



**Wakimiri v The Business Premises Rent Tribunal & 2 others (Environment and Land  
Judicial Review Appeal 7 of 2020) [2022] KEELC 2667 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2667 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND JUDICIAL REVIEW APPEAL 7 OF 2020**

**JG KEMEI, J  
JUNE 30, 2022**

**BETWEEN**

**STEPHEN WAKIMIRI ..... APPLICANT**

**AND**

**THE BUSINESS PREMISES RENT TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**MICHEAL KIMANI NJOROGE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Before Court is the Applicant's Notice of Motion Application dated 7/9/2020 seeking Orders THAT;
  - a. An order of certiorari be issued quashing the entire proceedings in Business Rent Tribunal Case No. 609 of 2020 (Nairobi) - Michael Kimani Njoroge Vs Stephen Wakimiri alias Njenga together the Order issued in Business Rent Tribunal case No. 609 of 2020 (Nairobi) on 10<sup>th</sup> July 2020.
  - b. The costs of this Application be borne by the Respondents.
2. The Application is based on the grounds thereto and the Supporting Affidavit of even date of Stephen Wakimiri, the Applicant. It is his case that on 21/8/2019 he entered into a lease agreement with the 3<sup>rd</sup> Respondent for a rent business space measuring 50\*80 on the ground floor of Plot No. 135 situated in Kiambu Town (the suit property) at a monthly rent of Kshs.30,000/-. That he commenced renovations thereat and paid the requisite County Government levies on 30/9/2019 and diligently paid the rent as agreed.
3. The Applicant averred that on 12/6/2020 the 3<sup>rd</sup> Respondent filed an application of even date seeking leave to distress and evict the Applicant from the suit property. He denied service of that application hence his non-attendance at the interpartes hearing slated for 10/7/2020 leading to adverse orders



- dated the 10/7/2020 being issued against him. He accused the 3<sup>rd</sup> Respondent of filing an untruthful affidavit of service at the Business Rent Tribunal (BPRT) and concealment of material facts from the Tribunal by failing to attach the lease agreement as well as proof of rent payment.
4. He deponed that prior to the issuance of the orders by the Tribunal, Hon Lady Justice Maureen Onyango in Nbi ELRC Petition No. 100 of 2020 issued orders on the 1/7/2020 that;  

“That in the meantime a temporary stay be and is hereby granted restraining the interested parties from assuming office pending the inter-partes hearing of the application’. Copy of the said order is annexed as SW2.”
  5. According to the Applicant the effect of that order was that the members of the BPRT appointed vide Gazette Notice No. 4244 of 2020, SW3 published on 26/6/2020 were barred from conducting any sittings hence any consequent orders made thereon were/are null and void.
  6. He maintained that the impugned eviction orders against him by the Tribunal on the 10/7/2020 are null and void in light of the restraining orders of the 1/7/2020 in Nbi ELRC Petition No. 100 of 2020. That the Respondents actions are thus illegal, malicious and ultra vires hence the Application.
  7. The application is also opposed by the 1<sup>st</sup> Respondent through the 1<sup>st</sup> Respondent’s Chairman Cyprian Mugambi Nguthari who swore a Replying Affidavit on 24/9/2021. He avowed that the current 1<sup>st</sup> Respondent’s members were appointed by the Cabinet Secretary, Ministry of Industrialization, Trade and Enterprise Development as per the Kenya Gazette dated the 26/6/2020. That 4 out of the 5 members took their oath of office on 30/6/2020 and a copy of the oath of office of Mr Andrew Muma whose order is the subject of the proceedings was enclosed. That by the time the stay orders marked SW2 were being issued, they had already assumed office and started discharging their duties- as members of the Tribunal.
  8. That the petitioners in Nbi ELRC Petition No. 100 of 2020 had filed an application on the 30/6/2020 seeking temporary orders of prohibition restraining the BPRT members from assuming office and discharging their duties. That the Court did not prohibit them from discharging their duties and that the order restraining their assumption of office was issued way after they had taken the oath of office and it cannot therefore be stretched to include a restriction on discharge of their duties. That in any event they were only served with the impugned order on 15/7/2020 and thus the order issued by Andrew Muma on 10/7/2020 was properly issued and cannot be a subject of Judicial Review.
  9. Further that any grievances emanating from such an order ought to be appealed against to the Environment & Land Court and not through Judicial Review proceedings. He denied this Court’s jurisdiction to determine the instant suit saying that the remedy of Judicial Review is not available herein.
  10. The 2<sup>nd</sup> Respondent did not oppose the application.
  11. In opposing the application, the 3<sup>rd</sup> Respondent, Michael Kimani Njoroge filed his Replying Affidavit sworn on 23/2/2021. He deponed that he is the landlord and registered owner of the suit property. He conceded the lease Agreement dated 21/8/2019 but accused the Applicant for failing to meet its terms as agreed; that the Applicant ignored to meet his obligation despite demands and notice to sue prompting him to seek redress at the BPRT. That the BPRT directed him to serve the application upon the Applicant which he did through David Jod, a Court process server to effect service in his presence whereat they met the Applicant and his workers renovating the premises. Accordingly, that the instant Application is malicious and a waste of Court’s time and urged the Court to dismiss it with costs.



12. The 3<sup>rd</sup> Respondent also filed a Preliminary Objection dated 16/11/2021 on grounds that; this Court lacks jurisdiction to hear this matter; that the Environment & Land Court deals strictly with matters relating to environment and land and that the matter herein is strictly a landlord/tenancy dispute and therefore ought to be filed at the commercial division of the High Court.
13. On 1/12/2021, directions were taken to canvass the objection and application simultaneously by way of written submissions.
14. On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Learned Counsel namely Faith Njeri filed submissions dated 16/11/2021 while the Applicant through the firm of S. N. Thuku Advocates file submissions dated 10/10/2021 and 3/2/2022. The 3<sup>rd</sup> Respondent did not file any submissions.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents drew three issues for determination; whether the Chairman of the BPRT acted ultra vires, whether this Court has requisite jurisdictions to hear the matter and whether the Applicant is entitled to the orders sought. On the first issue, they maintained that the Applicant's failure to attend the Tribunal hearing was his omissions because he was duly served through a notice and no evidence has been tendered to show that the BPRT acted ultra vires. That the restraining order against the Tribunal was only served on 15/7/2020 and therefore the orders issued in Nbi BPRT No. 609 of 2020 were properly issued and cannot be a subject of Judicial Review.
16. Secondly, the Court was referred to the case of *Owners of Motor Vessel Lilian S vs Caltex Oil Kenya Ltd* (1989) KLR that without jurisdiction, a Court must down its tools. That Judicial Review under Order 53 *Civil Procedure Rules* is concerned with the decision-making process and not the merits of the decision. That if the Applicant was aggrieved with the decision of the Tribunal then his recourse was to file an appeal in the High Court.
17. Lastly, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents argued that the Applicant has not demonstrated any impropriety on the part of the 1<sup>st</sup> Respondent and thus the application is unmerited and ought to be dismissed with costs.
18. The Applicant reiterated that the 1<sup>st</sup> Respondent acted in blatant disobedience of the order issued in Nbi ELRC Petition No. 108 of 2020 that restrained the Interested Parties from assuming office which according to him, included a bar to discharge their office work. Reliance was placed on the case of *Noah Kibelenkenya v Simore Olochurie & Anor.* [2015] eKLR where the Court held that where a Tribunal was improperly constituted, its decision was null and void. The Applicant was adamant that the 2<sup>nd</sup> Respondent has misled the Court in stating that the Court order was issued on 15/7/2020 contrary to the position that the order was issued on 1/7/2020. That this Court has requisite jurisdiction to hear the instant Application.
19. Opposing the objection, the Applicant submitted that this Court has jurisdiction to hear matters touching on land use in line with Article 162(2) Constitution of Kenya and Sections 13(2)(a) and 13(6) of the *Environment & Land Court Act*. That it is against that background that the High Court sitting in Kiambu transferred this matter to this Court for hearing and determination. The Applicant also relied on paras. 8 and 11 of the Gazette Notice No. 16268 of 2013 on Practice Directions on Proceedings relating to the Environment and the use and occupation of, and Title to Land.
20. The main issue for determination is whether the Preliminary Objection and the Application are merited.
21. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal



in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

23. The Preliminary Objection seeks to challenge the jurisdiction of this Court to hear and determine the matter before it. Jurisdiction is a matter of law and it is so critical that should the Court make a finding that it is bereft of jurisdiction, then the logical thing is to down its tools and take no more step. This is because jurisdiction is a creature of law and Courts are bestowed power to hear and determine disputes by the Constitution and/legislation or both.

24. The objection is therefore anchored on a point of law and therefore it is a proper objection to be raised. The next issue is whether the objection has merit.

25. Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) CAP 301 provides;

“ 15. Appeal to Court

(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court: Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) In hearing appeals under Subsection (1) of this Section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.

(3) Deleted by Act No. 2 of 1970, s. 13.

(4) The procedure in and relating to appeals in civil matters from subordinate Courts to the Environment and Land Court shall govern appeals under this Act: Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.”

26. Section 13 of the Environment & Land Court Act provides as follows;

“ 13. Jurisdiction of the Court

1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with



the provisions of this Act or any other law applicable in Kenya relating to environment and land.

- 2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes-
  - a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - b) relating to land administration and management;
  - c) relating to land administration and management;
  - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - e) any other dispute relating to environment and land
- 3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- 4) In addition to the matters referred to in Subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate Courts or local Tribunals in respect of matters falling within the jurisdiction of the Court.
- 5) Deleted by Act No. 12 of 2012, Sch.
- 6) Deleted by Act No. 12 of 2012, Sch.
- 7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
  - (a) interim or permanent preservation orders including injunctions;
  - (b) prerogative orders;
  - (c) award of damages;
  - (d) compensation;
  - (e) specific performance;
  - (g) restitution;
  - (h) declaration; or
  - (i) costs.”

27. In the case of *Sanghani Investment Limited Vs Officer in charge Nairobi Remand and allocation prison* (2007) 1 EA 354 the Court stated as follows;

“... Judicial Review proceedings and the orders are; mandamus, certiorari and prohibition.”



28. The suit before the Court is that of Judicial Review which as is commonly known is a sui generis suit. This Court is empowered under Section 13(7) (b) of the *Environment & Land Court Act* to make any orders and grant any reliefs including orders of a prerogative nature. In the instant suit the Applicant has sought for orders of certiorari to quash the decision of the Tribunal.
29. I find that the Court has jurisdiction to hear and determine this matter. The Objection therefore must fail.
30. As to whether the instant application is merited, the Applicant averred that the adverse orders issued against him on 10/7/2020 are null and void in light of the restraining Court orders that had been issued in Nbi ELRC Petition No. 100 of 2020 on 1/7/2020 to wit;

“That in the meantime a temporary stay be and is hereby granted restraining the interested parties from assuming office pending the inter-partes hearing of the application.”

31. According to the Applicant, the effect of that order barred the BPRT members appointed vide Gazette Notice No. 4244 of 2020 from conducting any sittings including the sitting of 10/7/2020 and the consequent orders in favour of the 3<sup>rd</sup> Respondent.
32. In its defence, the 1<sup>st</sup> Respondent avowed that the restraining orders in ELRC Petition 100 of 2020 were limited to assumption of office which in any event had taken place as demonstrated by a copy of the oath office by Andrew Muma dated 30/6/2020. That the BPRT was not barred from conducting its duties as alleged by the Applicant. That in any case, the Tribunal was served with the restraining orders way later on 15/7/2020 and thus its orders made on 10/7/2020 were valid and cannot be challenged by way of Judicial Review but appeal only. To that end annexure CMN4 was relied on to show that the 1<sup>st</sup> Respondent was served with the order on 15/7/2020. A glean of CMN4 shows that the order was served upon the firm of Muma & Kanjama Advocates on 2/7/2020 and not 15/7/2020). I say so because in para. 10 of the 1<sup>st</sup> Respondent’s Replying Affidavit dated 24/9/2021 it was deponed that the impugned orders made by Andrew Muma, the Tribunal Vice chair were properly issued on 10/7/2020.
33. In the case of *Pastoli vs. Kabale District Local Government Council and Others* (2008) 2 EA 300, the grounds for bringing Judicial Review were stated as follows;

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules



expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

34. Additionally in the case of *Municipal Council of Mombasa v Republic and Another* 2002 EKLR 223 CA No 185 Of 2001 stated:

“...Judicial Review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the Court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? ....”

27. The totality of the foregoing in my view is that the Tribunal orders were made in contravention of the restraining orders issued by the Court on 1<sup>st</sup> July 2020. The argument by the 1<sup>st</sup> Respondent that the orders were limited to assumption of office only fail for two reasons. First, at para. 9 of its Replying Affidavit, it was deponed that it was only on 15/7/2020 that the Tribunal was stopped from transacting its business. So, on one hand the 1<sup>st</sup> Respondent concedes that the orders indeed it barred it from conducting business. On the other, that the orders restraining assumption of office would not be efficacious if its literal interpretation was applied that it was limited to oath taking only. Be that as it may, the final Judgment in the ELRC Petition 100 of 2020 delivered on 30/10/2020 by Hon Lady Justice Onyango declared the appointment of the BPRT members unconstitutional and proceeded to quash the Gazette Notice No. 4244 that appointed them.

28. I agree with the decision of the Court in *Noah kibelenkenya Vs Simore Ololchurie & Anor* (2015) eKLR where the Court stated;

“It follows that if the Tribunal was not properly constituted then its decision is null and void. A decision could only be said to be a decision of the Tribunal if the Tribunal was properly constituted.”

27. In light of the foregoing Judgment and there being no evidence of staying those orders, I find that the Tribunal was far from being legally constituted. Secondly the members had no power to assume office and undertake the hearing and determination of cases including issuing orders of eviction as it did on the 10/7/2020. The decision of the Tribunal dated the 10/7/2020 was therefore ultra vires and consequently its orders issued thereon are null and void.

28. In the end I find the application merited and I make orders as follows;

- a. An order of certiorari be and is hereby issued quashing the entire proceedings in Business Premises Rent Tribunal Case No. 609 of 2020 (Nairobi) - Michael Kimani Njoroge vs Stephen Wakimiri alias Njenga together the Order issued in Business Premises Rent Tribunal case No. 609 of 2020 (Nairobi) on 10<sup>th</sup> July 2020.
- b. The costs of this Application shall be borne by the Respondents in favour for the Applicant.

PARAGRAPH 27.

**It is so ordered.**

**DELIVERED, DATED AND SIGNED AT THIKA THIS 30<sup>TH</sup> DAY OF JUNE 2022 VIA MICROSOFT TEAMS.**



**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Maina holding brief for Thuku for Applicant

Ms. Njuguna for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

3<sup>rd</sup> Respondent – Absent

Court Assistant – Phyllis Mwangi

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