REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 64 OF 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

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

AND

IN THE MATTER OF TRIBUNAL CASE NUMBER 85 OF 2011

BETWEEN

REPUBLIC……..…… APPLICANT

VERSUS

BUSINESS PREMISES RENT TRIBUNAL…….....….. RESPONDENT

AND

KARIRA KINYNAJUI THUO…….....INTERESTED PARTY

***EX PARTE:* ELIUD M. NJUGUNA**

JUDGEMENT

Introduction

1. On 11th March 2015, the ex parte applicant herein, **Eliud M. Njuguna,** filed a Notice of Motion dated 6th March 2015 seeking the following orders:

a. **An order of certiorari removing into this court and quashing the decision of the Respondent**

made on 16th January 2015 in Tribunal Case Number 85 of 2011.

b. **An order of Mandamus compelling the Respondent to retry the complaint filed by the tenant in tribunal case number 85 of 2011 within its jurisdiction under Section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya.**
c. **Costs of the Application.**

Ex Parte Applicant's Case

2. According to the Applicant, he is the owner of the premises, shop No. 2 and 3 measuring about 578 square feet known as Dagorreti/Riruta/T/143 Nairobi which he rented out to the Interested Party vide a tenancy agreement that commenced on the 1st January 2004 and terminated on 31st December 2006.
3. According to the Applicant, before January 2004 the Interested Party and himself conducted the landlord and tenant relationship orally without any written agreement and that before the signing of the tenancy agreement the Interested Party alleged to have done some renovations on the premises which were valued at the Kshs. 300,000.00. Pursuant thereto, the parties to the agreement entered into an agreement where the Interested Party was to pay rent less Kshs 5,000 per month from the month 1st January 2004 to 31st December 2008.
4. It was averred that in the month of July, 2010 the parties entered into negotiations with the view to increasing rent Kshs 21,000 to Kshs 34,000 after carrying out extensive renovations in the premises. However, the Interested Party insisted that he could only add the rent up to a maximum of Kshs 25,000 month and not the required Kshs 34,000.00. Consequently, the Applicant served a proper notice to alter the terms under the law, which provoked the Interested Party into filing a reference being BPRT No. 735 of 2010 Nairobi.
5. According to the Applicant, the Interested Party became evasive in rent payment and performance of his other obligations under the tenancy including the payment of the agreed Kshs. 40,000 to top up his security.
6. It was the Applicant's case that with respect to the renovations, the written agreement lapsed on 12th December 2008 and the Interested Party persistently refused to sign another agreement and as a result the Applicant never allowed him to carry out any renovations. However, in the month of June 2010, the Applicant discovered that the Respondent had constructed for himself a toilet in the shop without the Applicant's knowledge and permission. The interested party then filed a complaint in which he *inter alia* asked the court to compel the Applicant to pay a sum of Kshs 371,400 as the costs for the alleged renovations.
7. It was deposed that the Tribunal appointed Paragon Property Valuers Limited to prepare a valuation report on the costs that the Interested Party had incurred on the repairs of the said premises. Although the valuation was done, it was averred by the Applicant that there were inconsistencies with the receipts relied on and the alleged repairs.
8. According to the Applicant the decision by the Respondent is unreasonable for failure to consider the fact that the Interested Party carried out the renovations without his consent and also because the Respondent failed to consider the valuation report and the inconsistencies that were discovered in as far as the receipts and the repairs alleged to be done were concerned.
9. It was the Applicant's case that the Respondent's decision was unreasonable, ultra vies, illegal and breached his legitimate expectation.
10. On behalf of the Applicant it was submitted that the Respondent's decision was unreasonable on the grounds of the Respondent's failure to consider the existence of the agreement between the parties hereto requiring the tenant to seek the consent of the landlord before carrying out any renovations; failure to consider the valuation report and the inconsistencies therein; and failing to consider the fat that the valuer did not visit the site but relied on statements of the interested party and its receipts. In support of this submission the applicant relied on **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223**, **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2, Certified PublicRe Hardial Singh and Others [1979] KLR 18; [1976-80] 1090, Republic vs. Institute of Accountants of Kenya ex parte Bhatt Nairobi HCMA No. 285 of 2006**, and **Patrick Kariungi vs. Commissioner of Police &**

Another [2014] eKLR.

11. It was further submitted that the Respondent acted *ultra vires* by failing to decode the case on the agreement between the parties to the agreement and purporting to create a new agreement for the parties inconsistent with the one between them; by imputing an agreement an agreement between the parties, failing to assess the evidence presented to it in form of the valuation reports and the inconsistencies therein; and failing to consider the existence of the agreement between the parties with respect to the need to seek consent before carrying out renovations. In support of this submission the applicant relied on **Anisminic vs. Foreign Compensation Commission [1969] 2 WLR 163**, **Council of Civil Service Union vs. Minister for The Civil Service (1985) AC 374**, and **Patrick Kariungi vs. Commissioner of Police & Another** (supra).
12. It was further submitted that the Respondent's decision was tainted by procedural impropriety by sending a valuer to carry out the valuation when the very existence of the repairs and aimed were carried out by the applicant; by ignoring the issue of rent arrears; by failing to determine if the repairs were actually done before determining the amount therefor; by failing to assess the three reports before settling on one; and by failing to consider that the valuer did not visit the site. In support of this submission the Applicant relied on **Patrick Kariungi vs. Commissioner of Police & Another** (supra).
13. The Applicant further submitted that the Respondent breached its legitimate expectation and relied on substantially the foregoing grounds. In support of this submission the applicant cited **CCSU vs. Minister for Civil Service [1985] AC 374**, and **Republic vs. City Council of Nairobi exp Kenya Taxi Cabs Association [2010] eKLR**.
14. It was the Applicant's case that the Respondent acted in bad faith, abused the powers conferred upon it and failed to take into account relevant considerations in making its decision and acted contrary to the ex parte applicant's legitimate expectations. Reliance was also placed on **Republic vs. Commissioner of Customs Services exp Africa K-Link International Limited Nairobi [2012] eKLR** and **Republic vs. Public Procurement Administrative Board & Another exp Unto Creations Studio Limited [2013] eKLR**.

Respondent's Case

15. In opposition to the application, the Respondent filed the following grounds of opposition:

1. **The Respondent had the requisite jurisdiction to determine the matter at hand and the applicant has not demonstrated any case as to why an order of certiorari should be issued as against the 2nd and 3rd Respondent's decision.**
2. **That judicial review deals with the procedure and process of decision making and not the merit or substance.**
3. **That the applicant being aggrieved with the decision of the tribunal ought to have gone for an Appeal and challenged the same but not to come under judicial review.**
4. **The application has no legal basis hence the prayer by the Respondent for its dismissal with costs.**
5. **The application is an abuse of Court process and therefore unmerited.**

16. It was submitted on behalf of the Respondent that in arriving at its decision the Respondent acted within its jurisdiction conferred by section 12 of the Act. In making its decision the Tribunal considered the documents on record which included the submissions and valuation reports and this was within the jurisdiction of its chairperson.
17. To the Respondent, what the Applicant is challenging is the merits of the decision hence the Applicant ought to have appealed under section 15(1) of the Act rather than institute these proceedings.

Interested Party's Case

18. In opposition to the Application the interested party contended that his relationship with the Applicant as his landlord was established by two agreements one entered into on 1st March 1997-28th February 2000 and another one on 1st January 1999-31st December 2001 through a written

agreement between the landlord, the interested party's brother and the interested party.

19. The interested party admitted that he was the tenant/Applicant in the Business Premises Tribunal Case Number 85 of 2011 whose Judgment dated 16th Januarys 2015 is being faulted. He deposed that upon presenting his complaint to the Tribunal he was granted orders to stop distress which was unlawfully being carried out by his landlord. To him, the landlord decided to convert rent for the months of November, December 2010 and January 2011 to a deposit. According to him, the landlord could not convert rent to a deposit without his consent because that could amount to an alternation of a term of tenancy without complying with Section 4 of the ***Landlord and Tenants Shops Hotels and Catering Establishment Act*** (hereinafter referred to as 'the Act") which section forbids alteration of terms of tenancy or introduction of a new term of tenancy without giving a two month's notice in the Tribunal's prescribed form. However, the landlord was illegally levying distress for rent for November, December 2010 and January 2012 after converting rent for those months to a deposit.
20. The interested party also complained that the landlord had advertised his shop as vacant and available for letting while he was still in possession which act amounted to harassment and intimidation which the Act forbids. Surprisingly the landlord did not deny this in his replying affidavit to the complaint. The interested also complained about the landlord's failure to refund him the costs of repair and renovations carried out in the premises with his consent since the year 2004 though the landlord had compensated him for all repairs done up to the year 2004 January vide an agreement executed by both of them. The interested party disclosed that from the said written agreement the landlord refunded the costs of repairs already carried out with his consent orally given hence they had set a precedent of obtaining oral consent. There was also evidence from his witnesses that the landlord visited the premises almost daily as his house was barely a kilometer away though he did not give the applicant receipts for payment of a further rent deposit of Kshs 40,000 paid.
21. The interested party therefore found it strange that the landlord denied giving him consent and that a written consent was required when there was no such condition.
22. It was averred that the Tribunal ordered each party to produce a valuers report to point out what repairs had been carried out since the year 2004 and their cost. However when the tribunal realized that the two valuers tendered two reports that were irreconcilable it ordered for an independent report which valuation was conducted in a transparent and impartial manner in the presence of the landlord and that whenever the interested party pointed out the improvements the landlord did not raise any objection, a fact which the valuer attested this during his evidence in court.
23. To the interested party the Tribunal's decision was not unreasonable since in its judgment the subject of this application, most of the orders the court acted on in establishing whether the tenant had carried out any works if constructions and repair after the year 2004 and what their value was were made by consent.
24. Based on legal advice the interested party asserted that the landlord was supposed to maintain a rent book a mandatory requirement under the Act and if he chose not to do so or issue rent receipts the burden of proving any unpaid rent lied on his shoulders; that alteration of terms of tenancy could only be done per the provisions of the Act; that the process of investigating his complaint was properly followed and therefore the order of certiorari and mandamus should not issue; that there's provision for review of an order of court in the Tribunal an avenue the Applicant did not pursue before instituting judicial review proceedings; that the Applicant having participated fully in the process of investigating the complaint without raising any objection can not now rise up and claim that the process was flawed more so when the fees for the independent valuer were paid by both parties.
25. To the interested party, the landlord set a trend of not keeping written records for example issuing receipts and therefore he can not say that oral consent to carry out repairs was not adequate.
26. The interested party therefore was of the view that there is no good ground for interfering with the decision of the tribunal and urged the Court to reject the Applicant's application with costs.
27. It was submitted on behalf of the interested party that in appointing an independent valuer the Tribunal exercised its powers under section 12 of the Act and that none of the parties objected to the adopting of the said report. It was submitted that the Tribunal was not bound to accept either of the parties; report.

28. It was submitted that any aggrieved party ought to have appealed against the decision.

Determination

29. I have considered the issues raised herein.
30. The scope of judicial review was dealt with by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which the Court held:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

31. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
32. It must be remembered that judicial review is concerned not with private rights or the 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 has been subjected. *See* R vs. Secretary of State for Education and Science *ex parte* Avon County Council (1991) 1 All ER 282, at P. 285.
33. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.
34. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the Court held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

35. Whereas it is true that the frontiers of judicial review have expanded and will continue to expand in order to meet and address emerging situations the present position is that the decision whether or not to grant judicial review orders is dependent on whether or not the impugned decision is tainted by the three "Is" and these are illegality, irrationality and procedural impropriety. These broadly encompasses whether the body or authority concerned has acted without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles; whether there is such ***gross*** unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision in that the decision taken is in defiance of logic and acceptable moral standards; and whether there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision the unfairness being in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision as well as failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.
36. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly...And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction...Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

37. In **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003**, **Omolo J.A**. stated as follows:

"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."

38. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the

applicant while believing the evidence not favourable to him. Therefore in cases where the credibility of the witnesses is in issue, even an appellate court will not lightly interfere with a decision of the lower court since in that case the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence. The well known legal principle is that in the realm of "pure" fact, the advantage which the judge derives from seeing and hearing the witness must always be respected by an appellate court and that the importance played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, where credibility is crucial and the appellate court can hardly ever interfere. See **Aga Khan Hospital vs. Busan Munyambu KAR 378; [1976-1985] EA 3; [1985] KLR 127.**

39. However, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be aground for quashing a decision if there was material on record which would have warranted a finding to the contrary.
40. It was averred that the Respondent's decision was ultra vires because the Respondent failed to decide in accordance with the agreement between the parties and imputed an agreement between them and failed to assess the evidence presented before it in form of valuation reports and the agreement between the parties. In **Uganda General Trading Co. Ltd ss. N T Patel Kampala HCCC No. 351 Of 1964 [1965] EA 149**, **Sir Udo Udoma, CJ** expressed himself as follows:

"The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law... The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity."

41. In my view the mere fact that a Tribunal in the course of its determination errs in failing to consider some evidence or misconstrues evidence presented before it does not mean that the Tribunal has acted ultra vires its powers. Whereas the Tribunal may well arrive at a wrong conclusion taking into account the evidence before it, that does not mean that it acted in excess of the power conferred upon it. Accordingly, I am not satisfied that the issues raised by the Applicant herein proves that the Tribunal acted *ultra vires* its powers.
42. With respect to the allegations that the Tribunal's decision was unreasonable, it ought to be appreciated that there is a distinction between mere unreasonableness and Wednesbury unreasonableness. It is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. Since unreasonableness is a subjective test, to base a decision to grant judicial review relief merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, and this view is supported by the very test in ***Wednesbury Case***, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so

outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

43. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

44. In this case, there is no satisfactory material placed before me on the basis of which I can find that the Tribunal's decision was irrational. Whereas one may find it disagreeable that in itself does not elevate it to the level of irrationality. I cannot say that the Tribunal's findings were so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at it. The issues raised herein such as failure to consider the import of the tenancy agreement and the valuation report and reconcile inconsistencies therein would in my view if true amount to failure to appreciate the evidence presented and attach to it the weight that ought to have been accorded to it. That if true would be a ground for an appeal rather than judicial review. The Tribunal had three sets of valuation reports and the mere fact that it relied on one and not the other, cannot be a ground for upsetting the decision in proceedings of this nature. That the Tribunal had powers to seek assistance of a valuer is clear from the provisions of section 12 of the Act and its decision to rely thereon can only be challenged by way of an appeal as provided under section 15 of the Act.

45. With respect to procedural impropriety it ought to be noted that this does not mean that an alleged failure to favourably consider a party's position amounts to a procedural impropriety for the purposes of judicial review relief. Similarly violation of legitimate expectation cannot be successfully based on the failure by the Tribunal to consider the evidence in the manner proposed by one of the parties.

46. My consideration of the Applicant's case seems to be that the case is hinged on the alleged findings and decisions which were not supported by the evidence before it. With due respect that is not the role of a judicial review court. In order to make a finding whether or not the impugned decision was supported by evidence would necessarily involve re-evaluation of the evidence that was placed before the Tribunal and whereas that is a matter which ought to be dealt with by a first appellate court, the issue goes to the merits of the decision rather than the process. In judicial review proceedings the mere fact that the Tribunals decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review.

Order

47. Accordingly, I find no merit in the Notice of Motion dated 6th March 2015 which I hereby dismiss with costs.

Dated at Nairobi this 19th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kashindi for Mr Achach for the Applicant

Cc Muruiki