



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 136 OF 2015

REPUBLICAPPLICANT

VERSUS

CITY PRINTING WORKS (K) LTD.....1ST RESPONDENT

CHAIRMAN BUSINESS PREMISES RENT TRIBUNAL.....2ND T RESPONDENT

CHIEF MAGISTRATE'S COURT.....3RD RESPONDENT

ATTORNEY GENERAL4TH RESPONDENT

EX-PARTE FRANCIS KOMU GITAU

JUDGEMENT

1. Upon obtaining the leave of the Court to commence these judicial review proceedings, the ex-parte Applicant Francis Komu Gitau t/a Bomas Motor Mart filed the notice of motion dated 27th April, 2015 seeking orders as follows:

- “1. That the application herein be certified urgent and be heard ex parte without serving any notice to the respondents herein in the 1st instance.**
- 2. That the court do declare that the 2nd Respondent acted in abuse of its powers, irrationally, unprocedurally and in breach of rules of natural justice in issuing the 1st Respondent with ex parte order pursuant to the 1st Respondent's Application dated 10th March, 2015 despite having stayed the applicant's orders issued on 2nd March 2015 vide the 1st Respondent's application dated 6th March 2015 and ordering inter partes hearing for the 1st Respondent's both applications on 13th April 2015.**
- 3. That the court do declare that the 2nd Respondent acted illegally, in abuse of its powers, ultra vires, irrationally, unprocedurally and in breach of rules of natural justice in ordering reconstruction of file number 147 of 2015, entertaining the application of the 1st Respondent and consequently issuing orders therein despite a clear order by a Superior Court transferring the said file through the orders of 1st April 2015 of the Chief Magistrates Court in RTC NO. 10 of 2015.**
- 4. That the court do declare that the 3rd Respondent acted illegally, in abuse of its powers, ultra**

vires, irrationally, unprocedurally and in breach of rules of natural justice in ordering transfer of BPTR Case No. 147/2015 through the orders of 1st April 2015 of the Chief Magistrates Court RTC NO. 10 of 2015.

5. That the court do declare that the 1st Respondent and/or its agents acted illegally, in abuse of its powers, ultra vires, irrationally, unprocedurally and in breach of rules of natural justice in evicting, carting away the applicant's good and/or tools of trade on the 23rd January 2015 and on the 9th April 2015 despite having received rent.
6. That the court do issue an order of PROHIBITION to stay the proceedings and execution of the consequential orders dated 11th March 2015 issued thereunder in BPTR 147/2015 as transferred vide an order in RTC No. 10/2015, BPTR reconstructed file No. 147/2015 and consequential orders dated 13th April 2015 pursuant to proceedings of 13th April 2015, proceedings and orders issued on 1st April 2015 in RTC No. 10/2015 pending the hearing and determination of this application and suit.
7. That the court do issue an order of CERTIORARI ordering the proceedings and the consequential orders of the 2nd Respondent dated 11th March 2015 issued thereunder in BPTR 147/2015 as transferred vide an order in RTC No. 10/2015, BPTR reconstructed file No. 147/2015 and consequential orders dated 13th April 2015 pursuant to proceedings of 13th April 2015, proceedings and orders issued on 1st April 2015 by the 3rd Respondent in RTC No. 10/2015 to be brought before it with a view of quashing the said orders pending the hearing and determination of this suit.
8. That an order of MANDAMUS does issue compelling the 1st Respondent to return goods and/or tools of trade carted away by the 1st Respondent and/or his agents from the demised property on the 23rd January 2015 and on the 9th April 2015 to the applicant pending the hearing and determination of this application and suit.
9. That an order of JUDICIAL REVIEW do issue against the 2nd and 3rd Respondents for abusing the court process, acting mala fides , and disregarding the rules of natural justice pending the hearing and determination of this application and thereafter the suit.
10. That the court do declare that the action and/or decision of the respondents against the applicant are unconstitutional, unlawful, illegal, unprocedural, ultra vires, malafides, biased and unfair and the same should be quashed pending the hearing and determination of this application and suit.”

2. The application is supported by the chamber summons application for leave filed on 23rd April, 2015.

3. City Printing Works (K) Ltd (“the Landlord”), the Chairman Business Premises Rent Tribunal, the Chief Magistrate’s Court and the Attorney General are the 1st to 4th respondents.

4. The Applicant’s case is that on 1st March, 2007 he entered into a lease agreement with the 1st Respondent for the lease of part of the basement of its premises known as Braidwood House along Tom Mboya street in Nairobi at an agreed price of Kshs. 29,000/=.

5. On 24th January, 2015 one Moses Mbugua moved into the said premises and carted away all the goods in the premises. The Applicant reported the said incident as theft at Central Police Station leading to the arrest and prosecution of Moses Mbugua Githegi and two others in Criminal Case No. 143 of 2015.

6. On 2nd March, 2015 the Applicant filed BPRT No. 147 of 2015 before the Business Premises Rent Tribunal (“the Tribunal”) and obtained certain orders. The matter was set down for *inter partes* hearing on 13th April, 2015.

7. Before the matter could be heard *inter partes*, the Landlord moved the Tribunal on 6th March, 2015 and stayed the orders granted to the Applicant on 2nd March, 2015.

8. The applications did not end at that point as on 10th March, 2015 the Landlord through Moses Mbugua Githegi moved the Tribunal and obtained *ex parte* orders directing the Applicant to give vacant possession of the premises on the strength of orders obtained in BPRT No. 19 of 2013, Ziporrah Njenga v Moses Mbugua Githegi. This particular application, like the rest, was fixed for *inter partes* on 13th April, 2015.

9. On 31st March, 2015, the Landlord through Moses Mbugua Githegi filed RTC No. 10 of 2015 before the 3rd Respondent asking for the transfer of BPRT 147/2015 to the 3rd Respondent. An eviction order against the Applicant, to be enforced by the police, was also sought in the application. On 1st April, 2015, the 3rd Respondent granted all the prayers sought.

10. It is the Applicant's case that the Landlord through the said Moses Mbugua Githegi went back to the Tribunal on 13th April, 2015 and obtained orders for reconstruction of the file in BPRT No. 147/2015. Upon reconstruction of the file the Tribunal directed a rent inspector to visit the premises and file a report on whether the premises in contention were the subject of BPRT No. 19 of 2013 and whether the Landlord had taken possession of the suit premises.

11. On 20th April, 2015 the rent inspector filed a report to the effect that the premises in dispute were the subject of the reference in BPRT No. 19 of 2013. The report also indicated that the premises were unoccupied and the Landlord had taken possession of the same.

12. It is the Applicant's case that the decisions of the Tribunal and the 3rd Respondent are illegal, an abuse of power, *ultra vires*, irrational, unprocedural and in breach of the rules of natural justice. He singles out the Tribunal's orders issued on 10th March, 2015 and 13th April, 2015 as deserving rebuke by this Court. The 3rd Respondent's order dated 1st April, 2015 also attracts the Applicant's castigation.

13. The Landlord opposed the application through a replying affidavit sworn on 16th June, 2015 by Moses Mbugua Githegi. It is the 1st Respondent's case that it is a private limited liability company and the orders of judicial review sought against it by the Applicant do not lie as it is not amendable to judicial review.

14. Further, that any action carried out by the Landlord was in compliance with valid orders issued by the Tribunal in BPRT No. 147 of 2015 and the Chief Magistrate's Court in Case No. 10 of 2015.

15. It is also the Landlord's case that an order of prohibition is not available to the Applicant as the orders issued by the 2nd and 3rd respondents have already been executed and action taken as ordered.

16. The 1st Respondent therefore prays for the dismissal of the application with costs.

17. The 2nd, 3rd and 4th respondents opposed the application through grounds of opposition dated 23rd July, 2015. The grounds of opposition are as follows:

“1. The Respondent has requisite jurisdiction to determine the matter at hand and the applicant has not demonstrated any case as to why an order of certiorari should be issued as against the 2nd and 3rd Respondents' decision.

2. That judicial review deals with the procedure and process of decision making and not the merit or substance.

3. That orders 2, 3, 4, 5, 9 and 10 cannot be issued by this Honourable Court in a judicial review application. Order 53 of the Civil Procedure Rules is very clear that

the only orders are Certiorari, Prohibition and Mandamus.

- 4. That an order of Mandamus can only be issued against a public body and not an individual.**
- 5. That the applicant being aggrieved with the decision of the tribunal ought to have gone for an appeal and challenged the same but not to come under judicial review.**
- 6. The application has no legal basis hence the prayer by the Respondent for its dismissal with costs.**
- 7. The application is an abuse of court process and therefore unmerited.”**

18. Having outlined the positions adopted by the parties herein, I find that the main question is whether the orders sought by the Applicant should issue in the circumstances of this case.

19. The respondents have correctly captured the principle of the law that judicial review is only available against public bodies or bodies performing duties of a public nature. Any orders sought by the Applicant against the Landlord cannot therefore issue through these proceedings.

20. The respondents have also correctly stated that under Order 53 of the Civil Procedure Rules, 2010 this Court can only issue orders of certiorari, prohibition and mandamus.

21. However, the terrain may have irreversibly changed as Section 11 of the Fair Administrative Action Act, 2015 now provides that:

“11. (1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-

- (a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**
- (b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**
- (c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**
- (d) prohibiting the administrator from acting in a particular manner;**
- (e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;**
- (f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**
- (g) prohibiting the administrator from acting in a particular manner;**
- (h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;**
- (i) granting a temporary interdict or other temporary relief; or**

(j) for the award of costs or other pecuniary compensation in appropriate cases.

(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs and other monetary compensation.”

22. I need not say more on the orders available in judicial review as this matter was filed before the Fair Administrative Action Act came into force on 17th June, 2015.

23. It must be appreciated from the outset that the Applicant herein is the one who commenced BPRT case No. 147 of 2015 against the Landlord on 2nd March, 2015. His application was certified urgent and orders issued prohibiting the Landlord from interfering with the quiet occupation of the suit premises by the Applicant. The Landlord was directed to remove the locks from the doors of the suit premises immediately and in default the Applicant was allowed to break into the premises under the supervision of the O.C.P.D, Central Police Station. The matter was then listed for *inter partes* hearing on 13th April, 2015.

24. On 6th March, 2015, the Landlord moved the Tribunal under certificate of urgency and obtained stay of the orders issued to the Applicant on 2nd March, 2015. The Landlord’s application was listed for *inter partes* hearing on 13th April, 2015.

25. The Landlord followed the application of 6th March, 2015 with another application dated 10th March, 2015 alleging that the Applicant, though served with the orders of 6th March, 2015 staying the orders of 2nd March, 2015, had forcefully broken into the premises in question. The Landlord sought among other orders, an order that the Applicant vacates the premises forthwith and be committed to civil jail for contempt of the Tribunal’s orders of 6th March, 2015.

26. The Landlord’s notice of motion dated 10th March, 2015 and filed on the same date indicates that it was to be heard on 13th April, 2015.

27. However, in an interesting turn of events, the Tribunal on 11th March, 2015 issued orders as follows:

“1. The matter is certified.

2. The tenant is ordered to vacate the demised premises situated on L.R. Number 209/566 Braidwood House Basement Shop along Tom Mboya Street Nairobi forthwith.

3. The Officer Commanding Police Division Central Police Division Nairobi and the O.C.S. Central Police Station do enforce compliance with an order made pursuant to prayer (2) hereof.

4. Costs in the cause.

5. Hearing inter partes on 13th April, 2015.”

28. It appears the order of the Tribunal was not complied with and on 1st April, 2015 the Landlord obtained *ex parte* orders in Milimani Commercial Courts CM RTC No. 10 of 2015 as follows:

“1. THAT the Business Premises Rent Tribunal case file number 147 of 2015 be transferred to the Chief Magistrate Milimani Commercial Court Nairobi.

2. THAT an eviction order be and is hereby issued to Simon Kanure Kibue Auctioneer T/a Restorers Consult Auctioneers to remove the tenant from the premises occupied at Braidwood House Basement on L.R. Number 209/566 shop along Tom Mboya Street Nairobi.

3. THAT the Officer Commanding Station (OCS) Central Police Station or an officer under him not below the rank of an Assistant Inspector be and is hereby authorized to supervise the exercise of the Auctioneer evicting the applicant Francis Komu Gitau T/a Bomas Motor Mart from the premises on the basement of Braidwood House LR No. 209/566 along Tom Mboya Street Nairobi.

4. THAT costs be in the cause in any event.”

29. On 13th April, 2015 when the advocates for the parties appeared before the Tribunal, orders were issued as follows:

“1. The rent inspector to inspect the premises and ascertain whether the premises which are in contention in this matter are the same premises which were the subject matter of the reference in BPRT/No.19/2013.

2. The rent inspector to confirm whether the landlord has taken possession of the suit premises.

3. Costs in the cause.

4. Parties to share the court inspection charges.

5. Rent Inspector Isabel to handle the matter.

6. Mention on 17th April, 2015.”

30. The circumstances under which judicial review is available were captured by Lord Diplock in his judgment in **Council for Civil Service Unions v Minister for Civil Service [1985] A.C. 374**, as follows:

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety.”....

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

31. Unfortunately, the parties have not placed before this court the proceedings before the Tribunal and the 3rd Respondent. The Court cannot therefore speculate as to why the 2nd and 3rd respondents made the orders that the Applicant is challenging through these proceedings.

32. It is however clear that the orders issued by the Tribunal on 11th March, 2015 and those issued by the 3rd Respondent on 1st April, 2015 essentially decided the dispute between the Applicant and the 1st Respondent. The said orders were issued without hearing the Applicant. The Applicant's case was therefore determined without affording him an opportunity to be heard thereby breaching the rules of natural justice which protects the right to a fair hearing.

33. It is not clear how the Tribunal proceeded on 13th April, 2015 as the file had already been transferred to the 3rd Respondent through the order issued by the 3rd Respondent on 1st April, 2015. The matter had already been taken out of the hands of the Tribunal by the 3rd Respondent and there was no way the matter could have been heard by the Tribunal and orders issued on 13th April, 2015.

34. In light of what I have stated above, I will call into this Court the orders issued by the Tribunal on 11th March, 2015 and quash the same. All the proceedings that took place after the issuance of the said orders and any pleadings filed thereafter are also called into this Court and quashed.

35. An order is also issued calling into this Court and quashing the entire proceedings before the 3rd Respondent in RTC No. 10 of 2015.

36. For avoidance of doubt, any action taken in pursuance of any orders issued after the 1st Respondent filed the application dated 10th March, 2015 amount to nothing. The proceedings are only valid up to and including the 1st Respondent's said application.

37. In the circumstances of this case, this matter is remitted to the Tribunal which is directed to hear the Applicant's notice of motion dated 2nd March, 2015. The Tribunal should also hear and determine the applications of the 1st Respondent/Landlord dated 6th March, 2015 and 10th March, 2015. All the applications should be heard *inter partes* and without unnecessary delay.

38. All the other prayers by the Applicant are dismissed. There is no order as to costs.

Dated, signed and delivered at Nairobi this 2nd day of March, 2016

W. KORIR,

JUDGE OF THE HIGH COURT