



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Kwach, Omolo & Shah JJ A)

CIVIL APPEAL NO 48 OF 1995

Between

HASSAN MBARAKAPPELLANT

AND

NORTH COAST FISHERMEN'S

CO-OPERATIVE SOCIETY LIMITEDRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Justice Wambilyangah) dated 17th June, 1993

in

HCCC No 27 of 1986)

JUDGMENT

On 4th March, 1985 the appellant entered into an agreement in writing with the respondent whereby the appellant hired the respondent's motor boat M V Ushirika for a fixed period of one year which period was to end on 28th February, 1986. The appellant had earlier repaired MV Ushirika at a cost of Ksh 64,187/- apparently whilst using the same prior to 1st March, 1985. The rental (hire-charges) of MV Ushirika was agreed at Shs 7,000/- per month. This rental was agreed to be paid in terms as shown in clause 11 of the said agreement. We set out all the said clause below:

“11. The rent accruing to the society during this period (outside the lease) shall be deducted from the cost of repair as follows: 6 months @7,000/- = 42,000/- balance Kshs 22,187/-. This balance of Kshs 22,187/- shall be recovered by the lessee from the rent payable to the society during the rent period as follows:

March 1985 - Shs 7,000/-

April 1985 - Shs 7,000/-

May 1985 - Shs 7,000/-

June 1985 - Shs 1,187/-

Total - Shs 22,187/-”

The agreement in question did not provide for what was to be done in the event of the appellant’s failure to pay the rent.

When opening his arguments Mr H A T Anjarwalla for the appellant took us through the relevant clause in the said agreement and based his submissions primarily on there being no default clause, that is to say, what was to happen if the appellant failed to pay the rent when due. Mr Anjarwalla urged that as there was no clause entitling the respondent to take possession of its motor boat in the event of non-payment of rent, the respondent had no right to repossess the motor boat.

The learned judge in the superior court had come to the conclusion that once there was non-payment of rent by the plaintiff for the 3 consecutive months, the defendant as the innocent party was perfectly entitled to elect to treat the contract as determined. The learned judge considered the aspect of non-payment of rent carefully and in our view correctly came to the conclusion that the respondent was properly entitled to terminate the contract by notice as it did upon non-payment of rent.

We cannot accept Mr Anjarwalla’s submissions to the effect that the respondents could not repossess the motor boat in the event of non-payment of rent (which rent was admittedly not paid) and that the respondents were still bound to treat the contract in question as subsisting.

That is too simplistic a view. We cannot subscribe to the submission by Mr Anjarwalla to the effect that the respondent should have waited for the expiry of the contract period despite non-payment of rent and that the respondent should have sued for recovery of rent as and when it was unpaid. This is a fallacious argument.

Mr Anjarwalla has relied upon the authority of *Jiwaji & others vs Jiwaji & another* [1968] EA 547 to support his submissions. This case is authority for the proposition that if necessary a term will be implied to give effect to an agreement.

In the *Jiwaji* (supra) the then Court of Appeal the *ratio decidendi* in the case of *Campling Bros vs United Air Services* (1952), 19 EACA 155 that is to say that a necessary term must be implied into the agreement to give it efficacy in accordance with the clear intention of the parties.

The agreement in question is what we would call a home-made agreement. If the parties were asked, prior to breach, what was to happen in the event of non-payment of rent, the obvious answer would have been, the contract would come to an end; there is no more to it.

We need not go into all grounds of appeal as the situation is clear. There was a fundamental breach of contract on part of the appellant, that is non-payment of rent and the respondent was entitled to terminate the contract.

The appeal is dismissed with costs. The learned judge did not deal with the counter-claim. There is no cross-appeal. Mr Kimani for the respondent has stated that his client society is not really interested in the counterclaim. The same is dismissed with no order as to costs.

Dated and delivered at Mombasa this 18th day of January 1995 .

R.O KWACH

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL

A.B SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR