IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJA)

CIVIL APPEAL NO 60 OF 1981

BETWEEN

SHAH & ANOTHER.....APPELLANT

AND

AGGARWAL & ANOTHER.....RESPONDENT

JUDGMENT

The two respondents are the owners of a block of flats in Okoth Aura Road, Nairobi. The appellants were and according to them, still are, tenants of the respondents; the first appellant of flat No 1 and the second appellant of flat No 4. In 1980, the respondents brought separate actions against each of the appellants for possession of the premises, mesne profits, costs and interest; in both cases relying on a notice to quit dated January 30, 1980. The two actions were consolidated and the respondents applied for summary judgment under order XXXV rules 1 and 2. Summary judgment was given against the defendant in each case for possession and other relief, by Simpson J (as he then was). The appellants now appeal against those summary judgments and ask for unconditional leave to defend the actions. Each flat was let to one of the appellants on January 1, 1965 on a monthly tenancy at a rent of Kshs 500 per month. Under the Rent Restriction Act (cap 296) (hereinafter referred to as "the Act") as then in force, the standard rent was therefore Kshs 500 per month, and the tenancy was a controlled tenancy under the Act. In 1977 the respondents purchased the block of flats. On July 27, 1978 the respondents applied to the Rent Tribunal for an assessment of the standard rent, under the powers conferred on the tribunal by section 5(1)(a) of the Act. The respondents relied upon section 4(2)(a)(iv) of the Act, which provides:

> "(2) Notwithstanding anything contained in the definition of "standard rent"-
> (a) where the tribunal is satisfied that the standard rent would yield an uneconomic return to the landlord because of …
> (iv) the fact that it does not yield a fair capital return on the cost of construction and market value of the land as at January 1, 1965, or that, in the absence of any indication that the purchase price paid by the landlord was excessive, it does not yield a fair capital return on that purchase price, the tribunal may determine the standard rent to be such amount as, in all the circumstances of the case, it considers fair; and …"

The Rent Tribunal ruled on the February 15, 1979 that the purchase price paid by the respondents for the block of flats was not excessive, and determined that a fair rent for each of the appellants and three other tenants was Kshs 1,070 per month, with effect from March 1, 1979. The effect of this ruling was that the Act no longer applied to the appellants' flats as the standard rent had been raised above Kshs 800 per month (see section 3(c) of the Act as then if force). It was held in *Gershuni v Ombima* [1975] EA 135,

that a rent tribunal may raise a standard rent to any figure, and when that rent is raised above the limits set in the Act, the premises are no longer subject to it.

Following its ruling, the Rent Tribunal recorded the following:

> "OBC. It is further agreed between the landlord/ applicant and the tenants herein that the tenants shall pay a monthly rent of Kshs 1,500 per month with effect from January 1, 1979 exclusive of light, water and other charges for a period of twelve months ie up to February 29, 1980. The tenants at liberty to vacate earlier by giving one month's notice to the landlord/applicant."

The appellants paid this rent of Kshs 1,500 per month for the twelve month period ending on February 29, 1980. The respondents gave notice to each of the respondents on January 30, 1980 to quit on February 29, 1980, and then commenced the actions for possession.

At the hearing of the motion for summary judgment, Mr Sharma for the respondents submitted that there were no triable issues, and that the tenants were represented by advocates before the Tribunal and had agreed willingly to the agreement recorded by the Tribunal. Mr Khanna for the appellants submitted that the consent order recorded by the tribunal was *ultra vires* the Tribunal and a nullity. The tenants had no option but to agree in the circumstances. Apart from other submissions which were not the subject of grounds of appeal to this court, Mr Khanna relied upon his submission as to the effect of section 14(1) of the Act, which became his main submission in the appeal to this court.

Summary judgment was given in each case. As to the oral agreement recorded by the Tribunal, the learned judge said:

> "The 'OBC' recorded by the Tribunal must I think in the circumstances be regarded merely as a record made by the Tribunal of an oral agreement reached in their presence by the plaintiffs and the defendants, both of whom were represented by advocates. It is not an order made by the Tribunal."

With respect we agree that this agreement was made in the presence of the Tribunal, and as an agreement between the parties, was valid and enforceable. The tenants paid the rent secured by this agreement until these proceedings for possession were commenced. Although Mr Khanna was heard in this court to complain of duress in relation to this agreement, the validity of the agreement was not the subject of a ground of appeal.

Mr Khanna's main submission in this court was that the enhancement of the standard rent by the Tribunal could not be enforced lawfully until section 14 of the Act had been complied with. Section 14 provides as follows:

> "(14)(1) Nothing of this Act shall be taken to authorize any increase of rent except in respect of a period during which, but for the provisions of this Act, the landlord would be entitled to obtain possession.
> (2) Notwithstanding any agreement to the contrary, where the rent of any premises is increased, no such increase shall be due or recoverable until, or in respect of any period before, the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent."

Mr Khanna based two propositions on this section. Firstly, a tribunal has no jurisdiction to assess the standard rent of a premises if a contractual tenancy is still in force. *A fortiori*, the landlord may not increase the rent if a contractual tenancy is still in force. In this case, the original contractual tenancy at a rent of Kshs 500 per month was still in force when the Tribunal reassessed the standard rent of the premises on February 15, 1979. Secondly, section 14(2) requires the landlord to serve a valid notice in writing upon the tenant, before an increase in rent becomes due or recoverable. This was not done.

Mr Shah's answer on behalf of the landlord is firstly, that on a true construction of the Act, section 5(1)(a) empowers a tribunal to reassess a standard rent, and to apply section 4(2)(iv) for that purpose, whether or

not a contractual tenancy is still in force.

Secondly, that by reason of the decision of the Tribunal on February 15, 1979, the premises ceased to be affected by the Act and by reason of the oral agreement reached between the parties in the presence of the Tribunal on that day, the contractual tenancy was lawfully and effectively varied by an increase of the rent from Kshs 500 per month to Kshs 1,500 per month.

It appears that section 14(1) of the Act has been copied from section 3(1) of the English statute entitled the Increase of Rent and Mortgage Interest (Restriction) Act, 1920 (Ch 17). The effect of section 3(1) of the English statute, as held in *Kerr v Bryde* [1923] AC 16, approving *Newell v Crayford Cottage Society* [1922] 1 KB 656, is that it is a condition precedent to the landlord's right to the permitted increases of rent under the Act that he should have terminated the tenancy by notice to quit. The only increases of rent above the standard rent allowed by the English Act are the "permitted increases of rent" provided for in section 2. Sections 10 to 14 of the Kenya Act relate to the limitation of increases in rent provided for in section 12 (which may be compared with section 2 of the English Act). It is clear in my opinion that section 14 of the Act is intended to have the same effect in relation to the permitted increases under section 12 as section 3 of the English Act has in relation to the permitted increases under section 2 of that Act, that is to say the contractual tenancy must be terminated before increases of rent can be recovered under the terms of the Act.

Unlike the Kenya Act, first enacted in 1959, the English statute of 1920 contained no provision for reassessing the standard rent. The power of the tribunal under section 5(1)(a) of the Act to assess the standard rent of any premises on the application of any person interested is not in my judgment subject to any condition precedent. If the tribunal increases the standard rent of a premises without removing the premises from the application of the Act, the landlord will have to terminate the contractual tenancy, if it exists and will also have to serve a valid notice of increase on the tenant before he can recover. But where the tribunal assesses the standard rent at a level which removes the premises from the application of the Act, as in this case, section 14 has no application. In this case once the Act ceased to apply, the parties made a valid agreement for a rent in excess of the new standard rent, as they were free to do. There is no merit in this point based on section 14 of the Act. I would dismiss this appeal with costs. I would allow the respondents a certificate for two counsel.

Law JA. I agree with the judgment prepared by Potter JA which I have had the benefit of reading in draft, and I concur with the orders proposed by him.

Madan JA. Section 5(1)(a) is not subservient to section 14 of the Act. Mr Khanna's argument that no increase in the standard rent can take place unless the existing tenancy is first terminated is clearly incorrect. Under section 5(1)(a) the Tribunal may assess the standard rent of any premises either upon the application of any person interested or of its own motion. The Tribunal would not, and there would be no call for it to do so, serve notice terminating the tenancy before proceeding to assess the standard rent upon its own motion. The tenant is unlikely to serve himself with notice terminating his own tenancy so that he may become liable to pay increased rent. If an increase in the standard rent takes place as a result of assessment by the Tribunal, the new rent does not become recoverable until the existing tenancy is first terminated, not because of the provisions of section 14 but because the landlord is bound to charge or claim no more than the existing contractual rent, which contract must first be put an end to. In this case the existing tenancy and the existing contractual rent were put an end to when the parties agreed of their own free will to create, in respect of the premises which had been freed from the protection of the Act (*Gershuni v Ombima* [1975] EA 135) a new tenancy at the rent of Kshs 1,500 per month. The old tenancy became extinguished, there was nothing left to terminate.

I also agree that this appeal be dismissed in the terms proposed by Potter JA, and it is so ordered.

Dated and delivered at Nairobi this 12th day of November, 1982.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR