REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 277 of 1996

TWIGA PROPERTIES LIMITED.....……..APPELLANT

AND

GADINOS PIZZAS LIMITED …….....……. RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Nairobi at Nairobi (Mr. Justice M. Ole Keiwa) given on the 4th day of July, 1996

IN

H. C. C. C. NO. 642 OF 1995)

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JUDGMENT OF THE COURT

The appellant, a limited liability company, is the owner of a piece or parcel of land known as Land Reference Number 209/2559, Nairobi and has a building thereon known as "Twiga Towers".

One shop in Twiga Towers was let by the appellant to the respondent, also a limited liability company. The letting was incorporated in a lease dated 20th December, 1989. The period of the tenancy in question was five years and three months from the 15th day of November, 1989. The tenancy would have, therefore, ended by affliction of time on 14th February, 1995; but the lease contained an option clause which reads as follows:

"That the lessor will on the written request of the lessee made not less than six months before the expiration of this lease and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the lessee herein before contained at the expense of the lessee grant to it a lease of the said premises for the further term of five years three months from the expiration of the present term at a fair open market rent to be agreed by the parties and containing the like covenants and provisos as are herein contained with the exception of the present covenant for renewal and the lessee on the execution of such renewed lease to execute a counterpart thereof AND in case of any difference touching this clause the same shall be determined by a single arbitrator in accordance with the Arbitration Act (Cap.49) or any statutory enactment in that behalf for the time being in force.

The option was, therefore, to be exercised on or before 14th August, 1994. It is common ground that it was not exercised in time. By its letter of 17th October, 1994 the appellant informed the respondent that its lease was expiring on 17th February, 1995 and called upon the respondent to discuss the matter.

Presumably the discussions were meant for the grant of a further or new or renewed lease. By its letter of 12th January, 1995 the appellant offered a new lease for a period of five years and three months from 15th February, 1995 at an annual rent of Shs. 1, 252, 800/= to be reviewed upwards by 15% annually. This offer was contained in a letter of even date annexed to the said letter of 12th January, 1995. It is common ground that the offer of the new tenancy was not accepted. The respondent responded to the offer of 12th January, 1995 by its letter of 16th January, 1995 wherein it introduced the words "renewal of our lease" in the heading of the letter and it appears that thereafter the words "renewal of the lease" kept on being repeated in further correspondence. However, as pointed out earlier, the offer was not accepted and the counter offer made by the respondent was not accepted by the respondent was not accepted by the appellant who filed suit for possession in the superior court on 28th February, 1995.

After the filing of the suit the appellant applied for summary judgment against the respondent. On 2nd November, 1995 when the summary judgment application came up for hearing the parties agreed to refer the matter in dispute for the sole arbitration by Mr. P. J. Ransley, advocate, in terms as agreed in a consent letter of same date.

The consent letter was signed by advocates for both parties which letter in material parts reads as follows:

(1) The arbitrator do determine the dispute between them on the issues that are disclosed from the pleadings.

(2) The decision of the arbitrator shall be final and binding on the parties hereto".

The consent order of the superior court referring the matter for the sole arbitration by Mr. Ransley, incorporated the aforesaid conditions agreed between the parties.

When the hearing commenced before Mr. Ransley on 26th January, 1996 the following issues were agreed:

(1) Did the defendant exercise his option to renew in accordance with terms of lease?

(2) If not, did the plaintiff waive the terms of the option clause and therefore is the defendant entitled to a new lease?

(3) In the event that there is to be a new lease, what is the rent and terms?

(4) If not, how much does the defendant pay by way of mesne profits.

(5) Costs and expenses.

The arbitrator with regard to the option to renew the lease said:

"So far as the terms of the option to renewal clause are concerned in my view this must be strictly adhered to otherwise the right to option is lost. The defendant should therefore have written to the plaintiffs on or about the 14th of August, 1994 stating that they required a new lease in which event the operation of the option clause would have become fully into effect. This, however, was not done and as a result the defendant lost its right to renew the lease on terms stated in the renewal clause."

The respondent had taken a stand tot he effect that it exercised the option to renew the lease by its letter of 14th September, 1994.

The arbitrator made a finding of fact, after hearing evidence, in regard to that letter of 14th September, 1998. That finding of fact showed up the respondent in a bad light. The arbitrator said:

"So far as the letter of 14th September, 1994 is concerned, I accept that it was written but I am not satisfied that it was written but I am not satisfied that it was written but I am not satisfied that it was served on the plaintiff as stated by Mr. Shah."

The arbitrator said further:

"Having held as I do, the defendant lost its right to have the question of fair open market raw determined by an arbitrator. That right only arose in the event that the option had been validly exercised and a dispute then arose with regard to one or other of the terms contained in the clause including of course the question of what the fair market rent was.

When the plaintiff offered a new lease to the defendant, this was new transaction outside the lease and gave the defendant a right a right to either accept it or reject it. In fact there were discussions on the rent and the plaintiff agreed to reduce the rent demanded in the offer but still the offer was not accepted and therefore no new lease arose."

The arbitrator , having decided the first issue in favour of the appellant, inquired into the second issue afore-mentioned. Waiver being in its nature nature estoppel by conduct, there could not be one unless one party showed that the other party made a representation either expressly or by conduct which it intended that party should act upon and it acted on it to its detriment. The position here was that the appellant offered a new lease, the terms of which were not accepted. There was no representation which intended to be acted upon. Pure and simple a new contract of lease which was offered was not accepted when the old lease came to an end by effluxion of time. The arbitrator dealt with the issue of waiver and estoppel by conduct as raised by Mr. Kitonga. The respondent's case was that, as a result of the conduct of the appellant the appellant had waived its right to six months notice before the expiration of the lease by virture of its conduct in holding discussions with the respondent and offerring the respondent a new lease on the terms set out in the letter of 12th January, 1995.

The arbitrator, after going into the issue of estoppel and arguments of Mr. Kitonga said:

"In the defence dated the 23rd of March, 1995, the defendant alleged in paragraph 5, "the plaintiff is estoppel from enforcing its rights by conduct and relationship with the plaintiff. The defendant sought to rely on the action of the plaintiff in offering him a new lease on the terms contained in the letter of 12th January, 1995 and by entering into discussions with the defendant in regard to a new lease including a discussion of a new rental."

In other words, the arbitrator did conclude that there was no waiver of strict compliance of the exercise of the option clause on part of the appellant and that the offer of a new lease did not amount to such a waiver. That is correct as the respondent did not act to its detriment on any representation made by the appellant.

The learned judge, with respect, erred in going to the extent of making a finding of waiver on part of the appellant. Again with respect, waiver could not have been founded by the judge when, as is common ground, he did not even have the proceedings before him which proceedings set out the issues and facts.

Estoppel is a rule of evidence. The learned judge went to the extent of saying:

"although the referral to arbitration is not stated to be under any particular provision of law, I need to deal with this aspect <u>in view of my finding</u> (emphasis supplied) that in failing to determine that the plaintiff was estoppel as pleaded in the pleadings the doctrines of waiver and estoppel are issues of law in the final analysis and as such they give court the basis upon which to set aside the award on an error of law."

With respect, the learned judge erred when he made fundamental finding not based on what could in fact support a conclusion as to waiver or estoppel. However, we have already pointed out that the arbitrator did go into the issues of waiver and estoppel.

The arbitrator had before him an expired lease for a period of more than 5 years. Any lease for a period exceeding five years take the tenancy out of the Landlord Tenant (Shops, Hotels & catering Establishments) Act, Cap 301, Laws of Kenya. The arbitrator was quite aware of this situation. He held that the lease having expired and no new tenancy having come into existence, the respondent had to vacate the suit premises. The learned judge however, quite erroneously, concluded that the respondent became tenant to the appellant by holding over. With respect, the case of Dhupa v. Birdi [1967] E.A 568, relied on by the learned judge had no relevance to the issue before him. In that case, when the tenant held on to the residential flat after the termination of his months tenancy, he became a statutory tenant as the flat became subject to the Rent Restriction Act by virtue of an amendment enacted on 20th December, 1966. That case has no relevance whatsoever to business tenancies which are subject to Cap 301, aforesaid. Again, with respect to the learned judge , he was not called upon to decide if the respondent became a tenant by holding over.

The learned judge, with reference to whether or not the reference to arbitration was to ask the arbitrator to decide if the option to renew the lease was exercised, said that it was incorrect to say that the reference "did not have a bearing in the option clause which was one of the issues to be determined by arbitration." It becomes difficult to see what the learned judge had in mind when he said what has just been quoted. There was, however no doubt that the reference to arbitration was not in respect of assessment of rent as provided for in the option to renew clause. The reference was under the Civil Procedure Act & Rules. The disputes as disclosed in the pleading s were referred to arbitration and arbitrator properly framed the issues he had to decide and such issues were not objected to by the respondent . In any event the issues were properly framed in the light of the pleadings.

We have not dealt with each ground of appeal as set out in the memorandum of appeal as it is not necessary. The grounds overlap to such a considerable extent that the exercise of dealing with each ground would be futile.

Mr. Kalove for the appellant argued that the parties, having agreed to treat the award as final and binding and that agreement being made a part of court consent order, were not entitled to challenge the award. In support of a this argument he relied upon the case of Flora N. Wasike vs. Destimo Wamboko [1992-88] 1 KAR 625 wherein it was held that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation. There was no fraud, mistake or misrepresentation involved in the consent order, he urged. That is certainly so. The consent order to refer the disputes to arbitration and to be found by the award was not entered into as a result of any of the said factors. But do the principles as regards setting aside a consent judgment apply here? In the case of H. R. Shah vs. Westlands General Stores Properties, Ltd. & Another [1965] E.A. 642 the predecessors of this court held that a consent order made before the Deputy Registrar fixing the amount of the mesne profits was binding and there was no need for the judge to hold or order any further inquiry to determine the amount of the mesne profits and that the judge correctly ordered mesne profits to be paid in accordance with the consent letter.

We think both counsel were acting within the ambit of their authority when they entered into the agreement to refer the disputes to arbitration and further agreed to be bound by the arbitrator's award . Having so agreed, and having had the ostensible authority to do so, unless the arbitrator acted dishonestly, fraudulently or in a manner as to lead one to believe that he was utterly wrong (and there were no such allegations) the award is binding .

The argument that the judge could have remitted the matter back to the arbitrator to decide on the 'undecided' issues, could stand if the arbitrator did not decide the issues. But in this instance he decided the matter in terms of the issues.

Accordingly, in our judgment, there was no error of law on the face of the award and the learned judge was not justified in setting it aside.

It follows therefore that the appellant is entitled to have the award restored. We therefore allow the appeal, set aside the ruling and order of the High court and restore the ruling and order of the High Court

and restore the award in its entirety and that award may now be converted into the judgment of the superior court. The appellant will have costs of this appeal and costs of proceedings in the High Court.

Dated and delivered at Nairobi this 5th day of June, 1998.

A.M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL