



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Judicial Review 48 of 2010**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CHAIRMAN BUSINESS PREMISES RENT TRIBUNAL .....RESPONDENTS**

**EX-PARTE**

**PETERSON KARIUKI GUTU**

**AND**

**AGNES KIRINGI WAMUTIRA.....INTERESTED PARTY**

**J U D G M E N T**

The application for Judicial Review herein was properly commenced by way of Chamber Summons dated 17/9/2010 and filed on the 20/9/2010 by exparte applicant seeking leave to apply for an order of *certiorari* removing to this Honourable Court the order of the Business Premises Rent Tribunal at Nyeri dated the 6th September 2010 for the purposes of the same being quashed.

The applicant also sought an order that the granted leave to operate to stay the said order of the Business Premises Rent Tribunal pending the hearing and determination of the substantive application for Judicial Review.

On the 20/9/2010 the matter was brought before my brother judge Justice J.K. Serگون who granted the exparte applicant leave of 21 days to commence Judicial Review proceedings as prayed in prayer 3 and also directed the order of leave to operate as a stay in terms of prayer 4. The order was made in error as prayer 3 was for stay while prayer 4 was for costs. However, the import of the order was that leave to apply for an order of *certiorari* was granted and that the said leave was to operate as stay.

The Notice of Motion was filed on the 1st October 2010 within the 21 days given by the court. The Notice of motion is supported by the verifying affidavit sworn on 16/9/2010 and grounded on the statement filed with the chamber summons as required by law.

The Exparte applicant prays for an order of *certiorari* removing to the court the order of the Business Premises Rent Tribunal at Nyeri dated 6/9/2010 in B.P.R.T Case No.74 of 2010 for the purposes of its being quashed.

The grounds of the application as discerned from the statement of particulars are:-

- (1) **The Tribunal was improperly composed as it was presided over by a “presiding member”, other than the Chairman as mandated by the empowering Statute Cap.301.**
- (2) **The Tribunal violated the rules of natural justice in condemning the applicant unheard.**
- (3) **The Tribunal acted without jurisdiction.**

The facts of the matter according to the verifying affidavit were that the ex parte applicant was served with an order dated 6/9/2010 in B.P.R.T Case No.74 of 2010 at Nyeri, **Agnes Karingi Wamutira -VS- Kariuki Gutu**. He was also served with a certificate of urgency, Notice of Motion and affidavit. The applicant is a co-tenant in respect of stall No.KER/BP/56 belonging to the Municipal Council of Kerugoya Kutus. He claims to have no relationship with the interested party herein whether landlord or whatsoever and has no business with the respondent either. He states further that he was not heard when the orders of 6th September 2010 were made.

The respondent through the Provincial Litigation Counsel Stella Munyi, as she then was filed a Notice of Appointment on the 1/11/2011. The same was dated 24/10/2011. the same was followed with grounds of apposition filed on the 20/1/2012.

The Attorney General's *grounds of apposition* are seven fold.

The first ground paraphrases all the grounds of opposition and therefore we do not need to dwell on it.

The *second* ground is that the ex parte applicant failed or refused and or neglected to serve the respondent and/or the Attorney General with the statutory statement in breach of the mandatory provisions of order 53 Rule 4 of the Civil Procedure Rules.

Order *53 rule (4)* of the civil Procedure Rules provides that the statement shall be served with the Notice of Motion. Affidavits accompanying application for leave shall be supplied on demand. The respondent's complaint is that he was not served with the statement in breach of this rule. The ex parte applicant has not denied this allegation and has not complied with the provisions of order 53 rule 3 subrule 3 which provides for the filing of the affidavit of service giving the names and addresses of, and the place and date of service on, all persons who have been served with the Notice of Motion. If any person who ought to be served under the provision of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected and the affidavit shall be before the court before the hearing of the motion. **Order 53 (3) (4)** provides that if on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing in order that the Notice may be served on that person upon such terms (if any) as it may direct.

Order *53 rule (6)* provides that on the hearing of any such motion as aforesaid any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the Notice of Motion or summons and shall be liable to costs in the discretion of the court if the order should be made.

I have purposely rehearsed these rules to decide on the issue of service of the statement and whether failure to serve the statement was prejudicial to respondents defence or response. It is imperative to note that the respondent filed a Notice of Appointment through the office of the Attorney General and went further to file grounds of opposition through the said office. The respondent proceeded to take a date for hearing of the Notice of Motion and proceeded to be heard in opposition. It is interesting that the respondent did not ask for adjournment and request for a copy of the statement but requested the court to dismiss the suit for want of service of statement. The respondent did not swear any affidavit on the issue

of service but chose to file grounds of opposition in which he stated that he was not served with a statement of particulars. The issue of service is a fact that can only be proved through affidavit. In absence of affidavit this court is unable to decide whether there was service of the statement or not.

The court finds that failure to file an affidavit of service under the provision of order 53 rule 3 (3) was not fatal to the Notice of Motion as the respondents appeared by filing Notice of appointment and grounds of opposition and therefore no prejudice was suffered by the respondents as the purpose of the affidavit is to ensure that every person likely to be affected by the decision is heard. In this case, all persons affected by the decision appeared and were heard.

Dismissing the Notice of Motion on grounds that the statement of particulars which is part of the court record was not served would be going against the provision of article 159 of the constitution which requires this court to administer justice without undue regard to procedural technicalities. This court finds that failure to serve the statement of particulars is a procedural technicality that does not prejudice the respondents due to the fact that the Notice of Motion and support affidavit contained the relief sought and grounds relied upon whilst the facts were in the supporting affidavit, and in any event the respondent did not swear any affidavit and therefore it is impossible to know whether he was served or not. The issue of service is contentious and therefore the need for an affidavit. This ground by the Attorney General is dismissed.

The **third** ground by the Attorney General is that the ex parte applicant failed refused or neglected to annex to his verifying affidavit the proceedings sought to be removed for purposes of quashing in breach of the mandatory provisions of order **53 rule (7)** of the Civil Procedure Rules. Order 53 rule 7 (1) provides that the ex parte applicant cannot question the validity of any order, warrant, commitment, conviction inquisition or record unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar or accounts for failing to do so to the satisfaction of the court.

The court finds that the applicant complied with this provisions by annexing the decision sought to be quashed, dated 6th September 2010. the same was annexed in the verifying affidavit as annexure PKG 1.

The **fourth** ground by the Attorney General was that the respondent was at all material times empowered under section 12 of the Landlord and Tenant (shops, hotels and catering establishment) Act as read with the preamble to the Act to issue orders dated 6/9/2010. This argument should be considered with the applicants argument that the tribunal was **improperly composed** as it was presided over by a member other than the chairman as mandated by the empowering statute **Cap 301 Laws of Kenya**. Mr. Njagi for the ex parte applicant argued that the person presiding was a member and not a chair. He referred to regulation 2 of the Act which defines the chairman as the chairman of the Tribunal. He also referred the regulation 19 that provides for the chairman to record particulars. He argued that in order for a decision to be a decision of the tribunal it must comply with regulation 19. He submitted that Mr. Maina Kirori's decision was not a decision of the chair and therefore was not of the Tribunal.

M/s Terry Gathagu, the Deputy Chief Litigation Counsel for Attorney General argued that the presiding member is an issue to be determined by the provision of Regulation 2 which provides for an election of a member to act as a chairman in the absence of the chairman. She submitted that the ex parte applicant should prove that the Tribunal was not properly constituted and that the election is done during proceedings. She submitted that the ex parte applicant did not annex the proceedings and therefore denying the court the opportunity to consider the proceedings before making a finding.

The court finds that the verifying affidavit is deficient, bare and not supporting of the Notice of Motion. It does not state who the presiding officer was, it does not state how he was elected it does not annex the proceedings of the Tribunal from which the order was extracted. The court also finds the respondent not helpful in failing to file an affidavit in opposition and just relied on grounds of opposition. However, the burden lies on the ex parte applicant to prove that the person presiding was not elected in accordance with the rules and therefore lacked capacity. This ground fails as the exparte applicant has failed to establish the same. The fourth ground by the Attorney General is also dismissed

because he has failed to establish that Mr. Maina Karori was the chair of the Tribunal or was elected in accordance with the provisions of regulation 19 of the Landlord and Tenant (shops, hotels and catering, establishments) (Tribunal) (Forms & Procedure Regulations).

The **fifth** ground is related to the **fourth** ground and this court agrees with the respondent that the ex parte applicant failed to prove that the respondent did not comply with the provisions of regulation 21 (1) of the aforesaid, regulation due to his failure to annex the proceedings or make assertions to that effect in the affidavit.

The **sixth** ground by the respondent was that the applicant admitted that he was served with the order and claim supporting documents on the 8/9/2010 and therefore he is estopped from alleging that he was denied reasonable opportunity to be heard. The ex parte applicant in the verifying affidavit stated that he was not heard when the orders of 6th September 2010 were made. This fact has not been denied by the respondent. Moreover, the order dated and issued on 6th September 2010 speaks for itself that the matter came up for hearing on the 6/9/2010 before Maina Kirori (presiding member) in the presence of Agnes Karingi Wamutira and does not mention the ex parte applicant. The respondent has not denied that the member proceeded in the absence of the ex parte applicant. No provision has been cited by the respondent that allows it to proceed ex parte. The tribunal powers are underpinned in section 12 of the Act which does not empower the Tribunal to grant orders ex parte. The Deputy Chief Litigation counsel appears to be suggesting that no prejudice would be suffered by the ex parte applicant because he was served with the order and a date for inter parte hearing was set.

I do find that the decision of the Tribunal was tainted by procedural irregularities and improprieties in failing to give the ex parte applicant a hearing before issuing the orders made.

**In Desmith, Woolf and Jowell Judicial Review of Administrative Action fifth Edition at page 500 – 10 – 034** it is treated that

**“.....These cases support the view that the fundamental principle at stake is that public confidence in the fairness of adjudication or hearing procedures may be undermined if decisions are allowed to stand despite the absence of what a reasonable observer might regard as an adequate hearing, rather than that injustice lies only in holding an individual board by a decision whose substantive reliability is cast in doubt by the existence of procedural irregularities.”**

I have considered the authorities submitted by the ex parte applicant and do find that **Timotheo Makenge -VS- Mununga Ngochi** is not relevant as the applicant has failed to establish that Mr. Maina Kerori exceeded his jurisdiction. This court being a superior court of record has power to quash a decision of an inferior court made in excess of jurisdiction but this should be established by the applicant.

In **Matiba -VS- Attorney General 1995 – 1998 I EA** relied upon by the ex parte applicant it was held that failure to allow a party to address the court before making orders was a fundamental breach of the rule of law that no man shall be condemned unless he has been given a fair opportunity to be heard which is a cardinal principle of Natural justice. Any order that flows from such a fundamental breach cannot be sustained.

In conclusion, this court finds that the ex parte applicant was not treated fairly by the respondent when he failed to hear him before making the order dated 6/9/2010 and therefore the Tribunal violated the rules of Natural Justice in condemning the ex parte applicant unheard. Upshot of the above is that an order of ***certiorari*** is hereby granted removing to this court the order of the B.P.R.T Case No.74 of 2010 for purposes of its being quashed and the same is hereby quashed. Costs to be paid to the ex parte applicant by the respondent and the interested party.

***Dated, signed and delivered at Nyeri this 14th day of May 2013.***

**A. OMBWAYO**

**JUDGE**