



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 418 OF 2018

BETWEEN

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN, BUSINESS PREMISES RENT TRIBUNAL.....1ST RESPONDENT

DAVID WAKAHU NGANGA.....2ND RESPONDENT

EX PARTE:

CARRINGTON COMPLEX LIMITED

RULING

Introduction

1. Carrington Complex Limited, which is the *ex parte* Applicant herein (hereinafter the Applicant”) filed a Notice of Motion application dated 19th October 2018, seeking an order of certiorari to quash the proceedings in the Business Premises Rent Tribunal **Nairobi BPRT Case No. 826 of 2018 – David Wakahu Nganga vs Carrington Complex Limited**, together with the order therein made on 15th October 2018 by the Chairman of the Business Premises Rent Tribunal. The said application was supported by a statutory statement dated 17th October 2018, a verifying affidavit sworn on the same date by Ibrahim Adan, one of its directors, and a Further Affidavit sworn by the said deponent on 11th March 2019.
2. The 2nd Respondent herein, who was the complainant in **Nairobi BPRT Case No. 826 of 2018**, subsequently filed a Notice of Preliminary Objection dated 20th November 2017, on the ground that this Court does not have the requisite jurisdiction to hear and determine the said Notice of Motion. The 2nd Respondent urged that the Notice of Motion seeks to challenge the decision of the Chairman of the Premises Rent Tribunal, who is the 1st Respondent herein, in respect of a tenancy dispute between the Applicant and the 2nd Respondent, which falls within the exclusive jurisdiction of the Environment and Land Court. The 2nd Respondent in addition also filed a replying affidavit that he swore on 7th November 2018.
3. This Court directed that the said Notice of Preliminary Objection be canvassed by way of written submissions. Mutimu Kang’atta and Company Advocates for the 2nd Respondent filed submissions dated 5th December 2018, wherein it was urged that it is self-evident that the Applicant’s application dated 19th October 2018 was prompted by the proceedings and orders of the Chairman of the Business Rent Tribunal (hereinafter “the Tribunal”) in **Nairobi BPRT Case No. 826 of 2018**. That it’s also evident that the 2nd Respondent is asserting his right to quiet possession and enjoyment of his tenancy premises on a portion of L.R No. 1/422(Derby Court) off Ngong Road, and that the said Tribunal had granted *ex-parte* orders to stop the eviction of the 2nd Respondent pending the hearing of his complaint.
4. Based on the foregoing, the 2nd Respondent submitted that what has escalated from the Tribunal to this Court is essentially a dispute over the use and occupation of land i.e a portion of LR No.1/422. Therefore, that this being a dispute over the right to use and occupy land, it falls

under the exclusive jurisdiction of the Environment and Land Court as contemplated by Article 162(2)(b) of the Constitution, section 150 of the Land Act of 2012, and the Environment and Land Court Act of 2011.

5. Further, that Parliament was mandated by Article 162(3) of the Constitution to determine the jurisdiction and functions of the Courts contemplated by Article 162(2) of the Constitution. That pursuant to that mandate, Parliament enacted the Environment and Land Court Act of 2011, and section 13(5) of the Act confers the supervisory jurisdiction over the Business Premises Rent Tribunal upon the Environment and Land Court. In addition, that Article 165(5) of the Constitution specifically and in express terms excludes the High Court from exercising parallel jurisdiction to that of the Environment and Land Court over the Business Rent Tribunal. The 2nd Respondent therefore urged this Court to strike out the Notice of Motion application.

6. Wetangula Adan & Company Advocates filed submissions dated 22nd January 2019 on behalf of the Applicant, wherein the Applicant's and 2nd Respondent's cases as captured in their respective pleadings were reiterated. It was the Applicant's submission that the 2nd Respondent has asserted that this court lacks jurisdiction to hear or consider his substantive motion on the grounds that this is a dispute over the right to use and occupy land, which falls within the exclusive jurisdiction of the Environment and Land Court. Therefore, that should this proposition be accepted as true, then by necessary implication the prayer for certiorari in its Notice of Motion ought to be immediately granted on the basis of this admission of lack of jurisdiction on the Tribunal's part.

7. The Applicant also urged that an alternative remedy is not a bar to judicial review, and that moving the Tribunal to set aside the *ex-parte* order is not an appropriate or adequate alternative remedy for reasons already stated in its application, and further, that it is only during the hearing of the substantive application that the court shall consider whether the reasons given are sufficient enough. Therefore, that the sufficiency or other wise of these reasons are factual and cannot be disposed of by way of a preliminary objection.,

8. Additionally, the Applicant further submitted that the lack of jurisdiction of a decision maker is a matter that squarely falls within the purview of the High Court under the provisions of sections 7 and 9 of the Fair Administrative Action Act, which the Applicant has invoked in seeking a remedy of certiorari. That if at all as the 2nd Respondent asserts, this is a dispute over the right to use and occupy land that falls within the exclusive jurisdiction of the Environment and Land Court, then it ought to be appreciated that the Applicant's issue with, and the subject matter of these judicial review proceedings, is the lack of jurisdiction inherent in **Nairobi BPRT Case No. 826 of 2018**, and the Tribunal's order of 15th October 2018 which falls within this Court's jurisdiction. The Applicant therefore urged the court to dismiss the preliminary objection with costs.

9. The 1st Respondent did not respond to the application, nor file any submissions on the Preliminary Objection.

The Determination

10. I have considered the arguments made by both the Applicant and 2nd Respondent. The main issue for determination is whether this Court has jurisdiction to hear and determine the Applicant's Notice of Motion dated 19th October 2018. This Court is in this respect guided by the often cited decision of the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** as follows:

“

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

11. The Applicant argument is that this Court can exercise its supervisory jurisdiction to review the lawfulness of the 1st Respondent's decision, and that this is a case that would ordinarily be within this Court's jurisdiction. The 2nd Respondent on the other hand argued that the High Court does not have jurisdiction for two reasons. The first reason is that the Environment and Land Court is granted supervisory jurisdiction over the 1st Respondent. The second reason that has been propounded by the 2nd Respondent is that the matter in this suit is one that falls within the exclusive jurisdiction of the Environment and Land Court.

12. This Court's jurisdiction to hear and determine judicial review cases is granted by Article 165 (6) of the Constitution which provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard. The relevant provisions that grant the Environment and Land Court jurisdiction are Article 162(2) of the Constitution which provides as follows:

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."

13. Pursuant to provisions, the Environment and Land Court Act was enacted which elaborates on the jurisdiction of the Environment and Land Court in section 13 thereof as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

14. The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act in addition provides under section 15 that appeals from decisions of the Business Premises Rent Tribunal shall lie to the Environment and Land Court Act.

15. The Supreme Court in **Republic vs Karisa Chengo & 2 Others (2017) e KLR** amplified and pertinently held that each of the Superior Courts established by or under the Constitution has jurisdiction only over matters exclusively reserved to it by the Constitution or by a statute as permitted by the Constitution. In addition, while Article 165(6) expressly bestows and does not in any way limit the High Court's jurisdiction over tribunal and subordinate courts, it is under a Constitutional duty to observe and apply statutory provisions as regards alternative means of dispute resolution under section 9 of the Fair Administrative Action Act.

16. In the present application, the ex parte Applicant in its stated that it is the registered owner of LR No. 1/422, and that the 2nd Respondent was basing his claims on an expired license with the previous owners of the said premises. Further, that there being no tenancy in existence, the 1st Respondent granted ex parte orders to the 2nd Respondent in absence of subject matter jurisdiction, and in excess of the jurisdiction granted to him under section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

17. This suit is therefore a suit involving the 1st Respondent's jurisdiction to hear the 2nd Respondent's claim, which is one that this Court would ordinarily have jurisdiction to hear and determine pursuant to Article 165(6) of the Constitution. However, to the extent that the end result will touch on the occupation of the disputed premises, it also therefore falls within the jurisdiction of the Environment and Land Court. It is therefore one of those hybrid cases where both the High Court and the Environment and Land Court have concurrent jurisdiction as the issues herein cut across the exclusive jurisdiction reserved for the two courts.

18. The Courts have resolved the issue of concurrent jurisdiction by inquiring what the most substantial question or issue presented in the controversy is. In **Suzanne Butler & 4 Others v Redhill Investments & Another (2017) e KLR** the Court stated the test in the following words:

"When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and

therefore lends predictability to the issue."

19. I find that the issues that arise herein are predominantly and substantially land related issues, since the question of the jurisdiction of the 1st Respondent will have to be examined in light of the applicable land laws, and specifically on the issue of the 2nd Respondent's right to occupy the disputed land. It also my view that the Environment and Land Court, being a superior court of the status of the High Court, has similar supervisory jurisdiction granted to the High Court by Article 165(6) of the Constitution over subordinate courts and tribunals that make decisions as regards the title, use and occupation of land, as is also evidenced by the appellate jurisdiction granted to the said Court by section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

20. This is thus a matter that will be more competently heard by the Environment and Land Court, which has both the exclusive and supervisory jurisdiction to hear the matter, despite the fact that this Court also has supervisory jurisdiction over the 1st Respondent. Article 159 of the Constitution also mandates this Court to dispense justice expeditiously and without undue regard to procedural technicalities.

21. Therefore, to avoid further delay and in the interests of justice, it is prudent that this matter be transferred to the Environment and Land Court for further hearing and determination. It was in this respect held by the Court of Appeal in **Mackenzie Mogere & Another vs The Trustees of Teleposta Pension Scheme & 4 Others**, Civil Appeal N0. 221 of 2015, that to order such a transfer would not be in error on the part of this Court.

22. In light of the foregoing findings, the 2nd Respondent's Preliminary Objection only partially succeeds to the extent that this suit is hereby transferred to the Environment and Land Court at Nairobi for further hearing and determination. Each party shall bear its own costs of the said Preliminary Objection.

23. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JUNE 2019

P. NYAMWEYA

JUDGE