

IN THE COURT OF APPEAL FOR EAST AFRICA
AT NAIROBI

CORAM: (DUFFUS. P., SPRY. V-P. AND MUSTAFA. J.A.)

CIVIL APPEAL NO. 14 OF 1971

BETWEEN

EQUATOR INN LIMITED.....APPELLANT

AND

ARTIN TOMASYANRESPONDENT

*(Appeal from the order of the High Court of Kenya at Nairobi
(Madan, J. and Miller, J.) Dated 15th March 1971
in Civil Suit No. 363 of 1971)*

16th July, 1971.

MUSTAFA, J.A.

The appellant, a limited liability company, was carrying on the business of an hotelier and was the tenant of business premises owned by the respondent. The respondent gave notice of termination of the tenancy and the matter was referred to the Business Premises Rent Tribunal for decision. The Tribunal ordered the appellant to deliver up possession of the premises.

From that decision the appellant appealed to that court of the Resident Magistrate which dismissed or struck out the appeal as incompetent. On further appeal the High Court upheld the decision of the Resident Magistrate. The decision of the High Court being final was not appealable. The appellant then filed a suit in the High Court asking for a declaration that the proceedings and the decision of the Business Premises Rent Tribunal were a nullity and for an injunction restraining the respondent from enforcing the order of possession given by the said Tribunal.

The appellant then filed an application seeking two interlocutory orders against the respondent which

briefly were (1) that the respondent be restrained, until the disposal of the suit, from recovering possession of the premises in terms of the decision of the Tribunal (2) that the respondent be restrained from wasting or alienating the said premises.

The High Court rejected the appellant's submission that the proceedings of the Tribunal, which were heard by two members not including the gazzetted chairman, Mr. Wariithi, were a nullity and dismissed the appellant's application with costs. From that decision the appellant has appealed to this Court. The appeal in fact largely turns on one point, how the word "chairman" in the regulations made under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.30l) (herein after called the Act) should be interpreted and construed. Hotel business premises are protected under the Act. Matters in dispute between the appellant as tenant and the respondent as landlord as regards the possession of the premises have to be referred to a Tribunal set up under the Act. Section 11(1) of the Act so far as is relevant reads:

"11.(1) A Tribunal shall consist of a person or persons appointed as such by the Minister, and shall exercise such jurisdiction as is conferred on it by or under this Act, over such area as shall be specified in such appointment."

Section 16(1) reads:

"16. (1) The Minister may make regulations for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing such regulations may prescribe

- (a) the manner in which a Tribunal shall conduct its business;
- (b) the procedure in connexion with any reference to a Tribunal, or the determination of any matter by a Tribunal;
- (c) the matters which a Tribunal shall take into account in exercising its powers under this Act;
- (d) the fees which shall be payable in respect of any matter or thing to be done under this Act;

and

- (e) the scale and taxation of costs and expenses of witnesses in proceedings before a Tribunal."

The Minister made regulations in terms of section 16 of the Act. Regulation 2 so far as relevant reads:

"In these Regulations unless the context otherwise requires 'chairman' means the chairman of the Tribunal;"

This word "chairman" appears in Regulation 19(1), 21, 23 and 25. Regulation 21 reads:

"21. Two members of the Tribunal, one of whom shall be the chairman, shall form a quorum."

Regulation 23 reads:

"23. When only two members of the Tribunal are present and arrive at different findings, the

decision of the chairman shall be deemed to be the decision of the Tribunal."

The Minister by Gazette Notice No. 1171 of 1966 appointed Wariithi, M.P. (Chairman); and G.G.W. Nthenge, Wafula Wabuge, and Wambugu Kaigua to be a Tribunal for the purposes of the Act. It is common ground that the hearing of the dispute between the appellant and the respondent took place before two members of the Tribunal and that Mr. Wariithi, the gazzetted chairman, was not one of them. Mr. Gautama for the appellant has submitted that in the absence of the chairman, Mr. Wariithi, the proceedings including the judgment of the Tribunal were a nullity.

He relies on Regulation 21 which provides that two members of the Tribunal, one of whom shall be the chairman, shall form a quorum. Here, since the chairman, Mr. Wariithi was not one of the two, there was no quorum, and the proceedings were a nullity. Mr. Gautama's submission is that "chairman" in Regulation 21 can only mean the chairman of the Tribunal as defined in Regulation 2, and the chairman of the Tribunal was Mr. Wariithi who was so appointed by the Minister in Gazette Notice No. 1171 of 1st April, 1966.

Mr. Khanna has submitted that "chairman" in Regulation 21 does not mean the gazzetted chairman but only a member who happens to chair a particular meeting of the Tribunal. If it were otherwise, he submits that Regulation 21 would be ultra vires as it would have gone beyond the powers conferred on the Minister by the Act. He argues that if "chairman" in Regulation 21 is the gazzetted chairman it would mean there was discrimination by the Minister between the powers of the chairman and the other members of the Tribunal, as in the absence of the chairman, other members of the Tribunal would have no jurisdiction to sit. He points out that the Act does not mention a chairman or his powers.

He refers to *Utah Construction & Engineering Pty Limited v. Pataky (1966) A.C. 629 at 640* where in dealing with subsidiary legislation Lord Guest says:

“The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will over what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.”

Mr. Khanna submits that Regulation 21 should not be construed as meaning that without the presence of

the gazetted chairman there would be no quorum and the Tribunal would have no jurisdiction as such a construction would imply that Regulation 21 went beyond the powers conferred on the Minister by the Act and would be outside the scope of the Act itself.

Mr. Khanna does not say that the Minister has no power to appoint a chairman under section 11 of the Act; he appears to state that the chairman so appointed would be merely an "administrative" chairman but whose powers and authority would be the same as those of the other members of the Tribunal. To hold otherwise, he submits, would be inconsistent with the Act, as it would vary, restrict, widen or modify the scheme of the Act.

He points out that section 11 only mentions that a Tribunal shall consist of a person or persons appointed as such by the Minister; there is no mention at all of a chairman. In my view, once the Minister appoints more than one person to the Tribunal as he is entitled to do, it is implicit that he has the power to appoint one of such persons as chairman or its equivalent. I think therefore that the Minister was not acting outside the scope of the Act when he appointed Mr. Wariithi as the chairman of the Tribunal.

Chairman in Regulation 21 must mean the chairman of the Tribunal as defined in Regulation 2 and that would be the duly appointed chairman, Mr. Wariithi. That would be its plain and ordinary meaning. In terms of section 16 of the Act the Minister has very wide and comprehensive powers to regulate the manner in which the Tribunal shall conduct its business and the procedure to be followed. The Minister has thought fit to appoint a chairman whose attendance is necessary before the Tribunal can have a quorum.

The Minister could have appointed a sole member to the Tribunal, thus giving him full powers. I cannot say the provision that the chairman's attendance is necessary before there is a quorum in any way interferes with or abridges the rights of any litigants or infringes the Act or its general scheme.

The Act and the Regulations are not exactly a model of draftsmanship, but in my view, Regulation 21 means what it says, and that is, when only two members of the Tribunal sit, one must be the Chairman, otherwise there is no quorum.

Mr. Khanna sought to rely on *R. v. Bird (1898) 2 O.B. 340*, but there the position was entirely different. In that case, a rule restricted the right of parties to appear before a tribunal. In the present case, the regulation in no way affects the rights of the parties but merely prescribes the composition of the tribunal before which they appear. I would therefore hold that the proceedings and the decision of the

Tribunal are a nullity as there was no quorum when the matter was heard.

I would allow the appeal, set aside the order of the High Court, and grant the appellant the injunction to restrain the respondent from enforcing the decision of the Tribunal in its case No. 135 of 1969 pending the disposal of the suit. The appellant in his appeal has abandoned the prayer for the injunction in relation to alienation and waste and that prayer stands dismissed.

In the circumstances I would award five sixths of the costs of the appeal and of the High Court to the appellant. I would not certify for two advocates.

DUFFUS, P.

I agree with the judgment of Mustafa, J.A. and as the Vice-President also agrees the appeal will be allowed in accordance with the order set out in Mustafa J.A's judgment.

SPRY, V-P.

I agree.