



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. MISC. APPLICATION NO. 141 OF 2018

THE REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN, BUSINESS PREMISES

RENT TRIBUNAL.....RESPONDENT

MOHAMED SHEIKH YUSUF.....INTERESTED PARTY

DR DANIEL WANJOHI KABITHE

LYDIAH WANGUI KABITHE...EX-PARTE APPLICANTS

RULING

1. On 29/8/2018, the ex-parte applicants, Dr Daniel Wanjohi Kabithe and Lydia Wangui Kabithe brought a chamber summons application dated 28/8/2008 seeking leave of this court to bring a motion for judicial review by way of orders of certiorari and prohibition to quash the ruling and order of the Chairman of the Business Premises Rent Tribunal made on 20/7/2018 in Nairobi BPRT Case Number 604 of 2017 and to prohibit any further proceedings and/or hearing of the said Tribunal Case. Secondly, they sought an order staying further proceedings in the said case in the Tribunal pending the hearing and determination of the substantive motion.

2. The case of the ex-parte applicants is that they are proprietors of Land Reference Number 13155 situated in Karen, Nairobi, and the interested party is their tenant in the said premises. Under the tenancy, the interested party runs a school on the premises under the name **Karen Boys School**. They contend that the interested party defaulted in rent payment and on 30/8/2012 they levied distress to recover the unpaid rent. On 6/9/2017, the interested party filed BPRT Case Number 664 of 2017 against the ex-parte applicants urging the Tribunal to stop the distress and re-open the school. On 17/1/2018, the ex-parte applicants, through their counsel, objected to the jurisdiction of the Tribunal, contending that the material tenancy did not relate to a shop, hotel or catering establishment within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, hence the tenancy was not a controlled tenancy. The ex-parte applicants contended that the interested party had unequivocally stated in his suit papers filed in the Tribunal that the tenancy premises were used as a school within the meaning of the Basic Education Act. In a ruling rendered on 20/7/2018, the Chairman of the Tribunal held that the definition of the word “shop” is wide enough to cover institutions like schools. This finding is what aggrieved the ex-parte applicants, leading to the present application.

3. At the hearing, Mr Kangata, counsel for the ex-parte applicants submitted that the ex-parte applicants opted for judicial review as opposed to an appeal because in the past court decisions, the courts have been categorical that an appeal lies only in respect of decisions made under Section 9 of the Act. Section 9 of the Act relates to determinations on references filed in the Tribunal pursuant to Section 6 of the Act. He contended that decision made by the BPRT in exercise of jurisdiction under Section 12(4) of the Act are not appealable. He relied on **Francis Komu Gitau T/A Bomas Motormart v Mohammed Nyanga & 2 others (2013) eKLR**. Secondly, he contended that an appeal would not be appropriate because the ex-parte applicants were challenging the jurisdiction of the Tribunal.

4. Mr Khaduli, counsel for the interested party submitted that Section 9 of the Fair Administrative Action Act requires that an applicant exhausts all alternative statutory remedies available before seeking judicial review. He added that under Section 15 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, a party aggrieved by any determination of the BPRT has the right of appeal. He contended that the Act does not limit appeals to decisions made under Section 12 only. He relied on the case of **Flying Doctors Society of Africa v African Medical & Research Foundation (2014)eKLR**.

5. I have considered the chamber summons application and the parties' rival submissions. I have also considered the cases cited by the parties, the existing legal framework and the prevailing jurisprudence on the subject of leave to commence judicial review proceedings.

6. The test to be applied when exercising jurisdiction on an application for leave to bring judicial review proceedings is whether the applicant

has made out an arguable case to warrant grant of leave (see **Uwe Meinert & Another V Attorney General, (2005)eKLR**. It is now settled that the requirement for leave was tailored to eliminate frivolous, vexatious or hopeless judicial review application and to ensure that only arguable cases proceed for further consideration. Secondly, when considering an application for leave, the court is guided by the procedural framework in **Section 9** of the **Fair Administrative Action Act** to satisfy itself that all alternative mechanisms have been exhausted or that there is no framework for alternative redress mechanisms such as appeal forum or review forum.

7. The ex-parte applicants contend that the BPRT lacks jurisdiction because a school is not a shop within the meaning of the Act. At this point the court has not been shown settled pronouncement on whether a school is a shop or not. Secondly, the ex-parte applicants contend that the prevailing jurisprudence is that an appeal lies only a determination of a reference brought under Section 6 of the Act. Taking the foregoing into account, the court is satisfied that the intended motion is not a frivolous or patently hopeless application; it is an arguable motion which deserves ventilation by the parties and adjudication by the court. Consequently, I will allow the plea for leave.

8. Lastly, the key question in the intended motion is the jurisdiction of the BPRT to entertain a tenancy dispute relating to a school. There is evidence that the proceedings in the Tribunal may be finalized and may render the intended motion an academic exercise. I will therefore stay further proceedings in the Tribunal, pending the hearing and final determination of the intended judicial review motion.

9. The upshot is that the ex-parte applicants' Chamber Summons application dated 28/8/2018 is allowed in terms of prayers 2 and 3. The substantive motion shall be filed and served within 21 days from today. In default, the orders granted herein shall stand vacated and the Chamber Summons dated 28/8/2018 shall stand dismissed.

Costs of the Chamber Summons application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Kariuki holding brief for Mr Kangata Advocate for the Ex-parte Applicants

June Nafula - Court Clerk