



**Republic v Mboroki; Westelco Limited (Exparte); Navdeep Singh Mehta T/
A Kensun Enterprises (Interested Party) (Environment and Land Miscellaneous
Application 114 of 2018) [2022] KEELC 2289 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 114 OF 2018
LN MBUGUA, J
JUNE 23, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CHAIRMAN, BUSINESS PREMISES RENT TRIBUNAL (MBICHI
MBOROKI) RESPONDENT**

AND

WESTELCO LIMITED EXPARTE

AND

**NAVDEEP SINGH MEHTA T/A KENSUN ENTERPRISES INTERESTED
PARTY**

RULING

1. The background to this suit is that the interested party Navdeep Singh Mehta T/a Kensun Enterprises had filed a reference dated 31.7.2014 before the Business Premises Tribunal (BPRT) Nairobi in Case No.453 of 2014 against the Exparte Applicant Westelco Limited. The former is the tenant and they desired the landlord (Exparte Applicants) to be restrained from terminating the tenancy and evicting the tenant. The landlord (Exparte Applicant) had filed a preliminary objection in the BPRT case dated 8.8.2014 in the following terms;

“Take Notice That the Landlord/Respondent herein, Westelco Limited will object to the Tenant’s Notice of Motion, dated 31st July 2014, on the grounds that, the premises the subject matter of the said Notice of Motion are not a Shop, a Hotel, or a Catering Establishment, within the meaning of Section 2 of the [Landlord and Tenant \(Shops, Hotels](#)



§ Catering Establishments) Act, Chapter 301 of the Laws of Kenya. Consequently, this Tribunal does not have the requisite jurisdiction to hear and determine the dispute between the parties herein.”

2. A ruling was delivered on 20.2.2015 in which the preliminary objection was dismissed by the tribunal.
3. The suit proceeded to trial culminating in a judgment dated 26.1.2018 in which the claim of the tenant was upheld by the tribunal.
4. The Exparte Applicant has moved this court for Judicial Review orders of certiorari to quash the decision of the Respondent in BPRT Case No. 453 of 2014 on the grounds that the Chairman of the Business Premises Rent Tribunal acted outside his jurisdiction in determining BPRT Case No. 453 of 2014 filed by the Interested Party herein. Leave to bring forth the aforementioned Judicial Review proceedings was granted on 12. 11.2018 and the substantive Motion was filed on 30.11.2018.
5. The Exparte Applicant claims that the relationship between the Interested Party and them was neither a controlled tenancy nor were the leased premises a shop as per Section 2 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. That despite the Exparte Applicant’s preliminary objection on jurisdiction, the Respondent went on to determine the dispute thus acting outside his statutory mandate. It is on that regard the ex-parte applicant moved this court to quash the said proceedings, judgement and orders of the Respondent.
6. The Interested Party in their Replying Affidavit dated 6th February 2019 contested the application on grounds that the decision of the Respondent was not *ultravires* because the rent inspector inspected the suit premises and concluded that the premises was a shop as per the meaning of Cap 301.

Analysis and Determination

7. This court finds that the issue for determination is; Whether this application for Judicial Review is meritorious to warrant the issuance of the orders sought. To this end, I have read and duly considered the submissions advanced by the Exparte Applicant and the Interested Party. I have disregarded the submissions of the respondent in view of the fact that the said party appears not to have filed any response to the substantive Judicial Review Motion; see Supreme Court decision of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR on failure to file a replying affidavit.
8. The Exparte Applicant contends that they could not appeal the decision in which their preliminary objection was dismissed in light of the provisions of Section 12 (4) of the Landlord and Tenant (Shops and Catering Establishments) Act citing the judgement in Gatanga General Store & 2 others v Githere [1988] eKLR. In the aforementioned case cited by the Exparte Applicant, the Court of Appeal stated thus;

“The powers given in section 12 (4) are expressly in addition to any other powers specifically conferred.” I am of opinion however that the term “complaints” is intended to cover only complaints of a minor character. “The term ‘investigate’ does not necessarily imply a hearing. Such complaints would include complaints by the tenant of turning off of water, obstruction of access, and other acts of harassment by the landlord calling for appropriate orders for their rectification or cessation.”



9. And in the case of *Re-Heptulla Proberties Ltd* [1979] eKLR cited by Judge Oguttu Mboya in the case of, *Mike Muli v Justus Mwandikwa Kilonzo & 4 others* [2022] eKLR, the court had observed that;
- “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.”
10. This court is not persuaded by the arguments advanced by the Exparte Applicant that Section 12 (4) of *Cap 301* barred them from lodging an appeal. The decision delivered on 20.2.2015 in relation to the preliminary objection raised by the Exparte Applicant on jurisdiction was certainly not in the realm of a complaint let alone a minor complaint in the nature of turning off water, blocking access et al.
11. It is clear beyond peradventure that the question of jurisdiction was a subject of contest before the tribunal in which a determination was made in favour of the respondent on 20.2.2015. The arguments presented before the tribunal in regard to the preliminary objection are the same same arguments tabled in these Judicial Review proceedings. Mativo J in the case of *Abmad & another v Kadbi Mombasa; Khabifa & another* (Interested parties) (Judicial Review 4 of 2020) [2021] KEHC 133 (KLR) (21 October 2021) had the following to say on the issue at hand:
- “... The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For the court to interfere, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal, etc. has resulted in grave injustice. The fact that the applicants are aggrieved by the decision does not amount to grave injustice. What the applicants are citing are pure grounds of appeal as opposed to review which are illegality, irrationality, ultra vires and procedural impropriety. (emphasis mine)”
12. In respect to the scope and purpose of judicial review, the Court of Appeal in the case of *Municipal Council of Mombasa v Republic* And Another [2002] eKLR stated as follows;
- “Judicial Review is concerned with the decision -making process, not with the merits of the decision itself.”
13. I pose the question; had the final judgment of the tribunal delivered on 26.1.2018 been in favour of the Exparte Applicant, would the said party have revisited the question of jurisdiction?. Certainly not. It is quite apparent that the Exparte Applicant having lost the case before the tribunal is now challenging the decision delivered 7 years ago in relation to the question of jurisdiction which in essence is a way of appealing the said decision. In the case of *Kiplangat Korir v Dennis Kipngeno Mutai* [2006] eKLR, Kimaru J while dealing with a question of jurisdiction for the first time in an appeal stated that;
- “Substantial Justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent”.
14. Even though the current scenario is one where the issue of jurisdiction had been raised before the tribunal, it is still rather late in the day for the Exparte Applicant to raise the same issue all over again simply because he lost the case before the tribunal.
15. In the final analysis, I find that this suit is not merited, the same is hereby dismissed with costs to the interested party.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA



JUDGE

In the presence of:-

Kangata for the Exparte Applicant

Ade for the Interested Parties

Court Assistant: Eddel

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