REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 191 OF 2013

IN THE MATTER OF AN APPLICATION IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE RENT RESTRICTION ACT, CAP 286

AND

IN THE MATTER OF RENT RESTRICTION CASE NO. 278 OF 2013

REPUBLIC .....APPLICANT

VERSUS

AMBROSE ODWAYA O. ONYANGO .....1ST RESPONDENT

THE RENT RESTRICTION TRIBUNAL.....2ND RESPONDENT

EX-PARTE CEASAR NGIGE WANJAO

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 28th June, 2013, the ex parte applicants herein, **Ceasar Ngige Wanjao ,** seeks the following :

1. **An order of CERTIORARI to remove into this Honourable court for the purpose of quashing the order made by the 2nd Respondent in Tribunal Case No. 278 of 2013 conveyed by the Chair person of the Rent Restriction Tribunal, Hilllary K. Korir, whereby it was ordered on the 29th day of may 2013 that the landlord re open the suit premises and reinstate the Plaintiff/Tenant/1st Respondent back into the suit premises, reconnect water, electricity and return all confiscated goods forthwith.**
2. **An order of Prohibition for this Honourable court to prohibit enforcement of the orders given by the 2nd Respondent.**
3. **An order for costs of and incidental to the application.**
4. **Such further and other reliefs that the Honourable Court may deem just and expedient to**

grant.

Ex Parte Applicant's Case

2. The application was based on the following grounds:

a. **The decisions made vide the order granted was substantively ultra vires as the Tribunal had no jurisdiction over the tenancy relationship between the Applicant and the 1st Respondent/Tenant and was therefore not clothed with the powers to grant the orders it issued on 29th May 2013. The 1st Respondent herein paid Kshs.24,700/= as monthly rent and therefore excluded for the jurisdiction of the Rent Restriction Tribunal.**
b. **The decisions made had jurisdictional errors from the fact that the Tribunal acted outside its jurisdiction. The relationship between the Landlord and Respondent was not a controlled tenancy and the Tribunal was not clothed with the jurisdiction to hear and determine the reference as against the Landlord herein. The relationship between the Landlord/Landlord and the Tenant/1st respondent was clearly exempted from the application of the Rent Restriction Act, CAP 286. As stipulated under section 2 which defines a controlled tenancy as one which the rent payable is below Kshs.2,500/= in the instant case rent payable is Kshs.24,700/=.**
c. **The decision made failed to take into account relevant considerations in the form of evidence of consistent rent payment to be tendered by the Plaintiff/Tenant/1st Respondent in order to justify issuance of such orders as the one made on 29th May 2013, in particular Order 3 which says, "Tenant do continue paying rent as usual."**
d. **The order issued by the 2nd Respondent is marred with an error of law on the face of the record as there was blatant disregard of the law by the 2nd Respondent failing to ascertain whether the tenancy fell under the ambits of the Rent Restriction Act (CAP 286).**
e. **There was also an error of fact as the facts on record are not enough to warrant the order issued by the 2nd Respondent, the decision was made without giving due regard to the factual circumstance of the case at hand. The 2nd Respondent failed to ignore the fact that there was no evidence to issue in support of the orders sought.**

3. The application was supported by a verifying affidavit sworn by the applicant, **Caesar Ngige Wanjao**, on 6th June, 2013.
4. According to the deponent, the 1st Respondent wrongfully instituted the reference/suit at the tribunal against him instead of **Graceland Gardens Limited**, the Landlord. According to him, the Tenant/1st Respondent and the Landlord entered into a Tenancy Agreement renewable annually for a 2 bed-roomed house of rental amount of Kenya Shillings Twenty Four Thousand, Seven Hundred (Kshs.24,700/=). However, the 1st Respondent has over the years been a habitual defaulter in paying the agreed rent and in time and vide a letter from the 1st Respondent to the Landlord dated 12th April 2013, the former committed himself to paying both the rent arrears and the outstanding rent in full by 17th April 2013 and thereafter vacate by the end of that month to which the Landlord responded notifying the 1at Respondent that he had already been in breach of the Lease Agreement between them and giving the 1st Respondent a 30 day notice to vacate and also to clear outstanding arrears not later than the next day, 25th April, 2013. On the 1st Respondent receiving the abovementioned letter, he responded on the same day making a counter request citing financial difficulties, and requesting to be granted a further extension up to 29th April 2013 for him to pay the arrears.
5. It was deposed that despite numerous efforts vide written and/or verbal communication with a view to amicably accommodating the 1st Respondent, it became difficult on the Landlords' end as the former always reneges on his promises and the 1st Respondent having failed to deliver his promises of payment of arrears and outstanding rent vide the many letters annexed herein, the Landlord wrote to him on 7th May 2013 to clear all balances by 10th of May and to vacate by 15th

of the same month. The 1st Respondent then issued a cheque for rent payment of Kshs.26,000/= this being short of the arrears he already owes which cheque was rejected by the bank for reasons of insufficiency of funds. This, however was not the first such cheque as he had previously issued various dishonoured cheques.

6. It was averred that notwithstanding the aforesaid, the 1st Respondent wrongfully moved to the Rent Restriction Tribunal with unclean hands and filed an application against the applicant instead of Graceland Gardens Limited, the Landlord under a certificate of urgency on 28th May 2013, now Rent Restriction Tribunal Case No. 278 of 2013 seeking orders that the Landlord to reinstate the tenant back to the suit premises and for the Landlord to re-connect water and electricity in the suit premises.
7. The applicant's position was that the 1st Respondent throughout the application acted fraudulently by concealing several facts of one such fact is the issuance of bad cheques, he had always sought the indulgence of the Landlord who all along has been accommodative and that the 1st Respondent owes the Landlord huge sum money in terms of rent arrears yet is masquerading as the victim despite notice to vacate having been given to him since the year 2011.
8. It was deposed that the said orders sought were granted the same day by the Chairperson of the Tribunal, **Hillary K. Korir**.
9. According to the applicant, the entire ex-parte Order is irregular, fatally defective, bad in law and ought to be discharged, vacated and/or set aside forthwith based on the grounds that the Tribunal has no jurisdiction and is not clothed with the powers to grant the orders it issued in that the relationship between the Landlord and Respondent was not a controlled tenancy as described under section 2 of the Rent Restriction Act and the decision made failed to take into account relevant considerations such as the evidence of consistent rent payment. It was contended that the conduct of the 2nd Respondent in issuing the orders made on 29th May 2013 and admitting the 1st Respondents application notwithstanding that she lacks the jurisdiction to do so smacks of impropriety is absurd, arbitrary, ultra vires, blatantly illegal, capricious, unjust and untoward and that the 1st Respondent is driven by ill will and his application lacks good faith To him, it is clear, that the 1st Respondent is abusing the Rent Restriction Tribunal and the orders issued by the 2nd Respondent albeit in excessive of her powers to perpetuate grave illegality against the Landlord yet the ***Rent Restriction Act*** (hereinafter referred to as the Act) protects the tenants with low financial power in society from arbitrary action by their landlords, but the tenant herein has a choice as he seems to have financial muscle as he has been paying Kshs.24,700/= .
10. According to the applicant, the decision of the 2nd Respondent of 9th May 2013 smacks of impropriety is unlawful, unjust, Wednesbury unreasonable and irrational.

1st Respondent's Case

11. In opposition to the application, the 1st Respondent filed the following grounds of opposition:

1. **THAT the Ex-parte application's application filed on 28th June 2013 has already been overtaken by events and there is no Order and/or decision to be brought before this Honourable Court for an Order of certiorari to be issued so as to quash the Order.**
2. **THAT there is nolonger Landlord/Tenant relationship as between the 1st respondent and the ex-parte applicant as the first respondent has already vacated the suit premises henceforth, the second respondent has got No jurisdiction to proceed with Tribunal Case No. 278 of 2013 and enforce any Orders given by the 2nd respondent, therefore, the prohibitory Orders sought to prohibit enforcement of the ex-parte Orders issued on 29th May 2013 by the 2nd Respondent have already been overtaken by events.**
3. **THAT from the foregoing the applicant's application is an abuse of this Honourable court Process, premature and misconceived and ought to be dismissed with costs to the respondents.**

Applicant's Submissions

12. On behalf of the applicant it was submitted that 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. It was submitted that the 1st Respondent was therefore locked out from the protection of the Act. It was therefore submitted that the entire ex parte order was irregular, fatally defective, bad in law and ought to be discharged, vacated and/or set aside.
13. It was further submitted that the Tribunal also acted outside its mandate, in that the relationship between the Applicant and the Respondent was not governed by the Act thus lacked jurisdiction to hear and determine the reference against the Applicant. In support of this position the applicant relied on **Republic vs. Chairman Matungu Land Disputes Tribunal [2012] eKLR** and **Republic vs. Funyula Land Dispute Tribunal & Another [2011] eKLR**.
14. According to the applicant, where a tribunal acts *ultra vires* its decision is brought before the court by authority of certiorari to be quashed. The Court was urged to find that the Tribunal's order was a nullity and reliance was placed on **Republic vs. Makueni District [2004] eKLR** as well.

1st Respondent's Submissions

15. On behalf of the 1st Respondent, it was submitted that pursuant to section 3 of the Act, the tribunal had an obligation to determine the standard rent payable for the suit premises before it could down its tools for want of jurisdiction. It was submitted that unless determination had been done by way of assessment of the standard rent of the suit premises, the 2nd Respondent had jurisdiction to issue the ex parte orders until such time as the standard rent had been ascertained.
16. It was therefore submitted that this application is premature, misconceived and an abuse of the Court process.
17. According to the 1st Respondent, the application has been overtaken by events and there is no order sought to be quashed. According to the 1st Respondent, he is nolonger residing in the suit premises as the same has been rented to a third party hence the order seeking the reopening of the premises and reinstatement of the tenant and reconnection of water and electricity and return of the confiscated goods and continued payment of rents. Since the Landlord and Tenant relationship nolonger exists the 2nd Respondent has no jurisdiction to proceed with the case and enforce the orders given by it hence the orders sought cannot be granted.
18. It is not contested 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.
19. An issue of jurisdiction may arise in one of two instances or both. The first scenario is where the Court has no jurisdiction to embark upon the investigation of the matter before it *ab initio*. The second scenario is where though the Court was seised of jurisdiction at inception subsequent events or circumstances remove the dispute from the jurisdiction of the Court. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** where he held:

> **"Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make…….The phrase "to make such order thereon as it deemed fit" giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication."**

20. Similarly, in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that 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 and 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.

21. 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."

22. 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.***

23. 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.

24. 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.

25. In this case, it is contended that the issue of the standard rent was yet to be decided. "Standard rent" is a special term and it is defined in section 2 of the Act. It is therefore a term of art as far as protected tenancy is concerned.

26. In the particular circumstances of this case, for the 2nd Respondent to make a decision whether or not it had jurisdiction to entertain the dispute before it, it had to make a determination on the "standard rent". Without that determination, it cannot be said with certainty that the 2nd Respondent lacked jurisdiction to entertain the matter. That a court or tribunal has jurisdiction to decide on the issue of jurisdiction is not in doubt. The law is not that a court or tribunal which has no jurisdiction to entertain a matter has no jurisdiction at all in the matter. For example under section 26 of the ***Civil Procedure Act***, a court which lacks jurisdiction to entertain a matter has jurisdiction to make an order respecting the costs of the matter. However once the Court makes a determination that it has no jurisdiction, it must down its tools at once. This was the holding in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** (supra).

27. In this case as there was a factual issue, the issue of standard rent, which was yet to be determined, I am in agreement with the position taken by the 1st Respondent that these proceedings were prematurely instituted.

28. Apart from that as was held 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. Similarly, in **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.

29. In this case, the applicant could have applied for setting aside the ex parte order and could also have raised the issue of jurisdiction before the Tribunal. These options in my view were equally convenient, beneficial and effective remedies which were available to the applicant.
30. It is also trite that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is nolonger necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** and **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
31. In this case, it is submitted that the 1st interested party has since vacated the suit premises. If that be the position it would follow that the application has been overtaken by events and that the orders sought herein are nolonger efficacious and may only serve as an academic exercise.
32. In my view sound legal principles would dictate that the Court takes a pragmatic approach to the resolution of the dispute before it. In this case the pragmatic approach in my view would have been to invoke the aforesaid alternative remedies.

Order

33. It follows that the Notice of Motion dated 28th June, 2013 is unmerited and the same is hereby dismissed but with no order as costs in light of the 1st Respondent's conduct as shown by copies of correspondence exhibited herein.

Dated at Nairobi this 25th day of March, 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kemboy for Mr Arimi Kimathi for the Applicant