REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPLICATION NO. NAI. 233 OF 1998 (92/98 UR)
CORAM: GICHERU, SHAH & OWUOR JJ.A
BETWEEN

JOHN NJOROGE MICHUKI.....APPLICANT
AND
KENYA SHELL LIMITED.....RESPONDENT

(An Application for stay of execution in an intended Appeal from a decision of the High Court of Kenya at Nairobi (Mr. Justice S. Amin) dated 26th May, 1998 in H.C.C.C. NO. 1894 OF 1997)
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RULING OF THE COURT

The applicant, Mr. John Njoroge Michuki, is the landlord of all that piece of parcel or land known as title number Loc.12/SUB-LOC. 1/1230/6 situated in Murang'a registration district. This title is leasehold, that is, he holds the said parcel of land (hereinafter referred to as "suit premises") for a term of 99 years from 1st day of January, 1972 from the County Council of Murang'a.

By a sub-lease dated 31st day of August, 1988, the applicant leased to Kenya Shell Limited, the respondent, the suit premises for a term of 10 years from the 1st day of August, 1987 at an annual rent of Shs.60,000/=. The said sublease expired by effluxion of time on 31st day of July, 1997.

The respondent had, with the consent of the applicant, sublet the suit premises to Kangema Petrol station Limited, a limited liability company in which the applicant is a director.

One of the terms of the said sub-lease was that the respondent, as tenant, was permitted to make such additions alterations or replacements to the building then forming part of the suit premises to enable the respondent to properly utilize the suit premises as a petrol filling and service statiTohne. respondent had constructed, on the suit premises, underground tanks, a suitable canopy and all other apparatus for the efficient running of a petrol filling and service statiTohne. respondent had covenanted with the applicant as follows per clause 1(i) of the lease:

> "***(i)At the end or sooner determination of the lease or any renewal thereof to yield up the premises together with the buildings and improvements erected and being thereon (excluding all the equipment and machinery installed in or on the premises by the lessee which shall remain the property of the lessee) in such repair and condition as shall be in accordance with the lessee's covenants herein contained"***

In addition to what is stated in clause 1(i) of the lease, just reproduced, it was also agreed between the parties as follows:-

Clause 3(b)

> "***At the expiration or sooner determination of the term hereby created or any renewal thereof the lessee shall at its own expense be entitled to remove all its pumps, tanks, pipes and other equipment fittings and fixtures whatsoever and wheresoever placed on or upon or under the said premises or any part thereof the lessee making good at its own expense any damage caused by such removal as aforesaid."***

It is the construction of the above two covenants which is the bone of contention between the parties here as well as in the superior court. In addition the applicant places reliance on the issue as to what may constitute removable fixtures and permanent fixtures. The learned judge (Sheikh Amin J) concluded that the underground tanks are equipment and fixtures in terms of clause 3(b), supra and made the following order:-

> ***"The plaintiffs be restrained from receiving and/or dispensing or in any other way dealing in Petroleum products from the defendant's tanks, pumps and/or any other equipment, fittings or fixtures whatsoever at the plaintiff's petrol station situated at title number LOC.12/SUB.LOC.1/123O/6, Murang'a***"

At the same time the learned judge declined to grant order sought by the applicant. That order sought was:

> ***"The defendant by itself, its servants or agents be restrained until the hearing and the determination of this suit or until such time as this Honourable court deems fit, from demolishing and/or removing any buildings and improvements being contained in or on the premises known as Title Number LOC.12/SUB.LOC.1/1230/6***

The learned judge did not consider the issue as to whether or not the tanks and the canopy could be landlord's (applicant's) fixtures and therefore not removable by the tenant (the respondent). At least it is arguable that the underground tanks and the canopy could well form part of the buildings and improvements erected and being thereon. It is stated in Hill & Redman's Law of Landlord and Tenant, 16 Edition, page 522, as follows:-

""422. Articles attached only for use as chattels.

> ***- Where an article is actually attached to land or to a building the rule to determine whether it is a chattel or a fixture, is to consider in the first place whether it can be removed without irreparable damage to itself (emphasis supplied) or to the land or the building, and in the next place whether the annexation was for the permanent and substantial improvement of the freehold (in this case leasehold) or merely for a temporary purpose, or for the more complete use and enjoyment of it as a chattel."***

In the case of Smith v. City Petroleum Co. Ltd [1940]1 All E.R. 260 the headnote reads:

> ***"Petrol pumps affixed to tanks embedded in the ground are the tenant's fixtures, and are removable within a reasonable time after the determination of the term. If not so removed, the property in the pumps passes to the landlord, and a subsequent tenant takes no interest in them."***

In fact in the Smith case it was admitted that the tanks were fixtures and passed to the landlord, but the issue there was whether the pumps pass to the landlord. In the instant case the issue is in respect of the tanks and canopy only.

Upon consideration of what is stated in Hill & Redman and in view of clause 1(i) of the lease it is arguable whether or not the underground tanks and the canopy well form part of the landlord's fixtures. That satisfies the first of the two limbs this court considers when granting an injunction such as sought

here, that is, that the intended appeal is not frivolous. It is also a matter for full argument in due course, that, the apparent conflict in clause 1(i) and 3(b) of lease has to be eventually resolved and perhaps can be resolved by reference to the law relating to landlords and tenants.

What would happen if the respondent was allowed to remove the canopy and the underground tanks? The canopy would be destroyed. It will not exist any more. The tanks would also be destroyed. They will not exist any more. The same will probably be of no use to anyone. Removing tanks embedded in concrete, and underground, will be, in our view, a major exercise and it is perhaps for this reason that the learned judge referred to "modalities related to removal of the tanks in question and the making good of any incidental damage are to be worked out by the parties." The canopy is there. The tanks are there. If the appeal succeeds and if these are removed, the success would be nugatory.

We would therefore allow this application and order that the respondent be restrained from executing the order for removal of the tanks and the canopy pending the hearing and determination of the intended appeal. We would also order that the costs of this application be costs in the intended appeal. These are our orders.

Dated and delivered at Nairobi this 23rd day of October, 1998.

J. E. GICHERU

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL