REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 367 OF 2014 (JR)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE

PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26, LAWS OF KENYA

BETWEEN

PRISCILLA LAND GATES LTD.....1ST APPLICANT

RUTH NYAMBURA WANDAKA.....2ND APPLICANT

AND

MORRIS GIKONYO.....1ST RESPONDENT

RENT RESTRICTION TRIBUNAL.....2ND RESPONDENT

RULING

Introduction

1. By a Chamber Summons dated 22nd October, 2015, the applicants herein, **Priscilla Land Gates Ltd** and **Ruth Nyambura Wandaka**, seeks the following orders:

a. **This application be certified as urgent;**

b. **This court be pleased to grant the Applicant leave to file a judicial review application for orders:**

i. **That an order of Certiorari do issue to remove into this court and quash the proceedings in the rent Restriction Tribunal at Nairobi Case Number 707 of 2015 and all the consequential orders and directions issued therein;**

ii. **That an order of Prohibition do issue to the 2nd Respondent prohibiting the 2nd Respondent from entertaining or hearing the matter in Rent Restriction Tribunal at**

Nairobi case Number 707 of 2015;

c. **That the leave so granted to operate as a stay of all the proceedings and any consequential orders or warrants in the Rent Restriction Tribunal a Nairobi Case Number 707 of 2015 until the final hearing and determination of the Judicial Review proceedings to be filed by the Applicant herein;**

d. **That the court grants such further and other reliefs that this honorable court may deem just, fit and expedient to grant in the circumstances.**

e. **That the costs of this Application be provided for.**

Applicant's Case

2. According to the applicant, on 8th September, 2015, the 1st interested party filed a suit before the 2nd respondent and simultaneously applied for injunction against the applicant which application was heard and allowed ex parte. According to the applicants, the 2nd respond lacked jurisdiction to entertain the matter. However the 2nd respondent went ahead to entertain a subsequent application by which it issued warrants of arrest against the applicants herein after denying the applicants' counsel audience to raise the issue of jurisdiction.

3. It was the applicants' case that they would be denial of justice if they were denied audience.

4. It was further contended that the 2nd respondent has acted without jurisdiction y enforcing its orders through contempt proceedings.

Determinations

5. I have considered the application, the verifying affidavit and the statement of facts filed herein as well as the submissions of counsel.

6. 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.**

7. **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".

8. 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.

9. 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…"

10. 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."

*11. 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 is 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."

12. 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.

13. 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."**

14. 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 for consideration though the decision thereon does not bar this Court from entertaining judicial review proceedings if in fact the Tribunal had no jurisdiction. 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.***

15. 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).***

16. 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.***

17. 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. 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. The applicants contend that they have been denied audience. However, it

is clear that the reason for denial of audience is the failure by the applicants to comply with the orders of the Tribunal.

18. The applicants contend from the bar that by the time the Tribunal orders were served, the applicant before the Tribunal had already been evicted from the suit premises. There, however, was no affidavit to that effect before the 2nd respondent. There is no such averment before me either. Accordingly there is no evidence on the basis of which I can find that the applicants were unable to comply with the orders of the Tribunal. In my view exceptional circumstances justifying the exception under section 9(4) of the Act cannot be found on factors arising from the applicants' failure to comply with the orders of the Court or Tribunal.

19. This Court will not exercise its discretion in favour of an applicant who fails to comply with orders of a Court, of which the 2nd respondent is, under Article 169 of the Constitution.

20. In the premises, the applicant ought to comply with the orders of the 2nd respondent and/or apply for setting aside the orders made by the 2nd Respondent before invoking the jurisdiction of this Court. 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.

21. 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 rendered still-born and are hereby struck out but with no order as to costs.

Dated at Nairobi this 29th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwangi for the Applicant

Cc Patricia