



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CIVIL APPEAL 47 OF 2012

1. HAIDER ALI LAVING.....1ST APPELLANT

2. SALAUDIN KASU2ND APPELLANT

3. ABDULKADIR SALAYANI3RD APPELLANT

VERSUS

SHARIFF JAFFER AHMEDRESPONDENT

RULING

1. By a Notice of Motion application dated 16th March, 2012, the Appellants/Applicants sought the following orders under urgency:

“2. That this Honourable Court do stay all the proceedings, rulings and orders in Rent Restriction Tribunal Assessment Case Number 50 of 2010 pending the hearing and determination of this application.

3. That this Honourable Court do stay all the proceedings, rulings and order dated 1st March, 2012 in Rent Restriction Tribunal Assessment Case Number 50 of 2010 pending the hearing and determination of the appeal filed herein.

4. That the Appellants do continue paying rent that they were earlier paying before the order of the 1st March, 2012 and in the alternative, the same be paid to the tribunal or any other place which this court deems convenient pending the hearing of the appeal.

6. That the Respondent by himself, servants and or agents or any other person acting as such be restrained from interfering with the Appellants’ quiet occupation of the tenancy pending the hearing and determination of the appeal.”

2. The motion is supported by the Affidavit of Haider Ali Laving with annexures thereto. I certified the

application as urgent on 16th March, 2012, and issued the following orders:

“1. That a stay of all the proceedings, rulings and orders stay in Rent Restriction Tribunal Assessment Case Number 50 of 2010 is hereby issued pending the hearing and determination of this application.

2. That stay is granted on condition that the Applicant does issue a formal irrevocable, unconditional undertaking to the Respondent to pay arrears of Kshs. 108,000/= and any new rental amount determined by the Court on the event the Appeal is not successful.”

The Applicant also filed a Memorandum of Appeal in this matter. The application and order were served on the Respondent on 16th April, 2012.

3. The Respondent filed Notice of Preliminary Objection on 16th April, 2012, and a Replying Affidavit on 17th April, 2012 to which he annexed as “SJA 1”, a Ruling from the Rent Restriction Tribunal dated 1st March, 2012.

The Respondent’s Preliminary Objection raises five grounds as follows:

“1. The application and appeal are incurably defective in law and consequently a nullity.

2. The Appellants have to complied with the conditional order granted ex-parte on the 16th of March, 2012 and the same should be discharged.

3. The Honourable Court has no jurisdiction to grant the orders sought in the Notice of Motion dated 16th March, 2012.

4. The appeal as framed does not lie and raises no point of law as envisaged by the provisions of Section 8 of the Rent Restriction Act (Chapter 296 Laws of Kenya).

5. The application is scandalous, vexatious and an abuse of the court process.”

4. At the hearing of the Preliminary Objection on 4th May, 2012, Mr. Asige for the Respondent argued the Preliminary Objection in three limbs:

a) He argued that the Applicant had already applied for and had the Tribunal’s order reviewed by the Tribunal itself pursuant to Section 8(3) of the Rent Restriction Act. As such, the appeal herein arising from the review, is misconceived and a nullity in law.

b) Counsel also argued that the prayers sought in the Applicant’s application could not be granted by the court under the provisions of the Civil Procedure Rules which were invoked. The Applicant applied under Civil Procedure Rules Order 40 Rules 1, 2 and 3, which relate to injunctions, yet the Applicant sought orders of stay pending appeal, which are provided for under Order 42 Rule 6. Accordingly, counsel argued that the court had no jurisdiction to grant the orders of stay granted *exparte*.

c) Finally, counsel argued that the Court had granted the *exparte* orders on the condition that the **“Applicants do issue a formal irrevocable unconditional undertaking to the Respondent to pay the arrears of Kshs. 108,000/=”**. What the Appellants did instead, was that the 1st Appellant provided an undertaking dated 16th March, 2012 for Kshs. 108,000/= on behalf of the other two Appellants. This was served on the Respondent. However, on 4th April, 2012, the Appellant filed two additional undertakings for Kshs. 67,200/= and Kshs. 49,500/- respectively by the 2nd and 3rd Appellants. These were not served on the Respondent. Counsel thus argued that the Applicant failed to satisfy the Court order and has instead unilaterally filed undertakings in piecemeal, choosing who should undertake how much without the approval of the Court.

On account of all these matters the Respondent argued that the application should be dismissed and the orders since granted be vacated.

5. In response, the counsel for the Appellants argued that a Preliminary Objection can only address matters of law yet the Respondent was relying on matters of fact. Further, counsel argued that the issues raised by the Respondent should be raised during the appeal itself. On jurisdiction, counsel referred to Section 8 of the Rent Restriction Act and pointed out that under Sub Section (2) and (3), an appeal lies to that court against a determination of the Rent Restriction Tribunal.

On the undertakings provided by the Appellants, counsel argued that these were sufficient and the essence was that the Appellant had in fact provided undertakings covering the whole amount ordered to be undertaken.

Finally, counsel pointed out that although their application invoked and cited specific statutory provisions it also had the blanket invocation of **“all other enabling provisions”** which was sufficient for purposes of the application.

6. I have carefully considered the parties’ submissions and the application, the Notice of Preliminary Objection and the documents availed and referred to by counsel.

The Rent Restriction Act is enacted with the object of providing for resolution of disputes in relation to dwelling houses where rents are low. Under Section 8(1) the Tribunal’s decisions are required to be final and conclusive, and not appealable except as provided in Section 8(2). That Section provides:

“(2) An appeal shall lie to the High Court from any such decision determination or order in the following cases:

a) In the case of an order under subsection (5) of Section 6; or

b) On a point of law

c) In the case of premises whereof the standard rent exceeds on the thousand shillings a month on any point of mixed fact or law.”

Appellate jurisdiction is only possible under the abovestated situations. In the present case, it is not clear whether any of the routes of appeal shown in Section 8 (2) was elected by the Appellants. What they did was to seek review before the Tribunal of its previous order. This is clear from the Respondent’s annexure “SJA 1” where the Tribunal’s Ruling states:

“The tenants applied for the review and stay of the tribunal orders made on 9.9.2011 where standard rent was assigned and fixed....”

7. Under the Rent Restriction Act, review by the Tribunal of its own previous orders is only possible pursuant to Section 8 of the Rent Restriction Act where a decision has been made by a person acting under delegated powers under Section 5(3). Again it was not clear from the ruling in “SJA 1” whether the review was in respect of delegated powers. If it was, then Section 8 (4) bars any further appeal, as argued by the Respondent. I am, however, not satisfied that it has been demonstrated on the basis of the available documentation that the said review was under Section 8 (4) in respect of which no appeal is allowed. I also find that there was material non disclosure by the Appellants of the fact that what the Tribunal’s orders sought to be stayed, emanated from a review of the Tribunal’s own ruling.

8. On the jurisdiction point, I agree with the Respondent’s counsel that the stay granted to the Applicants cannot stand as the provision invoked in obtaining it, namely, Order 40 of Civil Procedure Rules were for an injunction. The court, accordingly, had no legal basis for grant of a stay. In addition, I also agree with the Respondent’s counsel that in any event, the terms under which stay was granted, were not duly complied with by the Appellants in that they selectively interpreted the order as they wished. Instead of

the Appellant's issuing an undertaking for Kshs. 108,000/=, each of Appellants issued an undertaking for different amount which when added together do not amount to KShs. 108,000/= in any event.

9. Accordingly, for the reasons stated above, I hereby vacate the interim orders earlier issued by the court on 16th March, 2012.

Dated, signed and delivered this 16th Day of May, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....