



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO. 5 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**IN THE MATTER OF AN APPLICATION BY MOHAMED ALI ABDALLA**

**FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE LANDLORD AND TENANT (SHOPS,**

**HOTELS & CATERING ESTABLISHMENTS) ACT – CAP 301 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CHAIRPERSON BUSINESS PREMISES RENT TRIBUNAL**

**AND**

**IN THE MATTER OF BUSINESS PREMISES RENT TRIBUNAL CASE NO. 118 OF 2015 – EMBU**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**EXPARTE.....MOHAMED ALI**

**AND**

**GEORGE KARIUKI.....1<sup>ST</sup> INTERESTED PARTY**

**FEISAL MOHAMED**

**(Administrator to the Estate of Mary Njeri Mohamed Ali (deceased).....INTERESTED PARTY**

**FAUD MOHAMMED ALI**

**(Administrator to the Estate of MOHAMED ALI (deceased).....APPLICANT**

**RULING**

1. Vide a judgment by Kuloba J. dated 08.03.1994, a decree was issued to the effect that:

*(i) The Plot No. 498 Embu Municipality be subdivided into Two (2) equal portions, the plaintiff to be proprietor of the front portion and the defendant to be proprietor of the rear equal portion.*

*(ii) There shall be no orders as to costs.*

2. Thereafter, the defendant via an application ( Civil Case No. 156 of 2012, formerly HCCC 297 of 1993) dated 08.04.2014 moved this court inter alia under Section 1A,1B,3A and 63(e) of the Civil Procedure Act seeking for the following orders that;

*i. Pending hearing and determination of this matter, the court be pleased to grant a stay of the judgment of 08.03.1994 and any consequential orders and/or decree of 05.04.2012.*

*ii. Pending the hearing and determination of this matter, the court be pleased to set aside the judgment of 08.03.1994 and any consequential orders and/or decree issued thereafter.*

*iii. The defendant be granted leave to defend this matter and the draft statement of defence be deemed as duly filed and served upon payment of the requisite fees.*

*iv. The Honourable court be pleased to grant leave to the defendant/applicant to cross examine K.K. Wa Mulwa Advocate on his return of service dated 14.09.1983.*

*v. The plaintiff /applicant be condemned to pay costs of this application.*

3. Honourable Muchemi J. vide a ruling delivered on 02.06.2015 dismissed the application..

4. Via notice of motion dated 01.11.2016, the *ex parte* applicant sought for orders that :

*i. Spent.*

*ii. Pending the hearing and determination of the application herein inter partes, the 1<sup>st</sup> interested party be directed to deposit rent into account to be provided by the court.*

*iii. This Honourable court be pleased to grant an order of Judicial Review by way of certiorari to bring before this Honourable court and quash the entire proceedings and decision of the respondent as the chairperson of the Business Premises Rent Tribunal made on 19.10.2016 in BPRT No.118 of 2015 between George Kariuki of the one part and Mary Njeri Mohamed and Mohamed Ali Abdalla of the other part.*

*iv. This Honourable court be pleased to grant an order of Judicial review by way of prohibition against the chairperson of the Business Premises and Rent Tribunal ordering it not to hear and determine matters on property ownership dispute between the applicant and the 2<sup>nd</sup> interested party.*

*v. The 1<sup>st</sup> interested party herein, George Kariuki be ordered to pay rent to the applicant on plot No. Embu/Municipality/112/498 and in default thereof, the 1<sup>st</sup> interested party be evicted therefrom.*

*vi. The respondent and the interested parties be condemned to pay the costs of these proceedings.*

5. The application is premised on the grounds on its face and further supported by the affidavit sworn by the *ex parte* applicant. In a nutshell, the *ex parte* applicant's case is that the chairperson of the Respondent exceeded its mandate by encroaching on a territory for which it neither had jurisdiction nor had been invited to patrol, pronounced itself on a land matter which is a legal preserve of the Environmental and Land Court. Further that, there was a manifest bias and bad faith when the respondent directed that the 1<sup>st</sup> interested party should continue paying rent to the 1<sup>st</sup> respondent/2<sup>nd</sup> interested party herein unless there is an order from the Court of Appeal restraining the order of the High court in HCC No. 297/1993. They proceeded to argue that the respondent decided to take sides by interpreting legal proceedings which were a subject of another court.

6. The 2<sup>nd</sup> interested party in her affidavit in reply deposed that the respondent never deliberated on the issue of ownership of the suit property between the *ex parte* applicant and the 2<sup>nd</sup> interested party. That the decision of the respondent is not in excess of the mandate or jurisdiction given to it by the law and further that she is the proprietor of the portion which decision has never been challenged. They proceeded to depose that the 1<sup>st</sup> interested party filed a reference No. BPRT No. 118/2015 at the Tribunal seeking to restrain her and the *ex parte* applicant and their agents from evicting or harassing him or attaching his goods that had been proclaimed for non payment.

7. It was further deposed that the *ex parte* applicant misinformed the court that he had filed an appeal challenging the decision in Meru High Court Case No. 297 of 1993. That, it is worth noting that there was another tenant by the name Peter Njiru Mbogo who had filed a similar reference in the Tribunal (BPRT No. 117/2015) and granted similar orders as the 1<sup>st</sup> interested party yet the *ex parte* applicant has not sought to stay execution of the said orders.

8. The *ex parte* applicant on submission argued that it is not in dispute that the original *ex parte* applicant and the 2<sup>nd</sup> interested party are still registered as joint proprietors of the property in question and therefore due to the developments of the stated deaths and by operation of law,

the subject matter is also affected. It was their prayer therefore that, the court orders the 1<sup>st</sup> interested party to pay the outstanding rent into the account of the *ex parte* applicant. That in the same breadth, the respondent acted in excess of its jurisdiction to make a determination on ownership of the suit property on a dispute that was still under active litigation and which to date, is still active and has not been determined.

9. I have certainly considered the application herein and further perused through the annexures thereto. I have further considered the applicant's written submissions and it is my considered view the main issue for determination is whether the same is merited.

10. The gist of this application is pegged on the aspect that Business Premises and Rent Tribunal the respondent herein, allegedly acted in excess of its jurisdiction in making a determination on ownership of the suit property on a dispute that was still under active litigation.

11. It is trite that Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid.

12. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As was held in Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji (Misc. 153 of 2012) :-

***“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were 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.***

13. The *ex parte* applicant has sought for orders that the 1<sup>st</sup> interested party be made to pay rent in an account provided by the *ex parte* applicant; but it is of importance to note that in the course of these proceedings, the court was informed that 1<sup>st</sup> interested party had since vacated the suit property; in that regard, this court shall only determine prayers sought in regards to issuance of certiorari and prohibition orders unto the respondent in that, it purportedly delved into the matters of ownership between the applicant and the 2<sup>nd</sup> interested party which action resulted to exercising excess powers out of its jurisdiction.

14. The Court of Appeal held in Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 *inter alia* as follows as regards the nature of the two judicial review orders:

***“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...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”***

15. It is important to note that previously, a judgment by Kuloba J. (In the High Court of Kenya at Meru, Civil CaseNo.297 of 1993) dated 08.03.1994 had ordered that the Plot No. 498 Embu Municipality (suit property herein) be subdivided into Two (2) equal portions, the plaintiff to be proprietor of the front portion and the defendant to be proprietor of the rear equal portion.

16. Further, the defendant having moved this court via an application dated 08.04.2014 seeking for orders *inter alia* that this court allows his application (Civil Case No. 156 of 2012, formerly HCCC 297 of 1993), Hon. Muchemi J., instead held that the application was not merited.

17. The *ex parte* applicant therefore argues that the respondent did act in excess of its jurisdiction in determining the ownership of the suit property in a dispute that was under active litigation and which is still active and has not been determined. In my considered view, it is not in dispute that the suit property is owned by one Mary Njeri and Mohamed Ali (the original disputants in HCCC 297 of 1993) an issue where the court had previously pronounced itself on. Therefore, in the given circumstances, ownership of the suit property is no longer a dispute that could be determined by the respondent since the court had already pronounced itself on the issue and further that, by the *ex parte* applicant's annexure marked as F1, the certificate of lease *prima facie* establishes that the suit property belongs to the father of the *ex parte* applicant and equally the mother of the 2<sup>nd</sup> interested party.

18. From the excerpts of the proceedings before the respondent, it was alleged by the 2<sup>nd</sup> respondent that the rent in question relates to the property on the 2<sup>nd</sup> interested party's portion of the building.

19. 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, this in my humble view, 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.

20. In 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.

21. It is my considered view, therefore, that the application lacks merit and it is hereby dismissed with costs.

22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF DECEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent

.....for the interested Party