REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 165 OF 2011

REPUBLIC .....APPLICANT

VERSUS

CHAIRPERSON BUSINESS PREMISES RENT TRIBUNAL .....RESPONDENT

GAMEX ENTERPRISES LTD .....1ST INTERESTED PARTY

FIFTY INVESTMENT .....2ND INTERESTED PARTY

EX-PARTE

1. Samuel Kariuki
2. Rhoda Muthoni
3. Monica Kanyi
4. Peris Wanjiru
5. Samuel Kamau
6. Daniel K Gathira
7. James Nderitu
8. Elizabeth Wacu
9. Waweru Maina
10. Jane Wambui
11. Catherine Wanjiru
12. Petterson N Njogu
13. Harrisson Waiyai
14. Naomi Karanja
15. Simon Ngure

JUDGMENT

As is the norm in judicial review applications, the applicant is the Republic. Samuel Kariuki, Rhoda Muthoni, Monica Kanyi, Peris Wanjiru, Samuel Kamau, Daniel K Gathira, James Nderitu, Elizabeth Wacu, Waweru Maina, Jane Wambui, Catherine Wanjiru, Petterson N Njogu, Harrisson Waiyai, Naomi Karanja and Simon Ngure are the 1st-15th ex-parte applicants respectively. The chairperson of the Business Premises Rent Tribunal is the respondent whereas Gamex Enterprises Ltd and Fifty Investment Limited are the 1st and 2nd interested parties. The application for consideration by this court is the notice of motion dated 29th July,2011 in which the ex-parte applicants seek orders as follows:-

1. THAT this court be pleased to grant an Order of Certiorari to remove into this court for purposes of quashing the decision of the Respondent given on the 8th of July, 2011, in Tribunal Cases No. 330, 331, 333, 334, 342, 343, 344, 345, 346, 347, 348, 350, 351 all of 2011 and all consolidated into Tribunal Case No. 330 of 2011 ordering the levying of distress by the 1st Interested Party as against the applicants with regard to the premises known as Basement Floor, L.R. No. 209/139/2 RIVER ROAD NAIROBI.

2. THAT this honourable court be pleased to grant an Order of Prohibition prohibiting the Respondent from finding that there is a controlled Tenancy relationship between the Applicants and the 1st Interested Party Gamex Enterprises Limited in that premises known as Basement Floor, L.R. No.209/139/2 RIVER ROAD NAIROBI and further from adjudicating over the tenancy relationship between the Applicants and the 2nd interested party Fifty Investment Limited in that premises known as Basement Floor, L.R. No. 209/139/2 RIVER ROAD NAIROBI.

3. THAT cost of this application be in the cause.

The application is supported by grounds on its face, a supporting affidavit sworn by Samwel Kariuki (the 1st ex-parte applicant) and Rhoda Muthoni (the 2nd ex-parte applicant) on 29th July, 2011; the chamber summons application for leave, the statutory statement, a verifying affidavit sworn on 15th July, 2011 by the 1st and 2nd ex-parte applicants and exhibits annexed to the affidavits.

Fifty Investment Limited (the 2nd interested party) is the owner of business premises situated on L.R. No. 209/139/2 in the City of Nairobi. In the said premises there are stalls and the ex-parte applicants carry out their businesses therein. Gamex Enterprises Limited (the 1st interested party) had through an agreement dated 5th November, 2008 leased the 2nd interested party's said premises. The 1st interested party converted the premises to stalls before subletting them to the ex-parte applicants.

Sometimes in the year 2010, the 2nd interested party moved to levy distress against the ex-parte applicants and other tenants for failing to pay rent. The ex-parte applicants and the other tenants filed a case namely Tribunal Case No. 705/2010 Nairobi before the respondent and argued that the 2nd interested party was a stranger to them and they had entered into controlled tenancies with the 1st interested party. The respondent issued an order directing the ex-parte applicants and the other tenants to deposit the rent in court pending inter partes hearing of the matter. As Nairobi Tribunal Case No.705/2010 was pending, the 2nd interested party purported to terminate its lease agreement with the 1st interested party. In early May, 2011 it went ahead and entered into lease agreements with the ex-parte applicants. That is when the 1st interested party filed Tribunal cases Nos. 330, 331, 332, 333, 334, 343, 344, 345, 346, 347, 348, 349, 350 and 351 all of 2011 against the ex-parte applicants and obtained in order dated 8th July, 2011 which was couched in the following terms:-

1. There exists a landlord tenancy relationship between the tenant/applicant and the respondents.

2. The relationship is controlled under Cap. 301.

3. The respondents are ordered to stop paying rent to the landlord (Fifty Investments Ltd) forthwith.

4. The respondents are ordered to pay outstanding rent arrears to the Landlord/Game Enterprises Ltd immediately, in default, the landlord to levy distress under section 12(1) (h).

5. Each party to bear their own costs.

For purposes of record it should be noted that all the said matters were consolidated under case No. 330 of 2011. The said decision is what the ex-parte applicants seek to challenge before this court. Their

challenge is premised on two grounds. Firstly, the ex-parte applicants argue that the respondent had no jurisdiction to handle the matter since the lease agreement between the 1st and 2nd interested parties had been terminated and they had subsequently entered into leases with the 2nd interested party which leases ousted the jurisdiction of the respondent. Secondly, the ex-parte applicants submit that the respondent's decision dated 8th July, 2011 disposed the entire matter and yet what had been argued before the respondent was a preliminary objection. They therefore argue that the respondent breached the rules of natural justice by making a decision without hearing them.

The 2nd interested party supported the application through a replying affidavit sworn as 18th August, 2011 by its secretary Mr. Elvis Maina Minju. Of importance to note in the said affidavit is the allegation that although the orders issued in Tribunal case No. 330 of 2011 directly affected the 2nd interested party, it was never served with the pleadings in that matter and neither was it made a party.

The respondent did not file any reply to the application. The 1st interested party opposed the application through a replying affidavit sworn by Samuel Njuguna Mbiri on 23rd August, 2011. It is the 1st interested party's case that the respondent had jurisdiction to hear and determine the dispute between it and the ex-parte applicants in that the tenancy between it and the ex-parte applicants is a controlled tenancy as per the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 of the Laws of Kenya. The 1st interested party also argues that since the relationship between itself and the ex-parte applicants was a protected one, the only way that relationship could be terminated was in accordance with Cap. 301 as the ex-parte applicants have not surrendered their tenancies as envisaged by the Act. The 1st interested party also submitted that the ex-parte applicants were given a hearing by the respondent before a decision was made. The 1st interested party also brought to the attention of the court the existence of High Court Civil Case No. 618 of 2009 in which the 1st interested party has sued the 2nd interested party seeking that the 2nd interested party be stopped from evicting or interfering with the 2nd interested party's quiet possession and enjoyment of the premises in question.

Considering the submissions made before this court, I conclude that the issues for determination by this court are whether the tribunal had jurisdiction to hear the matter and whether it complied with the rules of natural justice.

The 1st interested party has submitted that an order of prohibition cannot lie in this matter for the simple reason that the ex-parte applicants are asking the court to stop what has already happened. In the second prayer of the notice of motion the ex-parte applicants pray for an order of prohibition prohibiting the respondent from finding that there is a controlled tenancy relationship between the ex-parte applicants and the 1st interested party. In its ruling of 8th July, 2011 one of the findings of the respondent was that there is a controlled tenancy between the ex-parte applicants and the 1st interested party. An order of prohibition looks into the future and is meant to stop a tribunal from exercising jurisdiction it does not have. If a tribunal has made a decision, an order of prohibition can no longer be of any assistance to an applicant. I therefore agree with the 1st interested party that the prayer for an order of prohibition must fail.

Did the respondent lack jurisdiction to hear the matter? The ex-parte applicants and the 2nd interested party submitted that the respondent did not have jurisdiction to hear the matter. They argued that at the time the complaints were filed by the 1st interested party, the landlord/tenant relationship that had existed between the 2nd and 1st interested parties had been terminated through a notice issued to the 1st interested party on 1st April, 2011. They further argue that landlord/tenant relationship that was in existence at that time was the one between the 2nd interested party and the ex-parte applicants and that relationship was not a controlled tenancy since the leases were for a period of five years and three months.

The 1st interested party argued that there was a landlord/tenant relationship between it and the ex-parte applicants. The 1st interested party cited Tribunal Case No. 705 of 2010 in which the ex-parte applicants

and other tenants had sought the protection of the respondent when the 2nd interested party had attempted to levy distress for rent. At that time the ex-parte applicants had argued that the landlord they knew was the 1st interested party and the respondent had jurisdiction in their matter. The 1st interested party also argued that since the relationship between it and the ex-parte applicant was controlled tenancy then the only way their relationship could have been terminated was by invoking the provisions of Cap. 301 which had not been done in that the ex-parte applicants had not vacated the stalls and handed them back to the 1st interested party. As to the claim that the relationship between it (1st interested party) and 2nd interested party had been terminated through a notice issued to it by the 2nd interested party, the 1st interested party submitted that there was in existence High Court Civil Case No. 618 of 2009 in which it was seeking a permanent injunction to restrain the 2nd interested party from evicting it from the premises or from in any way interfering with its quiet possession of the premises. It is the 1st interested party's submission that the leases between the ex-parte applicants and the 2nd interested are of no effect the same having been entered into during the subsistence of the suit between the interested parties.

The ex-parte applicants submitted that the matter was heard and determined without their being given an opportunity to reply to the substantive matter. According to the ex-parte applicants, the proceedings of 1st July, 2011 were in respect of their preliminary objection but on 8th July, 2011 the respondent made a decision which concluded the matter thereby denying them an opportunity of responding to the substantive application. To this, the 1st interested party replies that the ex-parte applicants made substantive submissions before the respondent as to why the 1st interested party was not entitled to levy distress. It is the 1st interested party's case therefore that the ex-parte applicants were given a hearing.

In respect of the 2nd interested party's case, it was submitted that the respondent breached the rules of natural justice by purporting to interfere with its proprietary right without giving it a hearing. It should be noted at this stage that the 1st interested party did not make any response or submission regarding the 2nd interested party's claim that it was not heard by the respondent. As regards HCCC No. 618 of 2009 the 2nd interested party submitted that there was no order issued stopping it from exercising its proprietary rights and it was therefore at liberty to enter the leases it entered into with the ex-parte applicants.

The facts surrounding this cause are not disputed. The 2nd interested party is the owner of the premises in question and in 2008 it entered into a lease agreement with the 1st interested party. The 1st interested party sub-divided the premises into stalls and leased them to the ex-parte applicants. It appears that the relationship between the 1st and 2nd interested parties soon soured and the 2nd interested party attempted to collect rent directly from the ex-parte applicants. That is when the ex-parte applicants moved to court in Tribunal case No. 705/2010 and obtained an order directing them to deposit rent with the respondent. Prior to that, the 1st interested party had filed HCCC No. 618 of 2009 seeking orders restraining the 2nd interested party from interfering with its quiet enjoyment of the premises. That matter has not been finalized and it appears that no interim orders were issued. Through a notice dated 1st April, 2011 the 2nd interested party indicated to the 1st interested party that it was terminating its relationship. After the expiry of the one month notice the 2nd interested party entered into leases with the ex-parte applicants. About three weeks later the 1st interested party filed complaints before the respondent seeking permission for the levy of distress for rent. This culminated in the respondent's orders of 8th July, 2011.

Let me start by stating that I am surprised that the respondent allowed the 1st interested party to proceed with the complaints consolidated into Tribunal Case No. 330 of 2011 knowing well that there was Tribunal Cause No. 705 of 2010 in which the ex-parte applicants had been directed to pay rent to the respondent. The respondent eventually ended up setting aside the orders it had issued in Tribunal case No. 705 of 2010 when it directed the ex-parte applicants to pay rent to the 1st interested party. It is difficult to understand why the respondent decided to proceed in this manner.

Did the respondent have jurisdiction to entertain the matter which is the subject of these proceedings? It

must be noted that by the time the 2nd interested party entered into leases with the ex-parte applicants, there was an order issued in Tribunal case No. 705 of 2010 directing them to pay the rent to the respondent. Had the ex-parte applicants paid the rent to the 2nd interested party, then they would have clearly gone against the order of the respondent. On the other hand the 1st interested party clearly abused the court process by filing the complaints consolidated into Tribunal Case No. 330 of 2011 knowing well that there was a clear order in Tribunal Case No. 705 of 2010 directing the ex-parte applicants to pay the rent to the respondent.

It is clear that no order had been issued in HCCC No. 618 of 2009 and neither the 1st interested party nor the 2nd interested party can be accused of disobeying any court order. In my view what the respondent ought to have done was to carry out an inquiry as to whether it still had jurisdiction considering the leases entered into between the ex-parte applicants and the 2nd interested party. I hold the view that if the respondent had proceeded with Tribunal Case No. 705 of 2010, then it may have retained some jurisdiction. After it allowed the 1st interested party to proceed with a matter which was not proper, then it lost jurisdiction since the 2nd interested party could correctly say it had terminated its relationship with the 1st interested party. There is no evidence from the respondent (the receiver of the rent) to show that the ex-parte applicants had ceased remitting the rent. The complaints consolidated into Tribunal Case No. 330 of 2011 were brought in bad faith and the respondent ought not to have entertained the same. In view of the fact that the respondent was seized of the matter in Tribunal Case No. 705 0f 2010, then I hold that it had no jurisdiction to entertain the fresh complaints.

The second issue is whether the respondent breached the rules of natural justice. I have read the proceedings of 1st July, 2011 in which Mr. Kopere for the 7th ex-parte applicant herein commenced by addressing the respondent thus:-

“I have raised a preliminary objection. Looking at the applicant’s complaint .....”

It is clear therefore that what was canvassed before the court was the preliminary objection. The respondent never indicated to Mr. Kopere that the main application for the levy of distress for rent was being heard. It is clear that the main application was not being heard on that day and that is why Mr. Kopere is the one who was allowed to start addressing the court. Mr. Laichena for the 1st interested party herein was then allowed to respond. The main motion was therefore not heard on that day. The ex-parte applicants are therefore correct when they submit that the respondent made a decision on the main motion without affording them an opportunity to be heard. It would have been proper had the respondent clearly indicated to Mr. Kopere that she was treating his preliminary objection as a response to the main application. The advocate would then have proceeded with the knowledge that he was responding to the substantive notice of motion.

Orders adverse to the 2nd interested party were issued without the 2nd interested party being heard or made a party to the proceedings. In fact at page 2 of the ruling the respondent noted that although Mr. Gaita for the 2nd interested party was in court, he did not make any submissions. How could he have addressed the respondent and yet it was not a party to the proceedings?

The right to a fair hearing is a cardinal principle of the rules of natural justice. A party cannot be condemned unheard. The 2nd interested party is the owner of the premises in question and the respondent was wrong in ordering the ex-parte applicants to pay rent to the 1st interested party without hearing the 2nd interested party. The ex-parte applicants were also entitled to be heard before being ordered to pay rent to the 1st interested party. They were never heard on the substantive application that was before respondent.

In my view, the ex-parte applicants herein are entitled to the order sought in prayer No. 1 of the notice of motion. I think the ex-parte applicants ought to have applied for the quashing of the entire proceedings since all the complaints consolidated into Tribunal Case No. 330 of 2011 are nothing but an abuse of the

court process. The 1st interested party will meet the costs of the ex-parte applicants and the 2nd interested party.

Dated, signed and delivered at Nairobi this 16th day of April, 2013

W. K. KORIR,
JUDGE