IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GACHUHI, AKIWUMI & LAKHA JJ A)

CIVIL APPLICATION NO NAI 113 OF 1995

BETWEEN

KAPSET AGENCIES LIMITED.....APPELLANT

AND

SARJIT 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 HCCC 472 of 1994)

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 LR 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 LR/1539/16 on 22nd March, 1989 for a term of five years and three months commencing from 1st November, 1988 at a monthly rental of Kshs 35,000/-. The applicant went into possession and paid the agreed rent, but refused to deliver up suit premises and vacate the same on the expiry of the said term of five years and three months on 31st January, 1994. The respondent also claimed mesne profits and other reliefs. By its defence 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 defences material to the present application and which had been urged before the superior court.

By a Notice of Motion dated 16th March, 1994 the respondent applied for summary judgment 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 defences in the defence, that the said tenancy became 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 was purchased by a director of the applicant, his brother and his son creating a break in the said tenancy so that the tenancy that ensued left the balance of the outstanding tenancy for a period of less than five years. And by a supplementary affidavit sworn on 6th September, 1994 the applicant raised yet a further defence that the lease constituted a tenancy for a term of less than five years and was consequently

governed by the Act. The application for summary judgment was heard by Bosire, J who 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 urged for the purpose, rejected all the defences raised and held there was no triable issue. The learned judge accordingly entered judgment for the respondent for possession and mesne profits 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 are now well settled. They are two: first, the applicant must show that he has an arguable appeal and, second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. Mr Gautama, for the respondent, conceded, properly in our opinion, the second condition but challenged that the appeal was arguable. In his submission, the appeal was frivolous. Accordingly, the single issue before the Court is whether 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 and subject to the agreements, conditions and contingencies" set out in the lease. Section 32 reads thus:

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

He relied heavily on *Hega Holdings Limited vs Lavarini's Restaurant Ltd and another* Civil Appeals Nos 48 and 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 none of the advocates referred to this amendment. It is, in our judgment, decisive 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 judgment, the execution of that lease embodying those terms of the agreement is a 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 contention is invalid and does not raise a triable issue.

Second, it was submitted that as in or about August, 1992 the entire shareholding of the applicant company was 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 and converting the balance of the outstanding tenancy into a new lease 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, an 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) AC 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 section 2 of the Act this makes

the tenancy a controlled tenancy within the meaning of the Act. In our judgment, we do not find such a provision in the lease.

Reliance is placed upon the standard usual 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 re-entry 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 applicant 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 these letters nor did it at any time remind the respondent or allege that such an agreement had been reached in or about October, 1993 or at any other time disentitling him to possession. We find this is a sham defence and a belated afterthought on the part of the applicant. The learned judge also rejected this defence.

In our judgment, 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 long as legal ingenuity may make it possible and we commend the learned judge's valiant attempt to dispose of this case summarily, undoubtedly in the interests of economy of time and money as he was well justified so to do. Having decided that there is no triable issue in law we do not see why the respondent who has already been kept out of rightful possession of his property for sixteen months should further indefinitely 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 Greene, MR 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 judgment.

Accordingly and, for the reasons above stated, the intended appeal, in our judgment, is unarguable. This application, in the result, fails and must be, as it hereby is, 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 theoriginal.

DEPUTY REGISTRAR