



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION (JUDICIAL REVIEW) NO. 58 OF 2013**

**IN THE MATTER OF: AN APPLICATION BY SIMON NGURE NGATIA FOR JUDICIAL REVIEW**

**IN THE MATTER OF: THE RENT RESTRICTION ACT, CAP 296**

**IN THE MATTER OF: THE RENT RESTRICTION TRIBUNAL AT MOMBASA CASE NO. 112 OF 2013 BETWEEN MERCY RUCHA AND SIMON NGURE NGATIA**

**AND**

**IN THE MATTER OF: A DECISION OF THE CHAIRMAN OF THE RENT RESTRICTION TRIBUNAL SITTING AT MOMBASA ON 16<sup>TH</sup> SEPTEMBER 2013**

**REPUBLIC**

**VERSUS**

**THE RENT RESTRICTION TRIBUNAL**

**SIMON NGURE NGATIA .....EX PARTE APPLICANT**

**MERCY RUCHA .....INTERESTED PARTY**

**JUDGMENT**

[1] By Notice of Motion dated 9<sup>th</sup> October 2013, upon leave of court granted on 8<sup>th</sup> October 2013, the applicant sought judicial review orders as follows:

- a. *An order of certiorari to remove into the High Court for the purposes of quashing all proceedings and any orders made or alternatively such of the proceedings as relate to the order made on the 16<sup>th</sup> September 2013 in the case before the Rent Restriction Tribunal at Mombasa Case No. 112 of 2013 between Mercy Rucha and Simon Ngure Ngatia; and*
- b. *Any other or further and consequential orders and or directions be given.*

[2] The Motion is supported by the verifying affidavit of the applicant Simon Ngure Ngatia sworn on 2<sup>nd</sup> October 2013 and based on grounds set in the statutory Statement and reiterated on the application in the same terms as follows:

- a. *The Tribunal did not (and does not have) the requisite statutory jurisdiction to issue an injunction or similar remedy, whether ex parte or otherwise;*

- b. *The Tribunal did not (and does not) have the requisite statutory jurisdiction to deal with tenancy that is not controlled, as it was the case herein, under the Rent Restriction Tribunal;*
- c. *The Tribunal did not (and does not have) the requisite statutory jurisdiction to investigate, make any orders and/or grant any relief in respect of dispossession of or eviction from controlled premises;*
- d. *In receiving, entertaining, hearing and otherwise dealing with the said case, the Rent Restriction Tribunal has acted without jurisdiction or alternatively outside or in excess of its statutory jurisdiction contrary to sections 4 and 5 of the Rent Restriction Act.*

[3] By its impugned order made on the 12<sup>th</sup> September 2013 and issued on the 16<sup>th</sup> September 2013, the Tribunal had granted ex parte orders, principally, that -

2. ***That the defendant/landlord by himself, his agents, servants, employees and or anybody acting under his authority and or instructions is hereby restrained from evicting and or in any other way interfering with the plaintiff's peaceful residence on Plot No. Mombasa/MN Block 1/1424 Mikindani pending the hearing and determination of this suit.***
3. ***That the plaintiff/Tenant is hereby granted leave to deposit September 2013 rent and all future rents with the Rent Tribunal on or before the 10<sup>th</sup> of every month.***
4. ***That the O.C.S. Changamwe Police Station to enforce these orders.***
5. ***That the defendant is to be served for inter partes hearing during the next court session.***

[4] It would appear that upon grant by the High Court (Odero, J) on the 8<sup>th</sup> October 2013 of leave to file judicial review proceedings and a further order that grant of leave do operate a stay of the proceedings before the Tribunal wherein the Tribunal had granted, the ex parte applicant levied distress for rent on the Interested Party.

[5] In response, the Interested Party filed in the judicial review proceedings before this court, a Notice of Motion dated 12<sup>th</sup> November 2013 seeking principally an order of injunction *'that the plaintiff, his agents, servants and or employees be restrained from evicting and or interfering with the Interested Party peaceful occupation of house situated within plot No. 58 Mombasa/MN Block 1/1424 pending the hearing and determination of this application and subsequently suit.'* The application was based on three principal grounds set out in the Motion, namely:

- i. That the Interested Party is a tenant at a residential house on plot No. Mombasa/MN Block 1/897 at an agreed monthly rent of Ksh.8500/- and the interested has paid her rent upto and including October 2013 through the Rent Restriction Tribunal Mombasa.
- ii. That the plaintiff had sought to increase the monthly rent for the said premises to Ksh15000/- and had given notice to the Interested Party to vacate the premises under the pretext of undertaking renovation sometimes in August 2013.
- iii. That the Interested Party had filed a case in the Rent Restriction Tribunal RRTC No. 112 of 2013 in which she obtained an order restraining the ex parte applicant from evicting or interfering with her quiet possession of the suit premises pending hearing and determination of the suit and a further order for the deposit into the Tribunal of the sum of Ksh.8500/- as agreed monthly rent. The Interested Party complained that despite the orders in the Tribunal case, the ex parte applicant had levied distress upon the Interested Party's house-hold goods which if taken would render her homeless.

[6] The Interested Party's application dated 12<sup>th</sup> November 2013 was certified urgent by the court (Kasango, J) and an injunction restraining the ex parte applicant from evicting or interfering with the Interested Party's possession of the suit premises was granted pending hearing *inter partes*, which was scheduled for the 26<sup>th</sup> November 2013.

[7] In response to the Interested Party's application, the ex parte applicant filed a replying affidavit on the 22<sup>nd</sup> November 2013 raising the following principal defences:

- a. The Rent Tribunal had no jurisdiction to make an order of injunction or similar remedy and, upon being served with the Tribunal's order of 12<sup>th</sup> September 2013, the ex parte applicant had successfully sought leave of the High Court to seek judicial review order to quash the Tribunal proceedings on the ground of want of jurisdiction.
- b. The ex parte applicant levied distress upon the stay of the Tribunal's proceedings by the High Court upon the grant of leave to file judicial review proceedings and accompanying order that the grant of leave do operate as a stay of the proceedings in the Tribunal.
- c. The Interested Party had defaulted in paying the agreed monthly rent of Ksh.15,000/- since August 2013 and the ex parte applicant had by letter dated 23<sup>rd</sup> October 2013 demanded outstanding rent of Ksh.45,000/- prior to the levying of distress. .

[8] When the application of 12<sup>th</sup> November 2013 came up for hearing on the 26<sup>th</sup> November 2013, the Interested Party who was then self-represented successfully sought time to consider the ex parte replying affidavit and if necessary file a further affidavit and the hearing was then set for the 6<sup>th</sup> December 2013. For reasons that are not clear from the record, the matter did not come up for hearing on the 6<sup>th</sup> December 2013. On the 24<sup>th</sup> February 2014, the record shows that the firm of advocates representing the ex parte applicant fixed their Notice of Motion dated 9<sup>th</sup> October 2013 herein for hearing on the 26<sup>th</sup> March 2014 and on that date further fixed it for hearing on the 10<sup>th</sup> April 2014.

[9] On the 10<sup>th</sup> April 2014, the matter came up before me, when in the absence of counsel then on record for the Interested Party, the court adjourned the hearing to the 14<sup>th</sup> May 2014, to enable the counsel for the Interested Party to be served with a hearing notice. On the 14<sup>th</sup> May 2014, counsel for the Interested Party who had been duly served, the court made an order as follows:

**“Order:**

1. **In the absence of Interested Party who has been duly served, the court grants the Interested Party an opportunity to attend court on a date to be fixed when the Interested Party's application dated 12/11/13 and the main Motion for Judicial Review of 9/10/13 will be heard together.**
2. **Stood over to 21/5/13 for hearing.**
3. **Hearing notice to be served on both counsel and the Interested Party.”**

[10] On the 21<sup>st</sup> May 2014, neither the Interested Party nor her counsel attended court. The court was satisfied as to their service by the affidavit of Alex Philip Nzuki, a licensed court process server sworn on 20<sup>th</sup> May 2014 in the material parts as follows:

1. ....
2. ***That on the 15<sup>th</sup> May 2014 I received copies of HEARING NOTICE in triplicate all dated 14<sup>th</sup> may 2014 and coming for hearing on the 21<sup>st</sup> day of May 2014 from the firm of MOGAKA OMWENGA & MABEYA ADVOCATES to effect service upon the firm of S. O OGUK & CO. ADVOCATES and MERCY RUCHA.***
3. ***That on the same day I proceeded to Mikindani where MERCY RUCHA resides, upon arrival at around 6.30pm I met her at her residence. I introduced myself to her and the purpose of my visit. After introduction I tendered to her a copy of the hearing notice which she accepted but declined to append her signature on my service copy on the grounds that she has an advocate who is on record.***
4. ***That on 16<sup>th</sup> day of May 2014 at around 11.30am I proceeded to the offices of S. O. Oguk & Co. Advocates at Royal Building, 3<sup>rd</sup> Floor along Digo Road adjacent to Bank of Baroda and served the secretary of the said firm with a copy of the Hearing Notice which after perusing acknowledged to receive the copy of the HEARING NOTICE on behalf of the firm by appending her signature and the date she received the HEARING NOTICE at the back page of my service copy...”***

[11] The court considered that it had given the Interested Party and her counsel reasonable opportunity to attend court and urge her case in the proceeding before it and, having failed to attend court despite adjournment of the matter ordered for that purpose, the court therefore made an order that –

**“Order:**

***Upon reading the affidavit of service of Alex Philip Nzuki of 20<sup>th</sup> May 2014, I am satisfied that the Interested Party has been served and the matter will proceed to hearing her absence notwithstanding.”***

[12] In the course of the proceedings and at the hearing on the 21<sup>st</sup> May 2014, counsel who appeared for the Attorney-General for the respondent Tribunal, Mr. Ngari and Miss Lutta before him, contended that the issue in dispute is between the ex parte applicant and the Interested Party and consequently opted take a neutral position and not to participate in the contest the subject of the litigation between the parties - that is whether the Rent Restriction Tribunal had jurisdiction in the matter.

[13] Counsel for the ex parte applicant, Mr. Mogaka made brief oral submissions as follows, and judgment was reserved.

***“Mr. Mogaka:***

***[The] court has no jurisdiction to issue injunction in Judicial Review matters. It may issue a stay and not an injunction. The injunction has occasioned great suffering to the ex parte applicant because of the injunction of 12/11/13 to stop eviction and interfering with possession and we have not been able to distress for rent. In replying affidavit, it is admitted that rent is Ksh.8500/- increased to Ksh.15000/- per month. The Ksh.15000/- per month has not been executed because of the injunction.***

***As regards the Motion, Rent Restriction Tribunal determined the matter the rent was admitted at Ksh8500/-. The Rent Restriction Act cap. 296 does not confer jurisdiction on the Tribunal to deal with property in excess of Ksh.2500/-. The Tribunal was acting in excess of jurisdiction. It does not have the statutory power to entertain. The High Court is entitled to intervene by granting the relief sought by quashing the proceedings before the Rent Restriction Tribunal. I pray that the court considers the other matters set out in the Notice of Motion and section 2 of the Rent Restriction Act, cap. 296.”***

[14] The two issues that arise for determination are whether the Rent Restriction Tribunal has jurisdiction over disputes relating to residential property the monthly rent for which is admitted as Ksh.8500/- and whether the High Court has power to grant an order of injunction under its Judicial Review jurisdiction. There was an issue raised in the main Notice of Motion of 9<sup>th</sup> October 2013 as to whether the Rent Restriction Tribunal has jurisdiction to grant an injunction in proceedings before it but this issue was not canvassed at the hearing and the court does not propose in this matter to make a finding on it without having heard argument on the merits.

[15] **Jurisdiction of the Rent Restriction Tribunal.** The Rent Restriction Act has limited application as follows:

***“2. (1) This Act shall apply to all dwelling-houses, other than -***

***(a) excepted dwelling-houses;***

***(b) dwelling-house let on service tenancies;***

***(c) dwelling-houses which have a standard rent exceeding two thousand five hundred shillings per month, furnished or unfurnished.”***

[16] The object of the Rent Restriction Act is given in the words of the long title - ‘**An Act of Parliament to make provision for restricting the increase of rent, the right to possession and the exaction of premiums, and for fixing standard rents, in relation to dwelling-houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling-house.**’ It is clear for the provisions of the Act that it establishes protected tenancy status for tenancies on dwelling houses with low rent values with a view to protecting such tenants from exploitation by way of arbitrary increase of rent and eviction from their dwelling houses whose standard rent is less than Ksh.2500/-.

[17] In the present case, the Interested Party had in the proceedings that she filed in the Rent Restriction Tribunal, Mombasa RRT Case No. 112 of 20113, admitted through her supporting affidavit sworn on the 12<sup>th</sup> September 2013 that the monthly rent payable was Ksh.8500/- which was beyond the standard rent limitation of Ksh.2500/- for the application of the Rent Restriction Act. The tenancy was not a protected tenancy under the Rent Restriction Act and the Tribunal had, accordingly, no jurisdiction to entertain the suit by the Interested Party. The secondary question as to whether the Tribunal had jurisdiction to grant an order of injunction or similar remedy would only arise for consideration if the proceedings were properly before the Tribunal, and it not having been established that the proceedings before the Tribunal were competent, I do not find it necessary, as aforesaid, to pronounce on the issue of jurisdiction of the Rent Restriction Tribunal to grant an injunction or similar remedy.

[18] **Whether the High Court has jurisdiction to grant injunction in Judicial Review proceedings.** It is clear that the High Court in Kenya, unlike in England where the 1977 reform expanded the remedies of judicial review to include declaration and injunction, can only grant the old prerogative remedies of certiorari, mandamus and prohibition under the judicial review proceedings under Order 53 of the Civil Procedure Rules. However, where the justice and circumstances of the case demands, the court may deem the application for judicial review as a constitutional application which has widest scope of remedies including injunctions. This course was adopted in *Githunguri v. Attorney General* No. 2 (1985) KLR 1.

[19] In the present proceedings, the Interested Party could not justify the deeming of her application for injunction as a constitutional application in which orders of injunction could issue because the ex parte applicant’s levying of distress was undertaken only after the grant by the High Court of stay of the proceedings before the Rent Restriction Tribunal. There is, moreover, remedy for wrongful execution of distress under section 15 of the Distress for Rent Act cap. 293, as follows:

*“15. Where distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agents, the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio, but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the special damage he has sustained thereby, in a suit for that purpose”*

Where the right to levy distress itself is contested, the Interested Party may also sue in a competent civil court claiming that the ex parte applicant’s right to levy distress has not crystallised because she has not defaulted in the payment of rent due.

[20] Accordingly, for the reasons set out above, I make the following orders on the applications made by the ex parte applicant and the Interested Party respectively dated the 9<sup>th</sup> October 2013 and 12<sup>th</sup> November 2013:

- a. **The ex parte applicant’s Notice of Motion dated the 9<sup>th</sup> October 2013 is allowed to the effect that an order of certiorari issues to remove into the High Court for the purposes of quashing all proceedings and any orders made in the Rent Restriction Tribunal at Mombasa Case No. 112 of 2013 between Mercy Rucha and Simon Ngure Ngatia.**
- b. **The Interested Party’s Notice Motion dated the 12<sup>th</sup> November 2013 is dismissed and the ex parte order made thereon on the same date is discharged.**

- c. **In the interest of justice, noting that the Interested Party has pursuant to the order of deposit of rent granted in RRT Case No. 112 of 2013 paid as rent money into the Tribunal whose proceedings are by virtue of the court order herein quashed, there shall be stay of execution of the orders of this court for a period of 14 days only to permit the Interested Party recover from the Tribunal her deposits of rent and pay to the ex parte applicant the arrears of rent.**

[21] The Interested Party will pay to the ex parte applicant the costs of the two applications.

**Dated signed and delivered this 18<sup>th</sup> day of June, 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of:** -

Miss Langat for Mr. Mogaka for the Applicant

No appearance for the Respondent

No appearance for the Interested Party

Miss Linda Osundwa - Court Assistant