REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CIVIL CASE NO 56 OF 1979

REPUBLIC.....APPELLANT

VERSUS

NAIROBI BUSINESS PREMISES

RENT TRIBUNAL & OTHERS .....RESPONDENT

SIMON JOSEPH KARASHA..... EX PARTE

JUDGMENT

This is an application for orders of *certiorari* by a landlord against whom a tenant filed a complaint to the Business Premises Rent Tribunal under section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act alleging that he (ie the landlord) broke into the premises and put another tenant in possession. The tribunal heard the complaint in the absence of the new tenant, who had been in possession, and ordered the landlord to give possession to the complainant forthwith, the new tenant to vacate the premises with immediate effect and the landlord to pay the costs assessed at Shs 100.

A Senior Resident Magistrate subsequently made an eviction order and issued a warrant which was executed by the court bailiff. Mr D N Khanna for the landlord sought and obtained leave to apply for order of *certiorari* directed to the tribunal and the Senior Resident Magistrate to remove into the Court and quash the tribunal's decision and the magistrate's orders and warrant on the grounds that the tribunal and the magistrate acted without, or in excess of, their respective jurisdiction.

Mr Khanna appearing for the landlord relied on *Re Hebtulla Properties Ltd*, page 96, *ante*. In that case (decided as recently as 21st March 1979) an order of prohibition was granted by Chesoni J and myself prohibiting the tribunal (differently constituted) from proceeding with the further hearing of a complaint by a tenant alleging forcible dispossession of controlled premises by a landlord. The Court held that the Act gave the tribunal no jurisdiction to hear and determine such a complaint. Mr Edmonds, who appeared for the tribunal and the Senior Resident Magistrate (the respondents), and Mr Wambuhi for the tenant accepted that decision as correct, although Mr Edmonds reserves the right to attack it on appeal to the Court of Appeal. It was also conceded that there was no statutory right of appeal and proceedings by way of *certiorari* were appropriate. They contended, however, that *certiorari* being a discretionary remedy the orders sought should be refused having regard to the facts.

The landlord who now sought the assistance of the Court to have the tribunal's proceedings quashed had violated not only the principles of decency in landlord-tenant relations but also the principles which Parliament and the Courts had sought to establish for the protection of tenants. He had contravened the provisions of the Act for the termination of controlled tenancies by failing to give notice to the tenant in the prescribed form. A second ground was added, namely that the remedy should not be issued where it

could have no practical effect. No notice to quit having been given, the tenant was still the tenant of the premises. A declaration was suggested as a more appropriate remedy.

The proceedings of the tribunal were a nullity, there being total lack of jurisdiction. The remedy of *certiorari* is discretionary but, exercising my discretion judicially, I can see no valid reason to refuse the application or to grant an alternative remedy. The proceedings must, I think, be quashed. I would grant the application, albeit with regret. Such high-handed action by the landlord is to be deplored. The tenant has a remedy, but a slower and more expensive one; ie a suit for trespass. Considering might perhaps be given to the introduction of an amending Bill providing adequate protection to tenants against such evictions.

I do not propose (nor do I think it necessary) to consider whether the tribunal has power to determine whether or not a tenancy exists or whether it is open to the landlord to rely on a breach of the *audi alteram partem* rule in the absence of the person most concerned, the sitting tenant.

The fact that part of the premises consists of a residential flat is immaterial since the tribunal has in any case no jurisdiction under the Rent Restriction Act.

Mr Khanna asked for costs against the tribunal, the Senior Resident Magistrate and the tenant jointly and severally, alleging misconduct by the tribunal and the magistrate in ignoring three High Court decisions. The general rule is that costs follow the event as between the applicant and the party who improperly procured the impugned order unless there are special circumstances that make it proper for an exception to be made. Much as I sympathise with the tenant I can see no valid reason for departing from the general rule. The tenant appearing by his advocate sought initially to uphold the tribunal's judgment although, later, lack of jurisdiction was conceded. It is not usual to award costs against the tribunal unless it has been guilty of a serious impropriety and has been represented before the Court to oppose the application. The tribunal was so represented. According to the record neither advocate invited the attention of the tribunal to the High Court decisions.

We were informed that in fact the tenant's advocate did so. Whether or not he did so the tribunal proceeded to give a judgment substituting its own interpretation of the Act for that of the High Court, as expressed in three judgments by three different judges which, since they directly affect the tribunal, the chairman and members must be presumed to be aware of. I have no doubt that the tribunal was attempting in good faith to do justice on the facts before it; but this was a flagrant disregard of binding judicial decisions and I think that costs must be awarded against it. I would attach no blame to the Senior Resident Magistrate. I think that the proper order is one imposing joint and several liability upon the other respondents.

I would grant the application as prayed and would order the tribunal and the tenant jointly and severally to pay the landlord's costs. I would add that by virtue of the provisions of section 4(1) of the Act the tenancy of the tenant, if it is a controlled tenancy under the Act (to the extent that it is such a tenancy) still subsists.

As Scriven J agrees, the application is granted as prayed and it is ordered that the tribunal and the tenant jointly and severally pay the landlord's costs.

Scriven J. I have had the chance of reading not only the judgment of Simpson J in this appeal but also his, and the judgment of Chesoni J sitting with him, in *Re Hebtulla Properties Ltd* (1979), *ante*. Having read those judgments and the authorities reviewed I feel compelled to come to the same conclusion as they have done and so I respectfully agree that this appeal must be allowed as Simpson J holds.

I do so with such little enthusiasm, however, that I have agreed with Simpson J to add my own short judgment on one or two points. The first of these is a minor point, nevertheless one which (but for the concession that the tribunal had no jurisdiction made by counsel for the tribunal and the tenant) might well have been a lynch pin of this case, it is this: Mr Khanna, in opening, contended that the premises were "mixed", that is to say partly business and partly residential. In his affidavit in support of his

application for leave to apply for the order, the landlord even alleged that the tenant had concealed the true character of the premises from the tribunal (see paragraph 6 of his affidavit of 28th February 1979). Mr Wambuhi, the advocate for the tenant, replied in some detail to this contention that the mixed character of the premises ousted any jurisdiction of the tribunal.

He was forced, however, to rely on authorities which look at the problem from the other side of the hill, that is to say from the point of view of the rent restriction legislation protecting (basically) residential tenants and, whilst therefore I would respectfully have acceded to his invitation to look as the test for the "dominant user" of the premises, had the case required a decision on that point, I would have found that, in this particular case, the Act itself provides assistance which was not pointed out to us at the hearing. In section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, the words "catering establishment" are defined as:

> ... any premises on which is carried out the business of supplying any food or drink, for consumption on such premises by persons other than those who reside and are boarded on such premises,

and I would have felt no hesitation in saying that, even on the evidence before us, these premises were let for a use which is at least partly that of a catering establishment as so defined. The mere fact that some part of the premises consists of residential property would, in view of the definition section, in my judgment not take the matter out of the tribunal's jurisdiction. In this case there was evidence led before the tribunal to show that the premises fell within the definition, and any such matter if raised as a preliminary point can always be considered by the tribunal when considering whether it has jurisdiction or not (see *R v Croydon and South West London Rent Tribunal, ex parte Ryzewska* [1977] QB 876).

The other point which has given me great concern is that in allowing this appeal the law's repute is put on risk, since the man in the street as well as the tenant will only see that the orderly process of restitution which the tenant instituted by complaining to the tribunal has apparently been disapproved of and the organised violence employed against the premises by the landlord (the applicant) has the apparent approval of the Courts. The tribunal had apparently protected the tenant against violation of that basic tenet of the rule of law, namely that no-one shall be forcibly evicted from his property except under process of law, and now the tribunal is shown to have no powers so to do and is penalised for so doing. This Court can only enforce the law as it stands and, to preserve the rule of law ourselves, we have no alternative but to make the order we do.

Parliament clearly intended this tribunal to have the very power which it purported to exercise; one only has to read the preamble to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

Unfortunately by a complete *lapsus calumni* the offending section 12(4) can only be given force and effect by rewriting it and spelling out the powers given to the tribunal. This Court cannot do that. It has, in the clear and compelling judgments given in the past, been suggested that only minor matters can be the subject of orders issuing under the section. I myself with the greatest diffidence and respect would suggest that in so ruling we are in fact each time applying the *de minimis* test to our supervisory role, which can never give clear guidance or leave the tribunal clear in any particular case whether they will subsequently be regarded as having acted in a minor matter or overstepped their jurisdictional limits and strayed into "major" matters. I share fully Simpson J's urgent call for legislation to give the tribunal specifically the power which Parliament in my judgment intended for it, coupled perhaps with penalties for infringement of those provisions of the Act limiting the landlords' methods of terminating tenancies and securing possession of demised premises.

And then there is the question of costs; which must now be considerable and must in my view reflect not only the outcome of the appeal and follow the event but must also reflect the conduct of the parties. The landlord stands successful before us; this is not a Court of morals but, however one looks at it, he obtained possession in a picaresque fashion without going through the process of law available to him, and should he now be indemnified in costs after employing such conduct? The tribunal, even if they knew of the decisions (which in my view they should) defining and limiting their authority in this respect, saw

themselves as championing the intention of the Act and the rights of tenants to quiet enjoyment of their property. That in my view is an excess of zeal as well as of jurisdiction which does not require at this stage, the heavy censure of a full order for costs. The magistrate had no cause or reason to look into the question of jurisdiction of the tribunal before accepting the warrant. He should bear no costs.

The tenant is in a different position; he asked for help from the tribunal and got it; should he have told the tribunal that they could not make the order he asked for? W S Gilbert or Lewis Carrol might think so, but I do not; he was, however, unfortunately a late payer of rent by any standard, and it may well be that his brinkmanship has brought him to this situation, but I cannot say that (even then) his conduct is such that the financial burden of these proceedings should fall in full on him. I agree with the proposed order for costs to be made by Simpson J.

Order accordingly.

Dated and delivered at Nairobi this 25th day of April 1979.

A.H SIMPSON

JUDGE

SCRIVEN

JUDGE