



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW 25 OF 2012

IN THE MATTER OF: BUSINESS PREMISES RENT TRIBUNAL

COMPLAINT NO. 48 OF 2012 ITALIAN GELATI (K) LTD -VS- VELJI PREMCHAND SHAH

AND

IN THE MATTER OF: LANDLORD & TENANT [SHOPS, HOTELS & CATERING ESTABLISHMENTS] ACT

AND

IN THE MATTER OF: AN APPLICATION BY VELJI PREMCHAND SHAH FOR JUDICIAL REVIEW ORDER OF CERTIORARI AND PROHIBITION TO ISSUE AGAISNT THE BUSINESS PREMISES RENT TRIBUNAL, MOMBASA PROHIBITING THE TRIBUNAL FROM ENTERTAINING OR CONTINUING TO ENTERTAIN B.P.R.T COMPLAINT NO. 48 OF 2012 AND FOR QUASHING THE ORDER OF 21ST FEBRUARY 2012 FOR WANT OF JURISDICTION

AND

IN THE MATTER OF: JURISDICTION AND POWER OF THE BUSINESS PREMISES RENT TRIBUNAL TO ISSUE A PROHIBITORY INJUNCTION AND ORDER COMPENSATION OR REINSTATEMENT OF A TENANT WHO HAS ABANDONED A DEMISED PREMISES AND LANDLORD HAS RE-TAKEN POSSESSION UNDER SECTION 12(4) OF THE LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS) ACT

BETWEEN

REPUBLIC.....NOMINAL APPLICANT

V E R S U S

THE CHAIRMAN, BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

AND

ITALIAN GELATI (K) LIMITED.....INTERESTED PARTY

EX-PARTE

VELJI PREMCHAND SHAH

JUDGEMENT

(1) The Applicant has moved this Court by Notice of Motion seeking the following orders-

“(a) The Court is pleased to issue and grant an order of certiorari to call up to this Court for quashing, the proceedings in and order of 21st February 2012 made by the Chairman, Business Premises Rent Tribunal, Mombasa Complaint No. 48 of 2012 Italian Gelati (K) Limited –Vs- Velji Premchand Shah on the ground that the Tribunal acted without jurisdiction and in contravention of the audi alterm partem rule in granting an injunction ex-parte on a complaint under Section 12(4), the Landlord and Tenant [Shops Hotels and Catering Establishment] Act, where the tenant had abandoned shop on Mombasa Block XV/59 Mombasa Island;

(b) The Court is pleased to issue an order of prohibition prohibiting the Chairman, Business Premises Rent Tribunal, Mombasa from entertaining and hearing or continuing to hear and determine Complaint No. 48 of 2012 (Mombasa) Italian Gelati (K) Limited –Vs- Velji Premchand Shah on the ground that there is no landlord and tenant relationship between the parties named on the complaint, the tenant having abandoned shop on Mombasa Block XV/59 Mombasa island and the Tribunal has no jurisdiction to entertain the tenant’s complaint, or order repossession of the demised premises by Italian Gelati (K) Limited under Section 12(4) of the Landlord and Tenant [Shops Hotels and Catering Establishments] Act”

That Notice of Motion dated 12th March 2012 was filed pursuant to leave of Court granted on 7th March 2012.

(2) It would be pertinent to give a short background. The Applicant and his wife Vijyaben are joint proprietors in equal shares of the property known as Mombasa/Block XV/59. On that property stands a building. The Interested Party was a tenant in respect to one of the shops in that building. Whether or not the Interested Party remains a tenant is a contentious issue in these proceedings.

(3) It was said by the Applicant that the Interested Party fell into rent arrears for the period July 2011 to January 2012. Because of this the Applicant instructed Kinyua & Co. Auctioneers to distress for rent. But the Premises were closed. It is further said that the Auctioneer after, obtaining a break-in order from the Subordinate Court, entered the premises. Reporting the results of the break-in, the Auctioneer wrote to Court on 20th January 2012 indicating that he never found any distrainable assets. This is his letter-

“20th January 2012

***The Chief Magistrate,
Law Courts,
MOMBASA***

Dear Sir,

RE: MISC. CIVIL APPLICATION NO. 7 OF 2012

KINYUA & CO. AUCTIONEERS –VS- ITALIAN GETATTI (K) LTD

We refer to the above and to the Orders issued by your Honourable Court on 19th January 2012.

We proceeded today and break-opened the Respondent’s rented premises but to our dismay, we never found any distrainable assets as the tenant had already removed all its distrainable goods leaving the

premises locked.

We therefore left the premises under the care and custody of the landlord being vacant.

In the premise, we are notifying your Honourable Court of the compliance of the Order.

Yours faithfully,

KINYUA & CO. ADVOCATES

PETER KINYUA MUCHENDU

c.c Kariuki Gathuthi & Co. Advocates

G.P.O Building, Mombasa” (my emphasis)

(4) The Applicant avers that he re-took possession of an empty shop on 28th January 2012, although from the above letter the Auctioneer appears to have given the Applicant possession on 20th January 2012.

(5) Aggrieved by this state of affairs the Interested Party through the firm of Mogaka Omwenga & Mabeya Advocates filed a reference to the Business Premises Rent Tribunal and obtained the following interim relief;

“ORDER

THIS SUIT coming up for hearing on the 21st February, 2012 before Mochache D. (Chairperson) in the presence of Mr. Omwenga for the tenant.

AND UPON HEARING – IT IS HEREBY ORDERED THAT:-

- 1. The matter is certified as urgent.***
- 2. The Landlord either by itself, its servants, agents, assignees and/or employees be and is hereby restrained and prohibited from levying distress against the tenant, threatening to evict, locking the tenant’s premises, evicting, intimidation and/or any other manner whatsoever interfering with the tenant’s quiet possession and the lawful enjoyment of the premises known as tenancy shop on Plot No. 59/XV MIJIKENDA STREET MOMBASA pending hearing of the complaint interpartes.***
- 3. To serve the landlord for hearing on 16/4/2012 at Mombasa Municipal Hall.***
- 4. OCS Makupa Police Station to ensure that peace prevails.***

GIVEN UNDER my hand and the seal of this Tribunal Court this 21st February, 2012.

ISSUED:- This 21st day of February, 2012.

***MOCHACHE D.
CHAIRPERSON
BUSINESS PREMISES RENT TRIBUNAL”***

(6) The order and the proceedings of the Tribunal are the subject of The Judicial Review application now before court.

(7) It was the contention of the Interested Party before the Tribunal, and it still is, that it is a tenant in

the suit premises and has never vacated or abandoned it as alleged. That although the shop was empty it was because the Interested Party was carrying out major renovations and so it had kept its goods in the stores.

(8) In the affidavit of Bianchi Umberto (a director of the Interested Party company) sworn on 21st March 2012 he denies that the Auctioneer proclaimed any specific goods. This is what he says in paragraph 10-

“That it is not true or at all that the Auctioneer did proclaim any specific goods in the tenancy premises. I do annex a copy of the Proclamation dated 5th January, 2012 marked as exhibit “BU-3” and hence the contents of exhibit marked “B” are not true as to the removing of the distrained goods.”

It is also the Interested Party’s position that Applicant never took possession of the shop on 28th January 2012 but on 7th March 2012 after obtaining leave of this Court. The Respondent never filed any papers nor was she represented in these proceedings. The Respondent did not participate even at the submission stage.

(9) That in brief is the evidence is so far as is relevant to these proceedings. As is apparent there is no amity between the parties as to whether or not the Interested Party was still in possession of the premises at the time it moved the Tribunal. The issue of possession, as will turn out shortly, has a bearing on the outcome of this application. As a prelude to discussing the law, the Court will attempt to resolve the rival evidence presented by the parties but being cautious that where facts are seriously in dispute Judicial Review may not be an appropriate remedy. The Court takes the caution and advice sounded in the decision of Nrb Misc. 982 of 1997 Sea Star Malindi Ltd –Vs- Kenya Wildlife Services KLR (2002) where Justice Onyango Otieno (as he then was) said-

“In my mind, while I do agree that where facts are seriously in dispute review remedy may not be appropriate ... I do not think mere saying that certain facts are in dispute would be enough. They must be shown to be really in dispute before a Court of law can act on that allegation to refuse the orders sought.” (my emphasis)

(10) When the Interested Party approached the Tribunal it stated that the Applicant had locked the premises. Ground (d) of the Interested Party’s application of 20th February 2012 before the Tribunal states-

“The landlord has locked the premises.”

A reason given in the Certificate of Urgency filed therein to support the urgency is that-

“The Tenants premises has been forcefully locked by the landlord”

This was reiterated by Interested Party’s Director Bianchi Umberto in the affidavit of 20th February 2012 when he stated-

“10. That the Landlord without proper notice and or Court Order and in breach of our oral agreement did sometime in January, 2011 or there about begin to interfere with my quiet possession of the business premises by levying distress for rent and proceeding to close the suit premises with intentions to have tenant vacate the premises as he wants it back for his own use and that tenant should do so forthwith.” (my emphasis)

It would seem therefore that by the time the tenant moved the Tribunal the premises had been locked by the landlord.

(11) What is the Court to make of the contention by the Applicant that the premises were empty and abandoned when the Auctioneer broke in? The Interested Party denies this and says that there were major

renovations going on. In paragraph 8 of Mr. Umberto's affidavit sworn on 21st March 2012 he states-

“That the shop was empty not because the Tenant had vacated but because the major renovations were on going and goods had been kept in the stores to await completion of the renovations.”

(12) As proof that the Interested Party was indeed carrying out renovations the Court was shown “workings of expenses incurred” and a Bill of Quantities prepared by Nyange & Co.

Associates. Something is curious about this evidence! The list of expenses is for the period 31st January 2011 to 22nd April 2011. Nothing was shown for the time after 22nd April 2011 to January 2012 when the Auctioneer is said to have broken in. While the Bills of Quantities was prepared in February 2012 and is in respect of *“proposed alterations and additions to existing ice-cream shop.”* It does not seem to be Bills for work already done or in progress.

(13) On the balance the Court believes the version given by the Applicant that the premises were empty when locked and that no renovations were taking place. The issue for this Court to now determine is whether or not the Tribunal had jurisdiction to issue the orders it granted on.

(14) I think it can be accepted that the Court of Appeal in **Nrb Civil Appeal No. 205 of 1995 Narshidas & Co. Ltd –Vs- Nyali Air Conditioning & Refrigeration Ltd** endorsed the proposition in **The Republic –Vs Nairobi Business Premises Rent Tribunal & Others Exparte Karasha [1979] KLR 147** and **Re Hebtulla Properties Limited [1979] KLR 96** that the Tribunal does not have jurisdiction to grant an order of injunction. There is a view, however, that the Tribunal can nevertheless issue orders to preserve a tenancy which is the subject of proceedings before it. Judge Muriithi, in **Mombasa Misc. Application (J.R) No. 26 of 2010 The Chairman Business Premises Rent Tribunal at Mombasa Exparte Baobab Beach Resort (Mbsa) Ltd** rendered himself as follows-

“In my view, an order for status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of right, or, at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo. I find that the Tribunal has among the orders that it may make on a complaint under Section 12(4) of the Landlord and Tenant Act an order for status quo to hold the situation in the controlled tenancy until the determination of the proceedings filed thereon.”

I did recently in **Mbsa JR No. 27 of 2010 Republic –Vs- the Chairman Business Premises Rent Tribunal Exparte Kenya Safari Lodges** enjoin the position of Judge Muriithi in respect to the Tribunal's power to grant preservative orders.

(15) Whether or not the Tribunal acted within jurisdiction turns on the status of the relationship between the Interested Party and the Applicant on 21st February 2012 when it made the order. On my evaluation of the evidence presented I have found that the Auctioneers had already handed over empty premises to the Landlord. At the time of prosecuting the matter before the Tribunal the Interested Party stated unequivocally that the landlord had locked the premises. There is evidence that those premises were empty. It would seem therefore that the Applicant had completely dispossessed the Interested Party. The tenancy had been terminated and there was no tenancy capable of being preserved by the Tribunal. There was no longer a tenant-landlord relationship and so the Tribunal acted without jurisdiction. The proper forum for the 1st Respondents grievance was a Civil Court. That is where it should have sought intervention. The order made by the Tribunal is therefore amenable to an order of certiorari and any further proceedings pending before it can be stopped by a prohibitory order.

(16) But I am asked not to interpose whatever the circumstances. The Interested Party asked me to follow the decision in Mucuha –Vs- Ripples Ltd [1993]KLR 35 that;

“A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act ...”

It was argued by the Interested Party that the Applicant had employed distress proceedings to unlawfully evict and this Court should not be seen as abetting that conduct. I agree that this Court (*even if it were to find that a public body has acted ultra vires*) should be reluctant to exercise its discretion in Judicial Review when it results in intervening on the side of a law breaker.

(17) The Applicants position is that the Interested Party had in fact abandoned the premises as it was empty at the time of break in. That in any event the break-in was done by an Auctioneer and that a Court broker is an agent of Court. For this reason, I was told, the Applicant would not be responsible or liable for any unlawful conduct or Act of the Auctioneer. For the position that a Court broker is an agent of Court, I was referred to the decision in Davis & Shirtliff Ltd –Vs- The Attorney General KLR 272.

(18) I would agree that a Court broker is an agent of the Court when executing a Warrant, Order or Process of Court. But I do not consider that an Auctioneer who has been privately instructed under the provisions of The Distress for Rent Act (Cap 293) to levy distress is an agent of the Court. The Auctioneer would be acting at the behest and on the instructions of his client. It matters not that in carrying out those duties the Auctioneers seeks and obtains a break-in order from the Court. That would not change the principal. I do find and hold that Kinyua & Co. Auctioneers were agents of the Applicant.

(19) That said, on the evidence presented, this Court cannot say with certainty that the Auctioneers and/or the Applicant acted in disregard of the law. The break-in seems to have been sanctioned by a Court order. Then there was evidence that the premises were indeed empty. It may not have been unreasonable for the Auctioneer to hand over possession of these empty premises to its owners, the Applicant. If however the Interested Party is of the strong view that the conduct of the Applicant was unlawful then it is not without a remedy. The Interested Party can invoke the Civil Process.

(20) The upshot is that this Court will interpose and does hereby allow the application dated 12th March 2012 but with no order as to costs.

Dated and delivered at Mombasa this 18th day of September, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Kimani for the Applicant

No appearance for the Respondent

Omwenga for the Interested Party

Court clerk – Moriasi

F. TUIYOTT
JUDGE

