**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 14 OF 2003**

**M. SHEIKH & 20 OTHERS …….. PLAINTIFF**

**VERSUS**

**HERONSGATE LIMITED ……..……... DEFENDANT**

**RAJAN SAVANI …… 2ND DEFENDANT**

**JITU C. SAVANI …… 3RD DEFENDANT**

**RULING**

Notice of Motion dated 11th February 2003 is seeking only one order and that is an order that there be a stay of execution of the order made by the Rent Restriction Tribunal in Rent Assessment Case No.65 of 2000, on 22.1.2003 until the appeal filed by the applicants in the High Court is heard and determined. It is brought under Order 41 Rule 4 and Section 3A of the Civil Procedure Act. The grounds upon which the application is filed are three and these are that the appeal has good chances of success; that the appeal will be rendered nugatory and that the premises are decontrolled, and the said applicants may be evicted and will suffer substantial loss including loss of a statutory tenancy if the stay is not granted. The application is supported by an affidavit sum by one Japheth N. Kivaa, the 19th Applicant and a further and supplementary Affidavit sworn by the same applicant on behalf of himself and the other Applicants.

The Respondent opposed the Application and filed a Replying Affidavit sworn by Kamlesh Pritamlal Govindji Kamdar. In that Affidavit, the Respondent maintains in a nutshell that the appeal is incompetent and bad in law as it was filed without leave of the court and likewise the application is incompetent; that the grounds set out in the application are presumptive, anticipating and are not proper grounds to support the order sought; that the Applicants have not shown that the appeal would be rendered nugatory if the application is not granted; that no security has been offered for due performance of the orders in case the appeal fails; that the rents paid by the applicants have been so low that the applicants, some of whom have not fully paid their rents do not deserve the orders sought but if the stay is to be granted at all it should be granted upon conditions for if the stay is unconditionally granted then the Respondents stand to suffer irreparably as the current rents paid are uneconomic and insufficient to maintain the suit premises.

I have considered this application, the Affidavits, the annextures, the able submissions by the learned counsels and the authorities to which I was referred.

There is, in my humble opinion, merit in the contention of the learned counsel for the Respondent that strictly in law the Civil Appeal No.14 of 2003, the substratum of which this application is based is as matters still stand now incompetent and is not properly before the court. The appeal was filed against the decision of the Rent Restriction Tribunal in RR (A) No.65 of 2000 which was decided on 22nd January 2003. This appeal should have been filed within 15 days of that date 22.1.2003. However it was filed on 12.2.2003. That was clearly well over 15 days. I agree that the proviso to Rule 2 of the Rent Restriction (Appeals) rules would only help if the certificate is availed and if the court, having seen the certificate grants leave for the appeal to be filed. For ease of reference I will reproduce here below the relevant Rule 2 of the Rent Restriction (Appeals) Rules. It states as follows:

*"2. An appeal brought under Section 8(2) of the Act shall be filed within a period of fifteen*

*days from the day of the decision, determination or order appealed against, excluding from that period any time which the tribunal may certify as having been requisite for the preparation and delivery to the appell ant of a copy of the decision, determination or order. Provided that the appellate court may admit the appeal out of time if it is satisfied that the Appellant had good and sufficient cause for not filing the appeal in time."*

This rule makes three provisions as I understand it. First that the appeal from the tribunal to this court under Section 8(2) must be filed within 15 days. The word "shall" is used to emphasize the need for compliance with that rule. Secondly, in computing that time of 15 days, a consideration must be taken of the time the tribunal takes to prepare and supply the appellant with the copy of the decision, determination or order to be appealed against, and that period must be excluded when computing the period of 15 days which means that the period available to the applicant will be more if the Tribunal takes time to deliver the copy of the determination to him. However, in computing that period so as to know whether the Appellant is still within his fifteen days time, a certificate from the Tribunal must be given to show the period that was taken to prepare the determination or decision or order. It is only when that certificate is available that one can competently tell whether after excluding the period taken by the Tribunal to prepare decision, determination or order, the appeal is still brought within 15 days of the date of determination, decision or order. The third provision is that notwithstanding the delay over the fifteen days provided and notwithstanding the lack of the certificate from the Tribunal or the ineffectiveness of the same certificate, the Appellate court may for sufficient and good cause adduced by the appellant, still admit the appeal out of time. This appeal falls as I understand it in the second category and needed a certificate from the Tribunal if as Mr. Kasmani says proceedings are as yet not availed. As matters stand now and without that certificate, the court cannot compute time and conclude that the delay of six days (i.e. from 22.1.2002 to 12.2.2003) is conveniently taken care of by a certificate from the tribunal because indeed there is no such certificate as yet. It is when that certificate is availed (if it will be availed at all) that the court will be able to tell whether the appeal was in time. In my mind, as yet, what is there is indeed an intention to appeal. As I am not hearing the appeal, I cannot take any action on it but I do point this out because it is that alleged appeal which forms the substratum of this application as the application has been brought under Order 41 Rule 4(1) which presupposes the existence of a valid appeal or second appeal except in cases of an appeal to the court of appeal where Order 44 rule 4(4) will operate. In my mind, if this application had been filed under Order 44 rule 4(6), then this court would have dealt with it subject to the Applicants showing as it appears they would have shown that they had taken necessary steps for instituting an appeal.

As an appellate court, I can only entertain an application for stay if I am satisfied that the appeal to be preferred or already filed is arguable and that the results of the same appeal would be rendered nugatory if the stay is not granted. Mr. Kasmani, the learned counsel for the Applicant seems to be aware of these requirements for in the grounds of application his main two grounds out of three are that the appeal has good chances of success and that the appeal will be rendered nugatory if stay is not granted. One may ask, how would one successfully argue that an appeal which is filed out of time and without a certificate from the Tribunal has good chances of success merely because he anticipates that a certificate will be availed? In my mind, however good the chances of getting the same certificate is, it remains no more than speculation and anticipation, and a court of law cannot act on the same for to do so is actingin vain. I have perused the case of ***Chamunali Gulam Hussein vs. James Kisia, Mombasa HCCC No.15 of 1999*** on the part that deals with a similar issue of filing appeal without certificate. I do with respect agree entirely with what Waki J. says in that case. It is also true in this case that though Rulings of the Tribunal have been obtained, and were annexed in the further affidavit, no certificate of delay has been obtained, and no explanation has been offered by way of an affidavit and other documents as to why it has not been obtained except the learned counsel's words from the bar.

I will not go into the merits as to whether the alleged appeal has matters of law or matters of law and facts and whether on that score it is incompetent or not because Mr. Kasmani has said from the Bar that he is seeking the certificate. I will also not go into the substance of the application. I note however that even when such certificate is eventually obtained, the court's leave will still be required to revive this appeal. As matters stand I cannot entertain this application based on the appeal as is the case.

Application by way of Notice of Motion dated 11th February 2003 is struck out with costs to the Respondent. Orders accordingly.

**Dated and delivered at Mombasa this 3rd Day of April, 2003.**

**J. W. ONYANGO OTIENO**

**JUDGE**