



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL NO. 162 OF 2012

(An Appeal against the Ruling and the Order of Honourable Mochache D.Chairperson in BPRT NO. 264, 265, 268 & 270 of 2011 on the 21st August 2012)

(1) ALI ASGAR

(2) REHAN MOLU

(3) MOHAMED BAFAGY T/A AMO PROPERTIES

(4) ZEDCO RADIATORS & COOLING SYSTEMS LTD.....APPELLANTS

VERSUS

MUSLIM ASSOCIATION OF MOMBASA.....RESPONDENT

RULING

Introduction

1. By a judgment dated 9.7.2015 and delivered the same day, the appellant's appeal was found to lack merits and was thus dismissed with costs to the Respondent.
2. That appeal had sought to upset a decision of the BPRT in its case Nos 264,265,268 and 270 all of 2011 by which it ordered the rent to be increased by over 200%.
3. The appellant felt aggrieved and dissatisfied with the determination by the court and on the 15.7.2015 filed a Notice of Appeal and intimated its intention to appeal against the whole of the said decision. Three days later on the 18/7/2015 the appellants filed a Notice of Motion dated the same day in which it sought in the main an order of stay of execution of the ruling and order of Hon. D.Mochache, dated 2.8.2012 pending the hearing and determination of the intended Appeal to be filed by the appeal Appellant in the court of appeal.
4. In opposition to that Notice of Motion the Respondent filed a Notice of Preliminary objection dated 3/9/2015 together with a replying affidavit sworn by SHAHID SHEIKH on the 31.8.2015.
5. The parties also filed written submissions in which decided cases were cited but the respondent additionally filed a list of authorities.

Parties submissions:

6. Mrs. Ali for the Respondent while arguing the Preliminary Objection was precise and brief to the effect that by law, section 4, Cap 301, the proviso thereto, an appeal to the High court from a decision of the Tribunal shall be final and not subject to further appeal. She cited decisions of the court of appeal which she submitted are binding upon me to buttress the point.

7. On his part Mr. Mutubia for the appellant/applicant opposed the objection as misconceived on the basis that this court was being called upon to apply the court of appeal Rules, that the courts hands are tired by the fact that a Notice of Appeal has been filed in that even if the application is struck out, the Notice of Appeal will remain on record and further that the provisions of the section 4 Cap 301, should be aligned with the constitution and that the propriety of the proposed appeal ought to be considered on the application and not on the preliminary objection.

8. In response Mrs. Ali added that this court's decision being the final one by statute., If the court grants stay pending an appeal which is prohibited by law, the court shall have acted in vain.

Analysis and determination:

9. The single issue for my determination of the preliminary objection is whether or not there is an appeal to form a subtraction of me granting stay of execution.

10. Under order 42 Rule 4, a Notice of appeal filed in the High Court is deemed an appeal to court of appeal. In this matter there is indeed a Notice of appeal filed and whose service has not been challenged. What is challenged is whether or not there is a right of appeal to the court of appeal from a decision on appeal by this court from a decision by the Business Premises Rent Tribunal regard being had to the provisions of the cap 301.

11. All the decision cited to me are those that were rendered prior to promulgation of to the constitution 2010. It is common knowledge that prior to the reconstitution the court of appeal was a creature of the Appellate jurisdiction Act whose jurisdiction was prescribed by that Act. However with the new constitution, the court now is created by the constitution as a superior court and its jurisdiction vested under Article 164(3) which provides:-

“The Court of Appeal has jurisdiction to hear appeals from—

(a) the High Court; and

(b) any other court or tribunal as prescribed by an Act of Parliament.”

12. The court of appeal has had a chance to consider the effect and import of that provision in the constitution in **CACA NO. 46 of 2013 JARED OKENO -VS- FREDRICK O. OUTA & 3 OTHERS AND SAID** while address the implication of section 80 of Elections Act as being seen limit right of appeal to court of appeal. The court said:-

“It is because of the way in which the jurisdiction of the court of appeal under the 2010, constitution is formulated that it is not tenable, in our opinion, to insist that there must be statutory basis in addition to Article 164(3) before the court of appeal can exercise jurisdiction. That approaches was legitimates and mandatory under the former constitution but we are not convinced that it is still valid under the constitution 2010.”

13. This decision is indeed binding upon me on whether or not there is a right of appeal from the decision of this court to the court of appeal. I determine that as framed, Article 164(3) a of the Constitution open the gates for litigants to appeal to the court of appeal against any decision by the High Court and no limitation is inferable.

14. Such limitation could only be by the constitution itself or under the authority by virtue of those statutes enacted to implement the constitution and where the constitutional intention to limit access by

way of appeal is explicit.

15. The proviso to section 15 of the Landlord and Tenant, (shops, hotels and catering Establishments) Acts, having been an existing law on the effective dated must be surely be subjected to the dictates of section 7 of schedule 6 to the constitution and therefore construed with alterations, adaptations qualifications and exceptions that are necessary to bring it into conformity with the constitution.

16. I therefore construe it to the effect that it has no effect or legitimacy to restrict an aggrieved litigant from accessing the Court of Appeal

17. On the basis of Article 164(3) the legal landscape has changed and the decision cited to court were only in conformity with the former constitution and not the constitution 2010.

18. Accordingly the preliminary objection premised on those decisions are behind the new development and are not in conformity with the law. I therefore have no otherwise but to find that the objection as taken runs counter the constitutional provisions formulating the court of appeal jurisdiction and it thus must fail.

19. Since the Respondent did not resist the objection on the point upon which it has been decided, I order that each party bears own costs.

20. Additionally I direct that the application dated 18.8.2015 be fixed for hearing by way of highlighting the submissions filed on priority basis and within 30 days from the date of this ruling.

Dated, signed and delivered at Mombasa this 19th day of February 2016.

In the presence of:-

Mr.Akee for Mutubia for the Applicant/plaintiff.

No appearance for the Defendant/Respondent.

P.J.O.OTIENO

JUDGE