REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 16 OF 2013

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

IN THE MATTER OF THE BUSINESS PREMISES RENT TRIBUNAL

REPUBLIC .....APPLICANT

-VERSUS-

BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

AND

KANGEI NYAKINYUA BUILDING CO. LTD..... ..INTERESTED PARTY

***EX PARTE*:NGOTHO COMMERCIAL AGENCIES LIMITED.....SUBJECT**

JUDGMENT

Pursuant to leave granted on 10th April, 2013 allowing the subject herein (Ngotho Commercial Agencies Ltd) to commence Judicial Review proceedings against the respondent (Business Premises Rent Tribunal), the subject filed the Notice of Motion dated 19/4/2013 and it was later amended on 25/4/2013 and sought an order of Certiorari to remove into this court and quash the proceedings of the respondent in Tribunal Case No.18 of 2013 between Kange'i Nyakinyua as landlord and Ngotho Commercial Agencies Ltd as tenant and an order of Prohibition to prohibit the respondent from further hearing and proceeding with the said tribunal case. The subject also prayed that the costs of the application be borne by the Interested Party (Kangei Nyakinyua Building Company Ltd).

The application is premised on the grounds that the respondent has no jurisdiction to hear or entertain the dispute; that the respondent's act of proceeding with the case is *ultra vires* to its powers under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301, Laws of Kenya (hereinafter referred to as Cap 301) and that the applicant stands to suffer irreparable loss and prejudice.

The motion is supported by the affidavit of the managing director of the subject, Thomas Njenga Ngotho, where in addition to reiterating the grounds thereon the deponent has deposed that the subject and the

Interested Party entered into a written lease agreement; that the lease agreement is in respect of the premises occupied by the subject and is for a period of 5 years and one month. He explains that the interested party gave the subject a notice of termination of tenancy under Cap 301. In compliance with the law the subject filed a reference before the respondent. However, prior to the hearing of the reference the subject's lawyer applied for adjournment to enable him raise and address crucial matters including the jurisdiction of the respondent to hear the reference.

The deponent contends that the respondent denied its application and the matter partly proceeded. Based on its belief that the respondent had no power to hear and determine the reference, under Cap 301, the subject filed the instant application for quashing of the proceedings commenced before the tribunal and to prohibit the respondent from proceeding with the hearing of the reference on the ground that it had no power to hear and determine the dispute between the subject and the interested party.

In reply to the subject's application, the Interested Party's chairlady, swore the replying affidavit filed on 16/9/2013. In that affidavit, the deponent contends that its not true that the subject's advocate objected to the jurisdiction of the respondent to hear and determine the dispute referred to it by the parties. Contrary to the subject's aforesaid contention, she deposes that it was after she gave strong evidence on how the subject demolished a wall to create a door contrary to the lease agreement (clause 8 thereof) that the subject filed the proceedings herein allegedly to defeat the course of justice.

She denied the subject's claim that he would suffer irreparable loss and prejudice if the orders sought are not granted and stated that the respondent has power to hear and determine the dispute because it is premised on breach of tenancy and a statutory requirement for the termination of the lease agreement.

Before me counsel for the subject, Mr. Njuguna, reiterated the contention that the respondent had no jurisdiction to hear and determine the reference filed before it. In this regard he referred to the preamble to **Chapter 301** and **Section 2(1)** of the Act which defines a controlled tenancy as:-

> **"'Controlled tenancy' means a tenancy of a shop, hotel or catering establishment -**
>
> **(a) which has not been reduced into writing; or**
>
> **(b) which has been reduced into writing and which -**
>
> **(i) is for a period not exceeding five years; or**
>
> **(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or**
>
> **(iii) relates to premises of a class specified under subsection (2) of this section:**
>
> **Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy."**

In applying the foregoing provisions of the law to the circumstances of this application, he pointed out that the tenancy agreement executed between the subject and the interested party was for a period exceeding the 5 year limit (for 5 years and 1 month) hence outside the jurisdiction of the respondent.

Arguing that quasi-judicial bodies must act strictly within the law, Mr. Njuguna reiterated the contention that the respondent had no power to hear and determine the dispute hereto because the tenancy agreement was for a period exceeding 5 years. Counsel urged the court to grant the orders sought because in purporting to hear the dispute referred to it, when it had no power do to so, the respondent acted ultra vires.

In reply, Counsel for the Interested Party, Mrs. Njoroge, submitted that the application was an abuse of the court process having been brought by a litigant who does not want the issues raised in the reference

hereto to be heard and determined. In this regard counsel, explains that the interested party gave the subject notice to vacate after breaching the terms of the tenancy agreement (breaking a wall); that after it was served with the notice, the subject filed the reference which he now challenges before this court. Wondering why the subject filed a reference to the Tribunal if it knew it had no jurisdiction to hear and determine it, counsel submitted that the respondent acted reasonably because the subject had already subjected itself to its jurisdiction.

Terming the subject's application herein as an attempt to prevent a judicial process to take process because the subject was apprehensive that his reference may not go through, counsel for the interested party urged the court to dismiss the application with costs to the interested party.

In a rejoinder, Mr. Njuguna explained that it was the interested party who invoked the jurisdiction of the respondent by serving the subject with Notice to Terminate the tenancy under Cap 301. Consequently, in accordance with the provisions of that Act, the subject filed the reference. Arguing that a reference is equivalent to a defence, Mr. Njuguna submitted that even if the respondent had no jurisdiction, the subject had to file a reference since the law required him to do so. In any event, counsel submitted that parties cannot by consent confer jurisdiction on the respondent.

In view of the foregoing, counsel submitted that the proper forum for hearing and determination of the issues raised in the reference is this court (read the High Court).

ISSUES FOR DETERMINATION:

From the pleadings, filed in the application herein and the submissions made by the advocates for the respective parties, the issues for determination are:-

i) Whether the respondent has jurisdiction to determine the dispute hereto?

ii) Whether the subject has made up a case for issuance of the orders sought?

iii) What is the order as to costs?

ANALYSIS:

With regard to the first issue namely **Whether the respondent has jurisidiction to determine the dispute hereto?**

I begin by pointing out that the court needs to approach this question carefully. The reason for this is that under **Section 12 (1)(a)** of **Cap 301** the respondent has power:

"to determine whether or not any tenancy is a controlled tenancy."

In the affidavit sworn in support of the motion herein, it is contended that prior to the hearing of the reference to the tribunal (respondent), the subject's advocate applied for adjournment to enable him raise and address crucial matters including the jurisdiction of the tribunal. After his application was denied, the matter proceeded for hearing and the testimony of the interested party's chairlady was taken and a date given for hearing of the defence case. The foregoing contention is denied through the replying affidavit of the interested party, where it is explained that the subjects advocate only applied for adjournment on the grounds that he was not ready to proceed with the matter.

The interested party contends that it is after glaring evidence was given of the subject's breach of the lease agreement that it is when the subject proceeded to file the application herein. This contention was never controverted.

Although counsel for the subject, Mr. Njuguna, submitted that the tenancy agreement executed between the subject and the interested party is not a controlled one, upon careful perusal, I note that it contained a

provision for termination otherwise than for breach of contract. In this regard see the clause therein which states:

> **"But terminable or renewable upon such terms as may be mutually agreed between the Lessor and the Lessee."**

In my view, a reading of the foregoing clause in the lease agreement raises a question as to whether the tenancy signed between the interested party and/or the subject was controlled one. When such a question arises, the question should be raised before the Tribunal as the court of the first instance, to determine whether the tenancy was a controlled one. A party dissatisfied with its finding on that issue has a right of appeal to this court under Section 15 thereof.

In view of the foregoing, I concur with the submissions of counsel for the interested party that the application is an abuse of the court process. I say this because the applicant ought to have raised the issue of the tribunal's jurisdiction on account of the allegation that the tenancy was not a controlled one in order to give the tribunal, an opportunity to determine that question as the court of first instance.

Having found the tenancy to have such a clause, that may render it a controlled tenancy under **Section 2(1)(b)(ii)**, I decline to accede to the subject's claim that the respondent has no jurisdiction to hear and determine the dispute herein.

In reaching the above determination, I also noted that the tenancy agreement signed between the interested party and the subject offended the provisions of **Section 3(3)** of the **Law of Contract Act, Chapter 23 Laws of Kenya** and **Section 47** of the **Registered Land Act, Chapter 300 Laws of Kenya** (now repealed) in that it was not executed by both parties thereto and that it was not registered.

Although the defect concerning the tenancy's lack of registration is curable under **Section 2(3) OF Cap 301,** the defect concerning execution is not curable. In this regard, refer to **Section 3(3)** of **Law of Contract Act** which provides as follows:

> **"<u>Not suit shall be brought upon a contract for the disposition of an interest in land unless:</u>**
>
> **(a) the contract upon which the suit is founded-**
>
> **i) is in writing**
>
> **ii) is signed by all the parties thereto; and**
>
> **(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party....."**

Also refer to **Section 2(3)** of **Cap 301** which provides:

> **"Notwithstanding anything contained in any other written law requiring the registration of tenancies, evidence of a tenancy may, for any purposes of this Act, be given in any proceedings whether such tenancy is registered or not."**

It is clear from the foregoing quoted sections of the law that, whereas the parties to this dispute could rely on the tenancy herein under **Section 2(3)** of **Cap 301**, the subject cannot lodge a suit in court in respect thereof, based on a contract (read Lease Agreement)

The above notwithstanding, the Lease Agreement is found to contain a termination clause.

<u>FINDINGS</u>

For the reasons set out above this court makes the following findings;

1. This court finds that this court is not the proper forum for the hearing and determination of the dispute and further finds that the issues of jurisdiction ought to be canvassed in the court of first instance, which would be the Respondent.
2. The court finds that the orders sought of Certiorari and Prohibition are not merited.

DETERMINATION

The application has no merit and is hereby dismissed with costs to the Interested Party.

Orders Accordingly.

Dated, Signed and Delivered at Nakuru this 10th day of February, 2015.

A. MSHILA

JUDGE