REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

JUDICIAL REVIEW NO. I OF 2019

IN THE MATTER OF APPLICATION BY SAMUEL SERONEY T/A KIMSITE PARK HOTEL AND REST FOR TO LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

AND IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 2,3,4,6,7,9,10,12 AND 16 OF THE LANDLORD

AND TENANTS (SHOPS, HOTELS AND CATERING ESTABLISHMENT) CAP 301 LAWS OF KENYA

SAMUEL SERONEY T/A KIMSITE PARK HOTEL.....EXPARTE APPLICANT

VERSUS

DOUGLAS KIPKEMOI.....1ST RESPONDENT

PRISCAH JEPTOO.....2ND RESPONDENT

CHAIRMAN BUSINESS PREMISES RENT TRIBUNAL.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

The Ex Parte Applicant filed a Notice of Motion Application dated 8th July, 2019 together with a Supporting Affidavit sworn on even date seeking the following orders *inter alia:*

a. That the Honourable Court be pleased and do hereby issue orders of certiorari and prohibition against the 1st and 2nd Respondents enforcing the proceedings, decision and or orders of the Business Premises Rent Tribunal of 7th June, 2019;

b. A declaration that the *Ex Parte* Applicant paid rent in excess of Kenya Shillings Five Hundred and Forty Thousand (Kshs. 540,000.00) and a refund with the interest thereof.

The 1st respondent opposed the application vide a replying affidavit dated 24th July 2019 and the 3rd and 4th respondents opposed the application vide grounds of opposition dated 15th March 2021.

Counsel agreed to canvas the application vide written submissions which were duly filed.

EX PARTE APPLICANTS SUBMISSIONS

Mr Omusundi counsel for the Applicant gave a brief background to the case and submitted that the applicant entered into a lease agreement on 23 rd August, 2010 with Cheruiyot Kimeto the registered owner of the land known as KAPSABET MUNICIPALITY/95 over

the said property.

That the agreement was that the applicant (lessee) was to construct/set up structures on the property for a period of 5 years from the date of signing the lease. The applicant constructed structures (resort/bar/hotel) at a cost of Ksh. **3,000,000/=** (Three Million) .

The applicant further paid a monthly sum of Ksh. **20,000/=(**Twenty Thousand only) as rent for the premises but the lessor did not inform the applicant of change of ownership of the land KAPSABET MUNICIPALITY/95,

Counsel submitted that the applicant was only informed of a change in the bank accounts for depositing the monthly rent and that the applicant has no arrears and had at the time of issuing of the order by the Business Premises Rent Tribunal paid in excess of Ksh. 540,000 /= (Five Hundred and Forty Thousand only).

Counsel for the applicant submitted that the 3rd Respondent and the Business Premises Rent Tribunal acted ultra vires and contrary to the provisions of the Act that establishes the Tribunal and that the Tribunal issued orders against the applicant in its absence without due notice.

Counsel relied on Section 7(2) of the Fair Administrative Action Act, 2015 which provides that:-

A court or tribunal under subsection (1) may review an administrative action or decision, if:-

a) The person who made the decision;

i. Was not authorized to do so by the empowering provision;

ii. Acted in excess of jurisdiction or power conferred under any written law;

iii. Acted pursuant to delegated power in contravention of any law prohibiting such delegation;

iv. Was biased or may reasonably be suspected of bias; or

v. Denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

Counsel therefore submitted that in failing to issue any notice to the applicant the respondents denied the applicant a fair hearing and issued orders that were unfair, unjust and contrary to natural justice.

Further that Order 53 rule 3(4) of the Civil Procedure Rules states that:

4) if on the hearing of the motion the High court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rules the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

Mr Omusundi submitted that the Business Premises Rent Tribunal on its own motion should have granted a 30-day stay of execution in the circumstances due to the fact that the applicant and/or their advocate were not present in court.

Counsel relied on the case of **GRAHAM RIOBA SAGWE & 2 OTHERS V FINA BANK LIMITED & 5 OTHERS [2017] eKLR** where Mativo, J defined the concept of abuse of court process as follows:-

> *"The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. The situation may give rise to an abuse of court process and indeed in exhaustive, it involves situations where the process of court has not been resorted to fairly, properly, honestly to the detriment of the other party."*

Counsel cited the case of **KEROCHE INDUSTRIES LIMITED v KENYA REVENUE AUTHORITY & 5 OTHERS [2007] eKLR** where the Court made the following observation:

> **...** *it is implied that power given to authorities or persons by an Act of Parliament must be exercised fairly, and the court has the power to reach out where the exercise of that power is unfair and I further endorse Lord Scarman's quote in REG v SECRETARY OF STATE FOR THE ENVIRONMENT ex pare NOTTINGHAM SHIRE COUNTRY COUNCIL [1986] AC where he stated:*
>
> > *"A power which is abused should be treated as a power which has not been lawfully exercised."*

Counsel therefore urged the court to allow the orders as prayed in the Judicial Review.

1ST AND 2ND RESPODENT'S SUBMISSIONS

Counsel for the 1st and 2nd respondents submitted that the issues for determination are as follows:

a. Whether the Chairman of Business Premises Rent Tribunal heard and determined the matter ultra-vires.

b. Whether the applicant has made up a case for granting the orders sought

c. Who pays the costs.

Counsel submitted that the applicant cannot blame the BPRT for his non-attendance on 4th September, 2018 and that the Applicant has not adduced any evidence to prove that the BPRT acted *ultra vires* noting the BPRT has the jurisdiction to hear and determine disputes relating to rent disputes between landlords and tenants.

Further that the Chairman of Business Premises Rent Tribunal made the decision to proceed with the hearing of the case after the tribunal by itself fixed a hearing date and sent a hearing notice to each party vide registered mail.

It was counsel's submission that after the judgment and order dated 1st October 2018 the tenant made an application to set aside the judgment which both parties responded to and filed submissions. The chairman of Business Premises Rent Tribunal delivered a ruling on 7th June 2019 in which the tenant's application was dismissed with costs to the 1st and 2nd respondents.

Counsel therefore urged the court to dismiss the application with costs to the respondents.

3RD AND 4TH RESPONDENTS' SUBMISSIONS

Counsel for the 3rd and 4th Respondents listed the following issue for determination:

a. Whether the court has jurisdiction to entertain the instant dispute

b. Whether the orders sought can be granted against the 1st and 2nd Respondents.

On the first issue on jurisdiction counsel relied on the case of **Owners of the Motor Vessel Lillian S? -vs- Caltex Oil (Kenva) Ltd (1989) KLR**/ where Nyarangi, JA held,

> *"Jurisdiction is everything. 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.*

"Mr Odongo also cited the case of **Lemanken Aramat -vs- Harun Meitamei Lempaka & 2 Others [2014) eKLR** where the Supreme Court of Kenya expressed itself as follows:

> *On the basis of the foregoing principle. this Court' s priority in the instant case is to ascertain the extent of the jurisdiction of the other Courts. at the time they made their determinations: and if they lacked jurisdiction. then their decisions would be nu//: and consequent/y it would not be necessary for this Court to examine such other questions as may have been the subject of the Orders of those Courts.*

Further that in the instant application, the applicant moved this Court under Order 53 of the Civil Procedure Rules seeking judicial review orders of certiorari and prohibition and therefore the court must ascertain whether the circumstances presented before the court merit the special jurisdiction donated to this court under Order 53. It is trite that judicial review should concern itself not with the merits of a decision but with the decision making process.

Counsel cited the case of **In Republic -versus-Public Procurement Administrative Review Board & 2 others Ex Parte Sanitam Services (F.A) Limited [2013]eKLR ,** where Justice Mumbi Ngugi held thus:

> " *judicial review proceedings is that the remedy of judicial review concerned with review & not the merits of the decision in respect of which the application for judicial review is made. but the decision making process. 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".*

Mr Odongo also relied on the Court of Appeal case in Municipal Council of Mombasa -versus- Republic & Umoia Consultants Ltd Civil Appeal No. 185 of 2001 where the court affirmed the proposition that judicial review proceedings, is concerned with the decision making process, not with the merits of the decision itself. Further that it follows that where an applicant in a judicial review application appears to be aggrieved with the merit of the impugned decision. then judicial review would not be the appropriate forum in the obtaining circumstances even though appropriate grounds for granting the orders may have been pleaded. The justification for this proposition is that a court exercising jurisdiction under Order 53 is not an appellate court and it cannot justify impugned decision on merit.

Counsel further submitted that the applicants are aggrieved with the decision because apparently they were not served with the judgment but the applicant was a party in the proceedings before the 3 rd respondent whereby he filed his pleadings which were considered prior to the

impugned decision. Whether the applicant was served for 4-9-2018 when the decision was rendered is not material in an application of judicial review.

It was Mr Odongo's submission that the bottom-line is that the applicant was afforded the opportunity to be heard and was indeed heard and that it is also clear that the 3rd respondent did indeed have jurisdiction to adjudicate and determine the dispute and it properly exercised its jurisdiction.

That is the applicant was aggrieved by the decision then the remedy was to apply for stay of execution and file an appeal in the high court. That this court cannot purport to assume any jurisdiction as invited by the applicant.

Counsel relied on the case of **Seventh Day Adventist Church Limited -versus- Permanent Secretary. Ministry of Nairobi Metropolitan Development & another Judicial Review Case No. 112 of 2011:**

> *"Where an applicant brings judicial review procedures 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 (and we dare add 'or appeal)".*

Counsel therefore urged the court to find that it does not have jurisdiction to entertain the application as pleaded.

On the second issues as to whether orders sought can be granted against the 1st and 2nd respondents, counsel submitted that section 2 of the Fair Administrative Action Acts 2015 expanded the applicability of judicial review orders by widening the definition of administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals: or an act, omission or decision of an person, body or authority that affects the legal rights or interests of any person to whom such action relates.

Counsel further submitted that contrary to traditional view that judicial review was only available against public bodies exercising public powers, the new dispensation seems to suggest that actions of private citizens can be impugned if the individual is exercising a public power. That what is important is the nature of the duty imposed upon the concerned body and the duty must be judged in the light of positive obligation owed by body to the affected party no matter by what means the duty is imposed. That it is upon the affected party to demonstrate the duty that was breached and how he/she was affected.

Mr Odongo submitted that applicant seeks orders of certiorari and prohibition against the 1st and 2nd respondents from implementing the decision of the 3rd respondent and therefore it was incumbent upon the applicant to highlight the nature of duty imposed upon 1st and 2nd respondent.

Further that the 2nd respondent is the applicant's landlord and their engagement is purely a private affair as the 1st and 2nd respondents were not acting as holders of public office hence they owe applicant no public duty.

Counsel therefore submitted that throughout the application, the applicant did not lead any evidence to demonstrate the duty owed to him by the 1st and 2nd respondents to warrant an application of this nature and further that though allegations of breach of duty were made against the 3rd respondent, the applicant did not seek any relief against the 3rd respondent and in the premises, this application is clearly against the 1st and 2nd respondents.

It was Mr Odongo's submission that an order of certiorari seeks to remove into the court for purposes of quashing an impugned decision and therefore certiorari cannot be issued to stop parties from enforcing the decision. The applicant seeks for an order of certiorari against the 1st and 2nd respondents from enforcing the 3rd respondent's decision and the applicant has not sought to quash the 3rd respondent's decision nor has he sought for any specific prayer of certiorari against the 3rd respondent.

Counsel relied on the case of **NRB CACA No. 266 of 1996: Kenya National Examination Council -versus- Republic ex parte Geoffrey Gathenii Nioroge (1997) eKLR** where the court held that:

> *"Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction. or where the rules of natural justice are not complied with or for such like reasons. in the appeal before us. the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter."*

That certiorari is the only relief that can undo an already made decision. It must however be grounded and it cannot serve the purpose of a stay or appeal.

On the issue of prohibition counsel cited **Halsbury's Laws of England. 4th Edition. L/o/. at pg 37 paragraph 128** where prohibition was defined as:

> i. Is an order from High Court directed to an inferior tribunal or body which forbids a tribunal or body from proceeding in excess of jurisdiction or in breach of the law:
>
> ii. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice: and

iii. It does not lie to correct the course. practice or procedure of an inferior tribunal or wrong decision on merits of the proceedings.

In the case o Kenya National Examination Council (supra), the Court of Appeal observed that:

> ” *The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is made. Such an order can only prevent the making of a decision. That in our understanding is the efficacy and scope of an order of prohibition.”*

Counsel therefore submitted that it is trite law that prohibition is intended to prevent making of a decision and it cannot issue to prevent enforcement of a decision that is already in place. Only a stay of execution or appeal can stop enforcement of an already made decision.

ANALYSIS AND DETERMINATION

The issue for determination is as whether the orders sought by the applicant can be granted by the court as pleaded. The *Ex Parte* Applicant approached this Court seeking for orders of certiorari and prohibition against the 1st and 2nd Respondents and the question is whether Judicial Review Orders can issue against private citizens.

The right to fair administrative action is enshrined in the Constitution of Kenya under Article 47(1) which provides as follows:

> *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

Section 3 of the Fair Administrative Action Act, 2015 provides as follows:

> *(1) This Act applies to all state and non-state agencies, including any person-*
>
> *(a) exercising administrative authority;*
>
> *(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or*
>
> *(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.*

The 1st and 2nd Respondents are private citizens who are landlords to the applicant. They do not exercise administrative authority and they also do not perform any judicial or quasi-judicial function under the Constitution or any written law. It follows that the orders cannot issue against them in this case.

In the case of **REPUBLIC V CHIEF MAGISTRATE'S COURT AT MILIMANI LAW COURTS; DIRECTOR OF PUBLIC PROSECUTIONS & 2 OTHERS (INTERESTED PARTIES); EX-PARTE APPLICANT: PRAVIN GALOT [2020] eKLR** the Court made the following observation:

> **…** *the decision of a public authority or quasi-judicial tribunal is out rightly amenable to judicial review while the decision of any other person or body is amenable to judicial review if it affects the legal rights or interests of the concerned party. Judicial bodies are the ordinary courts of law - such as the Supreme Court, High Courts and the Magistrates Courts. A quasi-judicial body is a non-judicial body which can interpret law. It is an entity such as an arbitrator or tribunal board, generally of a public administrative agency, which has powers and procedures resembling those of a court of law or judge, and which is obliged to objectively determine facts and draw conclusions from them so as to provide the basis of an official action.*

In the case of **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER V STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR** the decision of the Malawi Supreme Court of Appeal in **MALAWI RAILWAYS LTD Vs. NYASULU [1998] MWSC 3**, quoted with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

> "*As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…*
>
> *In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."*

The issues of rent having been paid by the applicant who is seeking a declaration that he is entitled to a refund cannot be made in a judicial

review process. The applicant should have filed an appeal or stay of execution of the decree and not a judicial review. No orders were sought against the3rg respondent. This is an unfortunate application, wrong process and wrong forum.

The application is hereby dismissed with costs to the respondents.

DATED AND **DELIVERED AT ELDORET THIS 23RD DAY** OF **JUNE, 2021**

M. A. ODENY

JUDGE