



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 206 OF 2016**

**IN THE MATTER OF ULTRA VIRES DECISION AND/OR ORDERS FOR EVICTION AND PAYMENT OF RENT ARREARS BY THE APPLICANTS TO THE INTERESTED PARTY BY THE CHAIRMAN, BUSINESS PREMISES RENT TRIBUNAL**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA, SECTION 8 AND 9**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS FOR MANDAMUS, CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES 201, ORDER 53**

**AND**

**IN THE MATTER OF BREACH OF RULES OF NATURAL JUSTICE AND LACK OF JURISDICTION**

**BETWEEN**

**GEORGE MURIITHI NDIRANGU.....APPLICANT**

**VERSUS**

**THE CHAIRMAN BUSINESS PREMISESRENT TRIBUNAL.....RESPONDENT**

**EMMA WAIRIMURUNO…….…….....INTERESTED PARTY**

**JUDGEMENT**

**Introduction**

1. On 23rd May, 2016, the ex parte applicant herein, **George Muriithi Ndirangu,** filed a Notice of Motion dated 19th May, 2016 seeking the following orders:

> **a) That there be order of Certiorari to move into this honourable court and quash the decision/ruling/order by the honourable Mbici Mbooki, Chairman of the Business Rent Tribunal made on 28/4/2016.**
>
> **b) That there be an order of Mandamus to compel the interested party to allow the applicant to continue his tenancy on block 5/98 Nakuru Township uninterrupted.**
>
> **c)That costs of this application be in the cause.**

**Ex Parte Applicant's Case**

2. The applicant's application was supported by a rather brief affidavit sworn by himself.

3. According to the applicant, his application was based on the fact that the Business Premises Rent Tribunal did not give him a fair trial and or right to argue his case. He relied heavily on his statement in which according to him the decision by Business Premises Rent Tribunal was made in bad faith and the same breached of the rules of natural justice and constitutionally guaranteed rights to be heard before being judged and/or condemned.

4. The applicant averred that the decision to have him vacate from the premises by 1st June, 2016 and the decision to have him pay the alleged rent owing to the interested party was reached without considering the relevant facts since the Tribunal failed to appreciate that there existed no tenancy relationship between himself and the interested party as was initially the case hence the tribunal lacked jurisdiction to hear and determine the same.

5. To the applicant, the tribunal erred in law and did not give him a chance to prosecute his preliminary objection on whether it had jurisdiction or not hence reaching *ultra vires* decision.

**Interested Party's Case**

6. According to the Interested Party, **Emma Wairimu Runo**, on 28th April, 2016 when the matter between the applicant and the interested party came up for hearing at the Business Premises Rent Tribunal, the applicant's counsel **Mr. Ndichu** served her advocate with a Notice of change of advocate and a Preliminary Objection to the effect that the tribunal lucked jurisdiction to hear the matter since the applicant was no longer a tenant of the respondent/tenant as he paid rent directly to the owner of the building since the 1st July, 2015 and there was no tenancy relationship between them whatsoever.

7. It was averred that when the matter was called out, the interested party's advocate and an advocate for the applicant were present and the chairman of the Tribunal took cognizance of the preliminary objection and after hearing the same ruled that the same was based on issues of fact and dismissed it. Thereafter the chairman indicated that since the matter was coming up for hearing on the then the same must proceed at 11.00am, since both advocate were present and the matter had been delayed for far too long. According to the interested party, the main reason this matter had to proceed for full trial on the same day was majorly precipitated by the manner in which the applicant had conducted himself during previous hearings. This matter had come up seven (7) times when on each occasion the matter was adjourned on the behest of the applicant and on the attendance the chairman had indicated that on 28th April, 2016 the matter would proceed to full hearing. It was averred that the applicant has been intentionally trying to delay the tribunal case by changing advocates four (4) time in a span of less than two years, whose notices of change of advocate were always deliberately served on the hearing day and in court. Further the applicant had previous filed a similar preliminary objection but the same was never served more than four months after filing it and the same was dismissed by the tribunal.

8. It was the interested party's case that the averment by the applicant that he was not given an opportunity to be heard is false and misleading, on 28th April, 2016 the applicant's counsel had a counsel holding his brief both times the matter was called out not to mention that there was a representative from **Mr. Ndichu's** officer present in court at all times. Further, a clear reading of the order issued by the chairman of the tribunal on 28th April, 2016 will show that this order was made in the presence of both counsel, therefore the issue that the applicant was never heard is untrue.

9. It was contended that the ***Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act*** Cap 301 Laws of Kenya clearly provides in section 15 that when a party is dissatisfied with the order and/or ruling of the tribunal one should appeal to the High Court within thirty (30) days and on the basis of the above section the applicant should have appealed the decision of the tribunal and not institute judicial review proceedings. It was further contended that under the ***Fair Administrative Action Act 2015***, when an Act of Parliament provides for a certain resolution mechanism to be followed by an aggrieved party that mechanism should be exhausted first before judicial review and that is the case herein the applicant should have filed an appeal and not judicial review.

10. It was averred that the applicant is guilty of material non-disclosure, and has deliberately withheld to disclose the facts that essentially led to the circumstances in issue. It was revealed that the applicant is her tenant by virtue of a four-year lease dated 21st December, 2007 with **John Gatu Kirubi** whom the interested party was running the business together at the time and that the said lease was valid for a period of 4 years and would therefore expired on 21st December, 2011, but even after the expiry of the lease, the applicant continued to occupy the premises and to pay rent on a monthly basis for a period of 3 years without any complaints until July 2014 when he stopped without any cause or notification.

11. It was disclosed that the reference to the Business Premises Rent Tribunal was initiated by the applicant upon being served with a notice to terminate this tenancy dated 19th December, 2013 and that the new lease being presented in court came after the tribunal was seized of the matter and was entered into by the landlord and the sub-tenant without any notice to herself and with the unscrupulous intention of defeating the judicial process before the tribunal. It was therefore the interested party's position that the Business Premises Rent Tribunal has the powers and authority to determine it has the jurisdiction to hear a suit which was a fact that was raised on the applicant's preliminary objection dated 26th April, 2016.

12. It was asserted that since this suit has already been determined by the Business Premises Rent Tribunal, the application before this Court is filed in bad faith and malicious intent to defeat the judicial process before the Business Premises Rent Tribunal.

**Determination**

13. As indicated at the beginning of this judgement the applicant was very economical with his facts. It is now trite that it is the verifying affidavit which contains the facts rather than the statement.

14. This was held by the Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000** where the Court restated the law that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. Accordingly, the ex parte applicant ought to ensure that the verifying affidavit contains all the factual information that he intends to rely upon. In that case it was held that:

> **"The application for leave was grounded on the matters set out in the statement accompanying the application and in the verifying affidavit. The statement is required by rule 1(2) of Order LIII of the Civil Procedure Rules to set out the name and description of the applicant, the relief sought, and the ground on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case."**

15. This was the position adopted in **Bespoke Insurance Brokers vs. Philip Kisia, the Town Clerk City Council of Nairobi & Another [2013] eKLR** where it was held that;

> **"Thirdly, the respondents argued that the statutory statement does not adhere to the provisions of Rule 1(2) of Order 53 Civil Procedure Rules. According to the said rule a statutory statement should contain the name and description of the applicant, the relief sought and the grounds upon which the relief is sought. It is the respondents' argument that the statutory statement does not contain the grounds upon which the reliefs are sought but facts relied upon. The respondents argue that the facts are supposed to be found in the verifying affidavit(s). The respondents are correct in their submissions. The contents of a statutory statement are as they have stated. The facts to be relied upon are supposed to be found in the verifying affidavit(s)."**

16. In my view the scanty material deposed to in the verifying affidavit cannot be the basis of grant of orders in the nature of judicial review. In **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

17. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

> **"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."**

18. It follows that this application is unmerited.

**Order**

19. Accordingly, I find no merit in the Notice of Motion dated 19th May, 2016 which I hereby dismiss with costs.

**Dated at Nairobi this 8th day of November, 2016**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

**Mr Karanja for the Interested Party**

**CA Mwangi**