



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 4886 OF 1988

PATRICIA W. KUNGU PLAINTIFF

VERSUS

WOLFGANG ROESCH DEFENDANT

RULING

There was a short application argued here in limine by Mr. Kyalo Learned counsel for the Defendant dated 25-10- 2002. It says

- 1) That the Plaintiffs (Patricia Wairimu Kungu) suit is for evidence and mesne profits in respect of Residential premises namely L.R. NO. 37/260/29 Nairobi where the Rent is less than Ksh 2500/= per month.
- 2) This Honourable court has appellate but not original jurisdiction in respect of the subject matter of this suit.
- 3) Any dispute pertaining to rent possession of the said suit premises falls within the jurisdiction of the Rent Restrictions Tribunal.

Mr. Kyalo has urged that since the rent is below Kshs 2500/= per month the premises are within the jurisdiction of section 2 of Cap 296 of the Kenya Laws so this court cannot be used as a court of first instance. The court has no jurisdiction he says. But Mr. Nduati Learned Counsel for the Respondent opposes the application asserting that the court has jurisdiction because those cases were consolidated and in one of the two consolidated case the issue regards contractual agreement. He said there is nothing to bar the Plaintiff from instituting the case in the High Court and that Cap 296 Rent Restrictions Act does not apply because the premises are not controlled as this was as a result of written tenancy. This is a Preliminary point and normally Preliminary Points are arguable where the matter if decided is decisive of the case and as has been stated in the several cases inclusive of the decision by Sir Charles Newbold in the case of MUKISA BISCUITS MANUFACTURING LTD Vs. WEST END DISTRIBUTORS LTD 1969 EA 696 where he said that it is argued on pure points of law or on agreed facts only and where evidence is still to be settled or not agreed then it cannot obtain.

The fact which is agreed here is that the premises is a dwelling house and the rent payable here is Kshs 1600/= per month. This is not disputed. So the question is whether this brings this tenancy under the purview of the Rent Restrictions Act Cap. 296 of the Kenya Laws. Section 2 (1) of the said act provides:

“This Act shall apply to all’ dwelling houses other than:-

(a) excepted dwelling houses

(b) dwelling house let on in service Tenancy

(c) dwelling houses which have a standard rent exceeding two thousand five hundred shillings per month, furnished or unfurnished

Section (3) of the Act describes what standard rent is and this is not in dispute here.

This is, therefore, a controlled Tenancy and the question is whether the jurisdiction of this court is excluded. Section 4 of the act establishes a Tribunal to adjudicate over all those matters that arise from such Tenancies as are enlisted under Section 5 of the same Act inclusive of recovery of possession recovery of arrears of rent, mesne profit and service charges, to permit levy of distress for rent, to impose conditions in any order issued by it under the Act and under section 6 thereof It says

6 (1) "In addition to any other powers specifically conferred on it by this Act, the tribunal may investigate any complaint relating to the tenancy of remises made to it by either a tenant or the landlord of those premises".

The Tribunal is, therefore, an independent Tribunal with its rules of procedure prescribed by the Chief Justice under section 37 of that Act and its decisions are final except on those that appeal lies to the High Court under section 8 of the Act.

Although the High Court is a court of unlimited original jurisdiction in Civil and Criminal matters section 60 of the constitution that creates it also recognizes that other statutes or law can confer jurisdiction on it but in that same token other statutes can take out jurisdiction so conferred. Under section 8 of the Cap 296 the Act confers on it appellate jurisdiction on decisions of the Tribunal but not the others. The question is to what extent does a statute like Cap. 296 exclude High Court jurisdiction? It is not easy. I believed it was a small matter but it is not I have it from authority. It requires two tests to determine exclusion; first; whether the legislative intent to exclude is expressed explicitly or by necessary implication, secondly whether the statute in question provides for adequate and necessary satisfactory alternative remedy to a party aggrieved by an aggrieved person and such bearing provisions must in themselves be intravires the Constitution. [See Mulla on Civil Procedure pp. 117 Vol. I 15th Edition.

There are other considerations for I believe the Legislature in fact provided that appellate jurisdiction be bestowed on the High Court and not others. I think this was clearly and expressly thought out and deliberate and one can see that the matters left for the Tribunal to finalise are more of administrative nature whose fairness can always be enforced by applications to the judicial Review process. This underscores the requirement in the second Test whether there is adequate remedy to a person aggrieved.

I have found words of Madan, J.A. in the Court of Appeal case in BACHELOR BAKERY LTD v. WESTLAND SECURITIES LTD (1982) KLR (372) apt when he said that:

"The Act is legislation of a special nature enacted solely for the protection of tenants. It allows the parties a choice of occupation of premises under a controlled or uncontrolled Tenancy, in the first case within the ambit and in the second outside the ambit of the Act."

Although the Honourable Judge said so with reference to the sister statute to this one the Landlord and Tenants (Shops hotels and Catering Establishments) Act Cap. 301 nevertheless the words are relevant here as well.

In the case of CHEEMA v. RODRIGUES (No. 2) [1984] KLR 788.

The High Court on appeal under section 15 of 8 (1) 2 4 and 15 (d) (e) of Cap. 296 Cockar and Cotran JJ refused to order a Review of Tribunal's decision because that Act did not provide the High Court with

jurisdiction to entertain Review. This shows how the High Court cannot even in this case assume jurisdiction of adjudicating matters placed by statute under the Tribunal.

For this reason, the preliminary objection succeeds the case is incompetent in the event the second case involving a counterclaim can be heard on its own.

Dated and Delivered this 11th day of March 2003.

A.I. HAYANGA

JUDGE