**Desai & another v Shah & others**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 25 January 1974

**Case Number:** 85/1973 (64/74)

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**Before:** Harris and Muli JJ

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*[1] Rent Restriction – Dwelling house – Jurisdiction given over any part used as a dwelling house –*

*Rent Restriction Act* (*Cap.* 296), *s.* 4 (1) (*K*).

*[2] Rent Restriction – Standard rent – Assessment – May be fixed by tribunal of own motion – Tribunal*

*not bound by figures submitted to it – Rent Restriction Act* (*Cap.* 296), *s.*5 (1) (*K*).

*[3] Rent Restriction – Standard rent – Reassessment – Uneconomic return – Excessive purchase price –*

*Burden of showing purchase price to be excessive is on tenant – Rent Restriction Act* (*Cap.* 296), *s.* 4 (2)

(*K*).

*[4] Rent Restriction – Standard rent – Reassessment – Uneconomic return –* 15 *per cent p.a. a guideline*

*not a maximum – Rent Restriction Act* (*Cap.* 296), *s.*4 (*K*).

*[5] Rent Restriction – Standard rent – Assessment – May be made operative from commencement of*

*tenancy – Rent Restriction Act* (*Cap.* 296), *s.*5 (1) (*K*).

*[6] Rent Restriction – Costs – Tribunal may order costs to follow event.*

**Judgment**

The following considered judgments were read.

**Harris J:** This is an appeal from the decision dated 5 June 1973 of the Rent Restriction Tribunal at Nairobi whereby the tribunal allowed an application by the present respondents, as landlords, to assess the standard rent for each of two flats in a building in Second Avenue, Parklands, Nairobi. The building consisted of four flats, the other two being occupied by the respondents themselves. The first point taken by the appellants goes to jurisdiction and, although it was not raised before the tribunal nor mentioned in the memorandum of appeal, we agreed to consider it. Shortly, it is to the effect that s.4 (2) (*a*) (iv) of the Rent Restriction Act (Cap. 296) applies only to a single dwelling house or flat and that the Tribunal had no jurisdiction under the Act to apply the provisions of that sub-paragraph to the suit premises, constituting, as they do, only a portion of a building the remaining portion of which is retained by the landlords. The appellants concede that if this be the true construction of the sub-section such a tribunal would have no jurisdiction under the Act to fix the standard rent of a flat in a building containing other flats any one of which is occupied by the common landlord. This unreal situation, however, is avoided by the fact that in s. 4 (1) the term “dwelling house” is defined as meaning “any house or part of a house or room used as a dwelling”, and I am satisfied that there is no substance in this submission. The next matter raised is that certain passages of an affidavit filed by the respondents in the tribunal were inadmissible under O. 18 of the Civil Procedure Rules and should not have been relied upon by the tribunal. It is clear that the decision of the tribunal did not depend to any material extent upon these passages and this ground of appeal also fails. A third issue is that although the aggregate of the increased rents sought by the respondents totalled Shs. 2,580/ – per month the new rents fixed by the tribunal totalled Shs. 2,730/ – per month. There is nothing in the Act to suggest that a tribunal is bound to accept the figures put forward by the parties or their witnesses, nor is the tribunal bound to await an application by one of the parties to set the proceedings in motion, for s. 5 (1) (*a*) enables the tribunal to assess the standard rent of premises either on the application of any person interested or of its own motion. I find nothing in the Act, nor do I know of any authority, which debars a tribunal under the Act from assessing the standard rent at a figure in excess of or below that claimed or suggested by either of the parties if the circumstances of the case so warrant. Apart from the question to which I have referred, the principal ground upon which the appellants seek to have the decision of the tribunal set aside is that the purchase price of Shs. 200,000/ – paid by the respondents when they bought the premises in the year 1970 was, in the appellants’ submission, excessive and should not now be accepted as the basis for the assessment of the standard rent of any of the flats. This proposition requires a consideration of the terms of the Act. By s. 4 (2) (*a*), it is provided *inter alia* that, notwithstanding anything contained in the definition of “standard rent” in subs. (1) of the section, where a tribunal is satisfied that the standard rent as fixed under that subsection would yield an uneconomic return because (in the absence of any indication that the purchase price paid by the landlord was excessive) it does not yield a fair capital return on the purchase price of the premises, the tribunal may determine the standard rent to be such amount as in all the circumstances of the case it considers to be fair. It is clear that in such a case it is in the interest of the tenant and not of the landlord that the purchase price paid for the premises should be shown to have been excessive and since the “indication” referred to is of a positive nature, namely, that the price “was excessive”, rather than of a negative nature to the effect that the price “was not excessive”, the burden of showing some indication as to the price having been excessive falls on the party who would benefit thereby, namely, the tenant. The Act does not itself create a presumption either one way or the other but commonsense predicates that in the ordinary course of business a purchaser of premises will not pay more for his purchase than he is required to do. The obligation resting on the tenant therefore is to point to some indication suggesting that in the particular case the landlord in fact paid more than he need have done. It is not difficult to conceive of circumstances where this could occur but nevertheless the burden on the tenant, such as it is, must be discharged and an indication in that behalf must be brought to the notice of the tribunal. This proposition is in accord with the general rule of evidence that he who avers must prove. In the present case no evidence whatever was tendered as to the circumstances surrounding the purchase by the respondents or as to why an excessive price should have been paid. The best that the appellants have done is to produce the evidence of a land valuer with only six months’ experience in this country as to what he thought the condition of the premises might have been in 1970 and their consequent market value. The evidence of this witness, which was almost entirely speculative in this regard, did not impress the tribunal. I am satisfied that no indication has been shown to exist to suggest that the purchase price paid by the respondents in 1970 was in any way excessive and that therefore the tribunal was entitled to find that the standard rent, if fixed under s. 4 (1), would yield an uneconomic return to the respondents having regard to their capital investment of Shs. 200,000/ – . Argument was addressed to us regarding the amount of the increase of rent awarded by the tribunal which, it is said, will yield an aggregate return to the landlords in respect of all four flats of between 16 and 17 per cent upon the purchase price paid for the entire premises. The figure of 1 1/2 per cent p.a. referred to in the Act (that is, 15 per cent p.a.) is not intended for the purposes of s.4(2) to constitute a general upward limit to the rate of return that a landlord may reasonably expect upon his investment. The criterion laid down for the purposes of that subsection is that the standard rent to be fixed thereunder should be such amount as, in all the circumstances of the case, the tribunal considers fair, and in my opinion the question of what is fair in the present case can properly be considered in the light of, among other things, the current return of income obtainable in Nairobi from other forms of investment in land including the placing of money on mortgage. I am of the view that the overall return which the decision of the tribunal will yield to the present respondents is not unfair to the parties and cannot be seriously objected to. As to the four flats themselves, two of them, numbers 1 and 3, are occupied by the respondents and the remaining two by the appellants as tenants. In regard to accommodation those occupied by the respondents appear from the evidence to be slightly superior to those occupied by the appellants and the tribunal would seem to have been correct in fixing a slightly higher rent for those occupied by the respondents. I find no convincing reason for differing from the rents so assessed. The appellants also complain of the fact that the standard rent was fixed with effect from 1 August 1972, which, they say, was unfair and unjust. It cannot be disputed that s. 5 (1) (*b*) enables a tribunal in its discretion and in accordance with the requirements of justice to fix the date from which the standard rent should be payable. There is no suggestion that this can be done only prospectively and I am satisfied that, if necessary, the operative date can be set as far back as the commencement of the tenancy. Here the respondents’ application for the assessment of the rent was filed in May 1972, served on the appellants on 6 July 1972, and subsequently strenuously resisted by them. By analogy with a claim in a civil action for liquidated damages in which interest on such damages is commonly awarded as from the date of filing suit I see no undue hardship in the present case in fixing the standard rent retrospectively to I August 1972. Lastly we have the question of costs, which were awarded by the tribunal to the respondents and assessed at the sum of Shs. 1,000/ – . Under s. 30 of the Act it is provided that a tribunal in the exercise of its jurisdiction under the Act shall have the same powers in civil matters as are conferred upon this court, including a power in its discretion to order any party to the proceedings to pay the whole or any part of the costs and either itself to fix the amount of such costs or to direct taxation by the taxing officer of the court either on the High Court scale or on the subordinate court scale. The discretion is therefore absolute provided that it is exercised judicially. The appellants’ contention is, first, that the order for costs complained of was made solely because the tribunal was under the impression that the hearing before it had been adjourned several times on the application of the appellants, which it is said, was contrary to the facts; secondly, that the practice of tribunals under the Act in assessment cases is not to award any costs except where a landlord’s application is dismissed; and, thirdly, that costs, if awarded against a tenant, should not exceed Shs. 75/ – which is the normal figure. Whatever be the position regarding the adjournments in this case the order of the tribunal in no way suggests that the award of costs turned upon the tribunal’s view in that regard. I see no reason why the costs of proceedings under the Act should not follow the event if the tribunal in the proper exercise of its discretion considers this to be appropriate. As to the quantum arrived at here, I have had the advantage of a discussion with the principal taxing officer of this Court and I am satisfied that an award of Shs. 1,000/ – for costs was in no way too high in a case at hearing in whole or in part for two days (in addition to several other attendances by the advocates) and involving premises of the value of those with which we are concerned. I would therefore dismiss this appeal with costs.

**Muli J:** I concur with the judgment of Harris, J. which he has just read and which I had the advantage of reading in advance. I have nothing to add. I agree with the orders pronounced in the judgment. *Appeal dismissed.*

For the appellants:

*DN Khanna* (instructed by *Khanna & Co*. Nairobi)

For the respondents:

*Veljee Devshi* (instructed by *Veljee Devshi & Bakrania* Nairobi)