



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

MISCELLEANOUS CIVIL APPLICATION 15 OF 2008

REPUBLIC.....APPLICANT

VERSUS

MARGARET M. MARANGU.....RESPONDENT

RULING

The ex-parte applicant moved this court on 5/3/2008 under certificate of urgency for leave to file a notice of motion for certiorari to remove into this court for quashing the decision or order made by the chairman of the Business Premises Rent Tribunal sitting in Embu on 3/3/2008 in Embu Business Premises Rent Tribunal No. 4 of 2008. The said leave was granted. The court did in fact dispense with service of the notice to the Registrar as required by the Rules. That leave was therefore proper. The said application like the subsequent notice of motion has nonetheless omitted to cite the provisions of the Law Reform Act i.e Section 8 & 9 of Cap 26 of the laws of Kenya. I have stated time and again that prerogative orders are derived from the Law Reform Act and Order LIII only provides for the procedure. Any application for the said prerogative orders must be premised on the Law Reform Act which is the substantive Act as failure to cite the said provisions renders the application or motion fatally defective and may call for its striking out.

I will nonetheless not strike out this application on that basis alone and will determine the same on its own merit.

The prayer for certiorari orders based is on the following grounds.

- (a) ***That the chairperson of the Tribunal does not have jurisdiction to make the orders she did without the participation of another one member or members.***
- (b) ***In making the said orders, the Tribunal failed to observe the Rules of natural justice in that the applicant was not heard.***
- (c) ***The Tribunal made and executed its own orders. It has no such powers. It is supposed to file its order with a subordinate court for its execution.***

These grounds are further expounded in the verifying affidavit and statement of particulars dated 5/3/2008.

The same is opposed by the interested party vide her affidavit dated 27/5/2008.

I have considered the said grounds, the rival affidavits, the authorities cited by both counsel and the law applicable in such matters.

According to Mr. Njage for the Ex-parte applicant, the Chairman had no power to grant such orders in the absence of any other member. He submitted that the chair erred in assuming that she was the Tribunal. He referred me to Section 11 of Cap 301 but in my considered view and with respect, Mr. Njage misinterpreted the said provision. The same provides;-

“ A Tribunal shall consist of a person or persons appointed as such by the minister, and shall exercise such jurisdiction as is conferred on it by or under this Act, over such area as shall be specified in such appointment.”

A Tribunal shall therefore consist of either a person – or persons. The chair alone can therefore constitute a tribunal under section 11 and she can proceed to determine references and issue orders depending on the circumstances of the case. She did not therefore Act ultra vires in this matter and acted strictly within her jurisdiction. That ground must therefore fail. On the question as to whether the chair flouted Rule 19 of the Tribunal Rules or not, the court notes that in the absence of the proceedings before the tribunal, it is not possible to tell whether she indicated the reference number, the coram etc. What was annexed here was the extracted order. In any event it is conceded that she is alone, which I find she had jurisdiction to do and she did not therefore need to record any other “**composition**” of the Tribunal except for her name.

Further on the issue of the tribunal’s jurisdiction, Section 12 (1) (e) allows it,

to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits.....”

The order granted to the interested party herein was meant to enable her recover the possession of the premises where her goods were still being held. The orders restraining the ex-parte applicant from evicting her etc may sound like an injunctive order but it was an order meant to ensure that the order allowing her back into the premises was not frustrated.

On the issue as to denial of natural justice to the ex-parte applicant, it is clear that the application was an ex-parte application which was made under a certificate of urgency. The ex-parte applicant was not therefore denied a hearing. If he wanted to be heard after service of the said order on him, nothing stopped him from going to the tribunal that had issued the ex-parte orders to be set aside so that he could be given a hearing. The fact that an application is heard ex-parte does not amount to a denial of natural justice to the other side because the law provides for the setting aside of ex-parte orders.

On the issue of the Tribunal having no jurisdiction to execute its own orders, I agree that execution of Tribunal orders is supposed to be done through a subordinate court with the requisite jurisdiction. That was not done in this case, but that does not render the entire order illegal. It may have been an error on the part of the chairperson of the tribunal. This would nonetheless amount to a wrong exposition of the law which would call for an appeal but not for quashing of the decision itself. The other points as to the chair of the tribunal referring to a “**suit**” instead of ‘**reference**’ are peripheral and do not go into the root of the decision. The ex-parte applicant was not prejudiced by the same.

In sum therefore, my finding is that the order in question was not suited for Judicial Review orders. Rather, it was one where the same tribunal could have been moved for setting aside the ex-parte orders or subjected to the appeal process.

My finding is that the tribunal did not exceed or overstep its jurisdiction, the chair had jurisdiction to compose a tribunal on her own as provided for under Section 11 and the orders she gave pursuant to that exercise of her jurisdiction were not null or void. They were sanctioned by law. This motion therefore lacks merit and the same must fail. I dismiss the same with costs to the interested party. The order for stay granted earlier on is hereby vacated.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 27th day of April 2010.

In presence of:-Mr. Mugo for Mr. Njage for exparte applicant
Exparte applicant also present.