REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 67 OF 2012

REPUBLIC ..... APPLICANT

VERSUS

BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

AND

MARSHALLS (EAST AFRICA) LIMITED.....INTERESTED PARTY

EXPARTE

THE DAVIES MOTOR CORPORATION LIMITED

JUDGEMENT

INTRODUCTION

1. The applicant herein **The Davies Motor Corporation Limited**, commenced these judicial review proceedings by way of a Notice of Motion dated 7th March 2012 seeking the following orders:

1. **An Order of Certiorari do issue to remove into this Honourable Court and quash the decision and/or orders("the order") made by the Business Premises Rent Tribunal (Mochache D. Chairman) in Business Premises rent Tribunal Case No. 347 of 2010 on 27th January 2012 against the Applicant.**

2. **An Order of Mandamus do issue to compel the Business Premises Rent Tribunal ("the Respondent") to determine the Applicant's Notice of Motion application dated 5th April 2011, which was filed in Business Premises Rent tribunal Case No. 347 of 2010 on 6th April 2011.**

3. **The costs of this application be borne by the Respondent.**

EX PARTE APPLICANT'S CASE

2. The application is based on the following grounds:

1. **The Tribunal has no power to grant orders of injunction and as such, acted ultra vires in**

issuing the Order.

2. **The Tribunal consciously failed and/or refused to deal with and determine the Applicant's Notice of Motion applications dated 17th May 2010 and 5th April 2011 and the issues brought out through the Affidavits and the oral submissions presented by the Applicant, in a manner that was unreasonable, irrational, contrary to legitimate expectation and greatly prejudicial to the Applicant's right to a fair hearing and to fair and just administrative action. In particular the Tribunal failed to deal with and determine the following issues:**

    a) Whether the order made by the Tribunal on 7th May 2010 had been issued on the basis of intentional non-disclosure of material facts, dishonesty, false allegations and statements and gross misrepresentation of facts on Marshalls' part;

    b) Whether the Tribunal had the necessary jurisdiction to make the order that it made on 7th May 2010;

    c) Whether arrears of rent for the period between March 2010 and August 2010 (both months inclusive) were due from Marshalls to the Respondent and, if so, the amount that was due;

3. **By failing to deal with and determine the Applicant's Notice of Motion application dated 5th April 2011, the Tribunal unreasonably and unfairly failed and/or refused to exercise power donated to it by the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap.301 of the Laws of Kenya), which amounted to breach and/or abdication of duty on the Tribunal's part.**
4. **In granting the Order, the Tribunal failed and/or refused to abide by the law, in particular Articles 47 and 50 of the constitution of Kenya. The Order was, therefore, procedurally ultra vires.**
5. **The conduct of the Tribunal during the course of the hearing of the mater compromised the Applicant's right to a fair hearing enshrined under Article 50 (e) of the Constitution of Kenya as borne out by the chronology of events set out above. The violation of the Applicant's right to a fair hearing is exhibited more clearly by the fact that:**

    a) The matter was adjourned 9 (nine) times between the filing of the Complaint and the date when the Tribunal gave its ruling. All the aforementioned adjournments were at the instance of either Marshalls or the Tribunal;

    b) Whenever Marshalls sought an adjournment, the same was granted by the Tribunal;

    c) Despite the Tribunal granting Marshalls a "last and final adjournment" on 25th November 2010, it proceeded to grant Marshalls another "last adjournment" on 5th October 2011;

    d) When delivering the Ruling on 27th January 2012, the Tribunal acknowledged that there had been a long period of time between eh filing of the Complaint and the various interlocutory applications and the actual hearing of the matter;

    e) The Applicant's attempts to have the matter adjudicated upon expeditiously, through its Notice of Motion application dated 5th April 2011 were frustrated by the Tribunal, firstly by the said application being fixed for hearing on a date falling 1 month after the date on which it had been certified as urgent and, secondly, by the Tribunal consistently failing to sit on the date scheduled for hearing of the application;

f) When considered in totality, the Ruling delivered by the Tribunal on 27th January 2012 is not supported by the facts and the evidence presented before the Tribunal.

6. **In failing and/or refusing to address itself to the issues raised by the Applicant, the Tribunal acted unreasonably and the order was thus, procedurally ultra vires.**
7. **Given that the Order issued by the Tribunal is substantively and procedurally ultra vires, unreasonable, in error of law and contrary to the principles of natural justice it is illegal, null and void.**
8. **In any event, the Order is completely unreasonable and irrational as Marshalls' controlled tenancy came to an end on 31st August 2010 and Marshalls vacated the premises on 28th September 2011.**

3. The application is supported by a verifying affidavit sworn by **Richard James Davies**, a director of the applicant on 2nd March 2012.
4. According to the deponent, the Applicant is the owner of the building erected on the parcels of land known as L.R. Nos.37/686, 37/687 and 37/688, along Mombasa Road (**"the Property"**). Between 1st June 2007 and 31st August 2010, **Marshalls (East Africa) Limited**, the interested party herein occupied the office/showroom premises ("the Premises") on the lower ground, upper ground, ground and first floors of the Property under a controlled tenancy which controlled tenancy arose after a written lease made between the Applicant and the interested party expired and the interested party held over.
5. It is deposed that by a Lease dated 3rd December 2010, whose term commenced on 1st September 2010, the Applicant leased the Premises to the interested and a company known as **Foton East Africa Limited** ("Foton") jointly and severally for a period of 5 years and 3 months which lease was terminated and became void by reason of forfeiture on 4th January 2011 due to breach by the interested party and **Foton** of their covenants under the said Lease. Arising from the breach by the interested party and **Foton** of their covenants under the above-mentioned Lease and following the termination of the said Lease, there is a case between the Applicant on one hand and the interested party and **Foton** on the other hand pending for hearing and determination before the High Court (Civil Division) at Milimani Law Courts i.e. High Court Civil Case N. 16 of 2011 – **The Davies Motor Corporation Limited vs. Marshalls (East Africa) Limited and Foton East Africa Limited**. It is however deposed that the interested party voluntarily vacated the Premises on 28th September 2011 and by two Leases dated 11th July 2011 and 13th December 2011, the Applicant has leased the Premises to **Foton** alone. On 7th May 2010 the interested party filed a complaint ("the Complaint") at the Business Premises Rent Tribunal Case No.347 of 2010, together with a Certificate of Urgency, a Supporting Affidavit and Exhibits by which it sought an injunction to restrain and/or prohibit the Applicant from harassing it by refusing to accept rent or threatening to evict it or in any manner whatsoever from interfering with its quiet possession of the premises pending the hearing of the Complaint inter partes. Pursuant thereto, on 7th May 2010, the Tribunal certified the Complaint as urgent and issued an Ex parte injunction restraining and/or prohibiting the Applicant either by its servants and/or agents from harassing the interested party by refusing to accept rent or threatening to evict it or in any manner whatsoever from interfering with interested party's quiet possession of the premises pending the hearing of the Complaint inter partes which was fixed for 19th May 2010. On being served the applicant applied vide a Notice of Motion application dated 17th May 2010 for the setting aside the said injunctive orders on the ground that the ex parte injunctive order had been issued without jurisdiction and on the basis of intentional non-disclosure of material facts, dishonesty, false allegations and statements and gross misrepresentation of facts on the interested party's part. When both applications came up for hearing on 19th May 2010, the interested party applied for an adjournment purportedly to prepare and file a Supplementary Affidavit which application was granted and it was ordered that the *status quo* be maintained and hearing fixed for 14th July 2010. However the matter was not heard and was thereafter adjourned several times at the instance of the interested party and given the delay in the hearing of the matter and in view of its unfavourable financial position, the Applicant

decided file a Notice of Motion application dated 5th April 2011 by which it sought inter alia an order for immediate payment by Marshalls of Kshs.7,121,808/=, being arrears of rent for the period between Marsh 2010 and August 2010, and an order that the Tribunal should give an early hearing date for the matter.

6. After further adjournments on 5th October 2011, the matter was partly heard and during the proceedings on that day, the Tribunal dealt with a preliminary objection raised by Marshalls. After hearing and determining the preliminary objection, the Tribunal received the Applicant's oral submission on the Complaint and on the Applicant's Notice of Motion application dated 5th April 2011 and when the Applicant completed its oral submissions, the interested party applied for an adjournment to enable it call a witness to give oral evidence before the Tribunal and despite the Applicant's objection, the Tribunal granted the interested party what it termed as a "last adjournment" and the hearing was consequently adjourned to 23rd November 2011 on which date the interested party failed to present a witness before the Tribunal and sought leave to file written submissions which application was objected to and the objection upheld. However the Tribunal went on to grant the interested party leave to file written submissions on 1st December 2011 with corresponding leave to the applicant to respond thereto within 7 days and the ruling date set for 27th January 2012. The interested part however failed to file the said submissions. It was the applicant's case therefore that its submissions went unchallenged. On 27th January 2012, the Tribunal delivered a Ruling on the matter by which Ruling the Tribunal determined the Compliant in the interested party's favour and issued an order ("the Order") confirming the injunctive order that it had given on 7th May 2010.
7. On receipt of the complete proceedings the applicant found that the hearing of the case was adjourned 9 (nine) times between the filing of the Complaint and the date when the Tribunal gave its ruling and that all the aforementioned adjournments were at the instance of either the interested party or the Tribunal and despite the Tribunal granting interested party a "last and final adjournment" on 25th November 2010, it proceeded to grant the interested party another "last adjournment" on 5th October 2011; that oral submission made by the Applicant on 5th October 2011were not challenged or responded to in any way by the interested party; and that the oral submissions made by the Applicant on 5th October 2011 were in respect of the Complaint and the Applicant's Notice of Motion application dated 5th April 2011. According to the applicant, the Tribunal did not mention, deal with or determine the Applicant's Notice of Motion application dated 5th April 2011; save for mentioning that the Applicant filed the Notice of Motion application dated 17th May 2010 and awarding costs of the said application to Marshalls, the Tribunal did not deal with and determine the said application; the Tribunal acknowledged that there had been a long period of time between the filing of the Complaint and the various interlocutory applications and the actual hearing of the matter; the Tribunal indicated that it had "carefully considered the rival submission by the parties" whilst no such rival submission had actually been made; the Tribunal surprisingly stated that "it was not in dispute that the tenant (Marshalls) was in occupation of the premises and paying rent" whilst a clear issue for determination in the case was whether Marshalls had been paying rent and, if not, how much rent was in arrears; and that Tribunal surprisingly concluded that the Applicant's demand that Marshalls should either sign an agreed draft lease or vacate the Premises constituted a threat to evict the interested party.
8. In the applicant's view, the Tribunal consciously failed and/or refused to deal with and determine the Applicant's Notice of Motion applications dated 17th May 2010 and 5th April 2011 and the issues brought out through the Affidavits and the oral submissions presented by the Applicant, in a manner that was unreasonable, irrational, contrary to legitimate expectation and greatly prejudicial to the Applicant's right to a fair hearing and to fair and just administrative action and in particular failed to determine the following issues: Whether the order made by the Tribunal on 7th May 2010 had been issued on the basis of intentional non-disclosure of material facts, dishonesty, false allegations and statements and gross misrepresentation of facts on Marshalls' part; whether the Tribunal had the necessary jurisdiction to make the order that it made on 7th May 2010; and whether arrears of rent for the period between March 2010 and August 2010 (both months inclusive) were due form the interest party to the Respondent and, if so, the amount that was due.
9. It is therefore the applicant's position that the Tribunal has no power to grant orders of injunction

and as such, it acted ultra vires in issuing the Order; that in granting the Order, the Tribunal failed and/or refused to abide by the law, in particular Articles 47 and 50 of the Constitution of Kenya, meaning that the Order was procedurally ultra vires; that failing to deal with and determine the Applicant's Notice of Motion application dated 5th April 2011, the Tribunal unreasonably and unfairly failed and/or refused to exercise power donated to it by the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*** (Cap.301 of the Laws of Kenya), (hereinafter referred to as the Act) which amounted to breach and/or abdication of duty on the Tribunal's part; that the Order is completely unreasonable and irrational as the interested party's controlled tenancy came to an end on 3st August 2010 it vacated the premises voluntarily on 28th September 2011; that in failing and/or refusing to address itself to the issues raised by the Applicant, the Tribunal acted unreasonably and the Order was thus, procedurally ultra vires; and that given that the Order issued by the Tribunal is substantively and procedurally ultra vires, unreasonable, in error of law and contrary to the principles of natural justice it is illegal, null and void.

10. It is further contended that if this Honourable Court does not deal with the ultra vires, unlawful and illegal Order of the Tribunal, the interested party will use it to claim an entitlement to the Property to the detriment of the Applicant. The applicants states that it has locus standi in this matter as it is directly affected by the Order and the failure and/or refusal by the Tribunal to determine the Notice of Motion application dated 5th April 2011 and that its only remedy lies in this Honourable Court to exercise its inherent and statutory power to intervene and deal with the ultra vires, unlawful, unreasonable, irrational and illegal decision of the Tribunal and the failure and/or refusal by the Tribunal to determine the Notice of Motion application dated 5th April 2011.

RESPONDENTS' CASE

11. In opposition to the application the Respondent filed the following grounds of opposition:

1. **The Respondent has and had the requisite jurisdiction to hear, determine the matter in question and grant the *exparte* injunctive orders as it did and the Applicant has not demonstrated any case as to why an order of certiorari should be issued as against the respondent's decision.**

2. **The Respondent is *functus officio* as it has already heard and determined the Applicant's applications dated 17/5/2010 and 5/4/2011 as clearly evidenced in the Applicant's pleadings, the Interested Party's Replying affidavit and delivered its ruling on 27/1/2012 and cannot re-hear and/or re-open the matter hence the order of mandamus sought to compel the respondent to hear and determine the Applicant's Application dated 5/4/2011 is not available in the instant case.**

3. **The Judicial review proceedings purely deal with the procedure and process of decision making and not the merits and or/substance of the case.**

INTERESTED PARTY'S CASE

12. On the part of the interested party it filed a replying affidavit sworn by Manish Nair, its director on 10th April 2012. According to the deponent, the lease between the interested party and the applicant did not come to an end as alleged by the applicant since the Tribunal issued orders prohibiting the applicant from evicting the interested party. In his view the matter before the Tribunal was expeditiously heard despite the myriad applications filed by the applicant and that the Tribunal was accommodative to all the parties and gave cogent reasons for the dates it was not sitting. Contrary to the allegations of the ex parte applicant the interested party did file written submissions on 19th January 2012. In his view the Tribunal dealt with all the issues raised by the pleadings and properly found that the interested party was paying rent and that the applicant had threatened to evict the interested party and allowed its reference with costs. It is therefore his view that the Tribunal's decision was not irrational or contrary to legitimate expectations as alleged and that the interested party was not in arrears of rent as found by the Tribunal.

13. It is contended based on legal advice from the interested party's advocate that the Tribunal had jurisdiction to give the orders it granted; that the Tribunal acted intra vires; that the Tribunal was within the provisions of the Act and did not abdicate its duty; that the interested party did not vacate the premises; that the Tribunal gave all the parties the opportunity to argue their respective positions without any hindrance; and that the order of the Tribunal was lawful and there was no error of law hence the Motion ought to be dismissed.

APPLICANT'S REJOINDER

14. In a rejoinder the applicant filed a further affidavit sworn by the said Richard James Davies on 2nd May 2012 in which he reiterated that the tenancy between the applicant and the respondent having come to an end the Tribunal had no jurisdiction to entertain the mater and further that it had no jurisdiction to grant and confirm the injunction. It is deposed that the written submissions alluded to by the interested party have never been served on the applicant and were not filed in accordance with the directions of the Tribunal hence the applicant had no opportunity to respond thereto. It was deposed that the interested was always in rent arrears and by the time the tenancy came to an end on 31st August 2010, the interested party owed the applicant Kshs 11,621,808/= in arrears and still owes the applicant the sum of Kshs 5,371,808/= in the same. It was deposed that these matters were never considered by the Tribunal.

EX PARTE APPLICANT'S SUBMISSIONS

15. On behalf of the ex parte applicants it is submitted at the time when the impugned order was issued there was no controlled tenancy between the ex parte applicant and the interested party in respect of the premises hence the respondent had no jurisdiction to issue any order to regulate the actions or conduct of the ex parte applicant vis-à-vis the interested party. Since the Respondent only has jurisdiction to deal with disputes between "landlords" and "tenants" it was paramount for the Respondent to first direct itself to the issue of the existence of "controlled tenancy" before it could assume jurisdiction to make the order. It is further submitted that the Respondent had no jurisdiction to issue injunctive orders and reliance for this submissions is placed on **Caledonia Supermarket Ltd vs. Kenya National Examinations Council [2000] 2 EA 357** and **Tiwi Beach Hotel Ltd vs. Julian Ulrike Stamn [1990] 2 KAR 189**. It was submitted further that since the Tribunal Case arose from a "complaint" made under section 12(4) of the Act the Respondent had no power to issue an injunctive order since the said section permits the Tribunal to investigate minor matters only but does not give the Respondent the power to issue injunctive orders. In support of this contention the applicant relied on **Re Hebtulla Properties Ltd [1979] KLR 96**; **Pritam vs. Ratilal and Another [1972] EA 560**; **Choitram vs. Mystery Model Hair Saloon [1972] EA 525** and **The Republic vs. Nairobi Business Premises Rent Tribunal and Others ex parte Karasha [1979] KLR 147**.
16. It is further submitted that the Respondent failed to deal with the issues raised in the applicant's Notice of Motion dated 17th May 2010 and 5th April 2011 which omission was completely unreasonable and irrational. According to the applicant some findings by the Respondent were perverse and illogical and were not based on any law or fact which demonstrate unreasonableness and irrationality in the manner in which the Tribunal reached its decision. As the interested party had already voluntarily vacated the premises it is submitted that the order itself was irrational and unreasonable since it purported to grant the interested party an interests therein. In support of its contention that the Respondent's decision was irrational and unreasonable, the applicant relied on ***Judicial Review Handbook*** by Michael Fordham; **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] 2 All ER 680** and **Council of Civil Service Union vs. Minister for Civil Service [1984] 3 All ER 935**.
17. It is submitted that as the applicant had filed an application dated 5th April 2011 seeking an order for payment of arrears of rent by the interested party, the failure to deal with the same constituted a breach of duty. In support of this submission the applicant relies on ***Judicial Review Handbook*** by Michael Fordham; **Padfield vs. Minister of Agriculture Fisheries & Food [1968] AC 997, 1039 E-F** and **Singh (Pargan) vs. Secretary of State for the Home Department [1992] 1 WLR 2052, 1056 F-G** as well as Articles 10(2)(c), 47, 50 and 159 of the Constitution. According to the

applicant the manner in which the proceedings were conducted before the Tribunal amounted to the violation of the applicant's right to fair hearing hence based on **Republic vs. Commissioner of Lands & Another ex parte Coastal Aquaculture Ltd [2000] KLR 553**, **Republic vs. Minister for Local Government & Another x parte Mwahima [2002] 2 KLR 557** and **Kenya National Examinations Council vs. Republic ex parte Gathenji and Others [1997] eKLR** an order of certiorari ought to be granted. It is further contended that mandamus similarly ought to be granted based on **Kenya National Examinations Council vs. Republic ex parte Gathenji and Others** (supra), **Republic vs. Kenya Revenue Authority, ex parte LAB International Kenya Limited HCMA No. 82 of 2010** and **Padfield vs. Minister of Agriculture Fisheries & Food** (supra).

RESPONDENT'S SUBMISSIONS

18. On behalf of the Respondent, it is submitted that since at the time the proceedings before the Tribunal was instituted the Tribunal had jurisdiction, it had the powers to entertain the dispute. With respect to whether the Tribunal had the powers to issue the injunctive orders it is submitted that to determine this it is important to look at the purpose of the law which is to ensure the protection of tenants of controlled tenancies from eviction or exploitation and section 12 of the Act gives the Tribunal the powers to do all things and give all orders as it deems fit. It is submitted that there would be no purpose of the Tribunal entertaining and investigating a complaint if it cannot issue orders preserving status quo pending the hearing and determination of the suit since the same would be a futile exercise and waste of judicial time as its determination may be overtaken by events. Therefore relying on **Republic vs. The Chairman, Business Premises Rent Tribunal ex parte Velji Premchand Shah [2012] eKLR**, **Republic vs. The Chairman, Business Premises Rent Tribunal ex parte Kenya Safari Lodges & Hotels Limited [2012] eKLR** and **Republic vs. The Chairman Business Premises Rent Tribunal & 2 Others ex parte Piedmont Investment Limited [2012] eKLR**, it is submitted that the Tribunal can grant preservatory orders.
19. On the efficacy of mandamus, it is submitted that the same is meant to compel performance of a certain duty and in the instant case the applicant is seeking an order compelling the Respondent to determine its application dated 5th April 2011 which application was from the ruling dated 27th January 2012 heard and to grant the orders sought would mean compelling the Respondent to re-hear the same a decision which ought not to be made since the Court is concerned with the decision-making process and not the merits thereof. Based on **Republic vs. Commission of Customs Services ex parte Africa K-Link International Ltd [2-12] eKLR**, it is submitted that a party aggrieved by a decision made may only apply for review aor appeal against the same.
20. According to the Respondent based on **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209**, ***Halsbury's Laws of England*** 4th Edition Vol. II page 805 paragraph 1508 and **Republic vs. Business Premises Rent Restriction Tribunal ex parte Jubilee Insurance Company of Kenya Ltd [2012] eKLR**, the grant of judicial review orders being discretionary the Court can even where the orders are justified refuse to grant the same where the remedy is not efficacious as in this case where it is alleged the interested party has moved from the disputed premises.

INTERESTED PARTY'S SUBMISSIONS

21. According to the interested party section 12(4) of the Act is wide enough to clothe the Tribunal to make such order as it deems fit and the Act does not specifically exclude interim injunctive relief since it would be an exercise in futility for the Act to provide the Tribunal with investigatory powers in a vacuum and at the same time rule out any relief corresponding to its findings upon investigation. It is submitted that at the time the order of 7th May 2010 was granted the Tribunal did have the jurisdiction since at the time of filing of the Complaint and the Notice of Motion seeing injunctive orders on 7th May 2010 the interested party was a protected tenant and that this fact is supported by the affidavit sworn on behalf of the applicant where it is deposed that the interested party's tenancy came to an end on 31st August 2010 which the applicant based on the

fact following extensive negotiations between the applicant, the interested party and **Foton** a lease dated 3rd December 2010 was granted by the applicant jointly and severally to he interested party and to **Foton** for 5 years and 3 months commencing from 1st September 2010 which lease was purportedly terminated by the applicant on 4th January 2011. Thereafter the applicant entered into leases dated 11th July 2011 and 13th December 2011 by which the applicant leased to **Foton** parts of the premises occupied by the interested party under its controlled tenancy and the lease dated 2nd December 2010 while the interested party remained and continues in possession of parts of the applicant's building not leased to **Foton** under protected tenancy created by holding over. It is submitted that since it is contended by the applicant that the lease dated 3rd January 2010 was terminated on 4th January 2011, thereafter a new controlled tenancy was brought about by virtue of the interested party's holding over hence the Tribunal had jurisdiction to grant the orders it granted.

22. On Article 47 of the Constitution, it is submitted that since the Tribunal was exercising judicial powers as opposed to administrative powers, the applicant's right to fair administrative action has not been contravened by the Tribunal. The interested party contends that the applicant's Notice of Motion dated 17th May 2010 seeking to set aside the injunctive order granted on 7th May 2010 was considered by the Tribunal in the course of inter partes hearing on 4th November 2011 and was rejected since by its ruling dated 27th January 2012 the Tribunal awarded the costs of the application dated 17th May 2010 to the interested party.

DETERMINATION

23. I have considered the foregoing.
24. Before going into the merits of the application it is important to recap the principles that guide judicial review applications.
25. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal expressed itself as follows:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

26. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60;*** R vs. Secretary of State for Education and Science *ex parte* Avon County Council (1991) 1 All ER 282, at P. 285; **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

27. It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review hence the Court in judicial review application would not have jurisdiction to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.
28. 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. Judicial review being only concerned with the reviewing of the decision making process the evidence is found in the affidavits filed in support of the application. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995.**
29. However, the mere fact that an applicant merits the grant of judicial review orders does not necessarily follow that the said relief would automatically be granted. The decision whether or not to grant judicial review orders is an exercise of discretion. As stated in ***Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508***, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. It must be remembered that the decision whether or not to grant judicial review remedies is an exercise of discretion and the conduct of the applicant may deny him favourable exercise of discretion. As was held in **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 Of 2000** the court exercises a discretionary jurisdiction in granting such orders and can withhold the gravity of the order where among other reasons there has been delay, where the public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.
30. Back to the case at hand, it is alleged that the Respondent had no jurisdiction to grant the orders it granted. This attack is two pronged. First it is contended that since there was no controlled tenancy in existence between the applicant and the interested party the Respondent had no jurisdiction to entertain the dispute. It is trite that for the Respondent to be seised of a matter there must be in existence a relationship of landlord and tenant. The Tribunal's jurisdiction is circumscribed in section 12 of the ***Landlord and Tenant (shops, Hotels and Catering Establishments) Act*** under which subrule (4) provides:

(4) In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit…….. (emphasis mine)

31. One may be tempted to argue that the said provision gives the Tribunal the powers to deal with any dispute and grant any appropriate orders. However, **Simpson and Chesoni, JJ** (as they were) in **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195** dealt *in extenso* with the provisions of section 12 of the said Act. **Simpson, J** held inter alia as follows:

"Under section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act the tribunal's powers are restricted to the "area of its jurisdiction", that is the determination of references made to it under section 6. These can be made only by a receiving party, that is, a tenant, who wishes to oppose a notice of termination or alteration of the terms or conditions of his tenancy or a landlord who wishes to oppose a notice by a tenant seeking re-assessment of rent or the alteration of any terms and conditions of the tenancy. It has power to do "all things which it is required or empowered to do" under the Act. This may be tautological, but it must refer to section 5(3) and 6, the provisions of which are procedural only, and to the provisions of section 9, which set out what the tribunal, can do on a reference. In addition to these powers the tribunal has the specific powers contained in paragraphs (a) to (n) of section 12(1). The expression "all things", being qualified by the words "which it is required or empowered to do

by or under the provisions of this Act", no room is left for the application of the *ejusdem generis* rule…… The specific powers include the powers to make an order for the recovery of possession from a tenant, or indeed from any person in occupation. Such an order would be an order made on an application of the landlord. No corresponding power is given to make an order on the application of a tenant who has been forcibly dispossessed by a landlord. The powers specifically conferred can be exercised on a reference, which is defined in section 2 as "a reference to a tribunal under section 6 of this Act". In addition the tribunal may investigate any complaint made by a landlord or tenant. A clear distinction is made throughout the Act between a "reference" and a "complaint"….. A party to a reference has a right of appeal to the High Court against any determination or order made therein, but the maker of a mere complaint has no such right. The word "complaint" is referable only to minor matters."

32. **Chesoni, J** on his part expressed himself as follows:

> **"The tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied…. The complaint that the applicant has forcibly taken possession of the interested party's premises is precise and can neither be narrowed nor elaborated. It is not a minor complaint of obstruction, or access, or harassment by the applicant. It is a complaint of wrongful or forcible possession by the applicant; nothing more and nothing less. The interested party might have been far from willing to surrender possession, but that is beside the point…. The powers of the tribunal are contained in section 12(1) of the Act and anything not spelled out to be done by the tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under section 12(1)(a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the tribunal is to hear and determine references made to it under section 6 of the Act. Section 9 of the Act does not give any powers to the tribunal, but merely states what the tribunal may do within its area of jurisdiction…… It would be erroneous to think that section 12(4) confers on the tribunal any extra jurisdiction to that given by and under the Act elsewhere. For example it is not within the tribunal's jurisdiction to deal with criminal acts committed in relation to any tenancy nor is it within its jurisdiction to entertain an action for damages for trespass. These are matters for the courts and the tribunal cannot by way of a complaint to it by the landlord or tenant purport to deal with such matters. Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy…. The Act uses the words "any complaint" and the only qualification is that it must be "relating to a controlled tenancy"….. The "recovery of possession" under section 12(1)(e) of the Act mean and means, recovery of possession by, and not from the landlord. The legislature deemed in necessary to empower the tribunal to order recovery of possession by the landlord. If the reverse had been intended it would have been expressly provided since the intention of the Act is to protect tenants. It is therefore clear that Parliament never intended that the tribunal should have power to order recovery of possession by a tenant where such possession has been seized by a landlord and it never gave that power to the tribunal. That power cannot be implied. In the premises "forcible taking of possession" is not a matter within the area of jurisdiction of a tribunal and that being the case, the tribunal cannot investigate any complaint about forcible possession of the premises by a landlord, such matter being for the courts. The complaint was outside the area of jurisdiction of the tribunal and jurisdiction was wanting."**

33. In **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981 Sachdeva & Brar, JJ** stated:

> **"The board has jurisdiction to hear a claim for the recovery of key-money paid contrary to the Act for the reason that a claim for recovery of money illegally received by a landlord**

under the Act is a claim arising under the Act. In testing whether a statute has conferred jurisdiction on an inferior court or a tribunal such as Rent Control Board, the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication……It must however be borne in mind that the Tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute……..Where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature……It is recognised that each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration."

34. On the issue of jurisdiction of the Tribunal, the Court of Appeal in **Jitendra Mathurdas Kanabar & 2 Others vs. Fish & Meat Ltd. Civil Appeal No. 267 of 1996** held that once a reference has not been made to the tribunal and the tenancy notice has taken effect the landlord/tenant relationship comes to an end and there is no longer controlled tenancy without which a tribunal has no jurisdiction and in those circumstances the landlord has to come to Court to enforce his rights to his property.
35. **Madan, J** (as he then was) in **Pritam vs. Ratilal and Another Nairobi HCCC No. 1499 of 1970 [1972] EA 560** expressed himself as follows:

"There is no doubt that the decisions of statutory tribunals are subject to review by the High Court and also that the High Court has jurisdiction to review a decision of the Business Premises Rent Tribunal which is a statutory tribunal. The court may investigate whether the tribunal acted in excess of its jurisdiction. It must be a rare case when the court will substitute itself to exercise the powers conferred upon a statutory tribunal but in a proper case the court will not hesitate to inquire whether the tribunal acted properly and within the framework of its statutory powers, and set right that which ought to be set right….. As stated in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act itself, it is an Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto. The scheme of this special legislation is to provide extra and special protection for tenants. A special class of tenants is created. Therefore the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by a tribunal; otherwise the tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it, the tribunal has no jurisdiction."

36. Therefore if there was no landlord and tenant relationship between the applicant and the interested party the Respondent had no jurisdiction to entertain the dispute. From the record there is no dispute that the complaint before the Respondent was filed on 7th May 2010. It is the applicant's case that between 1st June 2007 and 31st August 2010, the interested party occupied the suit premises on the lower, upper ground, ground and first floors of the property under a controlled tenancy arising from a written lease made between the applicant and the interested party which had expired and the interested party held over. It is therefore clear that as at the time of the institution of the complaint on 7th May 2010, going by the applicant's own version, there existed a controlled tenancy between the applicant and the interested party and the injunction which was granted on 7th May 2010 cannot be challenged on the ground of non-existence of tenancy relationship between the applicant and the interested party.
37. It is however contended that there was a lease between the applicant, the interested party and **Foton** dated 3rd December 2010 effective from 1st September 2010 which lease was however terminated on 4th January 2011. However according to the applicant the interested party only vacated the premises voluntarily on 28th September 2011. According to the interested party after 4th January 2011 he continued and continues in occupation of part of the premises as a holding

over tenant hence his tenancy was controlled. Whether this version was correct or not is a matter of fact and since those facts are disputed this Court is not the right forum to resolve the said issue as the same would require viva voce evidence to be taken a jurisdiction which belongs to the ordinary civil courts.

38. The final decision was however delivered on 27th January 2012. According to the applicants the interested party had voluntarily vacated the premises. The interested party's position is that it is still in occupation of the said premises. If at the time of the delivery of its decision there was nolonger a landlord-tenant relationship between the applicant and the interested party then it would follow that the Respondent ceased to have any jurisdiction in the matter and as soon as it became known that it had no jurisdiction it ought to have downed its tools. As was stated by **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**:

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

39. However the issue whether or not the interested party was still in possession/occupation of the premises was a matter of fact whose finding was prerequisite to a determination of whether or not there was a landlord-tenant relationship and hence whether the Respondent had jurisdiction. Without a determination of that fact, this Court cannot assume that the Tribunal would have found it had no jurisdiction and it is not for this Court to make a finding on that disputed issue of fact. Accordingly I am unable to find that the Respondent had no jurisdiction to entertain the dispute based on non-existence of a landlord-tenant relationship. As was stated in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited** (supra) in which **Nyarangi, JA** while citing ***Words and Phrases Legally Defined*** – Vol. 3: I-N page 13 held:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist."

40. The second issue taken on jurisdiction was based on the fact that the Respondent had no jurisdiction to grant an order of injunction. That the order of 7th May 2010 was an order of injunction is not in doubt. That was the order which was confirmed in a short ruling delivered on 27th January 2012.

41. The issue for determination is therefore whether the Respondent had jurisdiction to grant an order of injunction. On my part I agree that the spirit of the Act which is to ensure the protection of tenants of controlled tenancies from eviction or exploitation would be rendered nugatory if the Tribunal was not similarly granted the jurisdiction to preserve the status quo between the landlord and the tenant pending the determination of the dispute before it. It is however not for this Court to grant to the Tribunal powers which it does not have. As was held by the Court of Appeal in **Italframe Ltd vs. Mediterranean Shipping Co. [1986] KLR 54; [1986-1989] EA 174:**

"It is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by legislature, and it is not the function of the Court to repair them. Thus while terms can be introduced into a statute to

effect to its clear intention by remedying mere defects of language and to correct obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission… It is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out what Parliament intended. It is not the function of the Courts to repair the blunders that are to be found in legislation. They must be corrected by the legislature."

42. Therefore whereas it is my view that by not expressly granting the Tribunal the power to grant orders of injunction Parliament made a blunder since it rendered the intention and objective of the whole Act a mirage, based on the authorities from the Court of Appeal I am unable to find that the Tribunal is empowered under section 12 of the Act to grant orders of injunction.
43. In **Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No. 205 of 1995,** the Court of Appeal held that a controlled tenant confronted with an illegal threat of forcible eviction cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. Similar holdings were made in **Caledonia Supermarket Ltd vs. Kenya National Examinations Council** (supra) and **Tiwi Beach Hotel Ltd vs. Julian Ulrike Stamn** (supra). It follows that by granting orders of injunction the Respondent acted outside its mandate. The respondent and interested party appear to appreciate this decision but contend that there are decisions of the High Court to the contrary. With due respect the decisions of the High Court cannot override the decision of the Court of Appeal and unless it is shown that the decision of the Court of Appeal was made *per incurium* or that the facts are distinguishable, the Court of Appeal decision is binding on this Court despite the misgivings this Court might have with respect thereof. As was stated by **Omolo, JA** in **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 Others Civil Appeal No. 238 of 2003**:

"The learned judge of the High Court had no jurisdiction to over-rule a decision of the Court of Appeal even if she disagrees with the decision and the comments in her judgement must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. Like all other judges in her position, under the doctrine of precedent, she is bound by the decision of the Court of Appeal even if she may not approve of a particular decision and any attempts to over-rule or side-step the court's decisions can only result in unnecessary costs to the parties involved in the litigation."

44. This position was restated in **Cassell & Co. Ltd vs. Broome & Another [1972] AC 1072** in which the Court held:

"The fact is and I hope it will never be necessary to say so again, that in the hierarchical system of the courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of higher tiers. Where decisions manifestly conflict, the decision in *Young vs. Bristol Aeroplane Co. Ltd [1944] KB 718* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously".

45. The rationale for this is to be found in **Musinga, J's** judgement (as he then was) in **Rift Valley Sports Club vs. Patrick James Ocholla [2005] eKLR** in which the learned Judge expressed himself as follows:

"The learned magistrate trashed such a forceful decision of the Court of Appeal by failing to give it any consideration at all and proceeded to grant an injunction in a ruling which was devoid of any legal reasoning. A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of *stare decisis* is very important in our judicial system and must be respected as much as possible

otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five judge binding decision without citing any reasons for doing so."

46. One cannot bring this discussion to an end without referring to the wise words of **Sir Charles Newbold** in the case of **Dodhia vs. National & Grindlays Bank Limited and Another [1970] EA 195.** The learned President of the East African Court of Appeal had this to say:

"I accept that a system of law requires a considerable degree of certainty and uniformity and that such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision".

47. It is further contended that the applicant's applications were never dealt with. One of these applications was the application dated 17th May 2010. In the ruling dated 27th January 2012, whereas it is true that the said application was not dealt with on merits, the learned Chairperson of the Tribunal awarded the costs of that application to the interested party. By confirming the orders made on 17th May 2010, the Tribunal in effect disallowed the application seeking to set aside the said orders since it could not arrive at any other decision. I must have bring to attention of the parties the provisions of explanation 5 to section 7 of the ***Civil Procedure Act*** which provides:

Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

48. As to whether or not the Respondent was right in declining to grant the orders sought by the applicant is a matter which goes to the merits and not a matter for this Court.
49. It is also contended that the interested party was granted several adjournments hence there was no fair trial. A decision whether or not to grant an adjournment is an exercise of discretion. Whether or not the Court was justified in granting the adjournment in my view is a matter which ought to be a subject of an appeal rather than judicial review. This Court would be sitting on appeal against the decision of the Tribunal if it were to find that the Respondent granted unmerited adjournment to the interested party yet it is no part of the purpose of judicial review to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question and unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. In my view, mere allegation of sufficiency of evidence will not suffice for the purposes of judicial review. Similarly, the mere fact that the evidence favourable to a party was not considered will not be aground for quashing a decision if there was material on record which would have warranted a finding to the contrary.
50. Having found that the Respondent had no jurisdiction to grant the injunctive orders, I find that the applicant's Motion is merited.
51. That however is not the end of the matter. It is the applicant's case that the interested party voluntarily vacated the suit premises on 28th September 2012. If that position is correct, then it would follow that the Respondent nolonger has the jurisdiction to entertain the dispute between the applicant and the interested party. As was held in **Anthony John Dickson & Others vs. Municipal Council of Mombasa** (supra) the court exercises a discretionary jurisdiction in granting such orders and can withhold the gravity of the order where among other reasons the remedy is not necessary or where the object for which application is made has already been realised. Where therefore the order sought has already been overtaken by events there would be no use granting the same. It is for this reason that I decline to grant the order of mandamus as sought in prayer 2 of the Motion herein. I however grant the order of certiorari prayed therein and issue an Order of Certiorari removing into this Court for the purposes of being quashed the decision and/or orders made by the Business Premises Rent Tribunal (**Mochache D. Chairman**) in Business Premises Rent Tribunal Case No. 347 of 2010 on 27th January 2012 against the Applicant which order is hereby quashed.
52. The costs of this application are granted to the applicant against the interested party.
53. Before I conclude, I strongly recommend to the Hon. Attorney General to expeditiously introduce

the necessary amendments to the Act to expressly empower the Tribunal to grant orders of injunction in order that the objectives of the Act may not be rendered illusory.

54. Orders accordingly.

Dated at Nairobi this 26th day of November 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Omondi for the applicant

Mr Kalove for the Interested Party