

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 215 OF 2010

ISLAM AHMED SAID.....APPELLANT

VERSUS

KING FEISAL TRUST OF KENYA.....RESPONDENT

R U L I N G

1. I have pursuant to this application for review revisited the Record of Appeal and noted at page 13 of the proceedings before the tribunal, page 59 of the Record of Appeal, that leave to appeal was indeed sought and granted to the Appellant on the 7/9/2010 in the presence of both counsel.

2. It is unfortunate that this matter proceeded before me without that critical fact, which was addressed by both parties, being identified and pointed out to the court. It is equally no excuse that the court did not note that there was indeed an order granting leave. That situation clearly presents an error glaring and apparent on the face of the record without which error the court would not have come to the conclusion that it did that the appeal was incompetent for having been filed without the requisite leave.

3. It is such error the law appreciates to occur and will continue to occur from time to time hence the remedy of review. I have had the time to consider the very forceful submissions by the Respondent that the Act, Cap 296, which grants the court jurisdiction does not vest on the court the power to consider review. That argument however forceful must be rejected.

4. It must be rejected because this court as a first appellate court is not garged and limited by the provisions of the Rent Restriction Act that gives the right of Appeal. Infact the provision of Cap 296 only gives the right of Appeal to the parties but is not the creator of jurisdiction of this court to hear such appeal. The jurisdiction of this court to hear and determine appeals is first and foremost constitutional under Article 165(3)(a) and (e). In handling appeals this court looks unto the Civil Procedure Act for what the Act calls supplemental Proceedings under part VII, VII & IX of the Act Section 80 in particular provides:-

Review

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

5. In this file the Appellant has shown himself as being aggrieved by the decision of the court dated the, 19/2/2016 and has not preferred an appeal therefrom. The law gives him the right to apply for review as he has done and there is nothing in the Rent Restriction Act that can be logically said to deprive the courts power to review its orders if the thresholds are met. To follow Mr. Hassan argument would be to ask the court to say; *indeed there was a mistake and indeed an injustice but we are helpless!* That would be an

abdication of duty and no court of law should ever resort to that in the words of the Court of Appeal in *Apaloo JA in Phillip Kepto Chemwolo vs Augustine Kubebe*. The court as is often said exist for purposes of deciding rights of parties and not for the purposes, of imposing discipline.

6. I am persuaded that the application for review is wholly merited and I therefore allow it as prayed with the effect that the ruling, decision and Order made by the court on the 19/2/2016 is hereby set aside and the struck out appeal is hereby reinstated for hearing on the merits.

7. On costs, even though the appellant has succeeded, it and its counsel cannot be allowed to earn the costs. He is disentitled to the costs because having participated as trial did initiated this appeal be owed a duty of candour and adequate preparation to the court. That it did not point out to the court the record granting leave is to this court a clear and manifest evidence of abdication of duty to both the profession and the court for which it cannot be excused nor rewarded. This blame also goes to the Respondent who was also duty bound to make full disclosure to court out of adequate and due preparedness.

8. Due to their failure or just abdication of duty at the time, the appeal was argued and struck out. Both advocates deserve no commendation but an admonishment. For those reasons no party shall be entitled to any costs of this application in all and every event. This court will now reconsider its decision on the appeal and give to the parties a reviewed judgment on 26/7/2017.

Dated and delivered at **Mombasa** this **20th** day of **June 2017**.

P.J.O. OTIENO

JUDGE