



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**ELC MISC CIVIL APPLICATION NO 176 OF 2017 (JR)**

**MASON SERVICES LIMITED.....APPLICANT**

**VERSUS**

**PARKLANDS BAPTIST CHURCH**

**REGISTERED TRUSTEES.....1<sup>ST</sup> RESPONDENT**

**CHAIRMAN BUSINESS PREMISES**

**RENT TRIBUNAL.....2<sup>ND</sup> RESPONDENT**

**J U D G E M E N T**

1. Pursuant to the leave granted by this court on 25/9/2017, the Applicant, Mason Services Limited, brought a substantive Motion dated 28/9/2017 seeking an order of *certiorari* bringing into this court and quashing the order made by the Business Premises Rent Tribunal (**the Tribunal**) on 13/9/2017 **in Business Premises Rent Tribunal Case No 724 of 2016 at Nairobi (BPRT Case No 724/2016-Nairobi)**. The Applicant also seeks costs of the motion. The motion is premised upon the grounds set out in the Statement of Facts dated 25/9/2017 and the Verifying Affidavit sworn by Stephen Njoroge on 25/9/2017.

2. The application is opposed by the 1st Respondent through a replying affidavit sworn by Patrick Gitau on 16/10/17 and through grounds set out in notice of preliminary objection dated 29/7/17. It is also opposed by the 2nd respondent through a replying affidavit sworn by the 2nd respondent on 13/11/2017.

**Applicant's Case**

3. The applicant's case is that on 1/6/2013 it entered into a three year lease agreement with the 1st respondent. The three year term was to expire on 30/5/2016 but the lease contained a clause for renewal for a further period of two years. While the tenancy was subsisting, the 1st respondent served the applicant with a termination notice indicating its unwillingness to renew the lease. Dissatisfied with the notice, the applicant filed a reference at the Tribunal whereupon the 1st respondent conceded that the applicant was a protected tenant. The applicant contends that on 20/7/16, the respondent served the applicant with a statutory notice of termination of tenancy and in return the applicant, on 3/8/16, served the 1st respondent with a statutory notice of intention not to comply with the statutory notice. The applicant has exhibited copies of the said notices.

4. On 2/9/2016, the applicant filed Nairobi BPRT Reference No 24 of 2016 challenging the said termination notice. The matter was scheduled for hearing on 13/12/16 but hearing did not proceed on that day. The applicant contends that hearing commenced on 1/3/17 and the Chairman directed that the 1st respondent's witness would be heard first. The matter was adjourned to 20/4/17. On 23/5/17 the 1st respondent led evidence and closed its case. The applicant states that on the next hearing date of 14/6/17, the Chairman did not sit as his term had expired and the 1st respondent took another hearing date *exparte* for 28/7/17. The applicant contends that on that particular date, the applicant's representative attended the Tribunal for hearing of the reference but the matter was not listed. Upon inquiry in the registry, the applicant's representative was informed the File could not be traced. The applicant contends that its advocate was served with another hearing notice for 13/9/17 and on that particular date, the advocate called the applicant's witness while at the Tribunal and informed him that the matter was not listed and advised him not to attend the Tribunal. The applicant exhibited a copy of the said notice and a copy of the day's cause list.

5. The applicant states that subsequently, on 22/9/17 it learnt that the 1st respondent had obtained orders of vacant possession. The applicant further contends that it subsequently established that the matter was heard *exparte* on 13/9/17 and the impugned orders were issued. The applicant states that the chairman was fully aware the matter was part-heard yet he proceeded to dismiss the same for want of prosecution. The applicant also contends that the chairman's decision to conduct an *ex-parte* hearing of the matter yet it was not listed, and his decision to issue punitive orders *exparte* manifests an abuse of judicial discretion and power. The applicant further states that the 1st respondent acted with malice when he placed the File before the court and asked for dismissal of a part-heard matter. The applicant has contended that the 2nd respondent abused his judicial discretion and power by proceeding to dismiss the reference without asking the 1st respondent to submit on its case as there was already tendered evidence on record requiring that judgment be rendered instead of dismissing the suit for want of prosecution. The applicant contends that it now faces eviction after being condemned unheard in the hands of a judicial officer contrary to the rules of natural justice. Lastly, the applicant argues that the orders of 13/9/17 were obtained through deceit, abuse of court process, abuse of judicial powers, violation of the procedures of the Tribunal and breach of the rules of natural justice. The applicant urges the court to quash the said orders.

### **1st Respondent's Case**

6. The 1st respondent has opposed the motion through a replying affidavit sworn on 16/10/2017 by Patrick Gitau. He has deposed that the applicant failed to disclose to this court that it was to pay rent deposit of Ksh 1,200,000 and security deposit of Kshs 50,000 which it has not paid to date and that the applicant has outstanding rent arrears of Kshs 8,350,000. He has also deposed that the applicant dishonestly used the process of the Tribunal to run away from its contractual obligations. He adds that the applicant has used the protection accorded to him by Cap 301 to frustrate the 1st respondent. He further deposed that the applicant through its advocate applied for adjournment on 9/12/16, 1/3/17, 23/5/17 and when the reference came up for hearing on 28/7/17 the applicant and its advocate did not appear. Consequently, the matter was listed for 13/9/19 which date was served upon the applicant and neither the applicant nor his advocate showed up at the Tribunal. He has further deposed that the File was not listed because it was under safe custody given its history that had attracted the attention of EACC hence it was not available to the registry staff who compile the cause-list. He has also deposed that the applicant's failure to attend court was deliberate and was intended to delay proceedings. He has further deposed that the applicant has not come to court with clean hands as it has avoided its contractual obligations thereby defeating the property rights of the 1st respondent. He urged the court to dismiss the application.

7. The 1st respondent also filed a notice of preliminary objection dated 29/9/17 and contended that this court lacks supervisory jurisdiction over the 2nd respondent by dint of Article 165(6) of the Constitution, Section 8 of the Law Reform Act, Cap 26 of the Laws of Kenya, and Section 9 of the Fair Administrative Action Act. The court directed that the grounds set out in the notice of preliminary objection be argued as part of the 1st respondent's grounds of opposition.

### **2nd Respondent's Case**

8. The 2nd respondent swore an affidavit in which he -contended that the reference was fixed for hearing on 13/9/17 and the applicant's advocate was duly served with the hearing notice but neither the applicant nor the advocate showed up for the hearing. He also deposed that the 1st respondent was entitled to make an application for dismissal of reference for want of prosecution as the proceedings were initiated by the *exparte* applicant, and in their absence, the Tribunal was not obliged to proceed and prepare any judgement in the matter. He has further deposed that there is no requirement under Cap 301 that a matter not listed cannot be heard and that the *exparte* applicant's advocate should have attended court on that material day. He contended that the applicant has not been condemned unheard as the matter came up for hearing on 28/7/17 but the applicant and the advocate failed to appear leading to an adjournment to 13/9/17 when they still failed to appear. He averred that the applicant did not exhaust alternative remedies before applying for judicial review and hence the present motion is misconceived and an abuse of the court process. He urged the court to dismiss the motion for lack of merit.

## **Submissions**

9. Mr. Oyugi, counsel for the applicant made oral submissions in court on 22/11/17. The applicant relied on its written submissions, statement of facts and verifying affidavit and contended that the reference was part-heard as the landlord had led evidence and it was the tenant's turn to lead evidence on 13/9/17. He submitted that the cause list serves the purpose of informing the parties that their cases are before court and he invited the court to look at the procedure through which the decision was arrived. He further submitted that the court has jurisdiction to hear the matter as mandated by Article 162(2) (b) and Section 33 of the sixth schedule of the Constitution of Kenya 2010.

10. The applicant filed written submissions dated 28.9.17 reiterating its earlier averments and referred to the case of **Republic v Chairman Land Dispute Tribunal, Kirinyanga District & Another Ex parte Kariuki (2005) KLR** where Justice Khamoni as he then was observed that “**judicial review is not an appeal from a decision but a review of the manner in which the decision was made.**”

11. Mr. Muigai, counsel for 1st respondent made oral submissions in response. He relied on the replying affidavit, notice of preliminary objection, list of authorities filed and written submissions. Counsel for the 1st respondent submitted that this court lacks supervisory jurisdiction over the Tribunal, contending that the supervisory jurisdiction that was granted to this Court over the Tribunal was deleted by Statute Law Amendments Act No 4 of 2012. He stated that this matter is not a dispute over land but one regarding procedure. He further submitted that prerogative orders under Section 13(7) (b) are not judicial review orders. He submitted that Section 9(1) of the Fair Administrative Action Act requires that a party must exhaust all the remedies available and there is no good reason why the applicant did not adhere to the procedure. He submitted that there is nothing irrational about the procedure adopted by the 2nd respondent as it was the duty of the *exparte* applicant to retrieve the file from the registry and have it placed before the Tribunal. He submitted that the right to be heard is not infinite and urged the court to dismiss the motion.

12. Counsel for the 1st respondent relied on the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (2012) KLR** where the Supreme Court held that “**a court's jurisdiction flows from either the constitution or legislation or both...**” In his further submissions, he stated that jurisdiction of specialized courts is limited to those matters provided for in the statute and that the judgement of Mativo J in **Sceneries Limited v National Land Commission (2017) eKLR** is also persuasive in this issue. He submitted that procedures in the Tribunal are governed by certain provisions of the Civil Procedure Rules and Order 12 rule 3 provides that where only the defendant appears and he admits no part of the claim the suit shall be dismissed except for good cause to be recorded by the court.

13. Ms Mwalози counsel for the 2nd respondent submitted that judicial review is a remedy of last resort and the applicant should have exhausted the remedies available under Section 12(1) of Cap 301. She further submitted that the applicant has not demonstrated that the 2nd respondent made the decision in excess of jurisdiction. She added that the 2nd respondent was performing that which he is mandated by law to perform. She urged the court to dismiss the motion.

## Issues

14. This judicial review motion raises three key questions to be determined. The first question is whether this court, as a superior court of equal status with the High Court, has supervisory jurisdiction over tribunals and subordinate courts discharging statutory mandate in disputes that fall within the constitutional jurisdiction of the court. The second question is whether a party aggrieved by an order made by the BPRT in its proceedings is obligated to exhaust the remedies available under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act before bringing judicial review proceedings against the order. The third question is whether, in the circumstances of the present motion, the prerogative order sought by the applicant should be granted.

## Determination

15. I have carefully considered the facts of this motion and the parties' affidavits. I have similarly considered both the written and oral submissions by counsel for the parties. I shall pronounce myself on the three questions in the order in which they are set out.

16. The applicant seeks an order of *certiorari*, calling into this court and quashing the order made by the Tribunal on 13/9/2017 in BPRT Case No 724 of 2016 at Nairobi. The 1st respondent has opposed the motion on the grounds, *inter alia*, that the Environment and Land Court lacks supervisory jurisdiction over the Tribunal by dint of Article 165 (6) of the Constitution of Kenya 2010 as read with Section 8 of the Law Reform Act and Section 9 of the Fair Administrative Action Act.

17. The broad constitutional framework on the jurisdiction of the Environment and Land Court is spelt out in Article 162 of the Constitution in the following terms:

**(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in Clause (2).**

**(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to**

**(a) employment and labour relations; and**

**(b) the environment and the use and occupation of, and title to, land.**

**(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in Clause (2).**

**(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.**

18. The above broad framework is elaborated in details in Section 13 of the Environment and Land Court Act which provides as follows:-

**(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**

**(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) relating to compulsory acquisition of land;**

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by [Act No. 12 of 2012](#), Sch.

(6) Deleted by [Act No. 12 of 2012](#), Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the court deems fit and just including:

(a) interim or permanent preservation order including injunctions;

(b) prerogative orders

(c) award of damages;

(d) compensation;

(e) specific performance;

(f) restitution;

(g) declaration; or

(h) costs.

19. At this point, it is important to explain what a prerogative order is. A prerogative order is what in common law is called a prerogative writ or extraordinary writ. Black's Law Dictionary describes it as:

**A writ issued by a court exercising unusual or discretionary power. Examples are *certiorari*, *habeas corpus*, *mandamus* and *prohibition*.**

20. The Supreme Court of Kenya in **R v Karisa Chengo & 2 Others (2017) eKLR** gave guidance on the approach to be adopted when faced with the question of jurisdiction of the courts contemplated under Article 162 (2) of the Constitution. The Court stated thus:

(51) Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the court's operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this court has reaffirmed its position that the jurisdiction of courts is derived from the Constitution, or legislation (see *In the Matter of the Interim Independent Electoral Commission*, at paras. 29 and 30; and *Samuel Kamau Macharia and Another v Kenya Commercial Bank and Two Others*, Sup. Ct. Civil Application No 2 of 2011 [para. 68]. In this

instance, the jurisdiction of the specialized courts is prescribed by Parliament, through the said enactment of legislation relating, respectively, to the Environment and Land Court and the Employment and Labour Relations Court. Such legislation is to be interpreted in line with relevant constitutional provisions hence our position in *Gatirau Peter Munya v Dickson Mwenda Kithinji and Two Others*, Sup. Ct. Civil Application No 5 of 2014; [2014] eKLR, where we examined the constitutional provisions alongside legislative provisions on elections, and held [para.77] that *“the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of Law cannot disengage from the Constitution.”* In the instant case too, we take guidance from the Constitution, as we interpret it alongside the relevant statute law, pertaining to the specialized courts.

(52) In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdiction of the ELC and ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that the parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.

21. Suffice to say that, any legislative framework, both pre-2010 and post-2010, touching on jurisdiction of any of the three courts of equal status (the High Court, the Environment and Land Court, and the Employment and Labour Relations Court) is to be interpreted in line with relevant constitutional provisions. It is with this in mind that one has to always remember that under Article 165 (5) of the Constitution, the High Court is barred from handling two categories of disputes: (i) disputes reserved for the Supreme Court; and (ii) disputes falling within the jurisdiction of the courts contemplated in Article 162(2). The disputes reserved for the Environment and Land Court as contemplated under Article 162(2) (b) are those relating to the environment and the use and occupation of, and title to land.

22. The question that then arises is: If the high court is expressly barred from exercising jurisdiction over disputes relating to the environment and the use and occupation, and title to land, which court then has supervisory jurisdiction over tribunals and magistrate courts mandated to deal with disputes spelt out in Article 162(2)(b) of the Constitution?

23. In my view, it is with this question in mind that Parliament, in Section 13(7) of the Environment and Land Court Act granted the Environment and Land Court powers to issue prerogative orders. The framework in Section 13(7) provides as follows:-

**(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the court deems fit and just including:**

**(a) interim or permanent preservation order including injunctions;**

**(b) prerogative orders**

**(c) award of damages;**

**(d) compensation;**

**(e) specific performance;**

**(f) restitution;**

**(g) declaration; or**

**(h) costs.**

24. Besides this, it is to be noted that the framework in Section 8 of the Law Reform Act which the 1st respondent has heavily relied on pre-dates the Constitution of Kenya 2010. That legal framework ought to be interpreted in line with the architectural design and reconstruction of Kenya's court system under the Constitution of Kenya 2010. It is within this context that the High Court contemplated in Section 8 of the Law Reform Act which is a pre-2010 statute should be interpreted to mean and refer to the court of equal status with the pre-2010 high court exercising the jurisdiction assigned to it under the Constitution of Kenya 2010. Indeed, Section 33 of the Sixth Schedule of the Constitution of Kenya 2010 provides as follows:

**Section 33: An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.**

25. It therefore follows that, in disputes relating to the environment and the use and occupation of and title to land, the court vested with supervisory jurisdiction over magistrate courts and over tribunals dealing with similar disputes is the Environment and Land Court. I say so because Article 165(5) (b) expressly bars the High Court from dealing with those disputes and Section 13 of the Environment and Land Court Act grants the Environment and Land Court powers to issue prerogative orders in relation to its area of jurisdiction.

26. I now turn to the question as to whether a party aggrieved by an order made by the Tribunal in its proceedings is obligated to exhaust the remedies available under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) before bringing judicial review proceedings. Both respondents have contended that under Section 9(2) of the Fair Administrative Action Act, no judicial review proceedings would lie if the applicant has not exhausted the internal mechanism for appeal or review and all remedies available under any other law. They further contend that an applicant who seeks to apply for judicial review without first exhausting alternative remedies must apply to the court for exemption from the obligation to exhaust the remedies.

27. Under the Fair Administrative Action Act, "administrative action" includes:

**(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or**

**(ii) any act, omission or decision of any person, body or authority which affects the legal rights or interests of any person to whom such action relates.**

28. Suffice to add that, Section 3 of the Fair Administrative Action Act applies the provisions of the Act to all state and non-state agencies exercising administrative authority or performing judicial or quasi-judicial functions under the Constitution or under any written law.

29. From the above definition and legal framework, I am persuaded that proceedings and orders of the BPRT are quasi-judicial in nature and are therefore subject to the legal framework in the Fair Administrative Action Act. This Act was enacted to give effect to **Article 47** of the Constitution which provides as follows:-

**(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

**(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**

**(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**

**(b) promote efficient administration.**

30. Section 9 of the Fair Administrative Action Act provides a procedural framework on judicial review. Under Section 9 (2) of the Act, the judicial review court is required to refrain from reviewing an administrative action unless the mechanisms for appeal or review have been exhausted. The Act, nonetheless gives the judicial review court powers, in exceptional circumstances, and upon an application by the applicant, to exempt the applicant from the obligation to exhaust the appeal and review mechanisms, if the court considers such exemption to be in the interest of justice.

31. It is contended that Section 12 (i) of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act grants the Tribunal the power to vary or rescind any order made by it. Secondly, it is contended by the respondents that under Section 15 of the Act, a party aggrieved by any determination or order of the Tribunal has a right of appeal to this court.

32. The Fair Administrative Action Act is a 2015 statute. Reliance on pre-2015 jurisprudence on judicial review must therefore take this fact into account. One of the key highlights of the Act is that it has changed the character and scope of judicial review. Secondly, it contains clear and mandatory framework on how judicial review proceedings are to be brought. In my view, the rationale behind the requirement that the internal review and appeal mechanisms be exhausted before judicial review proceedings are commenced is the need to ensure orderly functioning of agencies engaged in administrative and quasi-judicial processes. Secondly, there is need to avoid judicial review proceedings which unnecessarily disrupt administrative and quasi-judicial processes. It is preferred that administrative and quasi-judicial processes be finalized before they are subjected to judicial review.

33. Besides the foregoing, the new statutory framework in the Administrative Action Act has reduced the discretion hitherto exercised by the courts. First, judicial review remedy is available only after the internal review and appeal mechanism have been exhausted. Second, the court does not have the discretion to grant exemption *suo motto*; the court must be moved through an application, and the statutory criteria set out in Section 9 (4) must be satisfied. That criteria is that, there is a duty placed on the applicant to demonstrate the existence of the element of **interest of justice** in the matter.

34. There is no doubt in my mind that the mechanism of internal review exists under Section 12 (i) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. I say so because this provision grants the Tribunal powers to vary or rescind its orders. The Civil Procedure Rules which apply to the Tribunal similarly provide a mechanism for review or setting aside. Secondly, there is also no doubt that Section 15 of the Act provides a mechanism for appeal to the Environment and Land Court against orders of the Tribunal. The same Section grants this court jurisdiction to extend the period within which an appeal may be filed. This court is therefore persuaded that a party seeking judicial review remedy against an order of the BPRT is obligated to exhaust the review and appeal remedies available in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Where, in the interest of justice, exhaustion of those remedies is not a viable route, the applicant is obligated to move the court for an exemption order.

35. In the present judicial review motion, no application for exemption was made and no exemption was granted. Secondly, no explanation has been tendered as to why the appeal mechanism spelt out in the Act has not been utilized. The legal effect of this omission is that, the judicial review proceedings initiated in the present suit were commenced prematurely and in total disregard of the review and appeal framework provided in the Act.

36. Having found that the present judicial review proceedings were commenced prematurely and without

leave of the court, it follows that the relief sought by the applicant is unavailable because the motion lacks merit.

37. The upshot of the above findings is that the Notice of Motion dated 28/9/2017 is dismissed. The respondent shall have costs of the motion.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF MARCH 2018.**

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Omagwa holding brief for Mr. Oyugi for the Plaintiff

Mr Muigai advocate for the Defendant

Ms Halima Abdi - Court clerk