REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Misc Civil Appli. 562 of 2007

REPUBLIC..... APPLICANT

VERSUS

THE BUSINESS PREMISES RENT TRIBUNAL ..... RESPONDENT

LEO INVESTMENTS LTD ..... INTENDED PARTY

SAMIMA INVESTMENTS LTD ..... EX-PARTE APPLICANT

JUDGMENT

On 25th May 2007 the applicant filed under certificate of urgency an application seeking leave to obtain the order of certiorari and prohibition and that the leave if obtained operates as stay. On the same day leave was granted as prayed.

The proceedings spring from the relationship of Landlord and Tenant in respect of the premises known as LR No.209/560/10.

The applicant in the judicial review application dated 11th June 2007 is Ms Samina Investment Ltd, the Respondent is the Business Premises Rent Tribunal and M/s LEO Investments Ltd is the Interested Party.

When the order for leave and stay way obtained it was served on M/s LEO Investments Ltd, the landlord in LR 209/560/10 by the applicant Ms SAMINA INVESTMENT LTD as the Tenant therein.

In 2004 an undated notice to terminate tenancy was addressed by Leo Investments Ltd to one Sammy M. Maina t/a Bata Boutique at Mithoo House LR 209/560 Moi Avenue Nairobi. The notice purported to terminate the tenancy with effect from 1.7.2004.

A reference with the Applicant as Sammy M. Maina t/a Bata Boutique was filed in the Tribunal to oppose the Notice to terminate in BRTC No. 370 of 2004. The reference related to premises LR 209/560 Mithoo House. It was contended that the Notice was served on 1st July 2004 the same day the Notice was supposed to take effect. It is common ground that Sammy M. Maina died in 1999 yet it was claimed by one N.I Ibrahim that “we served him.” Having died nearly five years before, he could not possibly have

been served. It is also not explained how a deceased person could have filed a reference under s 12(4) of the Landlord Tenant Act as well.

From the Statement and Verifying Affidavit it is clear to the court.

(a) The statutory notice relied on in BPRTC 370/2004 had not been served

(b) It was addressed to a deceased person and therefore unserved

(c) The date of service is said to have been 1.7.2004 when it was supposed to take effect.

According to the provisions of s 4 of the landlord and Tenant Act a notice to terminate a tenancy governed by the Act must be served at least two months before the effective date.

However, in the BPRTC 370 of 2004 the notice was adjudged to be effective on 6th June, 2006 in the absence of the Tenant. The Interested Party continues to receive rent from the Applicant and it is contended that there was a tenancy by holding over which is a month to month tenancy. The Landlord did not file any eviction suit in respect of the month to month tenancy. It is contended that the Business Rent Tribunal had no jurisdiction to terminate the tenancy in the face of the clear provisions of s 4, and s 12(4) of the Landlord and Tenant Act and the said termination was a nullity ab initio and that all subsequent orders based on the challenged termination including the eviction order were equally void.

On 22nd June, 2006 an appeal was lodged against the decision of the Tribunal in BPRTC 370/2004 but the appeal was withdrawn on 20th April 2007.

After the Business Tribunal order the Landlord commenced enforcement proceedings in the Chief Magistrate Court (CMCC (RTC) 72 of 2006 wherein an eviction order was made and the Applicant herein has been evicted.

When the parties appeared before this court the court gave an order for the preservation of the status quo (the applicant goods have not been sold) until the determination of the application for judicial review.

The applicant filed written submissions on 23rd February 2008 and a list of authorities. The Applicant has in particular relied on a Five (5) Bench Court of Appeal decision in CA 145 of 1990 (unreported) ***TROVISTIK UNION INTERNATIONAL INGIRD URSOKA HEINZ and MRS JANE MBEYU AND ANOTHER*** for the contention that service on a deceased person is a nullity, as the proper representative is the administrator of his estate - the ratio of the case is that an administrator is not entitled to bring an action as an administrator before he has taken letters of administration. If he does the action is incompetent at the date of its inception.

The Interested Party (I.P.) has filed written submissions on 6th March 2008 and two lists of authorities filed on 11th March 2008 and 14th April 2008 respectively.

The gist of the Interested Party's opposition to the application is centred on s 9(3) of the Law of Reform Act and Order 53 rule (2) which stipulates that, in the case of certiorari if an application for leave is not filed within 6 months of the order/decision challenged, certiorari would not lie. The Interested Party has relied on the case of ***RE APPLICATION BY GIDEON WAWERU GATHUNGURI 1962 EA.***

The holdings of the Supreme Court of Kenya were:

(i) "**the rules of court made under s 9 ibid could not defeat the clear provisions of sub s (3) of the same section which imposed an absolute period of limitation so that leave should not be granted unless the application for leave was made not later than six months after the date of the conviction and sentence.**

(ii) the application for leave should not have been granted since it was made more than six months from conviction and sentence.

(iii) since the remedy was discretionary and it was clear that infact the order for leave to proceed should not have been made the court would not exercise the discretion and make the order sought."

In the case of ***IN RE*** estate of ***ODAGE 1991 KLR 184*** his Lordship Justice Khamoni applied the ***GATHUNGURI*** decision on the six months limitation for certiorari.

The I.P.'s Counsel Mr Omogeni has relied heavily on the decision of the Court of Appeal in the ***KENYA NATIONAL EXAMINATION COUNCIL v R EX-PARTE GEOFFREY GATHENJI NJOROGE CA 266 OF 1996*** to the effect that due to the principles established in the case the orders of certiorari and prohibition would not lie, firstly, because certiorari cannot be given outside the six months and secondly, because the eviction has taken place, prohibition cannot operate retrospectively. It operates as to the future not the past. He relied on the following quotations from the case at page 11 and 12:

"***That is why it is said prohibition looks to the future" ...***

<u>again</u>

"***prohibition cannot quash a decision which has already been made, it can only prevent the making of a contemplated decision."***

The Interested Party's Counsel has also submitted as under:

(1) The Applicant M/s Samina Investments Ltd has never been a tenant of the Interested Party and the Notice of Termination was never served on them but upon one Sammy M Maina t/a Bala Boutigue and it is Sammy Maina who filed the reference in Tribunal Case 370 of 2004.

(2) That the Tribunal proceeded to issue orders for vacation of the premises on 30th June 2006.

(3) The application challenging the order given above was filed on 24th May 2007 nearly one year later (and outside the 6 months limitation for certiorari).

(4) Finally in Chief Magistrate's Suit CMCC RTC 72 of 2006 eviction orders were issued by the Chief Magistrate and that eviction has already been effected.

The Interested Party contends that due to contention 1 to 4 neither certiorari nor prohibition would lie.

The Applicant on the other hand relies on the following grounds:-

(1) That the notice purporting to terminate the tenancy upon which the ultimate eviction was based was "served" on a dead person and the eviction itself was addressed and/or directed at a deceased person namely the late (Sammy Maina). In addition the two months period stipulated in s 4 of the Landlord and Tenant before any notice can take effect was disregarded. The reference itself was instituted in the name of Sammy Maina which is yet another nullity.

(2) Both the proceedings and the orders obtained in BPRT 370/04 were nullities for the reason set out in (1) above.

(3) That the purported enforcement proceedings and the eviction order in CMCC (RTC 72/2006) by extension constitute a nullity as well.

<u>FINDINGS AND HOLDINGS</u>

I have no doubt that this is a very unique case and calls for new thinking because of the special

circumstances as described above.

The fact that the situation is novel is no good reason for me to fold my hands or seek to perch on the nearest fence and do nothing. The facts of each case that comes before the court cry out in a special way for justice to be done. Some of the past situations have clear guidelines and in most cases the courts do justice in accordance with those guidelines. However, if laws are applied too strictly and mechanically, law ceases to keep pace with social innovation and societal needs. If there is an entirely new situation as I have encountered on the basis of the unique facts in this case, such a situation calls for individual justice hence the development of equity. The new facts demand dynamism and growth in the law, to meet the new situation.

Law regulates behaviour either to reinforce existing social expectations or to encourage constructive change, and laws are most likely to be effective when they are consistent with the most generally accepted societal norms and reflect the collective morality of society.

I derive great comfort in the thought that the pathways of justice are infinite and every generation of judges will always find the pathways to follow if they care to look out of the window of their chamber or the courtroom!

I have taken into account the following highlights:-

(1) It is common ground that the notice to terminate the tenancy between the Interested Parties and Bata Boutique (the late Sammy Maina) was allegedly served on the deceased (it has not been demonstrated how this could have been done), yet since all subsequent proceedings and orders, stem from the issue of notice, the Court finds that the service was not effective at all. In any event the 2 months period stipulated in s 4 of the Landlord and Tenant before any Notice could take effect were never complied with and the order is illegal. Similarly the subsequent reference was filed in the name of a deceased person and this could also not be effective - see ***HEIZ*** case (ibid) 145 of 1990.

(2) Under s 4 the Tribunal did not have jurisdiction to terminate the tenancy and to refer the matter to the Chief Magistrate's Court to issue an eviction order - see the case of ***HEIZ*** (5 Bench decision of the Court of Appeal as opposed to the same earlier case of ***HEIZ*** of a 3 Bench panel) C.A 145 of 1990)).

(3) There was no service of notice on any authorized person or administrator of the estate.

(4) It follows that the reference could not have been properly filed by a deceased person or on his behalf in the absence of the administrator of the deceased's estate. Only administrators of the estate could have filed a proper reference.

(5) The termination or eviction order were nullities for the same reasons.

(6) The subsequent proceedings in CMCC RTC 72/2006 were also a nullity having been filed against a deceased person.

(7) It follows just as the day follows night that all the proceedings and orders in the Tribunal and in the subsequent in the Chief Magistrate Court, were nullities and this Court so finds and declares.

Both the Tribunal and the Chief Magistrate's Court had no jurisdiction to take even the first step. While this Court is aware that the six months limitation for certiorari is based on very sound public interest and public policy considerations, so as not to interfere with public authorities and other decision makers after 6 months it is clear from the reading of the Act and the Rule 2 that the rule does not apply to all situations. As per marginal note, it only applies to certain matters only. This court also appreciates that the hallmark of judicial review is speed. This Court is also of the view that where a challenged body had no jurisdiction to make the impugned decision in the first place that decision is a nullity ab initio and once a nullity always a nullity. My finding is that where there is a jurisdictional error or where a matter does not strictly fall under the restriction, the time ouster does not apply. The case of ***WILSON OSOLO v***

JOHN OJIAMBO OCHOLA & THE AC CA6/1995 is distinguishable because it dealt with an application for leave but not a Judicial review application filed after leave had been granted as in this case. Moreover this Court cannot seat on appeal in respect, of an Order for leave by another Judge of coordinate jurisdiction. This is what the judges did in the ***GATHUNGURI*** case. I refuse to follow suit**.**

On the great issue of the public interest involved in observing the time limit for the ouster clause for certiorari, I am certain that the main interest is speed so as to enable the decision makers to implement the decisions unhindered by any court threats after the six months, hence that famous observation that speed is the hallmark of judicial review. While speed is the hallmark of judicial review, in my judgment, I would also add fairness is the heart of judicial review. Putting the two public interests of speed and fairness on the scales therefore demands from the court a balancing act. The Court is certain that the 6 months limitation does not cover all situations seeking the order of certiorari and certainly nullities could not have been covered by the limitation. In the case before me, I have to the best of my research, found myself in an untrodden and difficult jurisprudential terrain, but I felt constrained not to abandon the seat of justice and fairness which is the only constant, but instead, use it as guide in navigating the unknown shores of fairness, and the ever unfolding jurisprudential horizons. The reason for this, is that if nullities are condoned by our law they are capable of clogging our justice system, erode the effectiveness and respect for Law and ultimately undermine the rule of law.

Refusing to act in the circumstances would be serious abdication of the seat of justice. The situations which the Courts encounter and the facts are often so diverse that not all facts or situations are accommodated by the rules we are very often asked to apply. The greatest challenge, I have encountered on the special facts of this case, is for the Court to find a new perspective and for the reasons set out earlier also identify the new ways or the pathways of fairness and justice. The other reason for identifying the new ways in my case is the principle that no litigant should benefit from illegalities or nullities since this would be against the policy of the law.

I find that s 9(3) of the Law Reform and O 53 rule (2) do not protect nullities or confer validity on them. Both s 9(3) and Order 53, rule (2) are ouster provisions which cannot in my view be effective where there was no jurisdiction to grant the orders as regards the two bodies namely the Business Premises Rent Tribunal and the Chief Magistrate Court.

I find that Rule 2 was not cast in stone. It was not to apply to all situations except those set out. Apart from the situation arising from the unique facts of this case (nullities) two other good examples outside the Rule are:-

(i) the application of s 65 of the Constitution supervisory jurisdiction.

(ii) judicial orders may be given by a constitutional court to

secure or safeguard rights and freedoms enshrined in the Constitution under s 84 of the Constitution. No leave need be sought and the Court could if necessary move on its own motion to issue judicial orders in deserving cases. I had the honour of serving in a panel of judges who gave a judicial order under s 84 in an environmental matter.

My finding is that jurisdiction is such a fundamental principle in law, that no ouster clause should prevail against it at all. Indeed as the late Nyarangi JA put in the "LILAN CASE" ***jurisdiction is everything***. In my view, jurisdictional errors fall outside the ouster case. Of the foreign decisions, I have not found a better decision on the effect of lack of jurisdiction, than the ***ANISMINIC v FOREIGN COMPENSATION COMMISSION*** and I would not hesitate to apply it here.

In my opinion nullities are defects and cobwebs in our legal system which if allowed to remain, would discredit, litter or devalue the administration of justice in accordance with the law. I find that subject to the exceptions, which I have endevoured to set out, and which are by no means exhaustive, it is incumbent upon the court to enhance the rule of law by getting rid of the nullities in order to bring justice to victory.

In this judgment by intervening I have given a wide meaning to the word "jurisdiction", as something more than the power to entertain a matter or dispute. I have given the word the meaning given to it in the often cited decision of Lord Reid in ***ANISMINIC LTD v FOREIGN COMPENSATION COMMISSION [1969] 2 AC (HL)*** where he defined the scope of jurisdiction as under:-

"**It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "***jurisdiction"* **has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides, a question remitted to it for decision without committing any of these errors it is as much entitled to decide the question wrongly as it is to decide it rightly. I understand that some confusion has been caused by having said in** *REG v GOVERNOR OF BRITON, Ex parte ARMAN (1968) AC 192, 234* **that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law ..."**

It is clear to this court that the facts of this case take it out of any of the exceptions, I have endeavoured to describe in this judgment. It is also clear that the applicant would not have any alternative private law remedy if this court refuses to open the door.

It would be unjust for this Court not to intervene in the face of the nullities described elsewhere because of the statutory ouster where the Tribunal and the Court although entitled to enter into the inquiry had no jurisdiction from the word go and never had the power to order eviction in the first place.

The rule of law demands that tribunals operate within the powers conferred on them by statute. The enforcement of the rule of law can be reinforced by keeping the tribunals within the law. Our effectiveness as courts depends on how we react or deal with unbounded powers of tribunal, inferior courts and other persons when matters are brought before us. It is an important feature of the court's role to deal firmly with such unbounded powers because at the end of the day the primary purpose of certiorari and prohibition is for preservation of order in the legal system and preventing excess and abuse of power rather than the final determination of private rights.

The Landlord and Tenant Tribunal failed to address the correct law, yet it has a special jurisdiction that does not provide for an alternative remedy. This is therefore a deserving case for intervention.

The other reasons why I have to give the orders are:

(1) Order 53 Rule 2 only prohibits the giving of leave outside the six months limitation and also to only certain cases in certiorari as per the marginal note. It does not in my opinion apply to all the cases except those specified namely cases involving any *judgment, conviction or other proceedings. N*ullities are in my view outside this description.

(2) In the case before me leave was granted by another court 25th May 2007 (not my court). Rule 2 on its wording only prevents the grant of leave outside the 6 months in respect of certiorari and only in respect of the formal orders outlined in the rule. I therefore rule that s 9 of the Law Reform and in

particular rule O 53 rule 2 upon which the opposition to the grant of the order of certiorari is based does not bar this court. I am not sitting nor I am capable of sitting on appeal concerning leave (except in the rare cases where application to set aside leave is filed and the judge giving it is outside the station or where a judge chooses not to take up the application seeking to set aside his order).

(3) There was no reference in law nor a proper notice served to warrant such a reference. The notice was never served hence ineffective. A deceased person could not file a reference. Consequently both the Tribunal and the lower court had no jurisdiction to enter in the dispute in the first place.

There is nothing in s 9 of the Law Reform Act or O 53 which says I cannot hear an application for judicial review on merit after leave has been granted by another Court.

I do not believe that any rights could have accrued to the Interested Party or any party at all, pursuant to the void orders. Rule 2 or any other statutory provision is not capable of preventing the court from giving justice, the high pedestal it is supposed to occupy under our Constitution. This court's supervisory jurisdiction under the Constitution is not limited. Justice is the greatest of the principal objectives of the Constitution and I must for this reason grant the relief sought since it is in accordance with law, principles of equity and good conscience. By conscience I do not mean my conscience but the collective conscience of our people which identifies justice and nods when justice is seen to have been done.

I have observed severally in my decisions, that the rule of law is a cog upon which our Constitution turns. Allowing the tribunal and the lower court to disregard the law would constitute serious abdication of the courts core business, and a betrayal of the rule of law. The constitutional fundamentals as stated herein tilts heavily in the courts granting the orders so that the tribunal and the lower court acquire an opportunity to once again discharge their respective roles in accordance with the relevant law.

I am fortied in my view that it would be unfortunate to let any party benefit from past illegalities perpetrated by institutions handling the matter. I find that there cannot be any good legal basis for any such benefit. Thus *BROOMS LEGAL MAXIMS* at page 191 states:

"**It is a maxim of law, recognised and established, that no man shall 'take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognised in courts of law and of equity, and indeed admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest ... we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of law."**

It "has been applied to promote justice, in various and dissimilar circumstances ... and applies also with peculiar force to the extensive class of cases in which fraud has been committed by one party to a transaction, and is relied upon as a defence by the other.

... we may state the principle upon which (the court of equity) invariably acted namely that the author of wrong, who to puts a person in a position in which he has no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong."

Even on this maxim an order for certiorari must therefore issue to bring into this court and quash the nullities described herein both in the Tribunal and in the lower court.

The rule demands that in the formal matters constituted in the Rule 2 the court should never grant leave. Where leave has been granted as in this matter, the matter has gone past the filter and falls outside the provisions of Rule 2, and the Court has no reason to refuse to deal with an application for the grant of the judicial review order of certiorari on merit and in my view Court has the power to intervene. There is nothing wrong in my view in the court dealing with jurisdictional errors and nullities at the Notice of Motion stage. Any other view would in my view erode the authority of law.

As observed elsewhere in this judgment the courts core business in judicial review, is to strive to achieve fairness. Where the preservation of status quo is a threat to the rule of law because the law has

not been applied e.g. failure to serve a statutory notice, by failure to file a competent reference under s 4 of the Landlord and Tenant Act, or the filing of a reference on behalf of a deceased person, or filing suit against a deceased person the conscience of this court, its spirit, and its sense of justice cannot allow the preservation of the status quo. Public institutions including tribunals have no axe to grind outside the applicable law and they have no heritage of rights. They exist for the mandate given them by law and they do not exist for any other purpose.

The statutory ouster clauses cannot in my view be effective in the face of jurisdictional errors. Even on the wording of s 9(3) and O 53 rule 2 nullities have not been stipulated and are therefore outside the provisions. The Court's power to strike down nullities especially where the error of law is apparent on the face of the record of the inferior tribunal and/or Court is in my view intact and it is in the public interest to do so both to demonstrate the majesty of law and to promote the rule of law.

I see no good reason for not intervening in the situations outside section 9(3) and Rule 2 in the name of the rule of law except in the following situations:-

(i) if there is an adequate alternative remedy.

(ii) if there is inordinate delay.

(iii) if the conduct of the applicant disentitles him to relief.

(iv) If, in the interest of justice no order should be granted or if it would be unjust to do so.

(v) if the granting relief would be futile.

(vi) If, the court is approached to enforce stale demands.

(vii) If the grant of the order would defeat the principles of good public administration.

(viii) If the granting of the order would defeat rights of innocent third parties.

The principle behind the exceptions I have tried to set out is based on the policy of the law or public interest considerations and one good example is set out in the reasoning of the court in the English case of ***SMITH v EAST ELLOE RURAL DISTRICT COUNCIL [1956] AC 736.*** In this case the Council compulsorily purchased the plaintiff's house under the Acquisition of Land (Authorisation Procedure) Act 1946. Para 15 of the First Schedule to this Act laid down that a compulsory purchase order (CPO) could be challenged on specified grounds within six weeks. Para 16 contained the time limit clause!

"**Subject to the provisions of the last foregoing paragraph a compulsory purchase order ... shall not ... be questioned in any legal proceedings whatsoever."**

The plaintiff subsequently discovered facts which indicated that the town clerk and council had acted fraudulently and in bad faith.

Six years after the CPO was made, she brought an action claiming damages for trespass an injunction to restrain the Council's employees from trespassing on the land and a declaration that the order had been wrongly made and in bad faith. The law lords (by a 3-2 majority) rejected her argument that the statutory time limit only applied to prerogative orders. Viscount Simonds summarized the reasons for the court's intervention as follows:

"**If the validity of such an order is open to challenge at any time within the period allowed by the ordinary statute of Limitations with the consequence that it and all that has been done under it over a period of many years may be set aside, it is not perhaps unreasonable that Parliament should have thought fit to impose an absolute bar to proceedings even at the risk of some injustice to individuals ... The injustice may not be so great as might appear. For the bad faith or fraud upon**

which an aggrieved person relies is that of individuals and this very case shows that, although the validity of the of the order cannot be questioned and he cannot recover the land that has been taken from him, yet he may have a remedy in damages against those individuals."

In other words, at the end of the day, the overriding principle is that judicial review orders are not granted as of right by the Court and the Court has a discretion to grant or not to grant judicial orders in all situations and since the Court has this wide discretion even where time limits are not blindly followed it is the courts sense of balance and justice that counts and the court has in such situation to put various competing interests on the scales before giving or refusing the orders.

In the current case, the parties except the deceased person remain the same and the relationship of Landlord and Tenant is a common ground. For this reason, the Court feels that it must not condone the lack of jurisdiction and the clear manipulation of the law concerning landlord and tenant. It cannot be good law to let a party to benefit from a blatant violation of the law.

In the current case, I do not find any circumstances to justify this court looking the other way or which could prevent the Court from exercising its discretion to grant the judicial orders. The fact that a long time has elapsed since the challenged proceedings and orders were made cannot make them pass as valid or lawful since they constitute jurisdictional error. Thus, in the case of HEIZ cited above it was observed at page 103 that the maxim "communis error facit jus" that is common error sometimes passes as law." We cannot afford this in all situations in our legal system.

I have in this judgment endevoured to state two policy reasons for seeking a new way out of the routine. Perhaps the third one is the need for the court to always demonstrate its readiness to rise to the challenge in every situation. Past history has sufficiently demonstrated that in the practice of law, just as in other life endevours, it is those who have tried to think out of the box or those who have stepped out of the boat who have become the greatest catalysts or agents of change. By thinking out of the box or stepping out of the boat new perspectives and new pathways of justice emerge which in turn lift societies to greater jurisprudential heights. That way we render a better account of our stewardship of justice.

The facts of the case demand new stewardship.

The ultimate effect of the nullities as regards the proceedings in BPRT 370/06 and CMCC RTC 72/06 is that the position remains as it was before the statutory notice was issued. The litigants in this matter shall forthwith begin to take action in accordance with the law and the applicable procedure. In other words they would have to start all over again, this time round applying the law and the correct procedure in enforcing their respective rights.

The proceedings and the orders challenged in BPRT 370/2004 and CMCC NO TC72/2006 are therefore forthwith brought into this Court and forthwith quashed. In the circumstance an order of prohibition is unnecessary. Orders shall issue accordingly.

Because in the view of the Court both parties appear equally to blame for the quashed proceedings and orders, I make no order as to costs.

DATED and delivered at Nairobi this 6th day of June, 2008.

J.G. NYAMU

JUDGE

Advocates

Mr Paul Wamae - Advocate for the Applicant

Mr Omogeni - Advocate for the Interested Party.