



Case Number:	Civil Appeal 33 of 1990
Date Delivered:	13 Jul 1990
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Johnson Evan Gicheru, Abdul Majid Cockar, John Mwangi Gachuhi
Citation:	Premchand Nathu & Co Ltd & 4 others v Kariuki [1990] eKLR
Advocates:	Mr Gautama for the Appellant, Mr Trivedi for the Respondent.
Case Summary:	<p style="text-align: center;"><b>Premchand Nathu &amp; Co Ltd &amp; 4 others v Kariuki</b></p> <p style="text-align: center;">Court of Appeal, at Nairobi July 13, 1990</p> <p style="text-align: center;">Gachuhi, Gicheru &amp; Cockar JJA</p> <p style="text-align: center;">Civil Appeal No 33 of 1990</p> <p style="text-align: center;">(Appeal from the Ruling and Order of Shields J dated 20th November 1989 in Civil Appeal Nos 147, 148-154, 157 of 1989)</p> <p><b>Jurisdiction</b> – <i>jurisdiction of the Court of Appeal— where the High Court dismisses an appeal from the Business Premises Rent Tribunal and refuses to set aside that dismissal – whether the Court of Appeal has jurisdiction to determine an appeal against the refusal to set aside the dismissal – section 66 of the Civil Procedure Act (cap 21) – section 3(1) of the Appellate Jurisdiction Act (cap 9) – Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) section 15(4), regulation 15 and 16.</i></p>

The appellants had appealed to the High Court against a determination made by the Business Premises Rent Tribunal. The High Court dismissed the appeal on the ground that there was no sufficient reason for interfering with the decision of the Tribunal. The appellants applied to have the dismissal set aside but this was also rejected.

The appellants then sent to the Court of Appeal and argued that the matter was not a further appeal from the dismissal of appeal from the Tribunal but was an appeal from the refusal of the High Court to set aside the dismissal. They relied heavily on section 66 of the Civil Procedure Act (cap 21) to show that the Court of Appeal had jurisdiction in such matters.

**Held:**

1. All that section 66 of the Civil Procedure Act (cap 21) prescribes is that an appeal shall lie from a decree or any part of a decree and the orders of the High Court to the Court of Appeal except where otherwise provided in that Act. This section does not define the jurisdiction of the Court of Appeal.

2. It is clear from section 3(1) of the Appellate Jurisdiction Act (cap 9) which defines the jurisdiction of the Court of Appeal, that not every determination from the High Court is appealable. The jurisdiction of the Court of Appeal to entertain an appeal from the High Court is essentially derived from the law which is applicable to the matter in issue before the High Court.

3. Under Section 15(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act it is only the procedure and the particular sections of the Civil Procedure Act relating to appeals in civil matters from subordinate courts to the High Court which have been adopted.

Section 66 of the Civil Procedure Act is neither related to nor is it a part of the procedure in respect of such appeals.

4. The Civil Procedure Act (cap 31) does not apply to the Landlord and Tenant Act (cap 301) except

in very limited areas as defined in regulations 15 and 16 thereof. There is no mention of the Civil Procedure

Act anywhere in the Landlord and Tenant Act itself.

5. The court in this case is of the view that there is a clear manifestation of the intention of the Legislature to bring finality to appeals from the Business Premises Rent Tribunal with the decision of the High Court. Trying to take the appeal on some pretext beyond the High Court is an attempt to defeat the purpose of the Legislature. The Court of Appeal therefore has no jurisdiction to entertain this appeal.

*Appeal struck out.*

#### **Cases**

1. *Shah, Mohanlal Henraj & another v Elias Warungu Kariuki* Civil Application No NAI 220 of 1989

2. *Mudavadi v Kibisu* [1970] EA 585

3. *Alibhai, Hamzaali & 3 others v Amirali T Sulemanji & others* Civil Appeal No 2 of 1985

4. *Odongo & 6 others v Savings and Loan Kenya Ltd* [1988] KLR 224

5. *Gatanga General Store & 2 others v Githere* [1988] KLR 603

#### **Statutes**

1. Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) sections 15(2), 15(4)

2. Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations (cap 301 SubLeg) regulations 15, 16

3. Civil Procedure Act (cap 21) sections 3A, 66, 79B

	<p>4. Civil Procedure Rules (cap 21 Sub Leg) order XLI</p> <p>5. Appellate Jurisdiction Act (cap 9) section 3(1)</p> <p>6. Court of Appeal Rules (cap 9 Sub Leg) rules 5(2)(b), 42</p> <p>7. Judicature Act (cap 8)</p> <p><b>Advocates</b></p> <p><i>Mr Gautama</i> for the Appellant.</p> <p><i>Mr Trivedi</i> for the Respondent.</p>
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal struck out
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GACHUHI, GICHERU & COCKAR JJA)**

**CIVIL APPEAL NO 33 OF 1990**

**PREMCHAND NATHU & CO LTD & 4 OTHERS..... APPELLANT**

**VERSUS**

**KARIUKI..... RESPONDENT**

**JUDGMENT**

Following a determination made by the Business Premises Rent Tribunal on 6.6.89 at Nairobi an appeal was filed in the High Court under section 15(2) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, cap 301, which in accordance with the procedure prescribed in the Civil Procedure Act and more particularly under section 79B thereof, was perused by Dugdale, J on 7.8.89. He dismissed it after he had considered that there was no sufficient ground for interfering with the determination of the Tribunal.

About 3 weeks earlier the respondent's advocates had taken out chamber summons dated 20.7.89 under order 41 for the following specific orders:

1. For consolidation of the appeal with other appeals,
2. For hearing before 2 judges,
3. For the respondent therein (landlord) to prepare the record of appeal on receipt of proceedings from the tribunal,
4. Costs of the cause.

We are not at this stage concerned with the chamber summons or the orders made in respect thereof. What is of concern is that the summary dismissal of the appeal on 7.8.89 by Dugdale, J prompted the appellant to file an application by way of motion before the High Court on 16.10.89 for the order of dismissal of appeals made on 7.8.89 to be set aside. The application was made under section 3A of the Civil Procedure Act, the Judicature Act (cap 8) and all-enabling provisions. Shields, J, who heard the notice of motion, accepted the submission that the Tribunal was not a subordinate court, but rejected the submission that section 79B of the Civil Procedure Act did not apply to appeals from the Tribunal.

On 30.3.90 when the advocates for all the parties hereto appeared before us in consequence of an order made by this Court Civil Application No NAI 220 of 1989 for a mention within 14 days after the filing of the record of appeal, counsel for the respondent made an oral application that he had instructions to concede this appeal on ground No 2 of the Memorandum of Appeal. We adjourned the matter for further consideration and thereafter decided to call for arguments and submissions on the question of whether

or not the Court had jurisdiction. The advocates made their submissions on 25.4.90.

The thrust of the appellants' submissions was that this was not a further appeal from the dismissal of appeal from the Tribunal by Dugdale J but was an appeal from the refusal of Shields J to set aside the dismissal. Mr Gautama relied heavily on section 66 of the Civil Procedure Act and cited two authorities in which right of appeal granted under section 66 had been invoked to show that the Court of Appeal had jurisdiction in such matters. The third authority referred to by Mr Gautama was Court of Appeal Civil Application No NAI 220/89.

The ruling of this Court cited by Mr Gautama in Civil Application NAI 220/89 given in response to an application for stay of an eviction in an intended appeal from the ruling of the High Court of Kenya at Nairobi (Dugdale J) dated 14.2.89 in our view has not even by implication ruled that this court has a jurisdiction in a proceeding arising from a determination of the Business Premises Rent Tribunal. The application was made under rule 5(2)(b) and rule 42 of the Rules of this Court. Rule 5(2)(b) merely empowers this court to order a stay of execution or further proceedings on such terms as it may think just. Utterly different factors including urgency or the appeal being rendered nugatory come prominently under consideration. That ruling, to us, is of no help when we are now considering the question of this court's jurisdiction.

Civil Appeal No 25 of 1970, also cited by Mr Gautama, emanated from an election petition which was being heard by the High Court. It was not a second appeal.

We now come to the third case cited by Mr Gautama which is Court of Appeal Civil Appeal No 2 of 1985 in which once again the judgment therein has relied on the powers given under section 66 of the Civil Procedure Act in respect of appeals from the High Court. It is to be noted that all that section 66 prescribes is that an appeal shall lie from the decree or any part of decrees and orders of the High Court to the Court of Appeal except where otherwise provided in that Act.

However, what we are concerned with is a different issue altogether and that is the jurisdiction of the Court of Appeal. Section 66 on which Mr Gautama had heavily relied does not define the jurisdiction of the Court of Appeal.

Section 3(1) of the Appellate Jurisdiction Act (cap 9) which defines the jurisdiction of the Court of Appeal reads as follows:

"The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law."

We have underlined the portions pertinent to the question of this court's jurisdiction.

It is clear from the above definition that not every determination from the High Court is appealable. The jurisdiction of this court to entertain an appeal from the High Court is essentially derived from the law which is applicable to the matter in issue before the High Court. That is why all matters which are before the High Court initially through the application of the Civil Procedure Act become appealable by virtue of its sec 66 to this court except where otherwise expressly provided in that Act. As regards the Landlord & Tenant Act (cap 301) except in very limited areas as defined in regulations 15 and 16 thereof in respect of issue of summons and the procedure relating to trial before the Tribunal, the Civil Procedure Act does not apply. There is no mention of the Civil Procedure Act anywhere in the Landlord and Tenant Act itself – not even in its section 16 which has prescribed for the making of regulations by the Minister for the better carrying out of the provisions of the Act. The exclusion of the application of the Civil Procedure Act

is strongly driven home by the words used in sub section 4 of sec 15 which we quote below:

“The procedure in and relating to appeals in civil matters from subordinate courts to the High Court shall govern appeals under this Act”.

So it is only the procedure and the particular sections of the Act relating to appeals in civil matters from subordinate courts to the High Court which have been adopted. Sec 66 of the Civil Procedure Act is neither related to nor is it a part of the procedure in respect of such appeal. With sec 66 rendered inapplicable to any appeal to the High Court from the Tribunal and the proviso to sub-section 4 which has prescribed in no uncertain words that the decision of the High Court “on any appeal” shall be final and not subject to further appeal, there is, in our view, a clear manifestation of the intention of the legislature to bring a finality to the appeal with the decision of the High Court. Trying to take the appeal on some pretext or the other beyond the High Court is, in our view, an attempt to defeat the purpose of the legislature.

In Civil Appeal No 22/77, cited by Mr Trivedi, which is a later decision than the one cited by Mr Gautama the same views were expressed by this court. In Civil Application NAI 101/87 which had originally emanated from Business Premises Rent Tribunal, also cited by Mr Trivedi, Nyarangi JA observed as follows:

“The jurisdiction of this court is statutory. For this court to entertain this matter would be to confer jurisdiction on itself in the face of statutory provisions against appeal from a decision of the High Court, irrespective of whether that decision is interlocutory or final. The operative words of the proviso to sub-section 4 of section 15 are ‘on any appeal’ which words in my judgment cover interlocutory and final appeals”.

We have gone at length into the question of jurisdiction of this court in respect of any appeal from the decision of the High Court on appeal before it from the Business Premises Rent Tribunal. We find that we do not have jurisdiction to entertain this appeal. The same is truck out. Costs are awarded to the respondent against each one of the appellants. Orders accordingly.

Dated and Delivered at Nairobi this 13<sup>th</sup> Day of July, 1990

**J. M. GACHUHI**

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**JUDGE OF APPEAL**

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**A. M.COCKAR**

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**JUDGE OF APPEAL**



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