REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION 590 OF 2009

IN THE MATTER OF: AN APPLICATION BY WEGA BAKERY LTD FOR AN ORDER FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE LANDLORD/TENANT, SHOPS, HOTEL AND CATERING ESTABLISHMENT ACT CAP.301 OF LAWS OF KENYA

AND

IN THE MATTER OF: BUSINESS PREMISES RENT TRIBUNAL

BETWEEN

REPUBLIC……………………………….……...........………………………APPLICANT

-VERSUS-

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

AND

SHELTER INVESTMENTS LTD……….................…………………INTERESTED PARTY

***EX-PARTE*: WEGA BAKERY LTD**

J U D G M E N T

The Ex-parte Applicant herein Wega Bakeries Ltd. filed a Notice of Motion dated 26th October, 2009 pursuant to leave granted on 9th October, 2009 to institute judicial review proceedings for orders of certiorari and prohibition.

The notice of motion sought the following orders:

1. THAT an order of certiorari be issued to quash the order of the Chairman Business Premises Rent Tribunal issued on the 24th August, 2009 in Business Premises Rent Tribunal Case Number 778 of 2009 thereby ordering the Ex-parte Applicant to pay an electricity Bill of Kshs.2,952,683.90 to Kenya Power and Lighting Company and in default its goods to be attached and sold to offset the electricity bill.

2. THAT an order of prohibition be issued to prohibit the interested party from attaching and/or selling the applicant's properties so as to pay the electricity bill to Kenya Power and Lighting Company as per the order issued by the Business Premises Rent Tribunal on the 24th August, 2009 in Tribunal Case Number 778 of 2009 (Shelter Investments Limited Versus Wega Bakery Limited).

3. THAT cost of this Application be to the Exparte Applicant.

The application was premised on the grounds stated on the face of the application which were a duplication of the grounds stated in the applicant's statutory statement, the supporting and replying affidavit sworn by David Maina, the Managing Director of the applicant.

The application was opposed by both the respondent and the interested party.

In opposing the motion the respondent filed grounds of opposition on 18th September, 2011 while David Githere the Interested Party's director swore a replying affidavit on 4th December, 2009 on the Interested Party's behalf.

Following directions issued by the Court on 4th April, 2011 all parties filed their submissions which were highlighted in court by their respective counsels on 7th November, 2011.

It is clear from the grounds upon which the application is based and the depositions in the affidavits sworn by the applicant's managing director that the applicant wants the decision by the respondent made on 24th August, 2009 quashed by order of certiorari on grounds that it was issued in excess of the respondent's jurisdiction and that it was issued exparte without giving the applicant an opportunity to be heard and was thus made without observing the rules of natural justice.

It is the applicant's case that no tenancy relationship existed between it and the interested party who had filed a reference in the Business Premises Tribunal case No.778/2009 claiming that it was the applicant's landlord.

In the said reference exhibited as annexture DMI to the applicant's verifying affidavit, the interested party had made the following complaint and prayer:

"The complaint concerns the Landlord/Tenant in that he/she:

(i) Has accumulated electricity bills to the tune of Kshs.2,952,683.90 which they have refused to pay to Kenya Power & Lighting Co. Ltd.

(ii) The Landlord prays that this Honourable Tribunal do issue orders to the effect that the Tenant be compelled to pay the electricity bill of Kshs.2,952,683.90 to Kenya Power & Lighting Co. Ltd. and in default their goods to be attached and soled to clear the bill".

Filed together with the said reference was a notice of motion under certificate of urgency seeking in the interim, orders to compel the applicant to pay an accumulated electricity bill in the sum of Kshs.2,952,683.90 and that in default the applicant's goods to be attached and sold to clear the bill.

From the annextures to the affidavits sworn herein, it would appear that the notice of motion was heard on 24th August, 2009 exparte as though allegedly served with a hearing notice as shown in the affidavit of service marked as annexture DM2, the applicant did not attend the tribunal on the hearing date. Subsequent to that hearing the order challenged by the applicant was issued by the Respondent.

It is the applicant's case that the impugned order was made without jurisdiction as the electricity bill subject of the order was not an ordinary electricity bill for consumption of electricity but was a result of lost consumption due to meter tempering by agents of the applicant. That jurisdiction to entertain or determine issues related to meter tempering was vested in the Energy Regulatory Commission by the Electric Power Act and not on the Respondent.

I find that considering the issues raised in this application, it is important to establish the subject matter of the dispute that was placed before the Business Premises **Tribunal** ***(hereinafter referred to as the Tribunal)*** as this is what will lead to a determination of whether or not the tribunal had jurisdiction to issue the orders being challenged by the applicant.

Looking at the reference lodged before the Tribunal in case No.778/2009 as per annexture marked DMI and the Notice of motion dated 21st August, 2009 pursuant to which the impugned orders were made, it is clear that the Interested Party's complaint was that the applicant being its tenant had refused to pay an accumulated electricity bill of Kshs.2,952,683.90 to Kenya Power & Lighting Co. Ltd. which had been issued in its name being the landlord and this is the bill that the interested party wanted the applicant compelled to pay and in default to have its goods attached and sold to clear the bill.

From the documentation before the tribunal and subsequent proceedings, it is evident that no issue of meter tempering arose. It was not alleged in the pleadings and proceedings before the tribunal that the said electricity bill arose because of electric meter tempering by the applicant or its Agents. It is clear from the pleadings before the tribunal that what was to be determined was whether the applicant herein who was the respondent in the notice of motion before the tribunal could be compelled to pay an accumulated electricity bill of Kshs.2,952,683.90 to Kenya Power & Lighting Co. Ltd. and whether in default its goods could be attached and sold to clear the bill.

The issue of why or how the electricity bill had accumulated to such substantial amounts or whether it was as a result of meter tempering was not pleaded either in the main reference or in the notice of motion. It did not also arise in the proceedings before the tribunal. In the premises, I find that the subject matter of the reference and notice of motion before the tribunal which gave rise to the impugned order of 24th August, 2009 was not meter tempering but refusal of a tenant to pay electricity bills.

The Landlord and Tenant (shops, hotels and catering establishments), Cap.301 Laws of Kenya ***(hereinafter referred as the Act)*** is the Law that donates jurisdiction to the Business Premises Tribunal to determine and make appropriate orders in matters related to controlled tenancies.

It has been argued by the applicant that at the time in question it was not the Interested Party's tenant. That the tenant was Gerald Munene Mugo and not the applicant as evidenced by the tenancy agreement exhibited as annexture D1 to the Interested Party's supporting affidavit in the notice of motion filed before the tribunal and that it was wrong for the tribunal to issue such orders to a party who was not a tenant.

I have looked at the said tenancy agreement and I have noted that it has the name of Gerald Munene Mugo in the space provided for the tenant in respect of a shop at Kariobangi whose details are either not legible or were not disclosed. Looking at the tenancy agreement at its face value, it is easy for one to conclude that the tenant was Gerald Mugo not Wega Bakery Ltd as submitted by the applicant's counsel. However looking at the annextures to the replying affidavit sworn by David Githere a director of

the interested party, there is no room for doubt that the applicant was infact the interested party's tenant at the time in question. I am referring to annextures marked C1. The first two annextures are letters written in the applicant's letter head "Wega Bakery Ltd" addressed to the property manager of Shelter investments Ltd. They are on the subject of recent electricity bills and termination of rent agreement and notice to terminate tenancy. Both letters are signed by David Muhia and in the letter dated 12th August, 2009 David Maina has signed for the tenant, Kariobangi Plot No.462. It is important to note that David Maina is the person who has sworn affidavits in support of the applicant's pleadings in this case describing himself as the managing director of the applicant.

Given the content of these letters which bear the applicant's letter heads and which are signed by its managing director, I find that Wega Bakery Ltd was a tenant of the interested party at the time the impugned orders were issued by the Business Tribunal. The tenancy related to a shop in Kariobangi used for commercial purposes bringing it within the definition of a controlled tenancy as defined in Section 2(1) of Cap.301.

Section 12 of the Act spells out the jurisdiction donated to the Business premises Tribunal and Section 12(4) reads as follows:

"In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit"

The orders being challenged by the applicant herein were made pursuant to a complaint made to the tribunal by the interested party who was then the applicant's landlord and the complaint related to a controlled tenancy. In the circumstances, the tribunal was mandated by Section 12(4) of the Act to make any order thereon as it deemed fit.

After considering the notice of motion lodged by the interested party, the tribunal in the exercise of its discretion made the orders now being impugned by the applicant in this case.

Looking at the provisions of Section 12(4) of the Act, I am of the firm view that the tribunal had jurisdiction to entertain and determine the reference and notice of motion filed before it by the interested party herein and I so find.

The 2nd limb of the applicant's complaint is that the orders of 24th August, 2009 were made exparte without giving it an opportunity to be heard and were therefore made without observing the rules of natural justice.

In Kenya National Examination Council –vs- Republic Exparte Geoffrey Gathenji Njoroge & Others, Civil Appl. No.266 of 1996 the Court of Appeal held that an order of certiorari will issue to quash a decision already made not only without or in excess of jurisdiction but also where the rules of natural justice have not been complied with. The question then to ask at this juncture is whether the applicant was given an opportunity to be heard in the matter before the tribunal before the impugned decision was made. It is the applicant's case that the notice of motion was heard exparte and that it was not given an opportunity to be heard before the order was made.

Mr. Nyakiangana for the interested party submitted that the applicant cannot complain that it was not given an opportunity to be heard since the date for hearing of the motion on 24th August, 2009 was taken by consent of the parties. That the date was taken by himself for the interested party, the applicant in the motion before the tribunal and Mr. Wahito counsel for the tenant (current applicant) but that on the hearing date there was no representation for the applicant. This position is disputed by the applicant.

I have noted that Mr. Nyakiangana for the interested party irregularly placed in the court record proceedings before the tribunal in Case No.788/2009 which was later consolidated with Case No.446/09 by attaching them to his written submissions instead of filing a further affidavit and exhibiting the same as annextures.

However since in its judicial review jurisdiction the court is concerned with administering substantive justice without undue regard to technicalities, in the interest of justice, the said proceedings are deemed to be properly on record since they are relevant to the issues at hand.

A perusal of the said proceedings and the affidavit of service sworn by Kennedy M. Nyamweya on 24th August, 2009 seems to vindicate the applicant's complaint that indeed it was not given an opportunity to be heard before the impugned decision was made. The proceedings clearly show that the date of 24th August, 2009 was taken by consent of Mr. Nyakiangana and Mr. Wahito on 17th July, 2009. By this date, the notice of motion on the basis of which the order challenged by the applicant was issued had not been filed. It was filed on 21st August, 2009 and therefore counsels for the parties could not have had it in mind when taking date of 24th August, 2009. It was infact non-existent at the time. It is clear from the proceedings that followed that the hearing of 24th August, 2009 was in relation to the termination notice issued by the interested party to the applicant to terminate the tenancy.

The notice of motion filed on 21st August, 2009 – annexed to the applicant's supporting affidavit which must be the notice of motion referred to by the process server Kennedy Nyamweya which was allegedly served on a manager of the applicant had no return date and no hearing notice was apparently served alongside it as no mention is made in the Affidavit of Service of a hearing notice having been served together with the notice of motion and an undisclosed order. No hearing notice is attached to the Affidavit of Service. There is therefore no evidence to prove that the applicant was notified that the said notice of motion was scheduled for hearing on 24th August, 2009.

This notwithstanding, the Chairlady of the Tribunal without satisfying herself that the applicant had been served with hearing notice proceeded to determine the application and made orders that required the applicant to pay substantive amounts of money to Kenya Power Lighting Co. Ltd without giving it an opportunity to respond to the notice of motion and to be heard on the same. The orders made adversely affected the applicant and it ought to have been given an opportunity to be heard before the same were issued.

The right to be heard is a basic and fundamental right protected by the Constitution and it must be availed to any party in either judicial or quasi judicial proceedings ***(see Article 50 of the Constitution of Kenya).*** It is a basic component of the rules of natural justice which must be observed by courts, public bodies or inferior tribunals performing either judicial or quasi judicial functions. The Business Premises Tribunal was one such tribunal. It ought to have observed the rules of natural justice in its proceedings.

In view of the foregoing, I am satisfied that the applicant was not given an opportunity to be heard before orders adversely affecting it were issued on 24th August, 2009. The said orders were therefore issued in breach of the rules of natural justice and as held by the Court of Appeal in the Kenya National Examination Council –vs- Republic exparte Gathenji & Others (supra) which is binding on this court, this is one of the grounds upon which orders of certiorari should issue.

Lastly, there is one other thing that is disturbing about the impugned orders and which in my view gives rise to the impression that the said orders were not only issued in breach of the rules of natural justice but were also patently irregular. They do not appear to have been made on the basis of any proceedings. The tribunal's proceedings as exhibited in this case do not show that the application dated 21st August, 2009 was heard on that date even exparte. The proceedings of 24th August, 2009 as earlier indicated related to a completely different matter about validity or otherwise of a termination notice and had nothing to do with the said notice of motion. Curiously the said order indicates that it had been issued by consent of the parties. It is not clear how this would have been possible given that the applicant had not been notified of the hearing date and logically he would not have attended the tribunal on that date. The proceedings do not also show that parties either recorded or filed a consent.

Given these observations, I think it is safe to conclude that the said order was not based on any proceedings and this raises doubts regarding its legitimacy. Such orders in my opinion should not be allowed to stand.

Mr. Njuguna counsel for the Respondent had submitted that orders prayed for by the applicant should not be issued because the applicant did not exhaust the remedies under the Act as it failed to prefer an appeal under Section 15 thereof. The law is that the existence of an alternative remedy is no bar to issuance of remedies of judicial review. **(See the Court of Appeal decision in David Mugo t/a Manyatta Auctioneers –vs- Republic – Court of Appeal No.265 of 1997).**

For all the foregoing reasons, I find merit in the notice of motion filed on 28th October, 2009. The same is allowed in terms of prayer 1 and prayer 2 thereof.

The applicant is awarded the costs of the application which will be borne by the interested party.

Dated, **Signed**and**Delivered** by me at Nairobi this 8th day of December, 2011

C. W. GITHUA
JUDGE

In the presence of:
Florence – Court Clerk
N/A for Applicant

Mr. Mutungi holding brief for Njuguna for Respondents

Mr. Oluoch holding brief for Nyakiagana for Interested Party