IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, KWACH & SHAH, JJ.A.)

CIVIL APPEAL NO. 205 OF 1995

BETWEEN

NARSHIDAS & COMPANY LIMITED……..………APPELLANT

AND

NYALI AIR CONDITIONING AND REFRIGERATION SERVICES LIMITED…..RESPONDENT

(Appeal from the judgment of High Court of Kenya at Mombasa (Mr. Justice Wambilyangah) dated 27th September, 1995

IN

H.C.C.C. NO. 433 "B" OF 1995

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JUDGMENT OF THE COURT

Although fifteen (15) grounds of appeal have been raised in this appeal, the appeal revolves around two fundamental issues which are:

1. Was the superior court (Wambiliangah J.) right In proceeding to strike out the appellant's (plaintiff's) suit when there was, before him, no such application filed by the respondent (the defendant)?

2. Was the superior court right in holding that it had no jurisdiction to deal with the issues raised As the tenancy in question was one within the ambit Of the Landlord & Tenant (Shops, Hotels & Catering Establishment) Act, Cap 301 (the Act), Laws of Kenya, especially when the plaintiff was Seeking the protection of the superior court against unlawful eviction in the face of a notice to quit which was not in the statutory from as mandated by section 4(1) of the Act?

It was stated by this court quite clearly in the case of Manaver N. Alibhai t/a Diani Boutique vs. South Coast Fitness & Sports Centre Limited, Civil Appeal No. 203 of 1994, (unreported) as follows:

"The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act States in very clear language that a controlled tenancy shall not terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy

shall be altered, otherwise than in accordance with specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice."

The notice to quit purportedly relied on by the defendant in this appeal is by no means a notice which in any way complies with Form A as prescribed in the Act. Such a notice can only have been given pursuant to the provisions of section 7(1)(g) of the Act.

For the purposes of this appeal we must accept that the tenancy of the plaintiff was a controlled one as the superior court has so found. The notice to quit given or issued by the defendant was clearly void and had no effect in law on the plaintiff's tenancy and the plaintiff was under no duty, legal or otherwise to react to it as clearly stated in the DIANI BOUTIQUE case (supra). The method of terminating a controlled tenancy was clearly expounded by this court in the case of TIWI BEACH HOTEL LTD vs JULIANE ULRKE STAMM, (1990)2 KAR 189 and we see no need to repeat it here.

We does a controlled tenant confronted with an illegal threat of forcible eviction do? He cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. That Tribunal has no jurisdiction to do so as was held by High Court in the case of The Republic vs Nairobi Business Premises Rent Tribunal & Others, ex parte Karasha, (1979) K.L.R. 147 and also in the case of Re: Hebtualla Properties Limited, (1979) K.L.R. 96.

The learned judge was therefore in our view clearly wrong in holding that the superior court had no jurisdiction to hear the matter before him. There was clearly jurisdiction to deal with the matter.

We would also point out that it was not open to the judge to proceed to strike out the plaint when there was no application to do so before him and especially when the parties were still arguing whether or not the court could grant the injunction sought. That was unprocedural and would create a dangerous precedent if permitted. The remedy of striking out is to be used sparingly and only in the cases where the plaint is incontestably bad and that too when the court is properly seized of the matter upon a proper application, subject also to the remedy of allowing or ordering an amendment of the plaint if an amendment would cure the defect.

It is quite obvious that the superior court had the jurisdiction to adjudicate upon the issues before it. It is also quite obvious that that court was duty bound to grant the injunction sought.

In the upshot, we allow the appellant's appeal, set aside the decree of the superior court and substitute therefore an order reinstating the plaint and granting the injunction sought by the appellant in its Chamber Summons dated 7th June, 1995 with costs. The appellant shall also have costs of this appeal.

Dated and delivered at Nairobi this 9th day of May, 1996.

J.E.GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL