IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 64 OF 2015

BETWEEN

RAMADHAN MOHAMED ALI……..……..……APPELLANT

AND

HASHIM SALIM GHANIM…….……RESPONDENT

(Appeal from the judgment and decree of the High Court at Mombasa, (Emukule and Kasango, JJ.) dated 10th July 2015

in

HCCA No. 32 of 2013)

****

JUDGMENT OF THE COURT

This is a second appeal by ***Ramadhan Mohamed Ali (the appellant)*** against the original judgment of the ***Business Premises Rent Tribunal (the Tribunal)*** at Mombasa dated 15th February 2013. After the Tribunal upheld a notice of termination of tenancy served upon the appellant by ***Hashim Salim Ghanim (the respondent)***, it ordered him to vacate and hand over vacant possession of ***Plot No. 4740/VI/ Mombasa Mainlad (the suit property***) to the respondent. Aggrieved by that decision, the appellant filed ***Civil Appeal No. 32 of 2013*** in the High Court. On 10thJuly 2015 ***Emukule*** and ***Kasango, JJ***. found the appeal bereft of merit and dismissed the same, provoking the present appeal.

The respondent contends that a decision of the Tribunal is appealable to the High Court and that there is no right of a second appeal to this Court from the decision of the High Court. Indeed, he submits, the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, cap 301 (the Act),*** expressly provides that the decision of the High Court shall be final and not subject to further appeal. The appellant on the other hand argues that by dint of ***Article 163(4)*** of the Constitution, there is a right of appeal from all and sundry decisions of the High Court; that Article 163 (4) is a thoroughfare and a wide open door to this Court; and that no statute can shut or otherwise limit access to this Court without running a foul of ***Article 2 (4)*** of the Constitution on the supremacy of the Constitution.

To the extent that the respondent has raised a threshold issue, we shall address the same first and venture into the merits of the appeal only if we are satisfied that there is indeed a right of second appeal to this

Court from original decisions of the Tribunal.

For background and context it is apposite to briefly outline the antecedents of the appeal. It is common ground that the suit property is controlled premises within the meaning of ***section 2*** of the ***Act***. At all material times, the appellant was a tenant in a portion of the suit property, on which he was running the business of an open-air garage. Initially the appellant was paying rent to one ***Salim Said Ghanim (deceased),*** in whose name the suit premises were registered on 31st December 2008 under the repealed ***Registration of Titles Act***. The deceased died in September 2011 and the appellant started paying rent to the respondent, a son the deceased who averred that the portion of the suit property let to the appellant became his property upon subdivision of the suit property among the heirs of the deceased. It is also common ground that at the material time no grant of letters of administration had been applied for or issued in respect of the estate of the deceased. In his evidence before the Tribunal however, the appellant conceded that he knew the respondent as his landlord and that it was to the respondent that he was paying rent.

Matters came to a head when by a ***Landlord's Notice to Terminate or Alter Terms of Tenancy*** dated 11th July 2012 the respondent gave the appellant notice to terminate the tenancy with effect from 1st October 2012. In response, the appellant filed ***Reference No. 222 of 2012*** before the Tribunal, opposing the landlord's notice. After hearing evidence from both the appellant and the respondent, the chairperson of the Tribunal dismissed the reference and allowed the respondent's notice as aforesaid.

Before the High Court the appellant challenged the judgment of the Tribunal primarily on grounds that it had erred by holding that the respondent had capacity to issue the termination notice whilst he was not the registered owner of the suit property or the personal representative of the estate of the deceased; by denying the appellant compensation for improvements on the suit property; and by failing to hold that the appellant was entitled to goodwill upon vacating the suit premises. On the main issue, the High Court affirmed that a landlord under the Act need not be the registered owner of the demised premise or holder of a grant of representation of the estate of the registered owner, but rather, is the person entitled to the rent and profits payable under the terms of the tenancy. As for the other two issues, the Court found that they were never raised, canvassed or decided by the Tribunal.

Before this Court the appellant contends in his grounds of appeal that the High Court erred: by allowing the respondent, who did not have a grant of letters of administration to the estate of the deceased to intermeddle in the estate; by entertaining a claim by one beneficiary who did not have a grant of representation to the exclusion of other beneficiaries; by failing to address the issues of goodwill and costs of improvement of the suit property whilst the issues were alive before the court; by ignoring "principles of justice" and equity thus denying the appellant the right to recover for improving the suit property and allowing the respondent to unjustly enrich himself; by failing to find that the deceased had promised the appellant that he would occupy the suit property in perpetuity; by making its decision against the weight of evidence; and by failing to hold that the object of the Act is to protect tenants from oppression by landlords. By consent of both parties, this appeal was heard through written submissions and limited oral highlights.

As we indicated earlier, the first issue that calls for determination before addressing the merits of the appeal is the issue taken by the respondent whether the appellant has a right of appeal to this Court. ***Mr. Mogaka,*** learned counsel for the respondent, in a short and succinct submission argued that by dint of ***section 15(4)*** of the Act, the appellant did not have a right of appeal to this Court from the decision of the High Court in the exercise of its appellate jurisdiction from the decision of the Tribunal. He relied, in support of that proposition, on the judgment of this Court in ***Premchand Nathu & Co Ltd. & 4 Others v. Kariuki, CA No. 33 of 1990.***

Mr. Gikandi, learned counsel for the appellants contented that notwithstanding the provisions of section 15(4) of the Act, the appellant had a right of appeal conferred by Article 164(3)(a) of the Constitution. In counsel's view, upon its promulgation on 27th August 2010, the Constitution of Kenya 2010 created a right of appeal to this Court from all decisions of the High Court. It is apt to quote directly, a few extracts from counsel's written submissions to appreciate the unblemished argument:

"Article 164(3) (a) of the Constitution of Kenya 2010…has thrown the doors of the Court of Appeal wide open in respect of appeals from the High Court…"

"…The wording in Article 164(3) of the Constitution of Kenya, 2010 is plain and obvious. It expressly provides that whenever the high Court has rendered a decision, any person aggrieved by that decision is entitled to prefer an appeal to the Court of appeal. No More no less…"

"…If the people of Kenya wanted to limit the right of appeal, the people of Kenya would have easily provided such limitations. Article 164(3) of the Constitution plainly states that a right of appeal lies in the Court of appeal from any decision made by the High Court. Period. It does not lie in any organ of the Constitution including, with outmost respects, this Court or any other Court to impose limitations on the will of the Kenya people. To do so is to erode the will of Kenyan people."

Accordingly, in counsel's view, all laws in force before the promulgation of the Constitution which limited the right of appeal to this Court from the High Court, are unconstitutional, null and void by virtue of ***Article 2(4)*** of the Constitution. In the same vein, all decisions ante dating the Constitution such as ***Premchand Nathu & Co Ltd. & 4 Others v. Kariuki, (supra)*** belong to the dustbin of history.

Developing the argument, counsel relied on the majority decision of the Court of Appeal of Tanzania in ***Ndyanabo v. Attorney General [2002] 3 LRC. 541*** and submitted that the right to access justice is foundational and ought not to be curtailed because without it there can be no rule of law. For that reason powerful considerations are required for any limitation of the right to access justice to be reasonable and justifiable. Invoking Article 50 of the Constitution, counsel contended that the right to fair hearing includes the right of an aggrieved party to file an appeal and that under Article 25 of the Constitution the right to a fair trial cannot be limited.

We have duly considered the written and oral submissions by learned counsel and the authorities they have cited. We think that the appellant's submissions, forceful as they have been presented, are based on a basic misapprehension of the distinction between jurisdiction and the right of appeal. Article 164(3) of the Constitution addresses itself to ***the jurisdiction*** of this Court and states as follows:

"(3) The Court of Appeal has jurisdiction to hear appeals from –

a. ***the High Court; and***
b. ***any other court or tribunal as prescribed by an Act of Parliament."***

That Article gives this Court jurisdiction to hear appeals from the High Court. It does not at the same time confer a right of appeal to this Court from all and sundry decisions of the High Court as the appellant appeals to assume. The appellant has to have a right of appeal before he can invoke the jurisdiction conferred by article 164(3). The distinction between jurisdiction and the right of appeal was aptly captured by ***Odek, JA*** in ***Judicial Service Commission & Another v. Hon Lady Justice Kalpana Rawal & 3 Others, CA No 308 of 205 (UR 263/2015)*** when he stated:

"Jurisdiction is conferred upon a court of law while the right of appeal is granted to a litigant"

The question whether Article 164(3) of the Constitution creates, to borrow the words of ***Ouko JA*** in ***Judicial Service Commission & Another v. Hon Lady Justice Kalpana Rawal & 3 Others (supra)*** "thoroughfare" to this Court has been considered in several decisions of this Court, among them *JSC & Another v. Justice Kalpana Rawal & 3 Others (supra); Nyutu Agrovet Ltd v. Airtel Networks Ltd, CA No. 61 of 2012; Equity Bank Ltd v West Link MBO Ltd, CA. No. 78 of 2011(UR 53/11); Twaher Abdulkarim Mohammed v Mwathethe Adamson Kadenge & 2 Others, CA No. 45 of 2015 (Malindi); Joel Nyabuto Omwenga & 2 Others v IEBC & Another, CA No. 137 of 2014; Issac Oerri Abiri v Samuel Nyang'au Nyanchama & 2 Others, CA No. 25 of 2014; Kakuta Maimai Hamisi v. Peris Tobiko & Others, CA. No. 154 of 2013 and Timamy Issa Abdalla v Swaleh Salim Imu & 3 Others, CA No. 36 of 2012.* The view is that it does not. Benches of 5 judges of this Court have handed down some of those decisions and the appellant, with respect, has not place anything before us that would justify a different view.

In the appeal before us, we think it is stretching imagination to claim that sans a right of appeal to this Court, the appellant's right to access justice and fair trial has been violated. The appellant has been heard before the Tribunal. He has had a right of appeal to the High Court, which he has exercised.

Ultimately, we are satisfied that there is no right of second appeal to this Court from the original decision of the Tribunal. Accordingly, we find that the respondent's objection is well founded and strike out this appeal with costs to the respondent. It is so ordered

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE-MAKHANDIA

……

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR