REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 931 of 2003

KOBIL PETROLEUM LIMITED……………………..APPELLANT

VERSUS

ALMOST MAGIC MERCHANTS LIMITED……..RESPONDENT

(An appeal from the determination/order/ruling of the Business Premises Rent Tribunal at Nairobi in Tribunal Case No.60 of 2002 between Kobil Petroleum Limited (Tenant) and Almost Magic Merchants Limited (Landlord) delivered on 21st November, 2003).

J U D G M E N T

1. The genesis of this appeal is a tenancy termination notice dated 21st December, 2001, which was issued by Almost Magic Merchants Limited (hereinafter referred to as the respondent), to Kobil Petroleum Limited (hereinafter referred to as the appellant). The appellant was a tenant, and the respondent the landlord of premises known as LR.No.209/7592 (hereinafter referred to as the suit premises). The respondent issued the termination notice to the appellant under Section 4(2) of the Landlord and Tenants, (Shops, Hotels and Catering Establishments) Act Cap 301, on the grounds that:

> ***"the landlord intends to demolish and construct a modern petrol station and shopping complex and cannot reasonably do so without obtaining possession of the premises and thereafter the landlord himself intends to occupy for a period of not less than one year the premises comprising the tenancy for the purposes of the business to be carried by him therein".***

2. In response to the notice, the appellant filed a reference to the Business Premises Rent Tribunal under Section 6 of the Landlord & Tenants, (Shops, Hotels and Catering Establishments) Act, Cap 301. Before the hearing of the reference commenced the appellant filed an application under Section 12(1)(j) of the Landlord & Tenants, (Shops, Hotels and Catering Establishments) Act, Cap 301, for an order that the respondent be ordered to give discovery of the documents which were in his possession or power relating to any matter in question on the reference. That application, which was not opposed, was granted on 22nd October, 2002.

3. On 15th January, 2003, the appellant having complained that the respondent had failed to comply with the order for discovery, the Tribunal ordered:

> ***"That the landlord to give discovery of all documents relating to matters in question in this reference. That is to say that the landlord is to make a discovery of documents which it wishes to rely on in this suit in the next 7 days thereof."***

4. In a further application dated 26th February, 2003, the appellant sought to have the termination notice set aside and his reference allowed, on the grounds that the respondent had failed to comply with the Tribunal order of 15th January, 2003 with regard to discovery. It was contended that the Landlord had failed to disclose crucial bank records and statements. In a ruling delivered on 25th April, 2003, the Tribunal dismissed the application on the grounds that the landlord had complied with the order for discovery. The Tribunal further held that if the appellant believed that the documents it was referring to were necessary, it could apply for witness summons for the bank to produce the documents.

5. During the hearing of the reference before the Tribunal, five witnesses testified on behalf of the respondent. These were; Maragwa Kahare, an architect, Samuel Kuria Ndungu, a director of the respondent, Boniface Murithi Wamae, a valuer, Joseph Kabunde Nganga, a quantity surveyor and Daniel Manduku, an architect.

6. Briefly the evidence of the witnesses was as follows: The respondent bought the suit premises in the year 2000. The suit premises was an old building used as a fuel station. The appellant were tenants in the suit premises at the time the respondent acquired the same. The respondent company in a special general meeting, resolved that a notice be served upon the appellant to terminate the tenancy, on the grounds that the respondent intended to demolish the building on the premises and construct a modern petrol station with a cafeteria and shops.

7. In pursuance of this intention, Samuel Kuria Ndungu, a director of the respondent, bought some machines and equipments in Dubai for a total sum of 165,700 Dirhams. Apart from the equipments the respondent had a sum of slightly over Kshs.2 million in cash which it intended to use in the project. The respondent further intended to obtain a loan from the bank on security of the suit premises which was valued at Kshs.18 million and the respondent's other property valued at Kshs.5.4 million.

8. The respondent commissioned Daniel Manduku who designed building plans for the construction of an ultra modern petrol station on the suit premises. The plans were duly approved by the City Council. Joseph Kabunde Nganga prepared a bill of quantities for the intended project with a valuation of Kshs.10,627,139/= as the cost for the project. The respondent therefore maintained that it had a serious intention of reconstructing the building on the premises, and had to demolish the existing building hence the notice to the appellant.

9. The appellant did not call any evidence. However, counsel for each party made submissions, each urging the Tribunal to find in favour of its client. For the respondent it was submitted that the respondent had proved on a balance of probabilities that it was entitled to an order for the termination notice to take effect. It was maintained that the respondent had established its intention to reconstruct the premises and had demonstrated its financial ability.

10. For the appellant it was submitted that the respondent had failed to discharge the burden of proof. It was maintained that the respondent had failed to avail crucial documents for inspection. The respondent had further not established with clear books of accounts, the identity of the landlord, or the landlord's ability to carry out the stated intention. It was pointed out that the approval for the building plans had expired, and that no certified structural drawings were submitted for approval. It was further noted that the appellant had not complied with the conditions of the grant subject of the title, as there was no consent for the alteration of the building. It was maintained that the respondent could not legally carry out any of the proposed developments. Further, it was pointed out that no permission had been obtained under the Petroleum Act or from the National Environmental Management Authority, for the proposed development.

11. Counsel for the appellant pointed out that the respondent's director who testified was an unreliable witness,

who failed to produce any document to confirm that the alleged equipment bought in Dubai were brought to Kenya. The financial ability of the company was also not established. The court was therefore urged to dismiss the reference.

12. In its judgment, the Tribunal found that the respondent had shown an intention to reconstruct the premises as per the building plans produced by its architect. The Tribunal held that although the approval for the plans had expired, obtaining an extension was not an insurmountable obstacle. The Tribunal noted that the respondent had produced bank statements showing a credit balance of over Kshs.2 million, as well as evidence of existence of property whose value would be sufficient to secure a loan facility of over Kshs.10 million. The Tribunal was further satisfied that the respondent had already purchased equipment worth over Kshs.3.3 million for its intended project. The Tribunal therefore allowed the landlord's notice to take effect and ordered the appellant to give up vacant possession by 28th February, 2004.

13. Being aggrieved by that judgment, the appellant has lodged this appeal raising 10 grounds as follows:

(i) The Tribunal erred in law in holding that the notice of termination of tenancy dated 21st December, 2001 complied with the requirements of the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act Cap.301 and was hence a valid notice.

(ii) The Tribunal erred in law or exercised its discretion on wrong principles when it declined to order the respondent to make discovery relating to the respondent's books of account and related documents.

(iii) The Tribunal erred in law and on the facts in holding that the respondent had established an intention to reconstruct the premises.

(iv) The Tribunal failed to appreciate that the respondent was not in a position to carry out the reconstruction either on the dates fixed for hearing or on 28th February, 2004 as:

(a) The approval of building plans from Nairobi City Council had expired and no extension had been sought;

(b) No approval of the building plans had even been sought from the Commissioner of Lands;

(c) No approval of the said plans had been sought under the provisions of the Petroleum Act;

(d) The respondent did not have the funds ready and available to carry out the proposed reconstruction and re-equipping the service station;

(e) The terms and conditions of the Grant of the land in favour of the respondent did not authorize the major portion of the proposed reconstruction;

(f) The proposed reconstruction was illegal in the circumstances; and

(g) The respondent did not have finance available to carry out the proposed project.

(v) The Tribunal failed to appreciate that Special Condition Number 5 of Grant registered as Number I.R.2894/1 permitted the land in question to be used only for petrol service station and tyre service and sales centre, and such development had already been carried with the approval of the Commissioner of Lands and was still in existence;

(vi) The Tribunal failed to appreciate that the shopping complex which the respondent proposed to construct consisting, inter alia, a supermarket, cafeteria and showrooms was not legally permissible.

(vii) The Tribunal failed to appreciate that the respondent had not even approached any financial

institution or anyone else for a loan, let alone obtained financing, for the proposed reconstruction and purchase of equipment needed to operate a service station.

(viii) The Tribunal failed to appreciate that there was no evidence regarding what equipment the respondent needed to operate the station and its value.

(ix) The Tribunal failed to appreciate or pay any regard to the fact that the respondent, despite numerous requests, failed to produce its books of accounts and related documents.

(x) The Tribunal failed to appreciate that the lack of aforementioned consents and approvals (and there was no evidence that any of them were forthcoming) placed an insurmountable obstacle in the path of the proposed reconstruction.

14. In support of the appeal, Mr. Esmail who appeared for the appellant pointed out that the principal ground upon which the appeal was anchored was ground No.3. He maintained that the Tribunal was wrong in finding that the respondent had a firm and settled intention to reconstruct the premises. Mr. Esmail argued that the Tribunal completely misapprehended the evidence that was adduced by the respondent's director, and therefore acted on wrong principles in determining the intention of the respondent. Mr. Esmail submitted that the Tribunal completely failed to evaluate the evidence and ignored the admission by the director that there were certain obstacles in the way of reconstruction.

15. Mr. Esmail further submitted that the evidence adduced on behalf of the respondent was not sufficient to prove that the respondent was financially able to undertake the development or that it had borrowed or made any arrangements with the bank. Mr. Esmail pointed out that the development intended to be undertaken by the respondent, could not be legally undertaken as there was no evidence of the necessary consents having been obtained from the authorities such as the Commissioner for Lands, National Environmental Management Authority (NEMA), etc. The approval obtained from the City Council in respect of the development had also expired. Mr. Esmail submitted that no evidence was adduced to prove that the equipments allegedly purchased by the respondent's director for the project belonged to the company, or that the equipments were imported into Kenya and customs declaration done or taxes paid.

16. Mr. Esmail maintained that on the evidence before it, the Tribunal could not come to the conclusion that there was a firm and settled intention. Referring to ***Auto Engineering vs Gonella [1978] KLR 248***, Mr. Esmail argued that reasonable prospects of the respondent's intention being effected could not be inferred, as no application had been made in respect of some of the approvals. He submitted that the "intention" must be distinguished from mere hope. It must be evidenced by reasonable prospects of the intention being carried out. Relying on ***Rehorn vs Barry [1956] 2 All ER 742***, Mr. Esmail submitted that there must be a legal ability to carry out the intention into effect. He maintained that in this case, there were so many legal obstacles that it must be concluded that there was no legal ability to put the intention into effect.

17. Mr. Esmail further pointed out that the Tribunal misdirected itself and prejudiced the appellant by ordering the respondent to make discovery of all documents "it wishes to rely on". Mr. Esmail argued that discovery is meant for disclosure of all documents in a party's possession, and therefore by limiting the discovery to production of documents which the respondent wished to produce, the appellant was prejudiced. Mr. Esmail further pointed out that the Tribunal misdirected itself in ruling that it was for the appellant to produce the documents it wished to rely upon. He maintained that it was not for the appellant to bring witnesses to prove the respondent's documents.

18. Mrs. Waweru who appeared for the respondent submitted that the appellant had not demonstrated that the National Environmental Management Act was applicable at the material time, or, that if it was applicable, obtaining the necessary consent was an insurmountable task for the respondent. Similarly, the appellant had not

demonstrated that obtaining the necessary consent under the Petroleum Act was an insurmountable task. With regard to the issue of discovery, Mrs. Waweru submitted that the Tribunal properly dealt with the issue. She observed that the rules relating to discovery under the Civil Procedure Act were not applicable under the Business Premises Rent Tribunal Act. Relying on ***Lavington Green Ltd vs John Njoroge Kinuthia HCA. 389 of 1995***, Mrs. Waweru submitted that the only necessary requirement was that the Tribunal conducts its inquiry in a manner that conforms to justice, equity and good conscious.

19. Relying on ***Betty's Cafés Ltd vs Phillip Furnishing Stores Ltd [1958] 1 All ER 607***, Mrs. Waweru argued that the facts establishing the intention of the landlord as stated in the notice, must be shown to exist at the time of the hearing of the reference. She argued that it was wrong for the appellant to refer to the state of facts before the hearing of the reference. Relying on ***Auto Engineering Ltd Vs Gonella & Another*** (Supra), She conceded that a "firm and settled intention" must be established on the part of the respondent. She noted that the intention of the respondent as stated in the notice was to construct "a modern petrol station and shopping complex". She observed that the notice was further supported by the evidence of the architect who testified that the development intended was reconstruction and modernization of the petrol station. Approved plans for the proposed reconstruction and modernization were also produced. Mrs. Waweru contended that there was no need for change of user as the premises were still being used for the original purpose. She maintained that even assuming that change of user was required, obtaining it was not an insurmountable task.

20. With regard to finances, Mrs. Waweru maintained that the respondent had established a firm and settled intention in accordance with the ***Auto Engineering vs Gonella case*** (Supra). She noted that it was enough that the respondent had bought equipment worth Kshs.3,645,400/= for the project. It was not necessary to produce evidence that the equipment had been transported from Dubai to Kenya. The respondent had further demonstrated its financial ability by producing a bill of quantities for the amount required in the construction, and evidence regarding properties intended to be used as security for a loan. Mrs. Waweru concluded that the Tribunal properly addressed its mind to the issue of intention and urged the court to dismiss the appeal as having no merit.

21. In reply to Mrs. Waweru's submissions, Mr. Esmail pointed out that Section 12(1)(j), gives the Tribunal powers to order discovery. He maintained that the Tribunal failed to order discovery in respect of crucial documents. In regard to the application of the National Environmental Management Act, and the Petroleum Act, that was an issue of law that can be raised at any time. Mr. Esmail contended that what was intended was not refurbishing of the petrol station but demolition and reconstruction. He therefore urged the court to reconsider the application afresh and allow the appeal.

22. We have carefully reconsidered and evaluated all the evidence which was adduced in the lower court. We have also considered the submissions made before us and the authorities cited. There are two preliminary issues which are of interest. Firstly, although the reference in the Tribunal was filed by the appellant, the appellant did not call any evidence. Therefore, the exact basis of the appellant's objection to the notice only came out during cross-examination, and in the submissions made by the appellant's counsel.

23. Secondly, on the issue of discovery, contrary to the submissions that were made by Mrs. Waweru, the Landlord and Tenants, (Shops, Hotels and Catering Establishments) Act Cap 301, Section 12 (j) empowers the Tribunal as follows: -

> ***"to administer oaths and <u>order discovery and production of documents in like manner as in civil proceedings before the High Court</u>, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or condition of tenancies, and to issue summons for attendance of witnesses to give evidence or produce documents or both before the Tribunal.*** (Emphasis added)

24. The above Section extends the application of Order X Rule 11 of the Civil Procedure Rules to proceedings before the Tribunal. Therefore in ordering the landlord "***to make a discovery of documents which it wishes to rely on in the suit***", the Tribunal erred by limiting the scope of the application of Order X Rule 11(1) which requires discovery of all documents which are or have been in possession or power of the party relating to "any matter in question in the suit." It was therefore wrong for the trial magistrate to limit the discovery to the documents which the respondent wished to rely on.

25. It is evident that in the application dated 23rd September, 2002 for discovery of documents, the appellant had requested that the respondent be ordered to give discovery of documents which were in the respondent's possession or power, relating to any matter in question in the reference, including but not limited to bank statements and building plans. The affidavit that was filed by the respondent in response to that application, and the lists of documents availed for inspection, included bank statements and all other documents.

26. In the notice of motion dated 4th March, 2003, in which the appellant requested for further discovery of documents allegedly omitted by the respondent, the appellant requested for:

(a) The balance sheets and profit & Loss accounts and financial statement of the landlord for the past 3 years,

(b) The correspondences exchanged between the parties' advocates during 2002.

(c) Bank documentations relating to payment on 9th January, 2003 of Kshs.448,815/= to Esmail and Esmail.

27. Although the appellant maintained that it was prejudiced by the failure of the trial magistrate to order the production of these documents, the appellant has not demonstrated the relevance of any of these documents to the reference before the Tribunal. We find that these documents did not go to the crux of the issue before the court, and the appellant was merely fishing for evidence. We find that no injustice was caused to the appellant by the error made by the trial magistrate.

28. The main issue before the Tribunal was whether the respondent had satisfied the Tribunal that it had a firm and settled intention to carry out the intention stated in the termination notice, of constructing a modern petrol station and shopping complex. It was argued by the appellant that the respondent did not have the legal capacity to carry out the intended project because it had not obtained the required approval from various authorities, and therefore the intended construction would be illegal.

29. In an effort to establish its intention, the respondent called evidence to show that it had architectural drawings which were approved by the City Council. The respondent also showed that it had a bill of quantities for the intended project. The building plans which were duly approved by the Council were for the construction of a modern petrol station and shopping complex. Although the plans had expired, the same having been initially approved, obtaining an extension of the approval would not be difficult.

30. As regards the approval for the intended construction from the Commissioner of Lands, the respondent did not require any change of user, the premises were being used as a petrol station and their intended reconstruction was simply to modernize the petrol station and include a shopping complex. The intended reconstruction was not inconsistent with any of the conditions of the lease for the premises. There was no evidence that the respondent had been denied approval by the Commissioner for Lands. Indeed, obtaining the approval of the Commissioner of Lands would not be an insurmountable task.

31. As a term of the lease, the respondent was under a duty to comply with the provisions of the Petroleum Act. There is no evidence that the respondent was in breach of any of the provisions of the Petroleum Act. The premises were already in use for sale of petroleum products. The reconstruction was not going to alter this

position. Again, if any consent was required, obtaining it would not be difficult.

32. As regards the authority from the National Environmental Management Authority, it is not clear whether the construction was subject to this Act. Nevertheless, assuming that it was, there is a procedure provided for dealing with any objections under the NEMA Act. There is no evidence that there was any formal objection to the respondent's intended project made to NEMA by any party. Noting that the premises were still going to be used for the same purpose for which it was already in use, there is no reason for us to speculate that the authority from NEMA for the project if required, would not be forthcoming.

33. Of greater concern, was whether the respondent had the financial ability to carry out the intended purpose. Although the respondent's director testified that he had bought some equipment worth over kshs.3.6 million for the intended project, he did not produce any evidence to confirm that the equipments which were bought in Dubai were actually brought to Kenya. There were no importation documents which were produced, nor were any documents for payment of any duty availed to the Tribunal. This coupled with the fact that the receipts for the purchase of the equipment were not in the respondent's name, cast doubt on the respondent's contention that the equipment were bought for the project.

34. The above notwithstanding, the respondent demonstrated that it intended to obtain money from the bank for the intended project. The respondent produced title deeds for properties together with valuations which confirmed that the respondent could obtain a loan of well over 10 million on the strength of those properties as security for the intended project. It is true that the respondent had not yet made an application to the bank for the loan. However, given the circumstances, it would not have been prudent for the respondent to approach the bank for a loan before resolving the issue of the appellant vacating the premises. Thus, it cannot be stated that the respondent did not have financial ability to carry out the intended reconstruction.

35. We come to the conclusion that the respondent did demonstrate that it had a firm and settled intention to carry out the intended reconstruction. The Tribunal was therefore right in allowing their notice to take effect. We therefore find no merit in this appeal and do dismiss it with costs.

Dated and delivered this 16th day of February, 2010

H. M. OKWENGU

JUDGE

R.N. SITATI

JUDGE

In the presence of: -

Karanja H/B for Esmail for the appellant

Wachira H/B for Mrs. Waweru for the respondent

Eric - Court clerk