IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Simpson CJ, Kneller JA & Nyarangi AG JA)

CIVIL APPEAL NO 62 OF 1983

BETWEEN

HEPTULLA……..…… APPELLANT

AND

NOORMOHAMED …….……..RESPONDENT

(Appeal from the High Court at Nairobi, Gachuhi J)

JUDGMENT

Simpson CJ The appellant in this appeal (the plaintiff in the court below), is the owner of premises situated on Plot No 209/136/170, Kirinyaga Road, Nairobi, which he let to the respondent by oral agreement for an indefinite period. On June 4, 1980, the appellant's advocate sent to the respondent a notice to quit the premises on July 31, 1980. The respondent remained in possession and the appellant accordingly filed a suit in the High Court at Nairobi, claiming possession and mesne profits at the rate of Kshs 1,200 per month from August 1, 1980. The plaintiff/appellant thereafter applied by notice of motion for summary judgment. His application was dismissed, the learned judge having held that there were triable issues, and it is against this decision that he now appeals.

The premises are described as two stores. The appellant claims that they were let to the respondent for use as stores. The respondent's defence is that they were let as a dwelling and he is, accordingly, entitled to the protection of the Rent Restriction Act (cap 296). The appellant produced an approved plan of the premises showing the authorized user of the accommodation let to the respondent as stores only. The respondent, he submits, is using the premises for an unlawful purpose and is thus relying on an illegality. By-law 252 of the Local Government (Adoptive By-laws) (Building)

Order 1968 (LN 15 of 1969) provides as follows:

"1. Any person, who shall erect or permit the erection of a building, without first obtaining the approval of the council to plans submitted in accordance with these By-laws, shall be guilty of an offence.

2. Any person who shall, except with the permission of the council, use any building or part of a building otherwise than for the purpose specified in the approved plan thereof, shall be guilty of an offence.

3. An owner of a building who shall, except with the permission of the council, permit such building or any part thereof to be used otherwise than for the purpose specified in the approved plan, shall be guilty of an offence.

4. In any proceedings under this by-law, it shall be deemed, until the contrary is proved, that where a building or any part thereof, is used otherwise than in accordance with the approved plan thereof, such use is with the permission of the owner of the building.

5. In this by-law, "purpose" means the particular purpose for which each part of a building was erected and the approved plan shall be prima facie evidence of such purpose."

Mr NP Vohra, appearing for the respondent, submitted that only the owner of the building was responsible for breach of this by-law but this is clearly not so. A person using premises otherwise than for the purpose specified in the approved plan is guilty of an offence. The appellant having permitted this illegal user, is also guilty of an offence, but he does not, in his claim, seek to rely on the illegality as does the respondent in his defence.

In *Charan Kaur v Mistry Makanji Vanmali* (1956) XXIII EACA 14, the former Court of Appeal for Eastern Africa held that where a by-law made it an offence to permit unauthorised structures to be occupied, no relationship of landlord and tenant could be created in respect of those structures which was tainted with illegality *ab initio*. In the instant case, likewise, the relationship of landlord and tenant was tainted with illegality *ab initio* or at least from the time when the respondent started to reside in the premises. The material date, however, is the date when the motion for summary judgment was heard by the judge in the High Court (see *Benninga (Mitcham) Ltd v Bijstra* [1945] 2 All ER 433). On that date, the respondent was, and he still is, using the premises for residential purposes. Were the parties to this illegal contract in *pari delicto*?

In *Sewano Kulubya v Mistry Amar Singh* [1961] EA 157, an African registered proprietor of "Mailo land" had illegally leased it to an Asian and subsequently terminated the agreement and instituted proceedings for possession. The Court of Appeal for Eastern Africa, sitting in Kampala, considered whether the African and the Asian were in *pari delicto*. It was held that the appellant African was entitled to rely on his registered ownership of the premises and to recover possession from the respondent as from a trespasser and the respondent could only seek to set up a right of occupation which was illegal by statute.

On further appeal to the Privy Council, (*Mistry Amar Singh v Sewano Kulubya* [1963] EA 408) their Lordships said (at p 413):

"The defendant for his part could not point to or rely upon the illegal agreements as justifying any right or claim to remain in possession and without doing so he could not defeat the plaintiff's claim to possession. In so far as the plaintiff may have thought that, in the circumstances, it was reasonable to give the defendant notices to quit, he could give such notices without their being related to or dependent upon the unlawful agreements. Because the agreements were unlawful no leasehold interest vested in the defendant. He had no right to hold over or to hold from year to year. His occupation of the land was contrary to law. Their lordships consider therefore that the plaintiff's right to possession was in no way based upon the purported agreements. It was the defendant who might have needed to rely upon them because had they been valid and permissible agreements the defendant would have contended that the tenancies would have needed for their termination, longer periods of notice than those contained in the notices to quit that were given. As it was, the contention of the defendant (based on paragraph 3 of the defence) was that the plaintiff was disabled from suing because he had been a party to illegal agreements. It was quite correct, as set out in paragraph of the defence, that the plaintiff had been a party to illegal agreements. At the time of the trial, however, he was not basing his claim "on the said agreements". Indeed, he could have presented his claim (if it were limited to a claim for possession) without being under any necessity of setting out the unlawful agreements in his plaint. He required no aid from the illegal transactions in order to establish his case".

Likewise, in the present case, the appellant has given a notice to quit which is not dependent upon an

illegal agreement. The respondent, on the other hand, is seeking to rely on such an agreement and is not therefore entitled to the protection of the Rent Restriction Act. Mr Vohra, as an alternative, sought the protections of the Landlord and

Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) on the basis that the premises occupied by the respondent are stores. A store can come within the purview of that Act, if it falls within the definition of

"shop". "Shop" is defined in section 2(1) of that Act as

"premises occupied wholly or mainly for the purpose of a retail or wholesale trade or business or for rendering services for money or money's worth".

The premises in the present case are not so occupied (see also *Trikam Maganlal Gohil v John Waweru Wamai* (Civil Appeal No 42 of 1982).

The appellant, in his plaint, also sought mesne profits at the rate of Kshs 1,200 per month with effect from August 1, 1980, supported by the evidence of a qualified surveyor, Mr Levitan, who also carries on business as an Estate Agent and Valuer and who estimated the rental of the premises occupied by the respondent at Kshs 1,107 in October, 1980. The respondent filed no affidavit by a valuer and has not disputed this valuation. In his memorandum of appeal, Mr DN Khanna, for the appellant, restricts his claim to Kshs 1,107. The respondent being a trespasser from the effective date of the notice to quit, the appellant is, I think, entitled to the mesne profits claimed. Having regard to the foregoing, I think, with respect, that the learned judge erred in finding that there were triable issues and that it was but "fair if the parties would have referred the matter first to the Rent Restriction Tribunal for determination."

I would allow the appeal and set aside the orders of the High Court. I would award the appellant possession of the suit premises and mesne profits at the rate of Kshs 1,107 per month from August 1, 1980, until delivering up of possession, with interest thereon at 12% per annum from the date of filing the plaint until payment. I would order the respondent to pay the appellant the costs of this appeal and his costs of the suit in the court below, including costs of the summary judgment application, the costs in the court below to carry interest at 12% per annum from the date of filing suit until payment.

As Kneller JA and Nyarangi Ag JA agree it is so ordered.

Nyarangi Ag JA. The facts giving rise to this appeal have been outlined in the judgment of Simpson CJ.

The appeal concerns premises shown on a plan which was produced during the trial. The plan, which was not challenged, showed the material store as separated from the rest of the premises and the servants' quarters at the back. The City Council enforces the usage of the premises so strictly according to the plan, that any misuse is an offence under section 252 of the Local Government (Adoptive By-Laws) Building Order 1968 published as LN 15.

The respondent was a monthly tenant under an oral agreement with the appellant. The respondent used the premises for residential purposes thus contravening the relevant By-Laws. The illegality pertaining to the agreement between the parties was disclosed at the hearing of the action.

The respondent could not rely on the long illegal occupation of the store to file a defence with triable issues. The store is not a dwelling house as that term is defined in section 3 of the Rent Restriction Act (cap 296) and on the evidence, the Landlord and Tenant (Shops, Hotels and Catering Establishment) (cap 301) affords no refuge to the respondent. The insurmountable hurdle which faces the respondent is that he cannot establish lawful occupation. The participation by the appellant in the illegal user of the store for living in, does not legalize the user. The effect of the judgment and order appealed from is to give effect to an unlawful contract: *Charan Kaur v Vanmali* (1956) 23 EACA 14. The respondent alone has to bear the illegality particularly as he has brought it up. The following passage in the judgment of Lord Morris of Borth-y-Gest, in the case of *Mistry Amar Singh v Kulubya* [1963] EA 408 at page 414, letter D,

admirably sums up the position of the parties to this appeal.

"*Ex Turpi causa non oritur actio*. This old and well known legal maxim is founded in good sense and expresses clear and well-recognized legal principle, which is not confided to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him."

The obvious rights which the appellant has as leasehold owner such as getting possession of the premises, are recognized and enforced notwithstanding the illegal contract. There is no reason why the appellant should not be paid mesne profits.

I am in entire agreement with the judgment of Simpson CJ. I would allow the appeal. I agree with the order on costs and with the other orders proposed by Simpson CJ.

Kneller JA. I agree.

Dated and Delivered at Nairobi this 5th day of April, 1984

A.H. SIMPSON

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CHIEF JUSTICE

A.A. KNELLER

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JUDGE OF APPEAL

J.O. NYARANGI

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AG. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR