory jurisdiction under Article 165(6) of the Constitution over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Once this court has determined a matter even if a party or its counsel does not agree with it, the proper course to take is an appeal to the appellate court, or seek review in the same court in exercise of its review jurisdiction in accordance with relevant provisions of the Civil Procedure Rules. There should never be recourse to the subordinate court or Tribunal. That is what parties used to do with Land Disputes Tribunal after losing land cases in the superior courts. It is called blatant abuse of the processes of those bodies and no less the courts themselves. Courts as custodians of the rule of law and do not countenance abuse of their processes as litigation must have some legitimate end and finality.

17. So advertent to the application at hand, I agree with submissions by counsel for the Applicant that the Respondent/Tribunal does not have jurisdiction to hear any reference by the Interested Parties in relation to the suit premises because this court has already heard and determined the question of tenancy between the Applicant and the Interested Parties. If the Interested Parties had any issue with decision of this court, only the Court of Appeal can intervene.

18. If it were otherwise, it would be the nadir of absurdity and illogicality and a complete affront to the authority of this court for a subordinate statutory tribunal, the Respondent, to entertain a matter whose subject this court has dealt with conclusively. In my view it would be outright illegal for the tribunal to so act.

19. It is important to add that if only for purposes of emphasis, that the jurisdiction of the Respondent Tribunal is solely premised on the existence of a landlord-tenant relationship. If no such relationship exists, and none exists in the instant case (the question having been determined earlier by this court), and orders made for the Interested Parties to vacate the suit premises. It is not open to the Interested Parties to flout the orders of court without first successfully appealing against them or having them set aside. The Tribunal has no jurisdiction over decisions of this court.

20. An order of prohibition is a judicial review remedy that is available to be issued by this court and directed to an inferior tribunal such as the Respondent which forbids the Tribunal to act without or in excess of its jurisdiction or contrary to law. Prohibition will also issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice.

21. In the instant case, I am satisfied that the Respondent-Tribunal has no jurisdiction to entertain and determine a matter which has been heard and conclusively determined by this court.

22. For those reasons there shall issue an order of prohibition, prohibiting the Respondent-Tribunal from hearing any matter referred to it by the Interested Parties pertaining to the terminated tenancy of the property known as **MANYARA BUILDING MOMBASA.BLOCK1/351**.

23. The *ex parte* Applicant shall also have the costs of the application and be borne by the Interested Parties.

24. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 15th day of May, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Ondego holding brief Kontos for Applicant

Mr. Gikandi for 2nd Respondent

Miss Kiti for 1st Respondent

Court Assistant Kaunda