



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC.CIVIL APPLICATION NO 440 OF 2014

REPUBLIC ..... APPLICANT

VERSUS

THE CHAIRMAN, BUSINESS PREMISES RENT TRIBUNAL .....RESPONDENT

AND

GEOFREY MACHARIA KANAGI T/A WHEELS MOTORS.....INTERESTED PARTY

EX-PARTE THE TRUSTEES, KENYA RAILWAYS STAFF RETIREMENT  
BENEFITS SCHEME

### JUDGEMENT

1. The Applicant is the Trustees Kenya Railways Staff Retirement Benefits Scheme registered under the Retirement Benefits Act. The Respondent is the Chairman of the Business Rent Tribunal (“the Tribunal”). The Tribunal is established under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya (“the Act”). The Interested Party who is a tenant of the Applicant is Geoffrey Macharia Kanagi trading as Wheels Motors.
2. Through a Notice of Motion dated 24<sup>th</sup> November, 2014 the Applicant prays for orders to quash the proceedings before the Tribunal in **Business Premises Rent Tribunal Cause No. 680 of 2014, Geoffrey Macharia Kanagi T/A Wheels Motors v The Trustees, Kenya Railways Staff Retirement Benefits Scheme** and prohibit the Respondent from in anyway entertaining any proceedings touching on the licence agreement dated 30<sup>th</sup> July, 2013 between the Applicant and the Interested Party. The Applicant also prays for costs of the application.
3. The Applicant’s case is that it entered into a licence agreement with the Interested Party on 30<sup>th</sup> July, 2013 for a term of five years and three months. The licence period was to start running from 1<sup>st</sup> August, 2013. Through a letter dated 26<sup>th</sup> August, 2014, the Applicant notified the Interested Party of its intention to terminate the licence within 60 days. The Applicant gave the Interested Party reasons for the termination of the licence.
4. Instead of vacating the premises, the Interested Party on the 23<sup>rd</sup> October, 2014 instituted a complaint in the Tribunal being **Business Premises Rent Tribunal Cause No. 680 of 2014, Geoffrey Macharia Kanagi T/A Wheels Motors v The Trustees, Kenya Railways Staff Retirement Benefits Scheme** seeking various orders against the Applicant, among them that the Respondent, its servants or employees be restrained by way of temporary order from terminating,

- evicting, harassing, locking out and or interfering in any manner with the occupation of the premises by the Interested Party pending the hearing and determination of the complaint.
5. The Tribunal heard the Interested Party's application, without notice to the other parties, and issued an order restraining the Applicant from terminating the licence or evicting the Interested Party from the suit premises and fixed the matter for hearing on 4<sup>th</sup> December, 2014.
  6. It is the Applicant's contention that the Tribunal did not have jurisdiction to handle the matter based on the fact that the licence does not fall under the purview of a controlled tenancy as the licence agreement was for a term of more than five years. It is therefore the Applicant's position that the proceedings conducted on the 23<sup>rd</sup> October, 2014 and the entire suit is tainted with illegality and thus null and void *ab initio*.
  7. The Tribunal and the Interested Party opposed the application by way of grounds of opposition. The Tribunal's position is that it acted within the premises of the law since under Section 12 of the Act, it has jurisdiction to investigate all complaints filed before it and that jurisdiction includes the determination as to whether or not a tenancy is a controlled tenancy.
  8. It is the Tribunal's assertion that the issue for determination is whether a license of five years and three months is the same as a tenancy agreement as defined in Section 2 of the Act and that was an issue to be addressed during the *inter partes* hearing. The Tribunal submitted that this matter is premature as the Applicant could have raised the issue of jurisdiction at the *inter partes* stage. It is the Tribunal's case that the application is therefore an abuse of the court process and lacks merit and ought to be dismissed with costs.
  9. On his part, the Interested Party submitted that these judicial proceedings are not only premature, speculative, incompetent and void in law but are fatally defective as the issue of jurisdiction which the Applicant wishes to challenge herein was never raised by the Tribunal as the recipient court which is the correct forum to determine the legal nature of the Interested Party's tenancy as per Section 12(1) of the Act.
  10. It is the Interested Party's position that the Applicant has not exhausted the alternative procedure by applying for vacation of the orders at the Tribunal before invoking the judicial review jurisdiction. Further, that the Applicant has not disclosed any cause of action meriting the exercise of the prerogative powers of review. It is also the Interested Party's position that the Applicant has not shown any good and sufficient cause to warrant this court's intervention. In the Interested Party's view, the Tribunal's decision was correct, fair, just and unbiased.
  11. The Interested Party also asserted that the Applicant has not demonstrated how the Tribunal in arriving at its decision failed to act diligently, in good faith and within its statutory mandate. Further, that the Applicant has not shown that he was denied an opportunity by the Tribunal to be heard or locked out from canvassing the facts he is ventilating in this court.
  12. In addition, the Interested Party submitted that the Applicant's case does not meet the threshold to warrant the intervention of this court by way of judicial review. According to the Applicant, judicial review is a remedy of last resort.
  13. Upon reflection on the pleadings and submissions of the parties, it emerges that the only issue for consideration by this court is whether the Tribunal had jurisdiction to handle the Interested Party's case.
  14. The Tribunal is governed by the Act which at Section 2(1) defines a controlled tenancy as follows:

**“ “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;"

Section 2(2) provides that:

"The Minister may, by notice in the Gazette, specify, by reference to rent paid or rateable value entered in a valuation roll under the Valuation for Rating Act (Cap. 266), classes of shops, hotels or catering establishments tenancies of which shall be controlled tenancies regardless of the form or period of such tenancies."

15. Section 12 of the Act gives the Tribunal jurisdiction as follows:

#### **Powers of Tribunal**

"12. (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;
- (b) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
- (c) to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
- (d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
- (e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
- (f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;
- (g) where the landlord fails to carry out any repairs for which he is liable—
- (i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;
- (ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;
- (h) to permit the levy of distress for rent;
- (i) to vary or rescind any order made by the Tribunal under the provisions of this Act;
- (j) to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or

conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the Tribunal;

(k) to award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;

(l) to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;

(m) to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend, the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;

(n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.

(2) A Tribunal shall not have or exercise any jurisdiction in any criminal matter, or entertain any criminal proceedings for any offence whether under this Act or otherwise.

(3) .....

(4) In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit.

(5) ....."

16. The Applicant's case is that the agreement entered between it and the Interested Party was for a period of five years and three months thus not being a controlled tenancy as per Section 2 of the Act. The Respondent and the Interested Party did not dispute this fact. According to them, the question of jurisdiction would have been addressed at the hearing and that is when the Tribunal would have decided whether or not it had jurisdiction.

17. A statutory tribunal like the Respondent is obligated to only do that which the establishing law allows it to do and no more. It must satisfy itself from the outset that it has jurisdiction to hear a matter before proceeding to do anything.

18. Jurisdiction is everything and where a court has no jurisdiction it can take no further step in a matter- see **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**. In the cited case, Nyarangi, JA opined that: **"Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

19. The court or tribunal does not operate on guesswork when it comes to the question of jurisdiction. The court or tribunal does not issue orders and wait for the opposing party to raise the issue of jurisdiction. The tools are downed pronto the moment it emerges that there is no jurisdiction.

20. Having laid down the applicable law, I will now proceed to interrogate the matter that is before me. There is a letter of offer that was issued to the Interested Party by the Applicant and this is the basis upon which the relationship was founded. The letter of offer clearly shows that the offer was for a period of five years and three months. The agreement between the parties was therefore not a controlled tenancy.

21. In **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195** Chesoni, J dealt at length with Section 12 of the Act and rendered himself as follows:

**"As correctly pointed out by Mr Khanna, the tribunal is a creature of statute. It derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things which the statute has empowered it to do. Its powers are expressed and cannot**

**be implied....**

**The position as to the tribunal's powers could not be clearer than the Act which creates it has put it..... Thus anything not spelled out by the Act as to be done by the tribunal is outside its area of jurisdiction.”**

- 22.The Tribunal has no jurisdiction to entertain a matter where the parties had through their written and signed agreement taken it out of its control. There is no evidence, and there was no allegation that the Minister had made the tenancy a controlled tenancy in exercise of the power granted to him by Section 2(2) of the Act.
- 23.The end result is that the Applicant's case is merited and an order of certiorari is issued calling into this Court the proceedings in **Business Premises Rent Tribunal Cause No. 680 of 2014, Geoffrey Macharia Kanagi T/A Wheels Motors v The Trustees, Kenya Railways Staff Retirement Benefits Scheme** and having them quashed. The Tribunal is also prohibited from ever entertaining any proceedings relating to the licence/lease agreement dated 30<sup>th</sup> July, 2013 between the Applicant and Interested Party. There will be no orders as to costs.

**Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of October, 2015**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**