IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Gachuhi & Masime JJA)

CIVIL APPEAL NO 38 OF 1986

Between

KIMAKIA CO-OPERATIVE SOCIETY .....APPELLANT

AND

GREEN HOTEL.....RESPONDENT

(Appeal from the judgment of the High Court at Nairobi, Porter J)

JUDGMENT

September 29, 1988, **Platt JA** delivered the following Judgment.

The appellant Society has appealed against the orders and decision of High Court, which were as follows:-

1. (a) On the plaint brought by the Society, the claim for damages was dismissed;

(b) The order in 1978 of the Business Premises Rent Tribunal, that the Society pay Kshs. 20,000 as damages to the respondent was declared null and void; and the sum of Kshs. 20,000 was to be paid into the High Court, and thereafter to be paid over to the defendant/respondent Green Hotel;

(c)The order of the Tribunal dated October 5, 1976 which purported to give possession to the tenant/ respondent was declared null, following Simpson and Chesoni JJ in Misc/Civil Case No 336 of 1978. *In the matter of an application of Hetulla Properties Ltd and in the matter of a complaint by Electro Service Equipment Ltd and the Business Premises Rent Tribunal*; and

(d) As a result of these declarations the order of the resident magistrate, Kitale on execution proceedings were declared null. But then (2) on the respondent's counterclaim, the High Court held that the plaintiff Society was liable to pay Kshs. 160,000 damages and costs on this sum.

The appellant Society claims that the award of Kshs. 160,000 damages to the respondent was erroneous upon the principal ground that the learned judge assumed that the controlled tenancy subsisted for some 8 years. It was wrong to assess the loss at Kshs. 20,000 per year in the absence of evidence to that effect. In any event the tenancy would be subject to notice of two months and damages should have been restricted to that period. (At most the damages should have been nominal). On the other hand, the learned Judge ought to have awarded the Society rent or mesne profits for storing the Defendant's goods for those eight years. Having held that the Tribunal's order for damages had been null, the Kshs. 20,000 ought to have

been released to the Plaintiff Society.

These complicated orders and claims arose out of a very simple transaction. It was not disputed that the respondent Green Hotel, had been the tenant of the appellant Society of certain premises in Kitale in which the appellant traded as a Restaurateur. It occupied a large room and kitchen with access to a lavatory. The tenancy agreement, entered into in 1969, ran from 1967 for five years as the agreement did not exceed five years it was admittedly a controlled tenancy. After 1972 it appears that the tenancy was continued, and in any event, it is admitted that the respondent was still a controlled tenant in 1976. It is further admitted that the Business Premises Rent Tribunal at Kitale ordered that the respondent give vacant possession of the suit premises to the appellant for the purposes of reconstruction and renovation, and that the respondent did give vacant possession on May 28, 1976. The learned Judge said that that order was given pursuant to a notice given by the landlord under Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act cap 301 and that possession would have been ordered under Sec 7(f) of the Act. The learned Judge set out the terms of the Act but it is important to note that Sec 7(f) provides:-

> "that on the termination of the tenancy the landlord intends to demolish or reconstruct the premises comprised in the tenancy, or a substantial part thereof, or to carry out substantial work of construction on such premises or part thereof, and that he could not reasonably do so without obtaining possession of such premises."

The Tribunal's order of February 9, 1976 was given, partly on the basis, no doubt, that the Municipality of Kitale had ordered the appellant to reconstruct with permanent materials. The appellant Society had therefore to comply with this order and it appears that the Society decided to turn three shops into four to increase its rental income. The Society got approval for its plans, which included permanent dividing walls between the four shops, improved kitchens and lavatories. The Tribunal expressed itself as satisfied that the premises were required for reconstruction, which was to be carried out as soon as possible and the respondents to be let into possession immediately after the above reconstruction "if they wish to do so." The landlord appellant was to inform the respondent when the premises were ready.

The reconstruction was complete by October, 1976. The appellant alleged that it invited the respondent to take possession but that the latter refused to do so. The respondent denied this. On October 5, 1976 by an *ex parte* order in favour of the tenant, the Tribunal referred to its orders of February 9, 1976 saying that the landlord had been expected to give the tenant vacant possession. But the landlord had divided the tenant's portion into two parts which had not been authorised by the Tribunal. Accordingly the landlord was to give the tenant his old premises and breach the partition wall. The landlord was to pay Kshs. 15,000.

It was these orders that were declared null and void.

Then on September 22, 1977, it was sought to set aside the *ex parte* order of October 5, 1976. That resulted in orders whereby the Kshs. 20,000 held by the Court Broker, was to be continued to be held by him. The tenant was to take possession this time without demolishing the partition wall. The matter was stood over for further hearing.

These orders were also held to be null.

Later on May 10, 1978 the parties came to an agreement. It was ordered by consent, that the landlord would give the tenant possession of the premises as they stood, and the Kshs. 20,000 was to be deposited with the Tribunal.

On March 1,1979, the Tribunal clarified its orders, as referring to both portions, the butchery and the restaurant. Later on the Tribunal held that it had no power to review its orders and so the matter came to the High Court.

There is no cross-appeal on the declarations given by the High Court on the authorities at that time. The

position seems then to be that the landlord appellant had agreed to give the divided premises to the respondent as from the date of the consent order of May 10, 1978. That was lawful. It is simply the orders for possession which could not be given; and also the orders for damages which the Tribunal had no power to make nor was there any appeal from the order for possession for reconstruction. That order stands. The time to consider whether there was to be a true reconstruction was when the Tribunal made its order of February 9, 1976. Having given its order, there having been no appeal, that order stands.

It is now possible to approach the main ground of appeal and inquire what is the effect of the order of February 9, 1976. The learned judge held that it was not meant to disturb the controlled tenancy which therefore continued on. Now that would not appear to be consistent with the wording of section 7(f) of the Act (cap 301) which commences with the premise that reconstruction is to be carried out at the end of the tenancy. The section says "at the termination of the tenancy." It would seem to follow that the order for possession under this provision would bring the tenancy to an end. Moreover in the case of a controlled tenancy, relinquishing possession would end the tenancy. That at any rate was the view of the House of Lords in *Heath v Drown*, [1973] AC 498. Lord Kilbrandon who wrote the leading opinion of the majority explained the situation under similar but identical legislation, in the Landlord and Tenant Act, [1954] of England which is probably the inspiration of the Landlord and Tenant Act (cap 301) in Kenya. He said at p 517 –

> "The holding referred to in section 30(1)(f) [allowing a landlord to take possession when he intends to demolish or reconstruct as in section 7(f) in cap 301] is *ex hepothesi* one in respect of which there is a subsisting tenancy, since sec 24(1) extends the current tenancy until the tenant's application for a new lease has been finally disposed of. 'Obtaining possession of the holding' (SC by the landlord) must, in my view, mean putting an end to such right of possession of the holding as are vested in the tenant under the terms of his currency tenancy. This is the ordinary meaning 'obtaining possession' in the context of the relationship of landlord and tenant. Moreover an examination of the Act shows that when the word 'possession' is used it means the legal right to possession of land."

Lord Reid came to the conclusion that in section 30(1) (f) possession meant legal possession. He then explained at p 507:-

> "But I understand that the granting of a new lease would necessarily imply that the tenant is given legal possession from its commencement and throughout its duration. But it is found as a fact that the landlord needs exclusive physical possession for a period of at least four months. So far as I know it would be a novelty to provide in a lease that during so long a period the tenant, although liable for the full rent, shall have no right even to enter the demised premises. I do not see in what sense the tenant could during that period be said to have legal possession."

It is true, of course, that under the English Act, the tenant may apply for a new lease, while that is not the position in Kenya. But suppose we take the order of the Tribunal of February 9, 1976, in the sense understood by the learned judge, that if the tenant wished, he should be granted a new tenancy after reconstruction, and thereby to imply that the tenancy was subsisting, that cannot be correct. Once the Tribunal has terminated the tenancy by notice under section 4 of cap 301 for the purpose of reconstruction, (because the landlord could not carry out the reconstruction with the tenant still in possession,) then the order to give the landlord possession is one for legal possession terminating the existing tenancy, even if a new tenancy is envisaged. As the learned judge pointed out, the Tribunal in Kenya cannot force the landlord to grant the tenant a new tenancy. It was simply hoped that if the tenant so wished he would be granted a new tenancy, and in this particular case the landlord offered to give the tenant a new tenancy. Later on there was a consent order. That is within the powers of the landlord. But there is no ground for saying that the Landlord's offer keeps the old tenancy alive.

In practice the tenant may not wish to take up a new tenancy. He cannot expect that the premises he used to occupy will be the same or that he will enjoy the same terms. He may find that the reconstruction has led to an alteration in the shape or layout of the premises and the rent higher. He cannot object if a better use of space has allowed the landlord to gain more profit out of his building; and of course he cannot

complain if the reconstruction has been carried out in accordance with sanitary and health objectives as required by the Municipality. The tenant must decide whether he wants the new premises, or he does not want them.

In this case the large room occupied by the tenant formerly was cut down in size so that the landlord appellant could make four shops instead of three with better supporting facilities. Was or was not the size of the new premises of use to the tenant, together with better kitchen and lavatory facilities? Apparently not. The respondent tenant wanted the dividing wall taken down so that he could have a larger space. That is not within the options of the Tenant. As has been pointed out, there was no appeal against the order for possession. The reconstruction was accepted by the Municipality in approving the plans. Having allowed reconstruction, the Tribunal could not go back on its order, and the High Court had to accept the Tribunal's first order as it stood. There can be no ground therefore for saying that the old tenancy subsisted, and that the reconstruction must take account of and preserve the area leased in the old tenancy. The old tenancy came to an end and the tenant had to decide whether or not to start again with a fresh tenancy in the new premises. The respondent never did. The learned judge excused him because the old premises were not made available. With respect that was the wrong approach.

It may well be that the contradictory orders of the Tribunal, at one stage ordering the dividing wall to be broken down, and later permitting the dividing wall to stand, caused confusion. But the situation or law is clear. The Tenant never took up the new tenancy, even after the consent order of 1978. The landlord was therefore permitted to re-lease the premises. On this basis the Tenant cannot claim any loss of trading profits. I would agree with the appellant that in principle the respondent was not entitled to any damages.

Moreover no profits were proved on the basis of which damages could be assessed. Where damages are at large and cannot be quantified, the Court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given the chance to prove the loss and did not, he cannot have more than nominal damages. I agree with the appellant that the damages awarded were not awarded on any sound basis.

I also agree with the appellant that the Kshs. 20,000 should have been ordered to be repaid to the appellant.

In the result I would set aside the judgment for the respondent on the Counterclaim and substitute judgment for the appellant, dismissing the Counterclaim with costs.

There is then the appellant's claim for rent or mesne profits for storage. What is fair to one party is fair to both. The appellant showed the Court no basis on which to assess the rent or mesne profits. What is the cost of storage in Kitale? It is a matter which can be proved. It was not proved. I would agree with the learned Judge that this claim was not proved, and consequently I would reject the appeal on this point.

I would allow the appeal against judgment on the counterclaim as indicated above. I would reject the appeal on the appellant's claim for storage. I would order that each party bear his own costs in the Court below and award the appellant half the costs of this appeal.

Gachuhi JA. I had the advantage of reading the judgment of Platt JA. The Tribunal created a confusion by giving orders one of which was ineffective and cannot be complied with.

When an application is made under sec 7(f) of the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act (cap 301) the Tribunal is empowered to grant the order for possession or reject it. Once an order has been granted, that brings a controlled tenancy to an end. One order made by The Tribunal was a recommendation that the tenant was to renegotiate for a new tenancy on completion of the reconstruction. This in my mind, was not in order. The tenant if he so wished could renegotiate for fresh tenancy. The landlord should not be compelled by the Tribunal to grant a new tenancy to the tenant. The relationship of a landlord and tenant ceased on termination of the tenancy.

If a tenant would wish to exercise an option if he had been given one for a new lease, may have to be

negotiated on different terms from the previous tenancy. The tenant may not be able to get the premises in the same conditions it was surrendered because reconstruction had altered the previous layout. He must expect to pay higher rent than before. The Tribunal cannot review its previous order except as provided in section 13 of the Act and only in awarding damages. The Tribunal's orders could only be reviewed on appeal.

Taking all these facts into account, it is my view that the tenant could not claim any tenancy or have any claim on damages for loss of income. There is no basis for such claim. In law, where there is no tenancy entered into since the previous one was validly terminated, there is no tenancy. On my part I would allow this appeal with costs. I agree with further orders proposed by Platt JA that this Court should make.

Masime JA The turbulent history of the tenancy relationship between the parties to this appeal and the decision and declarations of the High Court on the dispute have been set out in detail in the judgment of Platt JA which I have read in draft. The learned trial judge correctly appreciated that there was a controlled tenancy between the parties subject to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301). However he erred when he held that despite an order of the Business Premises Rent Tribunal permitting a landlord to "terminate" the tenancy to enable substantial reconstruction to be undertaken that controlled tenancy continued to run uninterrupted and so continued even after the reconstruction the landlord offered the premises to the Tenant who rejected the new terms of tenancy.

The consequence of the trial court's error regarding the continuation of the tenancy is that for the alleged breach the tenancy relationship the court proceeded to assess and award damages on that basis. And he did so despite his own confession that the defendant had failed to prove such damages so that the learned judge was left to guess what loss the defendant had suffered. In the result I agree with Platt JA that the appeal should be allowed: the tenancy was terminated when the Tribunal ordered that the Tenant give up possession of the premises for reconstruction; no new tenancy was created as the 'tenant' rejected as the terms of the Landlord's offer for a new lease and consequently there was no tenancy that the appellant could be said to be in breach of and the award of damages were uncalled for.

I would concur in the orders proposed by Platt JA as to allowing the appeal, setting aside the award of damages and refund of the sum of Ksh. 20,000 to the appellant and on costs.

Dated and delivered at Nairobi this 29th day of September, 1988.

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR