



**Republic v Chairperson, Rent Restriction Tribunal; Karega  
(Exparte); Simon & another (Interested Parties) (Judicial Review  
6 of 2022) [2023] KEELC 17275 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17275 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
JUDICIAL REVIEW 6 OF 2022**

**NA MATHEKA, J**

**MAY 9, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CHAIRPERSON, RENT RESTRICTION TRIBUNAL ..... RESPONDENT**

**AND**

**RAJAB MOHAMED KAREGA ..... EXPARTE**

**AND**

**VIOLET ATIENO SIMON ..... INTERESTED PARTY**

**DONNASAMA ACHIENG ..... INTERESTED PARTY**

**JUDGMENT**

1. The Application is dated 29<sup>th</sup> September 2022 and is brought under Order 53 Rule 3 of the Civil Procedure Rules 2010, Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, Section 13 (5) of the Environment & Land Court Act, Act No. 19 of 2011, Sections 7, 8, 9, 10 & 11 of the Fair Administrative Actions Act, Section 2 (1) (c) & 5 of the Rent Restrictions Act, Sections 3 & 5 of the *Distress for Rent Act* seeking the following orders;

1. That an order of certiorari to bring into this Honorable court for purposes of being quashed the orders, decision and or ruling of B. W. Mathenge, the Deputy Chairperson of the Rent Restrictions Tribunal dated and delivered on April 27, 2022 in Mombasa Rent Restriction Case No. 45 of 2022 Violet Atieno Simon vs Rajab Mohamed Karega & Sammy Muli Mutua t/a Work No Words Auctioneers.



2. That an order of prohibition be issued restraining and or prohibiting the Chairperson and all members and officers of the Rent Restrictions Tribunal from dealing with and or undertaking any further proceedings and or issuing any further orders and or directions in Mombasa Rent Restriction Case No. 45 of 2022 Violet Atieno Simon L/ Rajab Mohamed Karega & Sammy Muli Mutua t/a Work No Words Auctioneers.
  3. That an order of prohibition be issued restraining and or prohibiting the Chairperson and all members and officers of the Rent Restrictions Tribunal from dealing with and or undertaking any further proceedings and or issuing any further orders and or directions in Mombasa Rent Restriction Case No. 51 of 2021 Donnasama Achieng vs Rajab Mohamed Karega, Shimba Ventures & Sammy Muli Mutua t/a Work No Words Auctioneers.
  4. That the costs of these proceedings be borne by the Respondent and or the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.
2. It is based on the Statutory Statement filed and adopted during the grant of the leave and the Verifying Affidavit herein and on the following other grounds that the ex parte Applicant is the registered proprietor in absolute ownership the piece of land known and registered as Subdivision 12783 (Original Number 1449/15) Section I Mainland North), along Factory Road, Number CR. 37002 within Bamburi Vescon area (the first property) and all that piece and or parcel of land known and registered as Subdivision 14663 (Original Number 13781-2) Section I Mainland North) along Factory Road, Number CR. 46003. .... The ex parte Applicant has developed upon the first property a residential block consisting of 19 one bedroom flats and 4 bedsitters as well as shops on the ground floor. On the second property, the ex parte Applicant has developed a residential block consisting of two bedroom flats. Pursuant to a Tenancy Agreement dated August 20, 2021, the ex parte Applicant let out to the 1<sup>st</sup> Interested Party one unit of two bedroom flat identified as House No. 4D in the second property at an agreed monthly rent of Kshs. 18,000/= payable monthly in advance from the September 1, 2021 and terminating on the August 31, 2022 subject to the other terms and conditions contained in the aforesaid agreement. Pursuant to a Tenancy Agreement dated April 7, 2021, the ex parte Applicant let out to the 2<sup>nd</sup> Interested Party one unit of one bedroom flat identified as House No. Bl 3C at an agreed monthly rent of Kshs. 13,000/= payable monthly in advance from the 7<sup>th</sup> day of April 2021 and terminating on the 31<sup>st</sup> day of May 2022 and subject to the other terms and conditions contained in the aforesaid agreement. Having taken up possession of the demised premises, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties subsequently defaulted in their subsequent rental payments. On the part of the 1<sup>st</sup> Interested Party, a sum of Kshs. 57,000/= remained in arrears as at April 2022 equivalent to rent for three (3) months while the 2<sup>nd</sup> Interested Party had accrued rent arrears of Kshs.40,800/= as at November 10, 2021. Negotiations and indulgences by the ex parte Applicant to have the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties settle their rent arrears and be up to date with their rent payments having failed to bear any fruits, the ex parte Applicant invoked the provisions of the [Distress for Rent Act](#) with a view to recover the rent arrears and instructed Ms. Work No Words Auctioneers who proceeded with distress for rent on April 12, 2022 against the 1<sup>st</sup> Interested Party and on November 10, 2022 against the 2<sup>nd</sup> Interested Party. On December 31, 2021 while the distress was still in force, the 2<sup>nd</sup> Interested Party lodged a claim with the Respondent under the Rent Restrictions Act being Mombasa Rent Restriction Case No. 51 of 2021 Donnasama Achieng vs Rajab Mohamed Karega, Shimba Ventures & Sammy Muli Mutua t/a Work No Words Auctioneers following which the Respondent issued, inter alia, orders of injunction restraining the ex parte Applicant and the aforesaid Auctioneers from proceeding with the distress pending the hearing and determination of an interlocutory application filed in the said case. In her pleadings before the Respondent in the aforesaid suit, the 2<sup>nd</sup> Interested Party had clearly stated the agreed monthly rent due and payable by her was Kshs. 13, 000/=, which monthly rent is beyond the



maximum monthly rent which falls within the jurisdiction of the Respondent under section 2 (I) (c) of the Rent Restrictions Act. . . . Upon being served with the said pleadings and orders, the ex parte Applicant raised a Preliminary Objection to the jurisdiction of the Respondent and was ready to have the same canvassed but on April 26, 2022 when the aforesaid case came up before the Respondent for hearing, the learned Hon. B. W. Mathenge, Deputy Chairperson of the Respondent proceeded to make further orders on the case without giving priority to the issue of jurisdiction as raised. On the same day, the 1<sup>st</sup> Interested Party filed Mombasa Rent Restriction Case No. 45 of 2022 Violet Atieno Simon vs Rajab Mohamed Karega & Sammy Muli Mutua t/a Work No Words Auctioneers in which she expressly pleaded that the agreed monthly rent due and payable by the 1<sup>st</sup> Interested Party was Kshs.13,000/= thus the demised premises was equally outside the jurisdiction of the Respondent but the learned Hon B. W. Mathenge, Deputy Chairperson still proceeded to issue orders on the case despite clear admissions and facts that the premises was outside its jurisdiction. Following, the initial orders issued infavour of the 2<sup>nd</sup> Respondent on December 31, 2021, the 1<sup>st</sup> Interested Party proceeded to abuse the aforesaid orders and rather than pay the rent due instead attempted to sneak herself out of the demised premises subsequently obtaining orders issued on April 26, 2022 by the Respondent allowing her to completely move out of the premises without paying the rent arrears due to the ex parte Applicant. Similarly, the 1<sup>st</sup> Interested Party refused, failed, neglected and or refused to pay the monthly rent as and when they fell due but also the rent arrears ever since the Respondent issued the orders dated April 26, 2022 until after the ex parte Applicant. At the time these two cases were filed and the ex parte orders issued by the Respondent, both the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were in arrears of rent, a fact both admitted in their pleadings before the Respondent thus the provisions of the *Distress for Rent Act* were lawfully and validly invoked thereby ousting the jurisdiction of the Respondent to interfere with the same. As a result of the facts disclosed herein, the ex parte Applicant has been unlawfully, irregularly, unfairly deprived of his rights to property and rental income and continue to be so deprived by the orders issued by the Respondent. To the extent that the monthly rent income of the demised premises were in excess of Kshs. 2,000/= and that the same had been expressly pleaded by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, the Respondent acted ultra vires and in excess of it's jurisdiction to entertain the cases and issue the interlocutory orders. At the time the causes of action arose, the Respondent had no jurisdiction to entertain and or deal with any complaint from the Interested Parties in respect of the demised premises thus the continuation of any proceedings before the Respondent would be ultra vires. The Respondent is due to hold its next session in Mombasa at any time when further proceedings are likely to be taken in either or both of the above cases thus the need to have this application heard urgently.

3. The Respondent submitted that the Application is prematurely before the court since Judicial Review is the last resort to the parties after exhausting all internal mechanism and other remedy provided for by the law. That there exists other appropriate remedies to the Applicant before invoking judicial review at the High Court as a remedy of last resort. That the gist of the Application is based on the third exemption. Standard rent is defined at Section 3 of the Act as the rent of the premises as at 1/1/1981 or the rent assessed by the tribunal. . . That Under section 5(1) (a) of the Act the tribunal has the power to assess standard rent of any premises to any figure. That the term Standard Rent is defined under section 3 of the Act means the rent at which the premises were as at 1<sup>st</sup> January 1981 and if or the tribunal is unable to determine whether or not it was on that date let or erected then Standard Rent is assessed by the Tribunal. That however, in circumstances where the tribunal assesses Standard Rent of premises above Kshs 2,500/- per month, the tribunal loses jurisdiction to hear any dispute relating to the said premises. That assessment of the Standard Rent of a property can only be carried out on an application by a party, their advocates or of tribunal's own motion. That the Interested Parties been paying rent agreed and not the Standard Rent as defined under Section 3 of the Act. That the Standard Rent of



the premises had not been determined, the tribunal could not be said to lack jurisdiction to entertain the dispute.

4. That from their records it is clear that the Applicant has made no request for assessment of Standard Rent or raised a preliminary objection on the issue of jurisdiction. It is important to note that at the rent restriction tribunal they have two case types i.e. Rent Restriction Case (RRC) and the Rent Restriction Assessment Case (RRA) and the two are handled independently even though they might have the same parties.
5. That the Standard Rent of the premises is unknown and therefore the suit premises have not been exempted from the application of the act as provided under Section 2(1) (c). That in the circumstances, the Act applies to the suit premises and the tribunal has jurisdiction to entertain any tenancy dispute relating to the premises.
6. That the finding on jurisdiction will depend on the factual determination of the issue of whether the premises ought to attract Standard Rent or not, a matter which is still at large. These are matters which ought to have been taken up before the Tribunal at the inter-parties hearing of the application. That apart from attending the Tribunal and opposing the application, the Applicants was entitled to apply for setting aside the said ex parte orders. In this case the Applicants have not shown the reason why they should be exempted from seeking to set aside the ex parte orders of injunction granted by the Tribunal or opposing the extension thereof at the inter partes hearing. That it ought to be remembered that judicial review is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of. That therefore their view is that these proceedings were prematurely instituted does not merit the exercise of the Court's Jurisdiction herein in favour of the Applicant.
7. This court has considered the application and the submissions therein. The purpose of judicial review was enunciated in the case of *Municipal Council of Mombasa vs Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007[2002] eKLR, where the Court of Appeal held that;

“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 make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

#### PARA 8.

It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the 1<sup>st</sup> Respondent.

9. This position was adopted by the court in *Associated Provincial Picture Houses, Ltd. vs Wednesbury Corporation* [1947] 2 All E.R 680. As a result, it is only in exceptional circumstances that the court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte*



- Sanitam Services (E.A) Limited [2013] eKLR, while citing the Associated Provincial Picture Houses Ltd. vs Wednesbury Corporation (supra) namely:

“where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is ‘so unreasonable that no reasonable authority could ever come to it.’”

10. The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision- making process as was held by Mumbi Ngugi J in the case of Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited (supra),

“That the purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question.”

11. It was incumbent upon the Applicant to demonstrate that the decision-making organ, in this case, the Respondent acted ultra vires in making the impugned decision. In the case of Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR, the court held that;

“Where an Applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

13. Similarly, in the case of Commissioner of Lands v Kunste Hotel Limited [1997] eKLR (E & L) 1 at page 249, the Court of Appeal stated that;

“But 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”.

14. In Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 2 Page 508 where it is stated that;

“Certiorari is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant exist. 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 judicial discretion of the Court being a judicial one, must be exercised on the basis of evidence and sound legal principles”.

15. This Court will therefore be guided by the above principles and other binding precedents and the relevant laws in determining the matter at hand. The Judicial Review process is concerned with the decision making process and not with the merits of the decision itself. Further, that a Court hearing an application for Judicial Review should not sit as an appellate Court and such orders will not be



granted as a matter of course but are a discretion of the Court which must consider if such orders are most efficacious in the circumstances of each case.

16. In the case of *Republic v Inland Revenue Commissioner Ex Parte Opman International* 1986 1ALL E.R 328, the Court held that the fact that there is an alternative procedure available to address a particular grievance does not mean one cannot apply for the remedy of Judicial Review. The Court stated that;

“Judicial Review is however the procedure of last resort and is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the Applicant’s claim”

17. In the case of *Speaker of National Assembly v Karume* C.A Civil Application No. 92 of 1992 (2008 1 K.L.R 426), the Court of Appeal stated that where there is a clear procedure to address a particular grievance, it should be followed.

18. Be that as it may, Judicial Review orders are granted at the discretion of the Court. Courts therefore have the discretion to refuse to grant such orders even where a foundation has been laid for the same although such discretion must be used sparingly. In the case of *Bluesea Shopping Mall Limited vs City Council of Nairobi & Others* C.A Civil Appeal No. 129 of 2013 (Nairobi), the Court of Appeal said the following on the issue of discretion in Judicial Review applications:

“In administrative law matters, Courts have discretion to withhold a remedy of Judicial Review even where a substantive foundation has been laid because administrative law remedies are inherently discretionary. But Courts are slow to deny the remedy. The discretion to refuse to grant Judicial Review orders where they are merited must be very sparingly exercised”.

19. In the instant case I find that, the Tribunal ought to have given an opportunity to make a determination on jurisdiction as soon as the issue was brought to its attention. In the case of *Owners and Masters of The Motor Vessel “Joey” v Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 the Court held that;

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

20. I find that a party challenging the jurisdiction of a Court or Tribunal ought to raise the issue before the Court or Tribunal whose jurisdiction is under challenge for consideration though the decision thereon



does not bar this Court from entertaining judicial review proceedings if in fact the Tribunal had no jurisdiction. The fact that a Court or Tribunal lacks jurisdiction to entertain a matter does not bar it from hearing and determining the issue of jurisdiction which ought to be determined in the initial stages of the proceedings.

21. Section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 provides;

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

Subsection (3) thereof provides;

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that Applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the Applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

22. Be that as it may, the onus is upon the Applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. One of the remedies available to a party aggrieved by an *ex parte* decision is to apply for setting aside the same before the Court or Tribunal that granted the order since generally *ex parte* orders are provisional in nature. Such *ex parte* orders can and do invariably get set aside at the inter partes hearing where found to be unmerited.

23. In this case the Applicant submitted that in her pleadings before the Respondent in the aforesaid suit, the 2<sup>nd</sup> Interested Party had clearly stated the agreed monthly rent due and payable by her was Kshs. 13,000/=, which monthly rent is beyond the maximum monthly rent which falls within the jurisdiction of the Respondent under Section 2 (I) (c) of the Rent Restrictions Act. The Respondent maintains that the Standard Rent of the premises is unknown and therefore the suit premises have not been exempted from the application of the act as provided under Section 2(1) (c). That in the circumstances, the Act applies to the suit premises and the tribunal has jurisdiction to entertain any tenancy dispute relating to the premises. The Respondent states that Standard rent is defined at Section 3 of the Act as the rent of the premises as at 1<sup>st</sup> January 1981 or the rent assessed by the tribunal. That Under section 5(1) (a) of the Act the tribunal has the power to assess Standard Rent of any premises to any figure. That the term Standard Rent is defined under Section 3 of the Act means the rent at which the premises were as at 1<sup>st</sup> January 1981 and if or the tribunal is unable to determine whether or not it was on that date let or erected then Standard Rent is assessed by the Tribunal. That however, in circumstances where the tribunal assesses Standard Rent of premises above Kshs 2,500/- per month, the tribunal loses jurisdiction to hear any dispute relating to the said premises. That assessment of the Standard Rent of a property can only be carried out on an application by a party, their advocates or of tribunal's own motion. That the Interested Parties been paying rent agreed and not the Standard Rent as defined under Section 3 of the Act. That the Standard Rent of the premises had not been determined, the tribunal could not be said to lack jurisdiction to entertain the dispute.



24. I find that the issue whether or not the premises in issue were standardised or not ought to have been determined by the Respondent. In the case of Republic v Business Premises Rent Tribunal & Another ex parte The Davie Motor Corporation Limited [2013] eKLR the court held that;

“...the issue whether or not the interested party was still in possession/occupation of the premises was a matter of fact whose finding was prerequisite to a determination of whether or not there was a landlord-tenant relationship and hence whether the Respondent had jurisdiction. Without a determination of that fact, this Court cannot assume that the Tribunal would have found it had no jurisdiction and it is not for this Court to make a finding on that disputed issue of fact. Accordingly I am unable to find that the Respondent had no jurisdiction to entertain the dispute based on non-existence of a landlord-tenant relationship.”

25. The finding on jurisdiction will depend on the factual determination of the issue of whether the premises ought to attract Standard Rent or not, a matter which is still at large. These are matters which ought to be taken up before the Respondent at the inter partes hearing of the application. Apart from attending the Tribunal and opposing the application, the Applicants were entitled to apply for setting aside the said ex parte orders.

26. Judicial review is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of. I therefore find that these proceedings were prematurely instituted. In the premises, I decline to exercise my discretion in favour of the Applicants as sought herein. It follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, would be overstepping the judicial review mandate vested upon this Court; the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.

27. In the case of Republic v Registrar of Societies & 3 others ex parte Lydia Cherubet & 2 others, Miscellaneous Civil Application 170 of 2016 the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits. It is my considered view, therefore, that the application lacks merit and it is hereby dismissed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MAY 2023.**

**N.A. MATHEKA**

**JUDGE**

