IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Platt JJA & Masime Ag JA)

CIVIL APPLICATION NO NAI 101 OF 1987

Betweem

GATANGA GENERAL STORE

& 2 OTHERS.....APPELLANT

AND

GITHERE.....RESPONDENT

(Application for stay of execution pending an appeal from a Ruling of the High Court at Nairobi, Gicheru J)

JUDGMENT

May 17, 1988, **Nyarangi JA** delivered the following Judgment.

There is before the court a preliminary point taken on behalf of the respondent arising from the notice of motion under rule 5(2)(b) of the rules of this court for an order that there be a stay of execution of the judgment of the Business Premises Rent Tribunal of January 5, 1984 in BPRT, Nos 113 of 1981, 366 of 1980 and 91 of 1981 pending the hearing and disposal of the appellant's intended appeal. The preliminary point relates to the court's jurisdiction and it is a matter of serious complaint by counsel for the respondent that on a true construction of the proviso to sub-section 4 of section 15 of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, cap 301, this court has no jurisdiction to entertain the notice of motion. Mr. Hira stated that the matter before the High Court was an appeal from the Business Premises Rent Tribunal, that the High Court (Gicheru J) has refused an application for stay of execution and that there is no appeal as of right to this court. The courts attention was drawn to rules 40 and 41 of the rules of this court and Mr. Hira submitted that in the circumstances the applicant could not rely on the two rules to file an appeal.

For the applicant Mr Gaturu told us that Mr. Hira had got everything wrong, that the application before the court arises from a decision of the High Court in an interlocutory application, the substantive appeal is still undetermined by the High Court and therefore this court has jurisdiction to hear the application. Mr Gaturu contends that rule 4 of order 41 of the Civil Procedure Rules confers jurisdiction on this Court.

It appears to me the crucial question is whether an appeal lies to this Court from a decision of the High Court in an interlocutory application when the Act, which makes provisions with respect to the subject-matter states that the decision of the High Court on any appeal under the Act shall be final.

I must have care in applying the proviso to sub-section 4 of section 15 of the Act.

Sub-section 4 provides,

> "(4) The procedure in and relating to appeals in civil matters from subordinate courts to the High Court shall govern appeals under this Act: Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal."

On the wording of the provision, it is true that no appeal can lie to this court from the decision of the High Court in an appeal. The reference to decision in the proviso is clearly to a decision of the High Court on a substantive appeal. Mr Gaturu invites the court to decide that as the matter before the High Court was interlocutory, the sub-section does not apply.

The authorities which were cited did not advance the matter. Order 41 rule 4 and order 21 rule 18 of the Civil Procedure Rules cannot have the effect of conferring jurisdiction on this court. Rule 39 of the rules of this court is inapplicable because the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act does not say that an appeal may lie to this court with the leave of the High Court. Nor does the Act say an appeal lies if the High Court certifies that a point of law of general importance is involved (rule 40). The observations of Hancox, Platt and Gachuhi JJA in *Kenya Shell Limited v Benjamin Karuga Kibiku & Anor*, Civil Application No NAI 97 of 1986 are not consistent with the proposition that in the circumstances this court has jurisdiction. The *ratio decidendi* of that case was that if there is no evidence of substantial loss to the applicant it would be rare indeed for an appeal to be rendered nugatory by some other circumstances. Much nearer is the decision in the case of *Gilbert v Endean* (1875) 9 Ch D 239 wherein Cotton LJ observed as follows:

> "Those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in *status quo* till the rights can be decided, or <u>for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties."</u>

The underlining is mine. Logically, in my judgment, there is no way this court can meaningfully decide how the appeal before the High Court is to be conducted. This court cannot ultimately decide upon the rights of the parties as no appeal lies from the final, ultimate decision of the High Court.

There is one further point. Supposing there is a decision in favour of the applicant. If this court's order were to be disobeyed, it is simply not common sense to suggest that this court would have any authority to punish for the disobedience. The practical consequence of that would be to bring this court into disrepute.

The jurisdiction of this court is statutory. For this court to entertain this matter would be to confer jurisdiction on itself in the face of statutory provision against appeal from a decision of the High Court, irrespective of whether that decision is interlocutory or final. The operative words of the proviso to sub-section 4 of section 15 are, "on any appeal" which words in my judgment cover interlocutory and final appeals.

I would for those reasons reject the argument for the applicant and rule that the application as well the appeal are incompetent and should be struck out. As Masime Ag JA agrees it is so ordered.

Platt JA (Dissenting). It is unfortunate, in my opinion, that the preliminary objection in this motion was entertained without notice given; so that full argument could not be heard on both sides.

Nyarangi JA whose ruling I have had the advantage of studying in draft has set out section 15(4) of the Landlord and Tenant Act (cap 301) and in particular the proviso. I shall only repeat the proviso:

> "Provided that the decision of the High Court on any appeal under this Act shall be final and shall

not be subject to further appeal."

I agree entirely that "the reference to "decision" in the proviso is clearly to a decision of the High Court on a substantive appeal." I take that to refer to the difference between a ruling on an interlocutory matter as distinct from what has been called an appeal on the subject matter of the Act, in which case an appeal under the Act shall be final. I also agree that the crucial issue on appeal lies from a direction or ruling on an interlocutory matter in the terms of an order, as distinct from the decision of an appeal concerning any matter competent to be taken on appeal.

It appears that there might be three sources of appeal. The primary source lies in section 15(1) of the Act. Any party to a reference aggrieved by a determination or order of a tribunal made in the reference may appeal to the High Court within the time stated. Hence this appeal concerns decisions on a reference.

Such an appeal depends upon two steps, the giving of the tenancy notice by the landlord and the reference by the tenant to the tribunal against the landlord's notice. The landlord by himself cannot make a reference (*Pritam v Ratilal & Another*, (1972) EA 560); that is for the tenant. If no reference is made then the landlord's notice takes effect under section 10 of the Act. So he does not need to appeal in that case. But on the appeal section 9 of the Act explains the determinations and orders which it may make; and the orders may be "further or other orders as it thinks appropriate." This explains the phraseology of section 15 – aggrieved by "any determination or order of a tribunal".

A second source of aggravation stems from a complaint under section 12(4) of the Act. This is not an easy concept to follow at every stage. Madan, J in *Choitram v Mystery Model Hair Saloon*, [1972] EA 525, (followed in *Machenje v Kibarabara*, [1973] EA 481) explained the scope of a complaint in these words:

> "The powers given in section 12 (4) are expressly in addition to any other powers specifically conferred."

I am of opinion however that the term "complaints" is intended to cover only complaints of a minor character.

> "The term 'investigate' does not necessarily imply a hearing. Such complaints would include complaints by the tenant of turning off of water, obstruction of access, and other acts of harassment by the landlord calling for appropriate orders for their rectification or cessation, but not including payment of compensation for any injury suffered."

It seems that the concept is that matters incidental to the protection of the tenancy given by the Act, especially security of tenure from dispossession and harassment may be dealt with at the level of minor complaints. Such complaints, having been entertained by the tribunal, and orders having been made, such orders have been held to be unappealable. Madan, J set out the history of the matter in *Choitram's* case at page 530 as follows:

> "Prior to April 6, 1970, section 15 of the Act permitted an appeal to a senior resident magistrate and from there to the High Court on a question of law or mixed fact and law in terms which included appeals from decisions on complaints under section 12 (4).
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> As amended appeals were restricted to determinations or orders made on a reference. This strengthens my view that proceedings under section 12(4) are intended for complaints of a minor nature only. If the legislature had considered that the tribunal had power under that provision to award large sums by way of compensation to a landlord for example ... it would surely have continued the right of appeal."

There is no appeal from orders made under section 12 (4) of the Act, because that appeal was held to have been deleted.

Then there is the third source of appeals which is procedural. The present case comes under this heading. The statutory position is that the procedure in and relating to appeals in civil matters from subordinate courts to the High Court shall govern appeals under this Act. (Section 15(4)). In hearing appeals under section 15, the court shall have all the powers conferred on a tribunal under the Act in addition to any other powers conferred on it by or under any written law. The Civil Procedure Act and Code would be such written law. Under the Magistrates' Courts Act the subordinate courts exercise civil powers and that would be under the Civil Procedure Act which regulates appeals from subordinate courts to the High Court. The definition of court in that Act includes the High Court and a subordinate court acting in the exercise of its civil jurisdiction. One of the procedures is to grant a stay of execution pending appeal. If the subordinate court will not grant a stay an application may be made in the High Court in that respect. When order XLI rule 4 of the Civil Procedure Rules is available as it would be, Sir Clement de Lestang made it quite clear in *Ujagar Singh v Runda Coffee Estates Ltd* [1966] EA 263 that there was no doubt that the High Court had power to order a stay of execution within the exercise of its inherent jurisdiction or under order XLI rule. Under section 151 of the Indian Civil Procedure Code which is in the same terms as section 3A of the Civil Procedure Act of Kenya many cases are cited by *Mulla* in his *Commentaries to the Code of Civil Procedure* 13th ed. Vol. 1 at page 378 *et sec*, illustrating the use of the inherent power to grant a stay of execution.

In the instant case, the High Court refused a stay of execution. That is one of the orders which is appealable under sections 66 and 75 of the Civil Procedure Act and order 41 rule 4 of the Civil Procedure Rules. An appeal lies to this court. The crucial decision then is whether section 15 of the Landlord and Tenant Act (cap 301) was enacted to curtail this appeal as well as the other types of appeal. I would adopt a statement in *Craies on Statute Law* explaining the general principle (at page 122) in seventh edition:-

> "A distinct and unequivocal enactment is also required for the purpose of either adding to or taking away from the jurisdiction of a superior court of law … Similarly as to ousting the jurisdiction of a superior court. "The general rule undoubtedly is, said Tindal CJ in *Albon v Pyke,* "that the jurisdiction of the King's Courts must not be taken to be excluded unless there is clear language in the statute which is alleged to have that effect …"

Lord Salvesen said

> "a general rule applicable to the construction of statutes is that there is not to be presumed without express words, an authority to deprive the supreme court of a jurisdiction it had previously exercised or to extend the private jurisdiction of the supreme court to the inferior courts."

If the tribunal is to be considered a subordinate court, and if there is an appeal to the High Court, and the High Court allows or refuses a stay, that is an order which has always been appealable to this court, under the Civil Procedure Act. It would require express words to deprive the litigant of his right of appeal to this court.

The words of section 15 are connected with appeals arising out of the procedure connected with appeals. Consequently there is no bar to this appeal.

But there is nothing new in the concept of interlocutory appeals being allowed although there is no final appeal. That will be seen by the decisions in *Mudavadi v Kibisu & Another* [1970] EA 585; *Nyarangi v Mukuna,* Civil Application No NAI 18 of 1975; *Karanja v Kabugi and Magugu,* Civil Appeal No 30 of 1981. These cases all followed the Privy Council's decisions in *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31, at pages 41 and 42. It is, of course, true that these cases depend on the constitutional provisions for elections. But there is no difference in principle. There is to be no appeal from the decision of the election court for purposes of speed and finality. Just so in rent restriction legislation, there is to be no appeal after certain decisions for the same purpose. But interlocutory appeals were allowed, because the established appeal system concerning interlocutory orders had not been ousted. After the amendment to the constitution in Kenya, interlocutory appeals are no longer allowed in election cases. But there has been no amendment to section 15 of cap 301 to this effect. The philosophy behind admitting interlocutory appeals is expressed, as it seems to me, by Lord Wright in *Evans v Bartlam* [1937] AC at page 654.

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction, unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that, if the judge had jurisdiction, and had all the facts before him, the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle.
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> The court must, if necessary, examine new relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order. Otherwise, in interlocutory matters, the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and may be one which requires a careful examination by the Court of Appeal."

In conclusion I agree with the views expressed concerning the particular objections based on rules 39, 40 and 41 of the Court of Appeal Rules. I agree also that *Kenya Shell Ltd v Benjamin Karuga Kibiku*, Civil Application No NAI 97 of 1986 does not advance the arguments or jurisdiction. But I would not allow the preliminary objection at this stage. I would allow the appeal to go to trial and allow the matter to be fully argued. All I have attempted to do is to draw out points of view which were not explored by counsel. It seems to me that there are sufficiently strong arguments which ought to be considered to prevent the application being accepted at this stage.

I would therefore dismiss the objection and allow the appeal to go forward to hearing.

Masime Ag JA. I agree that the preliminary objection taken by the respondent challenging the jurisdiction of this court should be upheld.

The jurisdiction of the Court to deal with matters arising from decisions of the tribunal created under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act cap 301 is provided by section 15 of that Act. By subsection (4) of that section it is provided:

> "(4) The procedure in and relating to appeals in civil matters from subordinate courts to the High Court shall govern appeals under this Act:
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> Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal."

On January 5, 1984 the tribunal gave its judgment in its BPRT cases Nos 113/81, 366/80 and 91/81. The present applicants being aggrieved by that decision have filed HC Civil Appeal No 249 of 1984 which is pending for hearing. They then took out *ex parte* an application before the High Court praying for the setting aside of eviction proceedings taken out by the decree holder in the resident magistrate's court and for stay of execution of an injunction against the decree holder enforcing the tribunals judgement until the final hearing and determination of the appeal. That application was on June 11, 1987 rejected by the High Court (Gicheru J) and the applicants have brought the present application under rule 5 (2) of the Court of Appeal Rules praying for the same orders.

It is submitted by counsel for the respondent in his preliminary objection that rules 40 and 41 cannot on a proper construction enable the present application to be filed. Counsel for the applicants on the other hand contends that as Civil Appeal 249/84 remains pending and only an interlocutory decision has been made, order 41 rule 4 of the Civil Procedure Rules empowers this court to entertain this application. I do not with respect agree as that would be tantamount to using subsidiary legislation to by pass the clear statutory removal of jurisdiction from the Court of Appeal.

In the result I would uphold the preliminary objection and agree with the orders proposed by Nyarangi JA.

Dated and delivered at Nairobi this 17th day of May, 1988

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.R.O MASIME

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AG.JUDGE OF APPEAL