**Devani and another v Patel**

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

**Date of judgment:** 2 December 1974

**Case Number:** 36/1973 (133/74)

**Before:** Simpson and Kneller JJ

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*[1] Rent Restriction – Standard rent – Identity of premises – Two rooms added – Premises not identical*

*– Standard rent calculated on cost of construction – Rent Restriction Act* (*Cap.* 296), *s.* 4 (*K.*).

*[2] Rent Restriction – Rent – Overpayment by tenant – No jurisdiction for Tribunal to order repayment*

*by landlord – Rent Restriction Act* (*Cap.* 296) *ss.* 5, 19(*K.*).

**JUDGMENT**

The following considered judgments were read.

**Simpson J:** The appellants in this appeal were the defendants and the landlords in a case heard and determined by the Rent Restriction Tribunal, Nairobi. The respondent was the plaintiff and the occupier from February 1969 to June 1971 of a ground-floor flat owned by the appellants. An agreed rent of Shs. 900/- per month was paid by the respondent or his father totalling for the period Shs. 22,000/-. No rent was paid after January 1971. It was about this time that the respondent discovered that the premises had been let on 1 January 1965, at a rent of Shs. 380/- a month. He accordingly contended that the Rent Restriction Act (Cap. 296) was applicable to these premises and that the standard rent was Shs. 380/- a month. He claimed to be entitled to recover under s. 19 of the Act the rent overpaid by him, totalling Shs. 10,730/-. The Rent Tribunal, accepting that the standard rent had previously been Shs. 380/- per month and having regard to the fact that the respondent had the benefit of more accommodation than that included in the premises as let on 1 January 1965, re-assessed the standard rent at Shs. 450/- and calculated that the excess paid by the respondent was accordingly Shs. 2,000/-. In calculating the excess they excluded half the period during which rent was paid on the ground that rent had during that period been paid by the respondent’s father. It then entered judgment for the respondent for Shs. 2,000/- with costs assessed at Shs. 525/-. It is against this judgment that the appellants now appeal. There are three main grounds of appeal as follows: (1) The Tribunal had no jurisdiction under the Rent Restriction Act to order repayment of rent overpaid. (2) There was no evidence that the respondent was the tenant of the premises or if he was there was no evidence of the period during which he was the tenant. (3) The premises occupied by the respondent were not the same premises for which a rent of Shs. 380/- was paid on 1 January 1965. The tribunal in its judgment said: “After carefully considering sections 5 (1) and 19 of the Act, the tribunal is satisfied that it has jurisdiction to make an order for the recovery of excess rent if any paid by a tenant. A tenant wishing to recover the excess rent can only, however, recover it within 2 years from the date of the payment under section 19 (3).” S. 5 (1) commences: “The Tribunal shall have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in particular shall have power. . . ” and the succeeding paragraphs set out these particular powers. None of these paragraphs empowers the Tribunal to order the recovery of excess rent paid by a tenant. S. 19 (1) reads as follows: “Where any sum has been paid on account of any rent, being a sum which is, under the provisions of this Act, irrecoverable by the landlord, the sum so paid shall be recoverable from the landlord who received payment, or from his legal personal representative, by the tenant by whom it was paid, and any such sum, and any other sum which under the provisions of this Act is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant, may, without prejudice to any other method of recovery be deducted by the tenant from any rent payable by him to the landlord.” Mr. D. N. Khanna who appeared for the appellant submitted that since this provisions does not expressly confer power on the tribunal jurisdiction lies with the ordinary courts only. An examination of the Act as a whole shows that the intention of the legislature was to confer wide powers upon the tribunal to the exclusion of the courts, except on appeal and in criminal matters. If s. 19 (1) had merely provided that excess rent paid by a tenant to which the landlord was not entitled was recoverable by the tenant from the landlord, I might have inclined to the view that jurisdiction was impliedly conferred upon the tribunal. The subsection however goes on to specify the manner in which the tenant may recover such payments namely by deduction from rent payable by him adding that this is without prejudice to any other method of recovery. No other method of recovery having been provided in the Act, I am of the opinion that the tribunal has no jurisdiction to order repayment by a landlord of excess rent. This would dispose of the appeal but it is I think desirable to consider briefly the other two main grounds of appeal. In its judgment with respect to the question whether or not the respondent was the tenant of the premises the tribunal said: “Originally the tenancy of the suit premises was negotiated between the father of the plaintiff and the first defendant. It is therefore not clear who was the actual tenant. The plaintiff occupied the premises but his father paid the rent for almost half the period of tenancy; subsequently the plaintiff himself started paying the rent which was accepted without any protest by the defendants. Although no receipts or rent books in the name of the plaintiff have been produced in evidence, it is clear from Ex. 2 that B. R. Patel the plaintiff was accepted as a tenant from the time when he started paying the rent to the defendants. Total rent paid amounts to Shs. 22,000/- from February 1969 to January 1971, inclusive. Therefore, accepting that the plaintiff paid for half of the period, it would be reasonable and equitable to accept that he paid Shs. 11,000/- in all.” In cross-examination, the first appellant made a number of conflicting statements but in his evidence in chief he admitted that he regarded the respondent as a tenant for half the period of the tenancy. Although there was no formal transfer of the tenancy from father to son and the precise date of commencement of the respondent’s tenancy was unascertainable the tribunal was I think justified in the foregoing findings and decision and I would not have allowed the appeal on that ground. The premises which had been let in 1965 at a rent of Shs. 380/- a month were subsequently altered before being let to the respondent by the conversion of a garage and servants’ quarters into an additional bedroom and study. The Tribunal was of the opinion that a “mere partial change” would not take the premises out of the Act and was satisfied that there was no change of identity. “The premises were already there,” they said, “the existing garage and servants’ quarters were connected by a mere passage.” With respect, I think they overlooked the fact that a dwelling house consisting of a lounge, dining room and bedroom had become one consisting of a lounge, dining room, two bedrooms and a study. This was not a “mere partial change” nor did it represent (in the words of Megarry which the Tribunal considered) “small and possibly colourable alterations of the structure”. It was undoubtedly a change of identity and the standard rent was not therefore Shs. 380/- as found by the Tribunal. Even if this finding could have been supported the Tribunal fell into a further error in re-assessing the standard rent at Shs. 450/- on the ground that the tenant had the benefit of extra accommodation and basing such re-assessment on the landlord’s estimate of the cost of alterations. The Tribunal did not purport to act under s. 4 (2) (*a*) on being satisfied that the standard rent yielded an uneconomic return. The Act sets out in s. 4 the methods by which the standard rent should be assessed by the Tribunal. None of these methods was followed. S. 12 enables a landlord to increase rent on the basis of a maximum of 10 per cent of the cost of improvements but the Tribunal must follow the provisions of s. 4. On this ground also I would have allowed the appeal. Since Kneller, J. agrees, the appeal is accordingly allowed with costs and the costs of the proceedings in the court below which were assessed at Shs. 525/-. **Kneller J:** The appellants are the registered owners of land on Taifa Road, South “C”, Nairobi and the landlords of buildings on it. They let part of it to someone called Robert Zanarali and he was there on 1 January 1965 and was paying Shs. 380/- a month for it. The date is significant for the purposes of deciding what was the standard rent: s. 3 of the *Rent Restriction Act* (Cap. 296). Later, the father of Mr. B. R. Patel, the respondent, became the tenant of the portion occupied by Mr. Robert Zanarali together with some additions, namely, a servant’s room which became a study and a garage which was converted into a bedroom all at a new rent of Shs. 900/- a month. A dispute arose between the respondent, who is an advocate, and the appellant and the respondent filed a plaint in the Nairobi Rent Restriction Tribunal on 24 November 1971 for an order that the standard rent for the premises was Shs. 380/- a month and the recovery of excess rent at the rate of Shs. 520/- a month for the period February 1969 to June 1971, inclusive, which amounted to Shs. 10,730/-. There was no defence filed which is usual in the Tribunal and on 3 December the same year evidence was recorded from Mr. Ivo Pereira and on 19 January, two years later, from the respondent and from Mr. Devani, one of the appellants, together with a Mr. Rodrigues. There were some plans of the buildings on the plot and some letters between the advocates for the parties or the parties themselves exhibited during the course of the trial. On 16 February, the judgment of the Chairman and members was delivered and the respondent succeeded in securing a declaration that the standard rent for the portion he occupied was Shs. 380/- on 1 January 1965 which was increased to and assessed at Shs. 450/- on and after 1 February 1969 and he was entitled to Shs. 2,000/- excess rent together with the costs of the litigation before the Tribunal fixed at Shs. 525/-. The Tribunal in its judgment did not make any finding about the credibility of the witnesses but it is clear from the rest of the judgment that apart from the appellants’ claim that they spent Shs. 6,000/- to Shs. 7,000/- on turning the garage and servant’s room into a bedroom and study the chairman and members believed what each witness said was the truth as he recalled it and it was only on the inference or deductions that each side drew from the same facts that the parties differed. I have read the evidence again and although I have not seen and heard the witnesses and therefore have missed the “feel” of the case I find no reason to disagree with what I believe was the attitude of the Tribunal to the question of where the truth lay. Did the Tribunal have the power to assess the standard rent for the portion the respondent occupied? It did; this is provided for under s. 5 (1) (*a*) of the Act which provides that it shall have the power to do all things which it is required or empowered to do by or under the provisions of the Act, assess the standard rent of any premises either on the application of any person interested or of its own motion and for any premises, at its discretion and in accordance with the requirements of justice, the date from which the standard rent is payable (which the Tribunal found was 1 February 1969). It appears to have been forgotten, I think, during argument in this court that the respondent asked for this assessment in the first paragraph of his prayers in the plaint because it was submitted that the Tribunal sprang the assessment on the unsuspecting appellants which is incorrect. The assessment was described as being outside the powers of the Tribunal but I have shown that it was provided for in the Act. It was also described as being not in accordance with the provisions of the Act on how the assessment should be reached by the Tribunal. What the Tribunal did was this. It studied the plans and the evidence and found that on 1 January 1965, the premises constituted an unfurnished dwelling house within the definition in the Act and let at Shs. 380/- a month. The servants’ quarters and garage were altered and the rent for the respondent’s father and later for him went up to Shs. 900/- a month. The Tribunal then asked itself whether the premises let on 1 January 1965 were the same as those let to the respondent or whether there had been a change of identity sufficient to make it different. They looked at *The Rent Restriction Act*, Megarry, 9th Edn., p. 114 and discovered that in his summary of the English cases he found that the court must be careful to ensure that the landlord does not evade the restrictions of the Act upon increases of rent by subdividing the tenancies or by making small alterations to the structure such as blocking up a connecting door or some minor improvements. He suggested the change must be radical. There are no cases on this point reported from this part of Africa. The statement in the text by the author is in my view correct and a useful yardstick to apply in this country to similar problems which arise under the local Act because it is based on the English one. The Tribunal was right to adopt this approach to this issue. The Tribunal said the main part of the building, the garage and the outside servants’ room were all there before the appellants altered the servant’s room and garage and turned them into two extra rooms. The Tribunal found that the respondent acquired extra accommodation and was better off in this respect than Robert Zanarali who was occupying on 1 January 1965 premises which did not include those two new rooms but, presumably, had the use of the garage and room for a servant. On all this, the Tribunal found only a partial alteration and was satisfied there was no change of identity. There is no doubt that what the appellants did was an improvement and a structural alteration. There was no blocking up of a connecting door making one room into two. There were no small or colourable alterations of the structure. There was no subdividing of the tenancy. I would have held that the change was radical and in my judgment, the Tribunal, with respect, was wrong to say that, in effect, the premises let to the respondent were the same as those let on 1 January 1965. It then went on to fix the standard rent of this unfurnished dwelling house the respondent occupied at Shs. 450/- from 1 February 1969. This date of 1 February 1969 was taken from the evidence by both sides of an oral tenancy of the premises made between the father of the respondent and the appellants at a contract rent of Shs. 900/-. The Tribunal, having found the dwelling house the respondent occupied was the same as that of Zanarali had and unfurnished, took Zanarali’s rent of Shs. 380/- on 1 January 1965 under s. 3 (*c*) and then referred to the appellants “wild guess” of Shs. 6,000/- for making the alterations and no more. I have already found that the premises Zanarali occupied were not the same as those the respondent had. I am not persuaded that Shs. 6,000/- for alterations was necessarily a wild guess and I am content to accept it as reasonable, as the Tribunal did eventually, as the true cost of converting the garage and the servant’s room. The Tribunal should have assessed the standard rent at a monthly rate of 1¼ per cent of the cost of construction and the market value of the land with the landlord paying all outgoings because this is the definition of the standard rent for any unfurnished dwelling house which was not let on 1 January 1965, according to s. 4 (1) of the Act. The Tribunal did not attempt this, I fear, and what they did is not saved, unfortunately, by anything in s. 4 (2) (*b*) which says that it may determine the standard rent to be such amount as it considers fair, having regard to the standard rent of comparable dwelling houses, if it is satisfied that it is not reasonably practicable to obtain sufficient evidence to enable it to find out the costs of construction or the market value of the land or the rent. It did not say so, all this evidence was probably available and the standard rents of comparable dwelling houses were not mentioned. This comparison ought not to be made by this court now, because matters relating to the rent of dwelling houses covered by the Act were specifically given by the legislature to the Tribunal and its jurisdiction is exclusive by virtue of s. 25 (2) except when matters under the Act reach here by way of an appeal under s. 8 (2). The Tribunal then recalled that excess rent could not be recovered for the period 1 February to 30 November 1969 because that was outside the two years period prescribed by s. 19 (3) for the recovery of any sum paid by a tenant which s. 19 (1) said he could recover. The Tribunal found that from December 1969 to the end of June 1971, which is when the respondent quitted the premises, the excess payment of rent could be recovered and it had been paid at the rate of Shs. 900/- less Shs. 450/- a month. The appellants say that they never accepted the respondent as their tenant of the suit premises and that all along they recognised only his father who made the oral contract with them. I do not think, on the evidence before the Tribunal, the appellants could argue that successfully because they knew the father rented it for the respondent when he had qualified, but was not making his way with sufficient success to take on the rent of these premises and that later the son was able to pay the rent himself and the appellants accepted it from him. I take the view that the Tribunal was right to say that for a certain period the respondent was the tenant of the appellants. One of the appellants said the same in his evidence. The Tribunal found that the total rent paid by the father and the respondent together from February 1969 to January 1971 inclusive was Shs. 22,000/- and of that the respondent paid about a half and the Tribunal declared this was a reasonable and equitable finding. Again, there was sufficient evidence for the Tribunal to make this finding and nothing in the arguments in this court persuaded me it should be altered. The Tribunal, as I have described, applied s. 19 (3) and held that any money paid before the two years preceding 24 November 1971, which is when the plaint was filed, could not be recovered. The respondent’s share of the excess was paid from November 1969 to June 1971 which was Shs. 11,000/- less the standard rent at Shs. 450/- a month for 20 months, which is Shs. 9,000/-, leaving a balance of Shs. 2,000/- due to the respondent from the appellants at the date of its judgment. The Tribunal could certainly make that calculation and finding under s. 19 (1) which declares that any sum paid on account of any rent caught by the provisions of the Act is recoverable by the tenant from the landlord who received payment or from his legal personal representative. Furthermore, this sum which is recoverable by the tenant may be deducted by him from any rent he ought to pay to the landlord. The Tribunal should have stopped there with that finding or declare that if the respondent owed any sum over and above the Shs. 2,000/- as rent to the appellants he could deduct it. The Tribunal had jurisdiction or power to deal with excess rent to that extent, at any rate, under the Act and any proceedings dealing with those two points, had the tenant paid excess rent? Could he deduct it from rent to be paid to the landlord? may not be taken in any court. They must be dealt with by the Tribunal. Here, the Tribunal went on, however, to enter judgment for the excess rent for the respondent against the appellants, but looking at the Act as a whole, including its preamble, I cannot discover any provision permitting the Tribunal to do that. There is no way in which the power to give judgment for sums paid in excess rents for tenants against landlords can be imported into the Act and the consequence is that the presumption remains that the jurisdiction of the ordinary courts is not displaced in any matter save by Parliament’s express will. Accordingly, I agree that this appeal must be allowed with costs. *Order accordingly.*

For the appellants:

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

For the respondent:

*R Hira*