Suriya & 3 others v Tribunal & another; Iqbaal (Interested Party) (Judicial Review Application E006 of 2025) [2025] KEELC 6095 (KLR) (19 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6095 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION E006 OF 2025

JG KEMEI, J

SEPTEMBER 19, 2025

BETWEEN

ABDULKADER HUSSEIN SURIYA .... 1ST APPLICANT

HANIFA ABDULKADER HUSSEIN SURIYA ADIL .... 2ND APPLICANT

ABDULKADER SURIYA .... 3RD APPLICANT

MUHAMMAD ABDULKADER SURIYA .... 4TH APPLICANT

AND

THE BUSINESS PREMISES RENT TRIBUNAL .... 1ST RESPONDENT

ABDI KADIR ELMI ROOBLE .... 2ND RESPONDENT

AND

IQBAAL .... INTERESTED PARTY

RULING

1. Vide a Notice of Motion dated the 21/2/25 the Applicants moved the court by way of Judicial review seeking the following orders;

    a. That an order of certiorari be and is hereby issued to quash the entire proceedings and judgment rendered by Hon Mike Makori on 20/1/25 in Nairobi BPRT No E095 of 2024.

    b. That an order of prohibition be and is hereby issued to prohibit the 1st Respondent from further proceedings in BPRT No E095 of 2024.

    c. That the Hon Court be pleased to give such further orders and directions as it may deem fit and just to grant.

    d. Costs of this application to be provided for.

2. The application is premised on the statutory statement, the verifying affidavit and the supporting affidavit all sworn by Abdulkader Hussein Suriya dated 21/2/25.

3. The applicants averred that, through the leases dated 1/12/2020 and 22/4/21, the ex parte applicants, being the landlords of the suit land Ref No 209/1656, entered into lease agreements with the 2nd Respondent, the tenant. The tenant fell into arrears on rent, prompting the landlord to issue demand notices for the outstanding amount. In response, the 2nd Respondent/tenant filed a reference with the 1st Respondent's Tribunal in BPRT No E095 of 2024 – Abdi Kadir Rooble Vs AbdulKader Hussein Suriya & Hanifa Abdulkader Hussein Suriya, Adil & Abdulkader Suriya & Abdulkader Suriya & Iqbaal. Additionally, the 2nd Respondent sought and obtained orders from the Tribunal on 29/1/24, which were final, restraining the landlords from demanding rent and suspending rent payments without requiring the tenant to deposit the monthly rent of Kshs 160,000/- as sought. These orders were issued without proof of a prima facie case. As a result, the tenant enjoyed rent-free occupation of the property, causing loss to the landlords. Furthermore, in its final judgment dated 20/1/25, the tribunal ruled in favour of the tenant based on issues that were not pleaded, including false oral testimony during the trial claiming an agreement to offset rent with construction costs of the buildings on the property. The tribunal unlawfully conferred ownership of the premises to the tenant, contrary to the lease agreement, thus acting beyond its powers as defined in the Landlord and Tenant (Shops , Hotels and Catering Establishments)Act.

4. That in issuing the orders, the Tribunal acted improperly, illegally, and irrationally. Given that there was no evidence supporting the tenant's case, the Tribunal's decision was unreasonable, illegal, and irrational in the circumstances. It was further contended that the judgment therefore constitutes an infringement of the landlord's proprietary rights, contrary to the provisions of Articles 40 and 43 of *the Constitution*, which guarantee the right to property. The court was urged to intervene and quash the proceedings and the judgement in E095 /2024 on grounds of irrationality, procedural unfairness, and illegality.

5. The 2nd Respondent opposed the application and raised a preliminary objection dated 7/4/2025 on the grounds that;

   a. The applicants Judicial Review application raises issues of merits and or correctness of the decision rendered in Nairobi BPRT No E095 of 2024 which is not within the purview of judicial review.

   b. The prayer for an order of prohibition offends the established principles governing the issuance of Judicial Review order of prohibition as there are no ongoing proceedings before the Business Premises Rent Tribunal that are capable of being stayed and or prohibited.

   c. The entire judicial review application is fatally defective as it is contrary to the predominant purpose test as the judicial review application improperly raises issues of merit that ought to be ventilated through an appeal rather than judicial review proceedings.

6. On the 8/4/25 the parties elected to canvass the preliminary objection by way of written submissions which I have read and considered.

The written submissions by the 2nd Respondent /objector

7. On the question of whether the Objection is justified, Counsel for the objector/2nd Respondent argued that if the objection mainly concerns the court's jurisdiction to hear and decide the dispute, it is a purely legal point that can resolve the matter. He stated that in this case, the applicants have asked the court to assess the merits of the case rather than the proper process through which the decision

was made, thereby exceeding the bounds of judicial review. He further suggested that when a challenge focuses on the merits, the correct course of action would be to appeal the decision. Therefore, he contended, the application falls outside the scope of judicial review, and as a result, the court lacks jurisdiction to decide on the matter.

8. Regarding whether the application meets the threshold for judicial review, Counsel argued that the purpose of judicial review is to examine whether due process was followed, whether the decision-making authority acted within its legal mandate, and whether the rules of natural justice were observed. To the extent that the applicants are dissatisfied with the tribunal's judgement on the grounds that the tribunal reached a decision without considering evidence filed by the applicants indicating that the tenant was in rent arrears, the current application aims to re-evaluate the merits of the Tribunal's decision rather than the process. For that reason, Counsel contended that an order of judicial review is not an effective means to resolve the issues raised by the applicants.

9. Counsel further submitted that the orders of prohibition are unavailable since, as it stands, there are no live proceedings at the tribunal, given that the tribunal has pronounced itself in its judgment, the subject of the judicial review herein.

The Applicants written submissions

10. Counsel for the applicants agreed with the 2nd Respondent that the purpose of judicial review is concerned not with the merit of the decision but with the decision-making process. They argued that the application is based on the fact that the tribunal acted in excess of its jurisdiction by issuing orders leading to a final judgment that was unreasonable, illegal, outrageous, irrational, and at best, in want of jurisdiction. Inter alia, counsel contended that the tribunal failed to act fairly in reaching its decision. They claimed it unfairly and unlawfully conferred property to the 2nd Respondent, an issue that was not pleaded and, even if it had been, was outside the jurisdiction of the tribunal. They further submitted that judicial review remedies in this case are aimed at providing the applicants with efficient and effective public administration remedies and upholding the rule of law. They also argued that the tenants have unjustly enriched themselves at the expense of the landlord. Additionally, they contended that the tribunal failed the test of proportionality by not balancing the administration of justice with the advancement of the fundamental rights and interests of the parties.

11. It was further submitted that this court has jurisdiction to determine the review, and therefore, the court ought to hold that the objection is without merit and dismiss it.

The written submissions of the Interested Party

12. The interested party submitted written arguments fully supporting the applicant's case. It was argued that the tenancy agreement between the tenant and Whitely Limited was not a controlled tenancy, and that the tribunal exceeded its authority in resolving the dispute, thus warranting the quashing of the decision. Additionally, it was contended that this court, under section 13(7) (b) of the ELC Act, has the power to grant reliefs, including those sought in this application.

13. The Interested party informed the court that he is aggrieved by the impugned judgment of the tribunal and, being one of the landlords, he had filed an appeal against the tribunal's judgment, which is pending before the court. The appeal challenges the tribunal's jurisdiction to entertain and hear the claim for a controlled tenancy.

Analysis and determination

14. The key issue for determination is whether the preliminary objection is justified. In other words, the question is whether the relief of certiorari and prohibition provides a complete and effective remedy in these circumstances.

15. To begin with, the dispute between the parties in this case revolves around a tenancy relationship with the applicants and the interested party (hereinafter called landlords as per the pleadings on record), who allege that the 2nd respondent has fallen into rent arrears, prompting the landlords to issue a demand for rent payment. The tenant responded by filing a reference at the tribunal. Upon hearing the reference, the tribunal delivered a judgment on 20/1/25 in the following terms;

    a. There be a joint valuation of the suit premises within 30 days to ascertain both the ground rent payable on the subject structure in this matter.

    b. The building be jointly valued within 30 days to ascertain the monetary value of the structure erected.

    c. The value of the property shall be converted to current rent and future ground rent and shall run up and until the tenant exhausts the said assessed value of the building.

    d. That in the alternative, the tenant shall vacate the premises subject to the landlord paying the value of the amount as obtained in the valuation

    e. That each party shall bear its own cost.

16. It is the above decision that has aggrieved both the applicants and the Interested Party, prompting the current judicial review application before the court. These parties have cited several reasons for seeking review, including: the tribunal acted beyond its jurisdiction as the tenancy agreement between the applicants and the tenant was not a controlled tenancy under the Landlord and Tenant Act; the decision lacks support from any evidence presented by the tenant to prove he was not in rent arrears; the judgement was flawed for ignoring the landlord's evidence indicating the tenant was in substantial rent arrears; the tribunal's impugned judgement unlawfully awarded the property to the tenant, a matter that was not pleaded and in clear contravention of the evidence provided, as well as exceeding its jurisdiction; the tenant owed rent arrears to the applicants; there was no agreement to offset the rent against construction costs; and the decision of the tribunal, as contained in the judgement issued on 20/1/25, was unreasonable, illegal, and irrational, and therefore ought to be quashed by this court.

17. On prohibition, the applicants urged the court to prevent the tribunal from proceeding with any actions, including carrying out the said impugned judgment.

18. The application for judicial review has been brought under Order 53, Rules 1, 2 and 4 of the Civil Procedure Rules and Sections 8 and 9 of the *Law Reform Act*.

19. For purposes of emphasis, I will reproduce the provisions of the order and the law under which the applicants have premised the instant judicial review application. Order 53 of the Civil Procedure Rules provides as follows: -

> " Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to

appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

20. On the other hand, Section 9(3) of *Law Reform Act* provides as follows: -

> " In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

21. It is trite that Judicial Review proceedings are commonly known as a sui generis suit. Sui generis is a Latin expression that translates to "of its own kind." It refers to anything that is peculiar to itself; of its own kind or class. In legal context, sui generis denotes an independent legal classification. The remedy of Judicial review is provided for under Article 23 of *the Constitution*.

22. This Court is empowered under Section 13(7) (b) of the Environment & Land Court Act to make any orders and grant any reliefs including orders of a prerogative nature. In the instant suit the Applicant has sought for orders of certiorari to quash the decision of the Tribunal as well as an order of prohibition halting further proceedings in the tribunal.

23. Judicial review, in reality, is neither civil nor criminal in nature. This was the proposition held by the court in the case of The Commissioner of Lands v Hotel Kunste Civil Appeal No. 234 of 1995 [1995-1998] 1 EA 1 when it stated as follows:

> " ...in exercising the power to issue or not to issue an order of certiorari the Court is neither exercising Civil nor Criminal jurisdiction. .... It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."

24. In the case of Captain Geoffrey Kujoga Murungi v Attorney General Misc Civil Application No. 293 of 1993 it was stated that:

> " Certiorari deals with decisions already made...Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice...".

25. In the case of Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300, the grounds for bringing Judicial Review were stated as follows;

> " In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when

the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

26. Additionally, in the case of Municipal Council of Mombasa v Republic and Another 2002 EKLR 223 CA No 185 0f 2001 the court stated:

> " .... Judicial Review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the Court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? ...."

27. The remedy of prohibition has been aptly defined in the case of Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR where the Court held as follows:

> " Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice, the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings."

28. The court notes that the application has been brought under the provisions of Order 53, read together with Sections 8 and 9 of the *Law Reform Act*. The application, therefore, focuses on the process of decision-making, including whether or not a body has jurisdiction. In this case, I have examined the record before the court, and it appears that the parties participated in the hearing of the matter, and neither has claimed that they were not heard. What I understand from the landlords/applicants is that the tribunal should not have entertained the matter on the grounds of lack of jurisdiction. This issue had been raised before the tribunal, and in its decision rendered on 18/7/24, the court dismissed the objection on the basis that it raised questions of fact which required the production and examination of evidence, thus excluding it from being a pure point of law.

29. Since the parties have invoked the court's appellate jurisdiction, which allows for a broader examination of the dispute, the court is of the view that judicial review remedies are not appropriate in this case.

30. To buttress the above point further, the court will rely on the decision in Sanghani Investment s Limited Vs Officer in charge of Nairobi Remand and Allocation Prison [2007] 1 EA 354 where the court stated as follows;

> “.... It is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being a discretionary remedy will only issue if it will serve some purpose.... The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles...”

31. Following the above decision, the court has considered the circumstances of this case and noted that the issues raised by the aggrieved applicants require a more in-depth re-examination of the proceedings and the tribunal's decision. To that extent, judicial review remedies, in my view, cannot provide an effective remedy, especially considering the ongoing appeal pending before the court.

32. Regarding the issue of prohibition, I hasten to state that since there are no ongoing proceedings in the tribunal because it has already pronounced itself in the impugned judgement of 20/1/25, I find that there is nothing to prohibit. Therefore, issuing an order of prohibition as sought would be futile.

33. Final orders for disposal

    In the end, I uphold the objection and make the following orders;

    a. The preliminary objection dated 7/4/25 is merited.

    b. The judicial review application dated 21/2/25 is hereby dismissed.

    c. Each party to bear their own costs.

34. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the Presence of:

Mr Mabeya for the Applicants

NA for the 1st Respondent

Ms Shamalla HB for Ms Odero for the 2nd Respondent

Ms Mugalla HB for Mr Ndegwa for the Interested Party

Ms Yvette – CA