



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NYARANGI, PLATT & GACHUHI JJA)

CIVIL APPEAL NO. 6 OF 1987

SAVINGS & LOAN KENYA LTD.....APPELLANTS

VERSUS

ODONGO.....RESPONDENTS

(Appeal from the High Court at Mombasa, Aragon J)

JUDGMENT

Nyarangi JA This is an appeal against an order of Aragon J made in the High Court, Mombasa and dated January 8, 1987. On November 5, 1981 the appellants as plaintiffs sued the respondents as defendants in the Rent Restriction Tribunal sitting at Mombasa. The decision of the Tribunal given on December 9, 1981 was that the plaintiff's case had no merit and so it was dismissed with costs. The High Court, Mombasa, (Aragon J) heard an appeal against the judgment of the Rent Restriction Tribunal. The appeal was allowed with costs. That was followed by an application by chamber summons, under section 3 of the Civil Procedure Act and order XXI rule 22 of the Civil Procedure Rules for an order to stay the execution of the decree pending the hearing and determination of the application for review. The judge made an order in the following terms:

“Let stay of execution be granted provided appeal filed and served not later than February 8, 1987 and arrears of rent if any be paid forthwith and suitable security for costs provided.”

The order was granted without the appellants being heard. The appellant's advocate was present as was counsel for the respondent. The judge gave no reasons for not hearing the appellants. In my judgment that is an error which goes to the root of the matter and is fatal.

The High Court had been moved to hear the parties and the judge was duty bound to hear the applicants and the respondents in reply. In my view this court could not possibly condone this approach. For my part, this appeal must succeed on that ground alone. I am satisfied that it is unnecessary for me to turn to the other grounds of appeal and consider the able submissions of Mr Khanna. The judge has decided in a manner which is absolutely wrong and opposed to justice. The very foundation upon which our judicial system rests is that a party who comes to court shall be heard fairly and fully. A judge who does not hear a party before him or the party's advocate offends that fundamental principle and it then becomes the duty of this court to tell him so. People come to court as the last resort and we judges are employed to hear them and then determine their cases.

I would allow the appeal with costs, set aside the order of the judge and I would order that the chamber summons be heard by another judge. As Gachuhi JA agrees it is so ordered.

Platt JA. On January 8, 1987, the High Court in Mombasa made the following order:-

“Let stay of execution be granted provided appeal filed and served not later than February 8, 1987 and arrears of rent if any be paid forthwith and suitable security for costs provided.”

A further order was made that leave to appeal against the order of stay granted to appellants.

The order of January 8, 1987 was made upon an application dated December 22, 1986 in which an order was sought for the

“stay of execution of the decree herein passed against the appellants/respondents in this case on November 28, 1986 pending the hearing and determination of the appeal to be filed to the Kenya Court of Appeal by the appellants/respondents.”

It is necessary to notice with care what this proposed order encompassed.

The decree referred to was dated November 28, 1986, relates to the judgment given by the High Court on November 28, 1986. It was a judgment given in Civil Appeal 13 of 1983. Savings and Loan (Kenya) Ltd had appealed to the High Court against the decision of the Rent Restriction Tribunal at Mombasa in several consolidated cases brought by the tenants of Savings and Loan (Kenya) Ltd . There were seven tenants in all, one of whom was Mrs Prem Bowry, who brought the application for stay mentioned above. The Rent Restriction Tribunal by its order dated

December 9, 1981 had refused the suit brought by Savings and Loan (Kenya) Ltd to evict the tenants. As a result Savings and Loan (Kenya) Ltd had appealed to the High Court, which by its judgment dated November 28, 1986 had allowed the appeal and had ordered vacant possession of the premises to be given not later than January 15, 1987. It was this decree which the tenants were anxious to prevent being put into operation.

But it was appreciated that there was no appeal allowed to the Court of Appeal from the High Court’s order for eviction because in 1981, the Rent Restriction Act (cap 296) did not permit such an appeal. Section 8 of the Act, ever since 1959, had left the High Court as the final court, and I do not see any change in the 1981 Amendment Act (sec 8(1) provides for no appeal at all to any court. Then section 8(2) provides for limited appeals to the High Court, and section 8(4) provides that no appeal shall lie from the determination of an appeal given under subsection (2), or an order of the Tribunal given under subsection (3) of this section (which refers to a decision given on a review by the Tribunal of one type of its orders). So there is no appeal to this court today as there was no appeal in the past, since the amendments of 1981 have not changed the position. It seemed that counsel were not quite clear on the position at present.

In those circumstances, Mrs Prem Bowry resorted to an application for review dated December 10, 1986. She said that authority for her action was section 80 of the Civil Procedure Act and order XLIV rule 1 of the Civil Procedure Rules. She asked the High Court to review its judgment of November 28, 1986 on the grounds that there was error on the face of the decree. That error was related to the jurisdiction of the court, and to put the argument shortly, the memorandum of appeal did not institute, it is said, an appeal within the High Court’s jurisdiction as laid out in section 8(2) of the Act. It was not proper in this case, of course, to challenge the merits of the decision from which no appeal lay, but jurisdiction is a cardinal matter and may certainly be investigated under the review procedure.

There is an established practice of allowing review of decisions of the High Court (which are not appealable) for good cause. The learned judge dismissed the application for review. But he gave leave to Mrs Prem Bowry to appeal against his decision. If he dismissed the review, his judgment would stand; and yet if it happened to be that he had no jurisdiction to order eviction, and his order for eviction were carried out, great hardship would be caused. The tenants might find that they were evicted for no good reason. So when Mrs Prem Bowry brought her application for stay dated December 22, 1986, the learned judge must have thought it wise to maintain the status quo pending the appeal which appeal would confirm or reject the jurisdiction in the High Court to overrule the Tribunal and grant eviction.

That apparently sensible approach is challenged on appeal by Savings and Loan (Kenya) Ltd. The latter, as landlords, have been kept out of their property for all these years at disadvantage to themselves, as the learned judge explained in his judgment. Mr Khanna for Savings and Loan (Kenya) Ltd put forward two main avenues of appeal. The first was that the appellants were not heard on the application for stay, and were thus prevented from opposing the application. The second avenue was the legal approach that the application for stay was itself misconceived. Thus the situation arises of a sort of Chinese puzzle, if I may so describe it, where the order for execution is challenged for lack of jurisdiction, and then the stay order resulting from the review process is challenged as being without jurisdiction. It is possible, of course, for the court simply to say that if the parties were not heard on the application for the stay, they should be heard before this appeal is entertained. But it seems to me that this court must attempt to unravel the knot that the parties appear to be tying themselves up in, in order to save time and expense in future protracted litigation.

On looking into the attack on the hearing of the proceedings for the stay, it is apparent from the record that no representations are recorded from either side on that application. The appearances having been recorded, the court proceeded to order the stay on terms that arrears of rent be paid, if any, and suitable security for costs be provided. Hence this court would have to agree that the present applicant was not heard in opposition to the order for stay. That is unfortunate and to be deprecated. The matter in hand was subtle and complicated, and needed the learned judge's full attention, which might even have avoided the necessity for this appeal. This court was given to understand that the learned judge thought that the matter was concluded by a recently publicized decision of this court, and while the learned judge loyally followed the spirit of that decision, it would have been better all-round if he had answered the question, whether that decision actually applied to the different circumstances of the case before him. There is no doubt that the learned judge's purported aim of preserving the status quo pending the appeal if applicable, was praiseworthy; and therefore I continue now to consider the grounds upon which it is said that he had no jurisdiction to grant the stay for that purpose.

The main attack is that the decree of November 28, 1986 is not appealable; as such an application for stay cannot be applied for because there is in effect nothing to stay. If the judgment of November 28, 1986 cannot be appealed, it stands and cannot be stayed. If the review was refused then no order that was made on review can be stayed. One cannot stay a negative order. That part of the argument and the authorities cited in support is perfectly logical. But in my opinion it does not reach the end of the situation. If it be correct that review lies at all, then the situation is as follows: True, the order for eviction cannot be appealed; but if it was given without jurisdiction it should not stand. That would be unjust. If by review the judgment should be set aside, then that should be done.

But if the review is refused, then if the review order can be appealed, the court would have to consider, not its specific powers under Order XLI of the Civil Procedure Rules, but its inherent jurisdiction to preserve the status quo pending appeal. Suppose that the eviction order was given without jurisdiction, and the High Court was asked to review it, and upon a wrong interpretation of the Rent Restriction Act, it refused review, there would arise a mounting impropriety which would lead to the illegal eviction of the tenants. If that could not be put right the purpose of the Rent Restriction Act of safeguarding the rights of tenants would be defeated with impunity. In another case the decision might go against the landlord with impunity. It becomes clear therefore that the problem before the learned judge was one which had to be dealt with outside the specific terms of order XLI rule 4 of the Civil Procedure Rules.

The ultimate question on this part of the appeal is then whether the court had inherent jurisdiction to grant a stay of execution of the order for eviction.

It will first be noted that there is inherent jurisdiction to stay execution in the alternative to order XLI rule 4 of the rules in the circumstances applying in *Ujagar Singh v Runda Coffee Estates Ltd* [1966] EA 263 where at page 267 Sir Clement de Lestang concluded:

“Since there can be no doubt that the High Court has power to order a stay of execution either in the exercise of its inherent jurisdiction or under order XLI rule 4, it follows that a like jurisdiction is conferred on this court”

The inspiration for the exercise of this example, and indeed all examples, of the use of inherent powers in civil matters is section 3A of the Civil Procedure Act (cap 21), which preserves the inherent powers of the court, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The establishment of Courts of Justice, of course, implies that they will mete out justice, tempered by rules, which, it is hoped, will preserve parity between all persons for whom the courts have been established. Now it is true that the *Ujagar Singh's* case concerned a party to an appeal who had not appealed, although his opponent had. At first sight, if the applicant had not filed an appeal, he could not apply for a stay of execution. But it was held that that was not material as an appeal had otherwise been filed, and if the rules did not technically cover the case, there was the inherent power.

From that position, one then goes on to consider the wider exercise of inherent power. The first example in this case was when there was a stay applied for pending the hearing of the review application. How was that done without an appeal? Another example is to allow evicted persons time to leave and find other accommodation. This order is often given without stating the nature of the power exercised. It is inherent power. Then one may usefully observe the instances of the exercise of inherent power established by the Indian courts under section 151 of the Indian

Civil Procedure Code, section 151 being in the same terms as section 3A of the Civil Procedure Act in Kenya. Take for instance *Mulla's Code of Civil Procedure* 13th Ed Vol 1 at page 578 *et seq.* There, illustrations are set out when inherent powers may be exercised.

It was held possible to stay the drawing up of the court's own order or to suspend that operation, if the necessities of justice so required. *Msst Brij Coomaree v Ramnick Das* [1901] 5 Case WN 781, 796; to stay execution or operation of the order appealed from, so that the order which might be passed in appeal might not be rendered infructuous, although there was disagreement as to whether the court whose decision had been appealed could itself make the order (*State of Uttar Pradesh v Mukthar Singh*, (1957) AA 505); but other courts had decided that it was possible for a court to stay proceedings pursuant to its own order in view of an intended appeal (*Sarat Kumar v Official Assignee*, (1971) (31) AC 79); and to order a stay of execution in view of an application by a judgment debtor to the judicial committee for special leave to appeal to His Majesty in Council; or to maintain the status quo in a fit case till the filing of an intended application for leave to appeal to His Majesty in Council (*Ramendra Nath Roy v Bibhaati Deuf*, (1942) (42) AC 488). The Bombay court had stayed execution of an award under an arbitration pending an appeal against the order refusing to set it aside. (*Mohamed Alli v Dharamsey*, (1931) 55 BOM 801). These are all examples of the use of inherent powers illustrating different aspects and purposes connected with the issue in this appeal.

The most interesting is perhaps the last in the sense that the arbitration award there would be equivalent to the decree in this case of November 28, 1986; the refusal to set aside the award there equivalent to the refusal to review this decree; and the appeal having been taken in both cases against a refusal to set aside, the stay was granted of the original award, or in this case the decree, pending the appeal. In the exercise of the inherent powers when they are applicable the test is justice. Here it is very clear that the tenants ought to be preserved pending appeal, if that is possible, because after all the time that has passed, the landlord will not be greatly prejudiced by a little more patience awaiting the appeal.

Considering the matter all round, it is my opinion that the Indian courts have given a useful and proper lead as to the exercise of inherent powers in cases like the present appeal. Consequently with respect, I would agree with them, that in cases of this nature the court should exercise its inherent power in a fit case, so that the appeal may not be rendered nugatory. (See *Wilson v Church*, (1979) 11 Ch D 576; approved by the Court of Appeal for Eastern Africa and the Kenya Court of Appeal in a number of wellknown cases). The learned judge was, in effect, correctly preserving the status quo pending the appeal.

It follows that the learned judge in my opinion had power to make the order that he made and that the power was reasonably exercised in the circumstances of this case. I am also of opinion that the conditions were reasonable.

Looking then at the nature of the appeal Mr Aboo argued strongly that there had been a great injustice, because the High Court had acted *ultra vires* section 8(2) of the Rent Restriction Act. I do not intend to offer any views on that issue, but I will content myself by saying that if jurisdiction is disputed, it is a matter which would correctly fall within the ambit of review, leading to error on the face of the record. If then that issue were wrongly decided, an appeal would arguably lie with leave. If that were so, then the stay was properly granted.

On this analysis of the situation there is a further consequence, and that is that whatever Mr Khanna could have advanced in opposition to the application, or at least what he has advanced in opposition to it in this court, would not have availed him. Consequently, the irregularity in not hearing him, did not, and could not, have caused his client any injustice. I am satisfied that the learned judge must have come to the same conclusion if the arguments presented to this court had been presented to him, and therefore it would be an idle waste of time and money to send the application back to him for re-hearing. In my opinion the learned judge came to the right conclusion. I would therefore dismiss the appeal with costs.

Gachuhi JA. The appellant, the landlord had succeeded in the High Court in an appeal from the decree issued by the Rent Restriction Tribunal. One of the tenants applied to the High Court to review its judgment. The said application was dismissed. There was another application by the tenant applying for stay of execution pending an appeal by the tenant to this court. On the day set down for the hearing of the application, the judge made an order in the following terms:

“Let stay of execution be granted provided appeal filed and served not later than February 8, 1987 and arrears of rent if any be paid forthwith and suitable security for costs provided”.--

The landlord complains in its grounds 1 and 2 of the appeal that the judge refused to hear the appellants on the application before the order was made.

The record for the day shows that after recording the attendances the order was made.

It is the tenant who wanted the stay of execution. The applicant got the order without addressing the court in support of the application and the respondents (landlord) also was not heard in opposition to the application. It is fundamental principle of justice that parties who appear in court should be heard, and the determination of their grievances given. If there will be a right of appeal then the aggrieved party can appeal. The grounds of appeal should attack what there is on the record. The order now appealed against has nothing to support it from the record. There is no undertaking in damages which ought to have been given by the applicant as a condition of granting the stay.

Taking the situation as it is, can it be said that justice in the case was meted out? The principles of natural justice should always be dispensed by the court, that is, both parties must be heard on the application before a final decision failing which there is miscarriage of justice.

There is no room for dealing with other grounds of appeal for which an appeal is to be filed by the tenant. If and when it is filed, it will be the right venue for argument on the merit of the refusal of review.

The order appealed against was imposed on the parties by the judge. In my view, this is wrong. The order cannot be allowed to stand. I would allow this appeal with costs. I would set aside the order made on January 6, 1987 and direct that the application for stay be heard by another judge as early as possible.

Dated and Delivered at Mombasa this 30th Day of April, 1987

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL