



Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Issue*
 - i) *Is a civil appeal a suit?*
 - ii) *Can you withdraw a civil appeal?*
4. *Subject of Tribunal Case*

BUSINESS PREMISES RENT TRIBUNAL

- 4.1 *Termination of tenancy*
- 4.2 *LR 209/869, Temple road, Nairobi*
- 4.3 *Notice of termination by landlord,*
Struck out by chairperson of tribunal (BPRT)
- 4.4 *Related cases filed by parties:*
 - a) *BPRT No. 795/08*
 - b) *BPRT No. 791/09*
 - c) *Criminal case 520A/09 (subordinate courts)*
 - d) *Judicial Review Misc 185/09*
 - e) *HCCA 710/09*
 - f) *HCCA 570/08*
- 4.5 *HCCA 710/09 – heard and finalized by*
Two Judge Bench
Angawa J, Onyancha J
- 4.6 *Decision in HCCA 710/09 held Hon. Chairperson Erred in striking out the notice of the tenant Issued on 27th October 2008, contrary to Section 9(3) Landlord & Tenant (Shops, Hotels & Catering Establishments) Cap 301 Laws of Kenya.*
- 4.7 *HCCA 570/08 filed earlier by Landlord/appellant Still pending and touching on the same*

subject

Matter.

4.8 Application by landlord appellant dated 6th January 2012, seeking orders to withdraw Appeal having been overtaken by events by Decision of HCCA 710/09.

4.9 Issue –

- a) Is an appeal a civil suit?
- b) Can you withdraw an appeal?

5. Findings

- i) An appeal is a suit.
- ii) That it can be withdrawn

6. Case Law:

7. Advocates :

- i) M. Kilonzo Jnr instructed by M/s Mutula Kilonzo & Co Advocates for appellant/applicant
- ii) P M Kigotho instructed by M/s Mwangi Kigotho & Co Advocates for respondent

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 570 OF 2008

VIKTAR MAINA APPELLANT

VERSUS

JACK & JILL SUPERMARKET LTD RESPONDENT

RULING

Application to Withdraw Appeal

Dated 6th January 2010

I. **PROCEDURE**

1. This appeal is related to another appeal being:

Jack & Jill Supermarket

Vs

Viktar Maina Ngunjiri

HCCA 710/09

2. The above appeal was heard and finalized by a TWO JUDGE bench (Ang'awa, Onyancha JJA) in which the court allowed an appeal filed and set the orders of the Business Premises Tribunal aside, on the

24th November 2011.

3. The court held that the Hon. Chairperson erred in striking out the notice of tenant issued on the 27th October 2008, contrary to

Section 9(3) of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act Cap 301 Laws of Kenya (herin referred to as the Act.)

4. In the course of hearing, the said appeal, it transpired that there were multiplicity of suits filed both at the Business Premises Rent Tribunal and at the High court in Nairobi. Some of the two cases are:-

4.1 BPRT No. 795/08

4.2 BPRT No. 791/09

4.3 Criminal case 520A/09
(Subordinate courts)

4.4 Judicial Review Misc 185/09

4.5 HCCA 710/09

4.6 HCCA 570/08

5. As a result of the decision of the High Court in HCCA 710/09

Jack & Jill Supermarket

Vs

Viktar Mwangi Ngugi

The original landlord in this appeal HCC 570/08, Viktar Mwangi Ngunjiri was of the view that his appeal would serve no useful purpose and wished to withdraw the same. An application dated the 6th of January 2012 was duly filed seeking orders to withdraw this appeal.

II APPLICATION 6TH JANUARY 2012

A: ISSUE: Can an appeal be withdrawn?

6. What the application came up for hearing, an issue arose as to whether an appeal can be withdrawn by the appellant? This was due to the comment made in the judgment of the **Jack & Jill Supermarket** case (supra) as follows:

“ ... an appeal, we find no clause/rules that permits the withdrawal of an appeal. If per chance a withdrawal is permitted, the effect to the landlord notice is that it does not amount to a notice.”

7. The advocate for the tenant was of the view that the appeal can therefore not be withdrawn.

III FINDINGS

8. Unlike the court of appeal rules where it specifically states that an appeal filed may be withdrawn, there is no such clause within Order 42 of the Civil Procedure Rules that deals with appeals. One has to go to the order dealing with withdrawals of suit being Order 25 r (2) Civil Procedure Rules.

This order reads:-

“at any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties wholly discontinue his suit against all or any of the defendants or may withdraw part of his claim and such discontinuance or withdrawal shall not be a defence to any subsequent action.

2(1) where a suit has been set down for hearing it may be discontinued or any part of the claim withdrawn upon the feeling of the written consent signed by all the parties.

(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit and otherwise as are just.

3) **The provision of this rule and rule 1 shall apply to counter-claim (emphasis supplied.)**

9. The question then further arises as to whether a civil appeal is a suit?

10. Under Section 2 of the Civil Procedure Act, it defines a suit to mean:-

“... *all civil proceedings commenced in any manner prescribed.*”

11. It is without a doubt that cases filed to the civil appeals section of the High Court emanates from civil proceedings. They are civil in nature and commence by way of filing a memorandum of appeal.

12. To all intent and purposes, a civil appeal is a civil proceedings commenced by way of a memorandum of appeal. This therefore places civil appeals in the same category as that of suits under

Order 25 r 2(2) Civil Procedure Rules, the applicant is permitted to withdraw the appeal.

13. That application of 6th January 2012, seeks orders as stated above to withdraw this appeal. The grounds of withdrawal is that there is nothing left in the light of the decision in a subsequent appeal case **Jack & Jill Supermarket** case (supra).

14. This court would grant the application herein. That the landlord/appellant be and is hereby granted leave to withdraw this appeal but with costs to the respondent/tenant in this High Court, and costs to the respondent/tenant in the tribunal court, to be paid by the landlord appellant.

DATED THIS 16TH DAY OF FEBRUARY 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

iii) *M. Kilonzo Jnr instructed by M/s Mutula Kilonzo & Co Advocates for appellant/applicant*

iv) *P M Kigotho instructed by M/s Mwangi Kigotho & Co Advocates for respondent*