IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, TUNOI & OWUOR, JJ.A.

CIVIL APPEAL NO. 113 OF 1998

BETWEEN

GITONGA WARUGONGO ..... APPELLANT

AND

TOTAL KENYA LIMITED ..... RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nairobi (Hayanga J) dated 19th March, 1998

in

H.C.MISC.C.S. NO. 718 OF 1998)

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JUDGMENT OF THE COURT

This appeal must be determined solely under the provisions of section 35 (1) of the Arbitration Act, that is, Act No. 4 of 1995. The appellant is the registered owner of the property known as Nyeri Municipality Block 1/207 within Nyeri Township. The respondent is a tenant of the appellant. The lease agreement between them provided in paragraph 2 (a) (iv) that:

> *"The rent hereby reserved shall during the continuance hereof be reviewed upwards at the expiration of seven (7) years from the date hereof taking into account the cost of petroleum products to the Company [the respondent] and the ruling pump prices at the time of review. In the event of disagreement between the parties hereto on the new rental, such rental, shall be determined by a valuer of not less than ten (10) years standing mutually appointed by both parties and pending such determination, the Company shall pay the rental then subsisting at the time of such review."*

The lease agreement having been made on the 23rd January, 1992, the rent payable came up for review in May 1996. The parties disagreed and in terms of the clause set out hereinabove, the matter was referred to the arbitration of a Professor Syagga and by his award dated the 25th June, 1997, the arbitrator set the monthly rent at KShs.167,000/=. Apart from that the arbitrator made a further award to the effect that:

> *"I also recommend an increment of 20% every two years for the current 7 years portion of the lease to take care of increases in sales and profit. Therefore, rent as at May 1998 and May 2000 will be KShs.200,000/= and KShs.240,000/= respectively."*

The respondent was aggrieved by the award and moved to the High Court. Under Section 35 (1) of the Arbitration Act:

> *"Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)."*

So there is no longer any provision in the Act for asking a court to modify an award or for the court to remit the same to the arbitrator for modification. It is accordingly understandable why the respondent moved the court to set aside the award; that was the only course open to the respondent.

Having heard the parties, the learned Judge of the superior court (Hayanga, J) agreed with the respondent and he held that:

> *"What the award grants is a two year period which is obviously outside it. I agree with the applicant, therefore, that the award is beyond reference terms and I set it aside."*

We agree with the learned Judge that the arbitrator did not have the power to authorise an increment of the rent payable after every two years. The parties had specifically agreed that there would be an increment after every seven years and they also agreed on the mode of calculating the increment. There was no mention of a 20% increment any more than there was a mention of two years. In purporting to impose those terms, the arbitrator was making a new contract for the parties. He was accordingly going beyond the terms of the reference to him, that is, he was exceeding his authority as an arbitrator.

The arbitrator, however, did determine the monthly rent payable as being KShs.167,000/= and the method he used in coming to that figure was in accordance with the method set out in the parties' agreement. The increase of 20% after every two years is clearly separate and severable from the arbitral award regarding the monthly rent payable. The proviso to section 35 (1 (a) (iv) is in these terms:

> *"Provided that if the decisions on the matters referred to arbitration can be separated from those not so referred only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside."*

The matter referred to the arbitrator for his determination was the monthly rent payable in accordance with the lease. The arbitrator determined that and he did so in terms of the lease. But he proceeded to add the rate of increment as being after every two years and at 20%. He was not asked to determine that question. We have said that determination is separate and severable from the issue he was asked to determine. We think the learned Judge ought not to have set aside the entire award but only the part dealing with the two years and the 20%. We accordingly allow this appeal, set aside the learned Judge's order setting aside the arbitral award and substitute it with an order restoring the arbitrator's award of a monthly rent of KShs.167,000/= but set aside that part of the award allowing a rental increase of 20% after every two years. We award to the appellant half the costs of this appeal and half the costs of the proceedings in the High Court. The parties will each bear its costs before the arbitrator. Those shall be our orders.

Dated and delivered at Nairobi this 11th day of December, 1998.

R. S. C. OMOLO

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR