



**Diani Properties Limited & 2 others v Business Premises Rent Tribunal;  
Jurgen Fuks t/a Shakatak Disco (Interested Party) (Judicial Review Application  
E002 of 2022) [2022] KEELC 15342 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15342 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
JUDICIAL REVIEW APPLICATION E002 OF 2022**

**AE DENA, J**

**DECEMBER 9, 2022**

**BETWEEN**

**DIANI PROPERTIES LIMITED ..... 1<sup>ST</sup> APPLICANT**

**SVEN KAMPA ..... 2<sup>ND</sup> APPLICANT**

**JOEL TITUS MUSYA T/A MAKURI AUCTIONEERS ..... 3<sup>RD</sup> APPLICANT**

**AND**

**BUSINESS PREMISES RENT TRIBUNAL ..... RESPONDENT**

**AND**

**JURGEN FUKS T/A SHAKATAK DISCO ..... INTERESTED PARTY**

**RULING**

**Background**

1. The applicant Diani Properties limited and its Director Sven Kampa on 24/02/22 filed a Judicial Review application dated 21/02/22. The matter was filed under certificate of urgency against the Business Premises Rent Tribunal, Jurgen Fuks T/a Shakatak Disco (Interested Party) and Joel Titus T/A Makuri Auctioneers as one of the applicants. The applicant sought leave to apply for an order of prohibition and certiorari and the grant of such leave to operate as a stay of proceedings and orders in Mombasa BPRT Case No 014 of 2021 Jurgen Fuks T/a Shakatak Disco vs Diani Properties Co Ltd, Sven Kampa & Makuri Auctioneers. For purposes of this ruling I will refer to the applicant in the JR as Diani Properties and the other contender as Jugen Fuks/ Interested party.
2. On 24/01/22 this court certified the application urgent, granted leave to Diani Properties to file the present judicial review application. This court also ordered that such leave operates as stay of further proceedings and stay of the orders given in the above case until further orders of this court. The



substantive application was to be filed and served within 21 days and set down for hearing inter parties on 15/2/2022.

### **The Applications**

3. Before the inter parties hearing the Interested Party filed a Notice of Motion application dated 27/1/2022 which is the subject of this ruling. The same is filed pursuant to the provisions of sections 1A,1B and 3A of the Civil Procedure Act, Article 159 of the Constitution and all other enabling provisions of the law. The interested party seeks the following verbatim orders;
  1. Spent
  2. That pending the hearing of this application inter parties order number 4 issued in this matter on 25/1/2022 be stayed
  3. That order number 4 issued in this matter on 25/1/2022 be set aside
  4. That in the alternative to prayer 3 above, the court do give an interpretation to the parties on the full effect and tenor of order number 4 issued by the court on January 25, 2022 in this matter so as to avoid any confusion with regard to the impact of the said order
  5. That costs be provided for.
4. The application is premised on the grounds of that the parties have been involved and fully participated in BPRT cause no E014 of 2021 since early August 2021. That it was improper for Diani Properties having participated in the said proceedings to file the judicial review under certificate of urgency way after 6 months. That the BPRT had already issued orders staying the distress for rent against the Interested Party which Diani Properties had unlawfully commenced. That the subsequent orders issued by this court on 25/1/2022 gave rise to complications in the sense that the orders by the BPRT had already taken effect and the orders given by this court lead to setting aside of the BPRT orders. The Interested Party was of the view that Diani Properties should not be allowed to take advantage of enjoying exparte orders to frustrate orders that have been issued by another judicial tribunal as the same would operate contrary to the provisions of Article 10 and 47 of the Constitution of Kenya 2010.
5. The application is further supported by the affidavit sworn by Mr Gikandi Ngibuini counsel for the Interested Party. It is averred that the subject matter of the judicial review related to a tenancy between the Interested Party and Diani Properties herein. That the proceedings herein were as a result of the unlawful manner in which Diani Properties sought to recover disputed rent arrears from the tenant and who filed a dispute at the BPRT where several orders have been issued by BPRT. That in a recent ruling of the BPRT parties were directed on further proceeding with the matter. That orders were also issued on December 23, 2021 which Diani Properties were fully aware of and have never appealed against or applied for stay of the proceedings by the BPRT. It is stated that Diani Properties were engaging in forum shopping, a disrepute to the administration of justice.
6. Counsel for the Interested Party avers that orders of stay of proceedings are substantive orders and should not have been granted exparte. That it was necessary for court to give an interpretation of the orders issued in view of the order stating stay was being issued until further orders of the court. Counsels understanding of the further orders of the court was to allow for hearing inter parties on whether leave should operate as a stay. The court is asked not to interfere with the orders issued by the BPRT unless with the full consideration of facts.



## Response

7. The 2<sup>nd</sup> Applicant on behalf of Diani Properties replied through the affidavit sworn on 31/1/2022. It is averred that the court has the discretion to grant leave for an order of prohibition and certiorari to operate as stay under Order 53 rule 1[4] of the Civil Procedure Rules. That if the Interested Party is of the opinion that the court was wrong in exercising that discretion the remedy was to appeal to the Court of Appeal. That the judge could not seat on appeal of its own decision.
8. It is stated that setting aside an order of stay would mean that the BPRT and the respondent will continue to do that which is sought to be prohibited by orders of prohibition and will continue to make decisions on top of other decisions that are sought to be quashed. That the order no 4 was clear and it did not require any interpretation and the BPRT was simply not to take further steps in the case before it or enforce any of its multiple decisions of August, September, November and December 2021. It is averred that the BPRT case was filed in August 2021 and discounting the recess period, the 6-month period referred to in order 53 Rule 2 had not lapsed by the time leave herein was sought. That the complaint about time bar was misplaced and incompetent and an abuse of the court process. It is stated that the ELC court has supervisory powers over the BPRT through judicial review. That the two courts do not share jurisdiction and in the event of a conflict or a contradiction over orders between the ELC court and the BPRT the former will prevail.
9. The deponent states that it is the Interested Party who has been forum shopping and had so far filed 8 cases before the lower court, BPRT and the ELC. The particulars were provided. Further that the applicant has not demonstrated how he intends to pay his rent arrears which run into millions of shillings. That the present application is meant to derail the hearing of the substantive motion herein and the same is a gross abuse of the court process. The court was invited to treat the application as a reply to the substantive application for judicial review. The court is urged to dismiss the same.

## Submissions

10. This court directed that parties file and exchange submissions which they did. The *Exparte* Applicants submissions are filed before court on 18/7/2022. It is submitted that the interested party has filed a total of 7 suits before various courts and the said action has necessitated the filing of the present judicial review application. That out of the 7 suits, 5 have already been dismissed with costs. The applicants state that the interested party is forum shopping as evidenced by the various suits filed by him and which amounted to abuse of the court process. It is submitted that the BPRT has no jurisdiction over dwelling houses and residential premises. That a preliminary objection was raised over this but the same has not been heard by the tribunal. In summary the interested party is accused of failing to remit rent and which has led to rent arrears in millions despite the interested party claiming to be making profits of over Kshs 1 Million in a month. That the interested party has further filed before this court ELC Petition 4 of 2021 where he claims to be the owner of Shakatak Bar and the Diani Sea Lodge. The same is disputed as a person cannot claim to be an owner and also tenant of the same property. According to the interested party, the exhaustion doctrine is not relevant or available in the circumstances of these proceedings. The court is asked to grant the orders sought by the *Exparte* Applicants as it has jurisdiction under Order 53 and Section 11 of the Fair Administrative Action Act.
11. The interested party's submissions are dated 24/3/2021. It is submitted that the BPRT enjoys the sole and exclusive jurisdiction to deal with the issues arising from the dispute herein. That the applicants herein have actively participated in the matter before the BPRT and have at no point raised issue with the jurisdiction of the court. The interested party states that the doctrine of exhaustion of remedies has not been exhausted as was set out by the court of appeal in Speaker of National Assembly Versus



Njenga Karume [1992] eKLR and Republic Versus Commissioner General, Kenya Revenue Authority & 2 Others; Exparte Cup of Joy Limited; Mombasa Judicial Review Application No E051 of 2021.

12. Counsel for the Interested Party submits that judicial review remedies are discretionary and the court can decline granting them even when they are merited. Reliance on this is placed in the decisions in Republic Versus Cabinet Secretary for Interior and Coordination of National Government & Another Exparte Peter Adiele Mmegwa & Another [2018] eKLR and Republic Versus Public Procurement Administrative Review Board & Another; XRX Technologies Limited Exparte MFI Documents Solutions Limited.
13. Additionally it is submitted that the Applicant should not be allowed to use the judicial review process so as to oust the BPRT from exercising its jurisdiction. That the applicants should wait for the BPRT to fully determine the issues that have been raised therein. That in the event that the applicants will be dissatisfied with the tribunals outcome they will automatically appeal the same before the ELC court.

### **Analysis & Determination**

14. I'm aware of the pendency of two applications herein. The application dated 27/01/22 filed by the firm of Gikandi Advocates on behalf of Jurgen Fuks and which is supposed to be the subject of this ruling pursuant to this court's directions given on 15/02/22. There is also the substantive Notice of motion being the JR itself. I note that this matter has taken quite a substantial amount of time while there are more serious issues that require to be determined on merit especially the pending petition on the lease which also impacts on the rent dispute herein. I also note that Mr Gikandi on 15/02/22 was desirous that his application would serve as a response to the substantive notice of motion and then the two be disposed by way of written submissions. His objective was to save on time. Mr Murithi was of the view that Mr Gikandi's application should be dispensed with first. I took the latter view but I think Mr Gikandi was right then. However, considering the nature of Mr Gikandi's application and the submissions thereto as well as the submissions filed by Mr Kinyua both have substantively covered the main application for judicial review. In my view it would save judicial time and meet the objectives of the Civil Procedure and the court if the court proceeds to render itself on both applications which I proceed to as hereunder.
15. This court agrees with the averment that this court has the discretion to grant leave for an order of prohibition and certiorari to operate as stay under Order 53 rule 1[4] of the Civil Procedure Rules. Diani properties sought leave to apply for an order of prohibition and certiorari and the grant of such leave to operate as a stay of proceedings and orders in Mombasa BPRT Case No 014 of 2021 Jurgen Fuks T/a Shakatak Disco vs Diani Properties Co Ltd, Sven Kampa & Makuri Auctioneers. This court proceeded to grant such leave and also ordered that the leave operates as stay of further proceedings and stay of the orders given in the tribunal case until further orders of this court. The order granting stay is the main reason that precipitated the application dated 27/01/22. The substantive application was to be filed and served within 21 days and set down for hearing inter parties on 15/2/2022.
16. According to Mr Gikandi the orders of stay being substantive orders ought not to have been issued exparte. An interpretation of the same was also sought. From the record I have noted that on 28/01/22 when the application dated 27/01/22 was placed before me exparte I observed thus '...i have also looked at the orders given by this court on January 24, 2022. I'm not persuaded that the orders sought should be granted exparte the orders granted on January 24, 2022 were issued pending further orders of this court and a date was given for inter-parties hearing on 15/02/22 of the substantive application. Both parties shall have an opportunity to ventilate their case on the issue of leave.



17. Clearly parties were expected to canvas on the whether leave was going to operate as a stay. Be that as it may we are where we are and as stated the court is going to render itself on the substantive application as well. I also do not agree with Diani Properties position that Mr Mr Gikandi should have appealed to the Court of Appeal if he was aggrieved by the courts exercise of its discretion. The court had already stated that the orders were subject to further orders of the court and I would not fault Mr Gikandi for moving the court in this regard.
18. The substantive issue that precipitated the dispute between the parties is the issue of rent arrears that caused the distress which issues are stated by Jugen Fuks to be pending before the BPRT and which it is stated Diani properties has been participating. Diani properties on the other hand states that the BPRT has issued several orders at the instance of Jugen Fuks and which have become prejudicial to them hence the judicial review application herein. That a preliminary objection has been filed which the BPRT is not keen on making a determination including the applications upon which the various orders were made.
19. From the pleadings filed by both parties, it is clear that the dispute herein revolves around outstanding rent arrears which are disputed by the Interested Party as claimed by Diani Properties. This confirms that the issues are alive before the BPRT. It is trite that Judicial review is concerned with the decision-making process of an individual or a body exercising quasi-judicial powers. The BPRT as established by the law is a quasi-judicial body and whose decisions in this case are said to have been prejudicial to Diani properties limited as alleged. I'm aware that Article 165[6] of the *Constitution* provides that the High Court has supervisory jurisdiction over subordinate courts as rightly stated by Mr Kinyua. Be that as it may, it is clear that the proceedings before the BPRT are active and have not been concluded. It is feared by Diani properties that the BPRT will continue to do that which is being sought to be stopped by the judicial review proceedings.
20. In my view I do not think this courts supervisory powers were to be invoked in the manner that is being sought herein. To do so will be to create a bad precedent. It is imperative that the BPRT is given an opportunity to hear what is before it. The court will only be in a position to adjudicate over the issues as an appellate court once the same have been conclusively dealt with by the BPRT. The Landlord and Tenant [Shops Hotels and Catering Establishments] Act allows for appeals from the BPRT to be determined by the ELC. I refuse to grant the orders sought in the substantive motion as the jurisdiction of this court has been prematurely invoked. I must uphold the doctrine of exhaustion. I find support in various authorities where the principle of exhaustion has been litigated see *Charles Apudo Obare & Another V Clerk, County Assembly of Siaya & Another* [2020] eKLR.
21. The Court of Appeal in *Speaker of the National Assembly v James Njenga Karume* [1992]eKLR put it in the following words;-
 

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.”
22. I also find support in *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR\* [the Kibos Distillers case] wherein the Court of Appeal [Makhandia J] emphasized this principle and stated the following regarding multifaceted pleadings;-
 

To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent



organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that is *Speaker of the National Assembly v James Njenga Karume*[1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

23. This court notes that several applications pend before the BPRT and which need to be resolved and determined. Let the tribunal do its work. There is also ELC 4 of 2021 which has also been pending before this court on the mother title or lease which has been pending in court for sometime which parties need to prosecute with diligence for closure.
24. The upshot is that the judicial review application herein is not merited and the same is dismissed. This conclusively deals with the applications dated 25/1/2022 and 27/1/2022.

It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 9<sup>TH</sup> DAY OF DECEMBER, 2022.**

**A.E. DENA**

**JUDGE**

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms.Kiptum Holding Brief for Gikandi for Interested Party

No Appearance for Applicant

**Mr. Mwakina – Court Assistant**

