



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 46 OF 2014

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

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

AND

IN THE MATTER OF: THE LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING
ESTABLISHMENT ACT, CAP 301)

AND

IN THE MATTER OF: AN APPLICATION TO APPLY FOR THE PREROGATIVE ORDERS OF
CERTIORARI AND MANDAMUS

BETWEEN

ESTHER WAMBUA.....APPLICANT

AND

BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

AND

1. NAIROBI HOMES (MOMBASA) LIMITED

2. MOMBASA PORT SACCO LTD.....INTERESTED PARTIES

RULING

1. By a Notice of Motion dated 5th February, 2015 and filed on 6th February, 2015 the ex parte Applicant sought:-

(a) an order of certiorari to bring up into this court for purposes of quashing the proceedings and order of the Business Premises Tribunal dated 29th August, 2014 dismissing the Applicant's complaint before it, and

(b) an order of mandamus directing the Business Premises Rent Tribunal to proceed by way of investigation and/or inquiry so as to establish whether or not there is a tenancy created by the conduct of the parties in relation to the premises subject of the complaint in BPRT Case No. 36 of 2013 and whether such tenancy if any falls within its ambit.

(c) that costs be provided for.

2. The Application was supported by the grounds, set out in the Statement of Facts, and the Applicant's Affidavit Verifying the Facts sworn on 2nd September, 2014. It was however opposed by the Interested Parties through the Replying Affidavit of Solomon Muthunkumi Mutungi sworn on 30th September, 2014. In addition to these primary pleadings, counsel for both the Applicant and the Interested Parties filed written submissions. The Applicant's counsel's submissions are dated 20th June, 2015 and were filed on 23rd June, 2015.

THE FACTS

3. The facts are not in dispute. The First Interested Party is the registered proprietor of the parcel of land known as Mombasa/Block XIX/232 [the suit premises]. By an Agreement to lease dated 11TH February, 2002 the suit premises were let to the Applicant for a period of five years and three months effective which expired on or before 30th September, 2007. The said tenancy was renewed for a further term of five years and three months upon expiration of the first term.

4. The second term commenced on 1st October, 2007, and expired on 31st December, 2012. The **Renewal Clause** gave the tenant an option to renew the lease **"for a further term at negotiated terms and conditions by giving three months notice in advance."**

5. In the event the Applicant did not give the requisite notice, and by a letter dated 26th October, 2012, the First Interested Party gave notice to the Applicant that it would not renew the lease as it required the premises for the on-going expansion of their operations and required the Applicant to hand over the premises in vacant possession on First January, 2013.

6. Dissatisfied with that notice the Applicant filed on 19th February, 2013 a Notice dated the same date under section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act) Act, (Cap 301, Laws of Kenya), with a complaint entitled:-

"...the landlord has refused to extend my lease and has even refused to accept my rent."

7. The said complaint was however withdrawn by a Notice of Withdrawal dated First April, 2013 but it filed on 19th April, 2013 (that is after some consideration). The complaint was marked withdrawn by order of the Business Premises Tribunal dated and issued on 25th August, 2014 subject to payment of Kshs. 23,500/= costs to the First Interested Party (the Landlord).

8. Having filed and had the foregoing complaint withdrawn, the Interested Parties filed Mombasa CMC No. 1785 of 2014 seeking orders for vacant possession of the premises occupied by the *ex parte* Applicant.

9. In the pendency of that suit, and despite having withdrawn a similar application, the Applicant filed

Tribunal Case No. 36 of 2013 a similar complaint under section 12 (4) of the Landlord and Tenant (Hotel, Shops and Catering Establishments) Act, and the complaint was that the landlord had **“coerced, threatened to evict me and forced me to sign an expired offer to at and has refused to accept rent.”**

10. In opposition to this latest application, the Interested Party’s biased filed on 17th May, 2013, a Notice of Preliminary Objection dated 6th April, 2013 and sought orders for dismissal of the complaint on the grounds that:-

- (a) the application was filed against the agent while she knows the principal/landlord; and
- (b) the tenancy is not a controlled tenancy within the meaning of section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

11. In a Ruling delivered on 29th August, 2014, the Business Premises Rent Tribunal dismissed the Applicant’s complaint dated 18th April, 2013 and awarded costs of Kshs. 25,000/= to the Interested Parties. It is that Ruling and order which the ex parte Applicant seeks to be quashed, by an order of certiorari, and an order of **mandamus** directing the Tribunal to determine the application probably in the Applicant’s favour.

12. The law on judicial review does not concern itself with the merits of the case. Judicial review concerns itself with the legality (illegality), irrationality and impropriety of the process of decision-making process. The court will be considering whether or not an order of certiorari should be granted. If the relief sought is an order of **mandamus**, the Applicant must claim that it sought a decision from a decision maker, and the decision-maker has declined to make a decision despite its duty and statutory power to do so.

13. The Applicant’s application which was dismissed pursuant to the Interested Parties’ Preliminary Objection was premised upon the provisions of Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which says:-

“12(1)

(2)

(3)

(4) In addition to any other powers specifically conferred on it by or under this Act a tribunal may investigate any complaint relating to a controlled tenancy made to it by a landlord or the tenant, and may make such order thereon as it deems fit.”

14. The power to investigate a complaint is in relation to a **“controlled tenancy”** which under section 2(1) of the Act means:

- (a) a tenancy of a shop, hotel or catering establishment;**
- (b) which has not been reduced into writing; or**
- (c) which has been reduced into writing and which –**
 - (i) is a period not exceeding five years, or**
 - (ii) contains provisions for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or**
 - (iii) relates to premises of class specified under sub-section (2) of this section.**

PROVIDED that no tenancy to which the Government, the Community or a local authority whether as landlord or as tenant, shall be a controlled tenancy.

15. I considered the provisions of this section 12(4) of the Act, in the case of **RUTH K. WACHIRA t/a AMIGIRL BEAUTY PARLOUR VS. CHAIRMAN BUSINESS RENT TRIBUNAL [2006] e KLR** where *inter alia* I said –

“The right of appeal is in respect of any determination and order therein (in respect of a reference or a complaint) by the tribunal under the Act. An aggrieved party from a determination and order for a complaint under section 12(4) of the Act is in my respectful view entitled to an appeal as much as a person aggrieved by a determination and order pursuant to a reference under section 6 or other determination and order of the Tribunal under any of the powers conferred upon the Tribunal under section 12(4) (n) (inclusive) of the Act or any other provision of the Act conferring jurisdiction to the Tribunal to determine any matter thereunder. I therefore reject the Applicant’s contention to the contrary...”

16. The issue in this case, as in that case is whether, the Tribunal had jurisdiction to investigate a complaint regarding a controlled tenancy. The tenancy herein was not a controlled tenancy as defined under section 2 of the Act. The Applicant despite the notice to vacate to do so, declined to do so, and has unsuccessfully invoked the provisions of section 12(4) of the Act.

17. In my view having withdrawn one application brought under section 12(4), and bringing another identical application is no more than an abuse of the process of the court. In addition, the tenancy not being a controlled tenancy, the Tribunal had no jurisdiction and has no jurisdiction to entertain a complaint in respect of a non-controlled tenancy. The Ruling by the Tribunal was entirely correct, and there was nothing illegal, irrational or improper about it to order certiorari, still less is there reason for an order of mandamus. The Tribunal exercised its jurisdiction by appropriately dismissing the Applicant’s quite unmeritorious applications. The Tribunal cannot be faltered.

18. For all those reasons, the Applicant’s Notice of Motion dated 5th February, 2015 and filed on 6th February, 2015 is hereby dismissed with costs to the Interested Parties.

19. It is so ordered.

Dated, Signed and Delivered in Mombasa this 29th day of July, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Mwakisha for Applicant

No Appearance for Respondent

Mr. Wacheya holding brief Kaburu for Interested Party

Mr. Kaunda Court Assistant