



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Application 335 of 2006**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. THE CHAIRMAN, BUSINESS PREMISES RENT**

**TRIBUNAL**

**2. STANDARD ASSURANCE KENYA LIMITED**

**3. WORLDTECH CONNECTION LIMITED.....RESPONDENTS**

***EX PARTE: PIEDMONT INVESTMENTS LIMITED***

**J U D G M E N T**

**1.** The *Ex Parte* Applicant brought the **notice of motion dated 11<sup>th</sup> July, 2006** under the **Law Reform Act, Cap 26** and **Order LIII Rule 3** of the **Civil Procedure Rules** (the **Rules**) seeking:

(a) An order of **certiorari** to remove to the High court and quash the 1<sup>st</sup> Respondent's decision dated 16<sup>th</sup> June, 2006 in Tribunal Case No. 277 of 2006 in which decision the 1<sup>st</sup> Respondent issued orders -

i. Restraining the *Ex Parte* Applicant and/or its servants, agents, nominees or employees from entering and/or taking possession, occupying, leasing, closing or in any way dealing with land reference number 209/2582 or part thereof pending the hearing and determination of the complaint filed by the 2<sup>nd</sup> Respondent.

ii Permitting the 2<sup>nd</sup> Respondent with police assistance, to open the shop known as Alfulela Exhibitions situated on the ground floor of Land Reference Number 209/2582.

iii Requiring the firm of Rachuonyo & Rachuonyo, Advocates to deposit rent of the shop in the Tribunal.

(b) An order of **prohibition** directed to the 1<sup>st</sup> Respondent prohibiting it from proceeding with or in any manner whatsoever conducting any proceedings relating to the said Tribunal cause No. 277 of 2006.

**2.** The grounds for the application on the face thereof are essentially that the 1<sup>st</sup> Respondent acted without jurisdiction in dealing with a dispute concerning ownership of property and granting orders therein, and secondly, that the 1<sup>st</sup> Respondent acted in breach of principles of natural justice by proceeding with the application before it in the absence of the *Ex Parte* Applicant who had not been duly served.

**3.** The application is supported by the affidavit of Maxwell Otieno Odongo who states that by a

reference dated 13<sup>th</sup> June, 2006, the 2<sup>nd</sup> Respondent requested the 1<sup>st</sup> Respondent to investigate the closure and renovation of a shop known as Alfulela Exhibitions situated on Land Reference Number 209/2582.

4. He further depones as follows –

i. That by a separate application filed simultaneously with the reference on the same date, the 2<sup>nd</sup> Respondent sought on its behalf and that of the 3<sup>rd</sup> Respondent orders inter alia order of injunction to restrain the Ex Applicant and its advocates Rachuonyo & Rachuonyo Advocates from entering and/ or taking possession, occupying, leasing or in any manner dealing with Land Reference Number 209/ 2582 or part thereof, pending hearing and determination of the reference.

ii. The 2<sup>nd</sup> Respondent also sought an order to reopen the aforesaid shop and to deposit rent in the tribunal.

iii. The 1<sup>st</sup> Respondent then proceeded to hear and determine the application in the absence of the Applicant despite having knowledge of the existence of High Court Case No. 806 of 2003.

5. It is further contended in the supporting affidavit that the Applicant is neither a landlord nor a tenant of the 2<sup>nd</sup> Respondent and that no tenant – landlord dispute exists between them; that the only dispute between the 2<sup>nd</sup> Respondent and the Applicant is a property dispute relating to Land Reference Number 209/ 2582 which is the subject of proceedings in High Court Case No. 806 of 2003; and that an objection was filed on behalf of the Applicant objecting to the 1<sup>st</sup> Respondent’s jurisdiction.

6. It is further deponed that the Applicant obtained orders of injunction against the 2<sup>nd</sup> Respondent in the High Court case, which orders the 1<sup>st</sup> Respondent overturned.

7. It is also deponed that the 3<sup>rd</sup> Respondent has never been a tenant of the *Ex Parte* Applicant as the shop **Alfulela Exhibitions** was at all material times formally leased to one **Rose Owuor** whose tenancy was mutually terminated with no dispute.

8. The *Ex parte* Applicant filed skeleton arguments dated 28<sup>th</sup> July, 2006 which I have read and considered. In his submissions, Mr Kiura, the Applicant’s learned counsel, emphasised the issues as set out in the supporting affidavit.

9. In opposition to the application, Mr Imanyara, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted, first, that adequate notice was issued to the Applicant and that it is upon that service that the Applicant filed a notice of preliminary objection dated 15<sup>th</sup> June, 2006 being the same date service was effected, and that the Applicant appeared before the Tribunal on the 16<sup>th</sup> June, 2006 for hearing. He added that having filed the preliminary objection, the Applicant must have been served.

10. Further to this learned counsel submitted that the Applicant’s failure to annex the proceedings of the Tribunal is fatal and referred to Order 53, rule 1 (4) of the Rules.

11. Secondly, counsel submitted that the Applicant has omitted Rachuonyo and Rachuonyo, Advocates who is a necessary party herein as it was the 2<sup>nd</sup> respondent in the cause before the 1<sup>st</sup> Respondent and was bound by the orders of the 1<sup>st</sup> Respondent. He stated that by virtue of Order 53 rule 3 (2), the application herein must fail.

12. Thirdly, he opined that the Ruling of Emukule, J settled the issue of ownership, which ruling has not been appealed against. Of the order of Kasango, J he submitted that the same was *ex parte* and was never extended.

13. On the issue of failure to annex proceedings of the tribunal, Mr Kiura responded that it was unnecessary to annex the proceedings since it only seeks to quash the orders of the 1<sup>st</sup> Respondent and not the proceedings. He also submitted that failure to enjoin Rachuonyo and Rachuonyo Advocates does not render the application fatal since the orders the Applicant seeks to quash were not in their favour, and that if they are quashed it will not prejudice them at all.

14. I have considered those rival submissions. There are two main issues to be decided -

(a) Whether proper notice was given to the Applicant.

(b) Whether the 1<sup>st</sup> Respondent had jurisdiction to deal with the matter before it.

15. On the issue of whether the Applicant was served, I have looked at the affidavit of service of Nzuki Musyoki dated 16<sup>th</sup> June, 2006 (**Annexure ‘MOO 3’**) and come to the conclusion that proper service was not effected upon the Applicant herein. A copy of the Certificate of Posting annexed to the aforesaid affidavit of service clearly indicates that the said service was done on 15<sup>th</sup> June, 2006, that is a day before the hearing date. This was not sufficient time to enable the Applicant to appear. It is a basic principle of natural justice that before any party is condemned; he should be given a chance to be heard. Even if the Applicant was present at the hearing before the 1<sup>st</sup> Respondent, did he get time enough to prepare for the hearing? I do not think so.

16. Regarding jurisdiction, the Tribunal’s power to make orders is derived from the provisions of S. 12 (1) and (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which firstly, empower the tribunal in relation to its area of jurisdiction to do all things which is empowered or required to do by or under the provisions of the Act.

17. In **Pritam Vs. Ratilal [1972] EA 560**, Madan, J held -

**“I am of the opinion however that the term ‘complaint’ is intended only to cover complaints of a minor character. The term ‘investigate’ does not necessarily imply a bearing. Such complaints would include complaints by the tenant of the turning off water, obstructing of access and other acts of harassment by the landlord, calling for appropriate orders for their rectification or cessation but not including payment of compensation for an injury suffered.”**

And in **Re Heptalla Properties Ltd [1979] KLR 96**, it was said:

**“Section 12 (4) must be read together with the rest of the Act, 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. Whether section 12 (4) is limited to minor complaints only I find it unnecessary on it as this is not the issue before us. Suffice it to say that the Act uses the word “any complaint” and the only qualification is that it must be relating to a controlled tenancy.”**

18. Section 12 (4) therefore confers upon the tribunal in addition to other powers, the power to investigate any complaint relating to a controlled tenancy made to it by the landlord or tenant, and to make such orders as it deems fit. From the evidence on record there was no landlord–tenant relationship between the Applicant and the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent therefore had no jurisdiction to deal with the matter before it.

19. It must be noted that this court’s concern is whether there was a procedural lapse and not to go into the merits of the case. It is important to ensure that an individual is given fair treatment by the authority to which he has been subjected. But it is not part of that purpose to substitute the opinion of the court for that of the authority constituted by law to decide the matters in question. Therefore the decision of an inferior court will be quashed where the court acted without jurisdiction, or exceeded its jurisdiction or failed to comply with rules of natural justice where those rules are applicable. The function of this court

is to ensure that lawful authority is not abused by unfair treatment.

**20.** The upshot is that the application herein is allowed as prayed with costs.

**21.** Delay in preparation of this judgment is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully recovered my health.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 12<sup>TH</sup> DAY OF OCTOBER,  
2012**

**H.P.G. WAWERU**

**JUDGE**