



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 215 OF 2010

(Appeal from the Ruling and Order of Chairman of the Rent Restriction Tribunal (Hon. Hillary K. Korir) delivered on the 7th day of September, 2010 in RRT (MSA) Case No.39 of 2009 Trustees of King Feisal of Kenya -vs- Islam Ahmed Said)

ISLAM AHMED SAID.....APPELLANT

VERSUS

TRUSTEES OF KING FAISAL OF KENYA.....RESPONDENT

JUDGMENT

Introduction

1. On 04.10.2010, the appellant ISLAM AHMED SAID filed an appeal against the Respondent, TRUSTEES OF KING FEISAL TRUST OF KENYA, impugning a decision by the Rent Restriction Act Tribunal dated 7.9.2010 in the original BRRT(MSA) CAUSE NO. 39 OF 2009 by which the Tribunal found and held that it had no jurisdiction to entertain an applicant under section 5 of the Act the rent on the suit premises having been decontrolled.

History of litigation

2. By a Notice of Motion dated 11.6.2009, the Respondent as a landlord before the tribunal sought an order that the rent reserved for the premises be assessed and reviewed as the then prevailing rent had become uneconomical. That application was on the 9.10.2009 allowed and rent assessed in the sum of kshs.4,500 to take effect on the 1.12.2009.
3. That decision did not go down well with the tenant/appellant here, who on the 20.11.2009 filed an application to review, rescind or vary the orders of 9.10.2009 and for a interim stay.
4. That application by the tenant was opposed by the landlord on the basis inter alia, that the Tribunal was divested of jurisdiction the moment it assessed rent beyond kshs.2,500. Upon canvassing the preliminary objection, the Tribunal found for the landlord/Respondent and dismissed the application on account of lack of jurisdiction.
5. Still not to be discouraged, the appellant on the 13.5.2010 by a notice of motion dated 12.5.2010 once again moved the court with an application, this time round, seeking orders that the past proceedings be opened and the entire suit be struck out on account of the allegations that the tribunal did not have jurisdiction *ab initio* for reasons that the premises was a composite tenement in that it comprised both residential and commercial premises with the commercial part being the dominant; that the entire suit was incompetent for various reasons among them failure to comply with the provisions of Cap 164, Laws of Kenya and for reasons that the Tenant was denied a fair

- hearing by the tribunal.
6. To the application, the Landlord raised once again a preliminary objection to the effect that the tribunal having made an order that it had no jurisdiction in the matter, could not entertain the latter application.
 7. The objection was argued in *limine* and upheld by the tribunal which held:-

“Given that the facts and circumstances leading to the filing of this and previous application have not changed, there is no justification for a shift of position.

Accordingly I reiterate that the tribunal has no jurisdiction over premises that it had decontrolled.”

It is that ruling that has proved the current appeal before the court.

8. Having read the Record of Appeal filed and the decided cases, together with the statutory provisions cited by both sides, I have isolated only one issue meriting my consideration and determination in this appeal. That issue is whether or not the Tribunal has jurisdiction to open its proceeding in order to challenge its decision after the premises have been decontrolled. However preceding that issue is the consideration whether there is before court a competent appeal.

Analysis and determination

9. It cannot be gain said even by way of being repeatative that jurisdiction is everything and that a court of law cannot abrogate to itself jurisdiction if the law does not grant to it the same. The flip side court ought to run away from the jurisdiction granted to it by the law. (See **OWNERS OF MOTOR VESSEL LILIAN “S” -VS- CALTEX KENYA LTD. [1989] KLR 1.**)
10. Section 5(1) m of the Rent Restriction Act, Cap 296 provides:--

“The Tribunal shall have power do all things it is required or empowered to do by or under the provisions of this Act and in particular shall have power to:-

(m) at any time, of its own notion, or for good cause shown on an application by any landlord or tenant, to reopen any proceedings in which it has given any decision, determined any question, or made any order and to revoke, vary or amend such decision, determination or order, other than an order for recovery of possession of the premises or for the injectment of a tenant therefrom which has been executed.”

11. As pointed out above, the application before the tribunal was grounded upon the provisions of sections 5(1)m of the Act. It is not in dispute that the tribunal had determined the rent payable at the instance of the Landlord. In my view, when the Respondent/Landlord raised the objection that the Tribunal did not have jurisdiction merely because it had delivered itself on the matter and the tribunal in upholding such an objection was clearly an affront to the provisions of the law cited above.
12. I say an affront because, this is the section that is comparable to those provision in the Civil Procedure Act and the Rules made thereunder granting to a civil court the jurisdiction to revisit its findings either by setting aside or review so long as cause is shown.
13. My understanding of the jurisdiction granted to the Tribunal under section 5(1) m is that it entitles the tribunal to reopen and revisit any of its decision of whatever nature I believe for the ends of justice to be met. I hold and find that the tribunal had jurisdiction to entertain the application to reopen the proceedings even if there had been an order assessing rent beyond the statutory ceiling of Kshs.2500/= . If it was the order sought to be disturbed. To hold as the tribunal did would be to defeat the purpose of the provision and to make the tribunal helpless even where an obvious injustice can be seen by it.
14. However, there is the question whether there is indeed a competent appeal before me to deliberate upon. It is trite that a right of appeal is never automatic but must be granted by statute. Under the Civil Procedure Act Section 75 and order 43(1) provide for orders for which an appeal arises as of

- right. My reading of those provisions inform me that a ruling on a preliminary objection is not one of the orders from which an appeal h as a right.
15. In the instant case, the order appealed against was arising out of a preliminary objection and this could only be filed with the leave of the court under 43 Rule1 (2).
16. This was taken up by Ms. Ali and no response was made to the issue by Mr. Odongo for the Appellant. Infact a reading of the entire record reveal that no leave was ever sought nor was any granted with the consequence that this appeal was filed contrary to the law and it is to that extent incompetent. Having found that it is incompetent I therefore proceed and strike it out on that score.
17. On costs, I consider that if not for the incompetence of the appeal, there was an important question of the jurisdiction on which the appellant was entitled to question and which had he sought leave he would have succeeded on. For that reason the order that commands itself to me to meet the ends of justice is that each party shall bear own costs. It is so ordered.

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

In the presence of:-

Mr. Hassan for Mrs. Ali for the Applicant/plaintiff.

Mr. Olwande for Mr. Odongo for the Defendant/Respondent.

P.J.O. OTIENO

JUDGE