



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. JR CASE NO 14 OF 2018**

**REPUBLIC.....APPLICANT**

**=VERSUS=**

**THE CHAIRMAN BUSINESS**

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

**AUDIO CORNER LIMITED.....INTERESTED PARTY**

**THANDE HOLDINGS LIMITED.....EXPARTE**

**JUDGMENT**

1. This judicial review motion was provoked by orders made by the Chairperson of the Business Premises Rent Tribunal (**the Tribunal**), Honourable Mbichi Mboroki, on 31/8/2017, 4/9/2017 and 6/10/2017 in **BPRT (Nairobi) Case No 301 of 2017** and **BPRT (Nairobi) Case No 619 of 2017**. Aggrieved by the said orders, the *exparte* applicant herein, Thande Holdings Limited, sought an order of *certiorari* quashing the said orders. The *exparte* applicant also sought an order setting aside the impugned orders. Lastly, it sought costs of the suit.

2. A summary of the facts of the dispute giving rise to the suit is that the *exparte* applicant, Thande Holdings Limited, leased to M/s Audio Corner Limited (**the Interested Party**) two Shops; (i) Shop No GF6; and (ii) Shop No GF7; both situated on Land Reference Number 209/2421, Luthuli Avenue, Nairobi. In 2017 a tenancy dispute arose and both the interest party and the *exparte* applicant initiated parallel cases in the Tribunal at Nairobi. The interested party initiated **BPRT Case No 301/2017**. Full pleadings and proceedings relating to Case No 301/2017 were not availed to this court by the parties to the present motion. What can be gleaned from the few papers annexed to the rival affidavits is that on 31/8/2017, the Tribunal granted a *status quo* order and set down the matter for hearing on 4/9/2017. The *status quo* order of 31/8/2017 was exhibited. The subsequent extension orders of 4/9/2017 and 6/10/2017 though impugned by the present motion, were not exhibited by the parties to this motion.

3. On its part, the *exparte* applicant initiated **BPRT Case No 619/2017**. The full pleadings and proceedings relating to the case have similarly not been exhibited by the parties. What is however discernible from the few documents presented to this court is that on **22/8/2017**, the BPRT granted to the *exparte* applicant an order of vacant possession of Shop No GF6. Subsequently, the same Tribunal issued a *status quo* order on 31/8/2017 in **BPRT No 301/2017**. It does also appear that the two cases were at some point consolidated but the precise date when the consolidation order was made is not disclosed.

4. Aggrieved by, *inter alia*, the *status quo* order made on 31/8/2017, the *exparte* applicant obtained leave from this court (Obaga J) and brought a motion seeking an order of *certiorari* to quash the impugned orders. It also sought an order setting aside the said order. The motion was supported by the *exparte* applicant’s statement of facts and verifying affidavit sworn on 6/3/2018 by the *exparte* applicant’s director, A P Thande.

5. In summary AP Thande’s depositions were that the *exparte* applicant was the interested party’s landlord in relation to two shops, GF6 and GF7. On 22/8/2017, the Tribunal granted the *ex parte* applicant vacant possession of shop NO. GF6 and allowed it to levy distress for rent amounting to Kshs 120,690. Thereafter, the *exparte* applicant immediately entered into a new lease agreement with Sound Skills Ltd. The jurisdiction of the Tribunal was ousted once the *exparte* applicant was given possession on 22/8/2017. The subsequent *status quo* order issued on 31/9/2020 and subsequently extended was issued without jurisdiction on part of the Tribunal. The Tribunal had subsequently delayed its determination on the new tenant’s application for an order of joinder. He urged the court to quash the impugned orders of the Tribunal.

6. The interested party filed a replying affidavit sworn by its director, M. A Parker. Mr. Parker’s depositions were that the orders of 22/8/2017 which granted the *ex parte* applicant possession of the suit property were obtained fraudulently and through misrepresentation of facts by the *exparte* applicant. The interested party was a lawful tenant in relation to Shop No. GF6 and the material tenancy was a controlled one. The said tenancy could only be terminated by the landlord or the tenant through notice. The Tribunal had no jurisdiction to

terminate a controlled tenancy without a notice. The question of who was in actual possession of the suit premises was still under investigation by the Tribunal and it was not the duty of this court to determine it. He urged the court to dismiss the motion.

7. The motion was canvassed through written submissions. Counsel for the *ex parte* applicant filed written submissions dated 30/7/2019. He argued that the Tribunal did not have jurisdiction to bar the *ex parte* applicant and the new tenant from using the premises after the tenancy relationship between the *ex parte* applicant and the interested party had ceased to exist. He relied on the framework in Section 12 of the Act and the decision in: (i) **R v Business Premises Rent Tribunal & another Ex parte Davies Motor Corporation Ltd [2013] eKLR** and; (ii) **Moses N Gitonga & Another vs George Gatheka Kinyanjui & Another [2014] eKLR**. Counsel further submitted that the tenancy relationship between the *ex parte* applicant and the interested party ended when the *ex parte* applicant took possession of the suit property in pursuance of the order of 22/8/2017 hence the Tribunal had no jurisdiction to subsequently grant a status quo order.

8. The Attorney General filed written submissions dated 24/9/2019 on behalf of the respondent. The Attorney General submitted that the jurisdiction of the Tribunal is defined under Section 12 of the Act and includes power to make an order for recovery or possession of premises from a tenant or anyone in possession. The Attorney General further argued that the Tribunal acted within its powers when it ordered that the *ex parte* applicant takes possession of the suit property. It was further submitted that where an order for recovery of possession has been issued, the tenancy relationship ceases to exist and the jurisdiction of the Tribunal is ousted. It was the AG's position that the jurisdiction of the Tribunal ended when it issued the order for recovery of possession and the subsequent orders of the Tribunal were made without jurisdiction. Reliance was placed on the case of **Owner of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd [1989] KLR1**.

9. The Interested Party filed written submissions dated 19/10/2019. Counsel for the Interested Party submitted that the question as to whether or not the Tribunal had jurisdiction to grant injunctive relief was settled by the **Court of Appeal in Nyeri Civil Appeal No. 30 of 2013** and it is now settled law that the Tribunal has jurisdiction to grant injunctive orders in relation to disputes falling within its jurisdiction. Counsel for the interested party added that the interested party had never ceased to be a tenant of the *ex parte* applicant because the requirements of Section 4(2) of the Act had not been met. He argued that the Tribunal has no jurisdiction to terminate a tenancy without a notice under Section 4(2) of the Act. Lastly, counsel argued that under Article 169 of (1) (a) of the Constitution of Kenya 2010, tribunals are subordinate courts and by dint of their status as subordinate courts, they have jurisdiction under Sections 3A and 40 of the Civil Procedure Act to issue injunctive orders. He urged the court to dismiss the motion.

#### **Analysis & Determination**

10. I have considered the parties' pleadings, affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. The present judicial review motion is premised on two principal grounds namely: (i) the Tribunal having granted the *ex parte* applicant possession of the suit premises (Shop No GF6) on 22/8/2017, the tenancy relationship between the *ex parte* applicant and the interested party ceased and the Tribunal therefore lacked jurisdiction to grant the *status quo* order it subsequently granted on 31/8/2017 and extended on 4/9/2017 and 6/10/2017; and (ii) under Section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, the Tribunal did not have powers to grant injunctive orders in the nature of *status quo* orders.

11. The Attorney General, through Ms Rose Nyawira - Senior State Counsel, filed written submissions dated 24/9/2019 in which he took the position that the jurisdiction of the Tribunal over the dispute came to an end on 22/8/2017 when it issued orders directing the landlord (the *ex parte* applicant) to recover possession of the business premises. It was the position of the Attorney General that any other orders issued by the Tribunal after 22/8/2017 were issued without jurisdiction. The Attorney General did not comment on the second ground for judicial review herein.

12. The position taken by the interested party is that it is still the lawful tenant of the *ex parte* applicant and it is still in possession of the business premises. Secondly, the interested party contends that even if it had been evicted from the suit premises, the fact of not being in possession of the suit premises did not make the interested party cease to be a lawful tenant in the business premises within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, because the term "tenant" in relation to a controlled tenancy means "the person for the time being entitled to the tenancy, whether or not he is in occupation of the tenancy premises".

13. Secondly, the interested party's position is that the question as to whether or not the BPRT has jurisdiction to issue an injunctive order has been settled by the Court of Appeal and the position is that the BPRT can properly issue an injunctive order.

14. In my view, three key issues fall for determination in this motion. The first issue is whether the Tribunal had jurisdiction to issue the *status quo* order it issued on 31/8/2017 and the subsequent orders it issued on 4/9/2017 and 6/10/2017. The second issue is whether the Tribunal had jurisdiction to issue a *status quo* order in the nature of an injunctive order. The last issue is whether any of the parties to the motion should be condemned to bear costs of the motion. I will make brief pronouncements on the three issues sequentially in the above order.

15. The first issue is whether the Tribunal had jurisdiction to issue the *status quo* order it issued on 31/8/2017 and the subsequent orders it issued on 4/9/2017 and 6/10/2017. It is not contested that on 22/8/2017, the Tribunal issued an order in **BPRT Case No 619/2017** in the following verbatim terms:

**1. The matter certified urgent**

**2. The Landlord is directed to recover possession of the Landlord's/applicant's business premises being LR NO 209/2421, Shop No GF6.**

**3. The Officer Commanding Station Kamukunji Police Station to enforce compliance and that peace prevails**

**4. Cost to the Landlord assessed at Kshs 25,000.**

5. **The Landlord is allowed to levy distress and recover outstanding arrears of rent of Kshs 120,690.66**

6. **The costs to the Landlord shall be recovered as part of arrears of rent.**

16. My interpretation of the above order is that, effective 22/8/2017, the tenancy relationship which hitherto existed between Thande Holdings Limited (*ex parte* applicant) and Audio Corner Limited (**Interested Party**) ceased to exist because the *ex parte* applicant was granted possession of the suit property. Indeed, a subsequent inspection report by the Tribunal's Rent Inspector prepared and filed on 14/9/2017 pursuant to the order made by the Tribunal on 11/9/2017 indicated that a new tenant was in possession of the suit premises.

17. Subsequent to the order of 22/8/2017, on 31/8/2017 the Tribunal issued an order in BPRT Case No 301/2017 in the following terms:

1. **Matter certified as urgent**

2. **Status quo to be maintained**

3. **Hearing on 4th September, 2017**

18. The jurisdiction and powers of the Tribunal established under Section 11 of the Act is set out under Sections 6 and 12 as read together with Section 4 of the Act. In summary, the Tribunal exercises jurisdiction in relation to subsisting controlled tenancies. Where the controlled tenancy has ceased to exist pursuant to an order of the court such as in the present case, the Tribunal has no jurisdiction to entertain the dispute. In my view, the Tribunal having terminated the tenancy between the *ex parte* applicant and the interested party through its order of 22/8/2017, it had no jurisdiction to issue the subsequent *status quo* order it issued on 31/8/2017 and extended on 4/9/2017 and 6/10/2017. The avenue available to a party aggrieved by the vacant possession order of 22/8/2017 was to seek stay or setting aside orders in relation to the order of 22/8/2017. Only upon stay or setting aside of the order of 22/8/2017, and upon evidence that the premises had not been leased to another tenant, would the Tribunal have jurisdiction to issue the orders it purported to issue on 31/8/2017, 4/9/2017 and 6/10/2017.

19. In the present motion, the Tribunal purported to exercise jurisdiction without first staying or setting aside its earlier order of 22/8/2017. There is similarly no evidence that the interested party invited the Tribunal to first stay or set aside its order of 22/8/2017. For the Tribunal to exercise jurisdiction, there must subsist a controlled tenancy relationship [see **Republic v Business Premises Rent Tribunal & Another ex-parte Davies Motor Corporation Limited [2013] eKLR**. That was not the case when the Tribunal issued its order of 31/8/2017.

20. It is settled law that without jurisdiction, a court or tribunal has no power to make one more step and it ought to down its tools. [ see the **Judgment of Nyarangi JA in Owners of Motor Vessel "Lillian"S" v Caltex Oil Kenya Limited (1989) KLR1**. See also the decision of the Supreme Court of Kenya in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR**.

21. My finding on the first issue therefore is that the Tribunal having granted the *ex parte* applicant possession of the suit property on 22/8/2017, it had no jurisdiction to further entertain the dispute or grant the *status quo* order it granted on 31/8/2017 or to issue the other orders it issued thereafter, without first setting aside its order of 22/8/2017. Consequently, the notice of motion dated 13/3/2018 succeeds in terms of prayer 1 on the ground of lack of jurisdiction on part of the Tribunal.

22. The second issue is whether the Business Premises Rent Tribunal has jurisdiction to issue an injunction under the Act. Although both the *ex parte* applicant and the interested party identified this as one of the key issues falling for determination in this motion, the *ex parte* applicant did not submit on it. The Attorney General too did not submit on it. The position of the interested party is that the Tribunal has jurisdiction to issue injunctive orders in disputes within its jurisdiction and had such jurisdiction in the two consolidated cases giving rise to this motion.

23. Not too long ago, the Court of Appeal in **John Mugo Ngunga v Margaret M Murangi [2014] eKLR** rendered itself on this question and asserted that the Business Premises Rent Tribunal had jurisdiction to grant an injunction in **John Mugo Ngunga v Margaret M Murangi [2014] eKLR** as follows:

***"On the jurisdiction of the Tribunal to issue an order of injunction, it is clear the judge was right, the jurisdiction is provided for by the Act and that was further fortified by aforesaid decision of this court"***

24. In light of the above pronouncement by the Court of Appeal, my finding on the second issue is that where the Tribunal is properly seized of a dispute, it can properly issue an injunctive or conservatory order. But as found out in the preceding paragraphs, the tenancy relationship in the present dispute had ceased to exist effective from 22/8/2017 when the Tribunal granted the *ex-parte* applicant possession of the suit property.

25. The last issue relates to costs of this motion. The judicial review motion was necessitated by errors on part of the Tribunal while exercising judicial authority. In the circumstances, parties to this suit shall bear their respective costs of the suit.

#### **Disposal Orders**

26. In light of the above findings, I make the following disposal orders in relation to the judicial review motion herein dated 13/3/2018 and in tandem with the prayers sought in the motion:

***a) An order of certiorari hereby issues quashing the orders of the Chairman of the BPRT made on 31/8/2017, 4/9/2017, and 6/10/2017 directing the closure of the ex-parte applicant's business premises known as Shop No GF6 situated on Land Reference***

*Number 209/2421.*

*b) Parties shall bear their respective costs of this suit.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF FEBRUARY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

June Nafula - Court Clerk