**Pollok House Ltd v Nairobi Wholesalers Ltd**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 24 April 1974

**Case Number:** 48/1973 (55/74)

**Before:** Sir William Duffus P, Law Ag V-P and Mustafa JA

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**Appeal from:** High Court of Kenya – Nyarangi, J

*[1] Appeal – Decree, from – Decree itself not appealable but altered by judge after delivery – Appeal*

*incompetent.*

**JUDGMENT**

The following considered judgments were read.

**Mustafa JA:** The appellant (whom I will call the landlord) had served notice on the respondent (whom I will call the tenant) to alter the terms of a tenancy entered into between them by an increase in rent. The landlord served two notices, one for part of the premises occupied by the tenant was dated 27 August 1969 and another, for the whole of the premises occupied by the tenant, was dated 28 November 1969. The first notice would have become effective under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (Cap. 301), (hereinafter called the Act) on 28 October 1969, and the second notice on 31 January 1970. The tenant, however, opposed the notices, and duly notified the landlord and filed two separate references to the Tribunal set up under the Act, and thereby suspended the effects of the notices to alter the terms of the tenancy. The Tribunal consolidated both the references at the hearing, and in its judgment increased the rent for the premises, and held that the date for the payment of such increased rent was 1 January 1971. The landlord appealed to the High Court against the Tribunal’s finding, on the ground that the Tribunal had no discretion to fix a date for the payment of the increased rent other than the date when the notice to vary the terms of tenancy expired, or if it had, then it had exercised such discretion improperly. At the hearing of the appeal counsel for both the parties had agreed that if the landlord’s appeal succeeded, then the effective date for the payment of the increased rent would be 31 January 1970 (the date of expiry of the second notice). The High Court rejected the landlord’s submissions, holding that the Tribunal had acted properly in awarding increased rent and in ordering that such increased rent would be payable as from 1 January 1971. If the judge had stopped there, there probably would have been no trouble. However, he went on to state: “The second notice expired on 31.1.70. The increase should apply from that date, Counsel were agreed on this.” And towards the end of his judgment he stated: “The increase in rent shall apply from the date the second notice expired, i.e. 31.1.70. To that limited extent the appeal succeeds. Otherwise the appeal is dismissed.” When the draft decree was being settled, this dichotomy could not be resolved and both counsel informally approached the judge on this matter. It seemed that the judge had misunderstood the agreement between counsel. They had agreed that the date for the payment of the increased rent would be 31 January 1970 only in the event that the landlord’s appeal was successful. The judge apparently thought that the agreed date for the increased rent to take effect was 31 January 1970 in any event. The judge then gave a ruling on 6 July 1973, some 5 1/2 months after his judgment. In it he said, *inter alia*,: “This Court was moved I think in pursuance of s. 99 of the Civil Procedure Act to correct an alleged error concerning a date. . . . I am satisfied having considered the record, the judgment and the comments of counsel when this matter was last mentioned that the correct date is 1.1.71 and not 31.1.70”. He in short corrected his judgment by this ruling, substituting the date 1 January 1971 for 31 January 1970. From this ruling the landlord has appealed. Counsel for the tenant has taken a preliminary objection and has submitted that the appeal is incompetent and does not lie. S. 15 (4) of the Act reads: “The procedure in and relating to appeals in Civil matters from subordinate courts to the High Court shall govern appeals under this Act: Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal.” Counsel for the landlord conceded that this provision preludes him from appealing against the judgment and decree of the High Court. He however submitted that the ruling given on 6 July 1973 was separate and distinct from the judgment delivered on 23 January 1973, that the ruling arose out of proceedings initiated under s. 99 of the Civil Procedure Act, and did not form part of the Tribunal’s proceedings, and was in effect a second decree or a new judgment. He referred to the provisions of s. 72 (1) (*c*) of the Civil Procedure Act which read: “72 (1) Save where otherwise expressly provided in the body of this Act or by any other law for the time being in force an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds namely. . . . . . . . (*c*) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.” He submitted that in amending the judgment in the way he did the judge had clearly committed a “substantial error” and in terms of s. 72 he was entitled to appeal. He also relied on s. 79 (*b*) of the Civil Procedure Act as giving him a right of appeal. This reads: “79. The provisions of this Part relating to appeals from original decrees shall, as far as may be, apply to appeals– . . . . . . . . ( *b*) f rom orders made under this Act or under any special or local law in which a different procedure is not provided.” I am not in the present proceedings concerned with the propriety or otherwise of the judge in amending the judgment in the way he did. I will confine myself to the issue whether an appeal by the landlord lies. I am of the view that the ruling made on 6 July 1973 arose out of the judgment emanating from proceedings under the Act, and would be part of the decision of the High Court on an appeal under the Act. That ruling did not arise out of proceedings under the Civil Procedure Act as a separate and distinct matter, as no proceedings were commenced or instituted in any prescribed form or under the procedure provided by the Civil Procedure Act. The ruling was an extension of the judgment, as it purported to amend it. That being so, the ruling is not appealable in terms of s. 15 (4) of the Act. Since I have held that the ruling is a part of the “decision” of the High Court on an appeal under the Act, it does not matter whether it is to be treated as a decree or an order, and I will therefore refrain from dealing with this particular aspect which was so extensively argued before the Court, nor with the authorities cited in that connection. I do not see the relevance of s. 79 of the Civil Procedure Act in this matter; that section only provides that the procedure relating to appeals from original decrees shall also apply to appeals from appellate decrees or orders. In my view the appeal is incompetent and does not lie. I would strike out the appeal with costs.

**Law Ag VP:** I agree with the judgment prepared by Mustafa, J. A. This is in effect an appeal against a judgment of the High Court on an appeal from the decision of a Tribunal set up under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, and by s. 15 (4) of that Act, no further appeal lies. This appeal is accordingly incompetent, and must be struck out.

**Sir William Duffus P:** I agree with the judgment of Mustafa, J. A. and as Law, Ag. V.-P. also agrees, the appeal is struck out with costs. *Order accordingly.*

For the appellant:

*PJ Ransley* (instructed by *Archer & Wilcock*, Nairobi)

For the respondent:

*M da Gama Rose* (instructed by *Shapley Barret & Co*, Nairobi)