REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 15 OF 2012

IN THE MATTER OF AN APPLICATION TO FILE AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE LAND LORD AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS) ACT CHAPTER 301

AND

IN THE MATTER OF COOPERATIVE SOCIETIES ACT CHAPTER 490

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES

AND

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

CHAIRPERSON BUSINESS PREMISES

RENT TRIBUNAL..... 1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

AND

KAPTARAKWA ENTERPRISES LTD.....INTERESTED PARTY

AND

KEIYO HOUSING COOPERATIVE

SOCIETY LTD ..... EX-PARTE APPLICANT

JUDGMENT

The Ex-parte Applicant, Keiyo Housing Co-operative Society Ltd, filed the Notice of Motion dated 21st May, 2012 brought under Order 53 Rule (3) and (4) of the Civil Procedure Rules, Section 8 (2) and 9 of the Law Reform Act, Cap 26, Laws of Kenya.

The main prayer sought is that an order of certiorari do issue to quash the decision/judgment of the chairperson of Business Premises Rent Tribunal delivered on 30th March, 2012 in Business Premises Tribunal case numbers 24 and 40 of 2010.

The said Notice of Motion is premised on the following twenty (20) grounds:-

1. The Business premises tribunal exceeded its jurisdiction and mandate by determining issue of ownership and by doing so acted ultra vires.

2. The tribunal acted ultra vires by going outside what was before it, that is, tenancy termination between Kaptarakwa enterprises and Keiyo Housing Co-operative Society and deciding on ownership.

3. The tribunal exceeded its jurisdiction and mandate by handing over the premises to a stranger in the proceedings before it.

4. That the Exparte applicant being the undisputed land owner of the premises known as ELDORET MUNICIPALITY BLOCK 7/72 had issued a termination notice to the tenant the interested party herein.

5. That the interested party being the tenant resisted the termination by filing a reference and therefore the question before the Business Premises Tribunal was whether or not the notice was to take effect pursuant to the law.

6. The decision made by the tribunal is likely to lead to anarchy to the detriment of the ex-parte applicant who is now not receiving rent.

7. That the relationship between the ex-parte applicant and the interested party was that of landlord-tenant and they presented themselves to the tribunal as such.

8. That subsequent to the filing of the case the lease period that was binding between the Ex-parte applicant and the interested party expired on 28th February 2010 as the lease in question had been signed on 1st January 2005 for 5 years 2 months.

9. That the interested party was notified of the expiry of the lease and they responded through an advocate of the High Court of Kenya appealing that they be given priority in the extension of the lease.

10. For transparency and the best interest of the members of the ex-parte applicant, who were thousands in number, the ex-parte applicant did not automatically renew the lease but made an invitation for tender.

11. The interested party herein was one of the entitled individuals applying for the tenancy offering an amount of Kshs 82,000/=.

12. The interested parties bid was successful this was notified to them through a letter dated 3rd February 2010.

13. Problems started when the interested party whose lease had been extended pursuant to their own offer of Kshs 82,000/= per month, failed to pay rent as bidded and agreed.

14. The interested party disregarded the terms under which the lease was offered and opted to unilaterally fix for itself the rent it deemed fit and started paying Khs 46,000/-.

15. As a result of the disagreement the case in the Business Premises Rent Tribunal had to go on.

16. Statutory notice had also been issued by the Municipal Council of Eldoret demanding immediate renovation of the premises.

17. The issue was whether the ex-parte applicant who is the landlord had enough grounds to terminate the tenancy as laid down by statute.

18. The tribunal however deliberated on issues not brought before it made a determination as to ownership of the property.

19. The tribunal also exceeded its jurisdiction and mandate by introducing a stranger which had not testified nor was part of the proceedings, that is an entity termed as Kaptarakwa Co-operative Society which is a Co-operative society and totally different from Kaptarakwa enterprises (the Interested Party) which is a business entity and not a co-operative society.

20. That the 1st respondents judgment by virtue of the grounds set above can be subjected to judicial review.

I would however summarize the above grounds for ease of determination of this application as follows:-

(a) That the tribunal addressed itself to extraneous matters and failed to determine the issue at hand as a result of which it exceeded its jurisdiction and mandate. That is to say that it addressed itself on the issue of land ownership as opposed to determining the tenancy relationship between the warring parties.

(b) That it was apparent that the issue at hand was whether the Exparte Applicant being the landlord had sufficient grounds to terminate the tenancy as laid down by statute.

(c) That the Tribunal exceeded its jurisdiction by introducing a stranger who had not testified nor was a party to the proceedings, this party being Kaptarakwa Co-operative Society which is a totally different entity from Kaptarakwa Enterprises (Interested Party herein).

The application is opposed by the Interested Party vide a Replying Affidavit sworn by one Kipkoech Lagat, the chairman of the Interested Party on 30th July, 2012.

I will hereafter in this judgment revisit the issues canvassed in the said Replying Affidavit. But in summary, the deponent states that the Interested Party is not only owned by three individuals, namely John K. Kwambai, Gabriel Mammet and himself but also by Kaptarakwa Co-operative Society and several other members. That the Applicant herein is only a manager of the subject premises while the Ex-parte Applicant is a tenant on its behalf and Kaptarakwa Co-operative Society. That other tenants in the premises included Chepkorio and Metkei Co-operative societies, which together with Kaptarakwa Farmers Co-operative Society form the Ex-parte Applicant.

On behalf of the 1st and 2nd Respondents, the office of the Attorney General represented by the Senior Deputy chief litigation counsel filed Grounds of Opposition dated 25th April, 2013. The Grounds cited are as follows:-

1. The Order of Certiorari sought is not available to the Ex-parte applicant.

2. The motion is bad in law, incompetent and does not lie and is an abuse of court.

3. The honourable court lacks the jurisdiction to adjudicate the issues before the court.

4. The balance of convenience lies in favour of the Interested Party.

5. There was no landlord/tenant relationship as defined under Section 2(1) (a) of the Principal Act.

6. Alternatively, there was no controlled tenancy by virtue of section 2 of the principal Act.

7. The application offends Order 53 Rule 7(1).

8. The application offends Section 14(1) of the Principal Act.

Suffice it to note, the Senior Litigation Counsel did not state which statute she referred to as the Principal Act, but I opine it is Cap 301 - The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

The background to this Judicial Review is a consolidated judgment given by the chairperson of the Business Premises Tribunal delivered on 30th March, 2012 in Tribunal Case Numbers 40/2012 and 24/2012. In both cases Kaptarakwa Enterprises (Interested Party) was the Applicant/Tenant while Keiyo Housing Co-operative Society (the Ex-parte Applicant) was Respondent/Landlord.

An excerpt of the tribunal judgment reads:-

"On 23rd March, 2010, the tenants herein Kaptarakwa enterprises filed a complaint in case No. 24/2010, complaining that the landlord had issued an illegal of seven days notice to terminate the tenancy. They also sought an order restraining the Landlord from threatening to evict the tenants.....

Though the proceedings were recorded in file No. 24/2010, I want to point out that the two cases No. 24/2010 and 40/2010 are very different. Case No. 24/2010 is a complaint by the tenant against the land lord. This judgment therefore relates to Case No. 40/2010. I have however referred to case No. 24/2010 in this judgment since there are orders that I made on 1/1/2010 that will become very relevant in this judgment. The said order reads 'pending hearing of the reference (under section 6) the tenant to pay Kshs 68,000/= hearing next session.'

It is my considered view that Keiyo Housing Co-operative Society has no locus and had no capacity to issue the notice. Keiyo Housing does not own the property, it is only managing the property for its clients Kaptarakwa Co-operative Society. If indeed Keiyo Housing had the blessing of the Co- operative Society to terminate the tenancy so that it can renovate the premises, how come they did not issue the notice for and on behalf of the landlord? .....It is clear that Kaptarakwa Enterprieses is a joint owner of the suit premises. Besides being owners, they also occupy the premises as tenants so they must pay rent. This rent is distributed to all the members at the end of the year including the tenant. So besides being a tenant, the tenant is also an owner of the premises and therefore the landlord. ...On what basis then would the management committee say that it has permission to terminate the tenancy when the owners of the building have not consented? From the foregoing, it is very clear that there is no tenancy relationship between the parties. I would decline to make a determination on the facts herein and dismiss the notice with costs to the tenant. ...The orders herein to apply in Case No. 24/1010"

This judgment elicited a number of disputes which I also highlighted in my own ruling in **ELDORET HIGH COURT CIVIL CASE NO. 160 OF 2010.** I highlight them once again as follows:-

1. **ELDORET HIGH COURT JUDICIAL REVIEW APPLICATION NO. 15 OF 2012** that is subject of this dispute.

2. **ELDORET HIGH COURT CIVIL APPLICATION NO. 38 OF 2012** - the Ex-Parte Applicant therein contended that the chairperson of the Business Premises Rent Tribunal, Hon. Mochache erred in law and fact in making a determination over issues of ownership of the suit premises without the requisite jurisdiction.

3. **ELDORET CHIEF MAGISTRATE'S COURT MISC. APPLICATION NO. 38/2012** dated 31st day of July 2012. In the application, the Ex-parte Applicant sought orders of breakage by auctioneers in enforcement of distress for rent against the Interested Party herein.

4. **ELDORET HIGH COURT CIVIL APPEAL NO. 109 OF 2012** - the appeal was filed by Ron Boy Agencies and Keiyo Housing Co-operative Society against Kaptarakwa Enterprises. The appeal was filed pursuant to orders issued by the magistrate's court in Eldoret Chief Magistrate's Court Misc. Application No. 38 of 2012 on 18th October, 2012. The Appellants have argued that the court lacked jurisdiction to entertain an application for injunction in the absence of a pending suit among other grounds.

5. **HIGH COURT CIVIL CASE NO. 160 OF 2012** - in which the Plaintiffs sought, inter alia, an order declaring that the Defendant's action of closing down their business premises was illegal and unprocedural and for a permanent injunction restraining defendants from interfering with their business. The suit was filed simultaneously with a Notice of Motion application dated 31st July, 2012 seeking similar orders as in the plaint which I determined in a ruling dated 1st July, 2013.

Before I outline the issue for determination it is important to briefly set out the background to the dispute.

The Ex-parte Applicant was formed upon amalgamation of three distinct Co-operative Societies, namely Chepkorio Farmers Co-operative Society, Metkei Farmers Co-operative Society and Kaptarakwa Co-operative Society. Among the properties it purchased was Eldoret Municipality Block 7/72 with a fully developed one storey building. The Interested Party (Kaptarakwa Enterprises Ltd) became one of its tenants in the building. After sometime, the latter failed in its obligations to pay rent. In the result, the Applicant also urged by the need to repair the premises issued a notice to terminate the lease. The Interested Party then filed a reference to the Business Premises Rent Tribunal pursuant to Section 6 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya. This set the stage for the many legal battles referred to herein above.

The chairperson of the tribunal delivered her judgment on 30th March, 2012. It is clear from the judgment to discern what the case for the Interested Party (Tenant) was. Suffice it to say, the judgment is marked as annexture AY13 to the affidavit of Abraham Yator in support of the application.

According to the Interested Party, it deliberately declined to pay rent on account that the suit premises was purchased by three Co-operative Societies, namely Chepkorio, Metkei and Kaptarakwa. That the members of the three co-operative societies decided to share the properties purchased and the Interested Party was given the suit property. In this respect, the Interested Party argued that it could not allow the Applicant, Keiyo Housing Co-operative Society to take over its premises.

The Chairperson of the Tribunal then narrowed the issue for determination as, '*Is there a landlord tenancy relationship between Keiyo Housing and Kaptarakwa Enterprises, that is controlled?'* She then sought to address herself to the question of who the landlord was. On page 6 of the judgment she posed this question:-

"***The question then is, who is the landlord herein? Is it Keiyo Housing or Kaptarakwa Co-operative Society?"***

The Chairperson's decision to address herself to the question of the relationship between the Landlord and the Tenant is the borne of contention in this Judicial Review application. According to the Ex-parte Applicant, the chairperson exceeded her jurisdiction and mandate in attempting to determine the tenancy relationship between the warring parties.

In effect, I would further narrow down the issue for determination as, whether the Honourable Tribunal acted ultra vires its jurisdiction. But is it important that I first address myself to the principles governing judicial review orders.

Discretionary Powers of the Court

Judicial review is a discretionary remedy. They are prerogative remedies. It is in the orders to quash, prohibit or compel. In the Kenya legal system, the said prerogative remedies may be obtained under Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act).

It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings - See **WELAMONDI -VS- THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA (2002) 1 KLR, AT PAGE 487** ....."

"..... in exercising powers under Order 53, the court is exercising neither civil or criminal jurisdiction in sense of the word. It is exercising sui generis ....."

Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book "**Judicial Remedies in Public Law**" by Clive Olive, it is noted that ***"there are varieties of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy."***

In **ABERDARE FREIGHT SERVICES -VS- KENYA REVENUE AUTHORITY (2006) 2 KLR 303-305 at 305 Omolo, Githinji and Waki, JJA** noted;

" All remedies available upon judicial review were discretionary."

Judicial review orders can also be sought to correct a fundamentally flawed conclusion/decision:- See **REPUBLIC -VS- JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIRS & 2 OTHERS EXPARTE SAITOTI (2006) 2 KLR 408** in which learned Judges Nyamu, Wendoh and Emukule said;

"Generally, a court could not substitute its own decision in place of the decision of the public body on all questions; law, fact, judgment, policy and discretion. However, the court might appropriately intervene to correct a fundamentally flawed conclusion."

Conduct of the Claimant

In considering the conduct of a party vis-a-vis its entitlement to an order of judicial review, the following factors should be taken into account:-

(a) Failure to object

"A claimant who knows that a decision is potentially flawed and fails to object may find the courts refusing him remedy if he subsequently seeks to challenge the decision." See Clive Lewis Supra**,** Page 393).

(b) Acquiescent

"An individual who has acquiesced in a decisions may not be granted a remedy if he subsequently seeks to challenge it." (Clive Lewis, Ibid)

(c) Misconduct

" Misconduct in the course of judicial review proceedings such as failing to make material disclosure of all the facts in an affidavit or witness statement, may well lead to the court refusing any remedy."(Clive Lewis Ibid) *See also* ***REPUBLIC -VS- KENYA REVENUE AUTHORITY EX- PARTE ABARDARE FREIGHT SERVICES, LTD & 2 OTHERS (2004)2 KLR 530, AT 531)****, in which Nyamu, J noted that "****..... Judicial remedies are also discretionary and the Applicant's conduct and the assertions made in the proceedings disentitled it from benefiting from any such discretion."***

In **MSAGHA -VS- CHIEF JUSTICE & 7 OTHERS (2006) 2 KLR 253**, **Lesiit, Wendoh and Emukule, JJ,** noted that ***"unless and until the applicant presents himself before the tribunal, he could not be heard to say that he had not been heard or plead that he had not been granted an opportunity to be heard by an independent and impartial tribunal."***

<u>The Principle of Proportionality</u>

The gist in this principle is that the Applicant shall be seeking a remedy to orders issued that ultimately were out of proportion to the issue at hand for determination. See **REPUBLIC -VS- JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDERNBERG AFFAIRS & 2 OTHERS EX-PARTE SAITOTI (2006) 2 KLR, 408** in which **Nyamu, Wendoh, Emukule JJ,** observed that, "***Regarding the principle of proportionality in view of the commission fair, faithful and impartial findings, the ultimate findings concerning the applicant were out of proportion. The commission had struck the incorrect balance."***

Also in **<u>KARINA -VS- TRANSPORT LICENSING BOARD (2004) 2 KLR, 467</u> NYAMU, J** then held that, "***..... even if there was a violation warranting the grant of the order of certiorari, the court would still decline to grant the order because the relief is still discretionary and because of the wider public interest based on the principle of proportionality***."

<u>Abuse of Court Process</u>

In the case of ***ABERDARE FREIGHT SERVICES LTD VS. KENYA REVENUE AUTHORITY (Supra), at page 305***, the Court of Appeal noted that; ***"…As a general rule, a party would not be allowed to litigate issues which had already been decided by a court of competent jurisdiction. This amounted to an abuse of the court process…"***

In the case of ***REPUBLIC VS. NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY & 2 OTHERS EX-PARTE GREENHILLS INVESTMENT LTD & 2 OTHERS (2006) 2 KLR, 485 AT 487***, the learned Judge Ibrahim J. noted as follows; ***"…If the ex-parte applicants did not comply with the conditions or terms upon which leave and stay was granted the court had the power and discretion to make such orders that would ensure the said orders were either obeyed or put a stop to the said non-compliance which was clearly an abuse of the court process. The disobedience was due to negative act, non-compliance. As a result, it was not a case of ordinary contempt of court but of actual gross abuse of the court process…"***

Locus Standi

In the case of **REPUBLIC VS. REGISTRAR OF COMPANIES EX- PARTE GITHONGO** (See **REPUBLIC VS- REGISTRAR OF COMPANIES [2001] KLR, 299-306, AT 300),** the Honourable **Mulwa J.** noted that; "***The grant of a stay under order LIII rule 4 of the Civil Procedure Rules is discretionary. In exercising this discretion, the court must be satisfied that the application has locus standi and that the circumstances of the case warrant the granting of the stay applied***.

The applicant is required to demonstrate to the court that he is affected by the remedy in question. "***..All orders of certiorari, mandamus or prohibition issue in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue…***" (See **Ringera J.** (as he then was) in **WELAMONDI VS. THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA, SUPRA, AT 487**).

Legitimate Expectation

In the case of **TRANSOUTH CONVEYORS LTD & ANOTHER VS. KENYA REVENUE AUTHORITY & & 3 OTHERS (2008) e KLR.** The Court of Appeal held that; "***An order of mandamus is issued to an inferior tribunal, public authority or body charged with a duty to carry out what was by law required to be done and where it had failed to perform the duty to the prejudice of a person who had legal right to expect the duty to be performed. The order could properly issue against the KRA as it was a public body whose statutory duty was to clear imported goods where importers had met all the preconditions for the importation."***

In the case of **REPUBLIC VS. KENYA REVENUE AUTHORITY EX PARTE ABERDARE FREIGHT SERVICES LTD & 2 OTHERS (SUPRA) at 530,** the learned Judge **Nyamu J.** (as he then was) held that; "***The principle of legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought to be thwarted- that in judging a case a Judge should achieve justice and weigh the relative strengths of expectation of the parties. A representation giving rise to a legitimate expectation must however be based on full disclosure by the applicant***".

In the case of **KENYA COMMERCIAL BANK LTD VS. KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (2008) KLR, 362 AT 365,** the learned Judges of the High Court, **J. G. Nyamu, R. Wendoh & G.A Dulu JJ,** as then, held that; "***The applicant's legitimate expectation that it would get a fair hearing from the respondent was breached. The applicant expected to be given a fair hearing and all tenets of natural justice to be observed as per section 17 of the Act but the same were flouted by the respondent by their own conduct of prejudging the applicant, being a judge in its own cause, by breaching rules of natural justice and by the respondent committing errors of precedent fact.***"

Public Duty/Statutory Power

In the Kenya Revenue Authority case (Supra), the Honourable Judge opined that; "***There cannot be estoppel against a public authority's exercise of its statutory powers even in the face of error. …The order of mandamus sought did not lie because there was no public duty or statutory power which the respondent had failed to exercise. On the other hand, prohibition operates as to the future to prohibit unlawful acts on the part of an approved body. The order of prohibition also did not lie."***

Interest of the Claimant

In his book '**Judicial Remedies in Public Law**' Lewis argues that; "***The courts have a broad discretion in relation to remedies and may still need to balance the interests of the claimant and***

the requirements of good administration and the effects of the grant of relief on third parties even where the claimant has made the judicial review claim within time." (See, C. Lewis, supra, at pg 394).

Remedies of No Practical Use

The courts may refuse a remedy where it is found that it is no longer necessary in the circumstances or where the issue has become academic or of no practical significance. (See **Lewis, supra, at 399**).

However the courts have held that; ***"…Even if there is no point in granting remedies such as quashing orders, so far as the particular claimant is concerned, there may still be a need to clarify the law or give guidance for decision-makers in the future. A court may grant a declaration setting out the true legal position, or may give judgment clarifying the law but without making a formal declaration…"*** (See **LEWIS, SUPRA, AT PG 400, SEE ALSO R V. BIRMINGHAM CITY JUVENILE COURT EX. P. BIRMINGHAM CITY COUNCIL [1988] 1 W.L.R 337 AND R V. BROMLEY LICENSING JUSTICES EX. P. BROMLEY LICENSED VICTUALLERS [1984] 1 W.L.R 585**).

Prejudice Suffered

It has been argued that the fact that the applicant has suffered no prejudice as a result of the decision or error complained of may be a reason for refusing him a remedy.

"It is necessary to keep in mind the purpose of the public law principle that has technically been violated, and ask whether that underlying purpose has in any event been achieved in the circumstances of the case. If so, the courts may decide that the breach has caused no injustice or prejudice and there is no need to grant a remedy." (See **Lewis, supra, at 400***).

Decision Withstanding Irrespective of the Error

A court may be influenced by the fact that a public body would have exercised its powers in the same way or reached the same decision, even if it had not fallen into the error (See **Lewis, supra, at 401 - 402**).

"…a court may not quash a decision where there was an error of law, or a failure to take account of a relevant consideration, if the decision-maker would have reached the same decision even if he had correctly interpreted the law or taken account of all relevant material. A decision reached in breach of natural justice may not be quashed if the courts are satisfied that the decision-maker would have come to the same decision if natural justice had been observed…" (See also **R V. DEPUTY GOVERNOR OF PARKHURST PRISON EX. P. HAGUE [1992]1 A.C.58, R. V. MANSFIELD JUSTICE EX P. SHARKEY [1985] Q.B 613 AT 630 AND GLYNN VS. KEEL UNIVERSITY [1971] 1 W.L.R 487 AND LEWIS AT PAGE 402).**

Impact on the Third Parties

Decision of public bodies may affect not only the claimant, but third parties who may have acted in the belief that the decision was valid.

"The court may have regard to the interests of such third parties, whether or not they are before the court, in deciding whether to exercise their remedial discretion to refuse relief." (See **Lewis, supra, at 404)**

Impact on Administration

It has been noted that courts recognize that the impact on the administration is relevant in the exercise of their remedial jurisdiction. "***Quashing decisions may impose heavy administrative burdens on the administration, divert resources towards re-opening decisions, and lead to increased and unbudgeted expenditure."*** (See **Lewis, supra at 405*)***. Lewis goes on to say:-

"The courts now days recognise that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the courts' remedial discretion and may prove decisive."

Nature of Decision

The nature of the decision-making process in question may influence the willingness of the court to intervene. It has been noted that some matters are not justiciable, in that they are unsuitable for resolution by the court. (See **Lewis, supra, at 407**).

Alternative Remedies

Judicial review may not be the only available avenue of challenging a particular decision. (See **Lewis, supra, at 408**). In the case of **REPUBLIC VS. COMMISSIONER OF POLICE EX-PARTE KARIA, MISC. APP. NO 534 OF 2003 (UNREPORTED) AS CITED IN NATION MEDIA GROUP VS. ATTORNEY GENERAL [2007] e KLR,** the Court of Appeal held that; "***It was improper for the applicant to have combined judicial review relief applications with a constitutional application."***

Back to the issue for determination, a close scrutiny of the Tribunal's decision reveals that the Tribunal made the following final observations:-

(a) That Keiyo Housing Co-operative Society was not a Landlord capable of terminating a tenancy and that it was only managing the premises in question on behalf of its client, Kaptarakwa Co-operative Society.

(b) The Kaptarakwa Co-operative Society is in joint ownership of the suit premises together with Kaptarakwa Enterprises who equally occupy the premises.

(c) That besides, the tenant is also the landlord.

(d) That there was no tenancy relationship between the parties.

I then grapple with the following two questions, one, were the observations of the Tribunal within the scope of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya? Two, did the Tribunal act beyond its limits?

I respond to the first question as follows:-

The preamble of the Act (Cap 301) is set out as ***"An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto."***

The Business Premises Rent Tribunal is established under Section 11 of the Act, while Section 12 thereof spells out the powers of the Tribunal as follows:-

"12 (1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power -

(a) to determine whether or not any tenancy is a controlled tenancy.

(b) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstancesthereof;

(c) to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;

(d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge to fix the amount of such service charge.

(e) to make orders, upon such terms and conditions as it thinks fit, for recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;

(f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act the landlord could have recovered possession;

(g) where the landlord fails to carry out any repairs for which he is liable -

(i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;

(ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;

(h) to permit the levy of distress for rent;

(i) to vary or rescind any order made by the Tribunal under this Act;

(j) to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the Tribunal;

(k) to award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;

(l) to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of good will, and improvements carried out by the tenant with the landlord's consent;

(m) to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord.

(n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.

Section 2 defines tenancy as follows:-

"tenancy created by a lease or under lease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and

mortgagee as such."

It also defines a '***controlled tenancy***' as follows:-

"....tenancy of a shop, hotel or catering establishment-

(a) Which has not been reduced into writing; or

(b) which has been reduced into writing and which

(i) is for a period not exceeding five years;

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(***iii) relates to premises of a class specified under sub-section (2) of this section.***

Provided that no tenancy to which the government, the community or a local authority is a party, whether a landlord or a tenancy shall be a controlled tenancy."

The Landlord is defined in the Act as ***" .... in relation to a tenancy, means the person for the time being entitled, as between himself and the tenant to the rents and profits of the premises payable under the terms of the tenancy"***, whereas a tenant is defined as ***"....in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding and includes a sub-tenant."***

For proper application of Section 12 of the Act in relation to the instant case, I deduce the relationship between the warring parties as follows:-

(a) That Kaptarakwa Enterprises occupied the premises in question and operated guest houses/lodgings of which they paid rent for their occupation.

(b) The Keiyo Co-operative Society collected rent from the said Kaptarakwa Enterprises on behalf of Chepkorio, Metkei and Kaptarakwa Farmers Co-operative Societies Limited.

(c) That the lease agreement was entered between one Kipkoech Lagat on behalf of Kaptarakwa Enterprises (Tenant) and Keiyo Housing Co-operative Society (Landlord).

(d) That apparently same members of Kaptarakwa Co-operative Society Limited which co-owns the suit premises with Metkei and Chepkorio Co-operative Societies under the amalgamated Keiyo Housing Co-operative Society are the proprietors of Kaptarakwa Enterprises which is a business entity.

(e) That therefore Kaptarakwa Enterprises Ltd and Kaptarakwa Co-operative Society Limited are two distinct entities. This can be explained and simplified in threefold.

(i) Kaptarakwa Enterprises is a business entity whereas Kaptarakwa Co-operative Society is a Co-operative Society that went into amalgamation with two other Co-operative Societies to form Keiyo Housing Co-operative Society. (See Certificate of Lease marked Annexture AY 3 to Supporting Affidavit of the application).

(ii) According to Annexture AY 2 also in support of the application, being Certificate of Registration of Kaptarakwa Enterprise under Registration of Business Names Act, the proprietors of the Enterprise are listed as Kipkoech Kiplagat, John Kipkemoi Kwambai and Gabriel Mammet and not the entire membership of Kaptarakwa Co-opeartive Society Ltd.

(iii) The complaint before the Tribunal involved Kaptarakwa Enterprise through Kipkoech Lagat (as a Tenant) and Keiyo Housing Co- operative Society (as Landlord).

The Tribunal was presented with the question as to whether the Notice of Termination of the tenancy was appropriate and in accordance with the law. In this respect it needed firstly, to address itself as to whether a tenancy under the meaning of the Act existed between the parties, and, secondly, whether the Notice to terminate the tenancy was issued in accordance with the law.

A tenancy agreement was entered into between the parties on 1st January, 2005 and is annexed to the Supporting Affidavit as Annexture AY 4. Hence, no doubt a tenancy existed between the parties.

The Notice dated 21st June, 2010 to terminate the tenancy was issued by the Landlord (the same is annexture AY 5 to the Supporting Affidavit). It gave the grounds for termination as "*substantial breaches of obligation, non-payment of rent, repair and carry out renovations*".

The obligation to issue the Notice is bestored on the landlord by Section 4 of the Act. The same should be in writing and in the form prescribed by Form A. The landlord complied with this provision and so I hold that the Notice was appropriate and legal.

For the above reasons, it was erroneous and a lack of appreciation of the relationship between the parties before her that the Tribunal Chairperson noted that Keiyo Housing Co-operative Society was a managing agent of the suit premises. To the contrary, it was the Landlord while Kaptarakwa Enterprises was the Tenant. As such the latter was obligated to abide with the terms of the tenancy agreement.

Determination

On analysis of the above observations it is important to note that under section 12 (a) of the Act the Tribunal is empowered to **"determine whether or not any tenancy is a controlled tenancy".** This is exactly what the Chairperson of the Tribunal went ahead to do. The only handicap she presented herself with and the shortcoming in her judgment was that she misapprehended the facts and evidence laid before her thus ended up arriving at an erroneous decision. This did not ultimately mean she acted ultra vires her mandate. It is the end result that was wrong based on her inability to analyse the facts of the case properly.

Be that as it may, judicial review remedies being discretionary in nature, means that each case must be considered depending on its peculiar circumstances. In this case, I lay emphasis to Section 15 of the Act which provides for the right of appeal by an aggrieved party before the Tribunal. The same reads as follows:-

"15 (1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) In hearing appeals under subsection (1) of this section, the court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it b y or under any written law

(3) (deleted by 2 of 1970, s.13)

(4) The procedure in and relating to appeals in civil matters from subordinate courts

to the High Court shall govern appeals under this Act.

Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal."

From the foregoing, it is not clear why, despite the availability of an alternative remedy, which I think, would appropriately flow from the Tribunal's judgment, the Applicant opted to come to court by way of a judicial review remedy. The Applicant would have suffered no prejudice in appropriately filing an appeal from the judgment. It is my view that, at the end of the day, the multiplicity of the disputes currently revolving around the same subject matter may prejudice a fair decision in the interest of all parties. Therefore, to prevent the abuse of the court process and in observing that litigation must come to an end and further in exercise of this court's discretionary powers to grant the orders sought, I think this application ought to fail.

In the end, I dismiss the Notice of Motion dated 21st May, 2012 with costs to the Interested Party.

DATED and **DELIVERED** at **ELDORET** this 25th day of February, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Kiboi holding brief for Limo for the Ex-Parte Applicant

No appearance for the for the Respondents

Miss Kipseii for the Interested Party