



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 9 OF 2014 (JR)

JUDIAL REVIEW DIVISION

REPUBLIC.....APPLICANT

-VERSUS-

THE HON CHAIRMAN,

RENT RESTRICTION TRIBUNAL MOMBASA.....RESPONDENT

-AND-

SAID ALI & 19 OTHERS..... INTERESTED PARTIES

EX-PARTE.....THE ASSOCIATION FOR THE PHYSICALLY DISABLED OF KENYA

JUDGMENT

THE APPLICATION

By a Notice of Motion dated 12th March 2014 upon leave granted to file judicial review proceedings, the ex parte applicant sought the following specific reliefs:

1. ***THAT*** an order of Certiorari be issued to remove into this Honourable Court all the proceedings in Mombasa Rent Restriction Case No. 65 of 2013, and the orders made therein by the Honourable Chairman Rent Restriction Tribunal on 13th January 2014, dismissing the Applicant's Preliminary objection for the reason that the Honourable Chairman has no power and or jurisdiction to hear and or determine the said case and the proceedings therein contravene the rules of natural justice, for the purpose of quashing the said proceedings.
2. ***THAT*** an Order of Prohibition be issued prohibiting the Honourable Chairman, Rent Restriction Tribunal in Mombasa Rent Restriction Case No. 65 of 2013 from further hearing, proceeding with and or from making any further orders in Mombasa Rent Restriction Case No. 65 of 2013
3. ***THAT*** the costs of this Application be provided for.

GROUND FOR THE RELIEF

The application was founded on grounds set out in the Statement filed herein dated 11th March 2014 and supported by the Verifying Affidavit of Francis J.K. Kivulli sworn on 11th March 2014. The specific grounds upon which the reliefs were sought were listed in the Statement as follows:

C. THE GROUNDS UPON WHICH THE RELIEFS ARE SOUGHT ARE AS FOLLOWS:-

1. The Applicant, the Association for the Physically Disabled of Kenya (APDK), Coast Branch, operates a program named Bombolulu Workshops & Cultural Centre which is wrongly sued as the Defendant in Mombasa Rent Restriction Case No. 65 of 2013.

2. By a plaint dated 13th May 2013, the Plaintiffs, who are former employees of the APDK filed a suit in which they sought orders of permanent injunction to restrain the Defendant from evicting them from their rented houses and from increasing rent.
3. By an application dated 13th May 2013, filed under Certificate of Urgency, the Plaintiffs sought orders of interlocutor injunction to restrain the Defendant from evicting them from their rented houses and from increasing rent.
4. The said application was heard ex-parte on 13th May, 2013, before Mr. Hillary K. Korir, the Honourable Chairman, Rent Restriction Tribunal in Mombasa Rent Restriction Case No. 65 of 2013, who issued an ex-parte order of injunction restraining the Defendant in the suit from evicting the Plaintiffs/Tenants from the rented premises and or from removing any property therein pending the hearing and final determination of the suit, without hearing the Defendant sued in the said suit or APDK, the registered owner of the said property which had not been joined in the suit in breach of the rules of natural justice and which order is unlawful for want of jurisdiction.
5. The Honourable Chairman, Rent Restriction Tribunal in Mombasa, also issued an order that the Plaintiffs do continue paying "rent" for the premises occupied by them to the Defendant or its appointed agent yet it was clear from the documents availed by the Plaintiffs that they had never paid rent for the premises therefore the said order amounts to an error or mistake on the face of the record and the same is unenforceable.
6. The Defendant entered an appearance, filed a defence, an affidavit in reply to the application and a Preliminary Objection dated 10th September 2013 in which it raised the issue of jurisdiction and the legality of the suit to which parties filed written submissions.
7. On 13th January, 2014, the Honourable Chairman, Rent Restriction Tribunal made an order dismissing the Defendant's preliminary objection without any reference to inter alia, the issue of the Rent Tribunal's jurisdiction to hear and determine the case.
8. The entire proceedings and orders issued in Mombasa Rent Restriction Case No. 65 of 2013 are null and void for want of jurisdiction and the same ought to be quashed to avoid injustice being visited upon the Applicant because the order proceedings and orders made therein have legitimized the Plaintiff's unlawful occupation of the Applicant's premises without hearing the Applicant/owner of the suit premises.
9. There is **no** tenancy relationship between the said Plaintiffs and the Defendant sued in Mombasa Rent Restriction Case No. 65 of 2013 or Applicant herein, therefore the proceedings in the said case amounts to an abuse of the court process and the ruling given on 13th January 2014 amounts to a miscarriage of justice.
10. In addition, since the Defendant is a mere programme of APDK, it has no capacity to sue or to be sued as such it has no capacity to enter into any contractual relationship with the Plaintiffs or anyone else and any orders issued against it are unenforceable and null and void and an abuse of the process of the court.
11. It is clear from the Plaintiff's pleadings that the relationship between them and APDK emanated from employment wherein the contract of employment required the employer to house its employees under the terms of the Collective Bargaining Agreement (CBA) entered into between the employer and the Kenya Union of Domestic, Hotel, Educational Institutions, Hospital and Allied Workers Union (**KUDHEIHA**), of which they were members, which terms required the Applicant to provide housing to its employees during the duration of their employment. Therefore, the employees occupied the houses under Service Tenancies, which the Rent Restriction has no jurisdiction over by dint of Sections 2 (b) and 3 (1) of the Rent Restriction Act.
12. Under the terms of the said CBA, the Applicant is required to pay a house allowance equivalent to between 24% for junior staff like the Plaintiffs to 20% for senior staff where housing is not provided, which means that the for example the 1st plaintiff earning a salary of Ksh. 11,580, is entitled to house allowance of not less that Ksh. 2,779/20 yet the highest deduction from the Plaintiffs' salaries did not exceed Ksh. 1,000/= as it was not rent but charge for services to the premises namely electricity, water, security, cleaning and maintenance; therefore it is extremely unfair and a misrepresentation of facts for the Plaintiffs to continue occupying the Applicant's premises whilst claiming that the amount deducted from their salaries previously was rent, whereas the same was just subsidized payment for services mentioned above.
13. Even when the Plaintiffs were declared redundant and their employment terminated, their continued occupation of the premises amounted to an illegal act by the Plaintiffs which the Rent Restriction Tribunal ought not to have legitimized by granting ex-parte orders of permanent injunction based on the facts before it which showed that there was no tenancy relationship between the Plaintiffs and the Defendant, no privity of contract between the parties, therefore the Tribunal did not have jurisdiction to entertain the suit.
14. The Honourable Chairman Rent Restriction Tribunal's decision to sustain the suit is biased, ultravires and ignores clear provisions of the Rent Restriction Act, the Civil Procedure Act and other laws since he ought not to have entertained the proceedings in Mombasa Rent Restriction Case No. 65 of 2013 in the circumstance.
15. The Applicant has suffered serious loss and damage since the suit was filed and to date, it has lost Ksh 1,181,000 in rental income due to the unlawful occupation of its premises by the Plaintiffs in the said suit. Since the initial occupation by the first group of the plaintiffs it has actually lost a total income of Ksh 2,198,600 and as a result of this the Applicant's programme is likely to collapse due to huge losses occasioned by the illegal occupation. The Applicant also continues to pay for water, electricity, security and cleaning services, maintenance, etc estimated at Sh. 28,600 every month for the said premises, without any reimbursement by the Plaintiffs.

16. The effect of the Honourable Chairman Rent Restriction Tribunal's decision is to force the Applicant to enter into new contractual arrangements with strangers and its rights to the property and the income therefrom have been taken away in violation of the law, procedure and the principles of natural justice.

RESPONSE

In reply, **RACHAEL MWANGOME** on behalf of the Interested Parties swore an affidavit on 26th March 2014 setting out their case principally as follows:

3. **THAT** I have read and fully understood the contents of the Notice of Motion dated 12th March 2014, the same has also been explained to me by my Advocate on record and wish to reply as hereunder;
4. **THAT** it is correct that the Ex-Parte applicant filed a Notice of Preliminary objection challenging the jurisdiction of the Rent Restriction Tribunal to hear and determine Rent Restriction Case No. 65 of 2013.
5. **THAT** the Notice of Preliminary objection was dismissed because it did not raise pure points of law.
6. **THAT** am advised by my Advocate which advice I verily believe to be correct, the Rent Restriction Tribunal had jurisdiction to hear and determine Rent Restriction Case No 65 of 2013.
7. **THAT** am advised by my Advocate which advice I verily believe to be correct, that a party cannot challenge the merits of a finding since such a decision would mean that this court would be acting as an Appellate Court.
8. **THAT** am further advised by my Advocate which advice I verily believe to be correct, that Judicial Review is concerned with the decision making process not the merits of the decision being challenged.
9. **THAT** am advised by my Advocate which advice I verily believe to be true, that when the question of jurisdiction is pegged on the existence of a particular state of facts the tribunal must inquire into the existence of the facts.
10. **THAT** further to paragraph 8 above, am advised by my Advocate which advice I verily believe to be correct, that where a tribunal has made such finding, a party dissatisfied cannot lodge a judicial review application.
11. **THAT** am advised by my Advocate which advice I verily believe to be correct, the issue raised on the question of jurisdiction is whether or not the interested parties herein are in service tenancy and therefore the Tribunal lacked jurisdiction. This is a question of fact.
12. **THAT** am advised by my Advocate which advice I verily believe to be correct that the other issue raised on the question of jurisdiction is whether or not after being declared redundant thus ceasing to be employees, therefore the Tribunal had jurisdiction. This is a question of fact.
13. **THAT** further to paragraph 11 above I am advised by my Advocate which advice I verily believe to be correct, that once we were declared redundant and ceased being employees of the Ex-Parte Applicant we became protected tenants thus the Tribunal has jurisdiction to hear Rent Restriction Case No 65 of 2013.
14. **THAT** am advised by my Advocate which advice I verily believe to be true, that Judicial Review Orders would not issue where the Tribunal in arriving at its decision misconstrued the law or believed one set of evidence as against another.
15. **THAT** am also advised by my Advocate which advice I verily believe to be true, that Judicial Review jurisdiction ought not to be disguised as Appellate jurisdiction.
16. **THAT** so far there is no standard rent payable.
17. **THAT** am advised by my Advocate which advice I verily believe to be true, that the Ex-Parte Applicant is not being honest when they allege the proceedings in Rent Restriction Case No 65 of 2013 contravened rules of natural justice.
18. **THAT** further to paragraph 16 above. The Ex-Parte Applicant was afforded a fair hearing and an opportunity to be heard. They were well represented by counsel and did file on the 7th of August 2013. Their Memorandum of Appearance, Defence, Replying Affidavit and Notice of Preliminary Objection. Annexed hereunto find attached and marked as 'RM-2'
19. **THAT** the Applicant's Application lacks merit, is frivolous, vexatious and an abuse of the court process.

SUBMISSIONS

With exception of Counsel for the respondent who did not wish to make submissions, Counsel for the parties then filed written submissions on their respective contentions on the dispute before the court.

DETERMINATION

The question before the court is whether the Rent Restriction Tribunal had jurisdiction to make the decision that it made on the ex-parte applicant's Preliminary Objection. With respect, it is not whether the Tribunal had jurisdiction to entertain the suit by the interested parties where jurisdiction depended on the existence of certain facts as to tenancy and amount of rent payable.

For this judicial review court to determine on the facts that the tribunal had jurisdiction, or in other words that the tenancy of the interested parties was a constituted tenancy over which the tribunal had jurisdiction, the court must consider and determine the disputed facts as to the nature of the tenancy before the parties, whether service tenancy according to the exparte application or controlled tenancy according to the Interested Parties. This is a consideration of the merits of the dispute subject of the judicial review proceedings.

It is settled since **Commissioner Of Lands v Kunste Hotel Limited [1997]eKLR** that judicial review is not concerned with the merits of the decision being challenged but with the decision making process, its purpose being to ensure that the individual is given fair treatment.

The ex parte applicant raised a preliminary objection as to jurisdiction of the Rent Restriction Tribunal in Mombasa Rent Restriction case no. 65 of 2013, which was after full hearing of the objections rejected by the Tribunal. To grant the judicial review would be to find that the tribunal was wrong on its appreciation of facts upon which jurisdiction did or did not exist. That is not the Province of Judicial review but of appeal on the merits.

In discussing the nature of judicial review proceedings, the court of appeal in **Municipal Council of Mombasa v. R & Anor** Civil Appeal No. 185 of 2001 held:

“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 the decider would involve going into 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”.

See also the High Court decision in **R v. Chairman Business Premises Rent Control Tribunal & Anor. Exp Hekima College** (2014) eKLR, and **Chief Constable of North Wales v. Evans** (1982) WLR 1155.

By analogy, in the field of ordinary civil appeals and review procedures, the Court of Appeal in **National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR** has also settled a review of the merits of the decision to the proper subject of the Appeal rather than **Review** as follows:

*“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. **Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.**”*

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.”

If the Tribunal Chairman was wrong in his interpretation and conclusion of law on his jurisdiction over the matter, the remedy to the aggrieved party lies in an appeal.

CONCLUSION

It is clear that the Tribunal had jurisdiction to hear and determine the preliminary objection on its jurisdiction. Having done so, if the ex parte applicant considered that the decision of the Tribunal was wrongly on the merits, the proper challenge against the decision is by way of appeal on the merits and not judicial review. The Tribunal was properly taken within its jurisdiction to entertain and determine disputes relating to constituted tenancies.

As to whether on the facts if the case the tenancy between the parties was controlled or not so as to establish or oust jurisdiction of the Tribunal over the tenancy, the determination calls for a consideration of the merits of the decision which is the proper province of an appeal on the merits.

The court does not delve into the merits of the case in order not to prejudice further proceedings in the matter.

ORDERS

Accordingly, for the reasons set out above, the ex-parte applicant's Notice of Motion herein is declined with no order as to costs.

Order Accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2018

E.K. OGOLA

JUDGE

Appearances:

M/S E.W Njeru & Co. Advocates for Applicant.

Mr. Ngari, Litigation Counsel for the Respondent.

M/S Nyange Sharia, Advocates for Interested Parties.