



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT

MISCELLANEOUS APPLICATION 242 OF 2008

IN THE MATTER OF BUSINESS PREMISES RENT TRIBUNAL CASE NO 216 OF 2008

AND

**IN THE MATTER OF THE ORDERS OF THE BUSINESS PREMISES RENT TRIBUNAL
(MOHACHE D CHAIRMAN) MADE ON 23RD APRIL, 2008**

AND

**IN THE MATTER OF AN APPLICATION BY JUBILEE INSURANCE COMPANY OF KENYA
LIMITED FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

REPUBLICAPPLICANT

VERSUS

BUSINESS PREMISES RENT TRIBUNALRESPONDENT

EX-PARTE

JUBILEE INSURANCE COMPANY OF KENYA LTD

JUDGEMENT

Through a notice of motion dated 6th May, 2008 and brought under Section 9 of the Law reform Act and Order LIII Rule 3(1) of the Civil Procedure Rules, the applicant Jubilee Insurance company of Kenya Limited (hereinafter simply referred to as Jubilee) prayed for orders as follows:-

- 1. An order of certiorari do issue to remove into this Honourable Court and quash Business Premises Rent Tribunal Case No. 216 of 2008 and all references and interlocutory applications filed therein (together “the proceedings”) by Super Cosmetics Limited.**
- 2. An order of Certiorari do issue to remove into this Honourable Court and quash the orders (“the order”) made by the Business Premises Rent Tribunal (Mochache D, Chairman) on 23rd April, 2008 against the Applicant.**
- 3. An order of Prohibition do issue to prohibit the Business Premises Rent Tribunal from further**

entertaining, handling, hearing or determining the proceedings.

4. The costs of this application be provided for.

The application is supported by grounds on its face, a statement of facts dated 29th April, 2008, a verifying affidavit sworn on 29th April, 2008 and annexures thereto.

Briefly the facts of the case are that Jubilee is the owner of a building known as Jubilee Insurance Exchange situate on L.R. No. 209/4914 which is located between Kaunda Street and Mama Ngina Street in Nairobi. By a letter dated 11th July, 2002 Jubilee offered to lease Shop Number 1 in the said building to one Mohamed Fazal Virani for a period of 5 years and 7 months with effect from 1st September, 2002. Whether the offer was accepted and a lease signed is a matter of disagreement. Mr. Mohamed Fazal Virani who had in communication to Jubilee indicated that he was a director of a company called Super Cosmetic Limited (hereinafter simply referred to as the company) moved into the premises. The company is the interested party in these proceedings. On 10th January, 2008 Jubilee served Mohamed Virani with a notice that the lease was coming to an end. Mr. Virani insisted in remaining in the premises despite the expiry of the lease. Seeing that Jubilee was not interested in renewing the lease having sealed all entries to the premises the company moved to the High Court at Nairobi vide Civil Suit No. 115 of 2008 seeking orders to compel Jubilee to re-open the shop and orders restraining it from entering the shop and removing the company's goods from therein. As the decision of the High Court was being awaited, the company moved to the Business Premises Rent Tribunal (hereinafter simply referred to as the Tribunal) on 23rd April, 2008 and obtained orders requiring Jubilee to re-open the shop premises and restraining it from seeking to terminate or interfere with the company's tenancy in the premises. The Tribunal is the respondent in these proceedings.

Now Jubilee seeks to have the proceedings before the Tribunal quashed on the grounds that:-

- 1. There was no existing tenancy nor a controlled tenancy between Jubilee and the company and the Tribunal therefore did not have jurisdiction to handle the matter and therefore acted ultra vires, irrationally and illegally; and**
- 2. The Tribunal acted erroneously, unfairly, injudiciously, irrationally and in breach of the rules of natural justice by making ex-parte orders that are not limited in time as required by law,**

The company opposed the application through a replying affidavit sworn by Mohamed Fazal Virani on 11th June, 2008. In the replying affidavit the deponent introduces himself as one of the directors of the company. The company admits that there was no signed lease between it and Jubilee. The company asserts that the tribunal had jurisdiction to entertain the matter.

In my understanding the two issues to be addressed by the court are:-

- (a) Whether Jubilee was given a hearing by the Tribunal; and
- (b) Whether the Tribunal had jurisdiction to entertain the matter.

It has been argued by Jubilee that the Tribunal decided the matter ex-parte thereby denying it a hearing. It is not disputed that the orders that Jubilee seeks to quash were issued ex-parte. I have looked at the notice of motion filed on 23rd April, 2008 in Business Rent Tribunal at Nairobi in Case No. 216 of 2008 and find that the same was praying for conservatory orders. The order issued on 23rd April, 2008 by Mochache D. the Chairman of the Tribunal clearly indicated that the application was to be heard inter-partes on 26th May, 2008. Jubilee cannot therefore be heard to say that it was not given a hearing before the orders were issued. It was never denied a hearing because a date had been fixed for the hearing of the matter inter-partes. This particular ground in support of its application therefore fails.

The only issue that remains to be addressed is whether the Tribunal had jurisdiction to entertain the matter. I think the best place to start is by reminding ourselves about the scope of judicial review. In the case of **REPUBLIC VS. ISAAC THEURI GITHAE & ANOTHER (2007) eKLR** at page 5 the Court of Appeal (S.E.O. Bosire JJA, E.O. O’kubasu JJA & W.S. Deverell JJA) stated that:-

“The purpose and purview of judicial review proceedings is confined to the decision making process. The court in an application for an order of judicial review is not concerned with the merits or otherwise of the decision or threatened action. It is intended to ensure that an inferior tribunal or authority he had been subjected to has given the individual affected fair treatment. The authority is the one mandated to make a decision on the merits and the court should not attempt to substitute its decision or opinion in place of that of the tribunal or authority constituted by the law to decide the matters in issue.

The court intervenes where the authority has acted in excess of its jurisdiction or without jurisdiction, where there is an error of law on the face of the record, where it has failed to observe rules of natural justice or where the authority has acted unreasonably. In those circumstances the court will call for the decision for purposes of quashing it by an order of certiorari. But normally where there is a threatened breach of any of the foregoing principles the court will issue an order of prohibition to prevent the threatened breach.”

Looking at the facts surrounding this case, it is clear that the company did not act in good faith by dashing to the Tribunal when the High Court was already seized of the matter vide Nairobi H.C. Civil suit No. 115 of 2008. Such action resulted in a multiplicity of suits involving the same parties on the same issues. It is not good policy to have several suits involving the same parties over the same issues.

Did the Tribunal have jurisdiction to entertain the matter? It is agreed that the Tribunal was created by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 to deal with controlled tenancies. Section 2(a) of the said Act defines a controlled tenancy as:-

“a tenancy of a shop, hotel or catering establishment:-

- (a) which had not been reduced into writing; or**
- (b) which has been reduced into writing and which -**
 - (i) is for a period not exceeding five years; or**
 - (ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or**
 - (iii) relates to premises of a class specified under sub- section (2) of this section:**

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be controlled tenancy;”

I have looked at the facts surrounding the case before me. It is not quite clear under what circumstances the company took possession of Jubilee’s premises. The parties are not in agreement as to whether the Tribunal had jurisdiction to handle the matter. The issue of jurisdiction needs a fully pledged hearing to resolve it. In the ruling delivered on 14th May, 2008 Sitati, J did not address herself to the kind of tenancy that existed between Jubilee and the company. This was expected because this issue was not raised before her.

In my view the issue of the jurisdiction of the Tribunal can only be addressed after a hearing and production of the documents. The intention of the parties will have to be considered. As matters stand this court cannot say that the Tribunal did not have jurisdiction. The court cannot also say that the Tribunal had jurisdiction. That is a matter better left for trial. Jubilee and the company will find that their dispute

will best be addressed through the civil suit in the High Court and the reference before the Tribunal. If this court were to determine the issue of jurisdiction through these proceedings the end result would be to tie the hands of the High Court and the Tribunal on this issue.

Even if I were to hold otherwise, I would still find the application premature. Jubilee came to this court without addressing the Tribunal on the issue of jurisdiction. That makes this application premature. My view agrees with that of B.L. Jones & K. Thomson who stated at page 163 of the 8th edition of their book: **Garner's Administrative Law** that the issue of jurisdiction should first be raised in the subordinate court or tribunal. They stated that challenge on 'jurisdictional' ground can be brought:

“where statute has conferred a power not ‘at large’, but rather to be exercisable only in certain defined circumstances (e.g power to do A where conditions X and Y prevail). In this situation, if the requisite defined circumstances do not in fact exist but the agency nevertheless purports to exercise the power, its acts will be *ultra vires*. Whether the requisite conditions precedent to having jurisdiction, or having power, exist must inevitably be determined initially by the statutory body itself. However, its decision on that question will normally be fully reviewable by the courts.”

Jubilee and the company are not in agreement as to whether the Tribunal has jurisdiction or not. That issue ought to have first been placed before the Tribunal for determination. According to me, coming for judicial review in a situation where there was a dispute about the jurisdiction of the Tribunal resulted in unnecessary litigation.

It is also important to note that judicial review remedies are discretionary in nature. The court should only issue such orders where it is efficacious to do so. In the case placed before me I do not think that issuing judicial review remedies would be in the interests of justice. The parties have other forums within which to address the issues raised. After all even if the issue of jurisdiction is determined by this court, the parties would still have to go before another forum to address the tenancy issue.

As such, I dismiss the notice of motion dated 6th May, 2008. In all fairness I find that this is not a case where costs should be awarded and I therefore make no orders as to costs.

Dated and signed at Nairobi this 22nd day of February, 2012.

W. K. KORIR

JUDGE