



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JUDICIAL REVIEW NO. 65 OF 2018

FRANCIS NJOROGE BORO MUNGAI.....PLAINTIFF

VERSUS

MIDDLE EAST AFRICAN AUTOSPARES LIMITED.....1ST RESPONDENT

CHAIRMAN BUSINESS PREMISES TRIBUNAL.....2ND RESPONDENT

RULING

1. This matter was initially filed in the Constitutional and Judicial Review division. The Ex parte Applicant here filed a chamber summons dated 19th May 2015 under a certificate of urgency. The said chamber summons was brought under order 53 rule 1(1) (2) and (4) of the Civil Procedure Rules.

2. The said application sought leave to:-

1. Apply for judicial review for order of prohibition prohibiting the chairman of the Business Premises Rent Tribunal from presiding over the proceedings on trial, taking evidence, issuing orders and/or determining the Tribunal case no. 552 of 2014 Nairobi.

2. Proceed to serve the notice of motion for judicial review under order 53 of the Civil Procedure Rules 2010.

3. That the leave granted do act as stay of proceedings pending hearing and determination of the notice of motion application.

4. Costs.

3. Upon leave being granted the Ex parte Applicant filed the notice of motion dated 29th May 2015, under Section 889 of the Law Reform Act, Chapter 26 Laws of Kenya, and order 53 rule 3 of the Civil Procedure Rules, 2010.

4. It sought orders:-

1. That, an order of prohibition do issue prohibiting the Chairman, Business, Premises Rent Tribunal from presiding over the proceedings, trial, taking evidence, issuing orders and/or determining the Tribunal case no. 522 of 2014.

2. That the costs of this application be provided for.

5. The application is supported by the Ex parte applicant's affidavit sworn on the 19th May 2015. He annexed several documents in support of his application some of which are copies of the same documents he annexed to the verifying affidavit accompanying his statement. He also annexed a copy of another lease that the 1st respondent has purportedly executed by the Ex parte applicant's mother on 29th December 2008 for a period of 25 years. The Ex parte applicant has deposed that the 1st respondent filed tribunal case no. 552 of 2014 in which it's claiming to be a protected tenant while at the same time filed HCCC 406 of 2011 which case is still pending. The lease of 25 years that the 1st respondent relies on contradicts his claim to the tribunal that he is a protected tenant. The 1st respondent is in a hurry to have the complaint heard but has not facilitated the hearing of HCCC 406 of 2010. The grounds relied upon by the exparte applicant are:-

(a) That the applicant is one of the administrators of the estate of the late Margaret Wanjiru Njoroge.

(b) The deceased is a tenant in the said LR NO. 209/8675 having entered into a lease agreement with the deceased on 2nd May 2006 for a period of 8 years.

(c) The deceased died on 31st October 2008 before the said lease lapsed.

(d) In the year 2010, a dispute arose over payment of monthly rent and the respondent proceeded and filed HCCC No. 406 of 2011.

(e) An interim order was issued in a ruling delivered on 19th day of December 2012 in HCCC No. 406 of 2011.

(f) The proceedings in HCCC No. 406 of 2011 are still pending and the suit has not been determined.

(g) On 29th August 2014, eviction notices were issued by the applicant against the subtenants in LR No. 209/8675.

6. In his verifying affidavit dated 19th May 2015 the Ex parte applicant Francis Njoroge Boro Mungai deponed that in the year 2011 upon coming from Britain he discovered that the 1st respondent was in rent arrears and thereafter instructed auctioneers to levy distress for rent. The 1st respondent consequently filed HCCC 406 of 2011 against the applicant herein seeking interim orders of injunction which prayer was granted by the court. The 1st respondent breached the agreement by letting a substantial part of the suit premises to third parties and carrying a substantial amount of rent collected from the (11) eleven sub tenants. Later the applicant issued notices of his intention to seek eviction orders against the illegal subtenants which led the 1st respondent to file a complaint against the applicant before the Business Premises Rent Tribunal which issued an ex parte interim injunction against the applicant.

7. The Ex parte applicant has lodged a complaint with the criminal investigations department over the alleged lease for 25 years since it is purported to have been executed on 29th December 2015 when the applicant mother died on 31st October 2008. It is the applicant's contention that the 1st respondent believes that by filing a new matter at the tribunal during the pendency of the proceedings before the high court, the 1st respondent abused the due process of the law. It is engaging the applicant into different jurisdictions while it continues to benefit from the huge rent it is collecting from the estate.

8. In support of his case the Ex parte applicant relied on the following documents:

- A copy of grant of letters of administration of the estate of Margaret Wanjiru Njoroge.
- A copy of the lease agreement between the 1st respondent and late Margaret Wanjiru Njoroge.
- A copy of the ruling in HCCC No. 406 of 2011 dated 19th December 2012 issuing a conditional interim injunction in favour of the 1st respondent.
- Copies of notices of the applicant's intention to seek eviction orders against the illegal sub tenants dated 28th August 2014.
- A copy of proceedings of the Business Premises Rent Tribunal Case NO. 552 of 2014.
- A copy of the ex parte interim injunction order issued by the Business Premises Rent Tribunal against the applicant.
- A copy of a further affidavit filed by the 1st respondent
- A copy of invitation letter by the 1st respondent to the applicant's advocate.

The 1st Respondent's Case

9. David Njonjo Waiharo, the Operations Manager and Director of the 1st respondent has sworn a replying affidavit in response to the applicant's application. He states that the applicant is not the sole administrator as the property also belongs to his siblings and co administrator. The applicant has failed to disclose material fact to this court and is not entitled to the orders sought. HCCC 406 of 2011 and BPRT Case no. 552 OF 2014 though relating to the same properties do not relate to the same cause of action.

10. The applicant was threatening to evict the 1st respondent's tenants yet he was aware of the pending high court case. The right forum to arbitrate the dispute is the Business Premises Rent Tribunal. The Applicant ought to have appealed or sought an order of certiorari against the decision if he felt the order made by the Tribunal was ultra vires but not to seek an order of prohibition. The applicant's application is an abuse of the court process and ought to be dismissed.

11. The court directed that the application be canvassed by way of written submissions. By 24th September 2018 only the Ex parte applicant had filed submissions dated 21st October 2018 and a date for judgement was given.

The Ex parte Applicant's submissions

12. The gist of the dispute in HCCC 406 of 2011 emanates from the second lease of 25 years that the 1st respondent produced. It also involves rent arrears. The 1st respondent filed the case in the Business Premises Rent Tribunal claiming to be a protected tenant.

13. Under the Constitution of Kenya 2010, Superior Courts and Tribunals are clearly established and has their express powers in discharging their constitutional mandate. This is to safeguard order and protect the litigants from unnecessary litigation in different courts at the same time over the same subject matter and to ensure fair hearing. The Ex parte applicant cannot get a fair hearing when he is compelled to attend hearing in two different courts over the same subject matter arising from the same lease. The 1st respondent has to choose whether to litigate in HCCC 406 of 2011 or the Tribunal case No. 552 of 2014. The affected parties in the notices (sub tenants) are not parties to the tribunal case. He prays that the orders of prohibition be issued.

14. The 2nd respondent neither filed any responses to the application nor did he file written submissions.

15. The main issues for determination are:-

(i) **Whether the Business Premises Rent Tribunal has jurisdiction to handle the matter.**

(ii) **Whether the Ex parte applicant is entitled to the reliefs sought.**

(iii) **Who should bear costs?**

16. Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 (Laws of Kenya defines “**Controlled tenancy**” to mean a tenancy of a shop, hotel or catering Establishment:-

(a) **Which has not been reduced into writing; or**

(b) **Which has been reduced into writing and which-**

(i) **Is for a period not exceeding five years:- or**

(ii) **Contains provision for termination otherwise than for breach of covenant within five years from the commencement thereof;**

(iii) **Relates to the premises of a class specified under sub section (2) of this section; provided that no tenancy to which the government, the community or local authority is a party whether as landlord or as tenant shall be a controlled tenancy”.**

17. The lease herein is for a period of 25 years. It is my humble view that by virtue of the provisions of Section 2(a) (i) and (ii) of Cap 301, the tenancy does not qualify to be a controlled tenancy. It follows that the Business Premises Rent Tribunal has no jurisdiction to entertain any dispute arising out of the lease and I so find.

18. In the case of **Republic vs Chief Magistrate Milimani Commercial Court & 2 Others exparte Violet Ndanu Mutinda & 5 Others [2014] eKLR** it was held that:-

“Judicial Review is concerned with the decision making process, not with the meritS of the decision itself, the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters..... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision”

19. As to whether an order of prohibition ought to issue prohibiting the 2nd respondent from proceeding further with Business Premises Rent Tribunal case No. 552 of 2014 I am guided by the parameters of judicial review set out by the Court of Appeal in **Kenya National Examination Council exparte Gathenji & Others Civil Appeal No. 266 of 1996**. The Court of Appeal stated thus:-

“Prohibition look into the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice, the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However where a decision has been made whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made.....Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision....Prohibition is an order form the High Court directed to an inferior tribunal or body which forbids that tribunal body to continue proceedings therein in excess of its jurisdiction or in continuation of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision or the merits of the proceedings.....Only an order of certiorari can quash decision already made and order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons”.

20. In conclusion, I find that the Business Premises Rent Tribunal does not have jurisdiction to deal with any dispute arising out of the lease

in question. I find merit in this application and grant the orders sought namely:-

(a) That an order of prohibition is hereby issued to prohibit the 2nd respondent from presiding over the proceedings or trial, taking evidence, issuing orders and/or determining the Tribunal Case No. 552 of 2014.

(b) That costs of this application be borne by the 1st Respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25th day of September 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Ex parte Applicant

.....Advocate for the 1st Respondent

.....Advocate for the 2nd Respondent

.....Court Assistant