REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 308 OF 2012

IN THE MATTER OFAN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION AND MANDAMUS

AND

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

AND

IN THE MATTER OF BUSINESS PREMISES RENT TRIBUNAL CASE NO. 152 OF 2012 BETWEEN RTH WACHIRA T/A AMIGIRL BEAUTY PARLOUR –V- DR. AJIT BARUAH AT NAIROBI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

BSUINESS PREMISES RENT TRIBUNAL .....1ST RESPONDENT

THE HON. ATTORNEY GENERAL .....2ND RESPONDENT

DR. AJIT BARUAH….....INTERESTED PARTY

EX PARTE

RUTH WACHIRA t/a AMIGIRL BEAUTY PARLOUR

JUDGEMENT

INTRODUCTION

1. On 16th August 2012, the ex parte applicant herein **Ruth Wachira** t/a Amigirl Beauty Parlour filed a Notice of Motion dated the same day seeking the following orders:

1. **An order of Certiorari to remove into this Honourable Court for purposes of being quashed the ruling of the 1st Respondent delivered on 13th July 2012 in the Business Premises Rent tribunal Case No. 152 of 2012 and all sub-sequential orders dismissing the Applicant's**

complaint against her landlord, Dr. Ajit Baruah and upholding a Preliminary objection by the said landlord dated 13th March 2012 that the tribunal lacked jurisdiction to entertain the said complaint..

2. **An order of Prohibition restraining the 1st Respondent, the Interested Party or any other person whatsoever from implementing the Tribunal's decision dated 13th July 2012.**
3. **An order of Prohibition restraining the 1st respondent from assessing the cots on the dismissed reference.**
4. **An order of mandamus directing the 1st respondent to re-admit the applicant's Reference and to hear it on merits.**
5. **Costs of this application be provided for.**
6. **This Honourable court be pleased to make such further orders as it may deem just and expedient.**

EX PARTE APPLICANT'S CASE

2. The grounds upon which the Motion was based are as follows:
3. The application is supported by a Statutory Statement filed on 30th July 2012 and affidavit verifying the facts sworn by the said **Ruth Wachira** on 27th July 2012.
4. According to the applicant, she is the Tenant in the interested party's Business Premises on LR 209/3642 South B, Shop No. 2 Nairobi paying rents regularly as they become due to the interested party since January 2002 but without a lease agreement. In the year 2006 the interested party decided to give a lease for a period of five (5) years and three (3) months paying rents on a monthly basis and towards the end of the term of the said lease, the applicant requested the interested party through his then advocates, for an extension of two (2) more months which was accordingly granted. However, to the applicant's surprise, the said advocates **M/s Rachier & Company Advocates** on 29th September 2011 gave her a one (1) day notice to vacate the premises which the applicant's lawyers responded on the same day stating that the notice was too short being less than 24 hours. Shortly thereafter, the interested party's agent with some hired thugs attempted to break into the applicant's premises causing breakage on the applicant's property and tools of trade which the applicant reported to the police who arrested a **Mr. Bradox Muganda Omondi** who was charged with the offence of Malicious Damage to property C/S 339 (1) of the Penal Court vide Cri. Case No. 5142 of 2011, Makadara law Courts. The interested party's agent disappeared only to re-surface after five (5) months sometimes in the month of February 2012. However, the interested party's advocates to-date have never responded to the applicant's advocate's letter of 29th September 2011 protesting the short notice but instead talked to the applicant on phone and agreed that the notice was too short although he did not come for rents as usual until 20th February 2012. On the said 20th February 2012 the applicant received a call from her workers at the Salon and beauty parlour (herein referred to as the "business premises") that there were auctioneers in the company of police officers from the Industrial Area Police Station to supervise distress for rent. On receipt of the information, the applicant rushed to the business premises and confronted the auctioneers who gave her a court order for distress under Chief Magistrate's court Misc App. 57 of 2012. The applicant thereby explained to both the Auctioneers and the police her case that she did not refuse to pay the rents but it was the landlord who had failed to collect the same as before and paid a total sum of Kshs. 172,800/= being rents payable for five (5) months plus Auctioneers Charges of Kshs. 12,000/= and was duly issued with a receipt therefor. The applicant also deposes that she had an opportunity to see the interested party's instructions letter to the auctioneers **M/s Bealine Auctioneers** dated 7th December 2011 instructing them to levy distress for the months of October, November and December 2011. Sometimes towards the end of February and strangely after distress for rent aforesaid, a letter by interested party's new advocates, **M/s J. K. Bosek & Co. Advocates** and dated 6th February 2012 was dropped in the business premises threatening eviction by 5th March 2012. On receipt thereof the applicant immediately filed a complaint at the Business Premises rent Tribunal to investigate the matter on the strength that she was now a protected tenant within the meaning of Section 2(1) of ***Landlord and Tenant (Shops, Hotel and Catering establishments) Act*** Cap. 301 the Laws of

Kenya (hereinafter referred to as the Act). The interested party subsequently refused to accept rent for the month of March in form of a bankers cheque through their new advocates **M/s J. K. Bosek & Co. Advocates** arguing that there existed no tenancy relationship between the applicant and the interested party and that the applicant was a trespasser a contention which the applicant believes based on her advocate's advice to be a misapprehension of the law.

5. On 12th March 2012, the interested party filed a Preliminary Objection to the applicant's reference through his new firm of advocates by the name **Kihangah & Co. Advocates** arguing that the tribunal lacked jurisdiction as the applicant had already purportedly been evicted and only regained possession forcefully. That the Tribunal gave interim orders that the applicant continues paying rent in the form of *mense* profits on a without prejudice basis. After hearing the parties the Tribunal gave a date for the ruling on the Preliminary Objection on 8th June 2012 but the said ruling was not delivered until 13th July 2012 on which date the Tribunal held that it lacked jurisdiction to entertain the applicant on the ground that the lease had not yet expired by the time the reference was filed and consequently, vacated the interim orders of 12th march 2012. According to the applicant she was surprised at the strange Honourable chairperson's findings that the lease in question expired on 26th March 2012 when according to the lease documents the period of five (5) years and (3) three months starting from 26th June 2006 lapsed on 27th September 2011; it was not in dispute according to the interested party that the lease expired and a notice was issued to that effect on 29th September 2011; when according to Respondent's submission, it was admitted that the lease already expired by the interested party; when according to the Applicant the lease had indeed expired and the same converted to controlled and protected tenancy, the landlord having collected rents after its expiry; when there was an explicit court order on record under the Chief Magistrate's Misc. Application No. 57 of 2011 to levy distress for rent up-to December 2011; when the tenant further paid rents for January 2012, and February 2012 without complaining and objection from the landlord; and when the tenant having from March 2012 to July 2012 paid the rents as *mense profit*. According to the applicant the learned chairperson deliberately or otherwise and for whatever reasons or considerations erred in stating that the lease expired on 23rd march 2012 when there was no dispute between the parties that the lease had expired on 27th September 2011 hence the orders as prayed in my present application.
6. In the applicant's view, she will suffer irreparably if these orders are not granted as she has invested greatly and immensely in the said **Salon and Beauty Parlour** which is her only source of income. Further the applicant strongly feels that the learned magistrate misdirected herself in wrongly addressing the issue of computation or in excess of her jurisdiction and the validity of the lease as it was not before her for determination.
7. Although she has applied for the proceedings and a certified copy of the typed proceedings together with handwritten ruling which the Honourable tribunal has not issued to-date and this makes her more apprehensive of the fact that the refusal is bound to give the interested party an advantage over her in seeking justice. To the applicant this is a perfect case for the Honourable court to grant orders of certiorari quashing the ruling of the Honourable Chairperson granted on 13th July 2012 and issue orders of prohibition against any further consequential orders and any possible eviction of the Applicant since the interested party may take advantage of vacated court orders and evict her as threatened contrary to the law.

INTERESTED PARTY'S CASE

8. In opposition to the application by the interested party, **Amirjit Dhiman Singh** filed an affidavit sworn by himself on 15th October 2012.
9. According to him, he is the holder of Power of Attorney on behalf of **Dr. Ajit Baruah**, the landlord/interested party herein. He confirmed that indeed there was a lease agreement for the occupation of the suit premises between the applicant and the interested party but averred that there was never a further extension of two (2) months or any other duration granted by the interested party to the applicant. However, the applicant requested for an extension of two (2) months upon expiry of the lease by a letter dated 29th September 2011, the same of which was replied to the same day rejecting the offer since there was no obligation upon the landlord to notify

the tenant/Applicant of the expiry, as the notice was already embedded in the lease, contrary to allegation in paragraph 5 of statement. According to legal advice received from his advocate, the deponent avers that where there exists a periodic lease such as this, to which Notice of its termination is embedded in the lease agreement, there exists no statutory obligation to notify the lessee of its impending termination, especially where such tenant/lessee has a copy of that lease duly exhibited in his own application, The deponent challenges the applicant to provide any evidence confirming that "any extension was accordingly granted by the interested party" as alleged in the paragraph 4 of statutory statement. To the deponent, the interested party is neither a party to the proceedings nor is he the accused person. Furthermore, any complaints about illegal actions of auctioneers would be dealt with the Auctioneers Licensing court, to which the applicant has conveniently not opted to file proceedings. It is further deposed that the applicant has failed to pay rent hence it is not true that the "non-payment was due to the interested party's refusal to accept rent as usual" during the pendency of the lease. It was therefore false for the applicant to put a scenario that eviction is eminent, a fact of which is not, just so to be granted leave and stay orders. The deponent further avers that though the applicant in prayer 1 of the substantive application is seeking Certiorari orders following a ruling delivered on 13th July 2012 by the 1st Respondent a copy of the said ruling is not annexed for quashing purposes and based on the advice from his legal counsel the failure to do so is fatally and incurably defective at law.

10. With respect to the prohibitory orders against the 1st Respondent it is deposed that the same are un-implementable thus the court cannot grant an order it cannot supervise. To the deponent, the orders of Prohibition cannot be granted where an administrative decision is already made and further the grounds for this order are non existent cannot issue and the same remains spent and sterile. The Court is further invited to see the contradiction in paragraph 8 of the statement & paragraph 10 of the supporting affidavit which paragraphs speak of different scenarios, denoting the dishonest character of the applicant. While denying the contents of paragraph 9-12 inclusive of the supporting affidavit, the invited the court to provide another alternative method of determining the duration of the lease other than by computation which according to him is provided in section 12(1)(a) & (e) of ***Landlord and Tenant Act*** expressly provides for this purpose and intent. According to the legal advice received from his advocates the applicant has not stated, what is the grave error of law infringed upon by the 1st respondent to warrant the supervision by the High Court over the conduct of the 1st Respondent herein and neither has he demonstrated what "irrational", capricious, *mala fides*, illegal and null decision is being complained of in the statutory statement or in the supporting affidavit.
11. In the deponent's view, the judicial review application before this court is unmerited due to the fact that following the ruling by the 1st respondent, the respondent has never given any eviction notices or filed an action for eviction in the High Court. On the other hand prayer 4 of the Notice of Motion seeking mandamus is untenable for the reasons that the suit being ordered for re-instatement is a complaint and not a reference within the meaning of ***Landlord & Tenant Act*** Cap 301; an aggrieved party such as the applicant ought to file an appeal to reference as provided under & S. 15 (1) of ***Landlord & Tenant Act*** Cap 301 and not a judicial review if the applicant still contends that the matter before this court is a reference and not a complaint; that the applicant has already filed an appeal to the matter now before court for Judicial review vide HCCA 363 of 2012 against the interested parties, then appearing as respondents; that the applicant upon recommendation by **Lady Justice Ang'awa** to concede to the appeal did so by filing a notice of withdrawal of appeal. That indeed if the complaint is re-admitted by the same tribunal the 1st respondent, which actually delivered its ruling and became *functus officio* in the matter, then the same will be tantamount to the court seating its own appeal. It is averred that the burden of proof largely remains in favour of the applicant, to warrant the granting of the prerogative orders sought by the applicant in this matter.

APPLICANT'S FURTHER AFFIDAVIT

12. Confronted with the interested party's case, the applicant on 9th November 2012 filed a further affidavit sworn the same day in which she deposed that the interested party's affidavit ideally does not assist this Honourable Court in understanding what was before the Business Premises Rent

Tribunal but is instead has centred on extraneous matter and the merits of the application that was before the tribunal. To the applicant, the main actors in the matter are the 1st and 2nd Respondents who have not bothered to respond to the application before the Honourable Court and the allegations made by the ex parte applicant. In the deponent's view, what was before the Honourable Tribunal was a complaint by the ex parte applicant complaining of refusal to receive rents for the month of March by the interested party after having received rents up-to and including the months of February 2012 and the interested party's instructions to the auctioneers through the firm of Beeline Auctioneers who filed a Misc Application Number 57 of 2012 in the Chief Magistrate Court at Nairobi to get police assistance at the time of distress. It is averred the chairperson of the tribunal ignored the submission of the parties and the annexed supportive documents which showed that the lease of 5 years 3 months, from 26th June 2006 expired on 30th September 2011, after the 5 years and 3 month by doing a wrong computation of the lease period.

13. It is contended by the applicant that the filing of the appeal is her constitutional right which she preferred to withdraw after the interested party raised an objection and she elected to apply for judicial review to challenge the ruling of the tribunal. The said appeal, it is deposed was withdrawn before filing of this judicial review and even if there was an appeal the same can be either stayed or withdrawn at any point in time. In her view the point which she would wish this Honourable Court to address is whether the chairperson's finding and decision was supported by the evidence before her. To her the interested party has the notoriety of raising preliminary objections to any pleadings without giving any facts or evidence to the other party and this is not only bad in law but not in conformity with the provisions of the constitution of Kenya particularly Article 150 (2) of the constitution of Kenya.

APPLICANT'S SUBMISSIONS

14. On behalf of the applicant it was submitted that since the 1st and 2nd respondents have not filed any reply or grounds of opposition under Order 53 despite due service, the application is unopposed and must succeed. It is submitted that the main ground of the application is that the impugned ruling of the Business Premises Rent Tribunal (hereinafter referred to as the Tribunal) contains a finding over an issue which was not in dispute in that the lease had expired by 30th September 2011 when the applicant was given less than 24 hours to vacate. It is therefore submitted that the learned chairman of the tribunal went overboard and outside what she was being asked and that in doing so made extremely erroneous decision that led to the applicant's denial of justice. Based on **Kuria & 3 Others vs. AG [2002] 2 KLR 69** and **Nyongesa & 4 Others vs. Egerton University [1990] KLR 692**, it is submitted that the finding of the learned chairman was not only erroneous and an error in judgement but ultra vires the mandate and what was before the court for determination which was whether the tenant was entitled to continue staying in the premises when the lease had expired by virtue of the landlord having decided to take rents without a new lease which the court did not determine but rather considered extraneous matters. Based on **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge and 9 Others Civil Appeal No. 266 of 1996**, it is submitted that the learned chairman's calculation was outrageously wrong hence the ruling should be quashed since the finding was founded on erroneous misunderstanding.

THE INTERESTED PARTIE'S SUBMISSIONS

15. On behalf of the interested party it was submitted that the tribunal acted within its jurisdiction. It was further submitted that the ruling exhibited was not the ruling delivered by the tribunal. According to the interested party the preliminary objection was based on the decision in the case of **Owners of Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd** pursuant to which the tribunal made its decision which decision it is submitted was correct. To the interested party, the applicant has not demonstrated any capriciousness, irrationality, bad faith or illegality in assessing the tribunal award to warrant review of the order. Based on ***Halsbury's Laws of England 4th ed. Vol. 1 page 37 paragraph 129***, it is submitted that prohibition cannot be used as an avenue to appeal or inquire into past errors such as denial of costs. Since the tribunal has already determined that it has

no jurisdiction, it is submitted that to grant the order of mandamus would amount to the tribunal sitting on its own appeal.

16. It is further submitted that since the impugned decision arose from a complaint rather than a reference and since what is challenged is a reference, the ex parte applicant is seeking orders against a decision which is not before the court. While citing **King vs. The General Commissioner for Income Tax Purposes Districts of Kensington [1917] 1 KB 486**, it is submitted that since the applicant is guilty of material non-disclosure the orders sought cannot be granted.

APPLICANT'S REJOINDER

17. For completeness of the record it is worth mentioning that the applicant filed a reply to the interested party's submissions in which she *inter alia* reiterated her position that the 1st and 2nd respondents did not oppose the application.

DETERMINATION

18. The applicant's position is that since the 1st and 2nd respondents did not file any papers in response to the application and since it is their decision which is challenged the application is unopposed and hence ought to be allowed. Judicial review applications it must be noted are *sui generis* in nature and are neither civil nor criminal in nature hence the same are not disputes between the parties to the proceedings *per se* but are actually public law proceedings. See **Re: Justus Nyangaya and Social Democratic Party Nairobi HCMA 1132 of 2002.**

19. Therefore the mere fact that the parties to the proceedings decide not to participate therein does not automatically mean that the applicant must be allowed. The court is still under a duty to interrogate the application and find whether or not the same is merited and ought not to grant the same as a matter of course. Even in cases falling under Order 51 of the ***Civil Procedure Rules***, the failing to file grounds of opposition or replying affidavit are required under rule 14(1) thereof only means that the application may be heard ex parte pursuant to rule 14(4) thereof and not that the application must be allowed. See **The Central Bank of Kenya vs. Uhuru Highway Development Limited & Others Civil Appeal No. 75 of 1998.**

20. In order to understand the matter at hand it is important to restate the scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition. This was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji** (supra) in which the said Court held *inter alia* as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more

than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."

21. However judicial review proceedings do not deal with the merits of the decision but by the decision making process. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

22. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
23. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. *See* R vs. Secretary of State for Education and Science *ex parte* Avon County Council (1991) 1 All ER 282, at P. 285.
24. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

40. In this case, it is the applicant's case that chairperson of the tribunal ignored the submission of the parties and the annexed supportive documents which showed that the lease of 5 years 3 months, from 26th June 2006 expired on 30th September 2011, after the 5 years and 3 months by doing a wrong computation of the lease period. Further it is contended that the point which this Court

ought to address is whether the chairperson's finding and decision was supported by the evidence before her. With due respect that is not the role of a judicial review court. In order to make a finding whether or not the impugned decision was supported by evidence would necessarily involve re-evaluation of the evidence that was placed before the Tribunal and whereas that is a matter which ought to be dealt with by a first appellate court, the issue goes to the merits of the decision rather than the process. 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."

25. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him. Therefore in cases where the credibility of the witnesses is in issue, even an appellate court will not lightly interfere with a decision of the lower court since in that case the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence. Although the impugned decision arose from a preliminary objection the well known legal principle is that in the realm of "pure" fact, the advantage which the judge derives from seeing and hearing the witness must always be respected by an appellate court and that the importance played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, where credibility is crucial and the appellate court can hardly ever interfere. See **Aga Khan Hospital vs. Busan Munyambu KAR 378; [1976-1985] EA 3; [1985] KLR 127.**

26. Whereas the availability of the avenue of an appeal is not necessarily a bar to the grant of judicial review remedies, 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 ex parte orders granted to appeal against them would be less convenient or otherwise less appropriate, the Court would decline to grant the orders sought due to the availability of that alternative remedy since judicial review jurisdiction ought not to be disguised as an appellate jurisdiction.

27. However, once the court finds that there is no impediment to the grant of judicial remedies, the mere fact that the grant of the orders of mandamus would have the effect of reverting the matter to the Tribunal for hearing would not bar the Court from doing so since invariably such orders would be accompanied by directions on how the matter is to be handled and the Tribunal would be enjoined to comply therewith.

ORDER

28. Accordingly, I find no merit in the Notice of Motion dated 16th August 2012 which I hereby dismiss but with no order as to costs as the application was not opposed by the main protagonists, the respondents.

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the presence of Ms Chege for Ms Sirai for the Respondent