



No. 31 REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 78 OF 2013

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

BETWEEN

REPUBLIC APPLICANT

VERSUS

PRINCIPAL MAGISTRATE'S COURT, MOMBASA RESPONDENT

AND

FRANCIS WAMBUA MULWA INTERESTED PARTY

EX-PARTEALI SHEIKH & SONS LIMITED

JUDGMENT

Introduction

[1] The brief background of facts leading to these proceedings is as follows.

By proceedings in the lower court, in SRMCC. No. 229 of 2013, the Interested Party sued the *ex parte* Applicant for the recovery of monies paid under a lease agreement between the parties in relation to the suit premises, Plot No. 157/XX Mombasa, over which the Interested Party contends the *ex parte* Applicant had no authority to collect rent. The Interested Party pleaded that he had entered into a lease agreement with the *ex parte* Applicant the defendant in the suit] on the 1st August 2012 and the Interested Party subsequently in November 2012 learnt from the landlord's agents that the defendant had no authority to collect rent, and that he had on 7th December 2012 signed a fresh lease agreement with the landlord and he therefore sought a refund of the monies paid to the defendant under the lease between them aforesaid.

[2] The court struck out the suit [SRMCCC No. 229 of 2013] for want of jurisdiction holding that the lease between the parties was binding and as it was for a term of 5 years, the tenancy relationship between the parties was a controlled tenancy that was governed by the provisions of the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act and it should have therefore be dealt with by the Business Premises Rent Tribunal. Upon the striking out of the suit, the *ex parte* Applicant levied distress

for rent against the Interested Party and after proclamation the *ex parte* applicant's auctioneers physically removed the proclaimed goods for sale to recover the rent arrears.

[3] The Interested Party then filed another suit against the *ex parte* applicant, SRMCCC No. 2369 of 2013, for orders to restrain the levying of distress for rent and reinstatement into the suit premises, seeking by interlocutory motion orders to restrain sale of the distrained goods attached on the 25th November 2013 and '*that the status quo as at 24th November 2013 be reinstated. The status quo being that the plaintiff was in full occupation and possession of the premises known as Plot No. 157/XX Mombasa.*'

[4] The *ex parte* Applicant raised a preliminary objection inter alia that the matter in the suit SRMCCC No. 2369 of 2013 was *res judicata* by virtue of the determination of the court in SRMCCC No. 229 of 2013 that the tenancy relationship between the parties was a controlled tenancy within the meaning of the Landlord and Tenant Act Cap. 301. The subordinate court differently constituted dismissed the preliminary objection by its ruling of 9th December 2013 which was delivered in the absence of counsel for the *ex parte* Applicant on a date other than the one originally set for the ruling. On the same date of the ruling and in the absence of counsel for the *ex parte* applicant, the court granted the order for the reinstatement of the status quo before the attachment by return of the distrained goods by the auctioneers under police supervision.

[5] The *ex parte* Applicant alleges that while executing the court order for reinstatement, the Interested Party put back his goods into the premises and threw out of the premises goods belonging to the *ex parte* Applicant that were in a part of the premises that had not been leased to the Interested Party. The *ex parte* Applicant then filed in the High Court the application herein for leave to commence judicial review proceedings and sought an accompanying order that leave granted do operate as stay of the decision of the subordinate court in SRMCCC No. 2369 of 2013. The Court granted both orders whereupon the *ex parte* Applicant demanded that the status quo before the stay orders in SRMCCC No. 2369 of 2013 be restored by the retaking of the distrained goods by the *ex parte* applicant's auctioneers.

The applications before the Court

[6] Upon leave granted to file judicial review proceedings the *ex parte* Applicant by Notice of Motion dated 8th January, 2014 sought orders as follows:

1. An Order of Certiorari do issue to remove to this Honourable Court for purposes of quashing all the Proceedings and Respondent's Orders given on 09th December, 2013 emanating in Civil suit Number SRMCCC No. 2369 of 2013 between Francis Mulwa versus Ali Sheikh & Sons Ltd;
2. Prohibition be issued prohibiting the Respondent and the Interested Parties from proceeding any further with proceedings in suit number SRMCC No. 2369 of 2013 between Francis Mulwa versus Ali Sheikh & Sons. Ltd.
3. The costs of judicial review proceedings be provided.

[7] Being aggrieved by the attempted retaking of the distrained goods by the *ex parte* applicant's auctioneers following the grant of the order for leave to file judicial proceedings to operate as a stay of the subordinate court decision in SRMCC No. 2369 of 2013, the Interested Party filed an application by Notice of Motion dated 14th January 2014 seeking injunctive relief against the *ex parte Applicant* for principal orders as follows:

1. **THAT** the court does order the Applicant through its agents, employers and/or servants not to interfere with the quiet possessing and enjoyment of premises by the Interested Party pending the hearing and determination of his application.
2. **THAT** the court does order the Applicant through its agents, employers and/or servants not to interfere with the quiet possession and enjoyment of premises by the Interested Party pending the hearing and determination of this judicial review application.
3. **THAT** the costs of this application be in the cause.

[8] The ex parte's case is set out in the grounds of the Statement upon which the reliefs are sought in the Motion as follows: -

GROUND UPON WHICH THE RELIEFS ARE SOUGHT: -

1. Natural Justice/Article 50 and 25 of the Constitution of Kenya

i. *the Respondent acted against the rules of Natural Justice in issuing orders sought in an application when the matter came up for ruling on preliminary objection without according an opportunity to be heard in breach of Article 50 of the Constitution;*

2. Due Process of Law/Ultra vires/without or in excess of jurisdiction

i. *the Respondent in granting ex parte orders after delivering a ruling on preliminary objection and which orders were sought in an application which was not coming up for hearing acted without due process of the law in excess of jurisdiction and ultra vires;*

3. *that the Respondent would at times exercise its function judicially as provided allowed by law;*

a. *the Respondent would in exercising the said discretion, be guided by statutory provisions under Chapter 301 and Section 7 of the Civil Procedure Act;*

b. *the Respondent would not exercise such discretion in any unlawful manner that creates an impression of a Court of concurrent jurisdiction sitting on Appeal on a decision of another Court of equal jurisdiction which shall bring about Judicial absurdity;*

c. *the Respondent would not exercise the discretion granted to it by following the laid down laws and rules of procedure;*

d. *the Respondent would not act arbitrary in exercising the said discretion bestowed on it by law by breaching the doctrine of res judicata and the principle of finality to litigation on issues as between the same parties;*

e. *the Respondent would, in exercising the said discretion accord an unlimited right to be heard protected by Article 50 and 25 of the Constitution;*

4. Ultra vires/Excess or without jurisdiction

The respondent in continuing to hear and make orders in SRMCC 2369 of 2013 yet a Court of concurrent jurisdiction had already determined in SRMCC 229 of 2013 that the matter ought to be heard in the Business Premises Rent tribunal as the tenancy was a protected one is ultra vires the law.

[9] The Interested Party's case as set out in the grounds of his application is: -

a. **THAT** Interested Party maintains that it does not have any arrears.

b. **THAT** Interested Party does not have any relationship with the Applicant to warrant a distress.

c. **THAT** the order dated 24th December 2013 do not provide for eviction or distress.

d. **THAT** the Applicant though its auctioneer is keen and intent on evicting the Interested Party from the premises.

e. **THAT** if the orders are not allowed then the Applicant would wholly damage and cause havoc to the Interested Party's business occasioning irrevocable losses and damages.

f. **THAT** the Applicant is guilty of material non-disclosure.

g. **THAT** this court did not order a reinstatement of the status quo vide orders dated 24th December 2013.

[10] The two applications were heard together and Counsel for the parties – Mr. Olwande for the ex parte Applicant and Mr. Matheka for the Interested Party – made oral submissions before the court as set out below and ruling was reserved:

“Mr. Olwande

Notice of Motion of 8.1.2014 by the Applicant and Notice of Motion dated 14.1.2014 by the Interested Party.

In support of the application by ex parte applicant, I rely on the statement and verifying affidavit of the Mohamed Ali Abdalla of 24.12.2013.

In opposition to the Interested Party’s application, I rely on a replying affidavit of Mohamed Ali Abdalla sworn on 27.1.2014.

The Notice of Motion of 8.1.2014 seeks judicial review order of certiorari and prohibition. The Ex parte Application the matter avers that the was and still is a protected tenant of the suit property. In August 2012, the Interested Party appointed the Ex parte to be sub-let part of the premises on humanitarian grounds. The parties agreed to a sub-tenancy of 5 years from 1.8.2012. A copy of the leave is at p. 1-3 of the replying affidavit. The Interested Party is to run a hotel while the Applicant retained a portion. The Interested Party was to occupy the ground floor and the Applicant the Mezzanine floor. Three months down the line, the Interested Party sought a refund of the money amount Ksh.132,500/= at p. 45 annextures. The reason was that the landlord had directed that rent be paid to agent directly.

Upon refusal to refund the money on the ground that there was no privity of contract between the parties, the Interested Party refused to pay rent leading to a distress for rent. The Interested Party filed a suit SRMCC. No. 229 of 2013 seeking injunctive relief against the ex parte applicant. The Applicant raised a preliminary objection on the grounds that the right form was the BPRT in view of the protected tenancy nature of the tenancy. The magistrate struck out the suit. See p. 14-17 of verifying affidavit.

The court found that there existed a valid agreement between the Interested Party and the ex parte applicant. I refer to the ruling. The Interested Party did not appeal or seek review of the judgment. He insisted on refusal to pay rent and the ex parte Applicant against levies distress. The Interested Party filed a new suit SRMCC. No. 2369 of 2013 at p. 21-27. He raised the issue that the ex parte Applicant was not his landlord. A preliminary objection by the ex parte Applicant on ground of res judicata in view of 229 of 2013. The ruling of the court on 9.12.2013 dismissed the preliminary objection.

On 9.12.2013 in the absence of the ex parte applicant, the magistrate issued orders purporting to reinstate the Interested Party to the premises. The Interested Party then went into the premises and threw out the goods of the ex parte Applicant and took over the whole premises. This was even against the order of the court because he should only have given back to the premises not throwing out the applicant.

The magistrate’s conduct is amenable judicial review orders. The Applicant contends that he has been denied a fair hearing in accordance with the rules of natural justice.

On 26.11.2013 in SRMCC. No. 2369 of 2013 no orders were granted and the Applicant therein was required to served and come for inter parties hearing. The ex parte Applicant filed a preliminary objection. On dismissal of the preliminary objection, the Application should have been listed for hearing inter parties. The court went ahead to issue orders purporting to reinstate the Interested Party to the premises. It is entry to Article 50. We therefore pray that the orders granted after the dismissal of the preliminary objection should be quashed. It amounted to stealing a march on the ex parte applicant.

The respondent did not follow the due process of law. The magistrate acted despite the earlier decision by the court of concurrent jurisdiction in SRM 229 of 2013. The action of

the magistrate amounts to the court sitting for an appeal from a court of concurrent jurisdiction on the issue of contended tenancy. The Interested Party did not disclose that the other court had decided the issue of jurisdiction. The court should have directing to parties to get to the BPRT. I refer to section 3 of Cap. 301 and ss. 11-12 giving jurisdiction to the BPRT.

The magistrate acted arbitrarily against the principle of res judicata. The Interested Party should have appealed against the decision of court in SRMCC. No. 229 of 2013.

We pray that the proceedings be quashed to protect the integrity of the process of the court and rule of law.

Replying affidavit of the Interested Party raises the issue that there is no tenancy between the ex parte Applicant and himself and that the tenancy apartment between the ex parte Applicant had been terminated. He attaches a notice of termination dated 18.12.2013. The ex parte Applicant denies that the tenancy was terminated. The ex parte Applicant considers that the persons who terminated the tenancy are not the true landlords. We have annexed a search on the affidavit of 27.1.2014 which clearly show that the owners of the premises are Philip Ndambuki, Mangi, Muteru and Mutiso not the purported authors of notice of termination. The notice of termination was done on 18.12.2012 and the suit is SRMCC. No. 229 of 2013 determined that there was a protected tenancy. The issue of notice of termination was no brought up in the suit.

We pray that he proceedings in SRMCC. No. 2369 of 2013 be quashed and prohibited by prohibition. I rely on Authorities in the list of authorities dated 12.2.2014.

Application by the Interested Party

The application seeks stay orders and the application is misconceived because Judicial Review are special proceedings under the Law Reform Act and Order 53 CPR. A party aggrieved by stay may apply for setting aside of the order of stay or appeal. He cannot seek a stay of the stay granted. I refer to a list of authorities dated 7.2.2014. The authorities indicate that a party cannot apply for a stay of a stay. A party should appeal for the order for stay. I rely on replying affidavit and pray that the court grants the notice of motion of the Applicant and dismiss the application of the Interested Party as it lacks a basis in law.

Mr. Matheka for the Interested Party

Res judicata

Section 7 of the CPA – the issue has not been contended on the merits. The decision should have been by a court of competent jurisdiction.

*In 229/2013 at p. 6-7 of verifying affidavit. The reliefs are a refund of Kshs.132,000/= plus interests. The issue is that he was misled that the Applicant had a right to lease the premises. See also paragraph 4 of the plaint. Ruling of the court dismissed case on issue of jurisdiction. At p.17 of verifying affidavit. The court stated that it had no jurisdiction. I refer to Civil suit No. 171 of 2011 **Mutange Tea vs Municipal Council of Mombasa City. Owners of M/V Lilian SS.** In SRMCC. No. 2369 of 2013, we sought for mandatory injunction to reinstate the plaintiff to the premises and for injunction against the ex parte Applicant for seeking rent for the Interested Party. BPRT has no authority to issue injunctive orders; even contempt application cannot be filed in BPRT.*

The court only granted 2 orders on 26.11.2013 certifying the application urgent and an order restraining the auctioneers from selling attached property. The application was

heard on 29.1.2013. The *ex parte* applicant's preliminary objection was heard. Ruling was given on 9.12.2013. On 3.12.2013 when the matter was initially listed for ruling the *ex parte* applicant's advocate was present but when the ruling was given on 9.12.2013 he was present.

After the successful ruling, the Interested Party moved the court to grant prayers sought. The court granted the prayers 4, 6, 7. The status quo as at 24.11.2013 be reinstated before the auctioneers attach the goods. The orders are not final orders. There are 3 orders pending hearing. The application is not dispensed with. There is no prejudice suffered by the *ex parte* applicant. the BPRT orders there is a tenancy, the Interested Party will pay rent.

The Interested Party has always been a full occupant of the premises. Notice of 18.12.2012 terminated the tenancy but the Applicant and the Interested Party. I refer letter indicating that the tenancy was for the entire premises.

Res judicata

The court in 229/2013 was not competent. The case in 229/2013 and 2369/2013 were different. The court in 2369/2013 was properly seized of the matter. The *ex parte* Applicant should either appeal or review and not judicial review to iron out issues.

Ex parte Applicant does not have a tenancy relationship with the Interested Party. The Interested Party has been paying rent to the landladies' directions and here are receipts. The Interested Party should not be compelled to pay rent twice to two different people.

The owners of premises

Replying affidavit of Francis Wambua of 10.1.2014, at p.2 tenancy agreed between Ali Abdalla and the Landladies of 11.2.2010. It is clear that the Applicant came into possession of the premises by the Landladies the same who are receiving rent from the Interested Party. The agreement is signed for the ladies. The agents are Fourways Bureau. At p. 6 of the affidavit is a letter by Wambua of 7.12.2012 seeking to sign agreement with the ladies.

The Fourways Bureau were managing on behalf the ladies. At paragraph 7 of the tenancy agreement states that they cannot sublet the premises and that is the reason why they were evicted.

Article 50 on the right to be heard.

The *ex parte* application was notified of the ruling date but they did not wish to attend.

Notice of Motion dated 14.1.2014

Application is brought under the inherent Jurisdiction of the court. Equity will not suffer a wrong being done. Prayer No. 3 of the motion seeks the exercise of inherent jurisdiction. I filed the application to seek clarity the orders of the 24.12.2013, granting leave and stay to operate as a stay. We did not seek to appeal the grant of the stay. The order 9.12.2013 had been effected upon reinstatement into the suit premises. They were trying to get an order for eviction of the Interested Party. There is no prejudice because the court will order payment of the rent done. The applicants are ready for eviction of the Interested Party. I rely on the replying affidavit and my affidavit of 14.1.2014. The judicial review is wrongly before the court. These issues should have been done at the lower court. The application does not qualify for JR proceedings. The matters can be canvassed in the appellate court.

I pray that the application be dismissed and status quo maintained until the ruling of the court.

Mr. Olwande in reply:

1. *On 9.12.2013 matter was scheduled for ruling and not for hearing; could the court issue mandatory orders without hearing the other party.*
2. *Notice of Motion of 14.1.2014 is overtaken by events.*
3. *The Applicant seeks the payment of rent”*

Issues for determination

[11] The issues for determination are as follows:

1. Whether the court will issue the orders of certiorari and prohibition as prayed by the *ex parte* Applicant.
2. Whether the court will issue an order of injunction as prayed by the Interested Party.
3. What order will be made on the costs of the applications before the court.

Determination

[12] It is trite law that judicial review is only concerned with the legality of the decision making process and not the merit of the decision itself. See *The Commissioner of Lands v. Kunste Ltd.*, CACA No 234 of 1995, and *Republic v. Communications Commission of Kenya ex parte East African Television Network Ltd.*, CACA No. 175 of 2000. Accordingly, the correctness of the decision in magistrate court's ruling of 9th December 2013 overruling the *ex parte* applicant's preliminary objection to the suit in SRMCCC NO. 2369 of 2013 cannot be challenged in these judicial review proceedings.

[13] The question therefore whether the magistrate in the subsequent case SRMCCC 2369 of 2013 was right in rejecting the preliminary objection that the issue before him had already been determined in previous proceedings between the same parties is a matter of merit which may only be determined in suitable proceedings by way of appeal from the decision. For that reason, the decisions of the courts in *Gichuki v. Gichuki* (1982) KLR 285, *Norbert Mao v. A-G of Uganda* Constitutional Petition No. 9 of 2002 and *Trade Bank Ltd v. LZ Engineering Construction Ltd.* (2000) 1 EA 266 on the principle of *res judicata* and issue estoppel, cited by counsel for the *ex parte* applicant, relate to the question of the merit of the subordinate court's order in SRMCC No. 2369 of 2013 and are therefore not relevant in these judicial review proceedings.

[14] The challenge, on its merits, of the subsequent order for the return of the distrained goods and the reinstatement of respondent into the suit premises cannot also be made in these proceedings. In other words, although the law of mandatory injunctions is that interlocutory mandatory injunctions will not be granted save in exceptional and clear cases [see *Kamau Mucuha v. Ripples Ltd* (1990-94) EA 388; *Gusii Mwalimu Investments Co. Ltd v. Gusii Mwalimu Hotel* (1995-98) 2 EA 100 and *Locabail International Finance Ltd v. Agro Export and Others* (1986) 1 ALL E.R. 901, on the principle that mandatory injunctions at the interlocutory stage may be granted but only in special circumstances and clear cases], this court exercising its judicial review jurisdiction cannot examine the lower court's decision of 9th December 2013 to establish whether there was a clear and exceptional case for the grant of the interlocutory mandatory order for reinstatement of the status quo of 24th November 2013.

[15] In proceeding to grant the substantive order in the nature of a mandatory order for the return of the distrained goods and for the reinstatement of the status quo of 24th December 2013 as prayed in the pending Notice of Motion, without hearing the respondent who was absent at the delivery of the ruling on the preliminary objection, the court failed to afford the respondent an opportunity of being heard as

required by the rules of natural justice. It is no answer that the respondent's counsel did not attend the delivery of the ruling on preliminary objection when the matter was considered. As the matter was not listed for hearing, the court ought to have set a date for hearing and direct that the absent party be served with a hearing notice so that the party may be heard before the substantive orders were made.

[16] As observed by Bosire JA in the Court of Appeal decision in Civil Appeal No. 75 of 1998 **Central Bank of Kenya v. Uhuru Highway Development Ltd and 3 Others** mentions are not the proper occasions for the substantive determination of cases, and I would add *a fortiori* rulings also. The learned Judge said:

"The next ground I will proceed to consider is whether it was proper for the learned Judge to proceed to make orders on the application on a date when it was fixed for a mere mention. I can do no better than quote from a decision of this Court in the case of Mrs Rahab Wanjiru Evans v. Esso Kenya Ltd (Civil Appeal No.13 of 1995) (Unreported) which was cited to us by Mr Oraro. The Court which was differently constituted, said:

"We have no doubt that where a matter is fixed for mention, as it was in this case, the learned Judge had no business determining on that date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice."

That passage was quoted and adopted by the Court in a subsequent case, to wit, Floriculture International Ltd. v. Central Kenya Ltd & 3 Others, Civil Appeal No. 121 of 1995. (unreported)."

[17] An order made in breach of natural justice is liable to be set aside in the interests of justice even without applying for its setting aside in the regular procedure for the setting aside of judgments and orders. As Lord Diplock said in the House of Lords judgment in **Isaacs v. Robertson**, [1984] 3 All E.R. 140:

*"there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside **ex debito justitiae** in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts **ex debito justitiae** the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice."*

[18] The Kenyan Court, unlike the English Court, has no jurisdiction in Order 53 judicial review proceedings to make an order for declarations and injunctions. Such order can only be made in ordinary civil claims under Order 40 of the Civil Procedure Rules or in constitutional litigation by virtue of Article 23 (3) of the Constitution. Moreover, as held in *The Judicial Commission of Inquiry into the Goldenberg affairs and Ors v. Job Kilach*, CACA NO. NAI 177 of 2003, a party who wishes to challenge the grant of leave to commence judicial review proceedings should seek the setting aside of the leave by the court that granted it or appeal therefrom. The Interested Party's application by Notice of Motion dated 14th January 2014 seeking injunctive relief is therefore incompetent and the same will therefore be dismissed with costs.

Orders

[19] As judicial review orders are discretionary, in considering the orders to be made in this matter, the court shall be conscious of its duty to render substantial justice without undue regard to the technicalities

of procedure under Article 159 of the Constitution and take in account the following matters relating to the dispute between the parties, namely:

1. The tenancy between the ex parte applicant and the Interested Party is disputed and it is the subject of the suit SRMCCC NO. 2369 of 2013 before the Magistrate's Court following the rejection of the preliminary objection therein.
2. There is contention as to whether the ex parte Applicant's lease on the property. has been lawfully terminated by the owners of the suit property.
3. The ex parte Applicant's goods are lying outside the suit premises. According to clause 3 of the tenancy agreement of 1st August 2012, which is not denied, the lessor ex parte applicant was 'to maintain and use the Mezzanine floor for tailoring and storage purposes and the lessee shall allow right of passage.'
4. The Interested Party is presently in full occupation of the suit premises.
5. The Interested Party has allegedly paid rent to persons other than the ex parte applicant who now claim arrears of rent.
6. The alleged Landlords and their agents are not direct parties to the suit.

[20] This court does not make any findings on the merits of the case because that is not the province of judicial review proceedings and also so that it does not embarrass the trial court when the matter comes up for hearing before the court.

[21] Having found that the magistrate's court in SRMCCC NO. 2369 of 2013 made the order for the return of goods and reinstatement of the status quo of 24th November 2013 without hearing the ex parte applicant and therefore in breach of the rules of Natural Justice, the said orders were made without jurisdiction and are *ex debito justitiae* set aside. The ex parte applicant is therefore entitled to be restored to its possession of the Mezzanine Floor portion of the suit premises which it retained after sub-letting the rest to the Interested Party. However, I do not consider it appropriate that the Interested Party's goods should be retaken by the ex parte applicant's auctioneers for sale to recover the arrears of rent. I think that the suit in the lower court should proceed to hearing for a determination as to whether there is a valid tenancy between the parties herein and whether therefore any rent is owing to justify the distress for rent undertaken by the ex parte Applicant. The trial court may in the meantime give directions as to deposit in court or payment of rent and as to undertakings in damages pending determination of the suit.

[22] Accordingly, I do not make an order for the prohibition or stay of the proceedings in SRMCCC NO. 2369 of 2013. I only quash the proceedings and orders of 9th December 2013 which were made without hearing the ex parte Applicant. I however consider that the justice of the case requires that the status quo before the distress for rent was undertaken be restored so that the two parties are restored to their respective portions of the suit premises pending the determination of the issues on disputes. As the matter affects the landlords of the suit property, the parties in this suit or the landlords themselves may, if so advised, apply to be joined in the proceedings pending before the Magistrate's Court.

[23] For the reasons set out above, I make the following orders on the *ex parte* Applicant's Notice of Motion dated 8th January 2014 and the Interested Party's Notice of Motion dated 14th January 2014:

1. **An order of Certiorari is granted quashing all the Proceedings and Respondent's Orders given on the 9th December, 2013 in Senior Resident Magistrate's Court civil suit SRMCCC NO. 2369 of 2013 between Francis Mulwa versus Ali Sheikh & Sons Ltd.**
2. **The Interested Party's Notice of Motion dated 14th January 2013 is dismissed.**
3. **The parties shall maintain the status quo obtaining before the distress for rent by the ex parte Applicant and, for avoidance of doubt, the two parties - the ex parte Applicant and the Interested Party - will occupy their respective portions of the suit premises pending determination of the SRMCCC NO. 2369 of 2013 or further orders of that court.**
4. **In the interest of a smooth handing over of the Mezzanine Floor of the suit premises, counsel for the parties will undertake a joint handing over/taking over thereof within 7 days from today.**

5. The Interested Party will pay to the *ex parte* Applicant the costs of the suit and the applications filed herein.

Dated, Signed and Delivered on the 17th day of April 2014

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Applicant

No appearance for the Respondent

Mr. Lutta for Mr. Matheka for the Interested Party

Miss Linda - Court Assistant