REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MOMBASA

ELC APPEAL NO. 18 OF 2016

PAUL MWANGUNYA.....APPELLANT

VERSUS

ABDULAZIZ AHMED.....RESPONDENT

JUDGMENT

(Being an appeal from the Order of the Chairman, Rent Restriction Tribunal in case no 25 of 2013)

1. The Appellant herein is dissatisfied by the decision issued by the Rent Restriction Tribunal on 29th August 2016. In the said decision, the tribunal found that it lacked the jurisdiction to entertain an application before it by the Appellant dated 26th August, 2016 as it had previously adopted a consent (which consent is denied by the Appellant) by the parties and assessed the standard rent beyond the ceiling making the premises in question decontrolled. The tribunal directed the Appellant to seek recourse in the civil courts.

2. The Appellant filed a Memorandum of Appeal on 5th September, 2016 and listed the following grounds of appeal:

a) THAT the honourable Tribunal and Chairman erred in law and fact by failing to record the proceedings and submissions of the appellant therein.

b) THAT the honourable Tribunal and Chairman erred in law and fact in his failure to take into consideration and appreciating the magnitude of the entire dispute and only selectively dealt with only some of the issues before the Tribunal.

c) THAT the honourable Tribunal and Chairman erred in law and fact by failing to appreciate that the system in Kenya is adversarial and descending into the arena of the dispute hence creating the appearance of bias.

d) THAT the honourable Tribunal and Chairman erred in law and fact by proceeding to defend a matter and abdicated his role as the decision maker in disputes.

e) THAT the honourable Tribunal and Chairman erred in law and fact by failing to consider and appreciating the provisions of Rent Restriction Act Section 5 (1) (m) which give the Tribunal jurisdiction to review decision despite decontrol.

f) THAT the honourable Tribunal and Chairman erred in law and fact in arriving at a decision that the Rent Restriction Tribunal had no jurisdiction.

g) THAT the honourable Tribunal and Chairman erred in law and fact in failing to appreciate or even put on record the Appellant's/Tenant's submissions.

3. The Appellant prays that the appeal be allowed, the order made on 29th August, 2016 by the Tribunal be set aside and the application dated 26th AUGUST, 2016 do proceed for hearing before the Tribunal before any other Chairman or vice Chairman other than Hillary K. Korir.

4. The Respondent responded to the Appeal by way of a notice of preliminary objection dated 21st September, 2016 and a replying affidavit sworn on 21st September, 2016.

5. The Respondent contended that the appeal was defective as it did not emanate from a ruling or a judgment hence there are no orders to be appealed against. Further, the Respondent faulted the appeal for contravening Order 43 Rule (1) (2) and Order 9 Rule 9 of the Civil Procedure Rules.

6. In his replying affidavit sworn on 21st September, 2016, the Respondent averred that the subject premises was decontrolled hence the increase in rent. The Respondent explained that he applied for assessment of standard rent as he believed the rent payable was below the market value and he reached a compromise with the Appellant that the standard rent be assessed at Kshs. 4,000/- with effect from 1st May, 2013.

7. In relation to the consent reached before the Tribunal, the Respondent claimed that the Appellant was represented by Counsel in the proceedings and the Counsel had authority to enter into the consent on behalf of the Appellant. Accordingly, the consent is binding on the Appellant.

8. The Respondent averred that the claim before the Tribunal was for assessment of "standard rent" therefore the Appellant cannot claim that the consent entered into was for "agreeable rent".

9. It is the Respondent's case that the subject premises were decontrolled and it is within his right to increase the rent to a reasonable sum within the market value.

Submissions

10. The Appeal was canvassed by way of written submissions. The Appellant filed his submissions on 22nd January, 2018 while the Respondent filed his on 21st February, 2018.

11. The Appellant submitted that as per the typed and handwritten proceedings found at page 24 and 25 of the Record of Appeal there was no indication that the application was heard and there is no record of the Appellant's submissions.

12. As to ground (b), (e) and (f) of the appeal, the Appellant submitted that the application dated 26th August, 2016 sought various orders and was not limited to the impugned consent that the Appellant sought to set aside. Further, the Appellant contended that the tribunal by virtue of Section 5(1) (m) of the Rent Restriction Act had the jurisdiction to review its decision even if the rent had been assessed beyond the statutory ceiling. To support this assertion, the Appellant cited the case of **Islam Ahmed Said v. Trustees of King Faisal of Kenya [2016] eKLR** where it was held:

> **"***My understanding of the jurisdiction granted to the Tribunal under Section 5(1) is that it entitles the tribunal to reopen and revisit any of its decision of whatever nature I believe for the ends of justice to be met. I hold and find that the tribunal had jurisdiction to entertain the application to reopen the proceedings even if there had been an order assessing rent beyond the statutory sealing of Kshs. 2,500/=. If it was the order sought to be disturbed. To hold as the tribunal did would be to defeat the purpose of the provision and to make the tribunal helpless even where an obvious injustice can be seen by it."*

13. With regard to grounds (c) and (d) the Appellant submitted that the application before the tribunal was determined at the ex-parte stage to the prejudice and detriment of the Appellant who was not given an opportunity to be heard.

14. In response to the Respondent's claim that the Appellant required leave before filing this appeal, the Appellant relied on Section 8 of the Rent Restriction Act which he argued did not make any requirements for leave before Appeal. The Appellant cited the case of **Piara Singh Cheema v. C.Rodrigues [1982]eKLR** where the court observed as follows:

> **"***Nowhere is it provided either in Section 8 or any other section of the Rent Restriction Act that the Civil Procedure Act or Section 80 of this Act or any other section of this Act shall apply to the proceedings before or emanating from the Rent Restriction Tribunal. This was an appeal from the Rent Restriction Tribunal and the right thereof had been derived from Section 8(2) of the Rent Restriction Act. This right of appeal was not granted under the Civil Procedure Act. The provisions of Section 80 of the Civil Procedure Act would not be applicable in relation to this appeal."*

Further, the Appellant pointed out that under the Rent Restriction Appeal Rules LN 13/1969 there is no requirement for leave before an appeal. In the alternative, the Appellant submitted that an appeal on review is allowed by right without the requirement of leave.

15. The Appellant submitted that the standard rent can only be assessed by the Rent Restriction Tribunal under Section 5 of the Rent Restriction Act and the standard rent would be in rem and not in personam. The Appellant argued that the purported consent could only be on the agreeable rent and not on the standard rent. The Appellant submitted that the consent which was reached by the advocates was an illegality as it purported to usurp the statutory powers of the tribunal. The Appellant cited the case of **J.D Sumaria & 4 others v. Valbaiji & another [1998] Eklr**, the court found as follows:

> "**…***further parties cannot "by consent" agree on standard rent…"*

> **…***All the dwelling houses (which have not been exempted by the Act) tha has a rent (as of 1.1.81) payable of Kshs. 2,500/= per month or below fall under the jurisdiction of the Rent Restriction Act. Such premises are controlled. One cannot increase the rents without the compliance of the Rent Restriction Act…"*

The Appellant concluded that any agreement prior or after assessment of the standard rent does not affect standard rent.

16. The Respondent submitted that leave must be sought from the tribunal before instituting an appeal. The Respondent also relied on the case of **Islam Ahmed Said v. Trustees of King Faisal of Kenya** *supra*. The Respondent argued that in that case the court found that where

an appeal is made against an order arising from a preliminary objection leave of the court must be sought under Order 43 Rule 1(2) of the Civil Procedure Rules. The Respondent contended that the case cited by the Appellant to support his assertion that leave of the tribunal was not required before institution of this appeal i.e **Piara Singh Cheema v. C.Rodrigues (supra)** the ruling therein was delivered in 1982 yet the Civil Procedure was amended in 2010 therefore the ruling cannot apply to this matter.

17. The Respondent submitted that the tribunal correctly found that it did not have jurisdiction to deal with the application dated 26th August, 2016 therefore it did not selectively deal with some issues but rather did not deal with any issues before it.

18. The Respondent submitted that a landlord and tenant can agree on the rent and the same, where the amount agreed is above the standard rent prescribed by the Rent Restriction Act the tribunal cannot interfere. The Respondent relied on the case of **Republic v. Chairman Rent Restriction Tribunal and another Ex-parte Ezekiel Machogu and 3 others [2013] eKLR** where the court opined:

> **"***although section 5(1) (a) of the Act empowered the tribunal to assess the standard rent either on application of any person interested of its own motion, the case before it did not call for assessment of the standard rent as the rent was already agreed upon as between landlord and tenant. (see Gershini v. Ombima [1975] EA 135 and Shah v. Oggarival CA Civil Appeal no. 6 of1981 [1983]eKLR. I, therefore, find and hold that the amount of rent and the fact that it was agreed removed the subject premises from the definition of standard rent prescribed by the Act and therefore from the jurisdiction of the Tribunal. The Tribunal cannot appropriate jurisdiction to investigate or assess rent where the rent agreed by the Landlord and tenant is above the standard rent as defined by the Act."*

The Respondent distinguished this case from that cited by the Appellant, **Islam Ahmed Said v. Trustees of King Faisal of Kenya (supra)**.The Respondent argued that in the case cited by the Appellant the parties had the assessment done by the Tribunal after the matter was fully heard while in **Republic v. Chairman Rent Restriction Tribunal and another Ex-parte Ezekiel Machogu and 3 others (supra)** the parties agreed via a consent between the landlord and the tenant.

19. As to the issue of costs, the Respondent contended that he should not be burdened with costs as the Appellant had not prayed for costs and the Respondent was never a party to the hearing of the application before the tribunal as it was heard ex-parte. He urged the to dismiss and or strike out the appeal.

Determination

20. From the record of appeal filed and the submissions made by the parties, I can summarise the issues for determination as two;

i) Whether this Appeal lie as of right and

ii) If yes, whether the Tribunal erred in refusing to hear the application dated 26th August 2016 on its merits for want of jurisdiction?

21. The Tribunal made an order that it did not have jurisdiction to entertain the application dated the 26th of August 2016 as the premises had been decontrolled. From the original file, the record does not indicate that the order was made pursuant to a preliminary objection raised by the Respondent. The Tribunal seems to have moved suo moto. Therefore it is presumed it was a ruling and or order in respect of the application before it.

22. The Respondent cited the provisions of order 43 rule 1(2) which states that an appeal shall lie with leave of the court from any other order made under these rules. The present appeal is against the refusal order to entertain an application seeking to review the decree of the Tribunal. I do not agree with the Respondent that the order appealed from constitute any "*any other order made under the Rules.*"

23. Under order 43 rule 1(x) gives a party room to appeal as of right on applications for review brought under order 45 rule 3. The impugned order/ruling was purasuant to application for review though made under the provisions of the applicable law i.e section 5(1)(m) of the Rent Restriction Act and all other enabling provisions of the law. Lastly order 43 rule 3 which is referred to as saving states thus, "*nothing in this order shall apply to any adjudication which as regards the court expressing it, conclusively determines the rights of parties with regard to all or any of the matters in controversy in the suit."* My understanding of this rule is that it gives liberty to the Court (in this case myself) determining the dispute before it not to be limited by the provisions given under order 43.

24. I can therefore safely conclude that the appeal herein lie as of right and it is properly before the Court.

25. On 7th May 2013, the Tribunal marked the matter as settled pursuant to a written consent dated the same day. On 29th august 2016, the

Appellant filed a notice to act person and an application seeking several orders inter alia:

"5. *That this honourable Court be pleased to set aside /review the consent order recorded on 7th May 2013 and allow the Tribunal makes an assessment of the standard rent of the premises herein."*

26. Before the Consent of the advocates is filed and adopted as an order of the Court, it cannot be treated as part of the proceedings. Upon its adoption, it becomes an order of the Court and is to be executed like any order/judgement of that Court. Similarly the Court vested with powers to set aside or review any order is the Court which issued it. For instance a party cannot apply to the High Court to set aside and or review the proceedings of a subordinate Court. In this case the Appellant cannot move the High Court to set aside and or review the Consent.

27. The proper Court to determine whether that application for setting aside/ review of the impugned order is the same Court that issued it. This appeal is against the refusal by the Tribunal to hear that application because it did not have jurisdiction. I am of the considered opinion that the Tribunal was clothed with the jurisdiction to entertain an application which sought to review its earlier orders that had decontrolled the suit premises. To this end I agree entirely with the phrase cited by the Appellant in the decision of **Islam Ahmed Said V. Trustees of King Feisal** *supra* on the provisions of section 5(1) of the Act.

28. In light of the foregoing reasons, I find merit in this appeal. Consequently, I make the following orders:

a) The Appeal is allowed.

b) The Ruling and or order of the Chairman made on 29th August 2016 be and is hereby set aside.

c) The original file of the Tribunal be returned so as to have the application dated 26th August 2016 heard and determined on its merits.

d) The Appellant to pay the rent of shs 4000 as per the impugned consent of 7th May 2013 pending determination and final orders of the Tribunal in respect of the impugned application.

e) Each party will meet their respective costs of this appeal.

Dated, Signed and Delivered at Mombasa this 20th day of July 2018

A. OMOLLO

JUDGE