



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Miscellaneous Application 674 of 2009

DR. HASSAN A. AWADHAN.....APPLICANT
VERSUS
BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT
AND
DR. NAHIFA MAAMIRY.....1ST INTERESTED PARTY
JUDGMENT

On 30th December, 2009, Ibrahim J. granted the applicant **Hassan A. Awadhan**, leave to apply for an order of certiorari to bring up into this court for the purpose of quashing the proceedings and order of the **Business Premises Rent Tribunal** (hereinafter “*the respondent*”) sitting at Mombasa on 1st December, 2009. Pursuant to that leave, the applicant lodged this Notice of Motion on 20th January, 2010, seeking the said relief. The main grounds for the application as can be deduced from the face of the Motion on Notice and the supporting affidavit, are (a) that the impugned proceedings have been undertaken without observance of due process; that the effect was to deny the applicant his right to a hearing; that the proceedings and order are unlawful as being in breach of the principles of natural justice and that the proceedings have been undertaken contrary to the provisions of the Law and especially regulation 15 of the Regulations made under section 16 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act Cap 301. The background of the matter is as follows: The applicant is a tenant of Nahifa S. Maamiry (hereinafter “*the Interested Party*”) in respect of premises situate on Abdel Nasser Road, Alya Building, Mombasa. In the year 2008, the Interested Party served him with a notice of termination of his tenancy under section 4 of the Landlord & Tenant (Shops, Hotels & Catering Establishments) Act Cap 301 pursuant to which he filed a reference under section 6 of the said Act with the said Tribunal engendering the said proceedings in BPRT Case No. 212 of 2008. After several adjournments the defence was slated for heading on 1st December, 2009 and proceeded ex-parte with the Tribunal terminating his tenancy and ordering him to vacate the demised premises on 11th December, 2009.

The applicant contends that he was not served with a hearing notice for 1st December, 2009, and that his counsel came across the order of the tribunal fortuitously while on other business at Mombasa Law Courts. In the premises, he complains that he had been condemned unheard hence these proceedings. The respondent has neither filed grounds of opposition nor a replying affidavit. The Interested Party has however opposed the application by way of a replying affidavit in which he has deposed that the judgment of the Tribunal shows that the applicant was served with a hearing notice and was therefore given ample opportunity of being heard but opted not to take part to his prejudice. The Interested Party further contends that there are other remedies available to the applicant and that there are no grounds to allow this application.

When the application came up before me for hearing on 14th June, 2010, counsel for the applicant and the Interested Party agreed to file written submissions which submissions were in place by 15th July, 2010. Counsel for the Respondent did not wish to respond to the application and filed nothing. The submissions filed by the counsel for the applicant and the Interested Party recited the parties’ stand-points taken in their respective affidavits. I have considered the pleadings, the application and the affidavits filed. I have also given due consideration to the said submissions. Having done so, I take the following view of the matter. The applicant seeks one order of **certiorari** to bring into this court for the purpose of quashing the proceedings and order of the Business Premises Rent Tribunal (“*the respondent*”)

sitting at Mombasa on 1st December, 2009. The main ground for the application is that he was not served with a hearing notice for 1st December, 2009, and therefore the ex-parte proceedings, which took place and the order terminating his tenancy, offend against the Rules of Natural Justice as he was condemned unheard. With regard to the issue of service of a hearing notice, the applicant's complaint is not without basis. I say so, because the factual position regarding that service as given by the applicant has not been rebutted by the respondent. The Interested Party has contended that both parties were served with a hearing notice. In support of that contention she has exhibited a copy of a hearing notice dated 30th November, 2009. That hearing notice was however addressed to her counsel. She has not exhibited any evidence to demonstrate that a hearing notice was served upon the applicant or his counsel. That evidence could only have come from the respondent but the respondent chose not to respond to this Notice of Motion. Notwithstanding the total failure to respond, a scrutiny of the copy of the hearing notice served upon counsel for the Interested Party reveals that the same is dated 30th November, 2009, and commanded the Interested Party's counsel to appear before the respondent on 1st December, 2009. The copy of the hearing notice exhibited by the Interested Party does not indicate at the time it was issued.

Counsel for the Interested Party did not say at what time he was served with the same. Be that as it may, it cannot be gainsaid that the notice given in the hearing notice was of less than one (1) day. That notice, by all accounts, was too short and even if it had been served upon the applicant, he would have been entitled to complain. The Interested Party was seeking a drastic order against the applicant termination of tenancy and eviction of the applicant. The record of the respondent with all due respect reflects almost a casual approach to the proceedings before it, yet the consequences of the order which issued could be anything but grave.

It is trite that an order of **certiorari** will issue to quash proceedings and or order of an inferior tribunal or body if the proceedings and/or order are held and/or made without or in excess of jurisdiction or where rules of natural justice are not complied with. It cannot be doubted that the respondent is an inferior tribunal and is therefore clearly amenable to orders of judicial review. The Interested Party is of the opinion that the applicant should have sought relief before the respondent. That option was indeed ostensibly available to the applicant but was realistically only a mirage. However, the availability of another option is not a bar to the applicant invoking this court's judicial review jurisdiction. I am not alone in this view. Waki J. as he then was held in **Republic – v – Chief Magistrate's Court Mombasa & Another ex-parte Bahaji & Company Limited & Another [2000] KLR 56** held, *inter alia*, as follows:-

“5. The remedy of judicial review is available in appropriate cases even where there is an alternative legal or equal remedy.”

In the premises, I find and hold that the respondent did not accord the applicant an opportunity to be heard when his reference came before the respondent for hearing on 1st December, 2009. In failing to do so, the respondent acted in breach of the rules of natural justice. Where there has been a departure from the rules of natural justice by a public body or bodies or an inferior tribunal such as the respondent, an order of certiorari will issue. All the applicant is saying in his Notice of Motion is that before terminating his tenancy over the demised premises and ordering his eviction therefrom, he should have been given an opportunity to be heard. He is not asking the respondent to decide the reference in any particular manner. If he did so, he would not have invoked this court's judicial review jurisdiction.

In the end the Notice of Motion dated 18th January, 2010 and lodged on 20th January, 2010 is allowed as prayed. For avoidance of doubt this decision does not determine the reference filed by the applicant.

The applicant shall have the costs of the Notice of Motion to be borne by the Interested Party.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF SEPTEMBER 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Munyao holding brief for Mr. Mwakisha for the Applicant and Mr. Hamza for the Respondent.

F. AZANGALALA

JUDGE

9TH SEPTEMBER 2010