



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC JR NO. 47 OF 2017

ADERE & COMPANY ADVOCATES.....APPLICANT/PLAINTIFF

=VERSUS=

BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT/DEFENDANT

KARUNA PROPERTIES LTD.....INTERESTED PARTY

JUDGEMENT

1. The Ex-Parte Applicant is a firm of Advocates which had leased office premises at Standard Building along Standard Street in Nairobi. The Interested Party was the Ex-parte Applicants Landlord. On or around 29th November, 2010 the Interested Party filed a Notice of Motion dated 23rd November, 2010 in which it sought leave from the Business Premises Rent Tribunal (BPRT) to levy distress for rent against the Ex-parte Applicant. The Interested Party's application was registered as Tribunal Case No. 869 of 2010 (Nairobi).

2. On or around 1st February, 2011 the Ex-parte Applicant filed a Notice of Motion dated 31st January, 2011 in which it sought leave to file a reference to the Respondent despite non-compliance with **Section 6(1) of the Landlord & Tenant (Shops Hotels & Catering Establishments) Act (Cap 301)**. The application was registered as Tribunal Case No. 84 of 2011 (Nairobi).

3. The Tribunal Chairperson directed that the two applications were to be heard together. In the course of the hearing, the Interested Party's Advocate conceded that the notice which had been served upon the Ex-parte Applicant was defective. The Tribunal Chairperson then in a brief ruling stated that there was no need for the Ex-parte Applicant to file a reference out of time as the notice which had purportedly been served had been admitted by the Interested Party to have been defective. The Chairperson however awarded costs of Kshs.16,800/= to Ex-parte Applicant, which costs were to be set off against rent found to be owing from the Ex-parte Applicant. The Tribunal Chairperson further directed that the hearing in respect of Tribunal Case No. 869 of 2010 had to proceed. This is the case which proceeded and a ruling thereof delivered on 2nd November, 2012. This is the ruling which triggered the application for Judicial Review order of Certiorari.

4. The Ex-parte application through Notice of Motion dated 10th June, 2013 sought to have that part of the decision which held that outstanding service charge and City Council rates were rent and were payable by the Ex-parte Applicant to the Interested Party brought to this Court and quashed. The Ex-parte Applicant contends that under Cap 301 it has no right of appeal against the decision of the Tribunal arising out of a complaint. The Ex-parte Applicant further contends that as the jurisdiction of the Tribunal to investigate a complaint presumes that a complaint is based on existence of agreed and undisputed terms and conditions of tenancy, the Tribunal had no jurisdiction to determine the terms and conditions of the tenancy as presented in Tribunal Case No. 869 of 2010.

5. The Ex-parte Applicant's application was opposed by the Respondent through grounds of opposition dated 5th March, 2014 and filed in Court on 5th March, 2014. The Respondent contends that the orders which the Ex-parte Applicant seeks are not available to it; that the Ex-parte Applicant has failed to pursue the remedies available to it; that Judicial Review is concerned with processes leading to the decision complained of and that the Respondent Chairperson had jurisdiction to entertain the matter in question.

6. The Ex-parte Applicant's application was opposed by the Interested Party based on a Replying Affidavit sworn on 28th October, 2013 and a Further Affidavit sworn on 28th November, 2013. The Interested Party contends that the Ex-parte Applicant's application does not disclose any acts which ought to be brought before this Court for redress and that there is no demonstration that the Tribunal's decision was unfair or arbitrary and was not discriminatory. In answer to the Ex-parte Applicant's contention in a Supplementary Affidavit that it had been served with a notice to terminate the tenancy despite the pending application for review, the Interested Party argues that the filing of the present

application is not a bar to the Interested Party moving on with other lawful processes to realise rent on its premises which it is owed or to alter the terms of the tenancy.

7. I have considered the Ex-parte Applicant's application, the opposition thereto by the Respondent as well as the Interested Party. I have also considered the Submissions by the parties to this matter. The only issues which fall for determination are whether the Respondent's Chairperson had jurisdiction to entertain the complaint before her and whether the decision of 2nd November, 2012 should be brought to this Court for quashing.

8. I will first deal with the issue of jurisdiction. The Ex-parte Applicant contends that the Tribunal Chairperson had no jurisdiction to entertain a complaint whose effect locked it out of the Appeal process. The Respondent had been moved by the Interested Party which invoked the provisions of Section 12 (1) (h) and (4) of Cap 301. Section 12(1) (h) provides as follows:

1. 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-

“

a.

b.

c.

d.

e.

f.

g.

h. to permit the levy of distress for rent”

9. Section 12 (4) provides as follows:-

“In addition to any other powers conferred to it by or under this Act, or Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or tenant and may make such order thereon as it deems fit”

10. In the instant case, besides the application by the Interested Party for leave to levy distress for rent, the Respondent had been moved under Section 6(1) of Cap 301 by the Ex-parte Applicant for permission to file a reference notwithstanding non-compliance with Section 6(1) of Cap 301. The Tribunal Chairperson disposed of the issue under Section 6(1) and proceeded to hear the application by the Interested Party for leave to levy distress for rent. There is no way the Chairperson of the Respondent would have granted leave to levy distress for rent without inquiring into how the alleged rent arrears arose.

11. After granting the Interested Party and the Ex-parte Applicant a hearing, a finding was made that the Ex-parte Applicant was in arrears of rent. Rent is clearly defined and service charge is also defined. Instead of the Chairperson granting leave to levy distress, she gave the Ex-parte Applicant the option of paying the arrears by three equal instalments to avoid distress being levied. The Tribunal Chairperson had jurisdiction to make the orders. What had been placed before the Tribunal was not just a mere complaint. There was an application for leave to levy distress for rent. There was also an application for leave to file a reference under Section 6(1) of Cap 301. This is why the Tribunal Chairperson decided to hear the two cases together. One cannot therefore isolate the two and claim that what was before the Tribunal was a complaint under Section 12(4) of Cap 300. I therefore find that the Tribunal Chairperson had jurisdiction to hear what was before her.

12. I now move to the second issue. The law is clear that Judicial Review is concerned with the processes leading to the decision being impugned. It is not concerned with the merits of the decision. See **Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.**

13. The parties in this application were given a hearing before the decision was given. As I have already found that the Tribunal Chairperson had jurisdiction to entertain the matters before her, there is no ground upon which it can be held that the process was unfair or was arrived at in a manner not in accordance with the rules of natural justice. There is therefore no basis upon which the remedy of certiorari can be extended in favour of the Ex-parte Applicant.

14. In the case of **Pastoli Vs Kabale District Local Government Council and Others [2008] 2 EA 300**, it was held as follows:-

“In order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision making authority commits an error of law. In the process of taking the decision or making the act, the subject of the complaint. Acting without

jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of Logic and acceptable moral standards”.

15. The decision of the Tribunal Chairperson does not have any characteristics described in the Pastoli case (**Supra**).

16. The Ex-parte Applicant seems to complain about the findings of the Tribunal Chairperson as regards what is rent and service charge. This is not a complaint which should be addressed in a judicial review application. This is a matter which can only be addressed on appeal and a judicial review Court does not sit to determine whether such a finding was arrived at based on sufficiency or otherwise of the evidence before it.

17. The Ex-parte Applicant also appears to be complaining that the Tribunal Chairperson should have stopped the proceedings on grounds of want of jurisdiction. In case I am wrong on my findings on jurisdiction hereinabove, judicial review is a discretionary remedy which may be denied in the following instances; waiver which may be the result of Applicant's failure to object to the jurisdiction 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 of the remedy. See the judgment of Chesoni J as he then was in ***Re Hebtulla Properties Ltd [1979-1980] 1 KLR 1197 at 1206.***

18. Immediately after the Ex-parte Applicant's application under Section 6(1) of Cap 301 was disposed of, the Tribunal Chairperson proceeded to hear the Interested Party's complaint. There was no objection to jurisdiction raised by the Ex-parte Applicant. The Ex-parte Applicant continued to participate in the proceedings. A ruling was delivered on 2nd November, 2014. The proceedings for judicial review were commenced on 2nd May, 2013 which was six months after the ruling complained of. There was no reason given for this delay. The proceedings of the Tribunal were ready as at March, 2013. Even if I were to find that the Tribunal had no jurisdiction which is not the case, I will have not allowed the Ex-parte Applicant's application.

I therefore find that the Ex-parte Applicant's Notice of Motion dated 10th June, 2013 lacks merit. The same is hereby dismissed with costs to the Respondent and the Interested Party.

Dated, Signed and delivered at Nairobi on this 27th day of March, 2019.

E.O.OBAGA

JUDGE

Signed in Open Court in the absence of Advocates for the parties.

E.O.OBAGA

JUDGE

27.3.2019