REPUBLIC OF KENYA

IN THE HIGH AT NAIROBI

MISCELLANEOUS CASE NO 336 OF 1978

HEBTULLA PROPERTIES LTD .....APPLICANT

VERSUS

BUSINESS PREMISES RENT TRIBUNAL NAIROBI.....DEFENDANT

ELECTRO SERVICE & EQUIPMENT LTD .....INTERESTED PARTY

JUDGMENT

This is an application for an order of prohibition prohibiting the Business Premises Rent Tribunal, Nairobi, from proceeding with further hearing of a complaint lodged in the tribunal by a tenant alleging forcible dispossession of controlled premises by the landlord ("the applicant") and wrongful distress.

The relevant facts, briefly stated, are as follows. The applicant gave notice to the tenant ("the interested party") under section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act ("the Act") increasing the rent and requiring payment of other charges, such as water and conservancy, with effect from 1st November 1977. The interested party failed to give notice of unwillingness to comply or to file a reference under section 6 of the Act. The notice is dated 8th August 1977.

On 19th July 1977 the interested party had paid six months' rent to 30th June. No rent having been paid for the following seven months (including three months at the new rate) the applicant on 5th January 1978 instructed bailiffs to distrain for rent. This was done.

The interested party's advocates wrote to the bailiffs and to the applicant alleging wrongful and unlawful distress, and sending a cheque for the full amount of the arrears of rent and the rent for February. The applicants' advocate denied the allegations, returned the cheque and (in a letter dated 1st March 1978) requested payment only on the deficiency (the net sum realised by distress being only slightly less than the rent due) and the rent due for January and February. No reply was received and, on 18th April 1978, the applicant's advocates in another letter wrote, "Your clients seem to have abandoned the tenancy, having ordered the Post Office to disconnect their telephone as also by their other conduct". They inquired whether the interested party intended to pay rent due up to the end of April and resume the tenancy, failing which it would be assumed that the tenancy had been abandoned and the premises would be relet from 1st May.

On 20th April the interested party's advocates replied that there was no question of abandoning the tenancy adding, "The reference to other conduct is not understood. Please elaborate". An action for damages for wrongful distress and wrongful sale of property not belonging to the interested party was being filed, they said. The cheque for rent up to the end of February was again forwarded. On 28th April this cheque was again rejected with the words, "No cheques can be accepted from your clients". The request to elaborate was ignored.

No further payments of rent were made and nothing further appears to have happened until 7th October 1978 when the interested party's advocates filed a complaint to the tribunal under section 12(4) of the Act alleging that:

> The [applicant] has forcibly taken possession of the [interested party's] premises without terminating its tenancy or obtaining any order for possession from the tribunal under the guise of a pretended distress for rent and its distraint.

In the meantime the premises had been relet.

The hearing was listed for 30th November and on 28th November Mr D N Khanna for the applicant filed a notice of preliminary objection to the effect that the proceedings were misconceived and without jurisdiction. The tribunal decided to deal with the eviction alone and to hear any legal arguments later. The interested party gave evidence and, at the close of his examination-in-chief, the hearing was adjourned to 18th January 1979. On 22nd December 1978, on the application of Mr Khanna, leave was granted by this Court to make the present application.

Prohibition lies where there is a lack of jurisdiction and the proceedings in question are incomplete. A person against whom a non-existent jurisdiction is invoked may move at once for prohibition, without waiting until the tribunal decides for itself whether it has jurisdiction.

This was not in dispute. Mr Khanna said that the tribunal would not listen to his objection and that his only remedy was to seek an order of prohibition. The tribunal, Mr Khanna said, committed two fundamental breaches of natural justice. It refused to hear the preliminary point with respect to its jurisdiction first; and it proceeded to hear the complaint without giving a person affected, the tenant in possession, an opportunity of being heard. It assumed the task of remedying a tort for which it had no jurisdiction.

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He submitted that a complaint as envisaged in section 12(4) of the Act relates to minor matters such as turning off water, obstruction of access and other acts of harassment calling for orders of rectification or cessation and involves no more than mere physical investigation. He relied on three reported decisions of the High Court. The first of these was *Pritam v Ratilal* [1972] EA 560 in which Madan J held that section 12(4) did not entitle the tribunal to make an order for eviction and envisaged complaints other than eviction, such as a landlord turning off the water tap. The next was *Choitram v Mystery Model Hair Saloon* [1972] EA 525 in which the judgment as reported is wrongly attributed to Madan J. In that case I said (at page 530):

> I am of the opinion however that the term "complaints" is intended only to cover complaints of a minor character.
>
> The term "investigate" does not necessarily imply a hearing. Such complaints would include complaints by the tenant of the turning off of water, obstruction of access, and other acts of harassment by the landlord calling for appropriate orders for their rectification or cessation but not including payment of compensation for any injury suffered.

In *Machenje v Kibarabara* [1973] EA 481 Sheridan J said that he derived considerable assistance from the foregoing passage.

Mr Wekesa for the tribunal, arguing with commendable clarity and succinctness, said that the

complainant before the tribunal was still a tenant of controlled premises, the applicant having taken no steps to terminate the tenancy by a reference to the tribunal. The interested party, being unable to come to the tribunal by way of a reference under section 4(3), could only do so by way of complaint under section 12(4). He relied on the *Choitram* case. This, he said, was a minor complaint of obstruction of access and harassment by the landlord. The decision did not exclude investigation through a hearing. He distinguished the *Pritam* case which the tenancy had been legally terminated and the relationship of landlord and tenant no longer existed. The object of the Act was to protect tenants from eviction and the applicant in the present case, he said, had sought to evict outside the provisions of the Act and to defeat its purposes. The tribunal deferred argument on jurisdiction until the facts were clear. The record did not show that Mr Khanna specifically asked for the preliminary point to be argued first.

Mr Satish Gautama, appearing for the interested party, said that the queston of abandonment had to be considered by the tribunal whose jurisdiction depended on whether or not his client was still tenant. It was not required to hear a tenant who had been illegally implanted in the premises by the landlord. The application was premature.

He associated himself with everything Mr Wekesa had said, but would go further. Parliament intended that the tribunal should be the sole forum for such disputes and the Courts should lean towards a construction which was not repugnant to common sense. The applicant had broken the law and the interested party should be able to go to the tribunal and not be obliged to go to the trouble and expense of instituting court proceedings. Section 12(1) gave wide powers to the tribunal to deal with specific matters. Subsection 4 was enacted to provide for unforeseen matters relating directly to tenancy questions and was intended to remove any doubt arising from the application to subsection (1) of the *ejusdem generis* rule. The restricted meaning of "reference" in section 2 of the Act did not apply where the context otherwise required, and a complaint was also a reference. The words "of a minor character" in my judgment in the *Choitram* case were *obiter* and the *Pritam* case had nothing in common with the present case.

It will be convenient first to consider the record of the tribunal's proceedings to determine the meaning and intent of its ruling.

Mr Khanna's notice of a preliminary objection contained a number of grounds. At the commencement of the hearing Mr Gautama is recorded as saying "This is a complaint on eviction and file under the provisions of the Act". Then, before he could go further, Mr Khanna (according to the record) said "Notice of increase of rent 8th August 1977. This was done under the Act". He then apparently proceeded to set out the facts. He must have been in the process of arguing his preliminary objection (notice of which was in the hands of the tribunal). Before he reached the real substance of his objection the tribunal said:

> We will deal with eviction alone. The [interested party] alleges that he was illegally evicted and has filed a complaint. Mr Khanna contends that there was no eviction. The Court feels that it can take evidence on eviction and legal arguments not related to eviction may be taken later.

Mr Gautama and Mr Wekesa contended that by this order the tribunal meant that evidence was required to enable it to decide whether or not the premises had been abandoned in order to determine whether or not it had jurisdiction; but that is clearly not so. It was deferring the entire argument on jurisdiction until after it had decided whether or not the interested party had been unlawfully evicted.

If the tribunal had been allowed to continue the hearing it was by no means improbable that the result would have been an order of possession in favour of the interested party before it and the eviction of the tenant then in occupation. Mr Khanna therefore applied for an order of prohibition, a step which in the circumstances was fully justified believing as he did that the tribunal had no jurisdiction to hear the "complaint" of forcible dispossession by the applicant. There were three High Court decisions in his favour by which the tribunal was bound.

Were these cases correctly decided? Mr Gautama urged us to consider the long title and the system of the Act as well as the use of the word "reference" in the regulations. It must, however, be borne in mind that

the tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute. As for the regulations, they have obviously been carelessly drafted without sufficient attention to the contents of the Act itself and can afford no assistance in the interpretation of the Act.

Section 12(1) reads as follows:

> A tribunal shall, in relation to its area of jurisdiction, have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power … [and there follow a number of specific powers].

The tribunal's powers are restricted to the "area of its jurisdiction", that is the determination of references made to it under section 6. These can be made only by a receiving party, that is, a tenant who wishes to oppose a notice of termination or alteration of the terms or conditions of his tenancy or a landlord who wishes to oppose a notice by a tenant seeking the reassessment of rent or the alteration of any terms and conditions of the tenancy.

It has power to do "all things which it is required or empowered to do" under the Act. This may be tautological, but it must refer to sections 5(3) and 6, the provisions of which are procedural only, and to the provisions of section 9, which set out what the tribunal can do on a reference.

In addition to these powers the tribunal has the specific powers contained in paragraphs (a) to (n) of section 12(1). The expression "all things", being qualified by the words "which it is required or empowered to do by or under the provisions of this Act", no room is left for the application of the *ejusdem generis* rule.

The specific powers include (paragraph (e) the power to make an order for the recovery of possession from a tenant, or indeed from any person in occupation. Such an order would be an order made on the application of the landlord. No corresponding power is given to make an order on the application of a tenant who has been forcibly dispossessed by a landlord.

Section 12(4) 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.

The powers specifically conferred can be exercised on a reference which is defined in section 2 as "a reference to a tribunal under section 6 of this Act".

In addition, the tribunal may investigate any complaint made by a landlord or tenant. A clear distinction is made throughout the Act between a "reference" and a "complaint".

Section 15(1) reads as follows:

> Any party to a reference aggrieved by any determination or order of a tribunal made therein may within thirty days after the date of such determination or order, appeal to the High Court…

There follows a proviso which is not material for the purposes of this application; but the following proviso to section 15(4) is relevant:

> Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal.

A party to a reference has a right of appeal to the High Court against any determination or order made therein, but the maker of a mere complaint has no such right. Mr Gautama argued that, in this context,

"reference" must be given a wider meaning and must include a complaint; but in a provision conferring a right of appeal I have no doubt that word "reference" was used in its technical meaning as defined in section 2.

For this view I derive some support from the wording of the appeal provisions before they were amended by Act No 2 of 1970. Appeal then lay to the Court of a Senior Resident Magistrate or Resident Magistrate, with a further and final appeal to the High Court. Section 15(1) then commenced, "any party aggrieved by the determination or order of a tribunal may within fourteen days appeal against the same …".

Subsections (1) and (4) of section 12 as quoted above have remained unchanged.

Thus, until 1970, there was a right of appeal against an order made, not only on a reference, but also on a complaint. In inserting the words " to a reference" after the words "any party" and "made therein" after "tribunal" the Legislature must have had some object in mind; and that object could only have been to restrict the right of appeal to the High Court to determinations and orders made on a reference. The Legislature would not have removed the right of appeal to the High Court against orders made on a complaint if the term "complaint" had been intended to include such matters as forcible dispossession by the landlord, an act which amounts to the tort of trespass.

In my opinion the word "complaint" is referable only to minor matters, such as the examples I mentioned in *Choitram v Mystery Model Hair Saloon* [1972] EA 525. I cannot accept Mr Wekesa's argument that the complaint in this case is merely one of obstruction of access. It is alleged that the landlord "has forcibly taken possession of the tenant's premises".

Even if I am wrong in my interpretation of the Act the tribunal's denial of a hearing on the preliminary objections submitted by Mr Khanna and its proceeding to hear a matter behind the back of the tenant in possession would alone entitle the applicant to an order of prohibition. I would grant order of prohibition as prayed.

The tribunal and the interested party have both appeared by counsel and have opposed the applications; counsel for the interested party having done so at considerable length. The tribunal had the preliminary objection before it and declined to hear it. It made the impugned order without any application or prompting by counsel for the interested party. It acted in disregard of elementary principles and I think that it was a sufficiently flagrant instance to warrant an order for payment by it of one-half of the applicant's costs. I would make no order for costs on the higher scale as requested by Mr Khanna.

As Chesoni J agrees, the order of prohibition sought is granted as prayed and the applicant's taxed costs will be paid jointly by the tribunal and the interested party in the proportion of one-half each. These costs will not be on the higher scale. The costs of the typed record provided during the hearing to be allowed as part of the costs.

Chesoni J. The applicant who at the time of filing this application was the owner and landlord of a multi-storeyed building situate along Tom Mboya Street, and known as Rajab Manzil, gave a notice to the interested party, Electro Service & Equipment Ltd, which was then the applicant's tenant in Rajab Manzil Building, under section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The notice, which is dated 8th August 1977, was for alterations of terms and conititons of the tenancy which involved increased rent and, in addition, payment of the interested party's share of site value tax, water and conservancy charges and all other outgoings. The rent and charges were to be paid in advance. The grounds on which the alterations were sought were: firstly, that the existing rent was much below that expected to be obtained in the open market; and, secondly, that the other charges were in keeping with the trends of the open market. There was no reference to the Business Premises Rent Tribunal under section 6 of the Act by the interested party.

The interested party was, by December 1977, in arrears of rent for seven months. On 5th January 1978, on the applicant's instructions the bailiffs distrained for rent. There was thereafter an exchange of

correspondence between the advocates for the parties which I do not think that I need to detail here. The premises were relet on 1st May, 1978. The next important step or development in the matter is the reference filed by the interested party in the tribunal under section 12(4) of the Act. That reference is dated 7th October 1978, and it says:

> These complaint concerns the landlord/tenant in that the [applicant] has forcibly taken possession of the [interested party's] premises without terminating its tenancy or obtaining any order for possession from the tribunal under the guise of pretended distress for rent and its distraint.

(I have emphasised what in my opinion was the interested party's complaint which it was asking the tribunal to deal with).

On 16th November 1978, the tribunal issued a hearing notice to the parties for 30th November 1978; and on 28th November 1978 Mr DN Khanna for the applicant filed a notice of preliminary objection. It is not necessary to set out that notice in its entirety, but suffice to say that it clearly stated:

> The proceedings by the former tenant are misconceived and as an action of trespass or dispossession or damages, or for recovery of possession from a landlord by a tenant (the reverse of that prescribed by the Act), are not the subject of any powers in the Tribunal under section 12(1) of the Act. Such powers cannot be assumed by way of "complaint". The tribunal has no power to determine whether there is any subsisting tenancy at all under any of the paragraphs of section 12(1).

When the matter came up for hearing before the tribunal, after hearing Messrs Gautama and Khanna in the opening, the tribunal said:

> We will deal with eviction alone. The [interested party] alleges that he was illegally evicted and has filed a complaint. Mr Khanna contends that there was no eviction. The Court feels that it can take evidence on eviction and legal arguments not related to eviction may be taken later.

Mr S Gautama then proceeded to call the only witness for the interested party. There was no time for Mr Khanna to cross-examine the witness, and the matter was adjourned to January 1979.

On 22nd December 1978, Mr Khanna applied to the High Court for leave to apply for an order of prohibition to prohibit the tribunal from proceeding with the further hearing of the complaint by the interested party. There are five grounds for the application. These grounds can be grouped into two that is: (a) the tribunal was in breach of the rules of natural justice in shutting out the preliminary objection, and it would be a breach of the rules of natural justice to make an order against the tenant now in possession without impleading and giving him a hearing; and (b) the tribunal being a creature of the statute has only the powers expressly conferred, which powers are strictly construed; it cannot assume powers by implication and has no inherent powers like the High Court. Thus it lacked jurisdiction to hear or adjudicate upon the complaint, so far as it consisted entirely of matters upon which no jurisdiction has been expressly conferred upon it by the statute in respect of wrongful or illegal distress, trespass, forcible or wrongful dispossession; and cannot grant reliefs by way of damages, possession or repossession (though these reliefs were not sought), and determine whether at the material time the landlord/tenant relationship subsisted between the parties.

In my view these grounds for the relief sought have very great force and the matter requires a careful consideration.

Prohibition is one of the devices by which the High Court, in this country, superintends the exercise by any body of persons (like tribunals, and administrative governmental bodies which have legal authority to determine questions affecting the rights of subjects and which have a duty to act judicially) of their multifarious functions. Thus prohibition may issue against inferior courts, tribunals, local authorities and other statutory bodies and even individual officers discharging public functions. As Professor SA de Smith states in his book *Judicial Review of Administrative Action* (2nd Edn) at page 390, the phrase

"legal authority" generally means statutory authority that is invested by statute. There must be something remaining to be done that the Court can prohibit for an order of prohibition to issue. If I may use the words of Professor de Smith in (*ibid* at page 438) "the Courts will not issue orders that cannot possibly be enforced." Hence, prohibition will not lie to a tribunal if nothing remains to be done by it that can be prohibited. Nor will the Courts entertain proceedings that do not warrant the exercise of a corrective jurisdiction. Prohibition will not be awarded against persons who have taken it upon themselves to assume a jurisdiction without any vestige of legal authority.

However (*ibid*, at page 436):

> the existence of right of appeal to the Courts from a tribunal does not deprive the Courts of power to award prohibition to restrain the tribunal from acting outside its jurisdiction. Nor is the applicant obliged to have exhausted prescribed administrative means of redress before having recourse to Courts.

There cannot be a comprehensive list of acts in respect of which prohibition will issue, but to put it in the words of Atkin L J in the English case *R v Electricity Commissioners, ex parte London Electricity Joint Committee Co* (1920) *Ltd* [1924] 1 KB 171, 204, 205, prohibition may issue wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially exceed their legal authority. An inferior tribunal is such a body of persons and it has a duty to act judicially. Such inferior tribunal exceeds its legal authority when there is want or excess of jurisdiction or when it acts in breach of the rules of natural justice. For example, where the tribunal is without competence by reason of the status of the parties or the nature of the subject matter there is a total want of jurisdiction. In such a case prohibition will issue if there remains something to be done which the Court can prohibit. Where an inferior tribunal lacks or exceeds jurisdiction a prohibition *quousque* is awarded, and it operates until the tribunal corrects its conduct by containing itself within the bounds of its jurisdiction. Indeed, prohibition is a discretionary remedy and there are discretionary bars to its being awarded. These bars are waiver, which may be the result of the applicant's failure to object to the jurisdictional defect; acquiescence, which is participation in the proceedings by the applicant without taking objection to the jurisdiction of the tribunal immediately the facts giving rise for the objection are fully known to the applicant; laches, which is unreasonable delay in applying for the remedy sought as equity aids the vigilant; and conduct of the applicant, which may have been such as to disentitle him to the remedy. For example, where the applicant has suppressed or concealed facts in his affidavit he may lose the remedy. The applicant in this case took objection to the tribunal's lack of jurisdiction immediately, and applied for the remedy sought at once. It acted vigilantly. There is nothing in the applicant's conduct that would disentitle it to the remedy.

As correctly pointed out by Mr Khanna, the tribunal is a creature of statute. It drives its power from the statute that creates it. Its jurisdiction being limited by statute it can do only those things which the statute has empowered it to do. Its powers are expressed and cannot be implied.

The complaint before the tribunal was reduced into writing and is precise, namely that "the [applicant] has forcibly taken possession of the [interested party's] premises." This complaint cannot be narrowed or elaborated. It is not a minor complaint of obstruction, or access, or harassment by the applicant, as Mr Wekesa for the tribunal sought to put it. It is a complaint of wrongful or forcible possession by the applicant; nothing more and nothing less. The interested party might have been far from willing to surrender possession, but that is beside the point. The tribunal clearly said "We will deal with eviction alone. The [interested party] alleges that he was illegally evicted and has filed a complaint …" The issue, in my opinion is whether the tribunal had power to entertain a complaint of forcible or wrongful possession? If it had, then prohibition is not issuable. If it had not, then prohibition must issue. The position as to the tribunal's powers could not be clearer than the act which creates it has put it. Section 12(1) of the Act expressly says:

> The tribunal shall, in relation to its area jurisdiction, have power to do all things which it is required or empowered to do by or under the provisions of this Act … [emphasis supplied].

Thus anything not spelled out by the Act as 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 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 does not give any powers to the tribunal, but merely states what the tribunal may do within its area of jurisdiction (that is when dealing with a reference). Section 12(4) reads:

> 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.

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 damage for trespass. These are matters for the Courts. The tribunal cannot by way of a complaint to it by a landlord or tenant purport to deal with such matters. Section 12(4) 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. Whether section 12(4) is limited to minor complaints only I find it unnecessary 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". The cases *Choitram v Mystery Model Hair Saloon* [1972] EA 525 which was tried by Simpson J (although wrongly attributed to Madan J) and *Pritam v Ratilal* [1972] EA 560 heard by Madan J, were not cases where prohibition was the remedy sought. They were decided on their own facts and for different remedies which cannot be married with an order of prohibition. That is all I can say about those cases and I do not intend to, and will not consider them. They are distinguishable. Section 12 (1) (e) of the Act reads:

> The tribunal shall … have power to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits …

The "recovery of possession" must here mean, and means, recovery of possession by, and not from, the landlord. The Legislature deemed it necessary to empower the tribunal to order recovery of possession by the landlord. If the reverse had been intended it would have been expressly provided since the intention of the Act is to protect tenants. In my opinion it is, therefore, clear that Parliament never intended that the tribunal should have power to order recovery of possession by a tenant where such possession has been seized by a landlord and it never gave that power to the tribunal. That power cannot be implied. In the premises "forcible taking of possession" is not a matter within the area of jurisdiction of the tribunal and, that being the case, the tribunal cannot investigate any complaint about forcible possession of premises by a landlord, such matter being for the Courts. I find that the complaint was outside the area of jurisdiction of the tribunal. Jurisdiction was wanting.

As to the complaint that there was a breach of the *audi alteram partem* rule, one only needs to look at the record of the tribunal on 30th November 1978. Both Mr S Gautama and Mr DN Khanna were given an opportunity to address the tribunal, but before Mr Khanna went any further the tribunal decided to deal with eviction alone and hear legal arguments later. I have no doubt that if Mr Khanna had been allowed to continue he would have raised his preliminary objection orally. He had filed a notice of preliminary objection on 28th November 1978, two days before hearing of the complaint ; and since this was on record he should have been heard on his objection. Whether the tenant in possession should have been heard I can do no more than say that he was not a party to the proceedings. The tribunal had a duty to hear the landlord on the objection. It did not hear the landlord. There was in my opinion a violation of the *audi alteram partem* rule.

I am satisfied that there is lack of jurisdiction here and there has been a violation of the rules of natural justice. The tribunal intends to continue with the hearing when a fresh date is fixed as the matter was

incomplete at the date of adjournment on 30th November 1978. Something remains to be done which this Court can prohibit. The applicant is not guilty of any of the bars to the exercise of discretion by the Court in granting the remedy sought. In the result, and for the reasons I have given, I would award prohibition to the applicant as prayed.

I now turn to the question of costs. Mr S Gautama for the interested party argued that his client was dragged into the suit. It was served with the papers asking it to come. If the applicant succeeds the costs should be directed to the tribunal, but if the applicant is unsuccessful it should pay the Attorney-General's and the interested party's costs. This is one of those applications seeking a prerogative order. Mr Khanna was of the view that the interested party should also pay the costs if the application is granted. Mr Wekesa left the question of costs to the Court.

In matters of this nature the Courts, in my opinion, ought to take great care in exercising the discretion to award costs and consider whether the tribunal, ie the party against whom remedy is sought, has materially contributed to the error giving rise to the application. In my view the correct position as regard to costs is as stated by Professor de Smith in his book *Judicial Review of Administrative Action* (2nd Edn) at page 443, that:

> … they follow the events as between the applicant and the party who improperly procured the impugned order, unless there are special circumstances that make it proper for an exception to be made.

In the English case, *R v Liverpool Justices, ex parte Roberts* [1960] 1 WLR 585, the applicant successfully applied for an order of *certiorari* to bring up and quash an order made by the Liverpool justices whereby they imposed a fine of £2 on him and ordered that his driving licence be endorsed. The ground of the application was that the justices order was contrary to the principles of natural justice in that the applicant was not given an opportunity of being heard by the justices before the conviction was announced. Neither the justices nor the prosecutor appeared or were represented at the hearing of the application. The Court said it was not the general practice of the Court to make an order for costs against a party who had not appeared to resist a successful application for an order of *certiorari* when the party has not materially contributed to the error giving rise to the application. Of course in that case the justices and prosecutor did not appear and were not represented at the hearing of the application; but in this application, although the tribunal did not appear, it was represented at the hearing by the Attorney-General. However, that is not the only consideration when the Court is considering an award of costs. The Court must go further and consider whether the tribunal has materially contributed to the error giving rise to the application. In the English case cited above Lord Parker CJ said (at pages 586, 587):

> So far as costs against the justices are concerned, it has been the practice not to grant costs against justices or tribunals merely because they have made a mistake in law, but only if they have acted improperly, that is to say, perversely or with some disregard for the elementary principles which every Court ought to obey, and even then only if it was a flagrant instance.

In my opinion the tribunal did materially contribute to the error giving rise to the present application. Before it was an application by the interested party who chose not to proceed under section 6 of the Act, but to refer the matter to the tribunal by way of complaint. It was not a deliberate move by the tribunal to act the way it did, but if the tribunal had listened to the applicant who had objected to its jurisdiction it would not have proceeded to hear the complaint and the denial of justice and the attempt to adjudicate a matter over which the tribunal lacked jurisdiction would not have occurred, even though this may have been a pure mistake and not a flagrant instance. I would, therefore, award costs to the applicant against the tribunal and the interested party to be apportioned between them equally by the taxing master.

Order accordingly.

Dated and delivered at Nairobi this 21st day of March 1979.

A.H SIMPSON

JUDGE

Z.R CHESONI

JUDGE