REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 397 OF 2015

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

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 47 AND 48

IN THE MATTER OF BUSINESS PREMISES RENT TRIBUNAL AT NAIROBI

AND

IN THE MATTER OF AN APPLICATION BY PRIMROSE MANAGEMENT LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

PRIMROSE MANAGEMENT LIMITED…….....…….....… APPLICANT

AND

CHAIRMAN OF THE BUSINESS PREMISES RENT TRIBUNAL, NAIROBI……..1ST RESPONDENT

QUANZZA MANAGEMENT LIMITED….....….....…2ND RESPONDENT

RULING

1. By a Chamber Summons dated 10th November, 2015, the Applicant herein, **Primrose Management Limited**, seeks the following orders:

    1. That this application be certified as urgent and it be heard ex parte at first instance

    2. That service of this application be dispensed with in the first instance due to the urgency of the matter.

    3. That leave be granted to the Applicant to apply for the judicial review orders of certiorari and prohibition against the decision of the Chairman of the Business Premises

Rent Tribunal sitting in Nairobi on the 4th November 2015 in Tribunal Case no. 758 of 2015.

4. That the leave do operate as a stay of execution of the said orders

5. That cost of this application be awarded to the Applicant.

2. According to the Applicant, it entered into a duly executed an Agreement of Lease with Quanzza Clothing Limited, the 2nd Respondent herein (hereinafter referred to as the Tenant) on 1st September 2010 in respect of Unit No. 22 on the Applicant's Business Premises on Land Reference Number 209/410,2,4,5,& 6.
3. It was however disclosed that the Tenant has been in rent arrears of over Kshs. 500,000.00 and despite notice has refused to clear the said arrears. In exercise of its statutory and contractual rights, the Applicant distressed for rent owing to the Tenant's unwillingness to settle the rent arrears.
4. The Applicant however later found out the Tenant had procured orders from the Business Premises Rent Tribunal, (hereinafter referred to as "The Tribunal") sitting at Nairobi. To the Applicant, it was never served with any summons to appear before the Business Premises Rent Tribunal to facilitate a fair hearing.
5. On the said discovery, the Applicant referred the matter to their advocates Messrs, Musyoka Wambua & Katiku Advocates who perused the proceedings before the Business Premises Rent Tribunal in the Tribunal Case NO. 758 of 2015, and learnt that the Tenant did not attach any evidence that they had been paying rent to warrant issuance of the orders that the Chairman of the Tribunal issued.
6. It was disclosed that the orders issued by the Chairman of the Tribunal on 4th November 2015, are an abuse of the Constitutional rights of the Applicant, particularly Article 47(1).
7. To the Applicant, the orders issued by the Chairman of the Business Premises Rent Tribunal unconstitutionally prevents the Applicant from collecting rent legally owing to it for 3 months which orders allow the tenant, who has already been in rent arrears for over 2 months, to continue staying at the Applicant's premises for a further 3 months without paying rent.
8. It was the Applicant's contention that the tribunal does not have jurisdiction to settle the dispute between the Applicant and the Tenant as the tenancy relationship does not qualify as a controlled tenancy under the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*** Chapter 301 Laws of Kenya. The lack of Jurisdiction of the Tribunal, according to the Applicant, arises from the fact that there is no controlled tenancy between the Applicant and the Tenant as defined under the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*** Chapter 301 Laws of Kenya.
9. Apart from lack of jurisdiction it was contended that the Applicant was never given a chance to defend itself before the orders were issued which is an abuse of the principles of natural justice.
10. The Tribunal also accused of acting in excess of its jurisdiction by invoking the coercive powers of the Police Force in a civil dispute.

Determinations

11. I have considered the issues raised herein.
12. 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.**

13. **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".

14. 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.

15. 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…"

16. 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."

17. *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."

18. 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.
19. In this case, the applicant contends that the Tribunal had no jurisdiction to entertain the matter as there is no controlled tenancy between the Applicant and the 2nd Respondent. 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."

20. 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. No tribunal can by its own decision finally decide on the question of existence or extent of the limits of their jurisdiction, such question is always subject to review by the High Court which should not permit the inferior tribunal either to usurp a jurisdiction it does not posses at all or to the extent claimed or refuse to exercise a jurisdiction which it has. See **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another [2006] 1 EA 318.**
21. 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.
22. 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.

23. 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).

24.. 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.

25. 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* orders can and do invariably get set aside at the *inter partes* hearing where found to be unmerited.
26. In this case, the applicant contends that the relationship between the applicant and the 2nd respondent is not a controlled tenancy. Whether this is so will depend on the contents of the contractual document between the parties thereto. The terms will have to be considered before a decision one way or the other is arrived at. 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]

27. In other words the finding on jurisdiction will depend on the factual determination of the nature of the relationship between the Applicant and the 2nd Respondent. These are matters which ought to be taken up before the 1st respondent at the *inter partes* hearing of the application or at the time of

the hearing of the application for setting aside the ex parte order. This Court cannot usurp that jurisdiction and stop the 1st respondent in its tracks before it hears the parties on the issue.

28. 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 Applicant have not shown the reason why the Court ought to exempt it from seeking to set aside the *ex parte* orders of injunction granted by the 1st respondent or opposing the extension thereof at the *inter partes* hearing.
29. 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.
30. It was contended that the Tribunal ought not to have invoked the coercive powers of the Police Force in a civil dispute. Whereas I agree that the police have no powers to execute what are purely civil orders, the police are generally under obligation to ensure peace is maintained at all times even without being ordered to do so by the Court. Accordingly nothing turns on the mere fact that the Tribunal directed the police to maintain peace and order.
31. In the premises, I decline to exercise my discretion in favour of the applicant as sought herein.
32. However, this Court is clearly perturbed by the grant of an *ex parte* order for three months moreso when the said *ex parte* orders are in the nature of mandatory orders as in the instant matter. Such orders do not inspire confidence in the rule of law and do not advance the course of justice. To grant an *ex parte* order for a period of 3 months may well be deemed by a party to amount to a violation of Article 47 of the Constitution. This Court has the power and jurisdiction pursuant to Article 165(6) of the Constitution to supervise the subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court where a matter that cries out for justice is brought to its attention.
33. Although this Court has found that the Applicant ought to apply for setting aside, to expect the Applicant to wait till February, 2016 for it to be heard while enduring the *ex parte* order of this nature is clearly unjust.
34. In the premises I direct that the Tribunal lists the Application for *inter partes* hearing within 14 days from the date of service of this order on the Tribunal and the 2nd Respondent with notice to all the parties to the suit.
35. There will be no order as to costs.

Dated at Nairobi this 12th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Said for Mr Obel for the Applicant

Cc Patricia