



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC JR No. E001 OF 2020

BETWEEN

REPUBLIC APPLICANT

AND

KENYA RAILWAYS CORPORATIONRESPONDENT

EX PARTE: FLAMINGO PAINTS LIMITED

KENYA HARDWARE LIMITED

JUDGMENT

1. The ex parte applicants were granted leave on 22nd October 2020 to commence these judicial review proceedings. They subsequently filed Notice of Motion dated 11th November 2020 seeking the following orders.

1. THAT an order of CERTIORARI do issue for purposes of being quashed the Respondent's demand notices dated the 13th July 2020 for payment of land rent-addressed to the Ex-parte Applicants over property known as NAKURU MUN.BLOCK 6/66, 6/65 and 6/45.

2. THAT an order of PROHIBITION, do issue restraining the Respondent from enforcing the demand notices dated 13th July, 2020 or carrying out and/or acting upon its threat to terminate the Applicants lease and evict them from their premises NAKURU MUN.BLOCK 6/66, 6/65 and 6/45.

3. THAT pending the hearing and determination of this application, the leave so granted do operate as stay of the implementation and or enforcement of any action of termination of lease, eviction and or auctioneering notified in the subject notices dated 13th July 2020.

4. THAT the Court be pleased to grant any further orders that it may deem necessary in the interest of justice and in the circumstances.

5. THAT the costs of this application be provided for.

2. The Notice of Motion is supported by an affidavit sworn by M. A. Patel, a director of the ex-parte applicants. He deposed that the ex-parte applicants are the registered proprietors of lease hold interests in respect of the parcels of land known as NAKURU MUN.BLOCK 6/66, 6/65 and 6/45 respectively pursuant to certificates of lease issued to them by the Government of Kenya. That upon taking possession of the property, they have been paying and still continue to pay the requisite land rent to the Commissioner of Lands. That on 13th July 2020 the ex-parte applicants received demand notices seeking payment of land rent to the respondent despite the ex-parte applicants making payments to the Commissioner of Lands. He further deposed that the respondent has no authority to continue demanding payment of land rent from the ex-parte applicants as no official communication has been made by the Commissioner of Lands to the ex-parte applicants that the respondent should collect rent on its behalf.

3. In response, the respondent filed a replying affidavit sworn by Sammy K. Kipsamo, its Real Estate Assistant. He deposed that the 1st ex-parte applicant is obligated to pay KShs 20,989 to the respondent on account of annual rent (KShs 1,325), enhanced rent (KShs 18,000) and siding fees (KShs 1,664) in respect of KR land Block 6/66 leased to it. That the 1st ex-parte applicant has been paying rent and siding fees for the aforesaid land but stopped paying rent in 2012 and thus the outstanding arrears amounts to KShs 800,294 as at November, 2020. He further deposed that the 2nd ex-parte applicant has been paying annual rent (KShs 2,676.60) enhanced rent (KShs 18,000) and siding fees (KShs 3,348.40) in respect of KR land block 6/65. He stated that the 2nd ex-parte applicant paid rent to the respondent even after they were

issued with the certificate of lease and that the rent arrears stood at KShs 1,136,170.65 as at November, 2020. He added that the annual rent payable by the 2nd ex-parte applicant in respect of KR land Block 6/45 is KShs 19,516. He further stated that the respondent is rightfully demanding rent arrears and siding fees owed by the ex-parte applicants and that judicial review is not the appropriate process for redressing a civil debt.

4. The ex-parte applicant filed a supplementary affidavit sworn by Mr. M. A. Patel. He admitted the respondent's assertions that they have been paying annual rent, enhanced rent and siding fees to the respondent over properties Nakuru Mun. Block 6/66, 6/65 and 6/45. He added that after purchasing the said properties, they were issued with letters from the respondent demanding annual rent, enhanced rent and siding fees despite having no agreement between the ex-parte applicant and the respondent. He added that upon receiving the said letter, he wrote to the respondent a letter dated 27th July 1995 indicating that it had been paying the annual rent as prescribed by the government but protested why the respondent was demanding siding fees and enhanced rent yet there was no provision of the same in the lease.

5. That despite the ex-parte applicants writing the said letter seeking clarity on the matter, the respondent failed to adequately address the issues and that ex-parte applicants still continued to pay under protest. The ex-parte applicants further wrote to the respondent a letter dated 22nd May 1996 informing it that the company would no longer pay the enhanced rent and siding fees since the services offered by the respondent were outdated, slow and inefficient. He went on to explain that their decision to cease making any further payments was based on the fact that the respondent had ceased to provide and or operate railway services along that line leading to the railway line being covered by weeds. The ex-parte applicants added that the goods shed where the freight services used to be offered has since closed down and the respondent has leased out the same to other persons for their own private use.

6. He further deposed that the ex-parte applicants have never been tenants of the respondent nor was there any landlord-tenant relationship between the two to warrant the respondent to demand rent from the applicants and that the respondent was only an agent of the government thus payment of land rent to the respondent should not in any way be perceived to mean that the respondent was a landlord of the ex-parte applicants. That it was not until sometime in the year 2006 when the transfer of the collection of land rent from the Ministry of Lands to Kenya Revenue Authority through the Finance Bill 2006 that all lessees of government land were notified that land rent would be payable to the Commissioner of Lands through Kenya Revenue Authority. That it was as a result of the aforesaid notice that the ex-parte applicants stopped paying land rent to the respondent and started remitting the same to the Commissioner of Lands. He added that it constitutes unjust enrichment for the respondent to charge for services the ex-parte applicants do not use and cannot use because the platform to which the siding fees relates is situated on a railway line which is no longer in use and has not been in use for over 16 years.

7. The application was canvassed through written submissions. The ex-parte applicants argued that 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 itself. They relied on the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd** where the Court of Appeal set out the parameters of judicial review. They further argued that the respondent has no legal authority to demand for rents payment from them since they are the registered lease holders of the unexpired lease for a term of 99 years from the Government of Kenya as evidenced by the Certificates of lease of all that property known as NAKURU MUN. BLOCK 6/66, 6/65 and 6/45. That the issuance of the demand notices by the respondent was an illegality because it had no force or basis in law to issue the same as it impinged on the powers vested on the Commissioner of Lands and was a violation of the law as they purport to punish the ex-parte applicants to pay land rent twice. They relied on the case of **Rep vs Judicial Commission of Inquiry into Goldenberg Affair ex-parte Mwalulu** where the constitutional court held that certiorari will lie to quash a decision which was nullity *ab initio*. They finally argued that the respondent has not presented any document to prove that the ex-parte applicants' titles are unlawful or that they were fraudulently acquired. That the respondent should be stopped from issuing the demand notices to the ex-parte applicants.

8. The respondent in its submissions argued that this case is not appropriate for judicial review. That the demand notices are in the nature of a civil debt and if the debtor does not pay, the landlord's remedy is to sue for recovery of the same in a civil court. It argued further that the applicants have neither replied to the notices nor proved any grounds for judicial review; ultra vires, abuse of power, irrelevant considerations, unreasonableness, bad faith, error of law, proportionality, legitimate expectation, fairness or natural justice. That in a judicial review application parties do not have the forum for cross-examination of the witnesses to test their veracity of the competing factual claims. The respondent argued that there is a dispute as to the amount that is outstanding and further that the issues in contention include whether the ex parte applicants are still tenants of the respondent; if not, when the relationship ceased to exist; whether at the time the relationship ceased to exist the ex parte applicants were indebted to the respondent in arrears of annual rent, enhanced rent, siding fees; and if so, the amount owing. It concluded by submitting that the applicants have not invoked the appropriate jurisdiction of the court. Further, that grant of orders of certiorari and prohibition will forestall the determination of the aforesaid issues in a court of law and the respondent will have been prevented from pursuing its legitimate claims by a way of filing a civil claim. It therefore urged the court to dismiss the application.

9. The ex-parte applicants filed supplementary submissions. They submitted that this court has jurisdiction to hear and determine this matter. They placed reliance on the case of **Republic vs Kenya Railways Corporation, Ex-parte Sheets and Hardware Limited (Kirit Patel) JR ELC Miscellaneous No. 2 of 2009**. They submitted that these proceedings do not seek to dispute the amount owed to the respondent but the decision-making process involved in issuing the demand notice by the respondent. They relied on the case of **Republic vs Kenya Revenue Authority & Another Ex-parte Tradewise Agencies [2013] eKLR** which cited the case of **Pastoli v Kabale District local Government Council and Others [2008] 2 EA 300**. They further submitted that judicial review is entrenched as a constitutional principle pursuant to article 47 of the constitution. They made reference to section 7 of the Fair Administrative Action Act and article 165 (6) of the Constitution.

10. They further submitted that they are registered leaseholders of the unexpired lease from the government of Kenya as per the certificates of leases of the suit properties and that the respondents have not shown any proof of being their landlords but instead had been seized with management and collection of land rent on behalf of the Government of Kenya which is the head lessor. That the responsibility for collection reverted back to the Commissioner's office hence the respondent has no authority to continue demanding payment of land rent from them. That the fact that they made payments to the respondent should not be perceived to mean that the respondent is a landlord and or lessor of the subject parcels.

11. The ex-parte applicants further argued that the demands by the respondent are ultra vires as it has no proprietary interest in the parcels and that the respondent seeks to benefit unjustly by demanding enhance rent and siding fees which were in respect to the rail services it used

to provide. That there is no agreement between the parties regarding the said payments and that they paid under protest. According to them, no arrears are owed to the respondent and it is upon the respondent to show reasons why they should pay enhanced rent and fees. They contended that they had satisfied the conditions for grant of orders of certiorari and prohibition and urged the court to allow the application as prayed for.

12. I have considered the Notice of Motion, affidavits and the submissions. The issues that arise for determination are whether the court has jurisdiction and whether the reliefs sought should issue.

13. The ex parte applicants seek an order of certiorari to quash the respondent's demand notices dated the 13th July 2020 which seek payment of land rent in respect of NAKURU MUN.BLOCK /66, 6/65 and 6/45 and an order of prohibition to restrain the respondent from enforcing the said demand notices. As is manifest from the affidavits filed, the dispute revolves around whether or not the ex parte applicants are the respondent's tenants. Among other arguments, the ex parte applicants dispute both the quantum of the rent demanded and the justification for demanding any rent at all. They have called to question the demands for rent on the basis that services offered by the respondent are outdated, slow and inefficient. In other words, they say that they are not getting value for their money, that it is a raw deal. Even as they dispute being tenants, they also seek an order to restrain the respondent from acting upon threats to terminate their lease and to evict them from the suit premises. The respondent on the other hand maintains that the amounts in the demands are due. In other words, the respondent is vouching for both the quantum of the rent demanded and the justification for demanding it. I also note that it is not disputed that the respondent issued similar demands in the past which the ex parte applicants settled.

14. The mandate of a judicial review court was stated by the Court of Appeal in **Municipal Council of Mombasa v Republic & another [2002] eKLR** as follows:

... judicial review is concerned with the decision -making process, not with the merits of the decision itself. ... 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? 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 he 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 there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.

15. The Court of Appeal reiterated that position in **Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama [2014] eKLR** as follows:

Judicial review applications do not deal with the merits of the case but only with the process. For instance judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

16. In essence, the dispute that the ex parte applicants have presented before this court raises contested matters of fact which in effect seek to determine the merits of the dispute as to whether there exists a tenancy relationship between them and the respondent and whether the amounts demanded by the respondent are due and payable. As a judicial review court, this court does not have jurisdiction to determine such contested questions of fact. Such matters should be resolved in an ordinary civil suit which affords parties an opportunity to adduce oral evidence and to test each other's case through cross-examination.

17. It is trite law that a suit filed in a court devoid of jurisdiction is dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**. The present application is thus for striking out.

18. In view of the foregoing discourse, Notice of Motion dated 11th November 2020 is struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF JUNE 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kisilah for the ex parte applicants

Mr Mutonyi for the respondent

Court Assistants: B. Jelimo & J. Lotkomo