



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 205 OF 2015

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

AND

**IN THE MATTER OF NAIROBI BUSINESS PREMISES RENT TRIBUNAL COMPLAINT NO.
61 OF 2013**

AND

IN THE MATTER OF AN ORDER DATED 17TH OCTOBER 2014

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE CHAIRMAN BUSINESS PREMISES

RENT TRIBUNAL.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

MAURICE YUGI.....3RD RESPONDENT

EX-PARTE NAKURU STEREOS SERVICES CO. LIMITED

JUDGEMENT

Introduction

1. On 10th July 2015, the ex parte applicant herein, **Nakuru Stereos Services Co. Limited**, filed a Notice of Motion dated the same day seeking the following orders:
 - a. **An Order of mandamus** be and is hereby issued to compel the 1st respondent to release to the applicant Kshs. 450, 000/= deposited with it in NBI BPRT Complaint No. 61 of 2013 by the

- 3rd respondent on account of rent regarding the applicant's premises, Loika Complex Building.
- b. An Order of Prohibition to restrain the 1st respondent from releasing and or processing the release to the 3rd respondent of the Kshs. 450, 000/= already deposited in NBI BPRT Complaint No. 61 of 2013 as rent due to the applicant for its (applicant's) premises, Loika Complex Building.
 - c. Costs and interest.

Ex Parte Applicant's Case

2. According to the Applicant, it is the owner of property known as Loika Complex (hereinafter referred to as "the suit property") which, at the material time had been rented out to the 3rd respondent (hereinafter referred to as "the Tenant") who had lodged a complaint, Nbi BPRT Complaint No. 61 of 2013, with the 1st respondent (hereinafter referred to as "the Tribunal").
3. According to the Applicant, the Tribunal, at an *ex parte* stage, granted the entire complaint above lodged by the Tenant when it made a final Order dated 12th June 2013 that the Tribunal. To the Applicant, the Tenant, who had been supposed to be paying a monthly rent to the applicant of Kshs. 165, 000/- had, by September 2013, been in rent arrears to the applicant of Kshs. 1, 155, 000/- while, by November 2013 when he vacated the demised premises, his rent arrears had stood at Kshs. 1, 485, 000/= (before taking into account the amount of Kshs. 450, 000/- later disclosed to have been deposited with the Tribunal) and demands had been made. The Applicant added that by the Tenant's own reckoning, he had, by September 2013, deposited Kshs. 450, 000/= with the Tribunal on account of rent owing to the applicant. It however contended that even if the Kshs. 450, 000/- deposited with the Tribunal is taken into account, the Tenant is still in rent arrears to the tune of Kshs. 230, 000/=.
4. The Applicant averred that despite demand, the Tribunal declined to release the rent deposit to the applicant and persisted in its refusal despite notice of institution of suit being given. Notwithstanding the foregoing, the Tribunal determined the Tenant's complaint on the 16th October 2014 when it found *inter alia*, that no landlord-tenant relationship was existing owing to the Tenant vacating the demised premises, and that the complaint file was closed for the Tribunal's then lack jurisdiction. Despite the foregoing, the Tribunal made a further order dated 17th October 2014, unilaterally, and or with the prompting of the Tenant, and further without jurisdiction, to release the rent already deposited for and on behalf of the applicant to the Tenant.
5. The Applicant's case was that by its said order dated 17th October 2014, the Tribunal dispossessed the applicant of its property and asset without a hearing contrary to natural justice, and without mandate having previously found that he lacked jurisdiction. In the Applicant's view, the Tribunal, in addition, breached its fiduciary responsibility to hold rent that had been deposited with it for and on behalf of the applicant by directing that the same be released to the Tenant.
6. On behalf of the Applicant it was submitted that the impugned order was made in breach of the rules of natural justice as it was made without the Applicant being afforded an opportunity of being heard. It was further contended that the Tribunal having determined that it no longer had jurisdiction, acted without jurisdiction in making the said order thereby infringing upon the Applicant's right to freely own and use its property by dispossessing it of the rent without a hearing and without legal justification.
7. According to the Applicant, having received rent for and on behalf of the Applicant, the Tribunal became a Trustee for the Landlord in respect of the said rent and had no discretion to dispose of the same in a manner inconsistent with the Applicant's interest. This fiduciary duty was however breached.
8. According to the Applicant since the Tenant has not lodged any claim against the Applicant, the issue of pending dispute with respect to rent does not arise.
9. In support of its submissions, the Applicant relied on **R vs. Town Clerk City Council of Nairobi ex parte Printing Industries Limited, JR Nbi HC Misc. Civil Application No. 224 of 2012** and **Kadamas & Anor vs. Municipality of Kisumu, Civil Appeal No. 109 of 1984.**

1st and 2nd Respondents' Case

10. In opposition to the application, the 1st and 2nd Respondents filed the following grounds of opposition:

- 1. That the Notice of Motion application is defective has no merit and is based on a misconception of the law, vexatious and an abuse of the court process.**
- 2. That the matter is not within the purview of Judicial Review court neither does it meet the basic tenets of Judicial Review application**
- 3. That the application is an attempt to challenge the merits of the decision of the 1st Respondent and therefore an appeal through judicial review**
- 4. That the grant of orders of prohibition would under ordinary circumstances lead to curtailing of statutory powers of the 1st Respondent in accordance with the law**
- 5. That the application is an abuse of court process and lacks merit.**

11. It was submitted on behalf of the said Respondents that judicial review proceedings do not deal with the merits but with the decision making process. In support of the submission the said Respondents relied on **Francis Chachu Ganya & 4 Others vs. Attorney General & Another [2013] eKLR**, **Republic vs. Judicial Service Commission ex parte Pareno [2004] eKLR** and **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR**.

12. With respect to the grounds upon which judicial review relief is granted the said Respondents relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** and submitted that the Applicant had not demonstrated sufficient cause for the grounds upon which the Court can grant the orders sought. The Applicant was further faulted for not applying for either review or filing an appeal against the decision.

3rd Respondent's Case

13. On the part of the 3rd Respondent Tenant, it was conceded that he was a rent remitting tenant at the premises of the ex-parte applicant within Nakuru town, and also being the subject of the Judicial Review Application herein. However, due to difficulties initiated by the ex parte applicant herein pertaining to rent remittances, and having taken over possession from a previous owner with whom he had a continuing contract, he was compelled to seek remedial measures before the Tribunal vide complaint No. 61 of 2013, where he was ordered to deposit monthly rent at the tribunal which he did by remitting a sum of Kshs. Four hundred and fifty thousand shillings only **(Kshs. 450, 000/=)**.

14. According to him, the order remained in till the applicant herein, hired goons who vandalized his property leading to a colossal damage in alleged distress for rent albeit illegally. He averred that proceeds of the alleged illegal distress for rent were never revealed or disclosed but thereafter the ex parte applicant seemed satisfied with the irregularity and did not seek anything including the alleged outstanding sum of Kshs. 230,000/= from him till the present application. According to the Tenant, the ex parte applicants has adduced nothing to demonstrate how the bloated sum of Kshs. 230,000/= rent price allegedly owed was arrived at and when the same was arrived at. In his view, the same was unilateral and illegal contrary to existing contract over the valid rent price any other computation allegedly arising thereof was a gruesome illegality.

15. To the Tenant, the demands made to the Tribunal to release the said sums deposited thereto were illegal owing to the fact that it was neither deposited by the applicant, nor was it recoverable upon the illegal distress being levied in pursuit of unknown outstanding rent, in any event, the ex parte applicant tainted and muddied its own claim through the illegal distress it resorted to.

16. The Tenant disclosed that the ex parte applicant took over the premises from one **Mr. Kibe** who was the original land lord and with whom the Tenant had a valid lease agreement spanning five years from 2010 or thereabouts, which contract was crudely vitiated by the ex parte applicant in collusion with his counsel herein, which lease agreement stipulated rent to be Kshs. 165, 000/= for

- both the lodges and the hotel as a cumulative figure. The ex parte applicant then upon assuming ownership without notice and or justification proceeded to illegally hike rent for the hotel to the tune of Kshs. 30, 000/= and made the same a separate figure from the rent for the lodges which was equally skyrocketed to Kshs. 200,000/= unilaterally and once more without notice and that it is these breaches which led to his said complaint.
17. According to the Tenant, was ordered to deposit a sum of Kshs 495, 000/= being rent deposit, which has not been refunded to date and no mention is being made of by the ex parte applicant nor its counsel who was aware of the same, that through the ex parte applicants counsels account, he further deposited a total sum of Kshs. 805, 550/=, which counsel admits having received for onward transmission to the ex parte applicant.
 18. In the Tenant's view, the instant application deviates from the requirements of a standard Judicial review application, that it lacks both form and substance thus should be struck out for want of merit, form and substance.
 19. According to the Tenant, in the absence of allegation of bias or denial of fair hearing the instant application is a disguised appeal. In his view, the ex parte applicant has raised a fresh set of evidence which would require viva voce evidence in response and the need for rebuttals which should not be the case ordinarily, if it had any claim it should seek the aid of appropriate avenues elsewhere.
 20. The Tenant averred that through an application dated 25th May, 2015 he sought and was granted an adoption of the order of the 2nd respondent issued on 10th April 2015 as an order of the Honourable court, which can only be appealable, reviewed normally and or set aside through a formal application which is not the case herein.

Determination

21. Having considered the application, the affidavit both in support of and in opposition the application, the grounds of opposition and the submissions filed by the parties, this is the view I form of the matter.
22. First and foremost, it is important to consider the circumstances under which judicial review order of mandamus do issue. The scope of the an order of *mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...”

23. *Mandamus* is, essentially, English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature. See **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543.**
24. In other words for *mandamus* to apply, there ought to be a specific legal right or no specific legal remedy for enforcing that right. *Mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute or at common law where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature. Therefore it would not issue where what is sought is merely an exercise of discretion in order to compel a person to exercise the discretion in a particular manner. However where the person concerned is under a duty to exercise discretion one way or another the Court may well compel him to exercise the powers conferred upon him.
25. Although none of the parties deemed it fit to exhibit the proceedings before the Tribunal, in this case, the parties are agreed that the Tribunal directed the Tenant to deposit the sum of Kshs 450,000/-. According to the affidavit sworn before the Tribunal, the Tenant was paying a monthly rent of Kshs 165,000/- and the Applicant had not collected the said rent for 3 months. From the foregoing it would seem that from the Tenant's own point of view, the Applicant was owed Kshs 495,000/-. The Tenant must have been well aware that the sum of Kshs 450,000/- deposited with the Tribunal was due to the Applicant who, as the Tenant alleged had declined to take the same. In fact the reason for approaching the Tribunal was to forestall imminent distress by the Applicant.
26. In the premises, I agree with the Applicant that the said sum was held in trust for it by the Tribunal and the Tribunal was under a common law duty to hand over the same to the Applicant.
27. The Tenant however contends that the Applicant illegally levied distress on his property. If that position is correct then the Applicant's action may well amount to trespass and since the Landlord/Tenant relationship no longer exists between the two parties, the Tenant has a recourse in damages against the Applicant. That recourse however does not warrant the Tenant to "garnishee" the rents due to the Applicant which is held by the Tribunal.
28. The Tribunal therefore contravened the rules of natural justice when it directed that the said sum be paid to the Tenant without affording the Applicant a hearing more so after it determined that it was no longer seized of jurisdiction in the matter.
29. In the premises it is my view and I find that the Notice of Motion dated 10th July 2015 is merited.

Order

30. In the result the said Motion succeeds and I make the following orders:
- a. **An Order of *mandamus* compelling the 1st respondent to release to the applicant Kshs. 450,000/= deposited with it in NBI BPRT Complaint No. 61 of 2013 by the 3rd respondent on account of rent regarding the applicant's premises, Loika Complex Building.**
 - b. **In the premises the order for prohibition is no longer necessary.**
 - c. **I take note of the fact that the Applicant was ordered to pay the costs of the complaint before the Tribunal. In the premises there will be no order as to costs.**
31. Orders accordingly.

Dated at Nairobi this 6th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Kariuki for Mr. Ombwayo for the exp applicant

Miss Said for Mr. Biko for the interested party

Cc Mutisya