REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 187 of 1994

ACHKAY HOLDINGS LTD…………………………...……… APPELLANT

AND

N. M. SHAH TRADING IN THE NAME & STYLE OF BRAIDWOOD COLLEGE…………… RESPONDENT

(An appeal from Ruling/Order of the High Court of Kenya at Nairobi (Hon. Justice A. B. Shah) dated the 26th October, 1994

IN

H.C.C.C. NO. 2190 OF 1994)

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JUDGEMENT OF THE COURT

This is an appeal against a decision of the High court of Kenya at Nairobi made on an application by the Plaintiff, now the appellant herein, to strike out the defence and enter judgment in its favour pursuant to Order VI Rule 13 of the Civil Procedure Rules against the Defendant, now the respondent herein, on the grounds that the defence so filed is dishonest, unfounded, is designed to obstruct and delay the expeditious disposal of the action, is frivolous and/or otherwise an abuse of the process of the court. The learned judge (Shah, J. as he then was) declined to grant the application and dismissed it with costs. From that decision the appellant has appealed.

The facts which are largely not in dispute are that the appellant is the landlord of a building known as Oshwal House situate on Plot L.R. No. 209/539, Tom Mboya Street, Nairobi. The respondent occupies the third floor of the said premises and runs a commercial college known as Braidwood College. By a letter dated 19th June, 1991 written by the respondent and addressed to the General Secretary of the former proprietor of the suit premises i.e. Oshwal Education and Relief Board, the respondent agreed to pay progressively increased rent and hand over vacant possession of the suit premises occupied by him within six months in the event of the sale of the suit premises which was being contemplated.

It would appear that the appellant was subsequently registered as the proprietor of the suit premises on 10th January, 1994 and two weeks thereafter by its advocate's letter of 24th January, 1994 it gave six

months notice to the respondent to hand over vacant possession of the suit premises. It is worthy of note that that letter was conveniently omitted from the record of appeal and was neither availed to us.

In his written statement of defence the respondent averred inter alia that the transfer and change of ownership of the suit premises was not communicated to him at the material time and that, moreover, he was entitled to enjoy the benefit of "the lease" of five years and one quarter entered and agreed upon between him and the previous proprietor which period subsisted until at least 30th June, 1996.

When the application to strike out the defence and enter judgment came before the High Court it was urged by Mr. Lakha (as he then was), counsel for the appellant, that since the respondent had not traversed the specific allegations of fact made by the appellant in its plaint they are deemed to be admitted by the respondent; and consequently, his defence is vexatious and ought to be struck out. The learned judge rejected this submission and dismissed the application

Mrs. Rawal, for the appellant, repeated and developed these submissions, vigorously urging in the main, that it was an error on the part of the learned judge to hold that the commitments of the respondent in the letter of 19th June, 1991 did not enure to the benefit of the appellant and that there was no privity of contract between the parties to enable the appellant to rely on the said letter to obtain possession of the suit premises. She sought to persuade us to reverse the finding by the learned judge that there were triable issues and that the defence was not incontestibly bad.

The summary procedure under Order 6 rule 13 can only be adopted when it can be clearly seen that a cause of action or defence is on the face of it obviously unsustainable and should be applied only in plain and obvious cases. The learned judge refused to grant the application because the pleadings involved serious unresolved issues which could only be determined at the trial. In our view, the conclusion he reached is unassailable. The letter of 19thJune, 1991 requires serious investigation and construction. The learned judge could not at that stage rule whether it was a lease or not as he did not have the benefit of either oral or documentary evidence. On examination and consideration of the pleadings we are satisfied that, in the circumstances, the decision of the learned judge was fully justified and we do not interfere with it. We would dismiss this appeal with costs.

It is so ordered.

Dated and delivered at Nairobi this 6th day of April, 1995.

J. M. GACHUHI

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL