



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO. 174 OF 2015

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 LAWS
OF KENYA**

AND

IN THE MATTER OF THE RENT RESTRICTION ACT CAP 296

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF NAIROBI RENT RESTRICTION TRIBUNAL CASE NO. 555 OF 2012 -
ELIZABETH WANJIRU –VS- AGATHA NJOKI MWANGI**

AND

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

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE CHAIRMAN, RENT

RESTRICTION TRIBUNAL1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

AGATHA NJOKI MWANGI.....EX PARTE APPLICANT

AND

JUDGEMENT

Introduction

1. By a Notice of Motion dated 16th June, 2015, the *ex parte* applicants herein, **Agatha Njoki Mwangi**, seeks the following :

1. The honourable court be pleased to grant:-

a. An order of Certiorari do issue to bring into this court and quash the proceedings of Nairobi Rent Tribunal Case No. 555 of 2012 Elizabeth Wanjiru –vs- Agatha Njoki Mwangi.

b. An order of Prohibition do issue restraining the Respondent from hearing and or determining Nairobi Rent Tribunal Case No. 555 of 2012 Elizabeth Wanjiru Vs Agatha Njoki Mwangi.

2. Costs of this application be borne by the Respondents and the Interested Party jointly and severally.

Ex Parte Applicant's Case

2. According to the Applicant, at all material time to this suit she was the authorized agent of the owner of residential premises known as RUIRU/KIU/BLOCK 3/2566 which contains a residential house while the interested party herein was a tenant therein paying a sum of Kshs 15,000 per month excluding utilities which fact was disclosed by the interested party to the 1st Respondent.

3. Despite that, the applicant contended that the 1st Respondent is presiding and continues to preside over the matter which has precluded the Applicant from levying distress, increasing rent or evicting the Interested Party.

4. The Applicant disclosed that the 1st Respondent had previously issued orders of a similar nature in the year 2012 where indeed the Tribunal acknowledge the amount of rent payable as Kshs 15,000/= and despite this knowledge and the 1st Respondent's pecuniary jurisdiction, the 1st

5. According to legal counsel, despite his preliminary objection to the jurisdiction of the Tribunal, the same remains to be heard and the 1st Respondent has failed to hear the same in priority to the main claim which renders the entire proceedings a nullity.

6. It was the Applicant's case that the Rent Restriction Tribunal (hereinafter referred to as "the Tribunal") does not have pecuniary jurisdiction to handle the matter noting that the Interested Party in this pleadings has disclosed the actual rent in the pleading whose jurisdiction is limited to premises whose rent does not exceed Kshs. 2,500.

7. According to the Applicant, despite the foregoing attempts at the abuse of the judicial process the Interested Party filed another claim before the Chief Magistrate's Court at Nairobi in Misc. No. 1232 of 2013 Elizabeth Wanjiru vs Agatha Njoki Mwagi which matter is pending hearing and the Interested Party has failed and/or neglected to prosecute the same thereby prejudicing the Applicant's rights to collect rent.

8. To the Applicant the said orders have prevented her from collecting income from her business which has resulted into a drop in revenue from the said premises as the Interested Party has been stubborn in paying rent since the proceedings were instituted and she is unable to levy distress and it is the interests of

justice that the 1st Respondent be restrained from proceeding with the matter.

9. It was submitted on behalf of the Applicant that under section 2(1) of the ***Rent Restriction Act***, the Act applies to dwelling houses other than those which have a standard rent exceeding two thousand five hundred shillings per month, furnished or unfurnished. Since the subject rent is Kshs 15,000.00 per month, it was submitted that the Tribunal has no jurisdiction to entertain the matter. In support of its submissions the Applicant relied on **Republic vs. Rent Restriction Tribunal exp Simon Ngure Ngatia & Another [2014] eKLR** and **Republic vs. Chairman Rent Restriction Tribunal & Another exp Ezekiel Machogu & 3 Others [2013] eKLR**.

10. Based on **The Owners of Motor Vessel “Lillian S” vs. Caltex Kenya Ltd [1989] KLR 1** and **John Mugo Ngunga vs. Margaret M. Murungi [2014] eKLR** it was submitted that without jurisdiction a court has no power to make one more step.

11. On the issue of locus it was submitted that since the interested party has been paying rent to the *ex parte* applicant, there exist a landlord-tenant relationship between them and that it was in that capacity that the interested party sued the *ex parte* applicant before the Tribunal. To the Applicant she collects rent and manages the suit property and therefore she has sufficiency of interest in the matter. In support of this submission the applicant relied on **Teresia Waithira K Njuguna vs. John Nyandew & Another [2015] eKLR**.

12. Based on **Shah Vershi Devshi & Co Ltd vs. The Transport Licensing Board [1970] EA 631**, **John Mugo Ngunga vs. Margaret M. Murungi [2014] eKLR**, **Kenya National Examination Council vs. Republic exp Gathenji [1997] eKLR**, **Republic vs. Chairman Rent Restriction Tribunal & Another exp Ezekiel Machogu & 3 Others** (supra) and **Republic vs. Electricity Commissioners exp London Electricity Joint Committee Co. [1920] Ltd [1924] 1 KB 171 at 206**, it was submitted that the *ex parte* applicant is entitled to the orders sought herein.

1st & 2nd Respondents’ Case

13. In opposition to the application, the 1st and 2nd Respondents filed the following grounds of opposition:

- 1. That the Applicant had 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 against the 1st Respondent.**
- 2. That the matter is not within the purview of judicial review court neither does it meet the basic of judicial review application. Judicial Review deals with procedure of decision making and not the merit or substance.**
- 3. That the Applicants application for orders of certiorari is time barred pursuant to Order 53(2) of the Civil Procedure Rules.**
- 4. That the application has no legal basis hence the prayer by the Respondent for its dismissal with costs.**
- 5. That the application is an abuse of court process and lacks merit.**

Interested Party’s Case

14. According to the interested party, the application herein is premature as the exact amount payable as rent is yet to be established by rent assessors as commissioned by the rent restriction tribunal. According to her, the 15,000/= declared by her as rent payable is more than standard rent and she had been complaining to the *ex parte* Applicant to reduce the rent payable but the same has fallen on deaf ears.

15. The interested party further averred that the *ex parte* Applicant has no locus to make this application given that she is not the registered owner of the suit property.

16. In her view the *ex parte* applicant having submitted to the jurisdiction of the rent restriction is now stopped from complaining about its jurisdiction.

17. On behalf of the interested party, it was submitted that whereas under section 2 of the Act, the Act does not apply to dwelling-houses which have standard rent exceeding two thousand five hundred shillings per month, furnished or unfurnished and despite her concession that she pays rent of Kshs 15,000/- she had moved to the Tribunal for the ascertainment of standard rent which has not yet been done.

18. According to the interested party the applicant having entered appearance and filed a replying affidavit as well as a preliminary objection, it is presumed that the applicant voluntarily submitted to the jurisdiction of the Tribunal and is estopped from challenging its jurisdiction.

19. According to the interested since the cause was filed in 2012, it is presumed that the cause of action arose in that year hence these proceedings having been instituted outside the 6 months period for filing judicial review proceedings, the application must fail.

Determination

20. I have considered the issues raised hereinabove and this is the view I form of the matter.

21. It was contended that the Applicant has no *locus standi* to institute these proceedings. According to the Applicant, she is the authorized agent of the owner of suit premises. This contention is not disputed. In fact it was the interested party who instituted proceedings against the *ex parte* applicant which proceedings gave rise to these proceedings. The issue of standing was dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

“The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others...Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law....The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue....Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”...Although under statute our test is that of sufficient interest my view is that the

horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest...In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are “persons directly affected”. I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”

22. The interested having instituted proceedings against the *ex parte* applicant before the Tribunal cannot now be heard to take issue with the *ex parte* applicant’s challenge to the same proceedings on the ground of locus. If the *ex parte* applicant was entitled to oppose the said proceedings, there is nothing to stop her challenging the same in these proceedings on the ground that the Tribunal has no jurisdiction to entertain the same.

23. In any case **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318**, the Court found that despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities. This power is donated to the Court by Article 165(6) of the Constitution and once it is brought to the Court’s attention that an inferior Court or Tribunal is proceeding in a matter without or in excess of jurisdiction this Court is under a constitutional duty to remove the proceedings or decisions into this Court with a view to examining the same and if found that the Tribunal lacks or is exceeding its jurisdiction quash the same or prohibit the Tribunal from proceeding in the manner in intends to proceed.

24. It was contended that these proceedings are barred by limitation. Sections 9(2) and (3) of the **Law Reform Act** provides as follows:

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order,

decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

25. It would follow that if the instant application fell within the ambit of the said rule the application would be out of time. However, in **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** as well as **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 of the ***Civil Procedure Rules*** only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else.

26. The phrase “or other proceedings” for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199**, in which case the said Court held that the phrase “or other proceedings” has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.

27. However, it is clear that where the remedy sought is not just limited to an order of certiorari, even if the application was not commenced within the said 6 months period, the whole application cannot be said to be incompetent by that mere fact. The 6 months limitation only applies to application for certiorari for the simple reason that in cases where an order for prohibition is sought it means that the action sought to be prohibited is still continuing while mandamus applies to situations where a public authority has declined to carry out a duty imposed on it.

28. In the premises it is my view at this stage that the six months limitation period may not be successfully invoked to bar the applicant from bringing the present proceedings.

29. It is not in doubt that where the “standard rent” exceeds “two thousand five hundred shillings per month, furnished or unfurnished”, the provisions of the Act are inapplicable in which case the Rent Restriction Tribunal has no jurisdiction to determine a dispute arising from such a tenancy.

30. Although the interested party contends that the Tribunal is yet to determine the standard rent, it is clear from the proceedings before the Tribunal that the interested party was not seeking an order for ascertainment of the standard rent. The interested party’s complaint seems to be the increase of rent from Kshs 15,000.00 to Kshs 25,000.00. It is therefore clear that even if the interested party’s case was to be allowed, it would still remove the claim outside the jurisdiction of the Tribunal.

31. The Tribunal ought to have made a determination on jurisdiction as soon as the issue was brought to its attention. 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. [Underlining mine].

32. In **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** the Court of Appeal expressed itself as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which *forbids that tribunal or body to continue proceedings* therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Only an order of *certiorari* can quash a *decision already made* and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.” [Emphasis mine].

33. In this case the Applicant seeks an order prohibiting the Tribunal from proceeding with the matter which it has no jurisdiction to entertain. It is not contended that the proceedings have been determined. Accordingly, this Court has power to quash the proceedings undertaken so far and prohibit the Tribunal from proceeding further with the matter. As was held in **Republic vs. Electricity Commissioners exp London Electricity Joint Committee Co. [1920] Ltd** (supra):

“If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result into its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction.”

34. In this case where it is clear from the interested party’s own case that the Tribunal has no jurisdiction to entertain her complaint, it would be unjust to subject the Applicant to endure the agony of going through the motion when the Tribunal lacks jurisdiction to entertain the matter placed before it.

35. I am not satisfied that by merely entering appearance, filing a replying affidavit and a preliminary objection the Applicant submitted herself to the jurisdiction of the Tribunal. In any case as was held by the Court of Appeal in **Niazons (K) Ltd. vs. China Road & Bridge Corporation (K) Civil Appeal No. 187 of 1999**, jurisdiction cannot be conferred by *estoppel*, consent, acquiescence or default as there is no *estoppel* against statute.

36. In the premises I find that this application is merited.

Order

37. In the premises I make the following orders:

a. An order of Certiorari is hereby issued removing into this Court for the purposes of being quashed the proceedings of Nairobi Rent Tribunal Case No. 555 of 2012 Elizabeth Wanjiru vs. Agatha Njoki Mwangi which proceedings are hereby quashed.

b. An order of Prohibition is hereby issued restraining the 1st Respondent from hearing and or determining Nairobi Rent Tribunal Case No. 555 of 2012 Elizabeth Wanjiru vs. Agatha Njoki Mwangi.

c. The costs of these proceedings are awarded to the Applicant to be borne by the interested party.

38. It is so ordered.

Dated at Nairobi this 17th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Adira for the Applicant

Cc Patricia