



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO 30 OF 2013

BETWEEN

JOHN MUGO NGUNGA.....APPELLANT

AND

MARGARET M. MURANGI.....RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya

at Embu (Wanjiru Karanja, J.), delivered on the 27th April, 2011,

in

H. C. Misc. Civil Appeal No. 15 of 2008 (JR)

JUDGMENT OF THE COURT

[1] This is an appeal from the ruling of the High Court in Embu Karanja J., (*as she then was*), in **Misc. App. No. 15 of 2008 (JR)**, dated the 27th April, 2010. In that ruling the Judge dismissed the application by way of Judicial Review in which the applicant (*now the appellant*) had applied to quash the decision or order by the Chairman of the Business Premises Rent Tribunal sitting in Embu on the 3rd March, 2008, in **Embu BPRT No. 4 of 2008**. The facts of the matter were largely not in dispute. Upon being granted leave on the 5th March, 2008, to institute Judicial Review proceedings to quash the aforesaid order, the appellant filed a Notice of Motion under **Order L111 Rule 3** of The **Civil Procedure Rules**. He sought for an order of certiorari to quash the aforesaid order.

[2] In the grounds supporting the application, the statement of facts and the verifying affidavit by the appellant he averred that he was the owner of plot No. 106 Kagio Market which was leased out to the respondent. In February 2008, the appellant received a notice by the Kerugoya Public Health office requiring him to undertake major repairs on the said premises. It was thus necessary for the respondent who was a tenant to vacate the premises, the respondent gave possession of the premises to the appellant but in the course of the repairs, she served the appellant with order issued by the chairperson of the Business Rent Tribunal sitting in Embu. The order required the appellant to open the business premises

immediately and restrained him from harassing, evicting, closing and or interfering with the respondent's quiet enjoyment of the business premises pending the hearing and determination of the application. It also ordered the OCS Kagio Police Station to ensure compliance with the order.

[3] These are the orders the appellant sought to quash on the grounds that the Chairman of the Tribunal lacked jurisdiction to make orders while sitting alone as demonstrated by the coram of the day there were no other members present when the order was made. Secondly, there is no provision under the **Act** for issuance of ex parte orders, thus the appellant complained that he was condemned unheard which was against the rules of natural justice. Thirdly, the Tribunal lacked jurisdiction to issue injunctive orders, and to execute its own orders and finally there was excess of power when the Tribunal invoked the coercive powers of the police in a civil dispute.

[4] The respondent opposed the Notice of Motion, by challenging its competency and alleging that the appellant had not complied with the mandatory provisions of the law that required him to serve a notice upon the registrar of the court before filling an application seeking for orders of judicial review. The respondent also defended the orders made by the Tribunal as she accused the respondent of gross violation of the tenancy law and interference with her business premises.

[5] Upon hearing the Notice of Motion, the learned trial Judge found it lacking in merit, and in dismissing it made the following conclusions:

“In sum therefore, my finding is that the order in question was not suited for judicial review orders. Rather, it was one where the same tribunal could have been moved for setting aside the ex parte orders or subjected to the appeal process.

My finding is that the tribunal did not exceed or overstep its jurisdiction, the chair had jurisdiction to compose a tribunal on her own as provided for under Section 11 and the orders she gave pursuant to that exercise of her jurisdiction were not null or void. They were sanctioned by law. This motion therefore lacks merit and the same must fail...”.

[6] This is what provoked the present appeal that is premised on six grounds of appeal which for avoidance of repetition can be summarized as thus;

That the learned Judge erred in law and misdirected herself:

- i. ***When she held that an application for Judicial Review under Order L111 of the Civil Procedure Rules is fatally defective unless Sections 8 and 9 of Cap 26 Laws of Kenya are cited in the application.***
- ii. ***When she held the chair of the Tribunal can alone make a determination without recording such appearance or composition in both the proceeding and the order.***
- iii. ***When she held that the Tribunal had jurisdiction to make injunctive orders.***
- iv. ***When she held the Tribunal had powers to make ex-parte orders, or that such ex-parte orders did not in this case amount to a denial of justice to the appellant.***
- v. ***By making a finding that the Tribunal erred by ordering the execution of the orders but at the same time finding such errors did not make the entire order illegal.***
- vi. ***By failing to exercise the Judicial Review powers vested upon the High Court but instead opted to offer advice to the parties to seek alternative remedy of setting aside the orders.***

[7] During the hearing of this appeal, Mr. Njage, learned counsel represented the appellant. The respondent did not appear at the hearing although she was duly served. In his address to us, Mr. Njage reiterated the above grounds which he espoused further and referred to decided cases and the law. Mr.

Njage faulted the learned Judge for dealing with the issues raised in the Notice of Motion that challenged the excessive use of power by the Chair of the Tribunal as though the matter was an appeal notwithstanding the Court was being called upon to exercise its supervisory powers against an inferior Tribunal. Further the Business Tribunal has no mandate to grant ex-parte orders, counsel referred to the order that shows the Chair person did not sit with the members when the impugned order was made. The reference that was filed by the respondent was not served upon the appellant which was contrary to the Rules under the provisions of Cap 301 which makes it mandatory for service of a hearing notice. He cited the cases of **TIMOTHEO MAKENGE V MANUNGA NGOCHI [1978] KLR 53** and **DE SOUZA V TANGA TOWN COUNCIL, [1961] 377**. Lastly, counsel argued that the Tribunal lacked jurisdiction to issue injunctive orders thus making the orders issued amenable for judicial review.

[8] We have considered the submissions, the record of appeal, the authorities cited and the law. It would appear the first ground of appeal does not lie for reasons that although the Judge made an obiter dictum conclusion that the Notice of Motion was fatally defective, for failing to cite the provisions of **Sections 8 and 9 of the Law Reform Act**, she nonetheless proceeded to deal with the merit of the matter. We, however, agree with counsel for the appellant which is also in line with the dicta enunciated in the case of **R V COMMUNICATIONS COMMISSION OF KENYA EX-PARTE EAST AFRICAN TELEVISIONS NETWORK LTD., [2001] KLR 82**. Where the Court of Appeal held that once leave to institute judicial review proceeding is granted, the appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the Court, to the Judge who granted leave to set aside such leave – see *Halsbury's Laws of England, 4th Edition, Volume 1 (1) Paragraph 167 at page 276*. As regards the other grounds of appeal we have elicited three issues that stand out for our determination; that is whether the Chairman of the Business Tribunal had jurisdiction to issue orders of injunction ex-parte and while sitting alone without the members; whether the appellant was denied a hearing and thus the principles of a natural justice were breached and lastly whether the appellant's remedy lay elsewhere by way of an application for setting aside the ex-parte orders or by way of an appeal.

[9] Beginning with the last issue as to whether the appellant had a right to apply for an order of certiorari notwithstanding the existence of a right of appeal; or right to apply for review, we should point out that the Business Tribunal is a quasi-judicial body and its Chairman was exercising judicial power; accordingly the remedy of judicial review was available to the appellant. As it was stated by Simpson J., (as he then was) in the case of **SHAH VERSHI DEVSHI & CO. LTD v THE TRANSPORT LICENSING BOARD [1970] EA 631**:

“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. I am satisfied that the applicant is entitled to ask for an order of certiorari”.

[10] The next issue is whether the Chair had jurisdiction to hear an application for injunction and if so, whether the appellant was denied a hearing. It has been stated time without number that jurisdiction is everything and lack of it renders the proceedings a nullity. See the case of **Motor Vessel “SS Lillian”, [1989] KLR 1** in which this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:

“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

In the present appeal, the starting point is the decision in “SS Lillian Case” as restated by the Supreme Court ***In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution***, Constitutional Application No. 2 of 2011:

“The Lillian ‘S’ case [[1989] KLR 1] establishes that jurisdiction flows from the law,

and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.

[11] The learned trial Judge interrogated this issue in her ruling especially the provisions of **Section 11 (1)** of **Cap 301** which she reproduced as follows:-

“A Tribunal shall consist of a person or persons appointed as such by the Minister, and shall exercise such jurisdiction as is conferred on it by or under this Act, over such area as shall be specified in such appointment”.

This is what the learned Judge stated in regard to the above:

“A Tribunal shall therefore consist of either a person – or persons. The chair alone can therefore constitute a tribunal under Section 11 and she can proceed to determine references and issue orders depending on the circumstances of the case. She did not therefore act ultra vires in this matter and acted strictly within her jurisdiction. That ground must therefore fail. On the question as to whether the chair flouted Rule 19 of the Tribunal Rules or not, the court notes that in the absence of the proceedings before the Tribunal, it is not possible to tell whether she indicated the reference number, the coram etc...”.

[12] The issue of powers vested upon the Rent Restriction Tribunal and the orders that it can issue was also covered very broadly by the Court of Appeal decision in the case of **RENT RESTRICTION TRIBUNAL v RAVAL EX-PARTE MAYFAIR BAKERIES LIMITED, [1985] KLR 167** where the Court held on page 180 as follows

“As we see it the powers of the Tribunal are not restricted to those conferred by section 5 of the Act. Section 6 confers upon it the additional powers to investigate any complaints relating to the tenancy of premises made to it by either a tenant or the land lord of such premises. The interested party was a tenant – although a statutory tenant. Which matters not – when he made his complaint to the Tribunal. It may be “any” complaint. It matters not if the complaint is in tort or contract or equity or otherwise. The criterion is that the complaint must be relating to the tenancy. Here the complaint in effect is that the tenant was being harassed in the quiet enjoyment of his tenancy. Therefore, the Tribunal was empowered to investigate that complaint, and a fortiori under subsection (5) of Section 6 it could make such order in the matter as the justice of the case may require being an order which it is empowered to make by the Act, ...”.

[13] On the jurisdiction of the Tribunal to issue an order of injunction, it is clear the Judge was right, the jurisdiction is provided for by the Act and that was further fortified by the aforesaid decision of this Court. We however part company with the learned Judge regarding the issuance of what was a mandatory order of injunction ex-parte as well as the order directing the enforcement through the use of the local police. The provisions of **Rules 19** and **21** of the **Act** clearly provide for fixing a hearing date and service of hearing notice upon the parties. **Section 14** of the **Act** provides for the applicable procedure for the enforcement of the order by the subordinate court. On this issue we agree the Chair of the Tribunal acted in excess of the powers granted by the **Act** and thus the appellant was entitled to seek for orders of certiorari.

[14] Having regard to the above, the appeal is allowed, the order dismissing the appellant’s Notice of Motion dated the 27th April, 2010, is set aside and substituted with an order quashing the order of the Chairperson Business Premises Rent Tribunal dated the 3rd March, 2008. As the respondent did not appear in this appeal and the fact that the appellant partially succeeded we make no orders as to costs at the High Court and in this appeal. Each party to bear their own costs.

Dated and Delivered at Nyeri this 23rd day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR