

UGANDA / JUDGMENT

Khan v Din (Civil Appeal No. 27 of 1955) [1956] EACA 2 (1 January 1956)

[1956] EACA 2

COURT

East African Court of Appeal

BEFORE

Wyndham J

CASE / FILE NUMBER

Civil Appeal No. 27 of 1955

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APPELLATE CIVIL

Before WYNDHAM, J.

ALI MOHAMED KHAN, Appellant

SIRAJ DIN, Respondent

Civil Appeal No. 27 of 1955

Landlord and Tenant—Orders of Rent Control Board to vacate and to pay rent— Increase of Rent (Restriction) (Enforcement of Determination and Orders of the Board and Appeals from the Board's Determinations and Orders to the Supreme Court) Rules of Court, 1950, rule 5— Application for stay of execution to Supreme Court after filing appeal—No previous application to Board -Competency—Whether Order XLI, rule 4 of the Civil Procedure (Revised) Rules, 1948, or inherent jurisdiction can be invoked.

A tenant was ordered by the Central Rent Control Board, to vacate his landlord's premises and to pay rent to the date of vacation. The tenant filed an appeal to the Supreme Court and, thereafter, applied there for stay of execution of the Board's orders, averring that, if he were ejected or paid the rent, pending the hearing of the appeal, he would suffer substantial loss. The landlord's advocate accepted that the tenant had quitted the premises, before hearing and did not oppose a stay of the order to vacate, but opposed stay of execution of the order to pay rent. It was accepted that the tenant had, at no time, applied for stay of execution to the Board.

Rule 5 of the Increase of Rent (Restriction) (Enforcement of Determinations and Orders of the Board and Appeals from the Board's Determinations and Orders to the Supreme Court) Rules of Court, 1950, is as follows:-

"5. (1) An application for a stay of execution for the purpose of filing an appeal shall be made either to the Board or to the Court after filing an authenticated copy in such Court under rule 2 and an application for extension of such stay pending the decision of the appeal may be made to the Supreme Court after filing an appeal as provided by rule 6.

(2) An application may be made to the Supreme Court for setting aside or varying the order of refusing or granting a stay of execution under subrule (1) and the Supreme Court may make such order as may to it seem just, as if no order had been made by the Board or by the Court...." ("Court" meaning "Subordinate Court".)

The tenant relied upon Order XLI, rule 4, of the Civil Procedure (Revised) Rules, 1948, alternatively, invoking the inherent jurisdiction of the Supreme Court.

Rule 12 of the Rules of Court, 1950, is as follows: -

"12. Order XLI of the Civil Procedure (Revised) Rules, 1949 (sic), in so far as it is not inconsistent with the provisions of these rules, shall apply to appeals under the Increase of Rent (Restriction) Ordinance, 1949."

Order XLI, rule 4 (1) is as follows: \$-\$

"4. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from, except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether

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the application for stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty. on application being made, to consider such application and to make such order thereon as may to it seem just, but such application shall in every case be made in the first instance to the Court from whose decree or order the appeal is taken. Any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside."

Held (5-8-55).—(1) The applicant ought to have applied to the Rent Control Board for a stay of execution of the order of the Board, before filing an appeal, as regulated by rule 5
of the Increase of Rent (Restriction) (Enforcement of Determinations and Orders of the
Board and Appeals from the Board's Determinatio Rules of Court. 1950.

- (2) Order 41 at rule 4 (1) is not available in case of an application for stay of execution of the order of a Rent Control Board, made after an appeal has been filed, since rule 5 of the Rules of Court, 1950, must be deemed to cover exclusively the field. Since the second state with the more general and earlier Civil Procedure (Revised) Rules, 1948. A Rent Control Board is not a court and rule 4 (1) expressly provides that in every instance application is first to be made to the court appealed from.
- (3) An applicant had his proper remedy laid down by rule 5 of the Rules of Court, 1950, and to allow him to flout the procedure prescribed and, then, to invoke an inherent and the whole an ambient to make breestate presented and, then, to invoke an ambient jurisdiction, would amount to an abuse of the process of the Court. Nevertheless, provided an applicant satisfied the Court that he had been following the procedure regulated by rule 5, stay would usually be granted, in case of orders to vacate, in the absence of special circumstances.
- (4) Although the applicant had not shown good cause, the respondent had not opposed stay, since the applicant had vacated the premises and stay of the order to vacate would be ordered.
- (5) Stay of an order to pay rent is not granted unless in exceptional circumstances. The applicant had not proved that payment of rent would entail substantial loss and, consequently, stay of execution was refused.

Stay of execution to vacate granted; stay of execution of order to pay rent refused.

Cases cited: Mohamed Hayat v. Noor Fatma w/o Sheikh Gul Mohamed, Civil Appeal No. 18 of 1953; Bhagwanji Premchand and Others v. Gomes and Others, Civil Appeal No. 52 of 1953; B. G. Vyas v. A. B. De Souza, (1954) 27 K. L. R. 120.

Morgan for applicant.

Kean for respondent.

[Editor's Note.-In C. A. No. 18 of 1953, an application for stay of the Board's order was made to a subordinate court in terms of rule 5 (1) of the Rules of Court, 1950, before an appeal was filed, but dismissed by that Court, because, before heard, an appeal had been filed. De Lestang, J., was, therefore, conceivably dealing with a case comprehended by rule 5 (2). He granted stay. He added, obiter that there seemed a grave lacuna in the Rules of Court, 1950, which contained no provision for stay, after filing an appeal and that it seemed within the inherent power of the Supreme Court to grant such a stay, in a fit case, once an appeal had been lodged. That is, he rejected by implication any view that the inherent jurisdiction could be excluded by the Rules of Court, 1950; the rules could not be, at one and the same time, comprehensive and yet deficient.

In Civil Appeal No. 52 of 1953, the applicant applied for stay to the Supreme Court, after filing an appeal, but had, at no time, applied for stay to the Board, or to a subordinate court. The respondent argued that the application could not be entertained under the Civil Procedure Rules, and initially, had to be made to the Board and that the inherent jurisdiction of the Court could not be invoked because the exclusive proper procedure had not been followed. It is not clear whether the respondent maintained also that Order XLI, rule 4 (1) could not apply

because there had been no prior application to the "Court" appealed from, in this case the Board. De Lestang, J., ruled in granting stay, that, because the procedure prescribed by the Rules of Court, 1950, had not been followed, stay was granted only by the "indulgence" of the Court. It is not clear in a short ruling whether he was there referring to procedure by prior application under rule 5 or under Order XLI, as both are part of the Rules of Court, 1950, but he rejected the submission that the inherent jurisdiction was excluded by the Rules of Court, 1950, as it seems it was by use of this power he cured the irregularity.

In an identical matter, viz. B. G. Vyas v. A. B. de Souza, (1954) 27 K. L. R. 120, it was said that there was no inconsistency between rule 5 of the Rules of Court, 1950, and Order XLI, rule 4 (1) in that the former supplemented the latter. Order XLI, rule 4 (1) applied to the case of an application for stay, only, after an appeal was filed and, as execution was likely to be swift after an order to vacate by a Rent Control Board, relief to the tenant (filling an obvious gap in the procedure), was granted to apply for stay immediately and before filing an appeal, making use of rule 5. If no resort was made to rule 5, before filing an appeal, then, after filing an appeal, rule 12 applied the procedure laid down by Order XLI, rule 4 (1); the word "Court" in rule 4 (1), by necessary implication, was extended to mean a Rent Control Board. The application was dismissed inter alia on the grounds that the applicant had not first applied to the Board, either under rule 5 or under Order XLI, rule 4 (1), which was a condition precedent of any application to the Supreme Court. The inherent jurisdiction was not invoked, nor had the applicant shown good cause for any indulgence.]

ORDER.—The applicant is a tenant of dwelling-house premises against whom an order was, on 25th May, 1955, made by the Central Rent Control Board ordering (a) his eviction from the premises on or before 31st July, 1955, and (b) that he pay rent up to the date of his actual vacation of the premises. He applies for stay of execution of both parts of the order pending the determination of an appeal from it, which he filed on 13th June, 1955. He has not, either before or after filing his appeal, applied to the Board for a stay of execution pending the filing or determination of the appeal, but makes his application to this Court, in the first instance.

Now the rules under which the applicant ought to have proceeded in applying for a stay of execution of the Board's order are the rules that have clearly been enacted for the purpose, namely the barbarously entitled Increase of Rent (Restriction) (Enforcement of Determination and Orders of the Board and Appeals from the Board's Determination and Orders to the Supreme Court) Rules of Court, 1950. And from rule 5 of those rules it is clear that this Court cannot, under them, grant or extend a stay of execution pending the decision in the appeal unless application has already been made to the Board, before the filing of the appeal, for a stay pending the filing of the appeal, and has either been granted or refused. In short, under those rules an applicant for

a stay cannot approach the Supreme Court in the first instance.

The applicant, having filed his appeal without adopting the above procedure contends however that this Court has jurisdiction to entertain his application for a stay by virtue of legislation or powers outside those rules of 1950, namely either under Order XLI, rule 4 (1) of the Civil Procedure (Revised) Rules, 1948, or, alternatively, by virtue of its inherent powers as preserved by the saving provisions of section 97 of the Civil Procedure Ordinance.

I may say at once that Order XLI, rule 4 (1) is manifestly inapplicable to an application for a stay of execution of an order of a Rent Control Board. To begin with, the Civil Procedure Rules were enacted before any rent control legislation had been introduced into Kenya or any boards set up under it. Secondly, rule 4 (1) of Order XLI speaks throughout of "the court" appealed

from and a Rent Control Board is not a court. Thirdly, even if, by extension, the Board could be argued to be a court for the purpose of rule 4 (1), the rule expressly provides that "application shall in every case be made in the first instance to the Court from whose decree or order the appeal is taken", which was not done in the present case. Fourthly, subject always to any inherent and overriding jurisdiction which this Court may possess, with which point I will deal presently, the specific Rules of Court of 1950 with which I have earlier dealt must be deemed to cover exclusively the field of appeals from orders of Rent Control Boards and to leave no room for the supplementing or modifying of them by the more general Civil Procedure Rules.

But the question of inherent jurisdiction is another matter. Section 97 of the Civil Procedure Ordinance provides that "Nothing in this Ordinance" (which by definition includes the Civil Procedure Rules) "shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court". Since these powers of the Court are inherent, section 97 *ex hypothesi* does not confer them; it merely draws attention to them. Thus the powers exist side by side with, and are supplemental to, not only the Civil Procedure Ordinance and Rules, but also the Rules of Court of 1950 which I have earlier considered, and in particular rule 5 of those rules. This view has been adopted more than once by this Court. I would refer in particular to orders made by my brother de Lestang, J., in Civil Appeal No. 18 of 1953, and Civil Appeal No. 52 of 1953 (both unreported) invoking the inherent jurisdiction to stay execution of the Board's order pending determination of an appeal therefrom that had already been lodged, notwithstanding that no application for a stay had been made to the Board in the first instance. In his order in Civil Appeal No. 18 of 1953, de Lestang, J., after interpreting rule 5 of the Rules of Court of 1950 in the same manner as I have done, went on to state: "Nevertheless, I fully agree with Mr. Nazareth that it is within the inherent powers of the Supreme Court to grant such a stay once an appeal has been lodged."

Whether this Court has such inherent powers, and whether this is a proper case for their exercise are, however, two different questions. The order of the Board in the present case was two-fold; first, an order for the applicant's eviction; secondly, an order for him to pay arrears of rent. Now in the case of an eviction order, it is well-settled practice that a Court will ordinarily grant a stay of execution, so as to preserve the status quo pending the decision on the appeal against it. But

such inherent jurisdiction is only to be exercised in order to promote the ends of justice or to prevent abuse of the process of the Court. Now in the present case the applicant had his proper remedy and appropriate procedure specifically laid down for him by rule 5 of the Rules of Court of 1950; that is to say, his proper procedure was to have applied to the Board for a stay before lodging his appeal. To allow an applicant to flout that procedure, without good cause, and then to invoke the Supreme Court's inherent powers, would itself be an abuse of the process of the Court. In the present case the point becomes of academic importance so far as a stay of execution of the eviction order is concerned, for learned counsel for the respondent landlord does not oppose a stay of execution of that part of the order, since he says that he is instructed, and is, in fact, aware, that the applicant has already gone out of the premises. But were it not for that fact, I should have hesitated before granting a stay even of the order for eviction, until satisfied that the applicant had been prevented by some good reason from following the procedure specifically laid down by the law, namely from applying to the Board for a stay before lodging his appeal. I do not say there was no good reason in the present case. I say, merely, that I should have required to be more satisfied on the point if this part of the application had been opposed.

With regard to that part of this application which is opposed, namely which asks for stay of execution of the order for payment of all rents due from the applicant to the respondent, this order, unlike the order for eviction, is not one in respect of which a stay will be granted in the absence of exceptional circumstances, for the considerations regarding preservation of a status quo which could not be later restored do not apply to it: money paid over can usually be paid back again. The position is the reverse. A stay will not be granted unless there do exist exceptional circumstances. The only ground on which the applicant asks for a stay of execution of this part of the order is that set out in paragraph 5 of his supporting affidavit, which is obviously framed to apply also, and probably
primarily, to the execution of the order for eviction, and which merely alleges "that substantial loss may result to the applicant" unless the stay order is made. It is not alleged why the payment-over of the rent, before he determination of the appeal, may cause substantial loss to the applicant. In short, no sufficient grounds have been shown why a stay of this part of the Board's order, should be granted.

In the event then, a stay of execution, pending determination of the appeal, is granted (for what it is worth) in respect of that part only of the Board's order which requires the applicant to vacate the premises in dispute.

With regard to the costs of this application, such costs will normally be ordered to be paid by the applicant seeking the indulgence of a stay. It is argued on the applicant's behalf by his counsel, Mr. Morgan, however, that if learned counsel for the respondent, Mr. Kean, had made it clear at an earlier stage than half-way through the addresses that he was not opposing the application in so far as it related to the order for eviction, much time and research would have been saved and the application might possibly not have been brought at all. Mr. Kean, on the other hand, states that he took it for granted that Mr. Morgan knew that this part of the application would not be opposed, because the applicant had already vacated the premises, a fact which, if true, Mr. Morgan appears to have been unaware of. In any event, nearly all the argument before me dealt

with the matter that was common to both parts of the order sought to be stayed, for it turned on the question whether this court had jurisdiction to grant a stay at all, that is to say a stay of any part of the Board's order. That being so, I see no ground for departing from the ordinary rule. The applicant must pay the costs of this application.

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