**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**
**Civil Appeal 39 of 2001**

**WEKA INDUSTRIES LIMITED ……...…..APPELLANT**

**VERSUS**

**JOHN CHANGILWA ……...…..1st RESPONDENT**

**IBRAHIM MAKORI……..…..2ND RESPONDENT**

**EPHRAM MUDIDI ……....3RD RESPONDENT**

**ALFRED SUDZE ……..….4TH RESPONDENT**

**SANRITA BUNYALI ……..……..……5TH RESPONDENT**

**ROCKET MUNA ……6TH RESPONDENT**

**J U D G M E N T**

Weka Industries Ltd, the appellant is the landlord to John Changilwa, Ibrahim Makori, Ephram Mudidi, Alfred Zudze, Sannita Bunyali and Rocket Muna, being the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents herein, in plot No. 518 Section XVII Mombasa Island. By a notice of motion filed on 22nd June 1996, the Landlord moved the Rent Restriction Tribunal to assess the standard. The record shows the tenant (Respondents) opposed the motion. The Landlord was represented by the firm of M/s Kiarie Kariuki & Co. Advocates whereas the tenants were represented by the firm of M/s Y.A Ali & Co. Advocates. The record shows that a consent order was recorded between the parties dated 28th October 1996 and filed and filed before the tribunal on 31st October 1996. A rent control certificate was issued on 1st November 1996. Thus rent was increased from Kshs.4,000/- to 5,000/- for four (4) flats and from Kshs.3,000/- to 4,000/- for six (6) flats. The tenants (Respondents) through M/s Y.A. Ali & Co. Advocates filed the application dated 30th October 1999. When the aforesaid application came up for hearing interpartes on 26th November 1999, the landlord's (appellant's) counsel raised a preliminary objection against the application. It was said that the Rent Restriction Tribunal lacked jurisdiction as it had already issued a rent control certificate and that the rent was beyond Kshs.2500/- per month. The application dated 30.10.1999 had actually sought for the consent order recorded on 31.10.1996 to be reviewed with a view of setting aside the same. Mr. Muga Apondi, the then learned Chairman dismissed the application. His reasons were spelt out in his ruling delivered on 3rd December 1999. It was his view that the tenants were represented by learned counsel hence they had the benefit of legal representation. He also opined that there were no good grounds to set aside a consent order which had been approved and adopted by the tribunal. He further expressed the view that the tribunal was *functus officio.* In a nutshell the preliminary objection was upheld.

The tenants were unhappy with the decision they again filed the motion dated 24.5.2000 whereupon they sought for the standard rent assessed as of 30.10.1996 to be set aside. The tenants sacked M/s Y.A. Ali & Co. their advocates. They appeared in person. The tenants appointed the firm of M/s Charles Kioko & Munyithya & Co. Advocates to act in place of Y.A. Ali & Co. Finally the application came up for hearing before Ominde, the then Chair of the Rent Restriction Tribunal on 30.11.2000. a Preliminary Objection based on the grounds of jurisdiction and resjudicata were argued. The Preliminary was dismissed in a decision made on the same date on the basis that the tribunal had jurisdiction to entertain the application under sections 5(1)(M), 6 and 3 of the Rent Restriction Act. In the end the

tribunal heard the application and allowed the same in its ruling of 25.4.2007. In essence the consent order of 30th October 1996 was set aside. Being dissatisfied, the Landlord preferred this appeal.

On appeal, the appellant put forward a total of 14 grounds. These grounds can be summarized to two main grounds namely:

*(i) Want jurisdiction and*

(ii) *The setting aside of a consent order*. It is the submission of the appellant that the Rent Restriction Tribunal had no jurisdiction to entertain the matter having dealt with it substantively. In other words the appellant is of the view that the application was resjudicata hence the tribunal was functus officio. The Respondents on the other hand are of the view that the tribunal had a wide discretion to entertain the application under S.5 (1) M. I have carefully considered the written submissions over this issue. I have also considered the authorities relied upon by both learned counsels. It is not denied that the rent was increased to Kshs.5,000/- and Kshs.4,000/- respectively. That amount is beyond the standard rent fixed at Kshs.2,500/- under 2(1) (c) of the Rent Restriction Tribunal issued the Rent Control Certificate on 1st November 1996. I agree with the appellant that the moment the tribunal adopted the consent order, it effectively controlled the premises hence taking them out of its jurisdiction. In **Shah –vs- Aggarwal [1983] 476** the court of Appeal when called upon to consider what is the effect of a tribunal increasing the rent beyond the standard rent held interalia at page 478 as follows:

**"The effect of this ruling was that the Act was no longer applicable to the appellant's flats as the standard rent has been raised above Kshs.800/- per month. It was held in Gershumi –vs- Ombima [1975] E.A. 135 that a rent tribunal may raise a standard rent to any figure, and when that rent is raised above the limits set in the Act the praises are no longer subject to it."**

It is apparent from the above dictum that the rent Tribunal lost jurisdiction when it adopted the consent order which increased rent beyond the standard rent.

The other aspect which was argued is whether or not the application argued before chairlady Ominde, was resjudicata. According to the appellant, the application was resjudicata hence the jurisdiction had no option to reopen the same. The Respondent was of the contrary view that the tribunal was given a wide discretion under S.5(1) (M) of the Rent Restriction Act. After a careful consideration of the matter I am convinced that the Rent Restriction has very wide powers under the aforesaid section to revoke, vary, amend any decision earlier given other than an order for recovery of possession of premises or for the ejectment of a tenant there from which has been executed. The application to set aside the consent order of 31.10.96 dated 30.10.96 was heard by Muga Apondi, chairman of the Rent Restriction Tribunal. The same was brought under order XLIV rules 1,2,3,4 and 5 of the civil Procedure Rules and under Sections 5(1) and 3(2) of the Rent Restriction Act. The same was dismissed on the ground that the consent order was agreed upon by the parties hence the tribunal had no jurisdiction to revisit it. In other words the chairman was of the view the tribunal was functus officio as there were no good grounds to revisit it. A similar application was filed and argued before Ominde, the then chairlady of the Rent Restriction Tribunal. A Preliminary Objection was raised but the learned Chairlady overruled the objection. She heard the application and sort of overturned the decision of Muga Apondi. In my view I do not think the wide power given to the tribunal under Section 5 (1) M of the Rent Restriction Act, included the power to review a decision on review. If this was the intention, then litigations before the tribunal would be endless and there would be no need for parties to go on appeal. It should be noted that the two application were based on order XLIV of the Civil Procedure rules. Under Order XLIV rule 7 of the Civil Procedure rules, the law is quite categorical that no application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained. It is obvious from my above findings that I am of the considered view that the application before Ominde, was resjudicata hence the learned Chairlady had no jurisdiction to entertain it.

The second ground on appeal is whether the tribunal should have set aside the consent order. The Chairlady set aside the consent order of 31.10.1996 on the basis that the same was not recorded in good faith. It is apparent from the record that the landlord's agent and the tenants advocate negotiated for an amicable settlement before the consent order was recorded. The Tribunal's Chairlady inferred that the Landlord's agent had no intention of acting in good faith when he negotiated the deal behind the back of the landlord's advocate. I find the holding to be curious because there was no serious submissions to support the allegations of fraud on the landlord's agent. In any case the landlord's advocate did not raise the issue when the matter came for the first time before Muga Apondi, the then Chairman. Such allegations must be specifically pleaded and proved to the required standards in Civil Case. It was not open to the tribunal to make inferences. It was a burden to be discharged by the party alleging that frame was committed. That burden was not discharged hence there was absolutely no basis to set aside the consent order.

In the end and for the above reasons, the appeal is allowed. Consequently the Tribunal's decision of 25.8.2001 is set aside and substituted with an order dismissing the tenants' application dated 24.5.2000. costs of this appeal and those of

the application before the tribunal to be met by the Respondents.

Dated and delivered at Mombasa this 8th day of April 2009.

**J. K. SERGON**

**J U D G E**