



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 625 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS) ACT(CAP 301 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA AND FAIR ADMINISTRATIVE ACTION ACT (2015)

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE CHAIRMAN, BUSINESS PREMISES

RENT TRIBUNAL 1ST RESPONDENT

AND

ISAAC MAINA IHOMBA INTERESTED PARTY

EX PARTE :

JOSEPH KAMUA MUNYORO T/A

MIST BAR & LOUNGE

JUDGMENT

The Application

1. The *ex parte* Applicant herein operates a bar and restaurant known as Mist Bar and Lounge (hereinafter “the subject premises”), which is located on LR 2019/542, a property known as Brighton House on Tom Mboya Street owned by the Interested Party (hereinafter the “subject property”). The Applicant claimed that he had entered into a lease agreement with the previous owner of the said property from 25th November 2013 for a term of 5 years and 3 months. Further, that in the course of the said lease, the subject property was sold to the Interested Party, who entered into a new lease with the Applicant for 5 years and 3 months on 1st January 2014.

2. On 14th June 2017, the Interested Party served the Applicant with a Landlord’s Statutory Notice to terminate or alter the terms of the tenancy, pursuant to the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, which notice was lodged before the Business Rent Tribunal.

3. The Applicant then lodged a reference with the said tribunal and a Notice of Preliminary Objection dated 27th June 2016, and Notice of Motion dated 21st October 2016 in **Nairobi Business Premises Rent Tribunal Case Number 549A of 2016**, challenging the jurisdiction of the Tribunal to entertain the statutory notice, and seeking that the said Notice be struck out. The Applicant claims that the Respondent

thereupon directed the parties to file submissions on the said Notice of Preliminary Objection and Notice of Motion and gave them a ruling date. The Respondent thereupon delivered a ruling on 5th September 2017 dismissing the Applicant's Preliminary Objection and Notice of Motion.

4. Being aggrieved by the ruling by the Respondent, the Applicant filed a substantive application for judicial review orders herein by way of a Notice of Motion dated 24th October 2017, in which he is seeking the following orders :

a) An order of Certiorari do issue to bring to this court and quash the entire decision of the Respondent in Nairobi BPRT No. 549A of 2016 delivered on 8th September 2017 dismissing the Applicant's Preliminary Objection dated 27th June 2016 and the Notice of Motion Application dated 21st October 2016 and ordering the Applicant to pay to the Interested Party Kshs 35,000/= as costs.

b) An order of Prohibition do issue prohibiting the Respondent from hearing and determining Nairobi BPRT No. 549A of 2016.

c) The costs of the application be awarded to the Applicant in any event.

5. The application is supported by the grounds on the face thereof; the Chamber Summons for leave to commence judicial review proceedings and accompanying statement both dated 17th October 2017, and the verifying affidavit sworn by the Applicant on 17th October 2017. The Applicant's Advocates, Maingi Musyimi & Associates in addition filed written submissions dated 9th April 2018, which they relied upon during the hearing.

6. The Applicant in his submissions relied on the case of **Owners of the Motor Vessel Lilian "S" vs Caltex Oil (Kenya) Ltd, (1989) KLR 1**, and section 2 of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, for the proposition that the jurisdiction of the Tribunal is with respect to controlled tenancy and that the lease herein was beyond the purview of a controlled tenancy.

7. Section 2 of the Land Registration Act of 2012, and various judicial authorities, including the decisions in **Velji Shamji Construction Limited vs Westmall Supermarket Limited (2007) e KLR**, **Bachelor's Bakery Limited vs Westlands Securities Limited (1982) e KLR** and **Chon Jeuk Suk Kim & Another vs E.J. Austin & 2 Others (2013) e KLR**, were cited for the position that there is no requirement that a lease above 5 years has to be registered, and that if a lease of over 5 years is unregistered, it does not bring the agreement thereof within the jurisdiction of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act .

8. Therefore, that the Respondent acted unreasonably by not following established legal principles with respect to its jurisdiction; arbitrarily disregarded statute; and by arrogating to itself jurisdiction where none existed . Further, that the Respondent acted in contravention of the standards espoused under section 7 (2) of the Fair Administration Act (2015), including the Applicant's legitimate expectation that it would apply and adhere to the provisions of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act .

The Responses

The Respondents' Response

9. The application was opposed by the Respondent by way of Grounds of Opposition dated 7th February 2018, and submissions dated 18th February 2018 filed by Munene Wanjohi, a State Counsel at the Attorney General's Chambers.

10. The Respondent contended that the instant application is frivolous, vexatious and abuse of the Court Process, and that the Applicant has not exhausted all the internal appeal mechanisms before moving the Judicial Review Court as stipulated in section 9(2) of the Fair Administrative Actions Act. Further, that the Respondent is still seized of the matter, and such the issues raised in the present Notice of Motion can still be raised making the application premature. Therefore, that the application is incompetent and this Court ought to decline to exercise its jurisdiction and/or discretion in the circumstances.

11. The Respondent in its submissions relied on section 12 of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act for the contention that he acted within his jurisdiction. It was further submitted that the Applicant is aggrieved with the decision of the Tribunal and not the procedures used in reaching the decision, and should therefore appeal the decision under section 15(1) of the Act, and not file a judicial review application.

The Interested Party's Response

12. The Interested Party's response was in a replying affidavit he swore on 24th October 2017, and submissions dated 11th June 2018 filed by his Advocates, N.A. Owino & Company Advocates. The Interested Party averred that the instant application is bad in law and maliciously brought to stall and delay the hearing of **Business Rent Tribunal Case Number 549A of 2016 – Joseph Kamau Munyoro T/A Mist Bar & Lounge vs Isaac Maina Ihomba**. Further, that it is only the Respondent who has jurisdiction to hear and determine an objection as to whether the Business Premises Rent Tribunal has jurisdiction.

13. According to the Interested Party, the alleged tenancy agreement entered into between the Applicant and previous owner of the subject property on 25th November 2013 was illegal and void, for various reasons that he enumerated in his affidavit. Further, that there is no lease agreement dated 1st January 2014 between himself and the Applicant as alleged. Therefore, there having been no legally registered lease agreement for a period of five years and 3 months, the Applicant who is in occupation of the subject premises can only be a protected tenant and is covered by the provisions of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act.

14. These averments were reiterated in the Interested Party's submissions, and reliance was placed on the decision in **Kangatta Properties Co. Ltd vs Charity Njeri T/A Winacom Crossline Supplies & 4 Others (2014) e KLR.**

The Determination

15. The Court of Appeal discussed the nature of the remedies sought by the Applicant of certiorari and prohibition at length in its decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** in which the said Court held *inter alia* as follows:

“ . What does an ORDER OF PROHIBITION do and when will it issue It 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 – See HALSBURY’S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.... Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons...”

16. The order of certiorari is therefore concerned with the decision making process, and is issued when the Court is convinced that the decision of an inferior Court, tribunal or public authority sought to be quashed was reached without or in excess of jurisdiction, in breach of the rules of natural justice or contrary to law. An order of prohibition on the other hand is forward looking and lies to restrain an inferior tribunal from assuming jurisdiction or from doing that which it is not authorised by law to do. Prohibition does not therefore review the past errors or irregularities and is unavailable if a decision has already been made, and is only meant to contain an anticipated event or action.

17. In the present application, the decision that is being challenged is the ruling on the Applicant's Notice of Preliminary Objection and Notice Of Motion filed with the Business Premises Tribunal in **Nairobi Business Premises Rent Tribunal Case Number 549A of 2016** on 1st July 2016 and 26th October 2016 respectively, which ruling was delivered by the Respondent on 8th September 2018. A copy of the ruling was attached to the Applicant's verifying affidavit as "Annexure JK-9". The Applicant also seeks to prohibit the continued hearing of the said proceedings.

18. The Applicant alleges that the Respondent's ruling was illegal, irrational, in breach of the Applicant's legitimate expectations. These grounds of judicial review were discussed in the holding in **Pastoli vs. Kabale District Local Government Council and Others, [2008] 2 EA 300,** as follows:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

19. As regards the application of the principle of legitimate expectation, it was held in **Keroche Industries Limited vs Kenya Revenue Authority and Others , Misc Application No. 1285 of 2007** that the principle applies where public authorities must be held to their practices and promises unless a departure is justified by an overriding interest. In addition, errors of law on the record must be self-evident, patent and manifest, and should not require a long drawn process of reason or argument to establish.

20. The parties in this respect do not dispute that the Applicant's Notice of Preliminary Objection and Notice of Motion went through a process of hearing at the Business Premises Tribunal, before the said ruling was delivered. In addition, the Respondent's jurisdiction to hear references brought before it is provided for under section 6 of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act which provides as follows:

(1) “A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:

Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.

(2) A Tribunal to which a reference is made shall, within seven days after the receipt thereof, give notice of such reference to the requesting party concerned.”

21. It is thus evident that the Respondent did have jurisdiction to hear and determine the Applicant’s Notice of Preliminary Objection and Notice of Motion that was placed before it.

22. I have also perused the ruling on the said Notice of Preliminary Objection and Notice of Motion that was delivered by the Respondent on 8th September 2017, and note that the Respondent held as follows on the issue of its jurisdiction to continue hearing the dispute between the Applicant and Interested Party:

“The issue for determination in this matter is whether the Tribunal has jurisdiction to hear and determine this dispute. The law in respect of the preliminary objection is settled in the Mukisa Biscuit Case. There are issues (sic) in this matter which require investigation by the Tribunal. For example the Tribunal needs to peruse the documents in respect of the transfer of property which have not been exhibited by the parties.

The agreement between the Tenant and Mongose property is not clear in respect of material facts.

The Tribunal is satisfied that the issue raised in the preliminary objection and in the notice of motion are not issues (sic) of pure law. The issues raised in the preliminary objection and the notice of motion can adequately be dealt with in the hearing of the reference”

23. It is therefore not correct for the Applicant to state and argue that the Respondent made a decision that it had jurisdiction to entertain the subject dispute, as the issue was pending until the Respondent had considered the evidence and facts provided by the Applicant and Interested Party during the hearing of the reference. In addition, the Applicant’s arguments do not point to any defects in the decision making process by the Respondent, but are on the merits of the decision that resulted from the said process.

24. It is my understanding that the Applicant’s contention is on the correctness of the Respondent’s decision in finding that it could continue to entertain the Interested Party’s statutory notice, including the question raised by the Applicant of its jurisdiction. It cannot thus be said that there was an error of jurisdiction, breach of the Applicant’s legitimate expectation, or irrationality by the Respondent for the foregoing reasons.

25. It is my view, in light of the foregoing observations, that this Court is not the appropriate forum to review, or make a decision on the merits of the decision by the Respondent for two reasons. Firstly, there was no final and definite decision made by the Respondent on its jurisdiction to entertain the dispute between the Applicant and Interested Party, and to this extent the Applicant’s application is premature.

26. Secondly, and in any event, if and when such a decision is made by the Respondent, the proper and appropriate remedy provided for under the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act for any party aggrieved by a decision made by the Respondent is to appeal the decision to the Environment and Land Court, pursuant to the provisions of section 15(1) of the Act.

27. The Applicant is thus not entitled to the reliefs he seeks. In the premises I find no merit in the Applicant’s Notice of Motion dated 24th October 2017. The same is hereby dismissed with costs to the Respondent and Interested Party.

28. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE