



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 107 OF 2000**

AGAPITO PEREIRA

ABDULKADIR A.H. ZUBEIDY

AISHA SALEM BAKRESE AHMEND EMPORIUM

ABDULLA ABDUGAID ZUBEIDY

M.A. MEHRI

SULTANALI MOHAMED

IMAN ASISDIN

SHAUKAT M. KASSAM APPELLANTS

- V E R S U S -

SAID BIN SEIF PROPERTIES LTD.RESPONDENTS

JUDGMENT ON APPEAL

This is an appeal from Rent Restriction Tribunal in Rent Restriction Assessment No. 115 of 1999. In that case the Tribunal presided over by chairman Emily Omunde with Mr. Khaemba – Member, Mrs. Lusina – member ordered an assessment of rent to take effect as from first day of September, 2001.

The grounds of appeal filed by the tenants are set out thus:-

- 1. The proceedings before the tribunal are null and void as the Tribunal was not at the material time properly constituted as required under Section 4(5) of the Rent Restriction Act..**
- 2. Rule 9 of the Rent Restriction Regulations has not been Complied with as a member who was not present throughout the whole hearing has participated in the decision.**
- 3. The learned chairman erred in law in relying on the opinion and Report of Mr.Khaemba who was not called to give evidence before the Tribunal.**
- 4. The tribunal erred on facts and in law in not holding that the application was untenable and incurably defective.**
- 5. The tribunal erred in law in increasing rent by a further sum of Shs. 1000/- for Central**

location.

6. The tribunal erred in not calling for Tribunal files no. 92 of 1995.

7. The tribunal erred in not relying on exhibits attached in the affidavits of the tenants which were in tribunals own records.

8. The tribunals decision is against evidence and express provisions of Rent Restriction Act.

Arguments advanced for the appellants is firstly the provision of Section 4(5) of the Act the Tribunal is the Chairman, Member, Member, the proviso Chairman, alone or one member. In this case on 18.11.99 the proceedings commenced before Chairman only. Mr. Kasmani was present. On 2.12.99 the proceedings were taken before Chairman alone. Mr. Kasmani now submitted that court has jurisdiction only if it is properly constituted. Be it noted here that at no time did Mr. Kasmani take objections to proceedings. However, Mr. Kasmani relies on the decision of High Court in

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Where the court said

“But the contest of the jurisdiction of a court is a matter of law and can be raised at any stage of the proceedings and on Appeal ”

Sippy’s case was in relation to Cap 301(Business Premises Rent Tribunal) but in this appeal the matter was in Rent Restriction Act Cap 296. Section 4 thereof makes provisions for establishments of the Tribunal, the appointment of the Chairman and deputy chairman, the appointment of a panel of members appointed.

There is a proviso.

“where for any reason either or both of the members so selected were not present for any part of a hearing the jurisdiction of the Tribunal may be exercised by the Chairman or deputy chairman sitting either with one such member or alone as the case may be and no questions shall be raised in any proceedings.”

Under the Rent Restriction Regulations made under the Act regulation 9 provides that a member of the tribunal shall not participate in a decision of Tribunal unless he has been present through the whole of the hearing. These quotations are from Revised Edition 1982(1979). Laws of Kenya

. In the case of **Thakkar & another –vs- Jeram & others** 1973 E.A. 133 the court was considering the issue where the chairman of the tribunal had died. The court said at 134(H), with regard to subsection 7 of Section 4 which provides

“any matter considered by the Tribunal shall be decided by the votes of a majority of the persons constituting the Tribunal and voting and the person presiding shall have a certifying vote as well as a deliberative vote.”

The court said.

“The effect of these provisions is that on the death of the Chairman, or a member, the tribunal ceases to be lawfully constituted and the remaining members cease to have any jurisdiction”.

In that case Chairman had died.

In the present case the Chairman on 16-11-99 was changed. By 20.3.00 when the present chairman took over and all times presided over the tribunal. She had jurisdiction to sit alone as provided under section 4 above. No submission has been made that the case should have started de novo. However, Mr. Kasmani is only challenging the conduct of proceeding by new chairman.

On the issue of the report of Mr. Khaemba, firstly he was a member of Tribunal sitting in the matter, secondly he was not availed to give evidence and to be cross examined and his report and opinion was relied upon by the tribunal which differed with that of Municipal Council of Assessments as exhibited.

Mr. Khaemba signed the decision of the tribunal as a member. On the cost of construction the appellants said the cost of construction was contained in Tribunal Case no. 92 of 1975 which showed the same to be 413163/- and the value of plot as 25,000/-. The standard Rent was assessed in that file which means the matter was now Res Judicata. To determine that the returns are uneconomical material must be laid before the court. In the Thakkar case mentioned above the court discussed assessment on the basis that the landlord investment was yielding uneconomical return. At page 138 letter E court said;

“The tribunal’s first task is to determine whether the current lawful rent (standard rent) yields a fair capital return on the cost of construction and market value of the land as at (Jan. 1965) or on the purchase priceif the landlord has paid for the construction of the premises his capital investment is the cost of construction adjusted to 1/1/1965.” “If the tribunal is not satisfied that the standard rent would yield an uneconomical return there is obviously no need to go further and determine a new fair Rent .”

Instead of relying on the report made by Mr. Khaemba the Tribunal should have relied on that of the Tribunal’s own officer. It was the submission of Appellant that the standard rent was rent paid on 1/1/1981 and on assessment under Section 3 the actual cost of construction and rent payable on 1/1/1981 otherwise it is contrary to Section 3(2)

(a) (b). Section 3(b) permits the tribunal to determine the standard rent to be such amount as it considers fair having regard to the standard rent of comparable dwelling houses only where it is not reasonably practicable to obtain sufficient evidence to enable it to ascertain:-

(a) The rent at which the dwelling was let or

(b) The cost of construction or

(c) The market value of the land at the material time.

In the present case there was evidence available on these matters.

Counsel for the Respondent argues that the two Mrs. Lusina and Mr. Khaemba did not sit as members. This is strange argument in that the record shows that on 20-3- 2000 L. Lusina is described as member. On 1/8/2000 when the Ruling was read the member was R. R. Riyan. Again on 11-8-2000 Mr. Khaemba was sitting as a member with Lusina. It is clear that the provisions of Section 4(5) were not complied with. No reason is given as to why the members failed to turn up in a regular manner at all. And the provisions of regulations 9 was not complied with in that the two members who signed the proceedings absented themselves from time to time. It is completely unknown why the 3 Khaemba, Lusina, Riyani members attended at all. The chairman had jurisdiction to conduct proceedings alone in their absence. Regarding the action of Mr. Khaemba, an appointed member of Tribunal, in making a valuation and reporting to the Tribunal was irregular as it opened the tribunal to accusations of bias no man should judge in his case. Mr. Kiarie relied on the case of Davindrabhan Patel –vs- Mamlien & others. Nairobi HCC Appeal No. 55 of 1983.

Upon considering this appeal it is clear that the proceedings commenced with the Chairman presiding and one member, Khaemba. This was contrary to the Section 4(5). It should have consisted Chairman and

two members who should have attended all sittings to the end. In case both members or one member so selected is absent for any reason the chairman should have proceeded with the remaining member or alone. The jurisdiction of the court existed throughout the proceedings since the Chairman always presided. The attendance of the other members was irregular as they failed to attend all sessions.

Regarding the action of a member sitting and being appointed a valuer renders the deliberations null and void being in contraction of the rules of natural justice. He had an interest in the matter of the assessment of rent and his report should not be relied upon. The Tribunal failed to assess rent in accordance with the provision of Rent Restriction Act despite that there was evidence that the premises was let as on 1/1/1981 and that the matter of correct construction costs and value of land were matters already decided upon in tribunal case no. 92/1975. There is no discretion vested in the tribunal in assessing rent except as provided by Section 3(2) (b) and this case does not fall under that provision.

To conclude we must say that the proceedings commenced with an improperly constituted Tribunal contrary to Section 4(5) and therefore the proceedings were vitiated. The position is not rectified by a reading of the provision to the section as this operates only in absence of the selected members. On that ground alone the appeal would succeed. These other disturbing aspects is that member Khaemba who was sitting on some occasions made a report which was preferred by the Tribunal. This is a fatal complaint and vitiates the proceedings of the tribunal. Notwithstanding the above stated the tribunal in its decision did not comply with Section 3(2) (a) (iv). The tribunal failed to consider the assessment of its own officer and the evidence of cost of construction having become res judicata in tribunal case no. 92/1975. The upshot is therefore that this appeal is allowed and with costs to the appellants.

On the issue of refund of rent it would have to be proved that any rent in excess has been paid since 11-8-2000. This court has no such evidence. It is not possible to make such an order.

Read and dated this 26th day of November 2004.

J. KHAMINWA

JUDGE

D. MARAGA

AG. JUDGE