REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW DIVISION)

MISC. CIVIL APPLICATION NO. 323 OF 2012

IN THE MATTER OF AN APPLICATION BY HEKIMA COLLEGE FOR ORDERS OF CERTIORARI AND PROHIBITION

-AND-

IN THE MATTER OF THE LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS) ACT CHAPTER 301 OF THE LAWS OF KENYA

REPUBLIC .....APPLICANT

VERSUS

THE CHAIRMAN,

BUSINESS PREMISES RENT CONTROL TRIBUNAL.....RESPONDENT

HIGHRISE ELEVATORS COMPANY LIMITIED.....INTERESTED PARTY

EX PARTE HEKIMA COLLEGE

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 3rd September 2012 filed on 3rd September 2012, the ex parte applicants herein, **Hekima College,** seeks the following :

1. **THAT the Honourable Court be pleased to issue an order of Certiorari to bring to the High Court and quash the Order of the Chairman, Business Premises Rent Control Tribunal issued on 10/08/2012 in the Business Premises Rent Control Tribunal Case No.481 of 2012.**
2. **THAT the Honourable Court be pleased to issue an Order of Prohibition to restrain Highrise Elevators Company Limited from acting on the Order of the Chairman, Business Premises Rent Control Tribunal issued on 10/08/2012 in the Business Premises Rent control Tribunal Case No. 481 of 2012.**
3. **THAT the costs of this application be awarded to the Ex Parte Applicant.**

Ex Parte Applicant's Case

2. The application is supported by a Statement filed on 13th August, 2012 and supporting affidavit sworn by **Bernard Otieno**, the advocate for the applicant herein on 13th August, 2012.
3. According to the deponent, by an Order made on 10th August 2012 in Nairobi Business Premises Rent Restriction Tribunal Case No.481 of 2012, the 1st Respondent has purported to compel the Applicant to re-deliver possession of its premises known as Unit No.8, Riara Road Flats erected on L.R. 330/109 Nairobi to the 2nd Respondent (a former tenant). It was further deposed that the said Orders permit the 2nd Respondent to gain forceful entry into the premises currently occupied by a third party tenant in the event that the Applicant does not comply with the same within an unspecified period of time.
4. According to the deponent, the Orders were issued in excess of jurisdiction of the Business Premises Rent Control Tribunal and without granting both the Applicant and the innocent third party (current tenant) an opportunity to be heard. It was further deposed based on information received from **Fr. Gabriel Mmassi**, a Director of the Applicant, that the Orders were served on them on the same Friday 10th August 2012 hence the enforcement of the same is imminent hence the orders sought herein.

Respondent's Case

5. On behalf of the Respondent, the following grounds of opposition were filed:

   1. The Respondent 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 as against the 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 order of prohibition cannot lie where the action sought to be prohibited has already been effected.

   4. The application is an abuse of Court process.

   5. The application has no legal basis hence the prayer by the Respondent for its dismissal with costs.

Ex Parte Applicant's Submissions

6. In his submissions, the applicant there was no doubt that the 2nd Respondent had vacated the suit premises and therefore the 1st Respondent ordered the Applicant to compel the Applicant to redeliver possession of its premises to a former tenant in excess of its jurisdiction. It was further submitted that the 1st respondent ought to have conducted hearing so as to determine the question of the new tenant and to afford the new tenant a hearing.
7. According to the applicant, by making these orders without granting the new tenant an opportunity to be heard, the 1st Respondent fell in breach of the rules of natural justice hence the Court should grant the orders sought herein. In support of its submissions, the applicant relied on **Re Hebtulla Properties Limited [1979] KLR 96**.

Determinations

8. In its submissions the applicant introduced new factual matters which were not contained in the affidavit in support of the application for leave to apply for judicial review. In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000,** the Court of Appeal held:

"We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the *Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7*: 'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see *R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281*). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.' At page 283 of the report of the case of *R v. Wandsworth* Justices, Viscount Caldecote CJ said: 'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.' [Underlining mine].

9. It was therefore improper for the applicant to attempt to introduce factual evidence by way of submissions when the verifying or supporting affidavit did not allude to the same
10. Accordingly, I will determine this application based on the facts contained in the supporting affidavit.
11. According to the applicant, the application herein is based on two grounds. The first ground is that the Respondent acted outside its jurisdiction by reinstating the interested party to the premises after the said party had vacated the same. In **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195, Simpson, J** and held inter alia as follows:

"Under section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act the tribunal's powers are restricted to the "area of its jurisdiction", that is the determination of references made to it under section 6. These can be made only by a receiving party, that is, a tenant, who wishes to oppose a notice of termination or alteration of the terms or conditions of his tenancy or a landlord who wishes to oppose a notice by a tenant seeking re-assessment of rent or the alteration of any terms and conditions of the tenancy. It has power to do "all things which it is required or empowered to do" under the Act. This may be tautological, but it must refer to section 5(3) and 6, the provisions of which are procedural only, and to the provisions of section 9, which set out what the tribunal, can do on a reference. In addition to these powers the tribunal has the specific powers contained in paragraphs (a) to (n) of section 12(1). The expression "all things", being qualified by the words "which it is required or empowered to do by or under the provisions of this Act", no room is left for the application of the *ejusdem generis* rule…… The specific powers include the powers to make an order for the recovery of possession from a tenant, or indeed from any person in occupation. Such an order would be an order made on an application of the landlord. No corresponding power is given to make an order on the application of a tenant who has been forcibly dispossessed by a landlord." [Underlining mine].

12. It is therefore clear that the Respondent's power under section 12 of the Act with respect to recovery of possession cannot be exercised on an application of a tenant who has been dispossessed. If the Respondent were to make orders for repossession of a dispossessed tenant, it would no doubt act outside its jurisdiction. As was held by **Chesoni, J** in the same case:

"The tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied…. The complaint that the applicant has forcibly taken possession of the interested party's premises is precise and can neither be narrowed nor elaborated. It is not a minor complaint of obstruction, or access, or harassment by the applicant. It is a complaint of wrongful or forcible possession by the applicant; nothing more and nothing less. The interested party might have been far

from willing to surrender possession, but that is beside the point…. The powers of the tribunal are contained in section 12(1) of the Act and anything not spelled out to be done by the tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under section 12(1)(a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the tribunal is to hear and determine references made to it under section 6 of the Act. Section 9 of the Act does not give any powers to the tribunal, but merely states what the tribunal may do within its area of jurisdiction…… It would be erroneous to think that section 12(4) confers on the tribunal any extra jurisdiction to that given by and under the Act elsewhere. For example it is not within the tribunal's jurisdiction to deal with criminal acts committed in relation to any tenancy nor is it within its jurisdiction to entertain an action for damages for trespass. These are matters for the courts and the tribunal cannot by way of a complaint to it by the landlord or tenant purport to deal with such matters. Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy…. The Act uses the words "any complaint" and the only qualification is that it must be "relating to a controlled tenancy"….. The "recovery of possession" under section 12(1)(e) of the Act mean and means, recovery of possession by, and not from the landlord. The legislature deemed in necessary to empower the tribunal to order recovery of possession by the landlord. If the reverse had been intended it would have been expressly provided since the intention of the Act is to protect tenants. It is therefore clear that Parliament never intended that the tribunal should have power to order recovery of possession by a tenant where such possession has been seized by a landlord and it never gave that power to the tribunal. That power cannot be implied. In the premises "forcible taking of possession" is not a matter within the area of jurisdiction of a tribunal and that being the case, the tribunal cannot investigate any complaint about forcible possession of the premises by a landlord, such matter being for the courts. The complaint was outside the area of jurisdiction of the tribunal and jurisdiction was wanting."

13. However, before the Tribunal is deprived of jurisdiction, a factual finding must be made that the tenant's possession of the suit premises had ceased. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that 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. Where the Tribunal has made a factual finding, it is not for this Court in judicial review proceedings to interfere with such finding since such a decision would go to the merit of the decision and by interfering with such a finding this Court would be acting as an appellate court rather than a judicial review court.
14. Judicial review proceedings do not deal with the merits of the decision but by the decision making process. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal 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."

15. 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.***

16. 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.
17. 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.
18. In this case, the Respondent relied on a report made by a rent inspector. Therefore there was some evidence on the basis of which the Respondent acted. If that evidence was insufficient or if the Respondent misconstrued the effect of the said evidence and arrived at a wrong conclusion, that in my view could only be challenged by way of an appeal rather than judicial review. In order to make a finding whether or not the rent inspector's report supported the findings of the Respondent, this court would have to re-evaluate the evidence which was presented before the Tribunal in order for it to arrive at a decision 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. 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."

40. In **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo, JA** 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."

19. 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.
20. Whereas the availability of the avenue of an appeal is not necessarily a bar to the grant of judicial review remedies, one must, however, not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the orders granted to appeal against them would be less convenient or otherwise less appropriate, the Court would decline to grant the orders sought due to the availability of that alternative remedy since judicial review jurisdiction ought not to be disguised as an appellate jurisdiction.
21. As the Tribunal found that the interested party had not been dispossessed of the suit premises which dispossession would have been the ground upon which the Respondent would have been deprived of jurisdiction, it is not for this court to arrive at a different finding of fact in these kind of proceedings unless it is shown that there is no evidence upon which the Respondent would have arrived at such a decision in which case it decision would have been irrational.
22. I am therefore unable to find that the Tribunal had no jurisdiction to make the orders it made.
23. With respect to the breach of the rules of natural justice, the party whose rights are alleged to have been infringed is not before me. He is not a party to these proceedings assuming he exists. The Respondent has in fact made a factual finding that he does not exist. To grant orders in favour of a person who is not before the Court would in the circumstances of this case be unjust especially when the existence of such a person is highly contested and the said person has not come forward to protect his alleged rights.
24. In the premises there is no material upon which I can possibly find that the said party's rights to natural justice have been contravened.
25. It follows that the application dated dated 3rd September 2012 is unmerited and the same is hereby dismissed with costs to the Respondent and interested party.

Dated at Nairobi this 24th day of February, 2014

G V ODUNGA

JUDGE

Delivered in the presence of Miss Kanini for Mr Wandaka for the ex parte applicant