



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISC. APPL. NO.435 OF 2012**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI**

**AND**

**IN THE MATTER OF LAW REFORM ACT**

**(CHAPTER 26 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE BUSINESS PREMISES RENT TRIBUNAL ACT**

**(CHAPTER 301 OF THE LAWS OF KENYA)**

**REPUBLIC..... APPLICANT**

**VERSUS**

**BUSINESS PREMISES RENT TRIBUNAL... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JOHN MWANGI KARURI..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 16<sup>th</sup> August 2013, the interested party herein, **John Mwangi Karuri**, seeks the following orders:

**1. The Judgment and Orders of the Court, made on 5<sup>th</sup> July, 2013, be and are hereby reviewed and set aside, and the Ex-parte Applicant's Judicial Review Application shall be heard de-novo.**

**2. The Interested Party, John Mwangi Karuri be and is hereby allowed to participate in the Judicial Review proceedings.**

**3. The Ex-Parte Applicant, be and is hereby ordered to serve the Judicial Review**

**Application, the subject of the Judgment and Orders of 5<sup>th</sup> July, 2013, on the Interested Party.**

**4. The Ex-Parte Applicant be and is hereby ordered not to evict the Interested Party/Applicant, or in any other manner interfere with the Interested Party/Applicant's quiet possession and enjoyment of his tenancy premises on L. R. No.209/6492, Kileleshwa, Nairobi, pending the hearing and final determination of this Application.**

**5. The Ex-Parte Applicant be and is hereby ordered not to evict the Interested Party/Applicant, or in any other manner interfere with the Interested Party/Applicant's quiet possession and enjoyment of his tenancy premises on LR No.209/6492, Kileleshwa, Nairobi, pending the hearing of this Application inter-parties.**

**6. The Ex-Parte Applicant, Albert Kigera Karume, shall pay the costs of the present Application in any event.**

**7. The Honourable Court do make such other Orders and directions as it may deem fit.**

2. The said application is supported by an affidavit sworn by the said interested party on 16<sup>th</sup> August, 2013.
3. According to the interested party, he was the Complainant in BPRT case No.160 "B" of 2012, which is the subject of this Judicial Review Application hence he is directly affected by Judgment and Orders of this Court, made on 5<sup>th</sup> July, 2013. He deposed that on 6<sup>th</sup> August, 2013 his employee went to pay rent at the Exparte Applicant's premises at Kileleshwa where he is also a sub-tenant of the Ex- parte Applicant. However, the Ex-parte Applicant's employees refused to accept the Rent Cheque for the month of August, 2013, and instead gave to the said messenger, a copy of the Judgment of this Court, dated 5<sup>th</sup> July, 2013 which indicated him as the Interested Party.
4. Being unaware of the Judicial Proceedings the subject of the said Judgment, he consulted his lawyers on record who told him that they were not aware of the Judicial Review proceedings and the judgment, and advised him that the law required that as a person directly affected by the Judicial Review proceedings, he should have been served with the Judicial Review Application, and that he should also have been given an opportunity to be heard.
5. He therefore prayed that the Judgment of this Court, made on 5<sup>th</sup> July, 2013 be reviewed and set aside, that the Judicial Review Application be heard *de novo*, and that he be given an opportunity to be heard.
6. According to him, now that the ex-parte Application has refused to accept rent, and in view of the fact that the Orders of the Business Premises Rent Tribunal, made on 17<sup>th</sup> October, 2013, in BPRT Case No. 160 "B" of 2012, which had protected him from eviction and harassment were quashed by the Judgment and Orders of this court made on 5<sup>th</sup> July, 2013, he was apprehensive that he would be evicted at any time from the Tenancy premises where he operate a barber shop and Hair Salon.
7. In opposition to the application the ex parte applicant filed the following grounds of opposition:

**1. The Court has no Jurisdiction to issue the injunctive orders sought by the Interested Party.**

**2. The participation of the Interested Party will not confer jurisdiction to the Business Premises Rent Tribunal where this Honourable Court has found there is none.**

**3. The Application is misconceived and abuse of the Courts process and the same should be dismissed.**

8. The ex parte applicant also filed a replying affidavit sworn on 17<sup>th</sup> October 2013.
9. According to the said affidavit, at all material times he was the landlord of the premises known as

- LR 209/6492, Kandara Road, Kileleshwa Nairobi (herein after referred to as “suit premises”) wherein Interested Party was a tenant thereof. However, a dispute arose between the parties and the Interested Party (tenant) referred the dispute to the Business Premises Rent Tribunal.
10. On the 17<sup>th</sup> October, 2012 the Chairperson of the Business Premises Rent Tribunal, **Mrs Mochache, D** directed the tenant to forward monthly rent to the landlord’s advocate on due dates for onward transmission to the landlord; that the landlord either by himself, his servants and/or agents be restrained and prohibited from evicting the tenant and/or in any other manner whatsoever interfere with the tenants quiet possession and enjoyment of the business premises known as Boys to Men Salon and Barber Shop; that the costs to the tenant be assessed in the sum of Kshs. 73,717.00 and that the Tenant’s rent account be credited with Kshs. 73,717.00.
  11. Being aggrieved by the decision of the Business Premises Rent Tribunal, the ex parte applicant instructed his advocates to file the present Judicial Review Application with the aim of quashing the decision of the Business Premises Rent Tribunal and according to him, all parties were served with the judicial review application herein which application herein was seeking orders of judicial review in the nature of certiorari to quash the injunctive orders of the 1<sup>st</sup> respondent issued on the 17<sup>th</sup> October, 2012 and that the respondents be condemned to pay costs of this application.
  12. The said application was heard and the Honourable court found *inter alia* that the respondent had no powers to grant the orders of injunction and even if it had powers to grant such orders, it could not grant such orders ex-parte for a period of more than 14 days hence to grant such orders was without jurisdiction. The Court then issued an order of certiorari on 5<sup>th</sup> July, 2013 removing the injunctive orders of the 1<sup>st</sup> respondent issued on 17<sup>th</sup> October 2012 to the Honourable Court and the same were quashed.
  13. In the ex parte applicant’s view, the Interested Party has not shown cause why the court should review and/or set aside the final orders of judicial review issued on 5<sup>th</sup> July, 2013 and further the participation of the Interested Party in the proceedings will not grant the Business Premises Rent Tribunal jurisdiction where this court found there is none.
  14. It was further contended that the court has no jurisdiction to issue the orders sought by the Interested Party since the orders the Interested Party is seeking are injunctive in nature and the Honourable Court has no jurisdiction to grant such orders. Apart from that it was the ex parte applicant’s position that the court had no jurisdiction to vary and/or set aside its final order of certiorari issued herein.
  15. There was a supplementary affidavit sworn by the interested party on 25<sup>th</sup> February 2014 in which he reiterated that was never served with the ex-parte applicant’s notice of motion, or any other pleadings. Whereas the affidavit of service, sworn on 11<sup>th</sup> January 2013 stated that the process server visited his Barber Shop at Kileleshwa Shopping Centre, on 10<sup>th</sup> January 2013, and found the shop closed, as a result of which he pushed the papers under the door, his Barber Shop was not located at Kileleshwa Shopping Centre, or any other Shopping Centre in Kileleshwa but was located in a residential compound in which the main house has been converted into Bar that is operated by the ex-Parte Applicant, and that, the said Barber Shop was always open during the working hours, including on Saturdays, Sundays and even on Public Holidays.
  16. He further contended that the affidavit of service of **Francis N. Matu** did not meet the mandatory requirements of Order 5 rule 15(1) of the **Civil Procedure Rules**, in that, it did not disclose the identity of the person who allegedly pointed out his Barber Shop to the process server. To him, whether or not he was served with the court papers is a matter which must be canvassed before this court in the first instance, and not in the Court of Appeal as suggested by the *ex-parte* applicant.
  17. His position was that the provisions of Order 53, **of the Civil Procedure Rules**, Section 8(3) of the **Law Reform Act**, and Article 50(1) of the Constitution contemplate that, every party to a suit must be given an opportunity to be heard in the trial court (High Court) first, and not in the Court of Appeal, and that, there is no way he will go to the Court of Appeal to argue, that, he was not served with the court papers, when that issue has not been raised and ruled upon by this Court.
  18. The first issue for determination, based on the submissions filed on behalf of the ex parte applicant is whether this Court has jurisdiction to grant orders of injunction. I have no hesitation in finding that this Court has no such jurisdiction. The orders which this Court can grant in purely judicial review applications are certiorari, prohibition and mandamus. As was held in **Sanghani**

**Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354,**

**“...judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. It is governed by sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the *Civil Procedure Rules* being the procedural law. Section 8 of the *Law Reform Act* specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.”**

19. Therefore there is no room for grant of other orders such as injunctions and declarations. However this ruling is only concerned with the setting aside of the orders granted herein on 5<sup>th</sup> July, 2013 since the restraining orders were only sought on a temporary basis.
20. The second issue is whether this Court has jurisdiction to review, set aside or vary its orders made after the hearing of a judicial review application. The question whether the Court can revisit its decision made on a judicial review was dealt with by the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** where the Court held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the *Civil Procedure Act* which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.
21. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.
22. I therefore find no merit in the submission that this Court has no power to revisit its decision made on judicial review. Whether such course is referred to as review, vacation of orders or setting aside is irrelevant in my view. In light of the said decision of the Court of Appeal I decline to be persuaded by the High Court decisions to the contrary.
23. That brings me to the merits of the present application. The interested party's case is that although it was a party to these proceedings being a person directly affected by the decision which was sought to be quashed, he was nevertheless not afforded an opportunity of being heard in these proceedings. The ex parte applicant on the other hand seems to be of the view that since the Tribunal lacked the jurisdiction to grant the orders it made, the application ought not to be allowed. However, as was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456:**

**“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at**

**the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...**It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio." [Emphasis mine].

24. It is therefore clear that it is not the perceived hopelessness of a person's case that determines whether or not he ought to be heard in a decision likely to adversely affect him since the right to be heard is a fundamental human right that is not given by the State as human rights are generally universal and inalienable rights of human beings only given recognition by the Constitution.
25. In this case I have looked at the affidavit of service sworn by **Francis N. Matu** on 11<sup>th</sup> July 2013 and though the same does not seem to have been filed by the time of hearing of the Motion, it is clear that the same is lacking in material respects. As was held by **Warsame, J** (as he then was) in **National Bank of Kenya vs. Peter Oloo Aringo Kisumu HCCC No. 91 of 1998:**

**“In order for the Court to validate a mode of service other than personal, which is mandatory, the persons alleging proper service must have and prove in his return of service or otherwise the following: -**

- [i]. The time when service was effected on the said person.**
- [ii]. The manner in which the summons were served.**
- [iii]. The name and address of the person identifying the person served.**
- [iv]. The exact place where the service was effected.**
- [v]. Whether or not the person served is known to the person the summons is meant for if the person is not known to the process server.**
- [vi]. If no personal service, the person should indicate the relationship between the person served and the person summons were directed at.**
- [vii]. The source of information in vi above must be stated.**
- [viii]. That he required his signature and response.**

**Non-compliance with any command of the above would make any such service fatally defective and if there is no proper service there can be no regular judgement..... The**

**process server ought to explain the purpose of visit and the effect of the document served, so that the person served is able to comprehend his action and/or omission on third party.”**

26. The interested party has deposed that his shop is not situated at Kileleshwa Shopping Centre and this contention has not been seriously controverted. The principles guiding the setting aside *ex parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the Court will do so on terms that are just. In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder**, JSC stated:

**“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.**

27. Where there is no satisfactory evidence of service on a party the Court has no discretion in the matter and ought to set aside the judgement or order *ex debito justitiae*. As was held in **Re Hoima Ginners Ltd [1964] EA 464**, a person who is affected by an order of the court which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. Failure to serve process where service of process is required renders null and void an order made against a party who should have been served and the court can set it aside in its inherent jurisdiction and it is not necessary to appeal from it. So far as the procedure for having it set aside is concerned, the court in its inherent jurisdiction can set aside its own order; and an appeal from the order is not necessary. See **Mulira vs. Dass and Another [1971] EA 227**.

28. In the result, I find merit in the Notice of Motion dated 16<sup>th</sup> August 2013 and set aside the orders made herein on 5<sup>th</sup> July, 2013. Accordingly, the Ex-parte Applicant’s Judicial Review Application shall be served and heard de-novo. The Costs of the application to be to the interested party in any event.

**Dated at Nairobi this 9<sup>th</sup> day of April 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Ms Munyaka for the Applicant**

**Mr Kang’atta for the interested party**