



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPL. JR. NO. 61 OF 2012

BETWEEN

REPUBLIC APPLICANT

AND

GATMA HOLDINGS LTD..... 1ST RESPONDENT

THE BUSINESS PREMISES

RENT TRIBUNAL..... 2ND RESPONDENT

EXPARTE

ROSE OBAGA *practicing as* OBAGA & CO. ADVOCATES

JUDGMENT

Introduction and background

1. The subject of this judgment is a decision of the Business Premises Rent Tribunal (BPRT) in *Miscellaneous Case No. 46 of 2009, Obaga & Company Advocates v Gatma Holdings Limited*. The BPRT is established under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya* (“the Act”).
2. The genesis of that case was a complaint lodged by the *ex-parte* applicant (“the applicant”) where she prayed that the landlord be restrained from unlawfully terminating, harassing, distressing or closing the premises pending the hearing and determination of the complaint. She also prayed for the Tribunal “*to declare the proclamation herein illegal and threats of distress by the landlord against the Tenant null and void for want of compliance with the provisions of this Act.*”
3. In her deposition before the Tribunal, the applicant alleged that she had not been served with the demand notice for rent arrears, that she did not owe any rent arrears for the last quarter, that the landlord had refused or neglected to issue her with receipts for rent paid and no notice had been issued in accordance with the Act to increase her rent. She further claimed that the distress was illegal as the amount claimed was increased rent contrary to the provisions of the Act as it

included Value Added Tax (VAT).

4. The landlord, who is the 1st respondent, opposed the complaint on the ground that the tenant was in arrears and that she had constantly defaulted in paying rent and it is on that basis that it was constrained to instruct auctioneers to levy distress.
5. From the depositions filed by the applicant, the BPRT held that the applicant was indeed a protected tenant and after hearing the complaint, it dismissed it with costs on 17th February 2012.

The application

6. In the Amended Notice of Motion dated 22nd November 2012, the applicant seeks the following orders;
 - a. *An order of certiorari do bring to the Honourable Court to have quashed all proceedings, findings and decision of 17th February 2012 in the Business Premises Rent Tribunal Miscellaneous Case no. 46 of 2009 (Obaga & Company Advocates v Gatma Holdings Limited).*
 - b. *An order of prohibition do prohibit the Respondents or their servants and/or agents or any public officer from implementing the decisions made on 17th February 2012 in Miscellaneous Case no. 46 of 2009 (Obaga & Company Advocates v Gatma Holdings Limited).*

Determination and disposition

7. It is now well settled that the court in an application for judicial review is concerned to see that the process of adjudication of rights by subordinate courts and tribunals is fair. The court is careful not to usurp the decision making of authorities constituted by the law (See ***R v Judicial Service Commission exp Pareno [2004] 1 KLR 203***). As regards the orders of certiorari and prohibition, the Court of Appeal in ***Republic v Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996*** explained that; “*the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.*”
8. It is not disputed that the BPRT had jurisdiction to deal with the complaint before it and what is sought to be quashed is the decision dismissing her complaint. The applicant bears the burden of establishing that she is entitled to orders of certiorari and prohibition.
9. The applicant argued that BRPT decision was in excess of jurisdiction as the landlord increased the rent without following statutory procedure contrary to **section 4(2)** of the Act and that it contravened the law by permitting the landlord to charge Value Added Tax as the same is not an implied term under the **Schedule (ix)** to the Act. The 1st respondent contends the issue before the tribunal was a complaint which was addressed on the facts. As regards the VAT, it was submitted that the obligation to pay tax is implied by statute.
10. These arguments call upon the court to examine the merits of the decision which are matters outside the scope of judicial review. Even if I were to take a favorable view of the applicant’s case, the application before the court is inadequate as the proceedings and decision of the Tribunal were not brought before the court to enable the court make an assessment of the learned Chairperson’s reasoning and basis for the decision to determine whether the prerogative orders should issue. The only evidence of the decision is the order stating that, “***The tenant’s complaint is dismissed with costs.***”
11. Since the proceedings and decision impugned are not before the court, no error has been

established and the only logical, consequence is that the Amended Notice of Motion dated 22nd November 2012 fails and is dismissed with costs to the 1st respondent.

DATED and **DELIVERED** at **NAIROBI** this 9th day of September 2013

D.S. MAJANJA

JUDGE

Ms Obaga instructed by Obaga and Company Advocates for the *ex-parte* applicant.

Mr Wachira instructed by Waiganjo Wachira and Company Advocates for the 1st respondent.