



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 74 OF 2020

WARUGU HOLDINGS LIMITED.....PLAINTIFF

VERSUS

ANNE NJOKI KIUKA & OTHERS.....DEFENDANTS

RULING

(Application for leave to commence judicial review proceedings for certiorari and prohibition; order sought to be quashed was issued by the Business Premises Rent Tribunal in February 2020; this application being made in October 2020 close to eight months after the order; Order 53 Rule 2, requiring such application to be made within 6 months of the order; this being out of time; contention of the ex-parte applicant that the Tribunal has no jurisdiction being a matter that is best first raised before the Tribunal for the Tribunal to determine the issue of jurisdiction and there being a right of appeal; leave denied; application dismissed)

1. What is before me is an application dated and filed on 2 October 2020 seeking leave to commence judicial review proceedings for the following substantive orders (slightly paraphrased for brevity) :-

a) A declaration that the decision and/or order made and/or issued by the Chairman of the Business Premises Rent Tribunal in BPRT Case No. 61 of 2020 on the 14th February 2020 is ultra vires and is invalid and void and of no effect for the reasons that the 1st respondent dealt with a matter which is outside the scope of powers conferred upon it under Section 12 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, CAP 301, whereupon the Chairman is restricted to hear and determine matters in relation to restricted tenancies.

b) Certiorari for the purpose of being quashed the decision of 14 February 2020.

c) Prohibition to restrain the 1st respondent from hearing and determining the case BPRT Case No. 61 of 2020 (Anne Njoki Kiuka vs Warungu Holdings Limited)

2. The application is accompanied by the usual Statutory Statement and an affidavit of the ex parte applicant. I have gone through them.

3. In a nutshell, the ex parte applicant is landlord of the interested party herein/tenant with the tenant paying a monthly rent of KShs. 50,000/=. It is averred that they have a written lease for 5 years and 6 months dated 1 September 2018. It is further the claim of the ex parte applicant that the interested party has been in arrears of rent and has an outstanding sum of KShs. 200,000/=. The tenant, filed a reference, being the case BPRT No. 61 of 2020, before the Business Premises Rent Tribunal (BPRT) established under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, CAP 301, Laws of Kenya (CAP 301), through which she claimed that the landlord is irregularly altering the terms of their lease agreement. This suit before the BPRT was commenced on 14 February 2020. The matter was placed before the Chairman of the Tribunal where the following orders were made :-

a. Prayers 1, 2 and 5 of the notice of motion dated 14th February, 2020 are granted that is to say :-

(i) The matter is certified as urgent.

(ii) The Landlord/Respondent either by itself, its servants and/or agents is restrained from denying the applicant/tenant access and full use of the business premises known as Mombasa/Block XX/280 or otherwise interfering with the Tenant's tenancy pending the hearing and determination of this application inter-partes.

(iii) The O.C.S Central Police Station Mombasa to ensure compliance and that peace prevails.

b. Costs in the cause.

c. Hearing on 2nd June, 2020 at Mombasa Law Courts.

4. It is the above order which the ex-parte applicant wishes to be declared ultra vires and to be quashed. It is of course the position of the ex-parte applicant that the BPRT does not have jurisdiction in the matter, its contention being, that this is not a controlled tenancy as prescribed by Section 2 (1) of CAP 301.

5. Leave to commence the proceedings in the nature intended needs to be first given as provided by Order 53 Rule 1 (1) which states as follows :-

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

6. It is apparent that the requirement for leave is so as to weed out matters that are not suited to be heard by way of judicial review. I have considered the application and I have to decline it.

7. Firstly, the order sought to be quashed was made on 17 February 2020. It is now October 2020 and I am of the view that the prayer for certiorari is now time barred given the provisions of Order 53 Rule 2 which is drawn as follows :-

2. Time for applying for certiorari in certain cases [Order 53, rule 2.]

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

8. What is sought to be quashed in these proceedings is an order of the Tribunal. From a reading of Order 53 Rule 2 above, if one wishes to apply for an order of certiorari to quash an order, then the application needs to be filed within 6 months of the date of the order. Since the order herein was issued on 17 February 2020, if the ex-parte applicant wished to file for an order of certiorari, it needed to file the same by 17 August 2020, which is when 6 months lapsed. Clearly, this application is out of time in so far as it seeks an order for certiorari.

9. The other order sought is a prohibition, to bar the Tribunal from further proceeding with the suit. Again, the basis of this is that the Tribunal does not have jurisdiction. Now, the ex-parte applicant has an avenue of making an application before the Tribunal, so that the Tribunal can first determine whether the subject matter before it is one that allows the Tribunal to exercise jurisdiction. The Tribunal has capacity to interrogate the agreement of the parties and make a ruling on whether or not it has jurisdiction. The ex-parte applicant first needs to exhaust that route. If aggrieved by the decision of the Tribunal, he has a right of appeal to this court. That to me is the proper path to take.

10. The prayer for a declaration is not really a prayer for judicial review but is certainly tied to the argument that the Tribunal has no jurisdiction, which I have already stated above, is a matter best brought before the Tribunal in the first instance.

11. For the above reasons, leave to commence the intended judicial review proceedings is denied.

12. This motion is dismissed, but there will be no orders as to costs.

13. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8 DAY OF OCTOBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA