IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CIVIL APPEAL NO. 9 OF 1980

BETWEEN

PARMAR...APPELLANT

AND

KEBEIRO..DEFENDANT

JUDGMENT

Law JA This appeal raises a single point, but one which is of great importance to landlords and tenants and to the legal profession. The question is whether the Rent Restriction Act (Cap 296) hereinafter referred to as ("the Act") applies to dwelling houses erected after January 1, 1965. One would have thought that so basic a matter would be specifically dealt with in the Act itself, but it is not.

The appellants ("the landlords") own a block of flats in Nairobi. The block was built in 1972. The respondent ("the tenant") has occupied one flat in the block since February 1, 1975, and has regularly paid rent at the monthly rate of Kshs 700. This is evidenced by his rent book, issued to him by the landlords, which is headed —

"Tenancy commenced February 1, 1975. Standard rent Kshs 700 per month Payable rent Kshs 700 per month."

It is not in dispute that the landlords in 1976 applied to the Rent Restriction Tribunal at Nairobi for the assessment of the standard rent of all the flats in the block. This application is still pending. It would thus appear that in 1975 and 1976 the landlords considered that their block of flats constituted a dwelling - house falling within the protection of the Rent Restriction Act. Yet by their plaint dated October 5, 1979, and should bear that date), the landlords claimed possession of the flat, stating that the tenancy had ended on September 30, after due notice, and that the tenant, by retaining possession after that date, was a trespasser. In anticipation of what the defence would be, paragraph 5 of the plain went on to plead —

"5. The rent of the said flat was latterly Kshs 700 per month, payable in advance. The premises, of which the said flat forms part, were constructed in 1972, were not in existence on January 1, 1965, and as such the Rent Restriction Act Cap 296 did not apply to it or the said flat, nor could the said flat have had a standard rent, by reference to a letting as at the said January 1, 1965, or as one in existence then but not

let on that date, by assessment under the said Act, or be within the Act or controlled by it."

The tenant's defence, filed on November 9, 1979, was that he was a protected tenant under the Act, and that the High Court accordingly had no jurisdiction to try the suit. He pleaded that protection under the Act is not related to the date of construction of the building but to the quantum of rent, and he referred to the landlords' application to assess the standard rent which was pending before Restriction Tribunal.

On December 1, 1979, the landlords applied by notice of motion under Order XXXV rule 1 for final judgment for possession of the flat, mesne profits, interest and costs as prayed in the plaint. The tenant filed an affidavit in reply substantially repeating what he had pleaded in his defence.

The motion was heard on the 10th and 14th day of December,1979, by Todd J, and the learned judge delivered his ruling on December 17, 1979, dismissing the application with costs. The learned judge held that the Act applied to premises erected after January 1, 1965, and that the pleadings "clearly throw up triable issues".

The landlords would have been entitled to summary judgment if they could have satisfied Todd J that the tenant's flat was not protected by the Act, because in that case the tenant, being a contractual tenant on a month-to-month tenancy who has been given due notice, would have no alternative than to give up possession. The only defence raised by the tenant is that he is a protected and statutory tenant; he does not specifically deny having been served with what would be a valid notice if he were a contractual tenant of premises not falling within the Act.

On this appeal Mr Khanna appeared for the landlords and Mr Musyoka - Annan for the tenant. Mr Khanna relied on the case of *Pirbhai Dharshi v Alkarim Khaji* (Civil case 2781 of 1979) in which Platt J decided, on March 7, 1980, that the Act did not apply to premises erected after 1st day of January, 1965. The learned judge's attention does not seem to have been drawn to the earlier ruling of Todd J the subject of this appeal, to the contrary effect, as he does not refer to it. More recently, on September 27, 1980, in *Parmar v Shah* (Civil Case 3060 of 1979) Harris J expressly differed from Platt J's decision in the Dharshi case (supra) and held that he was —

"not satisfied that a restriction of the Act exclusively to dwelling - houses erected on or before January 1, 1965, can be sustained."

Harris J does not refer in his "order" to Todd J's "ruling," the subject of this appeal. It appears that Harris J and Todd J have independently reached the conclusion that the Act does apply to dwelling houses erected after January 1, 1965, whereas Platt J has reached the opposite conclusion. It is now for this court to reach its own conclusion. Mr Khanna has referred us to Section 3 of the Act, and to the definition of "standard rent" in Section 4. Section 3 reads —

"This Act applies to every dwelling house, other than —

a) an excepted dwelling house;

b) a dwelling-house let on a service tenancy;

c) a dwelling-house which, if it were a dwelling house to which this Act applies, would have a standard rent exceeding eight hundred shillings per month, or in the case of a furnished dwelling house one thousand one hundred shillings per month."

We are not covered with exceptions (a) and (b) and as regards paragraph (c), this appeal concerns a flat which was let unfurnished, and in a similar case (*Rodseth v Shaw* [1967] EA. 833) Farrell J held that the words "if it were a dwelling house to which this Act applies" were intended to apply to a case where there was neither a letting on January 1, 1965, nor had there been any assessment by the Tribunal. That being so, it had to be determined whether the dwelling house would have a standard rent exceeding Kshs 800 a month. If so it would be outside the Act. Farrell J went on to hold that where there had been no

assessment by a Tribunal, it was open to the court to make its own assessment on a balance of probabilities. I am doubtful whether the court has jurisdiction to do so, as the assessment of standard rents is a matter for a Tribunal, and apparently outside the jurisdiction of the courts except when entertaining an appeal from a Tribunal, see Section 35(2) of the Act. In any event, Farrell J was dealing with the case of a dwellinghouse which was in existence on January 1, 1965, but which was not let or assessed on that date. He was not dealing with a dwelling house constructed after that date, so that Rodseth's case is of no assistance in deciding whether or not such a dwelling-house falls within the Act. A dwelling house is outside the Act if it has, actually or notionally, a standard rent exceeding Kshs 800 or Kshs 1,100 a month according to whether it is let unfurnished or furnished. That standard rent, if the dwelling-house was let on January 1, 1965, is the rent actually paid on that date, and if it was not let on that date, it is the rent assessed by the Tribunal. Mr Khanna submits that a dwelling-house which was not in existence on January 1, 1965, cannot have a standard rent. Only a dwelling house which was let on that date, or which was not let on that date, can have a standard rent. If a dwelling house was not in existence on that date, it could not either be let or not be let on that date. Reading Section 3 together with the definition of standard rent in Section 4 of the Act, Mr Khanna submits that, in order to be within the Act, a dwelling house must either have actually been let or capable of being let on January 1, 1965; in other words, it must have been in existence on that date. There is much force in these submissions. On the other hand, as Mr Musyoka - Annan has pointed out, the Act as originally enacted in 1959 specifically exempted from its application dwelling-houses whereof the construction was begun after a certain date. This exception was dropped from the Act by the amending Act No 37 of 66 and amending Act, No 1 of 1971 had the effect of transforming the Act from a temporary to a permanent measure. Mr Annan submits that in these circumstances the inference is that the Act applies to all dwelling houses whether in existence on January 1, 1965, or not. Quite apart from the conflict of judicial opinion on this point in the High Court, it is also to my mind significant that for fifteen years the Rent Tribunal has been proceeding on the basis that dwelling houses erected since January 1, 1965, come within the Act, a position which was generally accepted by landlords and the legal profession. In my view, what Sir Charles Newbold P had to say in *Jivraj v Devraj* [1968] EA 263 is relevant to such a state of affairs, and is relevant to this appeal. He said, at page 266 B —

"There is a principle of law, however, that where a court has interpreted the law in a certain manner, particularly an interpretation which affects property rights, and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to injustices."

In the instant case, the Rent Tribunal has interpreted the Act for the past fifteen years as applying to dwelling houses erected after January 1, 1965; that interpretation has been acted upon consistently by the legal profession and by members of property-owning community, including the appellants in this appeal, until it was recently challenged in the High Court; since then that interpretation has been upheld by two judges and rejected by one. I am unable to say in these circumstances that the Rent Tribunal's interpretation is clearly wrong" although I entertain a doubt as to its correctness, nor can I say that Todd J was "clearly wrong" in coming to the same conclusion, nor in my view does that interpretation give rise to injustice. It would probably result in more injustice to depart from it than to adhere to it.

Accordingly, although with some hesitation, I would dismiss this appeal.

As **Miller** and **Potter JJA** agree, it is ordered that this appeal be dismissed, with costs.

Dated and Delivered at Nairobi this 28th day of November 1980.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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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