



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Miscellaneous Civil Application 27 of 2010

REPUBLIC

VERSUS

THE CHAIRPERSON BUSINESS PREMISES RENT

TRIBUNAL AT NAIROBI (D. MOCHACHE)RESPONDENT

EX-PARTE

KENYA SAFARI LODGES & HOTELS LIMITEDAPPLICANT

AND

CROSS CULTURE CRAFTS LIMITEDINTERESTED PARTY

**IN THE MATTER OF: AN APPLICATION BY KENYA SAFARI LODGES AND HOTELS
LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF: THE LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING
ESTABLISHMENT) ACT, CAP. 301**

**IN THE MATTER OF: THE BUSINESS PREMISES RENT TRIBUNAL AT NAIROBI CASE
NO. 70 OF 2010 BETWEEN CROSS CULTURE CRAFTS LIMITED V KENYA SAFARI
LODGES AND HOTELS.**

AND

**IN THE MATTER OF: A DECISION OF THE CHAIRMAN OF THE BUSINESS PREMISES
RENT TRIBUNAL SITTING AT NAIROBI ON 4TH FEBRUARY 2010**

JUDGMENT

(1) Pursuant to leave granted by Hon. Justice M. Ibrahim on 17th February 2010, Kenya Safari Lodges & Hotels Ltd (the Applicant) has in the Notice of Motion dated 5th March 2010 sought the following Judicial Review orders-

(a) An Order of Certiorari to remove to the High Court for the purposes of quashing such of the proceedings as relate to the order made on 4th February 2010 and the said order in the case pending before the Business Premises Rent Tribunal at Nairobi in Tribunal case No. 70 of 2010 between Cross Culture Crafts Limited and Kenya safari Lodges and Hotels Limited (hereinafter referred to as “the said case”);

(b) An Order of Prohibition restraining the Business Premises Rent Tribunal from further proceeding with the said case or entertaining, proceeding, hearing, determining or otherwise dealing with any other complaint or case akin to that in the said case.

(2) The Grounds upon which the leave is sought are-

(a) The Business Premises Rent Tribunal did not (and does not) have the requisite statutory jurisdiction to issue an injunction or similar remedy, whether ex parte or otherwise;

(b) The Business Premises Rent Tribunal did not (and does not) have the requisite statutory jurisdiction to investigate, make any orders and/or grant any relief in respect of dispossession off or eviction from controlled premises;

(c) In receiving, entertaining, hearing and otherwise dealing with the said case, the Business Premises Rent Tribunal has acted without jurisdiction or alternatively outside or in excess of its statutory jurisdiction contrary to Sections 6, 9 and 12 of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act, Cap. 301;

(d) The Order made by the Business Premises Rent Tribunal on 4th February 2010 is ultra vires and a nullity ab initio.

(3) Cross Culture Crafts Limited (the Interested Party) is a tenant of the Applicant at premises in Mombasa Beach Hotel, Voi Safari Lodge and Ngulia Safari Lodge. Through a notice dated 25th November 2009 the Applicant asked the Interested Party to yield up possession of the premises by 31st January 2010. The position of the Applicant being that the tenancy was to expire on that day by effluxion of time. That letter is reproduced below-

“25th November 2009

BY REGISTERED POST AND BY SECURICOR

Cross Culture Crafts Limited

Mercantile House

Koinange Street

P O Box 56003-00200

NAIROBI

Dear Sirs,

MOMBASA BEACH HOTEL – GUEST FACILITIES SHOP VOI SAFARI LODGE – GUEST FACILITIES SHOP NGULIA SAFARI LODGE – GUEST FACILITIES SHOP

We refer to the lease agreement entered into by you on 11th January 2005 whereby we let you the above facilities for the term of 5 years from 1st February 2005 at the rents referred to therein payable quarterly.

As you are no doubt aware, this agreement will expire by effluxion of time on 31st January 2010.

We therefore write to request you to confirm that you will yield up the above facilities to us at the expiration of the said agreement on 31st January 2010.

Yours faithfully,

Kenya safari Lodges & Hotels Ltd.

**Susan Kiragu
GENERAL MANAGER**

c.c Finance manager – KSLH

Admn manager – KSLH

File”

(4) The Interested Party did not yield up possession, and it would seem, the Applicant locked up the premises at Mombasa Beach Hotel and Ngulia Safari Lodge. That spurred the Interested party to move the Business Premises Rent Tribunal through Case No. 70 of 2010 in which it obtained the following orders on 4th February 2010 –

(a) Matter certified urgent.

(b) The Landlord either by itself, its servants and or agents are restrained from harassing the tenant by closing the tenant’s business premises or threatening to evict the tenant pending hearing of the complaint inter-parties.

(c) The Landlord is ordered to open the tenant’s premises forthwith failure to do so the Tenant is authorized to break the locks and gain access under the supervision of the O.C.S.

(d) The O.C.S

1. Mtwapa Police Station

2. Mtito Andei Police Station

3. Voi Police Station to protect the tenant from harassment, ensure compliance and that peace prevails.

(e) To serve the Landlord within 3 days of hearing on 18th February 2010.

These are the orders in contention.

(5) The Respondent did not file any response while the Interested Party maintained that the tenancy it enjoyed was protected by the provisions of provisions of The landlord & Tenant (Shops, Hotels & Catering Establishment) Cap 301 (Hereinafter called “**The Act**”) and that the Tribunal had requisite jurisdiction to grant the above orders.

(6) Although the Applicant concedes that the Tenancy is a controlled Tenancy, it argues that the Tribunal did not have jurisdiction to issue the orders as it does not have jurisdiction to issue an injunction and could not deal with the dispute under section 12(4) of the Act as that provision is restricted to minor disputes. The Applicant cited the decisions in **Re Hebtulla Property Ltd. (1929) KLR 96, The Republic Vs- Nairobi Business Premises Rent Tribunal Others Ex parte Karasha (1979) KLR 197** and **Narshides & Company Ltd and Nyalii M. Conditioning and Refrigeration Services Ltd – Nairobi Civil Application No. 205 of 1995 (unreported)** to support that position.

(7) These are the issues the court must determine:-

- (i) **Did the Tribunal have jurisdiction to deal with the complaint before it?**
- (ii) **If the answer to (i) is in the affirmative, did the Tribunal have jurisdiction to make the order it did.**
- (iii) **Should this court exercise its discretion in favour of the applicant.**

(8) The proceedings that were commenced by the Interested Party before the Tribunal were said to be brought under section 12(4) of the Act. That section provides

“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”.

Finding support in Re Hebtulla and Karasha, the applicant proposes that a complaint contemplated in section 12(4) of The Act relates to minor matters. In Re Hebtulla Simpson J (as then was) said,

“In my opinion the “word” complaint is referable only to minor matters, such as the examples I mentioned in Choitram -Vs- Mystery Model Hair Saloon [1972] EA 525.”

In the Choitram case the Judge had given examples of these complaints to include **“complaints by the tenant of turning off water, obstruction of access, and other act of harassment by the Landlord calling for appropriate orders for their rectification or cessation but not including payment of compensation for any injury suffered.”**

(9) Chesoni J (as he then was) who sat with Simpson J in Re Hebtulla did not want to be drawn into making a firm decision as to whether sections 12(4) is limited to minor complaints only. This is what he said

“Whether section 12(4) is limited to minor complaints only I find it un-necessary to comment on as this is not the issue before us. Suffice it to say that the Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy.” (my emphasis)

Very recently, Muriithi J in Mombasa Misc. Civil Application (J.R.) No. 26 of 2010 Republic Vs- The Chairperson Business Premises Rent Tribunal at Mombasa (D. Mochache) Ex-parte Baobab Beach Resort (Mombasa Limited) and Monica Clara Schriel reflected on the view taken by Chesoni J.

“I agree with Chesoni J in Re Hebtulla case that the phrase area of jurisdiction under section 12 of the Act is to be construed to mean that the complaint must be about a matter the tribunal has jurisdiction to deal with and that the complaint filed under that sub section (4) thereof need not be restricted to simple matters as suggested by Simpson J in the same case and that the only qualification to the words “any complaint” is that it must be “relating to a controlled tenancy”. (my emphasis)

This departure is attractive as it gives a purposive interpretation of the Tribunal’s power to act in matters within its area of jurisdiction in line with the objective of the Act which is **“to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and from matters connected therewith and incidental thereto.”** In addition such an interpretation gives the Tribunal a clear guide as to its jurisdiction so that it does not have to repeatedly engage in a subjective assessment as to whether a complaint before it is minor or major.

(10) That said, this Court is able to resolve this dispute without delving any further into the **“minor”** or **“major”** debate. The Interested Party’s chief grievance to the Tribunal was that it could not access the premises because the Applicant had locked them. The Applicant had locked the premises at Mombasa

Beach Hotel and Ngulia Safari Lodge but with the stock, goods and property of the Interested Party still inside. This is what the Interested Party said in an affidavit sworn on 4th February 2010 on its behalf and filed before the Tribunal;

5. THAT in January 2010, the Respondent served the Applicant with a defective termination notice which was to take effect on 31st of January 2009 (sic) (Annexed herein and marked “GKG 1” is a copy of the aforesaid defective notice).

6. THAT on the basis of the aforesaid defective notice the Respondents have locked the Applicants business premises at Mombasa Beach Hotel and Ngulia Safari Lodge and thus denying it access.

7. THAT they have also threatened to evict the Applicant on the basis of the said defective notice. (my emphasis)

That is the only evidence made available to this Court by the parties in respect to the subsisting status. The status was that the Applicant had locked the premises but had not evicted the Interested Party from the premises. The effect of the Applicants action was to block the Interested Party from accessing the premises. The Interested Party, however, remained a protected tenant as it had not been dispossessed of the premises.

(11) In **Choitram** the Court was of the view that a complaint by a tenant that the landlord had obstructed access to leased premises was a complaint the Tribunal could deal with under the provisions of Section 12(4) of The Act. This is in contrast with the circumstances in **Re Hebtulla** and **Navasha** where the Tenants had been evicted. In those cases there was actual and completed dispossession. The view I take, and so it is my finding, is that the Tribunal had jurisdiction to deal with the Interested Party’s complaint under the provisions of Section 12(4).

(12) What this Court must now consider is whether the Tribunal could then issue the orders it did. It helps to reproduce the two substantive orders of 4th February 2010-

2. The Landlord either by itself, its servants and or agents are restrained from harassing the tenant pending hearing of the complaint inter-parties.

3. The Landlord is so ordered to open the tenant’s premises forthwith failure to do so the Tenant is authorized to break the locks and gain access under the supervision of the O.C.S.

(13) This Court accepts that the Court of Appeal in **Narshidas & Co Ltd** endorsed the decisions in **Re Hebtulla** and **Karasha** and upheld the position that the Business Premises Rent Tribunal has no jurisdiction to issue an injunction. The Court said as follows-

“What does a controlled tenant confronted with a threat of forcible eviction do? He 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. That Tribunal has no jurisdiction to do so as was held by that Court in the case of The Republic Vs Nairobi Business Premises Recent Tribunal & Others, Ex-parte Karasha (1979) KLR 147 and also in the case of Re Hebtulla Properties Limited (1979) KLR 96”.

(14) This Court is nevertheless of the view that the Tribunal would have jurisdiction to make an order preserving the status quo of a matter before it pending the hearing and determination of a reference or complaint under the Act. I identify with the sentiments of Muriithi, J in **Baobab Beach Resort (Mombasa) Ltd** when he expressed himself as follows-

“In my view, an order for status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order

for the preservation off the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo. I find that the Tribunal has among the orders that it may make on a complaint under section 12(4) of the Landlord and Tenant Act an order for status quo to hold the situation in the controlled tenancy until the determination of the proceedings filed thereon”.

(15) By ordering the landlord to open the premises, the Tribunal was making, an order that a controlled Tenancy which was still subsisting remains be protected and preserved. The effect of the order was to preserve the status of the Tenancy. This is a preservatory order which the Tribunal had jurisdiction to issue. For this reason I would decline to issue the prayers sought by the Judicial Review application.

(16) There is perhaps another reason why the Applicant is not deserving of the prayers. Judicial Review in a Discretionary jurisdiction. So there will be occasion when the court will refuse to grant a Judicial Review Remedy even when the Applicant has proved that a public body has acted Ultra vires. That is, **“the court may find some Act to be unlawful but nevertheless decline to intervene”** (Wade & Forsyth on **“Administrative law”** 10th Edition).

(17) It is common ground that the tenancy between the Applicant and The Interested Party was protected under the provisions of the Act. This was expressly conceded by the Applicant’s counsel. It is not in dispute that the Applicant attempted to terminate that tenancy without regard to the procedure provided under the Act. The conduct of the Applicant in locking the premises was highhanded and a flagrant breach of the law. There is something wrong, I think, for the Applicant to urge that the Tribunal acted Ultra Vires when it set in motion the controversy by acting unlawfully. This court would have been reluctant to intervene even if it had found that the Tribunal acted ultra vires. But as said earlier, I have found that the Tribunal acted within jurisdiction.

(18) The upshot is that the motion dated 5th March 2010 is hereby dismissed with costs.

Dated and delivered at Mombasa this 6th day of September, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Maithya for Applicant

Magiya for Lutta for Respondent

Magiya for The Interested Party

Court clerk - Moriasi

F. TUIYOTT
JUDGE