



REPUBLIC OF KENYA



**Njuguna & another v Business Premises Ren Tribunal & 3 others;  
Maunji (Interested Party) (Miscellaneous Civil Application  
1 of 2023) [2024] KEELC 656 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 656 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS CIVIL APPLICATION 1 OF 2023**

**JA MOGENI, J**

**FEBRUARY 15, 2024**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE AN APPLICATION  
FOR ORDERS OF JUDICIAL REVIEW AGAINST THE BUSINESS PREMISES  
RENT TRIBUNAL AND BPRT VICE CHAIRPERSON HON. GAKUHI CHEGE**

**AND**

**IN THE MATTER OF THE TENANCIES OF SHOP NOS. A1 AND A3  
SITUATED UPON L.R NO. 36/11/13 ALONG 1ST AVENUE, NEAR THE  
JUNCTION OF 13TH STREET, IN EASTLEIGH, NAIROBI CITY COUNT**

**AND**

**IN THE MATTER OF AN APPLICATION BY IRENE NYAMBURA NJUGUNA AND  
ALLAN KIRONJI WANYOIKE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
AGAINST THE OFFICER IN CHARGE OF PANGANI POLICE STATION, NAIROBI**

**BETWEEN**

**IRENE NYAMBURA NJUGUNA ..... 1<sup>ST</sup> APPLICANT**

**ALLAN KIRONJI WANYOIKE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**THE BUSINESS PREMISES RENT TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**MR GAKUHI CHEGE ..... 2<sup>ND</sup> RESPONDENT**

**THE OFFICER IN CHARGE OF PANGANI POLICE  
STATION ..... 3<sup>RD</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**FRANCIS MWANGI MAUNJI ..... INTERESTED PARTY**



## RULING

1. At the outset, it is noteworthy that on 29/03/2023, the ex-parte Applicants, Irene Nyambura Njuguna and Allan Kironji Wanyoike represented by M/S Charles A. Khamala Advocate were granted leave by this Court to apply for *Certiorari*, *Mandamus* and Prohibition orders in this matter.
2. Subsequently, on 18/04/2023, the ex-parte Applicants filed a Notice of Motion dated 18/04/2023 (the application herein) under Order 53 Rules 3, 4, 5 & 6, Order 51 of the *Civil Procedure Rules*, Section 3A of *Civil Procedure Act*, Sections 7, 8, 9, 10, 11 and 12 of the *Fair Administrative Action Act*, Sections 2, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14 and 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Articles 22, 23, 25, 26, 43, 29, 47 & 50 of the *Constitution* of Kenya and all other enabling rules of the law seeking for the orders infra;
  1. An order of certiorari do issue to quash the decisions or orders of Hon. Gakuhi Chege (Vice Chairperson of the Business Premises Rent Tribunal) made on the 12/10/2022 and issued on the 13/10/2022 in BPRT case no. E730 of 2022 (Nairobi), Irene Nyambura Njuguna v Francis Mwangi Maunji, and in BPRT case no. E732 of 2022 (Nairobi), Allan Kironji Wanyoike v Francis Mwangi Maunji.
  2. An order of prohibition do issue directed to the Officer in Charge of the Pangani Police Station prohibiting him from enforcing compliance and/or continuing to enforce compliance of the decisions or orders of Hon. Gakuhi Chege (Vice Chairperson of the Business Premises Rent Tribunal) made on the 12/10/2022 and issued on the 13/10/2022 in BPRT case no. E730 of 2022 (Nairobi), Irene Nyambura Njuguna v Francis Mwangi Maunji, and in BPRT case no. E732 of 2022 (Nairobi), Allan Kironji Wanyoike v Francis Mwangi Maunji.
  3. An order of prohibition do issue prohibiting the Business Premises Rent Tribunal from continuing with or hearing BPRT case no. E730 of 2022 (Nairobi), Irene Nyambura Njuguna v Francis Mwangi Maunji, and BPRT case no. B732 of 2022 (Nairobi), Allan Kironji Wanyoike v Francis Mwangi Maunji until final determination of this suit or further orders.
  4. An order of mandamus do issue removing BPRT case no. E730 of 2022 (Nairobi), Irene Nyambura Njuguna v Francis Mwangi Maunji, and in BPRT case no. E732 of 2022 (Nairobi), Allan Kironji Wanyoike v Francis Mwangi Maunji into the High Court for determination and disposal.
  5. A declaration that the Ex Parte applicants for leave Irene Nyambura Njuguna and Allan Kironji Wanyoike are the tenants legally entitled to occupy Shop no. A1 and Shop no. A3, respectively, situated upon L.R. 36/11/13 along 1<sup>st</sup> Avenue adjacent to 13<sup>th</sup> Street junction at Eastleigh, Nairobi City County.
  6. A declaration that the notices of termination/alteration in BPRT case no. E730 of 2022 (Nairobi), Irene Nyambura Njuguna v Francis Mwangi Maunji, and in BPRT case no. E732 of 2022 (Nairobi), Allan Kironji Wanyoike v Francis Mwangi Maunji dated 20/07/2022 purportedly served on the tenants are incurably defective and incompetent to terminate the tenancies herein as decided ordered or determined by Hon. Gakuhi Chege (Vice Chairperson of the Business Premises Rent Tribunal) on the 12/10/2022 or at all and are of no effect.
  7. A declaration that the illegal, irrational, unprocedural and unreasonable decisions and/or orders of the Hon. Gakuhi Chege (Hon. Vice Chairperson of the BPRT) have subjected the



applicants/tenants to injury, loss and damage and therefore compensation be assessed and provided.

8. An order of mandamus directed at the 3<sup>rd</sup> Respondent and the other respondents in cooperation with the Eastleigh North Police Station to superintend over the reinstatement of the Applicants into their tenancy premises pending the hearing and determination of the Notice of Motion to be filed herein seeking judicial review or until further order.
  9. A declaration that the applicants'/tenants' references in Tribunal case no. E730 of 2022 (Nairobi) Irene Nyambura Njuguna (the receiving party) against Francis Mwangi Maunji (the requesting party) and Tribunal case no. E732 of 2022 (Nairobi) Allan Kironji Wanyoike (the receiving party) against Francis Mwangi Maunji (the requesting party) have been filed within the appropriate time and the Landlord/Interested Party's said notices to terminate or alter terms of tenancy of 20/07/2022, purportedly issued and allegedly served on the applicants/tenants have no effect pending hearing and determination of the reference herein pursuant to section 6 of the Landlord and Tenant Act.
  10. A declaration that the Landlord's/Interested Party's said notices of 20/07/2022, notices to terminate or alter terms of tenancy purportedly issued and allegedly served on the applicants/tenants are of no effect pursuant to section 9(1)(b) of the Landlord and Tenant Act as they make no distinction of whether the Landlord seeks alteration or termination and are therefore vague, and are not signed in person by the Landlord/Interested Party as purported, but by his advocate or a third party.
  11. An order that the costs of the application for leave and of the costs in the Tribunal in the aforesaid cases be provided for.
  12. An order that costs occasioned by this Motion be provided for.
3. The Application is anchored upon a statement dated 1/11/2022. The same is further anchored on the Ex Parte Applicants' three (3) paragraphed affidavit sworn on 30/10/2023 alongside the annexed documents.
  4. Briefly, the Ex Parte Applicants claim to be tenants on the suit premises having entered occupation in 2017 as controlled sub-tenants to the head tenant, Mr. Peter Mwangi Irungu at a monthly rent of Kshs. 30,000.00. The Ex Parte applicants claim to have contributed to the purchase of a container housing their shops. It is their contention that the head-tenant's lease termination led to them being issued with a notice from the Interested Party on 23/09/2020. The Interested Party directed all tenants who wished to continue occupying their portion to pay the rent directly to the Interested Party. Disputes arose on or around 8/08/2022, with eviction notices issued to both Applicants on the even date. They both disputed the eviction notice vide separate letters dated 17/08/2022. Further to that, references and applications for injunctory reliefs were filed at the BPRT by both Applicants on 18/08/2022. The cases are Nairobi BPRT Case no. E730 of 2022 and in BPRT Case no. E732 of 2022 and each Applicant referred their respective tenancy disputes against the Interested Party. Pursuant to their application dated 22/08/2022, Ex Parte interim orders were granted on 23/08/2022 by the Hon. Chairperson of the BPRT, restraining further breaches. A virtual hearing held on 12/09/2022 confirmed proper service. On the same virtual hearing, the 2<sup>nd</sup> Respondent issued injunctive orders pending the hearing of the reference, but on 12/10/2022, the 2<sup>nd</sup> Respondent entertained a new Ex Parte application dated 11/10/2022 filed by the Interested Party, vacating previous orders. The Ex Parte applicants argue the orders given on 12/10/2022 are in excess of jurisdiction and contrary to statute, noting that the said orders were not served upon them.



5. The Application is unopposed. The Respondents duly served, failed to file any reply to this Application.
6. When the Application came before me for determination, I gave directions for its disposal by way of written submissions. The Ex Parte Applicants filed their submissions dated 6/11/2023. The Respondents did not file any submissions in this Application.
7. I have thoroughly read and considered the application, the affidavit and statement on record and the Ex Parte Applicants' submissions inclusive of the issues and authorities relied thereupon. On that score, the issues for determination in the instant application are condensed to whether:
  - a. Whether the Ex Parte Applicants' case merits orders for judicial review.
  - b. Who should bear the costs of the suit.

### **Analysis and Determination**

- a. Whether the Ex Parte Applicants' case merits orders for judicial review.
8. As already noted, the Respondents did not file any replying affidavit. In the circumstances, the facts surrounding the dispute which have been presented by the Ex Parte applicants remains wholly uncontested.
9. The scope of Judicial Review was well articulated in the case of *Municipal Council of Mombasa – v- Republic & Umoja Consultants Ltd.* Civil Appeal No.185 of 2001 where the Court of Appeal stated: -
 

“Judicial review is concerned with the decision making process, not with the merits of the decision: 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”.
10. In the *Ugandan case of Pastoli v Kabale District Local Government Council & Others*, (2008) 2 EA, the court gave an in-depth analysis of what a Judicial Review application is as follows:
 

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Babikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.



Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

11. In the case of *Republic v Tanathi Water services board and 2 others exparte Senator Johnstone Muthama* (2014) eKLR, the court had this to say on the scope of Judicial review:

“It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits ..... The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large..... Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case (emphasis added).”

12. What resonates from the above case law is that the scope of judicial review proceedings, is limited to the decision-making process in relation to the decision which is being challenged. The role of the court is therefore supervisory and the court should not attempt to delve into the “forbidden appellate approach”, see *Republic v Public Procurement Administrative Review Board and 2 others exparte Rongo University* (2018) eKLR. Thus, the court can neither hear the merits of the dispute nor re-hear the same.
13. Having clearly set out the scope of judicial review, I will now proceed to deal with the issues of administrative process leading to the decision in question and to determine whether or not the Tribunal acted in excess of its jurisdiction and contrary to statute to issue the orders it granted on 12/10/2022.
14. The Ex Parte Applicants contend that the orders given on 12/10/2022 are in excess of jurisdiction and contrary to statute, noting that the said orders were not served upon them. This Court has to point out that where there are facts that are in dispute, Judicial Review may not be an appropriate remedy. The Ex Parte Applicants’ counsel submitted that the Applicants seek judicial review because the 1<sup>st</sup> and 2<sup>nd</sup> Respondent administrative bodies have on 12/10/2022, acquiesced in forcibly evicting the Applicants from their controlled tenancy premises through issuing irregular and unprocedural Ex Parte mandatory injunctions. That the forcible evictions of the Applicants were illegal, in light of the existence of the subsisting references before the 1<sup>st</sup> Respondent.
15. From the uncontested material on record, it is evident that the interested party sought to vacant possession of the suit property through their application dated 11/10/2022. The Tribunal did find and hold that the Ex Parte applicants were controlled tenants. Termination of a controlled tenancy is provided for under section 4 of the *Landlord and Tenant (shops, Hotels and Catering Establishments) Act*. The Section provides that;

“Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated,



and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the provisions of this Act”

16. Section 4 (2) and (4) of [cap 301](#) provides that;

“4(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form. 4(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein.”

17. In the present case, the record shows that the Ex Parte Applicants filed separate references in Tribunal Case No. E730 of 2022 and Tribunal Case No. E73 of 2022. In these suits, the Applicants approached the 1<sup>st</sup> Respondent through an application dated 22/08/2022 seeking an interim injunction pending inter partes hearing of that application. The record shows that the Hon. Chair granted them interim injunctive orders pending inter partes hearing of that application which was scheduled for 12/09/2022. The Hon. Chairman also ordered that the tenant be reinstated to the suit premises. For avoidance of doubt, these orders were given in both Tribunal Case No. E730 of 2022 and Tribunal Case No. E732 of 2022.

18. The evidence before me also demonstrates that the landlord/Interested Party filed an application dated 11/10/2022 seeking his notice to terminate dated 20/07/2022 to be allowed and for the orders given on 23/08/2022 to be vacated and/or set aside. The 2<sup>nd</sup> Respondent vacated the orders issued on 23/08/2022 on 12/10/2022 in Tribunal case no. E730 of 2022 wherein he ordered that; “the injunctive orders issued on 23/08/2022 be and hereby vacated/set aside pending hearing of the application inter partes on 10/11/2022” among other orders. Further, in Tribunal Case no. E732 of 2022, the 2<sup>nd</sup> Respondent ordered inter alia that; “the Notice to Terminate Tenancy dated 20/07/2022 to declare the premises on L.R No. 36/II/13 Eastleigh Nairobi vacant be and is hereby allowed pending hearing of the application inter-partes on 10/11/2022.” These order were given Ex Parte.

19. It is noted that the orders being vacated of 23/08/2022 are spent as fresh injunctive orders were granted by the 2<sup>nd</sup> Respondent on 12/09/2022 in both suits before the Tribunal pending the determination of the References. These injunctive orders have not been vacated.

20. It is the Ex Parte Applicants’ case that they have already been evicted from the suit premises subject to the orders given on 12/10/2022 by the 2<sup>nd</sup> Respondent. I have looked at the evidence presented before me. The landlord contended to have served the Ex Parte applicants with the notice to terminate dated 20/07/2022. The landlord/interested party thereafter filed an application dated 11/10/2022 seeking for the notice of termination to be allowed. I note that the Ex Parte applicants did not file a reference to oppose the notice of termination of tenancy. The 2<sup>nd</sup> Respondent allowed the notice of termination in the order given on 12/10/2022. The Ex Parte applicants argue that they were not served with the order given on 12/10/2022. They only aver that the orders were granted without being accorded the opportunity to be heard.

21. It is my considered view that the Ex Parte applicants exposed themselves to the provisions of Section 10 of the [Landlord and Tenant \(shops, Hotels and Catering Establishments\) Act](#) which is in the following terms:

“Where a landlord has served a notice in accordance with the requirements of section 4 of this Act, on a tenant, and the tenant fails within the appropriate time to notify the landlord of his unwillingness to comply with such notice, or to refer the matter to a Tribunal then



subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder.”

22. In that regard, having failed to file a reference to the said notice, it appears that the Tribunal went ahead to grant the vacant possession orders. I note that the termination notice was dated 20/07/2022 and the Application seeking for the Tribunal to allow the same was filed in 11/10/2022. When a party files an application, then such party must disclose all material facts to the court to enable the court come to a just conclusion. The record shows that the tenant/ Ex Parte applicants had not filed a reference opposing the termination notice dated 20/07/2022. The Tribunal could therefore not interrogate whether the reasons for termination given by the landlord in his notice were justified or not.
23. Judicial Review is concerned with the decision making process. An application for judicial review is largely about reviewing the process through which the decision was made to determine whether the process was indeed fair and not about the merit or the demerits of the decision.
24. Section 47 of the *Constitution* provides that:

‘(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’.
25. Section 9 (2) of the *Fair Administrative Action Act* provides that:

‘The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.’
26. I am guided by the decision of the Supreme Court in the case of *Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy* [2014] eKLR where it was stated that;

“(161) when Courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, Courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and individual rights; and ensures that decision makers are not above the law, but have taken responsibility for making lawful decisions, in the knowledge that they are reviewable.”
27. What resonates from the various case law on judicial review is that the scope of judicial review proceedings, is limited to the decision making process in relation to the decision which is being challenged. The Applicants claim is that the Tribunal acted in excess of its jurisdiction and contrary to statute.
28. On the question of whether or not the Tribunal acted in excess of its jurisdiction and contrary to statute, it turns on the status of the relationship between the interested party and the Ex Parte applicants on 12/10/2022 when it made the order. On my evaluation of evidence presented and



explained hereinabove, the tenant-landlord relationship had not been terminated as at 12/10/2022. In view of this, this Court finds that the Tribunal acted within its jurisdiction. This Court cannot say with certainty that the 2<sup>nd</sup> Respondent acted in disregard of the law. I opine that the remedies the Applicants are seeking in this judicial review are best canvassed at the Appeal and not in a Judicial Review. It is my view that there was no 'procedural impropriety' during the proceedings of the Tribunal cases regarding the Ex Parte Applicants. The 3<sup>rd</sup> Respondent did not act in disregard of the law either as his actions seem to have been sanctioned by the Court order of 12/10/2022 as well.

29. The Court has considered the evidence before it and the upshot is that this Court finds that the proceedings that culminated in the determination of 12/10/2022 were not vitiated by procedural impropriety. To this end, the Court finds that the Ex Parte Applicants have not made out a case of the grant of judicial review orders sought.
30. In addition to the above, the Ex Parte Applicants' application sought for the following orders:
  1. An order of *certiorari* do issue .....
  2. An order of prohibition do issue .....
  3. An order of prohibition do issue .....
  4. An order of *mandamus* do issue .....
  5. A declaration that the Ex Parte applicants for leave Irene Nyambura Njuguna and Allan Kironji Wanyoike are the tenants legally entitled to occupy Shop no. A1 and Shop no. A3, respectively, situated upon L.R. 36/11/13 along 1<sup>st</sup> Avenue adjacent to 13<sup>th</sup> Street junction at Eastleigh, Nairobi City County.
  6. A declaration that the notices of termination/alteration in BPRT case no. E730 of 2022 (Nairobi), Irene Nyambura Njuguna v Francis Mwangi Maunji, and in BPRT case no. E732 of 2022 (Nairobi), Allan Kironji Wanyoike v Francis Mwangi Maunji dated 20/07/2022 purportedly served on the tenants are incurably defective and incompetent to terminate the tenancies herein as decided ordered or determined by Hon. Gakuhi Chege (Vice Chairperson of the Business Premises Rent Tribunal) on the 12/10/2022 or at all and are of no effect.
  7. A declaration that the illegal, irrational, unprocedural and unreasonable decisions and/or orders of the Hon. Gakuhi Chege (Hon. Vice Chairperson of the BPRT) have subjected the applicants/tenants to injury, loss and damage and therefore compensation be assessed and provided.
  8. An order of *mandamus* .....
  9. A declaration that the applicants'/tenants' references in Tribunal case no. E730 of 2022 (Nairobi) Irene Nyambura Njuguna (the receiving party) against Francis Mwangi Maunji (the requesting party) and Tribunal case no. E732 of 2022 (Nairobi) Allan Kironji Wanyoike (the receiving party) against Francis Mwangi Maunji (the requesting party) have been filed within the appropriate time and the Landlord/Interested Party's said notices to terminate or alter terms of tenancy of 20/07/2022, purportedly issued and allegedly served on the applicants/tenants have no effect pending hearing and determination of the reference herein pursuant to section 6 of the Landlord and Tenant Act.
  10. A declaration that the Landlord's/Interested Party's said notices of 20/07/2022, notices to terminate or alter terms of tenancy purportedly issued and allegedly served on the applicants/tenants are of no effect pursuant to section 9(1)(b) of the Landlord and Tenant Act as they



make no distinction of whether the Landlord seeks alteration or termination and are therefore vague, and are not signed in person by the Landlord/Interested Party as purported, but by his advocate or a third party.

11. An order that the costs of the application for leave and of the costs in the Tribunal in the aforesaid cases be provided for.
  12. An order that costs occasioned by this Motion be provided for.
31. As it can be seen above, the application largely seeks declarations with regard to the suits pending before the BPRT, the 1<sup>st</sup> Respondent herein. Section 8 of the [Law Reform Act](#) does specifically set out the orders that the High Court can grant in Judicial review proceedings. Section 8 [Law Reform Act](#), Cap 26 Laws of Kenya provides under subsection 1 and 2 as follows: -

- (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of *Mandamus*, prohibition or certiorari. (2) in any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous provisions) Act, 1938, (1 and 2, Geo 6, C. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

32. Under the foregoing provision of the law it is clear that the High Court in determining an application for judicial review has jurisdiction to only grant the orders specified in Section 8 of the [Law Reform Act](#). In the case of [Khobesh Agencies Limited & 32 others – v- Minister of Foreign Affairs and International Relations & 4 others](#) (2013) eKLR, the court had occasion to consider the scope of the court’s jurisdiction in a judicial review application and was emphatic that judicial review is a special jurisdiction given to the court under the provisions of Section 8 and 9 of the [Law Reform Act](#) and it does not extend to other Civil and Criminal matters. Odunga, J (as he then was) in the case stated thus:

- “ 31. However, whereas, the court is bound in determining an application for judicial review to ensure that the Constitutional provision are adhered to, this does not entitle the court to change, the nature of the judicial review application into a constitutional petition. To do that would defeat the express provisions of section 8 and 9 of the [Law Reform Act](#), Cap 26 Laws of Kenya. It must always be remembered that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It is governed by section 8 and 9 of the [Law Reform Act](#) being the substantive law and Order 53 of the [Civil Procedure Rules](#) being the procedural law. Section 8 of the [Law Reform Act](#) specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. Any other remedy such as declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before making such a declaration. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Accordingly, it would be improper to turn judicial review proceedings into Civil Proceedings or even a constitutional petition where by virtue of Article 23(3) of the [Constitution](#), the court has jurisdiction to award inter alia a declaration of rights, on a declaration



of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights under Article 24, an order for compensation and an order of judicial review. Under the said Article the operative phrase is “a court may grant appropriate relief, including “as opposed to section 8 of the Law Reform Act which employs the phrase. “The High Court shall not”. I therefore find that it was incorrect for the applicants to equate the court’s judicial review jurisdiction with the court’s jurisdiction under article 23(3) of the Constitution. See *Commissioner of Lands – v- Hotel Kunste Ltd* Civil Appeal NO. 234 of 1995 and *Sanghani Investment Ltd – v- Officer in Charge Nairobi Remand and Allocation Prison* (2007) IEA 354”.

33. I concur with the position taken by Hon. Justice Odunga’s (as he then was) exposition of the law on the scope of Judicial review as set out in the above passage in his said judgment. In the case of *Sanghani Investment Ltd- v- Officers in charge Nairobi Remand and Allocation Prison* (2007) IEA 354 referred to by Odunga J, (as he then was) the court observed thus: -

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on merits-----“.

34. The Ex Parte Applicants in the present Application seek declaration orders in regard to occupation of the suit premises, that the notices to terminate purportedly served upon the tenants are defective and incompetent, that the Tribunal’s decision has subjected the Applicants to injury, loss and damage and therefore compensation to be assessed and lastly, that the tenants’ references have been fled within the appropriate time among other declarations. For this, the Applicants would need to present and adduce evidence by way of *viva voce* evidence to establish their claims with regard to the tenancy relationship between the parties. Since they contest lack of service of the notice to vacate dated 20/07/2022 that subsequently led to their eviction from the suit premises, it is more critical for *viva voce* evidence to be adduced to establish the same. That cannot be done in these judicial review proceedings.

35. Likewise, the quest to be compensated for injury, loss and damage to be assessed would require to be considered in civil proceedings which permits the court to grant and issue declaratory judgments and/or pronouncements. Under judicial review the court’s jurisdiction is restricted to issue orders of *Mandamus*, certiorari and prohibition which of necessity are confined to review of decisions whose propriety is in question. In view of this, it is my holding that the Applicants’ application for declaratory orders within the present judicial review proceedings is misconceived and incompetent and cannot be granted.

36. In conclusion, for the reasons given in the foregoing paragraphs, the *Ex-parte* Applicants’ Notice of Motion dated 18/04/2023 and the prayers made for declaratory orders is unmerited and is hereby dismissed and since the Respondents did not enter appearance I will not make any orders as to costs.

It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2024**

.....

**MOGENI J**

**JUDGE**



In the virtual presence of :-

Mr. Charles Khamala for the Ex-parte Applicant

None appearance for the parties

Ms. C. Sagina: Court Assistant

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**MOGENI J**

**JUDGE**

