**IN THE COURT OF APPEAL**

**AT MOMBASA**

**CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.**

**CIVIL APPEAL NO. 31 OF 2013**

**BETWEEN**

**ZAKAYO MICHUBU KIBUANGE …..... APPELLANT**

**AND**

**LYDIA KAGUNA JAPHETH …..... 1ST RESPONDENT**

**THE CHAIRPERSON BUSINESS**

**PREMISES RENT RRIBUNAL …..... 2ND RESPONDENT**

**RESIDENT MAGISTRATE MOMBASA ..... 3RD RESPONDENT**

*(An appeal against the ruling and order of the High Court of Kenya at Mombasa (Ibrahim, J.) dated 4th October, 2012*

*in*

*Msc.C.App.No. 239 of 2009)*

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**JUDGMENT OF THE COURT**

**Lydia Kaguna Japheth** "*the 1st respondent*" on 8th May, 2009 sought and obtained from the High Court, Mombasa, leave to commence judicial review proceedings in the nature of certiorari to bring forth "*and quash the decision of the* ***Business Premises Rent Tribunal in Tribunal Case No. 17 of 2009.***" She also sought a further "*order of certiorari to remove and quash the order of the Resident Magistrate, Mombasa in* ***RMCC Misc. Appl. No. 40 of 2009 on 1st April, 2009***." As can readily be seen, the orders were directed at the Chair, Business Premises Rent Tribunal and the Resident Magistrate Mombasa "*the 2nd and 3rd respondents respectively*" in this appeal. In those proceedings, **Zakayo Michubu Kibuange** "*the appellant*" herein was named as the interested party.

Leave having been so granted, the 1st respondent proceeded as required to mount the substantive Notice of Motion on 27th May, 2009. The basis for the 1st respondent's claim as deciphered from the documents filed in support of the motion was that she was the registered proprietor of all that piece or parcel of land known as **Mombasa/Block XVIII/264** "*the suit premises.*" Pursuant to an express sub-

lease agreement dated 11th November, 2003 she sub-let to the appellant the suit premises for a period of five years and three months. At the expiry of the lease and since she was not keen to renew the same, she by the letters dated 3rd November, 2008 and 5th February, 2009 respectively evidenced that fact and demanded of the appellant to vacate the suit premises upon the expiry of the term. However, on 2nd February, 2009 and after the expiry of the lease, the appellant lodged a complaint with the 2nd respondent claiming that the 1st respondent had threatened to terminate his tenancy with effect from 31st January and sought restraining orders in respect thereof. He also complained that she had disconnected electricity power supply to the suit premises and prayed for an order for the re-connection of the same. Apparently, the complaints were prosecuted *ex-parte* as *o*n 5th February, 2009, the 1st respondent was served with an order made by the 2nd respondent restraining her from evicting the appellant from the suit premises. Subsequently, the 1st respondent was yet again served with a further order by the 2nd respondent directing her to reconnect power to the suit premises, failing which the appellant would be at liberty to do so. The two orders were subsequently filed by the appellant with the 3rd respondent which on 1st April, 2009 proceeded to adopt the same as orders of the Court for purposes of execution. In the meantime and despite the lease having expired, the appellant failed, refused and/or ignored to deliver to the 1st respondent vacant possession of the suit premises. Coming back to the orders made against the 1st respondent as aforesaid, it is her case that the 2nd respondent had no jurisdiction to arbitrate over the dispute, there being in existence a sub-lease agreement between the appellant and the 1st respondent exceeding a period of 5 years and 3 months. She contended further that the 3rd respondent similarly lacked jurisdiction to adopt the said orders. Hence the application for judicial review for orders of certiorari to quash those orders.

In response, the appellant took the position that the High Court had no jurisdiction to determine whether or not any tenancy was a controlled tenancy. That was the preserve of the 2nd respondent. That as far as he was concerned, there was no written sub-lease agreement with the 1st respondent and the one exhibited was self-manufactured document meant to circumvent justice. That he took possession of the suit premises in November, 2002 and not November, 2003.

**Ibrahim, J.** (as he then was) having heard respective parties to the application crafted his ruling (though erroneously titled *"judgment")* which was delivered by **Mwera, J.** (as he then was) on his behalf on 14th October, 2012. In allowing the substantive Notice of Motion, **Ibrahim, J**. held thus:-

> **"... The question of law is a simple and straightforward one. Whether a lease of 5 years and 3 months reduced in writing would fall within the purview of the Business Premises Tribunal under cap 301. The controlled tenancy for which the Tribunal has jurisdiction are those falling under the terms of** *section 2(1)(b)(1)* **of** *Cap 301***. Clearly a tenancy of five years and three months which is in writing is outside the jurisdiction of the Business Premises Tribunal unless it (sic) he lease has breach clause. I therefore hold the Tribunal lacked jurisdiction in the matter ..."**

He then proceeded to allow the application with costs to the 1st respondent. The decision of the High Court above did not go down well with the appellant. He therefore mounted this appeal on four grounds, namely:-

> ***"1. The learned Judge erred in law and fact in proceeding without jurisdiction to hold that tenancy subject of this appeal is not a controlled one within the meaning of sec. 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, thereby usurping the powers conferred upon the Business Premises Rent Tribunal by sec. 12(1)(a) of Cap.301.***
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> 2. ***The learned Judge erred in law and fact in upholding the validity of the sublease dated 11th November, 2002 without any investigation while the appellant had expressly denied ever executing the same and categorically stated that he is not a sub- tenant.***

3. ***The learned Judge erred in law and fact in failing to appreciate that the matters raised by the Judicial Review subject of this appeal cannot be fairly and effectively determined by way of judicial review.***

4. ***The learned Judge erred in law and fact in failing to appreciate that judicial review remedy is only applicable in situations where there is no clear constitutional or statutory remedy, as way (sic) held by the court of Appeal in the Speaker of National Assembly -vs- Karume 1990-1994(EA) 549."***

Urging the appeal before us on 21st January, 2014, **Mr Odongo**, learned counsel for the appellant submitted that the issues raised in the Judicial Review application could not have been entertained by the High Court. The sub-lease agreement was in dispute. That where there was a dispute as to whether or not there was a tenancy, was a matter for the 2nd to determine respondent and not the High Court by dint of **section 12(1)(a)** of **Cap 301**. Counsel relied on the case of **Syedna v Mohamed Burhhannudin Saheb v Mohamedally Hassanally, Civil Appeal No. 28 of 1980 (UR)** for this proposition. Counsel went on to submit further that where there were disputed facts, Judicial review mechanism was not the proper forum. Finally, counsel submitted that **section 12(1)(i)** of **Cap 301** gave the 2nd respondent powers to rescind any order made by it. The 1st respondent should have invoked these powers if she felt that the 2nd respondent was wrong in issuing the orders complained of. This was an alternative remedy available to her. She should therefore not have invoked the Judicial Review mechanism. In aid of this submission counsel referred us to the case of **Speaker of the National Assembly v Karume (1990-1994) EA 546 (CAT)**. On the basis of the foregoing, counsel urged us to allow the appeal with costs.

Responding, **Mr Maundu**, learned counsel for the 1st respondent argued that the High Court was faced with a valid sub-lease agreement which provided for a period of 5 years and 3 months. That period took the complaint outside the purview of the 2nd respondent. Accordingly, the High Court was right in so holding. Counsel further submitted that the orders made by the 2nd respondent were final in nature. Accordingly, there was no room left for it to determine the validity or otherwise of the lease. The 2nd respondent had exceeded its jurisdiction in dealing with the dispute in the circumstances of the case. For this proposition counsel relied on the case of **Kadamas v Municipality of Kisumu (1985) KLR 954**. Further the order of the Business Premises Tribunal did not oust its jurisdiction to investigate the validity of the lease. It did not matter that the 1st respondent had another remedy. A party can still pursue Judicial review remedies even though he has a remedy under common law. For this proposition counsel referred us to the case of **Bahajj Holdings Ltd v Abdo Mohamed Bahajj & Company Ltd & Anor, Civil Application No. Nai 97 of 1998 (UR)**.

On behalf of the 2nd and 3rd respondents, **Ms Lutta** learned counsel submitted that the issue before the High Court was jurisdiction of the 2nd respondent. There was a written sub-lease agreement which was found to be valid. The High Court correctly found as a fact that the lease was for 5 years and 3 months. In the absence of evidence to the contrary, the Court was bound to rule as it did. The complaint before the 2nd respondent had nothing to do with the validity of the lease. Lastly, counsel submitted that **section 12** of **Cap 301** dealt with its jurisdiction. However, that section must be read with **section 2** of the same Act.

This was a Judicial review application for orders of certiorari. When is it that such an order would issue? In the case of **Raichand Khimji & Co., v Attorney General (1997) EA. 536**, this Court stated:-

> **"... The High Court has power to quash a decision of a statutory tribunal for want or excess of jurisdiction, breach of rules of natural justice, error of law on the face of the record, fraud or collusion."**

From the foregoing it is quite apparent that the Judicial Review remedy is available to a party once it is proved that in arriving at the decision sought to be challenged and which was detrimental to the person challenging it, the statutory tribunal or body acted in excess of or want of jurisdiction, breached the rules

of natural justice, acted in error of law, was fraudulent or acted in collusion with some of the parties. It has also been said that this remedy is just like any other remedy, in Judicial Review proceedings, discretionary. Its overall purpose is to ensure that a party is given fair treatment by the authority to which he has been subjected to. As stated by **Lord Hailsham of St. Marylebon** in the case of **Chief Constable of the North Wales Police v Evans (1982) I WLR 1155**:-

> **"The purpose of Judicial review is to ensure that the individual receives fair treatment and to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the Court ..."**

It should also be appreciated that Judicial review remedies are concerned more with the decision making process as opposed to the merits of the decision. Finally, being discretionary remedies it behooves whoever seeks them to act with candour, virtue and temperance.

With this general background regarding the Judicial review remedies, we now turn to consider this appeal. We will deal with grounds 1, 2, & 3 globally and then separately deal with ground 4. Dealing with the first batch of grounds aforesaid it is common ground that the 1st respondent is the registered proprietor of the suit premises. It is common ground as well that there was a landlord/tenant relationship, whether oral or written between the appellant and the 1st respondent. It is also not in dispute that the 1st respondent issued a termination Notice in writing of the sub-lease and indicated that upon expiry of the same in February, 2009, she was not keen on renewing it. It is also not denied that on 2nd February, 2009, the appellant filed a complaint with the 2nd respondent and obtained *ex-parte* injunctive orders effectively restraining the 1st respondent from *inter-alia* terminating the sub-lease. It is again not in dispute that the 1st respondent subsequently filed an application for reviewing and or setting aside the said orders but withdrew the application in favour of the Judicial review proceedings. Lastly, it is common ground that the 2nd respondent's orders were subsequently adopted as orders of the 3rd respondent for purposes of execution.

Was the sub-lease agreement between the appellant and 1st respondent in writing as claimed by the 1st respondent or oral as the appellant insisted. If in writing, was it for a period of 5 years and 3 months thereby ousting the jurisdiction of the 2nd respondent to entertain any complaint arising therefrom as stated by the 1st respondent or was it oral and therefore a month to month sub-tenancy, the effect of which would have been to bring it squarely within the purview of **Cap 301**. The High Court found that indeed there was a written sub-tenancy agreement for a period of 5 years and 3 months. Accordingly, the provisions of **Cap 301** were inapplicable. On the material placed before the Judge, we do not think that we can fault him on that finding. The 1st respondent exhibited in her supporting affidavit a copy of the written sub-lease agreement dated 11th November, 2003 and it was for a period of 5 years and 3 months. On 3rd November, 2008 and 5th February, 2009, the 1st respondent gave notices to the appellant in writing notifying him of her intention not to renew the sub-lease. Those notices were hand delivered to the appellant. They elicited no response at all from the appellant. The appellant did not claim not to have received them either. Indeed we are persuaded that the basis of the appellant's rush to the 2nd respondent were infact those Notices. It is instructive that both Notices make reference to the written sub-lease agreement. If indeed the appellant believed in the heart of his hearts that the sub-lease agreement was oral, why did he not discount those notices by reminding the 1st respondent of that fact. Instead he was scornful of the sub-lease agreement on account of it being a forgery. That infact his signature was forged. Forgery is a very serious allegation to make and more so, if it involves one's signature on a disputed document. One would have expected that having made such serious allegation and accusation, the appellant would have done the right thing and immediately took remedial steps such as reporting the alleged forgery to the relevant authorities for appropriate action or intervention. Instead what does he do? He sits tight and cheekily invites the 1st respondent to prove that his signature was not a forgery by invoking the assistance of document examiners. It is a cardinal principle of law that he who alleges must prove. The appellant having failed to undertake the necessary inquiry as to the forgery or not of his signature, the allegation was merely self-serving and without any basis at all. In any case, we do not see

the reason why the 1st respondent would have undertaken such an expensive venture of drawing up a sub-lease agreement and hold it against the appellant in the absence of evidence of bad blood between them regarding the sub-lease. It is also not lost on us that the signatures of the parties to the sub-lease agreement were even witnessed by **Mr Manghanani**, an advocate. He swore an affidavit confirming that indeed the appellant actually executed the sub-lease in his presence. It has not been suggested by the appellant that this was a false affidavit.

**Sections 2(1)(b)(1)** and **(11)** of **Cap 301** defines a controlled tenancy as:-

**"(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 provisions for termination, otherwise that for breach of covenant within five years from the commencement thereof, or**

III.**…"**

As we have already demonstrated, there was no credible evidence by the appellant to challenge the validity of the written sub-lease agreement. Confronted with such evidence, we doubt that the Judge would have reached any other conclusion than that the sub-lease agreement had been reduced into writing and was for a period of 5 years and 3 months. Accordingly, the sub-lease agreement did not fall within the armbit of controlled tenancies as contemplated by **Cap 301**. This being the case, it follows logically that the 2nd respondent lacked jurisdiction to entertain and arbitrate over a dispute turning the on sub-lease. In a nutshell the 2nd respondent in entertaining the dispute acted without or in excess of jurisdiction. The channel for checking such excess is of-course by way of Judicial Review remedy of certiorari. It is also settled law that jurisdiction is everything without which the Court can do nothing. Thus the learned Judge was right in coming to the conclusion that the sub-lease agreement was not a controlled tenancy.

The appellant has advanced the argument that where there is a dispute as to whether a tenancy is a controlled one or not, it is only the Business Premises Rent Tribunal which can make such a determination in terms of **section 12(1)(a)** of **Cap 301**. This provision provides that:-

**"... A tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power;**

**(a) determine whether or not any tenancy is a controlled tenancy."**

In support of this submission and as already indicated, the appellant called in aid the case of **Syedna Mohamed Burhannudin Saheb** (supra) and in particular where the Court stated:-

**"... in this case of an Act which creates a new jurisdiction, a new procedure, new form or new remedies, the procedure, forms or remedies there prescribed, and no other must be followed until altered by subsequent legislation ..."**

Still on this issue counsel for the appellant submitted that **section 12(1)** of **Cap 301** gave the 2nd respondent powers to rescind any order made by it. That if the 2nd respondent was wrong in issuing the orders complained of, the 1st respondent should have invoked that provision. The case of **R v National Environmental Management Authority and 2 others** *ex-parte*, **Greenhills Investments Ltd and 2 others (206) I KLR, (E & L)** was called in aid. This is all well. However, we are not persuaded by the argument that the jurisdiction of the High Court is wholly ousted from determining whether or not there is a sub-lease agreement in excess of 5 years, the effect of which is to oust the jurisdiction of the 2nd

respondent. There was a sub-lease agreement on record. It had not been discounted sufficiently by the appellant. Secondly, it is only in the High Court that Judicial review applications can be mounted and entertained. One of the considerations as to whether or not a Judicial review remedy should issue is whether or not the impugned decision was arrived at in excess or want of jurisdiction. Therefore the question of whether or not the 2nd respondent had jurisdiction to entertain the proceedings was validly before the High Court and determination thereof had to be made. The 1st respondent felt that in the face of the written sub-lease agreement, it would have been foolhardy to walk into the 2nd respondent and ask it to set aside the orders complained of and thereafter proceed to determine whether or not there was a controlled tenancy. The efficacious and expeditious way of dealing with the matter was to proceed to the High Court by way of Judicial Review. Further and as was correctly submitted by counsel for 1st respondent, the proceedings and or the complaint filed with the 2nd respondent by the appellant had run its entire course having reached the stage of execution. There was therefore no other proceedings upon which the 1st respondent would have demanded the determination of the nature of the tenancy. A complaint is just that, a complaint. Once it was addressed by the 2nd respondent as appropriate, that was the end game. In any case, whether or not there was an alternative remedy available to the 1st respondent was not a bar to her seeking Judicial Review remedy in the nature of certiorari. In the case of **Bahajj** (supra) this Court had the following to say on this aspect of the matter:-

> **"... without saying anything more, we would point out that this Court has, as recently as on 22nd day of April, 1998 held in the case of David Mugo t/a Manyatta Auctioneers v Republic, Civil Appeal No. 265 of 1997 (unreported) that the remedy of Judicial review is available, in appropriate cases, even where there is an alternative legal or equitable remedy. In his judgment in this case, Chesoni C.J. Said**
>
> > *"with respect to the learned Judge the existence of an alternative remedy is no bar to the granting of an order of certiorari …....."*

Again Kadamas (supra) this Court stated:-

> **"... In deciding whether or not to grant an order of Prohibition it is irrelevant to the Court that there are or were other remedies available to the applicant ..."**

We may add that position is equally applicable to the Judicial Review remedies of certiorari and mandamus as well. On this point as well, the Court in **Shah Vershi Dershi & Co. Ltd v The Transport Licensing Board (1970) EA 631** said:-

> **"... The existence of an alternative remedy does not preclude the applicant from seeking relief by way of certiorari and although it can hardly be said that speedy justice, the object of certiorari has been achieved in this case. The remedy of certiorari appears nevertheless to be speedier than the alternative one of appeal to the appeals tribunal ..."**

We may also reiterate that the High Court has original, unlimited and inherent jurisdiction. That jurisdiction cannot be hampered by the mere fact that a person well knowing that a tribunal has no jurisdiction to entertain the dispute brazenly nonetheless invokes its jurisdiction and then later claim that it is only that tribunal which has to determine whether or not it has jurisdiction to entertain the dispute. In this case, we have no doubt at all that the appellant knew that he had entered into a 5 year 3 months sub-lease with the 1st respondent. The 1st respondent had twice served him with notices under the sub-lease agreement intimating to him her desire not to renew the sub-lease. The appellant however did not want to move out. His reluctance may well be understandable. He was operating a shop in the suit premises. It is possible that he could not have found another place with such vantage position. However, that does not justify his dishonesty in filing a complaint with the 2nd respondent claiming that he was a protected tenant. Obviously this assertion was not genuine and was an abuse of the 2nd respondent's process. It is also instructive that though the orders had far reaching consequences, they were all obtained *ex-parte*. To ask the 1st respondent to enter the fray under the guise that it is only the 2nd respondent that can determine

whether or not there was a controlled tenancy would simply be asking the 1st respondent to aid and abet the appellant's mischief. It is tantamount to asking the 1st respondent to give a seal of approval to the appellant's otherwise wild manouvres. In the premises **section 12(1(a)** of **Cap 301** would not be available to a party such as the appellant herein who dishonestly and without any scintilla of candour invokes the jurisdiction of the 2nd appellant whilst hiding material facts. In the end we are of the considered view that contrary to the submissions of the appellant the learned Judge did not usurp the powers of the 2nd respondent in making a determination that the tenancy was not a controlled one.

In his last ground of appeal, the appellant advances the argument that the facts raised in the application could not be fairly and effectively determined by way of Judicial review. That the application raised contentious and disputed facts which the High Court was ill equipped to try under the special jurisdiction of Judicial review. Such issues included whether the appellant executed the lease, whether in the year 2002 the suit premises were leased to **Visheletric Ltd** and whether the cheques sent to the 1st respondent were indeed sent back. The submission that Judicial review is not the proper forum to deal with contentious issues has no legal or factual basis. Similarly there is no legal or factual basis for the contra submission that Judicial review mechanisms can only be invoked in cases where there is undisputed excess of jurisdiction. The case of **Syedna Mohamed Burhanundin Saheb** (supra) called in aid by the appellant for these submissions is irrelevant. That case dealt with the need to strictly adhere to the tenets of an Act which creates a new jurisdiction, new procedure, new forms or new remedies. Judicial review proceedings just like other legal proceedings will have opposing parties pursuing contrary positions. One party will be saying that the decision sought to be challenged was properly arrived at whereas the other party will be saying something to the contrary. Accordingly there will always be contestations and it will be upto the court seized of the proceedings to make a determination on those contestations. In any event the alleged contested issues had ready answers on record. There was evidence that the appellant had signed the sub-lease agreement and his signature witnessed by **Mr L. J. Manghanani**. The said Manghanani even went further and swore an affidavit to that effect. The appellant took no steps to counter that evidence.

The issue as to when the suit premises were leased to Vishelectric Ltd was clearly irrelevant. It was not a party to the proceedings. In any event, the issue was whether or not there was a sub-lease agreement between the appellant and the 1st respondent. Further it was self-evident that in the year 2003 the suit premises had been leased out to Vishelectic Ltd from the year 1999 as could be gathered from a copy of a certificate of lease exhibited in the record.

As for the cheques sent to the 1st respondent by the appellant after the alleged expiry of the sub-lease whose acceptance would have effectively created a fresh month to month tenancy between them, again this had no relevance to the application. The application was challenging the competence of the 2nd respondent to superintend over the dispute when it had no jurisdiction. The appellant's arguement then was not that after the expiry of the written sub-lease, he had continued to forward monthly rent to the 1st respondent which she accepted thereby creating a monthly tenancy and therefore a controlled tenancy. His argument was and remains that there was no written sub-lease agreement that was for a period of 5 years and 3 months. Lastly, before us, Mr Odongo conceded that though the cheques were forwarded, they were never cashed. If anything they were returned to the appellant through his then advocates, **Messrs Kimani Odongo Advocates**.

Confronted with all these, we are satisfied that the learned Judge was right in sustaining the Notice of Motion dated 16th May, 2009. We accordingly affirm his decision and dismiss this appeal with costs to the 1st respondent.

**Dated and delivered at Mombasa this 14th day of February, 2014.**

**H. M. OKWENGU**

**….....**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**….....**

**JUDGE OF APPEAL**

**F. SICHALE**

**….....**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**