



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPL. NO. 141 OF 2018 (JR)

THE REPUBLIC.....APPLICANT

=VERSUS=

THE CHAIRMAN, BUSINESS PREMISES

RENT TRIBUNAL (MR MBICHI MBOROKI).....RESPONDENT

MOHAMMED SHEIKH YUSUF.....INTERESTED PARTY

DR DANIEL WANJOHI KABITHE

LYDIA WANGUI KABITHE.....EXPARTE APPLICANTS

JUDGMENT

Background

1. The ex-parte applicants, Dr. Daniel Wanjohi Kabithe and Lydia Wangui Kabithe, are proprietors of Land Reference Number 13155 situated in Karen. Through a lease agreement dated 5/1/2015, they rented to the interested party the said land together with the fixtures and fittings thereon. It is common ground that the interested party has been running a school on the said premises under the name **Karen Boys School**. The school business is registered under the Registration of Business Names Act. The School is registered under the Basic Education Act as a basic education institution.

2. On 30/8/2017, the ex-parte applicants, through M/s Jumbo Airlink Auctioneers, levied distress against the interested party, to recover unpaid rent. The interested party challenged the distress through a complaint filed at the Business Premises Rent Tribunal (**the Tribunal**) under Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 (**the Act**). Upon being served with the complaint, the interested party filed a preliminary objection, contending that the premises subject matter of the complaint were occupied as a high school and the same was not a shop, a hotel or a catering establishment within the meaning of Section 2 of the Act, and consequently, the Tribunal did not have jurisdiction to entertain the complaint.

3. The preliminary objection was canvassed and in a ruling delivered on 20th July 2018, the Tribunal found that it had jurisdiction to entertain the complaint because, in its view, a school rendering services at a fee, was a shop within the meaning of the Act. The Tribunal rendered itself thus:-

“The Tribunal has considered the Technical Institute Case relied on by the advocate of the Landlord (1985 judgement) and the relevant decisions of Justice Mutungi in the Flying Doctors Society of Africa Case and is of the considered view that the definition of the word “shop” in Cap 301 is wide enough to cover institutions like schools, or kinds of training institutions, hospitals, nursing homes and all kinds of emerging business in the dynamic and turbulent market place i.e exhibition shops, stalls, cyber cafes etc. It is settled law that statutes should be interpreted in a purposive manner which promoted the object of the statute. The Tribunal does not accept a restrictive and conservative approach to the interpretation of the word “shop” in Cap 301 and has dealt and continuous to deal with many disputes in respect of emerging businesses where services are rendered for money or money worth”

4. Aggrieved by the decision of the Tribunal, the ex parte applicants sought and obtained leave of this court to bring a judicial review motion to quash that decision. While seeking leave, the ex-parte applicants contended that the impugned decision was made by the Tribunal under Section 12(4) of the Act and was therefore not appealable under the Act. They argued that in the circumstances, the only redress forum available to them was a judicial review motion which offers orders of *certiorari* and *prohibition* as appropriate reliefs. The ex-parte applicants were subsequently granted leave on 26th November 2018. Consequently, the ex-parte applicants brought a notice of motion dated 7/12/2018 seeking the following orders:-

1. That orders of certiorari and prohibition, be and are hereby issued to remove into this court and to quash the ruling and the

orders of the Chairman, Business Premises Rent Tribunal, Mr. Mbichi Mboroki, made on 20th July 2018 in BPRT Case No 644 of 2017, and to prohibit any further proceedings and or hearing of the said Tribunal Case.

2. That the costs of this application be borne by the respondent.

Submissions

5. Mr Mutimu Kang'atta, counsel for the ex-parte applicants, argued that a school is not a shop, a hotel or a catering establishment within the meaning of Section 2 of the Act. He relied on the case of **Panesar v Balbir [1972] EA 208** where Mustafa JA of the defunct Court of Appeal for East Africa held that the definition of "shop" in the Act ought to be construed from a common sense point of view. He contended that the word "shop" under the Act should not be given an extended meaning beyond the common sense meaning of a shop.

6. Mr Kang'atta further relied on the decision of the High Court (Porter J and Aluoch J) in **Technical Institute (A Firm) V Lalchand Somchand Shah & Others, Nairobi High Court Civil Appeal Number 190 of 1983 (unreported)** where the High Court held that a school was not a shop within the meaning of the Act. He contended that a shop in terms of the Act must have the element of retail or wholesale business being conducted therein or must be premises where members of the public can walk into, have a service rendered to them, pay for the service, and then walk away. He argued that one cannot walk into a school, get a lesson in history or mathematics, pay for it, and then walk away.

7. Mr Kang'atta faulted the Tribunal for ignoring the decision of the High Court yet it was bound by it. He contended that by ignoring the decision of the High Court, the Tribunal acted beyond its jurisdiction. He urged the court to grant the orders of certiorari and prohibition as sought in the motion.

8. Mr Khaduli, counsel for the interested party, submitted that education is a service and given that the school renders education services to members of the public at a fee, the school was a shop within the meaning of Section 2 of the Act. He further submitted that reliance on English cases was misplaced because the definition of "shop" in the English statutes differs with the definition of "shop" in Section 2 of the Act in the sense that the definition of "shop" in the Act is more expansive and defines a shop to include premises occupied for the purpose of rendering services for money or money's worth. He urged the court not to rely on the High Court decision in **Technical Institute (A Firm) v Lalchand Somchand Shah & Others (Supra)** because it was informed by English decisions based on the narrow and restrictive definition of "shop" in the English statutes.

9. Mr. Khaduli urged the court to give the word "shop" a literal meaning and pay due regard to the second limb of the statutory definition which relates to the offering of services for money or money's worth. He relied on the decision of **Hiran v Ramji Mena & Co (1971) EA 332**. He further relied on the decision of Mutungi J in **Flying Doctors Society of Africa v Africa Medical and Research Foundation, Nairobi ELC Civil Case Number 85 of 2013** where land leased for the purpose of an office and touring school in connection with the African Medical Research Foundation and the Flying Doctors Services was held to be a shop. He urged the court to dismiss the application.

Analysis & Determination

10. Two issues fall for determination in this judicial review motion. The first issue is whether a school is a shop within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (**the Act**). The second issue is whether the Tribunal exceeded its jurisdiction in entertaining the interested party's complaint. I will make pronouncements on the two issues contemporaneously.

11. The first issue relates to the question as to whether a school is a shop within the meaning of Section 2 of the Act. Section 2 of the Act defines "shop" as follows:-

"shop" means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth.

12. From the wording of the above definition, it does emerge that for premises to meet the statutory requirements of a shop under the Act, one of the following three features must be present in terms of user of the premises: (i) the premises should be occupied wholly or mainly for retail trade or business; (ii) the premises should be occupied wholly or mainly for wholesale trade or business; (iii) the premises should be occupied wholly or mainly for rendering of services for money or money's worth. In my understanding, if none of the above three features exist, the premises cannot be said to be a shop within the meaning of the Act.

13. Secondly, when construing "shop" within the context of Section 2 of the Act, the court is required to look at the object of the Act. The object of the Act can be discerned from the preamble which reads as follows:-

"An act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto".

14. It is clear from both the preamble and Section 2 of the Act that Parliament intended to enact a law to govern certain categories of premises. Secondly, Parliament did not expressly or in any way exclude school premises from the categories of premises to be governed by the Act. Thirdly, the only features which Parliament used to define "shop" relate to the user of the premises. Parliament therefore opted not to legislate exclusion provisions in terms of its definition of a "shop". Consequently, to tell whether or not a particular premises meets the requirements of "shop" within the meaning of the Act, the Tribunal and the courts are obliged to examine the operations of the entity occupying the particular premises. User is the only criteria to be applied in this regard. Lastly, examination of the name of the entity alone will not satisfy that criteria; the Tribunal and the courts ought to critically examine the user.

15. In the application under consideration, it is not contested that the respondent runs a private boys high school on the demised premises and receives fees from parents who enroll their children in the school. The interested party who is the proprietor of the school receives money in exchange for the services rendered to the children. From this perspective, and that being the position in this dispute, it emerges that the premises occupied by the private school which offers education services to the general public at a fee. Consequently, the premises would properly fall under the definition of “shop” under Section 2 of the Act.

16. Mr. Kang’atta urged me to construe “shop” from a common sense view and define it only as premises where members of the public can walk into, have a service rendered to them, and then walk away. With the fast-changing times, the features outlined by counsel happen to be the present features of modern day private schools. Modern day private schools offer educational services to the general public at a fee; enroll pupils and students as and when their parents walk or drive into the school; and receive money (fees) for their educational services. They include schools registered under the Basic Education Act, schools offering post-secondary school programmes in various disciplines such as computer, driving etc, and schools offering university programmes at a fee. Indeed they charge fees for their services on hourly rates. They are to be found in central business districts of urban centres, residential areas, shopping centres and shopping malls.

17. In my view, while Porter J and Aluoch J may have been right in their perspective of a school in 1985 in the decision in **Technical Institute (A Firm) V Lalchand Somchand Shah & Others, Nairobi High Court Civil Appeal Number 190 of 1983**, the same cannot be said of a school in 2019. The features which the learned judges considered to be absent in a school in 1985 are all present in most present day private schools. Similarly, a common sense perspective of a school ought to take into account the current defining features of a private school. It is for this reason that I entirely agree with the perspective of “shop” by Mutungi J in **Flying Doctors Society of Africa v Africa Medical and Research Foundation (Supra)**.

18. Consequently, it is my finding that if a school housed in any demised premises offers educational services to the general public for money or money’s worth, the premises occupied by the school properly meet the requirements of “shop” within the meaning of the Act.

19. In the application under consideration, there is *prima facie* evidence of existence of a school under the name **Karen Boys School**, offering education services for money. It is therefore my finding that in the absence of evidence to the contrary, the Tribunal would have jurisdiction to entertain the complaint subject matter of this judicial review motion. It is my further finding that the Tribunal did not, in the circumstances, exceed its jurisdiction or act *ultra vires* its powers in entertaining the material complaint.

Disposal Orders

20. In light of the above findings, the notice of motion dated 7/12/2018 is dismissed. Having taken into account the fact that the present motion raised a legal issue which had not been canvassed in our courts in recent times, parties will bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19 TH DAY OF JULY 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Kangata for the Exparte Applicant

Mr Osodo holding brief for Mr Owino for the Interested Party

Court Clerk - June Nafula