IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: HANCOX JA, PLATT & GACHUHI AG JJA)

CIVIL APPEAL NO. 47 OF 1986

(Appeal from the High Court at Mombasa, Aragon J)

MNAZI MOJA ESTATES LTD……..APPELLANT

VERSUS

AMBALAL MISTRY & 5 OTHERS……....……RESPONDENT

JUDGMENT

Hancox JA The first respondent in this appeal from the decision of Aragon, J dated the February 14, 1986, is, for the purposes of this appeal at least, the successor to the lessee of the property at plot No 416 of section 21 at Mombasa, which was leased for a term of ninety-nine years to Hira, the wife of Balwantray Karsanji Doshi, by an indenture dated September 25, 1956 by the present appellant Mnazi Moja Estates Ltd.

The indenture contained the following clause:

"2(j) The lessee shall not transfer assign or sub-let the demised premises or any part thereof without the written consent of the lessors which consent however shall not be unreasonably withheld the lessee being responsible for all costs incurred by the lessors for the preparation or approval of such consent to be endorsed on such transfer assignment or sub-letting. The lessee shall supply to the lessors a true copy of the instrument of such transfer assignment or sub-letting and pay the fees of the lessors' advocates for perusing such instrument and witnessing the lessors' consent thereon provided however that such consent will not be necessary for any mortgage or charge or for a sub-lease of the plot or the premises thereon for a period not exceeding three years."

The term sought to be assigned is more than three years in this case and so the latter part of the sub-clause does not apply.

The fifth and sixth respondents, Mr & Mrs Pereira, are desirous of purchasing the unexpired portion of the lease from the first respondent and his three co-lessees (who are the second, third and fourth respondents respectively) for Kshs 400,000.00 and have borrowed money from Barclays Bank for the purpose against the Bank's security of a charge on this proposed lease-hold interest. Accordingly the first four respondents wrote through their advocates, Messrs Atkinson Cleasby and Satchu, seeking the appellant's consent to be proposed assignment to the Pereirasby a letter dated October 7, 1985.

They did not receive a positive or a negative reply to the request. Instead, on October 9, the appellant replied that they would have to refer the matter to Mr Githere for signature on his return to Kenya. However, there are two affidavits on record dated December 4, 1985, the one in support of the originating summons filed by the respondents in High Court, by the first respondent, and the other by Mr Pereira, each of which states that the deponent called at the appellant's premises and was told by "a director" that consent would not be given to the proposed transfer. No details of the refusal are given in the affidavits, for instance, who refused the consent and when the refusal took place.

Thereupon the respondent filed the originating summons to which I have referred, seeking an order that the appellants should sign the necessary consents to the transfer to the Pereiras and to the Bank chargee, and in default that the Deputy Registrar of the court should sign them.

The summons was duly heard by Aragon, J on February 14, 1986 when for the first time it was revealed that the appellant company's reason for refusing consent was that it wished to purchase the property concerned.

This is reiterated in the affidavits of Mr Githere, the appellant's director, of February 14, 1986, which says it is prepared to offer the same price and refutes the allegations that any of the respondents called at the company's offices to discuss the question of its consent to the transfer. Mr Satchu, on behalf of the respondents, said that this affidavit was filed during the adjournment on February 14. Mr Gimaiyo, on behalf of the appellant, blamed the respondents for rushing to the court and not giving the company an adequate opportunity before hand to decide whether to give its consent or not, while Mr Satchu says that if the appellant had given its consent on February 14, this point might have had some validity, and he blames the appellant for not revealing the reason for its refusal beforehand.

At all events Aragon, J rejected the reason purportedly given by the appellant company for withholding its consent, stating that the authorities to which Mr Satchu then referred, and to which he again referred in this court, were clear that a desire to purchase the lease by the reversioner was not in law a valid reason. In consequence he granted the prayers and declarations sought by the respondents.

I have studied both the cases to which Aragon, J was referred, namely Bates v Donaldson [1896] 2 QB 241, and Re Winfrey & Chatterton's Agreement, [1921] 2 ch 7. In both of them a prior offer had been made by the reversioner, or the purchaser of the reversion on the lease, to buy the lease, and in each case the court held that the object of refusing consent to the assignment of the lease proposed was to coerce the lessee or tenant into selling it to the lessor and to enable the lessor to obtain possession of the premises.

There was no such prior offer in the instant case. The supposed reason may have been an afterthought, but for my part, I am not satisfied that the reason for the refusal was to coerce the present lessees into selling the remainder of this lease to the appellant company. I have considered the other two authorities referred to us by Mr Satchu. In the first of them, Lovelock v Margo [1963] 2 AER 13 the court rejected further reasons advanced at the hearing for refusing consent to the assignment, and held that the reason given at the time of the refusal amounted to an unreasonable refusal of consent. In the second case Bromley Park Garden Estates v Moss, [1982] 2 AER 890, the court of appeal expressed the view that a landlord can only be permitted to rely on reasons which actually influenced his mind at the relevant date, namely the refusal of the consent.

I do not think either of these last two authorities assist the respondent's

case here, for it is in dispute on the affidavits that there ever was a refusal of consent, or even an opportunity to refuse it, and the only reason given was advanced at the hearing. I am not prepared to go so far as to say that a desire by the landlord to purchase the reversion himself can never, as a matter of law, constitute a valid reason.

As to the question of whether an originating summons was the appropriate method of bringing this matter before the court, this court has held in James N. Kibutiri v Eliud Njau Kibutiri [1983] I KCA 38 and in Wakf Commissioner v Mohamed bin Umeya bin Abdulmaji bin Mwijabu & Another, Civil Appeal 83 of

1983 that this procedure is inappropriate when the issues raise complex and contentious question of fact; see also Kenya Commercial Bank Ltd v James Osebe [1982] 1 KCA 1. However, the appropriateness or otherwise of the originating summons procedure was not, in my judgment, raised as an issue on the appeal, and I would prefer to express no opinion thereon at the present stage.

However, for the reasons I have earlier given I would respectfully differ from Aragon, J that, on the material on the record and before the judge, it was shown that the landlords had unreasonably refused their consent to the proposed transfer. I would therefore allow the appeal and set aside the order and decree of the High Court. I would make an order remitting the proceedings to the High Court to hear and determine the case according to the evidence, which in my opinion should be oral evidence, brought before it. I would award the costs of the appeal to the appellant. I agree that each party should bear their own costs of the High Court proceedings.

Platt Ag JA. In the memorandum of appeal it is protested that several steps in the proceedings were undertaken so unreasonably, that there was a failure of justice. It is argued that a retrial should be ordered. The main issue in the trial was whether the High Court would be justified in holding that the landlord (actually "head lessee", but nothing turns on that point) had unreasonably refused consent to the proposed assignment of the sublease by the sub-lessee to a third party. In the learned judge's view, the reason given for withholding consent was not valid in law, the authorities being clear on the point. Consequently, the learned judge made a declaration that consent should be deemed to have been given, and the Deputy Registrar was empowered to sign all such documents as may be required.

The "Landlord" now appeals, and was represented by Mr Gimaiyo. The respondents are four persons who belong to the Mistry family, and Mr & Mrs Pereira. Mr Satchu represents all these respondents. The dispute arose when the Mistrys sought to assign their lease to Mr & Mrs Pereira.

The parties will be referred to by their position in this appeal unless the circumstances dictate that they should be named. By an indenture dated April 25, 1956 the present appellant Mnazi Moja Estates Ltd leased to various people the property in question for ninety-nine years, the sublessees at present being the four Mistrys. Their position is not in dispute, a matter made clear during argument. Covenant 2(j) provides as follows:

"The lessee shall not transfer assign or sub-let the demised premises or any part thereof without the written consent of the lessors which consent however shall not

be unreasonably withheld the lessee being responsible for all costs incurred by the lessors for the preparation or approval of such consent to be endorsed on such transfer assignment or sub-letting. The lessee shall supply to the lessors a true copy of the instrument of such transfer assignment or sub-letting and pay fees of the lessor's advocate in perusing such instrument and witnessing the lessor's consent thereon provided however that such consent will not be necessary in any mortgage or charge or for a sub-lease of the plot or the premises thereon to a person not exceeding three years."

The last provision relating to the period of three years, does not apply to the 'sale' of the premises to Mr & Mrs Pereira, but the latter may require a mortgage, to raise the purchase price. It is not an issue which this court can decide, as the proposed mortgage has not been included in the record of appeal; but it is apparently referred to in paragraph 6 of the appellants affidavit (filed on February 4, 1986), to the effect that the appellant

"cannnot" give consent to a charge or mortgage for a period not exceeding three years. It is not known for how long the mortgage is to last, but according to Mr Satchu, this academic since the mortgage will stand or fall with the assignment.

The issues now before this court are complicated by the lack of procedure pursued by the High Court. At the beginning of the hearing of the appeal, the court asked for the evidence of the refusal of consent by the appellant.

There was no letter embodying any such refusal. It had to be implied, according to Mr Satchu, from the appellant's affidavit (referred to above) and especially in paragraph 5 thereof, in which it is stated that the appellant was prepared to buy the premises at the same purchase price of Kshs 400,000.00 at which Mr & Mrs Pereira had been offered the premises.

That is not an outright refusal. It is a counter-offer. Whether the respondent rejected that counter-offer, or whether in the end the appellant refused consent is not clear. Mr. Satchu further inferred from the appellant's stand in court, that he had refused consent, are that would seem to follow from Mr Kiamba's comment that he had only received on the morning of the trial, instructions that the appellant's reason for refusing consent, was that the appellant wished to purchase the property. But that was not the position earlier on. From the correspondence, no answer had been given.

Mr Satchu applied by letter dated October 7, 1985 for consent to the assignment. The appellant's office replied on October 9, 1985 informing Mr Satchu that Mr S M Githere would be dealing with this matter, and at that time he was out of the country. The originating summons was filed on December 4, 1985. It is not clear what steps were taken before the latter date. The affidavit filed in support, by Mr. Ambalal Mistry & Mr Pereira, both of December 4, 1985 explain that they went to the appellant's premises at Bima Towers, Mombasa, where they saw a Director, who refused consent. Mr S M Githere challenged their statements in his affidavit dated February 14, 1986, by saying that he was responsible as the Director authorised to answer for the appellant company. The company's offices are in Nairobi. Nobody had approached him to discuss the matter. It is clear that before the application was brought there was no clear refusal. Moreover, it is not clear when, and who it was, who was alleged to have refused consent in Bima Towers; nor what was actually said, and whether that person had any authority to act. The respondent knew that they had a deal with Mr S M Githere; apparently they did not. It follows that the court had to investigate the area of conflict before it concluded that consent had been refused before the application was brought.

The legal principles to be adopted at this stage would be as follows:

1. There must be an application for consent by the lessee, or sub-lessee, however unreasonable a refusal of consent would appear to be on the part of the landlord;

2. That application must obviously be made to the right person, or authority, the person in Bima Towers not apparently having authority to refuse consent.

3. The lessor must be given reasonable time during which to consider the request, with full knowledge of the proposed assignment;

4. The lessor may make an offer or seek to impose conditions; for consideration by the lessee, which may be acceptable to the lessee;

5. The lessor cannot avoid a declaration against him, by merely refusing or failing to give any explanation of or reason for his refusal;

6. If the lessee considers a refusal unreasonable, or the protracted silence after application for consent of the lessor unreasonable, it is open to him to seek a declaration from the court instead of completing the assignment in defiance of the lessor;

7. The practice in Enland is to ask for a declaration that the lessor's or a landlord's refusal is unreasonable and that the tenant is entitled notwithstanding such refusal to make the proposed assignment or subletting. (adapted from Woodfall on Landlord and Tenant 26th Ed Vol I p 568)

These principles will explain that a careful inquiry was needed, before it could certainly be found that there had been a refusal before application or that it was unreasonable. The court must seek a balanced approach seeing to it that there is fairness on both sides. In the present case the decision does not appear to have been attended by due consideration. Mr Gimaiyo complains, indeed, that the hearing was rushed.

There appears to be some ground for this contention. The matter came up for hearing on 6th February, 1986. It was adjourned to 14th February, 1986 for Mr Kiamba to be present. On 14th February the matter was stood over to 2.30 pm that day, on rather unusual terms. (But I do not say anything more than that, because the appeal was not pressed on this point). Then the matter was heard. It would appear that at that stage Rule 9 of Order XXXVI was not complied with. It is clear that directions should have been given on the trial of issues arising from the affidavits, and Mr Kiamba would not have been rushed into this foolhardy statement, which did not tally with his client's affidavit. Indeed, it may have been necessary to consider whether the respondent had certainly rejected the counter-offer of purchase by the appellant. However that may be, the proper course was to give directions as to the trial of the issues, and as to whether rule 10 should be applied, turning the originating summons into a suit.

It must have escaped attention all around that the originating summons was not properly grounded. It was brought under Order XXXVI rule 3A of the Civil Procedure Rules, and section 97 of the Civil Procedure Act. Rule 3A is not relevant as this is not a mortgage dispute, and section 97 does not exist. Sec 3A of the Act which replaces section 97, concerns the inherent jurisdiction. The originating summons can only be used as the omnibus carrying all inherent matters within it, if provision is so made. Perhaps such provision should be so made; but at present it is not. A suit is defined in the Act as referring to all civil proceedings commenced in any manner prescribed. The scope of the originating summons is prescribed by order XXXVI. In none of the rules, is there a place for a declaration that consent was unreasonably refused. It is not a construction point in rule 5. It is not one of the specific classes of cases prescribed in rules 1,2,3,4 or 5A. Order XXXVI does not apply to this case. For this reason alone in the circumstances of this case, the appeal would have to be allowed, and a suit directed to be brought. Where a question of jurisdiction is concerned, this court must take it up, whether or not the point was raised below.

It is possible that the originating summons was used, because there are decided cases in England where such a summons had been employed. That may stem from the optional procedure of a suit for a declaration or an originating summons for a declaration which obtained in England before 1964. Order 54A of the rules of the supreme court directly provided for a declaration on an originating summons. But this has been repealed. It depends upon the general provisions in the rules, how far an inherent jurisdiction can be ventilated by an originating summons. It is clear Order XXXVI does not prescribe such procedure, and it is therefore necessary in Kenya to commence such matters by a suit.

In the result then I would allow the appeal. I would set aside the judgment and orders of the High Court and strike out the proceedings as incompetent.

I would grant the costs of the appeal to the appellant. But in so far as the appellant did not take all the points in the High Court which he should have done, each party will bear his own costs in the High Court.

Gachuhi Ag JA. The facts of this case are set out in the judgment of **Platt, Ag JA.** There is no need of repeating them in my judgment.

However, the manner this case was rushed through is the main complaint by the appellant. The appellant was never made aware of the whole truth of the request as he ought to, and was denied of his right to consider the said request. Just a mere letter to the Mombasa office which was not followed by a reminder while the main office is in Nairobi cannot be a sufficient request and failure to reply cannot be sufficiently stated to be a refusal to grant the consent. There was a rush, I think, to go to court because of the available supporting authorities which certainly overlooked the vital ground under which the matter should have proceeded. In Woodfall on Landlord and Tenant 26th edition vol. 1 at page 568 paragraph 1344 under the remedy for "unreasonable refusal to consent", there is this:

"The lessor must be given a reasonable time during which he can consider the request. When the lessee considers a refusal unreasonable or thinks that some term which the lessor seeks to impose as a condition of giving the consent is unreasonable, it is open to him to seek a declaration from the court instead of compelling the assignment in defiance of the lessor, a lessor cannot avoid such a declaration by refusing or failing to give any explanation of or reason for the refusal.

In the High Court such declaration may be either in an action commenced by writ or on originating summons under Order 54A.

In Halsbury's Laws of England 4th edition, paragraph 368 at page 287 under the sub-heading ' Unreasonable withholding of consent' there is:

"The tenant is bound to ask for the consent before he assigns, even though it could not properly be refused, and to give the landlord a reasonable time in which to consider the matter. If through forgetfulness he omits to do so, he becomes liable to forfeiture. The landlord is entitled to be told the true nature of the transaction to which he is asked to consent, and to withhold consent until the terms are disclosed."

Reading order 7/1-7/1 of the Supreme Court Practice 1973 at page 58, order 54A was revoked in 1962 and not replaced. It follows that the action can safely be filed in the High Court for declaratory order by way of plaint, though originating summons is sometimes used in England.

There is no specific provision under order XXXVI of the Kenya Civil Procedure Rules to file proceedings for declaration by originating summons, but under the amended rule 10 of the same order if an originating summons has been filed, it can proceed as if the suit was commenced by plaint and the affidavit filed be treated as pleadings. This rule should be strictly complied with. The plaintiff seeking declaration has to satisfy the court through evidence that prior to coming to court, consent was validly applied for and the answer or reply given by which the applicant hold that consent is unreasonably withheld.

The appellant was denied all this due to wrong procedure followed and compelled to file his affidavit in the morning while the matter was to be decided in the afternoon of the same day on the evidence in the affidavits.

From the papers filed and the submissions made by the counsel for the respondent it does not appear, to my mind, that consent was unreasonably withheld prior to coming to court.

While it is appreciated that the court aim at the expeditious disposal of the suits yet at times such expeditious disposal of the suits may cause injustice. The court never appreciated that all the facts were not before it and the counsel never referred to court of the procedure to be adopted. It was wrong to proceed as the court did without the appellant being properly heard, on a matter which affected its rights.

In my view, the appellant's complaint is justified. I would also allow the appeal with costs and set aside the order of the High Court. I would also agree with the proposed order regarding costs in the High Court. The plaintiff can start the matter afresh.

Dated and Delivered at Mombasa this 22nd July, 1986

A.R.W HANCOX

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.OGACHUHI

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AG JUDGE OF APPEAL