



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISC APPLICATION NO. 435 OF 2012**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI**

**AND**

**IN THE MATTER OF LAW REFORM ACT**

**(CHAPTER 26 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE BUSINESS PREMISES RENT TRIBUNAL ACT**

**(CHAPTER 301 OF LAWS OF KENYA)**

**REPUBLIC.....APPLICANT**

**VERSUS**

**BUSINESS PREMISES RENT TRIBUNAL.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**JOHN MWANGI KARURI.....INTERESTED PARTY**

**EX PARTE**

**ALBERT KIGERA KARUME**

**JUDGEMENT**

**INTRODUCTION**

1. This Judgement is the subject of the Notice of Motion dated 8<sup>th</sup> January 2012 October 2012 by

which the ex parte applicant herein, **Albert Kigera Karume** seeks the following orders:

1. **That an order of Certiorari does issue to quash the injunctive orders of the 1<sup>st</sup> respondent issued on the 17<sup>th</sup> of October 2012.**
2. **That the respondents be condemned to pay costs of this application.**

#### **EX PARTE APPLICANT'S CASE**

2. The application is supported by Statement of Facts filed on 10<sup>th</sup> December 2012 and affidavit verifying facts sworn by the said **Albert Kigera Karume** on the same date.
3. The *ex parte* Applicants' case is that he is and has at all material times been the landlord of the premises known as LR. No. 209/6492 in Kandara Road, Kileleshwa Nairobi while the Interested Party has been the tenant thereof. On the 17<sup>th</sup> of October 2012 the chairperson of the Business Premises Rent Tribunal, **Mrs. Mochache D. Made** the following orders touching on the said premises:
  - a. **The tenant is directed to forward monthly rent to the landlord's advocate on due dates for onward transmission to the landlord.**
  - b. **The landlord either by himself, his servants and/or agents be and is hereby restrained and prohibited from evicting the tenant and/or in any other manner whatsoever interfering with the tenant's quiet possession and enjoyment of the business premises known as (Boyz to Men salon and Barber Shop).**
  - c. **Costs to the tenant assessed in the sum of Kshs. 73,715/=**
  - d. **The tenant's rent account is credited with Kshs. 73,715/=**
4. The aforementioned orders were made in Tribunal case No. 160 'B' /2012, wherein the Interested party herein was seeking relief against the Applicant for allegedly unlawfully threatening to evict him from the said premises. It is the parte applicant's case the injunctive orders issued by the chairperson were *ultra vires* in nature as the Business Premises Rent Tribunal lacks the power to issue injunctive orders and that the chairperson of the Tribunal overstepped her mandate by issuing injunctive orders against the Applicant herein. According to legal advice received by the applicant, the power, mandate and functions of the business Premises rent Tribunal have been clearly spelled out in the Business Premises Rent Tribunal Act Cap 301 and such power, mandate and function does not include the power to issue an injunction.
5. It is therefore contended that in view of the foregoing, the decision of the 1<sup>st</sup> Respondent herein smacks of impropriety, is absurd, arbitrary, *ultra vires*, capricious, unjust and in flagrant breach of the rules of natural justice and the applicant is certainly apprehensive that he shall be occasioned a travesty of justice if the said orders continue in place unless application is heard and dispensed with urgently. In his view, he stand to suffer immense injustice and irreparable harm hence it is only fair and in the interest of justice that the said application be heard.

#### **RESPONDENTS' CASE**

6. In opposition to the application the interested parties filed the following grounds of opposition:
  - i. **The respondent has and had the requisite jurisdiction to hear, determine the matter in question and grant the ex parte injunctive orders as it did and the applicant has not demonstrate any case as to why an order of certiorari should be issued as against the respondent's decision.**
  - ii. **That Judicial review proceedings purely deal with the procedure and process of decision making and not the merits and or/substance of the case.**
  - iii. **The applicant has failed to pursue the available remedies in law and is only abusing the court process.**
  - iv. **The application is scandalous, frivolous and vexatious.**

## **EX PARTE APPLICANT'S SUBMISSIONS**

7. On behalf of the ex parte applicants it is submitted while reiterating the contents of the verifying affidavit that the respondents acted in excess of their powers by issuing the impugned orders since the mandate of the chairman of the 1<sup>st</sup> respondent under Cap 301 does not include the power to issue an injunction. In support of this submission the applicant relied on **Paul Imison vs. AG & 3 Others Misc. Civil Application No. 1604 of 2003, R vs. LCC ex parte Entertainments Protection Association [1931] 2 KB 215, Re Gilmores Application [1957] 1 QB 574, Captain Geoffrey Kujoga Murungi vs. The AG, Kenneth Stanley Njindo Matiba vs. Daniel Toroitich Arap Moi** and submitted that the injunctive orders of the 1<sup>st</sup> respondent have no legal validity due to the fact that they fall outside the limit of law and are thus substantively *ultra vires*.
8. It is submitted that the Tribunal's powers under section 12 of the said Act do not include injunctive powers and reliance for this submission is placed on **Josephat Thuo Githachuri T/A Kiagiri Building Contractors vs. Parkview Properties [2005] eKLR, Sammy Kipruto Tonui vs. Jeremiah Koech & Another Civil Suit No. 43 of 2008.**
9. The applicant contends that though under Order 40 rule 4(2) an ex parte order cannot be issued for more than 14 days, in this case ex parte orders were issued for a period of 44 days hence the respondents acted in excess of powers and unprocedurally.
10. It is therefore submitted that the application ought to be granted.

## **RESPONDENTS' SUBMISSIONS**

11. On behalf of the respondents it was submitted that since the main purpose of the Act is to ensure protection of tenants of a controlled tenancy, the 1<sup>st</sup> respondent had the powers under section 12 of the Act to adjudicate the matter before it. It is submitted that what will be the purpose of entertaining and investigating a complaint if the tribunal cannot issue orders to preserve the status quo pending the hearing and determination of the suit? In support of this submission reliance is placed on **Republic vs. The Chairperson Business Premises Rent Tribunal exp Baobab Beach Resort Ltd & Another Mombasa HCMA No. 26 of 2010, Republic vs. The Chairman Business Premises Rent Tribunal exp Velji Premchand Shah [2012] eKLR, Republic vs. The Chairman Business Premises Rent Tribunal exp Kenya Safari Lodges & Hotels Ltd [2012] eKLR, Republic vs. Chairman Business Premises Rent Tribunal & 2 Others exp Piedmont Investment Ltd [2012] eKLR and Kenya Safari Lodges vs. Business Premises Rent Tribunal and Hotels Limited [2012] eKLR.**
12. It is further submitted that the orders of judicial review being discretionary, the court may refuse the same even if merited if the court finds that the same are not the most efficacious in the interest of justice and citing **Republic vs. Business Premises Tribunal ex parte Jubilee Insurance Company of Kenya Ltd [2012] eKLR and Republic vs. Commissioner of Customs Services ex parte Africa K-link International Ltd [2012] eKLR,** it is submitted that a party dissatisfied with the Tribunal's findings is at liberty to either seek a review or lodge an appeal against the same.

## **DETERMINATION**

13. In this case, the orders which the applicant seeks to quash were granted ex parte. It is not in doubt that the said orders were injunctive orders. **Simpson and Chesoni, JJ** (as they were) in **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195** dealt *in extenso* with the provisions of section 12 of the said Act. **Chesoni, J** on his part expressed himself as follows:

**“The tribunal is a creature of statute and 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 since its powers are expressed and cannot be implied.... .... The powers of the tribunal are contained in section 12(1) of the Act and anything not spelled out to be done by the tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under section 12(1)(a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the tribunal is to hear and determine references made to it**

under section 6 of the Act. Section 9 of the Act does not give any powers to the tribunal, but merely states what the tribunal may do within its area of jurisdiction..... It would be erroneous to think that section 12(4) confers on the tribunal any extra jurisdiction to that given by and under the Act elsewhere. For example it is not within the tribunal's jurisdiction to deal with criminal acts committed in relation to any tenancy nor is it within its jurisdiction to entertain an action for damages for trespass. These are matters for the courts and the tribunal cannot by way of a complaint to it by the landlord or tenant purport to deal with such matters. Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy.... The Act uses the words "any complaint" and the only qualification is that it must be "relating to a controlled tenancy".

14. In Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No. 205 Of 1995, the Court of Appeal held that a controlled tenant confronted with an illegal threat of forcible eviction cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. It follows that by granting orders of injunction the 1<sup>st</sup> respondent acted outside its mandate. The respondents appear to appreciate this decision but contend that there are decisions of the High Court to the contrary. With due respect the decisions of the High Court cannot override the decision of the Court of Appeal and unless it is shown that the decision of the Court of Appeal was made per incuriam or that the facts are distinguishable, the Court of Appeal decision is binding on this Court despite the misgivings this Court might have with respect thereof. As was stated by **Omolo, JA** in Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 Others Civil Appeal No. 238 of 2003:

**"The learned judge of the High Court had no jurisdiction to over-rule a decision of the Court of Appeal even if she disagrees with the decision and the comments in her judgement must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. Like all other judges in her position, under the doctrine of precedent, she is bound by the decision of the Court of Appeal even if she may not approve of a particular decision and any attempts to over-rule or side-step the court's decisions can only result in unnecessary costs to the parties involved in the litigation."**

15. This position was restated in Cassell & Co. Ltd vs. Broome & Another [1972] AC 1072 in which the Court held:

**"The fact is and I hope it will never be necessary to say so again, that in the hierarchical system of the courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of higher tiers. Where decisions manifestly conflict, the decision in *Young vs. Bristol Aeroplane Co. Ltd [1944] KB 718* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously"**

16. The rationale for this is to be found in **Musinga, J's** judgement (as he then was) in Rift Valley Sports Club vs. Patrick James Ocholla (supra) in which the learned Judge expressed himself as follows:

**"The learned magistrate trashed such a forceful decision of the Court of Appeal by failing to give it any consideration at all and proceeded to grant an injunction in a ruling which was devoid of any legal reasoning. A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of *stare decisis* is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five judge binding decision without citing any**

reasons for doing so.”

17. One cannot bring this discussion to an end without referring to the wise words of **Sir Charles Newbold** in the case of **Dodhia vs. National & Grindlays Bank Limited and Another [1970] EA 195**. The learned President of the East African Court of Appeal had this to say:

**“I accept that a system of law requires a considerable degree of certainty and uniformity and that such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision”.**

18. Apart from that Order 40 Rule 4(2) of the Civil Procedure Rules provides:

***An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.***

19. In **Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332**, the Court of Appeal held that ex-parte injunction orders if granted for more than 14 days are of no legal effect and cannot be extended. It follows that even if the 1<sup>st</sup> Respondent had powers to grant the orders of injunction, it had no powers to grant such orders ex parte for a period of more than 14 days. To grant such orders was without jurisdiction.

20. I must however agree with the respondents 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 apply for setting aside the same would be less convenient or otherwise less appropriate, ex parte orders being provisional in nature, the adversely affected party ought to apply for them to be set aside before invoking the judicial review jurisdiction. That position, however, applies to situations where the orders are irregular. Where orders which are granted are without jurisdiction, the same are null and void and the position is that if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172**.

21. It was in light of the foregoing that **Nyamu, J** (as he then was) in **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** expressed himself as follows:

**“Judicial review deals with decisions and the decision making process and where the award has merged with the Judgement and no certiorari is sought against the Judgement an order prohibiting further steps in enforcing the Judgement, decree, or order would only hang in the air without an order for certiorari against the award and the Judgement.....If an award is made without jurisdiction, it is a nullity and anything out of a nullity is a nullity due to the maxim *ex nihilo nihil fit* – out of nothing comes nothing.....Despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.”**

## **ORDER**

22. In the premises the Notice of Motion dated 8<sup>th</sup> January 2012 succeeds and an order of Certiorari is hereby issued removing the injunctive orders of the 1<sup>st</sup> respondent issued on the 17<sup>th</sup> of October 2012 to this Court and the same are hereby quashed. However in light of the fact that the applicant

could have opted to apply for the setting aside of the same without necessarily instituting these proceedings there will be no order as to costs.

**Dated at Nairobi this 5<sup>th</sup> day of July 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Ms Chege for Mr Wanga for the Respondent:***