

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 30 OF 1994

ABDULSHAKOOR KHANDWALLA APPELLANT

- Versus -

E.A. BUILDING SOCIETY RESPONDENT

R U L I N G

This appeal arises out of the decision of the Rent Restrict Tribunal given in Rent Restriction Tribunal Case No. 106 of 1994. The appeal has not been admitted and has therefore not been heard. The reason for that is that the Appellant has not been able to get a copy the Tribunal proceedings and ruling. He has now applied under Section 3A of the Civil Procedure Act for an order allowing him to list the appeal for hearing without the Tribunal record. To his supporting affidavit he has annexed copies of correspondence exchanged with the Deputy Registrar of this court and the Tribunal. It is clear from that correspondence that the Tribunal file is lost. The Tribunal sent the file to the Deputy Registrar in March 1997. The Deputy Registrar states that he returned the file to the Tribunal vide his letter of 26th March 1997 for the typing of the proceedings. The Tribunal denies having received back that file. Several letters have been exchanged between the two offices but the file has not been traced hence the Appellant's said application. The Appellant's counsel submitted that if the appeal cannot be heard without the Tribunal record then the dispute between the parties should be heard by the Tribunal de novo.

Mr. Khana for the Respondent opposed the application. He submitted that this court has no jurisdiction to make the order sought. He also submitted that the appeal cannot be heard without the record. In the circumstances, he said, the Appellant should accept the decision of the Tribunal and the matter be laid to rest.

The Appellant has an undoubted right of appeal against the said tribunal decision. Although it is not stated when the tribunal ruled on the matter it would appear from the correspondence I have referred to that he filed the appeal immediately after the tribunal ruling. It is not his mistake that the tribunal record is lost. He had no control of over it. To suggest that he should forget the appeal and accept the tribunal ruling is in my view manifestly unfair.

I agree with Mr. Khana that the appeal cannot be heard without the tribunal record. But I do not agree with him that this court has no powers to do anything in the matter and that it should send the Appellant away without remedy. In my view Section 3A of the Civil Procedure Act is meant to give the court power to deal with situations like this and make appropriate orders to meet the ends of justice. The suggestion by Mrs. Moorlaji commends itself to me as the best in the circumstances. Accordingly I order that the dispute between the parties be taken back to the Tribunal and be heard de novo.

The parties did not address me as to what should be done about this appeal. In my view there is no point of keeping it pending. I order that the same be and is hereby marked as withdrawn. Each party shall bear its own costs of the appeal and this application. Order accordingly.

DATED this 11th day of June 2004.

D.K. Maraga

Ag. JUDGE