Case Number:	Civil Appeal (Appli) 164 of 2005
Date Delivered:	14 Nov 2008
Case Class:	Civil
Court:	Court of Appeal at Malindi
Case Action:	-
Judge:	Emmanuel Okello O'Kubasu, John walter Onyango Otieno, Erastus Mwaniki Githinji
Citation:	ABDULSHAKOOR KHANDWALLA v EAST AFRICAN BUILDING SOCIETY [2008] eKLR
Advocates:	Miss Tasneem Kasmani-Moolvaj fro the Applicant. Mr. Khanna for the Respondent.
Case Summary:	[Ruling] Civil Practice and Procedure - appeal - jurisdiction - dispute over a controlled tenancy - dispute having been referred to the Rent Restriction Tribunal - decision of the Tribunal appealed in the High Court - record of the Tribunal's proceedings lost thus frustrating the appeal - High Court ordering Tribunal to hear the dispute afresh - appeal against the decision of the High Court - application to strike out record of appeal - whether the decision of the High Court was final and no appeal lay from it - Court of Appeal Rules rule 80 - Rent Restriction Act section 8(1),(4)
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-

Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appeal (Appli) 164 of 2005

ABDULSHAKOOR KHANDWALLA……APPLICANT/RESPONDENT

AND

EAST AFRICAN BUILDING SOCIETY……...RESPONDENT/APPELLANT

(Application to strike out record of appeal in an appeal from the ruling and order of the High Court of Kenya at Mombasa (Maraga J) dated 11th June, 2004

in

H.C.C.C. NO. 30 OF 1994)

****

RULING OF THE COURT

This is an application under *Rule 80* of the Court of Appeal Rules (Rules) for an order that *Civil Appeal No. 164 of 2005 – East African Building Society* vs. *Abdulshakoor Khandwalla* be struck out on the ground that no appeal lies to the Court of Appeal from the ruling and orders of the superior court (Maraga J) dated 11th June, 2004.

The brief background to the appeal, the subject matter of this application is briefly as hereunder.

The applicant *Abdulshakoor Khandwalla* is one of the tenants of the respondent *East African Building Society Ltd* (EABS) on plot No. 89 Section XX along Moi Avenue, Mombasa. The applicant has been occupying one residential flat paying a monthly rent of Kshs.2,097/50. This is a controlled tenancy under the Rent Restriction Act (Cap 296) (Act).

It seems that sometime in 1991 EABS applied to the Rent Restriction Tribunal in *Assessment Case N0. 183 of 1991* for assessment of the standard rent in respect of the flats. It seems further that, four assessment files were opened each for each tenant but rent payable by each tenant was assessed in file No. 152/91 in which the rent payable by the applicant was increased from Shs.2,097/50 to Shs.5,747/=.

The record shows further that EABS had filed a previous case *Rent Restriction Case No. 154 of 1991* for assessment of standard rent in respect of the flat occupied by the applicant which case was allegedly withdrawn after the rent assessment in cases *Nos. 183 of 1991* and *152 of 1991*. After the

assessment, the Tribunal issued a Rent Control Certificate dated 26th August, 1993 showing the new standard rent payable w.e.f. 1st September, 1993 to be apportioned amongst the tenants. In March, 1994, EABS levied distress to recover the arrears of rent from the applicant. The distress prompted the applicant to file *Civil Application No. 106 of 1994* in the Rent Restriction Tribunal, Mombasa seeking, among other things, an order that the Rent Control Certificate dated 26th August, 1993 issued by the tribunal in *Rent Restriction Assessment No. 152 of 1991* be withdrawn, set aside or cancelled on the ground that he was not a party in *Case No. 152 of 1991* and that rent had not been increased. On 19th April, 1994, the Tribunal made a ruling to the effect that the assessment report for all tenants including the applicant was prepared in *Rent Restriction Assessment Case No. 183 of 1991* and standard rent assessed in *File No. 152 of 1991* for all the tenants.

The applicant being aggrieved by that finding filed *Civil Appeal No. 30 of 1994* in the High Court Mombasa on 28th April, 1994 pursuant to ***Section 8 (4)*** of the Act.

Thereafter, the Tribunal file got lost and the appeal could not be processed for hearing. On 2nd April, 2004, over 9 years later, the applicant filed an application by notice of motion under ***Section 3A*** *Civil Procedure Act* for directions regarding the hearing of the appeal and for an order that the appeal be heard without copies of proceedings and other documents. The respondent, EABS filed grounds of opposition to the application. Mr. Khanna for EABS submitted at the hearing of the application that the superior court had no jurisdiction to order the matter to be heard *de novo*; that the applicant had no remedy and that he should accept the judgment as it is.

By a ruling dated 11th June, 2004, the superior court ordered that the dispute be taken back to the Tribunal for hearing *de novo* and that the appeal be marked as withdrawn with each party bearing its own costs.

In reaching that decision, the superior court said in part:

"The appellant has an undoubted right of appeal against the said Tribunal decision. Although it is not stated when the tribunal ruled on the matter, it would appear from the correspondence I have referred to that he filed the appeal immediately after the tribunal ruling. It is not his mistake that the tribunal record is lost. He had no control over it. To suggest that he should forget the appeal and accept the tribunal ruling is in my view manifestly unfair.

I agree with Mr. Khanna that the appeal cannot be heard without the tribunal record but I do not agree with him that this court has no powers to do anything in the matter and that it should send the Appellant away without remedy. In my view, Section 3A of the Civil Procedure Act is meant to give court power to deal with situations like this and make appropriate orders to meet the ends of justice".

The EABS filed *Civil Appeal No. 164 of 2005* in this Courtagainst the decision of the superior court.

In support of the application to strike out the appeal, Miss Tasneem Kasmani – Moolvaj, learned counsel for the applicant, submitted, among other things, that the decision of the High Court is final and no appeal lies from it, and, that, it matters not that the appeal was not heard so long as the court has made a final decision. She relied on ***H. Odongo & 6 Others vs. Savings and Loans Kenya Ltd*** – Mombasa, Court of Appeal *Civil Appeal No. 22 of 1987* (unreported).

Mr. Khanna, on his part contended, *inter alia*, that the Rent Restriction Act is not relevant as the

appeal is not a second appeal from the decision of the Rent Restriction Tribunal; that the appeal is from a decision of the superior court on an application made independently of the appeal; that the appeal has neither been heard nor determined and that the appellant obtained leave to appeal from the superior court.

Section 8 (1) of the Act provides that every decision, determination and order of the tribunal shall be final and conclusive and no appeal shall lie from it to any court. ***Section 8 (2)*** of the Act, however allows appeals to the High Court in three cases, namely:

(a) ……. (not relevant),

(b) On any point of law; or

(c) In cases of premises whereof the standard rent exceeds one thousand shillings a month, on any point of mixed fact and law.

Further ***Section 8 (4)*** of the Act, provides:

"No appeal shall lie from a determination of an appeal given under subsection (2) or an order of the tribunal given under subsection (3) of this Section".

Subsection (3) is not relevant to this application ***Rule (3)*** of the Rent Restriction (Appeals) Rules made under ***Section 37*** of the Act provides.

"The Civil Procedure Rules shall *mutatis mutandis****, apply in respect of the procedure to be followed in an appeal under Section 8 (2) of the Act as may apply in respect of an appeal from the subordinate court to the High Court".***

Thus, by that Rule the procedure which regulates appeals from subordinate courts to the High Court prescribed in ***Order XLI*** *Civil Procedure Rules* applies to appeal from the tribunal to the High Court.

In ***H. Odongo*** (supra) relied on by the applicant's counsel (appellants), the Rent Restriction Tribunal dismissed the landlords suit for possession and eviction of the tenants. The landlord successfully appealed to the High Court and the decision of the tribunal was reversed. Thereafter, the tenants/appellants applied under ***Section 80*** of the Civil Procedure Code and ***Order XLIV*** – Civil Procedure Rules for review of its judgment on the ground that the High Court had no jurisdiction to hear the appeal. The High Court dismissed the application for review and the tenants appealed to the Court of Appeal. At the hearing of the appeal, counsel for the respondent raised a preliminary objection to the jurisdiction of the High Court to entertain the appeal. This Court in an unanimous decision, upheld the Preliminary Objection and struck out the appeal as incompetent.

In his ruling, Apaloo JA said in part:

"I think it is a platitude that a right of appeal cannot accrue to a litigant by implication. It must be expressly conferred. And in so far as the legislature expressed its will in this matter, it expressed it clearly against allowing a second appeal from the decision of the High Court from a Rent Tribunal.

The section which prohibits a second appeal is section 8 (4) of the Act ……. It is in clear language and does not admit of any other interpretation than that a further appeal from the High Court appellate decision from Tribunal is forbidden".

Earlier in ***Cheema vs. Rodrigues (No. 2)*** [1984] KLR 788 which neither counsel cited, the superior court had comprehensively considered the extent of its jurisdiction conferred by ***Section 8 (4)*** of the Act and held that it had no review jurisdiction and further said, quite correctly, at page 790 paragraph 20:

"Section 8 (4) of the Rent Restriction Act has made the High Court as the final Court of Appeal in matters emanating by way of appeal from the Rent Tribunal".

It is clear from ***section 8 (4)*** of the Act that no appeal lies to this Court from a determination by the High Court of an appeal from the tribunal. By ***Section 3 (1)*** of the Appellate Jurisdiction Act which confers jurisdiction on this Court:

"The Court of Appeal shall have jurisdiction to hear and determine appeals from the courts of Kenya in cases in which an appeal lies to that Court under the Law of Kenya".

Thus, the right of appeal to this Court has to be conferred by the law of Kenya. It is well established that there is no right of appeal apart from statute, and that the right of appeal has to be expressly granted by statute and cannot arise by mere implication or inference.

It is true that the appellant applied for leave to appeal against the ruling and orders of the High Court and that Mwera J granted leave to appeal on 15th September, 2004. However, such leave would amount to nought unless the statute authorizes an appeal with leave of the court. The Rent Restriction Act does not sanction an appeal to this Court with the leave of the High Court and unless the appellant can show that there is another law authorizing appeal from the decision of the superior court to this Court with leave, the leave so granted would be ultra vires the law.

Mr. Khanna distinguished this appeal from ***H. Odongo*** case (supra) on the ground that the superior court has not determined the appeal on the merits. It is correct that the High Court in ***H. Odongo's*** case (and even in ***Cheema's*** case (supra) had determined the appeal before being moved to review the decision, which is not the case in this appeal. Nevertheless, Mr. Khanna did not refer to any authority or law which allows an appeal to this Court against any order or decision of the High Court where the court has not determined the appeal on the merits. If he was relying on the Civil Procedure Act or Rules he has not referred to any specific section or rule which sanctions the appeal and we know of none. The High Court in ***Cheemas*** case, held, correctly in our view, that the fact that Civil Procedure Rules in respect of appeals from subordinate court to High Court apply to appeals under ***Section 8 (4)*** of the Act by virtues of ***Rule 3*** of Rent Restriction (Appeals) Rules does not bestow jurisdiction on the High Court to entertain review applications. The High Court said in part in respect of the application of Civil Procedures Rules to appeals under ***Section 8 (4)*** of the Act:

"These are mere matters of procedure. Jurisdiction is not the same thing as procedure. Procedural rules do not bestow jurisdiction".

Likewise, the fact that the procedures in ***Order XLI*** of Civil Procedure Rules apply to appeals under ***Section 8 (4)*** of the Act does not bestow jurisdiction on this Court to entertain appeals from the decision of the superior court even where the appeal has not been determined on the merits.

The superior court in making the order appealed from was exercising its appellate jurisdiction conferred by ***Section 8 (4)*** of the Act. It was not exercising its independent original civil jurisdiction. The orders were made in an application made in the appeal and the orders of the superior court finally determined the appeal by terminating the appeal and ordering a re-trial.

For those reasons, we are convinced that an appeal does not lie to this Court.

In the result, the application is allowed with costs. Accordingly, the appeal is struck out with costs to the respondent.

Dated and delivered at Nairobi this 14th day of November, 2008.

E. O. O'KUBASU

……

JUDGE OF APPEAL

E. M. GITHINJI

……

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR