



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

JUDICIAL REVIEW MISC. APPLICATION NO. 15 OF 2020

IN THE MATTER OF; AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 AND SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF; ARTICLES 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF; SECTION 3(3) OF THE LAW OF CONTRACT, CAP 233

AND

IN THE MATTER OF; SECTIONS 7-11 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF; SECTION 13(2) AND 13(7) OF THE ENVIRONMENT AND LAND COURT ACT, NO.19 OF 2011

AND

IN THE MATTER OF; SECTION 12 OF THE LAND; LANDLORD TENANTS (SHOPS,HOTELS AND CATERING ESTABLISHMENT ACT (CAP 301)

AND

IN THE MATTER OF; THE BUSINESS PREMISES AND RENT

TRIBUNAL CASE NO. 275 OF 2020

BETWEEN

SEAWAY HOLDING LIMITED.....APPLICANT

AND

CHAIRMAN OF THE BUSINESS

PREMISES RENT TRIBUNAL..... 1ST RESPONDENT

PETER MWENDA NJAGI T/A

MWENDA NJAGI & COMPANY ADVOCATES.....2ND RESPONDENT

RULING

The matter for determination is the Chamber Summons Application **25th March 2020** by the Applicant seeking for orders that;

1. THAT this Honourable Court be pleased to grant leave to the Applicant to apply for Judicial Review Orders of;-

a) Certiorari to quash the proceedings and order of the Honourable Chairperson of the Business Premises Rent Restriction Tribunal in Case No. 275 of 2020 (Nairobi) – Peter Njagi t/a Mwenda Njagi Advocates versus Seaway Holdings Limited issued on 10th March 2020, compelling the Applicant, being the landlord of the premises constructed on Title No. Thika Municipality Block 9/205 (known as Zuri Centre) to unlock a portion of the 4th Floor, in the said premises for access by the 2nd Respondent and

b) Prohibition to prohibit the respondents from proceeding further with the hearing and determination of Tribunal case No. 275 of 2020-Nairobi Peter Njagi t/a Mwenda Njagi Advocates versus Seaway Holdings Limited.

2. THAT the grant of leave do operate as Stay of Execution of the orders of Business Premises Rent Restriction Tribunal in Case No. 275 of 2020 (Nairobi) – Peter Njagi t/a Mwenda Njagi Advocates versus Seaway Holdings Limited issued on 10th March 2020.

3. THAT costs of this Application be provided for.

4. THAT this Honourable Court be pleased to make such orders and issue any other relief it may deem just in the interest of Justice.

The Application is premised on the grounds that the Business Premises Rent Tribunal lacks jurisdiction to determine issues relating to uncontrolled tenancy. That the Applicant and 2nd Respondent entered into a lease agreement for a term of five years and three months effective from **1st March 2016** and both parties signed a letter of offer and subsequently lease and therefore the 2nd Respondent is not a controlled tenant. Further that the 1st Respondent does not have jurisdiction to grant the orders in Tribunal **Case No. 275 of 2020**, seeking to compel the Applicant to open/ unlock an office located on the 4th Floor of the premises constructed and owned by the Applicant on the suit property which is leased to the 2nd Respondent.

That the orders are illegal, irrational and unprocedurally improper. Further that in its Application to the tribunal the 2nd Respondent failed to disclose all material facts regarding the tenancy between it and the applicant and it is in the interest of Justice that the orders sought are granted.

The Application is supported by the statement of Facts and the Affidavit of **Harshad Hirani Laxman** sworn on **25th March 2020**. He averred that on **12th March 2020**, the Applicant was served with an Application dated **5th March 2020**, and an order of the Court issued on **10th March 2020**, to which they discovered that the 2nd Respondent had made an Application and sought for various orders. Further that on **18th March 2020**, the Applicant received a Notice of Contempt of Court from the 2nd Respondent indicating that the Applicant had failed to obey the Court orders. He further averred that the Applicant through its Advocates on record responded to the Notice making it clear that it would proceed with execution. He further averred that the parties entered into a lease agreement for a term of **5 year 3 months**, wherein the rent payable was **Kshs. 40,000/=** per month payable quarterly. Further that in addition to the rent, the 2nd Respondent would pay service charge of **Kshs. 7500/=** per month quarterly in advance. Further that the 2nd Respondent would pay a deposit, rent and service charge of **Kshs. 120,000/=** and that there would be an annual escalation rent of **10%**. That the 2nd Respondent would use the premises as an office only and any outstanding rent would attract an interest of **3%**.

He further averred that the 2nd Respondent fell into arrears which occasioned the Applicant to issue arrears Notice and in response the 2nd Respondent requested for breakdowns of the amounts outstanding. However, he is yet to offset the rent and service charge arrears. It was his contention that failure by the 2nd Respondent to adhere to the Notices, the Applicant issued eviction Notices on **11th March 2019**.

Further that he has been advised by his Advocates that the Application dated **5th March 2020**, at the tribunal is an abuse of the Court process as the 2nd Respondent misrepresented material facts to the tribunal. He further averred that he has been advised by his Advocates that the tribunal lacked jurisdiction to hear and determine the matter. Further that in order to obtain the orders sought, the Applicant needs first to apply for and obtain leave from the Court. He further averred that unless the orders sought are granted, the Applicant will proceed and execute the orders granted by the **Business Premises Rent Tribunal (BPRT)**.

The Application is opposed and the 2nd Respondent filed grounds of opposition dated **11th May 2020** and averred that the Application before Court is premature as the 2nd Respondent was issued with ex parte orders and not final orders and any attempts to invoke the Court's supervisory orders at this stage is to usurp powers of the 1st Respondent. He averred that the orders issued on **10th March 2020**, were not issued in bad faith and or in disregard of the law as the Applicant was given an opportunity to be heard. Further that due to the ongoing COVID 19 pandemic the hearing did not proceed and further the instant suit was filed in a Superior Court touching on issues yet to be determined by the tribunal. Further that the supervisory jurisdiction of this Court can only be invoked where there is a clear case of abuse and that the Chairman should be allowed to reach a decision first,

It was contended that this Court can only exercise its Jurisdiction where the facts in issue are not in dispute and the challenge is on legality and/or rationality of a decision or procedural impropriety. That this is contrary to the circumstances in this case where the issue of whether or not there exists a controlled tenancy between the Applicant and the 2nd Respondent is alive issue which the Business Premises Rent Tribunal

ought to be allowed to conclusively determine and which is at the root of its jurisdiction. That failure to allow the 1st Respondent to conclusively deal with the Applications filed by the 2nd Respondent before him would be an attempt to dictate on another Judicial body arbitrarily without giving it an opportunity to apply itself issues raised before it.

That the Applicant has failed to utilize all legal remedies available before it. Further that the purpose of Judicial Review is to look at legality of decisions and decision making process and it does not offer efficacious remedies to redress the grievance complained of. It was averred that in issuing the ex parte orders, the 1st Respondent neither committed any procedural impropriety nor issued a decision which was illegal or irrational given the facts presented before him. It was further averred that the right to institute Judicial Review and an issuance of prerogative orders must be exercised judiciously and that the Applicant failed to appreciate that Judicial Review orders should only be sought as a last resort. Further that the Applicant has admitted willing refusal and failure to comply with Court orders. That the Court should take into account that **'he who comes to equity must come with clean hands'**.

The application was canvassed by way of written submissions. The Applicant through the **Law Firm of J/Louis Onguto Advocates** filed its written submission dated **20th May 2020**, and submitted that it has met the threshold for grant of **Leave** to apply for orders of **Certiorari** and Prohibition. It was its further submissions that the decision complained of was made by a public body as the Tribunal conducts public duties as it is established by a statute. It was further submitted that the Applicant has sufficient interest in the matter as the 1st Respondent issued adverse orders against it and therefore it is affected by the said decision. It was further submitted that given that the Applicant has challenged the **jurisdiction** of the 1st Respondent to entertain the tribunal case and annexed documentation affirming the presence of a written lease, then it has a prima facie case.

It was the Applicant's further submissions that the 1st Respondent issued orders without cogent proof and as it is well known and that any judicial decision must be supported by cogent evidence. Further that there was no evidence that was led to support the 2nd Respondent's allegation and therefore the decision arrived at was not reasonable in the circumstance. It was their further submissions that leave once granted should operate as stay so that consequent proceedings are not rendered nugatory. The Applicant relied on various decided cases and urged the Court to allow the Application.

The 2nd Respondent through the **Law Firm of Mwenda Njagi & Company Advocates** filed its submission dated **26th May 2020**, and submitted that its grounds of opposition should suffice as their appeal. It was further submitted that this is not an appeal and concerns by the Applicant ought to have been raised at the hearing which the Applicant ignored. It was further submitted that the role of Judicial Review is not to look at the merit of the case in as so doing, it will be engaging in merit review. It was further submitted that an attempt to supervise the Chairman of the BPRT is counterproductive as the courts and tribunal should be allowed to make their own independent judgment and decision. It was further submitted that the Application for leave should be rendered *otiose* for invoking the Court's supervisory role or duty without regard to the role of Judicial Review in our jurisdiction and the Application for leave deserves no audience before this Court. The 2nd Respondents relied on various judicial decision and provisions of the law and urged the Court to dismiss the Application.

The Court has carefully read and considered the pleadings, the Affidavit and the written submissions and renders itself as follows;

The Applicant has sought the leave of Court to institute Judicial Review Orders of **Certiorari** and Prohibition. Various Judicial decisions have held that Leave of the court is a pre-requisite in institution of **Judicial Review**. See the case of **R...Vs...Kenya University Exparte Ochieng Orwa Dominic & 7 Others (2018) eKLR**, where the Court quoted with approval the case of **Meixne & Another...Vs..AG (2005) 1KLR 189**, and held that:-

"Leave of court is a pre-requisite to making a substantive application for Judicial Review".

Further the Court set out the principles that the Applicant should meet before the Court can exercise its discretion and grant the leave sought and held that ;

"At the Leave stage, an Applicant must show that:-

- i. He/She has sufficient interest in the matter otherwise known as locus standi.***
- ii. The Applicant must demonstrate that he/she is affected in some way by the decision being challenged.***
- iii. An Applicant must also show that he/she has an arguable case, and the case has reasonable chance of success.***
- iv. The decision complained of must have been taken by a public body and that body is established by a Statute or otherwise exercising a public function.***

It is the Court's considered view that the Applicant must also persuade the court that the decision undertaken is unfair and irrational and that the application raises serious issues and serious issue herein is an arguable issue that can only be resolved in full hearing of the **Judicial Review**. Further the Applicant must that show he has a *prima-facie* arguable case for leave to be granted.

Has the Applicant herein established the above criteria?

On whether the Applicant has sufficient interest, is not in doubt that the Applicant is contesting the Jurisdiction of the 1st Respondent to deal with the matter. The Applicant is a party to the BPRT's case and therefore the Court finds and holds that the applicant has sufficient interest over the matter and any decision made will most definitely affect it. Further it is not in doubt that the decision complained of was made by

the 1st Respondent who is a public body.

The question that now remains is whether the decision complained of is unlawful and irrational. It is the Applicant's contention that the 1st Respondent granted Interim Orders to the 2nd Respondent in effect presiding over a matter that involved tenancy that is not controlled and therefore acted in excess of its jurisdiction. It is not in doubt that there is a dispute as to whether the tenancy is controlled or not. As submitted by the Applicant, In its Application averred it that the tenancy was reduced into writing thereby alleging that the said tenancy was controlled tenancy as per the provisions of **Section 2 of Landlord and Tenant (shops, Hotels and Catering Establishments) Cap 301**. However the Applicant has termed the said allegations false and averred that their agreement was reduced into writing.

The purpose of Judicial Review has been expressed in the case of *Municipal Council of Mombasa...Vs...Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR*, the Court of Appeal held that:-

“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 make 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 they 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 over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

As per the above, it would then mean that if the Court was to grant the leave to institute Judicial Review Proceeding, it ought to be certain that at the substantive Application, it will not be called to determine the merits of the case. In this case, it is not in doubt that the issue of whether or not there is a lease agreement is in dispute. Therefore there is no way the Court would determine the issue of controlled tenancy without going to the merits of the case.

Section 12 of Cap 301 provides for the powers of the tribunal and provides as follows;

(1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—

(a) to determine whether or not any tenancy is a controlled tenancy

There is no doubt that the tribunal has powers to determine whether or not a tenancy is controlled and consequently, the Court finds the tribunal had jurisdiction to deal with the matter at that stage. This is more so because the matter had only be heard ex parte. For this Court to make a finding on whether or not the tenancy is controlled, that would be tantamount to sitting on appeal which is not the function of a Judicial Review Court. For the above reasons, the Court finds and holds that the decision complained of was not irrational and unlawful as the tribunal must first be given an opportunity to determine whether or not the tenancy is controlled or not, a function well within its jurisdiction. In the case of *Republic ...Vs.. Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR* the Court held that;

*The importance of obtaining leave in a Judicial Review application was eloquently stated by Waki J (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others cited by the Respondent's Counsel where the learned Judge said:-**

“is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration.

Consequently, the Court finds that the Applicant has not established all the above set criteria for grant of leave. Therefore, the Court finds that the Application for **Leave** to file a Judicial Review as sought is not merited.

Having found that the Application for leave is **not merited**, the Court further finds and holds that the prayers for leave to operate as stay automatically collapse.

The Upshot of the foregoing is that the Chamber Summons Application dated **25th March 2020**, by the Applicant is found **not** merited and the same is dismissed entirely with costs to the 2nd Respondent.

It is so ordered.

Dated, signed and Delivered at Thika this 16th day of July 2020

L. GACHERU

JUDGE

16/7/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via zoom

M/s Mulei holding brief for Mr. Abuya for the Applicant

Mr. Njagi for the 1st Respondent

No consent for the 2nd Respondent

L. GACHERU

JUDGE

16/7/2020