REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND JUDICIAL REVIEW DIVISION

MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO.136 OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY CHRISTINE WANGARI

GACHEGE FOR ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE RESPONDENT

AND

IN THE MATTER OF THE LANDLORD AND TENANT (SHOPS, HOTELS & CATERING ESTABLISHMENTS) ACT (CHAPTER 301 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CHAIRPERSON, BUSINESS PREMISES RENT TRIBUNAL

AND

IN THE MATTER OF BUSINESS PREMISES RENT TRIBUNAL CASE

NO.666 OF 2012 – NAIROBI

REPUBLIC ..... APPLICANT

VS.

BUSINESS PREMISES RENT TRIBUNAL..... RESPONDENT

AND

LUZIKI HOLDINGS LIMITED.....1ST INTERESTED PARTY

ELIZABETH WANJIRA EVANS..... 2ND INTERESTED PARTY

MARY WANJIKU GACHEGE.....3RD INTERESTED PARTY

EX-PARTE: **CHRISTINE WANGARI GACHEGE**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 20th May 2013 in which the ex parte applicant herein, **Christine Wangari Gachege** seeks the following :

1. **That this honourable court be pleased to grant an order of Judicial Review by way of Certiorari to bring before this Honourable Court and quash the entire proceedings and decision of the Respondent as the Chairperson of the Business Premises Rent Tribunal made on 19th April 2013 in BPRT No. 666 of 2013 between Luziki Holdings Limited of the one part and Elizabeth Wanjira Evans, Mary Wanjiku Gachege and Christine Wangiri Gachege of the other part.**
2. **That this honourable Court be pleased to grant an order of Prohibition to restrain and/or prohibit the Respondent from entertaining, hearing or continuing with the proceedings in BPRT No. 666 of 2013 – between Luziki Holdings Limited of the one part and Elizabeth Wanjira Evans, Mary Wanjiku Gachege and Christine Wangari Gachege of the other part.**
3. **That the 1st Interested Party herein, Luziki Holdings Limited, be ordered to vacate the property known as L.R. No. 209/11540 Nairobi within such time as this honourable court may determine and in default thereof, the 1st Interested Party be evicted therefrom.**
4. **That the Respondent and the Interested Parties be condemned to pay the costs of these proceedings.**

Ex Parte Applicant's Case

2. The application was supported by an affidavit sworn by the Applicant herein one of the administrators of the estate of **Rahab Wanjiru Evans** (hereinafter referred to as the deceased) on 29th April, 2013.
3. According to the Applicant, **Peter Gachege Njogu** her co-administrator passed away on 7th February 2010. The deceased however passed away on 16th February, 2000 and left a vast estate amongst them being the property known as L.R. No. 209/11540 Nairobi which property is used as a parking place for the public at a fee. Although, the City Council of Nairobi unlawfully took over possession of the suit property in or about 1991/1992 during the lifetime of the Deceased, upon negotiation it was arranged that the Council would run the car park and pay itself the outstanding arrears of rates consequent to which the council would surrender back the property to her.
4. However, due to the fact that the said council was not accounting to the Estate the moneys it was collecting from the said property by way of car park fees, the Applicant filed **HCCC NO. 504** of **2002** in Nairobi against the said council seeking to compel it to provide accounts. The Applicant's co-administrator, **Elizabeth Wanjira Evans**, also filed a similar suit, being **HCCC No. 602** of **2009** in Nairobi against the council.
5. Despite the pendency of both suits on or about 8th August, 2012, the Applicant's co-administrators **Elizabeth Wanjira Evans** and **Mary Wanjiku Gachigi** entered into a discreet arrangements with the Interested Party by which the said administrators purported to engage the Interested Party to negotiate with the said council about payment of the alleged outstanding rates in which transaction the Interested Party purported to pay the sum of Kshs 3,500,000/= to the said Council purportedly in full and final settlement of the outstanding rates arrests and Kshs 10,000,000/= to the Interested Party's advocates as their fees for allegedly carrying out the necessary negotiations with the Council. This was however done despite the fact that the said two cases were still in Court and there was an order of stay pending appeal granted by the Court of Appeal in Civil Application No. 233 of 2007 staying, *inter alia,* payment of rate.
6. In consideration of the payments, the said Applicant's co-administrators purported to grant a Lease of the property to the Interested Party with an outright option to purchase on priority basis without consulting or involving the Applicant. The Applicant then peacefully took over possession

of the property from the City Council of Nairobi on or about 27th August, 2012 and ran the parking lot upto 27th September, 2012 when she was forcefully removed by the Interested Party on Orders issued by the Respondent. According to the Applicant, the said order was obtained notwithstanding the fact that the Interested Party had on 23rd September, 2012 submitted that it was not in occupation or possession of the suit property as the Interested Party had been "locked out". Therefore, at the time the Respondent made the orders in issue on 20th September, 2012 the Interested Party was not in possession or occupation of the suit property, and technically not a tenant therein and that the fact that it was not in possession of the said premises was admitted by its counsel on 13th September 2012 when the Interested Party first appeared before the Respondent while arguing the certificate of urgency. Further the fact that the Applicant was in possession of the suit property was admitted by the Applicant's co-administrator, **Elizabeth Wanjira Evans** in her Replying Affidavit sworn on 1st October, 2012.

7. It was therefore the Applicant's case that the Respondent lacked jurisdiction to receive, entertain and determine the complaint that was brought before it by the Interested Party and that the Respondent exceeded her authority by assuming jurisdiction that she did not have and issuing the controversial orders that resulted in the Applicant being evicted from the suit property.
8. Although the Applicant applied to set aside the said orders on grounds of want of jurisdiction on the part of the Respondent and presented the factual situation to the Respondent, the Respondent on 19th April, 2013 proceeded to dismiss the said application, holding that it had jurisdiction to entertain the complaint and holding that if a tenant is illegally evicted and fights back in whatever manner to regain possession, he cannot be thrown out by the Tribunal. The Applicant however contends that in this case, the Interested Party used the process of the Business Premises Rent Tribunal to regain possession when the said Tribunal lacked such powers, authority and jurisdiction to do so. The Applicant was perturbed by the Respondent's holding to the effect that she has no authority to order the Interested Party to vacate the suit property and that to do so would be to protect the illegality that resulted from the temporary eviction of the tenant (interested Party). To the Applicant it was evidently and manifestly clear that the Respondent appreciated that the tenant (Interested Party) was not in possession or occupation of the suit premises as it (the Interested Party) had been "temporarily evicted" from the suit premises, but because the action was illegal, she assumed jurisdiction ostensibly to protect the tenant.
9. It was the Applicant's case that the Respondent has no power, authority or jurisdiction under the provisions of **Section 12(1)(e)** of the ***Landlord and Tenant (shops hotels & Catering Establishments) Act*** (Chapter 301 of the Laws of Kenya) to order, on the application of a tenant, the re-instatement of a tenant into business premises where that tenant had been evicted or had lost possession of the premises though the Respondent had jurisdiction under the said provisions of law to order for the recovery of possession from a tenant on an application made by the Landlord which order the Applicant sought in her application in the Business Premises Rent Tribunal seeking to set aside the Orders made on 20th September, 2012 powers which the Respondent in her Ruling dated 19th April 2013 wrongly held that she did not have inspite of the provisions of **Section 12(1)(e)** of the ***Landlord & Tenants (Shops, Hotels & Catering Establishments) Act*** **(Cap 301).**
10. In the Applicant's view, the entire proceedings and orders made by the Respondent are a nullity because the Respondent lacked jurisdiction to entertain the complaint and although the ***Landlord and Tenant (Shops, Hotels & Catering Establishments) Act*** **Chapter 301** of the Laws of Kenya) provides for an appeal to the High Court by any person aggrieved by the decision of the Respondent, case law is to the effect that where proceedings and the resultant orders are a nullify *ab initio,* there is technically nothing to appeal against.
11. The Applicant lamented that as a result of the Respondent's unlawful assumption of jurisdiction, the Interested Party fraudulently obtained possession of the suit property where it is collecting revenue to the detriment of the Estate and as a co-administrator and beneficiary of the Estate, the decision of the Respondent has infringed upon her legal and constitutional rights as she, the Estate and the Beneficiaries thereof are not obtaining any benefit therefrom. In addition, the High Court in ***Succession Cause 96 of 2000*** had issued an injunction on 18th September 2012 restraining her co-administrators aforesaid from inter alia dealing or intermeddling with the suit property among other properties. To her, the granting of the purported Lease by her co-administrators to the

Interested Party was therefore illegal, null and void because it was also never registered as required by law.

12. There was also a supplementary affidavit sworn by the same applicant on 7th August, 2013.

Respondent's Case

13. In opposition to the application, the Respondent filed the following grounds of opposition:

> **1. THAT the application lacks specificity in terms of statutory or administrative laws to which the respondent is claimed to have breached.**
>
> **2. THAT the chair person acted within the premise of the law and has jurisdiction under section 12 Cap 301 Laws of Kenya.**
>
> **3. THAT the application is unmerited and an abuse of the process of the courts and the same should be dismissed with costs.**
>
> **4. THAT a Judicial Review Court is not an appeal court and therefore the Applicant is in the wrong court.**

Interested Party's Case

14. The interested parties on its part filed a replying affidavit sworn by **Elizabeth Wanjira Evans** on 21st June, 2013.

15. According to the deponent, the said application is frivolous, vexatious and an abuse of the process as what the applicant is doing is to seek and/or appeal through the backdoor. This, according to her, is due to the fact that the Applicant filed an application dated 1st October, 2012 which application was dismissed on 19th April 2013. In her view, if the Applicant so felt that the tribunal had no jurisdiction to deal with this matter then she ought to have raised a preliminary objection which she did not do. Apart from that the Applicant seems to be abusing the court process as she has filed judicial review proceedings left, right and centre in relation to the suit property viz, judicial review number 103 B 2-13 and 106/2013.

16. According to her, the 1st Interested Party entered their premises with their consent after they granted them a lease and the same was within the Applicant's knowledge. She contended that they were not served with her substantive notice of motion with the supporting documents hence the need to have this application dismissed. In her view, this court does not have the jurisdiction to issue an eviction order vide judicial review proceedings. She asserted that the 1st Interested Party has all along vide the lease agreement been on the suit property and the Applicant cannot be right to say that she had evicted them and that in any event the 1st Interested Party had an order barring the Applicant from evicting and/interfering with the quite enjoyment of the suit property.

Determination

17. I have taken into account the foregoing as well as the submissions filled herein.

18. It is argued by the ex parte applicant that since the interested parties had been dispossessed of the premises, the matter was nolonger within the jurisdiction of the Tribunal. The interested parties on the other hand contend that the ex parte applicant had not taken possession of the suit premises. Whereas I agree with the decision of **Simpson, J** (as he then was) in **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195** that the specific powers conferred on the Tribunal under section 12 of the Act to make an order for the recovery of possession from a tenant, or indeed from any person in occupation, would be an order made on an application of the landlord and that no corresponding power is given to make an order on the application of a tenant who has been forcibly dispossessed by a landlord, whether or not the interested parties were in actual possession of the suit premises at the time the said orders were made is a matter of fact. It would necessarily require *viva voce* evidence to establish who was in actual possession at the time the said orders

were made. Judicial review proceedings are not the right avenue to ventilate disputes which require the adduction of *viva voce* evidence. That is an issue that ought to have been raised before the Tribunal which would make a determination thereon after hearing the parties on merits and if the decision is not satisfactory an aggrieved party would be at liberty to appeal at which appeal the Court would be entitled to re-evaluate the evidence given and arrive at its own decision. Accordingly, I find that that issue is not properly before this court. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

19. Apart from that one must, however, not loose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the orders granted to appeal against the same where there is a right of appeal would be less convenient or otherwise less appropriate, the adversely affected party ought to appeal against the said order rather than to challenge a decision in respect of which an application to set aside has been made and dismissed by the Tribunal. For this Court to entertain, determine and quash a decision in respect of which the applicant attempted to set aside and failed, would in my view amount to the applicant seeking a second bite at the cherry. That conduct would amount to playing lottery with the judicial process which in itself amount to an abuse of the process of the Court.

40. In this case it is not in doubt that the decision which is being challenged in these proceedings was the subject of an application for setting aside which decision was disallowed by the Respondent. Whether that decision was right or not the Applicant ought to have appealed against the same instead of challenging the decision in respect of which attempt to set aside had failed. In judicial review proceedings the mere fact that the Tribunals decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points:

one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

41. In **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003**, **Omolo JA** stated as follows;

"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."

42. Apart from the foregoing, the decision whether or not to grant judicial review orders is an exercise of discretion. As stated in ***Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508***, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. In **Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 [2004] 1 KLR 203,** it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.
43. In my view where the applicant's conduct is geared towards an abuse of the process of the Court, the Court may well be entitled to decline the grant of the orders sought even if the same are merited. In this case, I am of the view that this application is an appeal against the decision of the Tribunal in disguise.

Order

44. Consequently in the exercise of the Court's discretionary powers, I decline to grant the prayers sought in the Notice of Motion dated 20th May 2013 which Motion I hereby dismiss with costs.

Dated at Nairobi this 5th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Maingi for Applicant

Cc Kevin