REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 366 OF 2015 (JR)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF THE LANDLORD AND TENANT (SHOP, HOTEL AND CATERING ESTABLISHMENTS) ACT, CAP 301

BETWEEN

NATIONAL OIL CORPORATION LIMITED ……..…….. APPLICANT

AND

REAL ENERGY LIMITED……..……..…….1ST RESPONDENT

THE BUSINESS PREMISES RENT TRIBUNAL.....2ND RESPONDENT

RULING

1. The Applicant herein, from the pleadings filed herein seemed to have entered into a Dealer Licence Agreement with the 1st respondent to operate sell display and advertise exclusively for the Applicant in its service station on LR. No. 209/6776, Ngong Road for a period of 2 years from 1st April. This agreement seemed to have run into problems prompting the applicant to allegedly terminate the same and take possession thereof.
2. Aggrieved by this action, the 1st respondent instituted proceedings before the 2nd respondent Tribunal and applied for a restraining order injuncting the applicant from interfering or taking possession of the service station pending the hearing of the 1st respondent's complaint an application which was granted by the 2nd respondent vide an order dated 19th October, 2015 which was granted ex parte. The 2nd Respondent thereafter fixed the inter partes hearing of the application for 28th October, 2015.
3. Before the matter could be heard inter partes however, the Applicant moved this Court by Chamber Summons dated 22nd October, 2015 seeking the following orders:

1. That this honourable court be pleased to certify this matter urgent and direct that the same be heard ex parte in the first instance

2. That this honourable court be pleased to grant leave to the Applicant to file an application for Judicial Review seeking the following:

a. An order of Certiorari to bring into the High Court for purposes of being quashed the order of the Business Premises Rent Tribunal made on 19th October 2015 in Nairobi BPRT Case No. 720 of 2015 granting an injunction against the Applicant with regard to possession of LR. No. 209/6776, Ngong Road.

b. An order of Prohibition restraining the 2nd Respondent from further proceeding with hearing of Nairobi BPRT Case No. 720 of 2015.

c. Such further and other reliefs as this honourable court may deem just and expedient to grant

3. That the leave so granted do operate as stay of the order of the Business Premises Rent Tribunal made on 19th October 2015 in Nairobi BPRT Case No. 720 of 15 granting an injunction against the Applicant with regard to possession of LR. No. 209/6776, Ngong Road and all further consequential orders.

4. That costs of and incidental to this application be provided for.

4. According to the Applicant, the said orders were issued without jurisdiction since there was no tenancy relationship between the applicant and the 1st respondent at the time of the issuance of the said orders. According to the applicant, the relationship between it and the 1st respondent in any case is a mere licence which does not amount to a tenancy relationship in order to clothe the 2nd respondent with the jurisdiction to entertain the matter. Thirdly, it was contended that in light of the arbitration clause in the agreement, the Tribunal lacked the jurisdiction to entertain the matter and grant the orders it granted.
5. As a result of the said order, it was contended that the 1st respondent has sought to enforce the same by way of forcible eviction of the applicant through police assistance, an action which is contrary to law as no eviction orders have been obtained from a competent court. That action, it was contended to bring the applicant's business to a halt thereby causing irreparable loss that cannot be remedied by an award of damages.
6. On his part the 1st respondent contended that there in fact exists a tenancy agreement between it and the applicant which is still in force. Further, the applicant had not terminated the tenancy agreement by the time the 1st respondent moved the Tribunal hence the Tribunal had the jurisdiction to entertain the matter. It was further contended that the Applicant by attempting to unlawfully terminate the Agreement had waived the need to refer the matter to arbitration. To the 1st respondent, the applicant ought to have raised the issues being raised herein before the Tribunal prior to commencing these proceedings.

Determinations

7. I have considered the application, the verifying affidavit and the statement of facts filed herein as well as the submissions of counsel.
8. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu, J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or

eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

9. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

   "The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

10. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.
11. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

    "If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"

12. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

    "Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him…. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of *John vs. Rees [1970] Ch 345 at 402.* In the exercise of the discretion on whether or not to grant stay, the court takes into

account the needs of good administration."

13. *This position was appreciated by **Majanja, J** in Judicial Review Misc. Civil Appl. No. 139 of 2014 between **Vania Investments Pool Limited and Capital Markets Authority & Others** in which the learned Judge expressed himself as follows:*

"I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR, "In my view, the reference to an "arguable case" in W'Njuguna's Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view." The duty of the court to consider the facts is not lessened by the mere conclusion that the case if frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose."

14. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. The grant of leave being an exercise of discretion the conduct of the applicant must also be considered.
15. In this case, the applicant contends that the 2nd respondent has no jurisdiction. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. *It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it*. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

16. It is therefore clear that a party challenging the jurisdiction of a Court or Tribunal ought to raise the issue before the Court or Tribunal whose decision is under challenge for consideration though the decision thereon does not bar this Court from entertaining judicial review proceedings if in fact the Tribunal had no jurisdiction. In other words the mere fact that a Court or Tribunal lacks jurisdiction to entertain a matter does not bar it from hearing and determining the issue of jurisdiction which ought to be determined in the initial stages of the proceedings.
17. Section 9(2) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

18. Subsection (3) thereof provides:

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

19.. Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

20. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. One of the remedies available to a party aggrieved by an ex parte decision is to apply for setting aside the same before the Court or Tribunal that granted the order since generally ex parte orders are provisional in nature. Such ex parte order can and do invariably get set aside at the inter partes hearing where found to be unmerited.
21. In this case, the applicant contends that the relationship between the applicant and the 1st respondent is that of a licencee. Whether this is so will depend on the contents of the contractual document since the mere fact that a document is called a licence does not necessarily mean it in law is a licence. The terms will have to be considered before a decision one way or the other is arrived at. Again whether a dispute falls within an arbitration clause depends on the interpretation of the contractual document. Further, whether or not the 1st respondent was in possession of the suit premises at the time of granting of the impugned orders largely depends on the actual position at the time which is a factual matter and is far from being agreed upon. As this Court appreciated in **Republic vs. Business Premises Rent Tribunal & Another ex parte The Davie Motor Corporation Limited [2013] eKLR**, a decision relied upon by the applicant:

"…the issue whether or not the interested party was still in possession/occupation of the premises was a matter of fact whose finding was prerequisite to a determination of whether or not there was a landlord-tenant relationship and hence whether the Respondent had jurisdiction. Without a determination of that fact, this Court cannot assume that the Tribunal would have found it had no jurisdiction and it is not for this Court to make a finding on that disputed issue of fact. Accordingly I am unable to find that the Respondent had no jurisdiction to entertain the dispute based on non-existence of a landlord-tenant relationship. As was stated in Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited (supra) in which Nyarangi, JA while citing *Words and Phrases Legally Defined* – Vol. 3: I-N page 13 held:

'By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. *If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction*; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist.' " [Emphasis mine]

22. In other words the finding on jurisdiction will depend on the factual determination of the issue of possession as well as the legal interpretation of the contractual document. These are matters which ought to be taken up before the 2nd respondent at the *inter partes* hearing of the application. This Court cannot usurp that jurisdiction and stop the 2nd respondent in its tracks before it hears the parties on the issue.
23. Apart from attending the Tribunal and opposing the application, the applicant was entitled to

apply for setting aside the said ex parte orders. In this case the applicants have not shown the reason why the Court ought to exempt them from seeking to set aside the ex parte orders of injunction granted by the 2nd respondent or opposing the extension thereof at the inter partes hearing which was due on the date following the day this application was argued before me.

24. Judicial review it ought to be remembered is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.

25. In the premises, I decline to exercise my discretion in favour of the applicant as sought herein. It follows that without leave being granted these proceedings are misconceived and are hereby struck out but with one third of the costs to the Respondents as the application proper is yet to be filed.

Dated at Nairobi this 30th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Waziri for Mr Munyu for the Applicant

Mr Ndege with Mr Cohen for the 1st Respondent

Cc Patricia