



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO.33 OF 2013

REPUBLICAPPLICANT

VERSUS

THE CHIEF MAGISTRATE'S COURT- NAKURU.....1ST RESPONDENT

COLORSONIC LTDINTERESTED PARTY

EX-PARTE

RESMA COMMERCIAL AGENCIES

JUDGMENT

(Judicial review motion to quash orders made by a Magistrate's Court; Orders issued were those adopting a decision of the Business Premises Rent Tribunal and an order executing the decision of the Tribunal; argument that the Magistrate could not adopt the order without first issuing a Notice to the BPRT; argument that ex-parte applicant was not heard before the Magistrate issued the decree; contention that Magistrate therefore lacked jurisdiction; Failure to follow a procedural rule is not the same as not having jurisdiction; Court had jurisdiction; court in its discretion proceeded to visit the scene and make the order directing ex-parte applicant to deliver the premises; right to be heard was at the Tribunal and parties resolved the matter by consent; there was no formal hearing before the Magistrate; No violation of the right to be heard; Issues could have been the subject of appeal but not judicial review; motion dismissed with costs)

1. This is a judicial review motion seeking to quash, by an order of *certiorari*, two orders made by the Chief Magistrate's Court, Nakuru in *Miscellaneous Application No. 66 of 2013, Colorsonic Ltd vs Resma Commercial Agencies Limited*. The two orders sought to be quashed were issued on 18 July 2013 and 29 July 2013.

2. The first order, that of 18 July 2013, was an order essentially adopting the decision of the Business Premises Rent Tribunal made in *Nakuru Tribunal case No. 41 of 2011*. The decision of the Tribunal ordered the ex-parte applicant to forthwith grant to the interested party, Colorsonic Limited, a lease and occupation of a Shop No. 2, and two stalls behind it, in the development known as Masters Building, being Nakuru Municipality Block 9/64, which premises is owned by the ex-parte applicant. The Tribunal also held that the lease between the ex-parte applicant and the interested party is a controlled tenancy; that the rent payable be determined by the prevailing market rents, or if unable to agree on rent, the same be referred to the Tribunal for determination; and costs were to be shouldered by the ex-parte applicant as landlord.

3. The second order sought to be quashed is that of 29 July 2013. That order held that upon inspection of the premises, the shop No. 2 was vacant and the order directed the ex-parte applicant to comply with the decision of the Tribunal within 24 hours.

4. According to the ex-parte applicant, it purchased the suit property in the year 2010 when the same was in a dilapidated state. In May of 2011, it issued a notice to terminate tenancy to the interested party on the ground that it needed to carry out substantial construction works. In essence, the ex-parte applicant was erecting a new building and there was an approved building plan. The interested party, as tenant, then filed a reference before the Business Premises Rent Tribunal (BPRT or the Tribunal). On 2 November 2011, the parties entered into the following consent :-

(i) The tenant to be granted lease for shop No. 2 in the approved plan and the two small stalls behind it.

(ii) The tenant to vacate within 14 days.

(iii) Rent shall be determined by the market rent prevailing of the completion of the building.

(iv) The tenancy shall be controlled.

5. On March 2013, the tenant wrote to the ex-parte applicant, seeking to be given the shop No. 2 in the new building, for apparently the development had now been completed. The ex-parte applicant informed the interested party that due to a change of the original plan, shop No. 2 was not constructed, and gave the interested party freedom to view any other shop they could be interested in.

6. On 17 April 2013, the interested party filed a suit Nakuru CMCC No. 304 of 2013, seeking specific performance of the order of the Tribunal. While the suit was pending, the two parties exchanged correspondences to the effect that the interested party would take Shop No. 1 because Shop No. 2 was no longer available. A letter of offer was given and the interested party was to give acceptance within 7 days. Through a letter dated 7 July 2013, the ex-parte applicant gave the landlord a final notice giving the interested party 7 days to accept the terms or else the shop would be offered to other intending lessees. On expiry of the 7 days, the ex-parte applicant avers that he leased out the premises to other persons.

7. On 18 July 2013, the interested party withdrew the suit Nakuru CMCC No. 304 of 2013. On the same day, the interested party filed a Miscellaneous Application before the Magistrate's Court at Nakuru, and obtained ex parte, the first orders sought to be quashed in this judicial review motion. It is contended that the said orders were made final without a Notice to the Tribunal and without service of the application upon the ex-parte applicant as landlord. It is averred that the said orders were made without jurisdiction since the Magistrate's Court had no powers to dispense with the notice to the Tribunal; that the orders were made without observing the rules of natural justice that no man should be condemned unheard; that the orders are illegal, irrational and against the ex-parte applicant's legitimate expectation of a fair trial and they were unproportionate.

8. Upon learning of the orders made, the ex-parte applicant filed an application to have the same set aside. On 26 July 2013, the ex-parte applicant obtained an order of stay of execution and the application was fixed for hearing inter partes on 29 July 2013. On that day, counsel for the ex-parte applicant was served with a replying affidavit and he sought an adjournment so as to respond to the issues therein. In response to the application for adjournment, counsel for the interested party asked the court to visit the premises. The court then visited the suit premises and saw a shop No. 2 which was locked but did not take any evidence from the parties. On resuming court sitting, it is contended that the court, without ruling on whether or not the adjournment should be granted, lifted the stay orders issued to the ex-parte applicant and ordered the ex-parte applicant to comply with the order of the Tribunal as adopted on 1 July 2013, within 24 hours. It is averred that the said orders were again made without hearing the ex-parte applicant. It is argued that in doing so, the court showed open bias against the ex-parte applicant. It is alleged that when the ex-parte applicant attempted to explain his position, he was told to "shut up" whereas the interested party was allowed to give an explanation although the same was not recorded.

9. In opposing this motion, the interested party relied on three affidavits; the first sworn by Bimal Roy Suresh Shah a director of the interested party company; the second by John Muthee Ngunjiri, a licenced auctioneer; and the third by one Benard Onzere, a security guard. In his affidavit, Mr. Shah has deposed inter alia that the Magistrate's court only adopted and enforced the order of the Tribunal as provided for under Section 14 of The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, CAP 301, Laws of Kenya. He averred that no service upon the ex-parte applicant was required under the law for the said enforcement. He deposed that the ex-parte applicant is abusing the stay orders, granted when the application for leave to commence these proceedings was allowed, to evict the interested party from the suit premises and to hand over the same to a third party in a bid to defeat the orders of the Tribunal. It is said that the director of the ex-parte applicant, Samuel Maigua came into the suit property, broke into the shop and threw out the interested party's goods which were therein. He has deposed that the ex-parte applicant intends to lease the shop in issue to one Christine Wood who runs a mobile phones retail shop though she is yet to take possession. The affidavits of John Muthee Ngunjiri and Benard Onzere are to the effect that Mr. Maigua came to the shop and removed some items placed therein by the interested party.

10. No replying affidavit and no submissions were filed on behalf of the respondent.

11. In his submissions, Mr. Kahigah for the ex-parte applicant, inter alia argued that Section 14 of CAP 301, requires the court to give notice to the Tribunal and that in enforcing the orders of the Tribunal without the notice, the Magistrate acted in contravention of Section 14(1) of CAP 301 and acted in excess of her jurisdiction and its decision amounted to nothing. He also submitted that the orders were made in breach of the rules of natural justice and that being the registered owner, the ex-parte applicant had all rights vested in him. He was of the view that the orders made were illegal, irrational and against the applicant's legitimate expectations.

12. For the interested party, Mrs. Magana inter alia submitted that the Magistrate's Court is given the power to enforce the award of the Tribunal by Section 14 (1) of CAP 301. She submitted that the order of the Tribunal has never been appealed against or set aside. She was of the view that the Magistrate's Court was perfectly within its mandate and jurisdiction in enforcing the said order of the Tribunal. She submitted that although Section 14 (1) does provide for a Notice to the Tribunal, nowhere in the Section does it state that the notice is mandatory or that want of such notice bars enforcement of the Tribunal order. She submitted that the purpose of the notice is so that the Tribunal can transmit to the Court its record of its proceedings for filing before the Court. She argued that the notice has nothing to do with the power of the Court to enforce the Tribunal orders. She pointed out that the court in its own wisdom dispensed with the notice on application by the Interested Party. She was of opinion that whether or not the discretion to dispense with the notice was proper or not, the same is not within the province of Judicial Review proceedings. She submitted that in Judicial Review, the court cannot act as an appellate court. She held the position that the correct course was to appeal the decision. She further submitted that under Section 14 of CAP 301, there is no requirement for Notice upon the landlord since the Magistrate's Court is not hearing the matter determined by the Tribunal but merely enforcing it. She asserted that the court had discretion to proceed ex-parte. She in fact was of the opinion that the ex-parte applicant was accorded a hearing. She did not see any illegality or irrationality in the orders of court nor any failure of legitimate expectation. She pointed out that the suit is not one to quash the proceedings of the lower court but only of certain orders. She averred that the ex-parte applicant is guilty of non-disclosure of material facts in that it is not true that the Shop No. 2 was never constructed and that on the visit to the site, the Court did see the Shop No. 2. She submitted that if there was a change in building plans the ex-parte applicant ought to have informed the Tribunal and seek to vary the Order of the Tribunal. She asked that this suit be dismissed and the orders of stay be vacated.

13. Mr. Kahigah in his rejoinder, reiterated that judicial review can be sustained on the ground of illegality, irrationality and procedural impropriety. He submitted that the lower court flouted the procedure in Section 14 of CAP 301 which required notice to the Tribunal. He submitted that there is no discretion given by the court. He reiterated that on the visit at the site, the court did not take evidence from the parties and the applicant was not therefore given a hearing.

14. Both counsels relied on various authorities which I have read and taken into account in my judgment.

15. I have considered the matter and I am of the following view.

16. What is before me is a judicial review motion and it is apparent that the complaint that the ex-parte applicant has is with the manner in which the Magistrate's Court handled the matter, through which the Interested Party sought to have issued and executed, a decree made after the adoption of an award of the Business Premises Rent Tribunal (the Tribunal). The ex-parte applicant's main contention is that the Magistrate did not have jurisdiction to dispense with the Notice to the Tribunal and also did not hear the ex-parte applicant thus denying him the right to be heard.

17. On the issue of the Notice under Section 14 of CAP 301, the same is drawn as follows :-

18. It is correct that once the determination of the Tribunal is filed in court, a Notice is supposed to issue to the Tribunal. Upon receipt of the Notice, the Tribunal is to forward its proceedings to the Court.

19. The ex-parte applicant argues that the Magistrate did not have jurisdiction to issue a decree and enforce the determination before the Notice is issued. I think, the issue before me is not really one of jurisdiction. The Magistrate did have jurisdiction to handle the matter. Once the Tribunal makes a determination, the same is forwarded to the Magistrate's Court which then proceeds to issue a decree after following certain procedures. Failure to follow the laid down procedure is not the same as not having jurisdiction. The court had jurisdiction but may not have followed certain procedures. A failure to follow a procedure set out in the statute cannot be equated to not having jurisdiction in the matter. One can be faulted for not following procedure but that does not mean that there was no jurisdiction. Not having jurisdiction means that the matter ought not to have been handled at all by the Magistrate's Court. If the ex-parte applicant felt that the Magistrate did not follow a particular procedure as set down in statute, the avenue was to seek a review or appeal the said decision. I am not of the opinion that an argument can be sustained that what the Court did thereafter is a case of want of jurisdiction. It cannot be. I therefore am not in agreement with the ex-parte applicant on its argument that the Magistrate did not have jurisdiction.

20. The other contention of the ex-parte applicant is that he was not heard before the Court effected the Order of the Tribunal. The ex-parte applicant was heard on the substance of the case before the Tribunal and he settled the matter by consent. What the court does is just to issue a decree. It is of course advisable for a court to hear the parties if there are some contentious issues. But again if the court in its discretion does not hear the parties, that again may be a ground of appeal or review but not a ground for judicial review. It was argued that the court did not address the application for adjournment and instead ordered a visit to the suit premises and did not invite parties to submit. In my view, that is how the court deemed fit to conduct the proceedings. The manner in which a court conducts its proceedings is within its discretion. A party may of course not be happy in the way in which proceedings are conducted. If so, such party has the avenue to appeal. I am not of the view that the correct procedure is to seek a remedy of judicial review to quash any orders issued in exercise of such discretion.

21. It must also be kept in mind that what the Magistrate did was only to issue a decree for purposes of enforcing the order of the Tribunal. I cannot fault the Magistrate for doing so since that is the reason the award is filed before the Magistrates' Court. The order of the Tribunal was one entered into by consent. That consent had not been set aside and the interested party was perfectly entitled to execute the same. The ex-parte applicant never went back to the Tribunal to seek to set aside that consent for the reason that the premises was not available as it was omitted from the building plan. The ex-parte applicant did not also go back to the Tribunal to ask that the interested party be given an alternative shop. The consent of the parties remained intact and undisturbed. A decree had to issue on its terms.

22. It was averred that the interested party was offered an alternative shop and given 7 days to confirm whether he would take such shop. But this was not in line with the consent of the parties given at the Tribunal. I do not think the ex-parte applicant could amend the consent unilaterally as it so wished. If it wanted to do so, it ought to have gone back to the Tribunal. From the affidavit of the respondent it appears as if the Shop No. 2 actually existed. But if it did not exist, the ex-parte applicant ought to have tried to argue its case, not before the Magistrate, but before the Tribunal, that the Shop no longer existed. There was no purpose in arguing the matter before the Magistrate whose mandate was only to issue a

decree.

23. Having considered the matter, I really do not see any substance in this Judicial Review motion. It is hereby dismissed with costs. The interim orders are also set aside. It is now up to the parties to determine their next course of action since it appears as if the shop in issue has already been given out to another tenant.

24. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of September 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Gatonye for the ex-parte applicant

N/A on part of State Law office for respondent

N/A on part of M/s Gatu Magana & Co. Advocates for interested party.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU