REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI
(CORAM: GACHUHI, AKIWUMI & LAKHA, JJ.A)
CIVIL APPLICATION NO. NAI 113 OF 1995 (NAI 49/95 UR)
BETWEEN

KAPSET AGENCIES LIMITED.....APPLICANT

AND

SARJIT SINGH CHODA

(Also known as SURGIT SINGH CHODA .....RESPONDENT

(Application for stay of execution in an intended

appeal from a Ruling of High Court of Kenya at

Nairobi (Mr. Justice Bosire) dated 9th May, 1995

in

H.C.C.C. 472 OF 1994)

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RULING OF THE COURT

This is an application under Rule 5(2)(b) of the Court of Appeal Rules for a stay of execution pending an intended appeal.

By a plaint dated and filed on 3rd February, 1994, in the High Court of Nairobi, the Plaintiff (now the respondent) sought possession of premises known as L.R.209/4441 (suit premises) which he had demised to the defendant (now the applicant) by a lease dated 9th December, 1988 duly registered in the lands Titles Registry as No.I.R./1539/16 on 22nd March, 1989 for a term of five years and three months covering from 1st November, 1988 at a monthly rental of K.Shs.35,000/-. The applicant went into possession and paid the agreed rent, but refused to deliver upon suit possession and vacate the same on the expiry of the said term of five years and three months on 31st January, 1994.

The respondent also denied Meshe Pupits and other reliefs. By its defense dated 6th April, 1994 the applicant pleaded, inter alia, that in or about October 1993 the respondent agreed with the applicant that the tenancy will continue from month to month at a monthly rental of Shs.60,000/- with effect from 1st February, 1994 and that, in any event, the applicant's tenancy had provisions for termination otherwise

than by breach of covenants. These were the two main defense material to the present application and which had been urgent before the superior court. By a Notice of Motion dated 16th March, 1994 the respondent applicant for summary judgement as prayed in the plaint under Order XXXV rules 1 and 2 of the Civil Procedure Rules.

The applicant by its affidavit sworn on 21st April, 1994 raised, in addition to the defence in the defence that the respondent agreed with the applicant that its tenancy will continue from month to month at a monthly rental of Shs.60,000/-, a further defence and the said tenancy because subject to the provisions of the landlord and tenant (shops, Hotels and Catering Establishments) Act, Cap.301 (the Act) because in or about August, 1992, the entire shareholding of the applicant company has purchased by a direction of the applicant, his brother and his son creating a break in the said tenancy so that the tenancy ensued left the balance of the outstanding tenancy for a period of less than five years by a supplementary Affidavit sworn on 6th September, 1994 the applicant raised yet a further additional defence that the said bearer constituted a tenancy for a term of less than five years and was consequently governed by the Act. The application for summary judgement was heard by Bosire, J. and he delivered his Ruling on 9th May, 1995. He held, inter alia, that the tenancy was not and did not become subject to the provisions of the Act on any of the three grounds urgent for the purpose, rejected all the defences raised and held there by the triable issue. The learned judge accordingly entered judgment for the respondent for possession and Meshe pupits to be assessed by the Deputy Registrar.

Being dissatisfied with the said Ruling the applicant filed a Notice of Appeal in accordance with rule 74 of the Rules of this Court and has now filed this application for a stay under Rule 5(2)(b) of the Rules of this Court. The principles governing the exercise by this Court of its jurisdiction on such an application and now well settled.

They are two: first, the applicant must show that he has an arguable appeal and, record, this court should ensure that the appeal, if successful, should not be nugatory. Mr. Gautama, for the respondent, covered, properly in our opinion, the second condition but challenged that the appeal was arguable. In his submission, the appeal was frivolous.

Accordingly, the appeal is an arguable one.

Mr. Sehmi, for the applicant, contended that since the lease was admittedly registered on 22nd March, 1989 there was less than five years to 31st January, 1994 which is the date the respondent claims was the date of the expiry of the lease. In that case the tenancy thereby created was a controlled tenancy within the meaning of the Act. He relied upon section 32 of the Registration of Titles Act, Cap.281, for the proposition that only when the lease was registered, the land passed "in the manner on subject to the agreements, conditions and contingencies" set out in the lease. S.32 reads thus:

> "No instrument, until registered in the manner herein before described, shall be effected to pass any land or any interest therein ....."

He relied heavily on Hege Holdings limited vs Lavarini's Restaurant Ltd and another. Civil Appeals Nos.48 or 49 of 1980 (consolidated) this decision of the then Court of Appeal was delivered on 5th November, 1981. But section 32 aforesaid was amended by the statute Law (Miscellaneous Amendments) Act. 1989 No.20 of 1989 by inserting the following sub-sections to the existing section:

> "(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract".

It is unfortunate that more of the ..... referred to this amendments. It is, in our judgement, decision on this issue. The lease therefore, clearly provides for the duration of the lease as being exceeding five years. Under section 2 of the Act, a tenancy for a period exceeding five years is excluded from the definition of "controlled tenancy" for the purposes of the Act if the tenancy is created by an agreement which has been reduced into writing. In our judgement, the execution of a lease embodying the terms of an agreement is on reducing into writing of that agreement so that the tenancy is not controlled.

The respondent is relying on a tenancy for a period exceeding five years created by an agreement which has been reduced into writing by virtue of the lease. To hold otherwise would lead to absurdity. In the result, the applicant's constitution is invalid and does not raise a triable issue.

Second, it was submitted that in or about August, 1992 the entire shareholding of the applicant company has purchased by a director of the applicant, his brother and his son with the knowledge and consent of the respondent, a break was created in the said tenancy leaving the balance of the outstanding tenancy for a period of less than five years with the result that the said tenancy became subject to provisions of the Act. This submission is misconceived at all times the tenancy remained in the name of the applicant company which is a limited liability company, on entity distinct from its directors and/or shareholders in accordance with the decision of the House of Lords in Solomon v Solomon & Co. Ltd. (1897) A.C.32. The learned judge dealt with this issue on the same lines and rejected it and we likewise find no merit in it.

Third, the applicant says that the lease contains provisions for termination otherwise than by breach of covenants within five years from the commencement thereof and under S.2 of the Act this makes the tenancy a controlled tenancy within the meaning of the Act. In our judgement, we do not find such a provision in the lease. Reliance is placed upon the standard issued covenant contained in the lease for re-entry in certain events. The events here are bankruptcy and others of an allied character. Is it a provision for termination within five years from the commencement of the term? We say no for the right of reentry may occur after five years but within the duration of the lease. There is the uncertainty when it will happen, if at all. If the event happens actually within five years it is even in such a case not "a provision for termination .....within five years.

Finally, reliance was placed on an alleged agreement made in or about October, 1993. No writing was produced, the respondent through his Advocates wrote to the defendant on 3rd August, 1993, 17th November, 1993, 30th November, 1993, 11th January, 1994 and 20th January, 1994 but the applicant did not respond to any of there letters Nor did it at any time remind the respondent or allege that such an agreement had been recorded in or October, 1993 or at any other time ..... his to possession.

We find this is a show defence and a belated afterthought on the part of the applicant. The learned judge also rejected this defence.

In our judgement, the learned judge was right to dismiss these defences as not raising triable issues. As he rightly observed defences may be raised as "a ploy to continue in possession of the suit premises." We on our part are well aware that in landlord and tenant cases the machinery of appeal is sometimes invoked in order to maintain the status quo as by a possible and we respect the learned Judge's valiant attempt to dispose to dispose of this case summarily, undoubtedly in the interests of economy of time and money as he was well justified to do so. Having decided that there is no triable issue in law we do not see why the respondent who has clearly been kept out of rightful possession of his property for sixteen months already shall further indefinately be kept out while the sterile exercise of arguing these points all over again is gone through. In Cow v Casey (1949) 1 KB 474, 481, Lord Greener, M.R. stated that however difficult the point of law is, once it is understood and the court is satisfied that it is really unarguable it will give final judgement.

Accordingly and, for the reasons above stated, this application fails and must be as it is hereby dismissed with costs.

Dated and delivered at Nairobi this 31st day of May, 1995.

J.M. GACHUHI

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR