IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Kwach, Omolo & Akiwumi JJ A)

CIVIL APPEAL 22 OF 1994

BETWEEN

K.D.SHAH.....APPELLANT

AND

1. PRAKASH VRAJLAL MALKAN.....1ST RESPONDENT

2. CHANDRAKANT VRAJLAL MALKAN.....2ND RESPONDENT

(Appeal from the orders of the High Court of Kenya at Mombasa (Mr Justice ICC Wambilyangah) dated 17th August, 1983 and 3rd September, 1993

in

Civil Case No 406 of 1993)

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JUDGMENT

The broad question that we have to deal with in this appeal is whether this Court would, in the circumstances of the case, be justified in interfering with the superior court judge's exercise of discretion, by which exercise of discretion he granted to the respondents, Prakash Vrajlal Malkan and Chandrakant Vrajlal Malkan, an injunction restraining the appellants, Mr and Mrs K D Shah,

> "..... from evicting the plaintiffs (respondents) from the suit premises or in any way dealing with the suit premises to the detriment of the plaintiffs until further orders of this Court."

As Mr Waweru Gatonye who argued the respondents' case before us correctly pointed out the decision to grant or refuse an injunction is an exercise of discretion by the judge hearing the matter and the circumstances in which this Court will interfere with a judge's exercise of discretion are now well settled. In this connection we can do no better than to quote from the judgment of Sir Clement De Lestang, V-P; in the case of *Mbogo and another v Shah* [1968] EA 93 at pg 94 letters H-I, where the learned Vice President is recorded as saying:

> " .....I think it is well settled that this Court will not interfere with the exercise of its discretion by

> an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion..."

It was for the appellants to satisfy us on these points and in their case, the matter is made even more complex by the fact that though the order of the judge appealed from was made in an interlocutory application, nevertheless, the judge before exercising his discretion in favour of the respondents, heard *viva voce* evidence and it would be a very strong thing

for this Court to interfere with the exercise of his discretion under those circumstances. Indeed, as Mr Gatonye rightly pointed out to us, even if we thought that if we had been in the judge's shoes, we would have given a contrary decision, that alone would not entitle us to interfere, for that would simply mean our substituting the judge's discretion with ours. We are not entitled to do that. We did not understand Mr Gautama for the appellants to challenge those simple and well settled propositions of law.

How does the matter before us arise? The respondents have been tenants of the appellant's in premises known as Plot No 102/section XX, Mombasa, since 1981.

The tenancy was a protected tenancy under the provisions of the Landlord and Tenants (Shops, Hotels & Catering Establishment) Act, cap 301, the Act, and on the 5th January, 1989, the appellants caused to be issued to the respondents a notice under sections 4(2) and 7(1) (d) of the Act seeking to terminate the tenancy on the ground that the landlords themselves intended to occupy for a period of not less than one year the premises comprised in the tenancy for the purposes, or partly for the purposes, of a business to be carried on by them in the said premises . The respondents opposed the notice and made a reference to the tribunal which heard the reference on 6th November, 1989, and gave its ruling upholding the notice and ordering the appellants to vacate the premises on or before 1st May, 1990. The appellants appealed against the tribunal's order to the High Court, but on 29th April, 1993, the High Court dismissed the appeal and confirmed the tribunal's order. The judge gave the appellants upto the 31st July, 1993 to vacate the premises. We are told there was another application by the appellants seeking a review of the judgement of 29th April, 1993, but once again Mr Justice Mbaluto rejected that application. We do not know the ground or grounds upon which the applications for review was made. We also understand that while the appeal against the tribunal's order was still pending, the respondents made an application to be allowed to adduce additional evidence and the burden of such evidence, we are told, was that since the appellants continued to receive rent during the pendency of the appeal in the High Court, a new tenancy had thereby arisen. That attempt to adduce additional evidence in support of that untenable proposition was also repelled by Wambilyangah J as unreasonable. With the rejection of their appeal in the High Court and the rejection of the applications set out above, the respondents would appear to have, at least temporarily, reached the end of the road in their bid to retain possession of their rented premises.

But then on the 23rd July, 1993, with just one week to go before they

would be forced to vacate the premises, the respondents filed a fresh suit in the High Court and in that suit it was claimed that the judgments of the tribunal and the High Court had been obtained by fraud, perjury and misrepresentation and in paragraph 6 of the plaint the respondents averred that:-

> " It has now come to the knowledge of the plaintiffs (and the plaintiffs have concrete evidence in this connection) that the defendants have all along had an intention to sell the premises to third parties. The plaintiffs shall crave leave of the court to refer to newspaper advertisement placed by the defendants."

The respondents continued to plead that because of the now disclosed intention to sell the premises, the appellant's original notice to terminate the tenancy was null and void *ab initio*, resulting in a serious breach of the statutory provisions relied on and that the appellants had acted *mala fides* as they always intended and had at all material times proceeded to terminate the tenancy on false grounds. The plaint ended with prayers for, among other things,

(a) a declaration to the effect that the notice by the defendants was invalid and that the tenancy relationship was still valid and subsisting; and

(b) an injunction to restrain the defendants from evicting the plaintiffs from the suit premises or breaching the tenancy relationship in any way whatsoever.

At the same time as the plaint was filed, there was also filed an interlocutory application by way of a chamber summons and under a certificate of urgency seeking an order under order 39 rules 1, 2, 3, and 9 of the Civil Procedure Rules that:

" ...this Court be pleased to grant an injunction restraining the defendants from evicting the plaintiffs from the suit premises or in anyway dealing with the suit premises to the detriment of the plaintiffs until further orders of this court "

This application was first heard and granted *ex parte* by Wambilyangah J on the 26th July, 1993, some three days after it had been filed with the plaint. No explanation was given as to why the application was not served on the other side within those three days. The application was eventually heard *inter partes* from the 10th August, 1993, and during that hearing the deponents of various affidavits were cross-examined at length. In a reserved and careful ruling dated the 3rd September, 1993, the learned

judge allowed the application and confirmed the *ex parte* injunction he had granted on 26th July, 1993. We only need to add that on the 29th July, 1993, three days after the *ex parte* order the appellants had applied to the Court by way of notice of motion under order 39 rule 3, seeking among other orders, one that the *ex parte* order of the court made three days earlier should be set aside. That application was itself rejected by Wambilyangah J in a ruling dated and delivered on the 17th August, 1993 the appeal before us concerns the judge's two orders, namely the one of 17th August 1993, and the other one of 3rd September, 1993, confirming the *ex-parte* injunction granted three days after the filing of the suit.

In all, there are 13 grounds of appeal with some of the grounds being sub-divided into various sub-heads but Mr Gautama who argued the appeal before us did not deal with each ground separately. Mr Gautama's main contention was that the learned judge ought not to have granted the injunction because the respondents had not shown that they had a *prima facie* case with a probability of success. According to Mr Gautama, there was, *prima facie*, no evidence of fraud, perjury or misrepresentation as alleged by the respondents. The appellants notice to terminate the tenancy was given on 5th January, 1989. The case before the tribunal was heard and determined in November, 1989. Apparently one of the landlords had given evidence during the tribunal's hearing and Mr Gautama contended that the intention of the appellants in giving the notice must be considered and determined as at the time when the notice itself was given and at the time when the tribunal gave its judgment, which judgment was based upon the evidence of the parties given at the trial. The first notice or advertisement to sell the premises appeared in a copy of a newspaper dated September, 1992. The second was in a copy dated 12th May, 1993. If we understood Mr Gautama correctly his contention was that these two dates were wholly irrelevant in determining what the intention of the appellants were between the 5th January, 1989, when they gave the notice and November, 1989 when the case was heard and determined by the tribunal.

Mr Gatonye, for the respondents, countered these submissions by stating that in determining what the appellants' intentions were, the matter has to be looked at right from the time the notice was given upto and even after the judgment of the High Court upholding the tribunal's order. It would appear Mr Gatonye was submitting that as the respondents were not aware of the first newspaper advertisement in September, 1992 until sometime after the High Court judgment, it was the duty of the appellants to inform or disclose to the High Court their intention to sell the premises. Mr Gatonye placed particular emphasis on the case of *B E A Timber Co v Inder Singh Gill* [1968] EA 463. We have to remind ourselves that

the hearing of the case in the High Court is still pending and it would be dangerous for us to try to resolve any issues of fact in dispute. The judge in the High Court never attempted to do so. All he did was to see if the respondents had established a *prima facie* case with a probability of success. On this point, the

respondents had against them the judgments of the tribunal and the High Court, and it would be their duty to prove the allegations of fraud, perjury and misrepresentations. Though the matter is civil, we think the respondents' burden will be quite heavy as they are alleging fraud against the other side.

Again there will be the question of the proximity in relation to the time when the notice to terminate the tenancy was given and the hearing of the reference in the tribunal, on the one hand, and the time when the first notice to sell appeared in the press. A period of some three years had elapsed in between these events and in our view, this will be the important period to consider. In the case of *B E A Timber Co v Inder Singh Gill*, *supra*, Forbes, VP with whose judgment the other members of the court agreed had this to say at page 471 at letters E to F:

> " ....I do not think it is seriously challenged that the learned judge's view of the law applicable is correct, that the real issue in the case is the state of the respondent's mind at June, 24th 1953, the date of the order of the board, and that this issue is a question of fact. It is not necessary to set out again here all the evidence on which the parties relied at the trial. Briefly it was to the effect that upto about April 23, 1953, ie before the board's order, the respondent had been trying to sell the plots in question, and that some months after the board's order, he did sell the plots. The appellant firm asked the Court to draw the inference that he always did intend to sell the plots and, at the date of the board's order, had no genuine intention to reconstruct ..."

Two things emerge from this passage, namely that even when the case was still pending before the board, there was evidence to attempts to sell the disputed property and secondly that the relevant date in considering the intention of the landlord is the date between the issue of the notice and the order of the board. The material available in the record before us appears to show that the first advertisement in the press appeared some three years after the order of the tribunal.

It is true an appeal was still pending in the High Court but no evidence was received in the appeal from which it could be inferred that the appellants

lied to the judge, who heard the appeal. If any lying was to be proved, it must be found in the record of proceedings of the tribunal. The learned judge did not have the record before him. Nor can it be seriously contended that the appellants should have told the High Court that they had changed their mind and intended to sell the property. All that a landlord in these circumstances is required to do is to show that he intends to occupy the premises for his own purposes for a period of not less than twelve months. More than three years had elapsed by the time the notice to sell appeared. In these circumstances, we are unable to see that there was a *prima facie* case with a probability of success and we are satisfied that the learned judge misdirected himself in finding to the contrary. We have already said that the learned judge wrote a careful and well-considered ruling and it is with some hesitation that we are compelled to disagree with him. Our holding that the respondents did not show *prima facie* case with a probability of success entitles us to interfere with the learned judge's exercise of discretion. Before we conclude the matter, there are other issues we must briefly dispose of. There was the question of whether the High Court would have jurisdiction to issue a declaration in respect of matters decided by a tribunal such as the Business Premises Tribunal. Our simple answer to that question is that the High Court has jurisdiction to issue such a declaration and indeed in certain circumstances such as those in this appeal a declaration may be the only feasible remedy. *Certiorari* which is a remedy available under judicial review may in the particular circumstances of the matter before us, not be applicable because that remedy can only issue where a tribunal has acted without or in excess of its jurisdiction; where it has not observed the Rules of Natural Justice or where there is an error apparent on the face of the record. In the absence of any of these matters, judicial review by way of *certiorari* would not be available and it seems to us that the only feasible way in which the High Court can supervise tribunals such as the one whose decision we are concerned with is by way of a declaratory judgment as the respondents asked the Court to do in this case.

Lastly, there was the question of section 13 of the Act which we ourselves raised with counsel. We think the remedy provided under that section is in addition to, and not in derogation of, the power of the High Court to issue declaratory judgements. Section 13 would be particularly appropriate where the tenant has infact moved out of the premises, suffered damage as a result of so moving out and then subsequently

discovered that the termination of the tenancy was infact obtained through fraud. But where the tenant is still in possession as these respondents were, then a declaratory suit may well be the most appropriate course to take since an injunction can also be applied for in the same suit.

In the result we allow the appeal, set aside the orders made by the High Court and substitute them with an order dismissing the application for injunction with costs. We award the costs of this appeal to the appellants. The result of our order is that the respondents will become liable to an immediate eviction from the suit premises. Taking all factors into account, we give the respondent's upto the 31st October, 1994, to vacate the premises.

Dated and Delivered at Mombasa this 29th day of July 1994.

R.O.KWACH

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

A.M.AKIWUMI

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JUDGE OF APPEAL

I Certify that this is a true copy of

the original.

DEPUTY REGISTRAR