



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Cause 93 of 2010

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI AND PROHIBITION

REPUBLIC.....APPLICANT

V E R S U S

BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

AND

DWINJENDRA KUMAR VARMA.....1<sup>ST</sup> INTERESTED PARTY

FRANCIS ALBERT GACHOKA.....2<sup>ND</sup> INTERESTED PARTY

EXPARTE:-

THE REGISTERED TRUSTEES OF NATIONAL UNION OF KENYA MUSLIMS COAST  
PROVINCE TRUST FUND

RULING

- 1) In these Judicial Review proceedings the Exparte Applicant seeks to impeach the order and proceedings of the Business Premises Rent Tribunal in Tribunal Case No. 155 of 2010 Dwijendra Kumar Varma, Francis Albert Gachoka t/a Rifkins Business College & Typing Bureau –Vs- The Registered Trustees of National Union of Kenya Muslims Coast Province Trust Fund. At the leave stage the Exparte Applicant obtained an order of stay against the enforcement of the order and further proceedings in the Business Premises Rent Tribunal.
- 2) Whilst these proceedings were pending the Exparte Applicant distressed for rent against Francis Albert Gachoka (the 2<sup>nd</sup> Interested Party) (**hereinafter ‘Gachoka’**). This prompted Gachoka to file an application for injunction to restrain the distraint pending the hearing of these proceedings.
- 3) The Exparte Applicant has raised a Preliminary Objection to that application on the following grounds-
  1. That the said application constitutes a separate and distinct cause of action that accrued subsequent to the filing of this suit and is not capable of being addressed within the context of this matter.
  2. That the said application raises matters of private law litigation that can not conceivably be

determined within the realm of public law litigation.

3. That the said application is incompetent, misconceived and otherwise an abuse of the due process of this Honourable Court.

4. That the said application is incurably defective and unsustainable in law and the same ought to be dismissed and/or struck out with costs to the Respondent.

That objection is what falls for my determination.

4) In his oral submissions Counsel for the Exparte Applicant emphasized that the question of rent arrears and distress are matters giving rise to a new and distinct cause of action subsequent to the commencement of the Judicial Review and Gachoka should have mounted a separate challenge. Of significance it was argued, the issue of rent is a dispute in private law and cannot be resolved in Judicial Review proceedings which are in the realm of public law.

5) In answer Gachoka pressed that the increase was issued after the institution of these proceedings. He thought this to be a breach of the stay order granted by Court. It was also his argument that the purported increase was done in contravention of the provisions of Landlord and Tenant (Shops, Hotels & Catering Establishment) Act Cap 301) as Gachoka is a protected tenant.

6) The Court was argued to disregard the theory and practice that separates private from public law and to hold that under its inherent jurisdiction it could stop a party from stealing a march on account of technicalities. It was argued that this would be in keeping with provisions of Article 159 of The Constitution 2010 which directs that justice be administered without undue regard to procedural technicalities.

7) I think it appropriate to start by considering the scope of the stay order issued by Court on 13<sup>th</sup> September 2010. Let me reproduce it-

**“The leave for the orders of Certiorari and Prohibition granted do operate as a stay of further proceedings in the said Business Premises Rent Tribunal Case No. 115 of 2010.”**

The scope of the order depends on the nature of the order and proceedings before the Tribunal. The order stayed was as follows-

**“THIS SUIT coming up for hearing on 19<sup>th</sup> August 2010 before Mochache D (Chairman) in the presence of Wameyo Counsel for tenants-**

**AND UPON HEARING – IT IS HEREBY ORDERED THAT-**

**1. Matter be and is hereby certified urgent.**

**2. The landlord by itself, its agents, servants and/or employees be and are hereby restrained and prohibited from taking possession, interfering with the tenants’ quiet possession of the premises let out to the 1<sup>st</sup> tenant being the premises comprised in PLOT NO. MOMBASA/BLOCK XXI/PARCEL 43 currently occupied by the 2<sup>nd</sup> tenant being used in running of a College by the name Rifkin’s Business College pending hearing of this complaint interpartes.**

**3. To serve the landlord for hearing interpartes on 24<sup>th</sup> September 2010.**

**GIVEN under my hand and sea of this Tribunal Court this 19<sup>th</sup> August, 2010.**

**ISSUED: This 20<sup>th</sup> day of August 2010.**

**MOCHACHE D.  
CHAIRMAN**

**BUSINESS PREMISES RENT TRIBUNAL.**”

That order was an order of injunction to protect Gachoka’s quiet possession of the premises. The proceedings themselves were to stop the landlord from taking away possession of the premises.

8) I am inclined to agree with the Exparte Applicant that the proceedings before the Tribunal did not touch on rent, its increase or otherwise. The stay order could not therefore relate to rent. The increase of rent and the levy for distress for it does not breach the stay.

10) What was Gachoka to do in the face of increase of rent

and the threat of distress? A course open to him would be to file a reference before the Tribunal in respect to the increase and a complaint on distress. If he thought that he would meet a challenge on jurisdiction then it would be open to him to seek the intervention of a Civil Court. The dispute revolving around the rent is a matter in the province of private law. These Judicial Review proceedings will be a discussion about the jurisdiction of a Tribunal (a public body) to entertain the proceedings in BPRT No. 115 of 2010. That is a public law issue. It would be untidy and against the principles that separate these two branches of law to entertain satellite proceedings of a private law nature in public law proceedings. I am unwilling to invoke the inherent jurisdiction of this Court to bless such an arrangement, moreso because Gachoka, as I have shown, is not without a recourse.

9) I uphold the Preliminary Objection. The application dated 7<sup>th</sup> May 2012 is struck out with costs.

**Dated and delivered at Mombasa this 11<sup>th</sup> day of December, 2012.**

**F. TUIYOTT  
JUDGE**

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

**Muganda for Exparte Applicant**

**No appearance for Interested Parties**

**No appearance for the Respondent**

**Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**