IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Kneller JJA & Chesoni Ag JA

CIVIL APPEAL NO. 42 OF 1982

BETWEEN

TRIKAM MAGANLAL GOHIL.....1ST APPELLANT

VELJI DAMJI NANDHA.....2ND APPELLANT

AND

JOHN WAWERU WAMAI.....RESPONDENT

JUDGMENT

The question in this appeal is whether or not the learned judge was right when he dismissed with costs the appellant's application for summary judgment against the respondent and gave him unconditional leave to defend? Or should he have allowed it with costs, or given the respondent leave, conditional or unconditional, to defend and reserved the costs or made them costs in the cause?

Trikam Maganlal Gohil and Velji Damji Nandha, the appellants, are the leasehold owners of a three storey building on plot 209/2730 Luthuli Avenue, Nairobi. John Waweru Wamai, the respondent, leases a shop on the ground floor at Kshs 800 a month and a store on the same level across a courtyard at the rear for Kshs 400 month. He trades in the shop as Tumaini Trading Store (Kenya). The store is subdivided by a hard-board partition and the appellants say he has sublet (Since December 1978) the larger part to Messrs Scientific Industrial Services at Kshs 800 a month and turned the smaller part into a dwelling house. The appellants served on the respondent a formal notice dated September 23, 1980 under section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) altering the terms and conditions of his tenancy of the shop from December 1, 1980 with which the respondent was unwilling to comply and his reference to the Business Premises Tribunal on November 24, that year was the foundation of its Case 493 of 1980. On September 28, 1980 the appellants' advocates and agents sent a letter to the respondent giving him notice to quit the entire store on October 31, 1980 or at the end of the next complete month of his tenancy which would expire next after the end of one month from the service of this notice upon him. A copy was sent to Messrs Scientific and Industrial Services Limited.

The appellants alleged in the letter about the store the respondent had made in his part of the store one passage under the stair into a bathroom and another leading to the main door at the rear into a kitchen and thus turned it into a residence which was a criminal offence under bylaw 252 of the Building Bylaws. The respondent's advocate merely denied this in a letter of October 9, 1980 and the respondent refused to comply with the notice to quit the store and is still occupying the smaller portion. So on December 30, 1980 the appellants sued the respondent in Nairobi High Court Civil Suit 3575 of 1980 for possession of both parts of the store, mesne profits at Kshs 1,865.50 a month from November 1, 1980 until delivery up

of it, or an inquiry before a deputy registrar as to such mesne profits, costs and interest at court rates on both sums. They say the duration of its tenancy was not agreed so it is deemed by law to be from month to month from the first to the last day of each calendar month terminable by fifteen days' notice expiring with the end of a month of the tenancy. The mesne profits are calculated on the present monthly rental value of the store based in turn, on a confidential report by Mr Levitan of RR Oswald and Company, Valuers, Land, Estate and Managing Agents of Nairobi.

The appellants also maintain the respondent is not entitled to the benefit of the Rent Restriction Act (cap 296) and its provisions as tenant of the store or the part of it with the bath and kitchen and the respondent's advocate conceded this in the High Court. Is he protected by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (ibid) so far as the store or either part of it is concerned? The appellants deny it and the respondent claims he is. The appellants argue that this store or either part of it is not a shop because it is not occupied by the respondent wholly or mainly for the purpose of a retail or wholesale trade or business or for rendering services for money or money's worth. They refute the respondent's written defence that it is being used as nothing but a store and it was let as one unit with the shop for the benefit of each other and the respondent's trade or business, and therefore its tenancy is a controlled one within the Act and the dispute must be dealt with by the tribunal. The other defences were that the notice to quit the store was not in proper form because it did not comply with the Act, the appellants are estopped from denying the Act applies to the store because they issued a rent card for it to the respondent and the monthly rental value of the store is not Kshs 1,865.80.

The appellants considered the respondent's defences sham ones and their own claims were unarguable so they moved the High Court by notice of January 23, 1981 under order XXXV rule 1 for summary judgment which Brar Ag J as he then was, dismissed with costs on February 17, 1982. Briefly, he held that these defences raised bona fide triable issues, there were no agreed facts and it was inappropriate for the issues to be decided on the pleadings, affidavits and submissions.

The major issues on the pleadings, affidavits and submissions were:

1. Is the tenancy of this store or any part of it a controlled one within either Act?
2. Estoppel?
3. Monthly rental value? The first one is the most important of the three.

Nobody would think of describing the store or part of it as a shop within the ordinary acceptation of that word. (Per Romer LJ in *Deeble v Robinson* [1954] 1 QB 77 87 (CA). 'The essential element in a shop is that people can shop in it' (per Green LJ in *Ritz Cleaners v West Middlesex Assessment Committee* [1971] 2 KB 642, 671). The Act however says:

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

The appellants say part of the store is not occupied by the respondent and part is but as a residence which is illegal (cf *Charan Kaur v Mistry Mahanji Vanmali* [1956] 23 EACA 14, 15 (CA-K)). The respondent denies such user, claiming, instead it was all occupied and used as a store house for the purpose of the respondent's business and he is therefore entitled to the protection of the second Act as Trevelyan J held in *Hirani v Ramji Mepa & Co* [1971] EA 332 (K). There is no suggestion yet that this store is occupied for the manufacturing of anything for sale in the respondent's shop and is therefore not occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth as Trevelyan J held in *Balbir v Panesar* [1972] EA 94 (K) which was approved of by the former Court of Appeal for Eastern Africa in *Panesar v Balbir* [1972] EA 208, 210 (CA-K), and in which Mustafa JA said the definition of a shop in the Act had to be construed from a commonsense point-of-view and Spry VP and Lutta JA agreed. They assumed, without deciding that *Hirani* (ibid) was correctly decided and there the storehouses were occupied and used for storing goods for a shop separated from it and therefore had much more affinity with a shop than a factory or premises where goods are made for sale in the shop. It was a question of degree.

There were agreed facts on the agreed issues put before Trevelyan J in *Hirani* and recorded evidence from witnesses at a trial in *Balbir* (p 95) but the learned judge was, with respect, not right in this one to hold he had to have one or the other before he could answer this issue or the other issues.

The respondent if he wants leave to defend may show he is entitled to it by affidavit or oral evidence or otherwise. Order XXXV rule 2. So, if the applicant has set out in his affidavit(s) in support of his motion and exhibits facts which are probably true and sufficient to warrant the granting of his prayer for summary judgment the respondent must discharge the onus on him of showing his defence(s) raises triable or bona fide issues. They will be ones of law or fact. If they are of fact, then, bare denials by the respondent or his advocate in a pleading or a letter will not do because there must be a full and frank disclosure of the facts before the court which will be proper and sufficient for it to rule that those issues are raised. This was dismally lacking in this application. So there was uncontradicted affidavit evidence before the learned judge that the respondent did not occupy one part of the store because he had let it to Messrs Scientific and Industrial Services Limited and that he probably used or let the other part as a dwelling which was illegal. All that the respondent put in the balance with his weightless denial was an assertion that the shop and store were one unit and let as such to him for the benefit of each other or for use contemporaneously or supplementary (whatever all that may mean) which is irrelevant. The point was whether the store or part of it was occupied by him wholly or mainly for the purpose of his retail or wholesale trade or business or for the purposes of rendering services for money or money's worth? The answer to the first important issue was, therefore, that the respondent's tenancy of this store or either part of it was not a controlled one within the meaning of the phrase in either Act. It follows that the notice to quit was in proper form and the application was made in the proper forum.

The second issue, in my judgment, is covered by authority. The appellants are not estopped from alleging that the premises are not controlled premises by reason of the representation, express or implied, made by them or their agent in a rent book or books to the effect that they were controlled premises on which representation the respondent acted to his detriment by not thereafter seeking other premises to occupy because such a statement in a rent book, if it amounted to a representation, constituted a representation of law and not of fact. *London County Territorial and Auxillary Forces Association v Nicholas and Another* [1948] 2 All ER 432, 435 (CA) and *Kai Nam (a firm) v Ma Kam Chan* [1956] 1 All ER 783, 784 (PC). The plea of estoppel in this case must also fail for the same reasons and the learned judge could and should have said so though it should be noted that these authorities were not cited to him.

The third, and last, issue was the monthly market rental value of the store?

The applicant's valuation was not offset by anything more than the respondent's denial that Kshs 1,865.50 a month was the correct figure for mesne profits and again the respondent failed to discharge the onus on him.

The judge erred, then, in ruling that the respondent was entitled to unconditional leave to defend. If he had been right he should have made that order and not dismissed the application. He was right to deal with the costs of and incidental to the application then order XXXV rule 8. If he had ruled that the application was based on a case not within the order or the plaintiff, in his opinion, knew that the respondent relied on a contention which would have entitled him to unconditional leave to defend he was empowered to dismiss the application with costs to be paid forthwith by the plaintiff but not otherwise. Order XXXV rule 8(2).

He gave unconditional leave to defend and costs should have been in the cause or reserved to be dealt with at the trial (though the proviso to the same subrule foresees possibility of no order as to costs being made at the hearing of the application). The upshot is that I would allow this appeal, set aside the decision of the High Court, order the respondent to give possession of the entire store (subject to the rights of Messrs Scientific Industrial Services) with mesne profits of Kshs 1,865.50 a month from November 1, 1980 until possession be delivered up with interest at 12% a year from the date of the plaint until payment. The costs of the suit and the application for summary judgment with interest on both at 12% a year from the date of the plaint and the application respectively until payment and the costs of the appeal should be awarded to the appellants.

Law JA. I have had the advantage of reading in draft the judgment prepared by Kneller JA with which I am in full agreement. I will only add a few words relating to the use of the summary procedure prescribed by order XXXV of the Civil Procedure Rules. An application for summary judgment should only be dismissed if it falls within subrule (2) of rule 8, where there is an express finding either:

a) that the case was not one falling under order XXXV, or

b) that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend in which case the application may be dismissed with costs to be paid forthwith by the plaintiff.

In all other cases, such as this one, the application should not be dismissed. If triable issues are found to exist, summary judgment should be refused, and an order made granting unconditional or conditional leave to defend, with an appropriate order as to the costs of the application, which would normally be dealt with at the trial. The application itself should not be dismissed, because in such a case it would cease to exist, and the necessary consequential orders as to leave to defend and costs could not be made. As Chesoni Ag JA also agrees, this appeal is allowed, with costs, and there will be orders in the terms proposed by Kneller Ag JA.

Chesoni Ag JA. The facts of this case have been fully narrated by my brother Kneller JA in his draft judgment with which I fully agree. During the appeal it was made clear by Mr Khanna for the appellants and the application to the High Court related to two stores. One store is by permission of the respondent being used by Scientific Industrial Services for keeping there their goods. The respondent did not tell the court whether the goods kept there are for sale in his business in the main shop. I have little doubt, if any, that this second store is not being used by the respondent, and, therefore, the question of whether or not it is occupied and/or used wholly or mainly for the business of the respondent does not arise. The question now before us is whether the learned judge should or should not have dismissed the appellants' application for summary judgment under order XXXV rule 1 of the Civil Procedure Rules with costs.

The basis of an application for summary judgment under order XXXV is that the defendant has no defence to the claim (*Zola and Another v Ralli Brothers Ltd and Another* [1969] EA 691. Rule 2(1) of order XXXV requires the defendant to show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit. The onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. He must go further and show that the defence is genuine or arguable or raises triable issues. He must show that he has a reasonable ground of defence to the question. A mere denial of the claim will not suffice. If the defendant shows that the application is not one, that should have been brought under order XXXV then the court must dismiss the application. On the other hand, if the defendant establishes what he is required to do under rule 2(1) of order XXXV the court should grant him conditional or unconditional leave to defend the suit and in that case the application of the plaintiff is not dismissed.

In resisting the application in this case the defendant filed a replying affidavit. He stated in the affidavit that the stores were let as part of the main shop and so the Landlord, Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) applied. The test is not how or when the premises were let, but the nature of occupation at the date of hearing of the application ie what were the premises being wholly or mainly used or occupied for at the date of the hearing? The respondent/tenant had to depone to the main use of the stores in his affidavit or orally or otherwise, show what the stores were wholly or mainly used for and not to merely allege that he was protected by the Act. There was no notice under section 4 of the Act served on the respondent in respect of the store. The stores may have been let for the benefit of the main shop or for use contemporaneously, and supplementary to the shop, but unless that was shown by the affidavit, or oral evidence, or otherwise, to be the case at the date of the hearing, such letting would not operate as a bar to granting possession. The court had to look at the whole of the respondent's replying affidavit and see whether it disclosed an arguable defence or any triable issue (*Kirat Singh & Co v Punja Meghji* (1952) 19 EACA 33. I have looked at the affidavit and in my view the respondent did not in the replying affidavit show that he should have leave to defend the suit and no triable issue is disclosed in that

affidavit. There is a defence on record and so it should be looked at (see *Mugambi v Gatururu* [1967] EA 196 at 197). The defence which I have perused is a repetition of what is said in the affidavit and disclosed no *prima facie* triable issues.

It is worth mentioning that in the cases of *Balbir v Panesar* [1972] EA 94 and 208 and *Hirani v Ramji Mepa & Sons* [1971] EA 332 the defendant adduced facts to show that the premises in the dispute were being used wholly or mainly for the purposes of the defendant's businesses, a stage which the defendant in the present case failed to achieve. I would not say that the defendant in his affidavit or by oral evidence or otherwise laid before the court below sufficient facts as to entitle him to leave to defend the suit. In the circumstances the learned judge erred in granting unconditional leave to defend. Since the application was one that could be brought under order XXXV, it was not for dismissing. As to costs where leave to defend is granted the desirable order to make is for costs to be in the cause or to reserve the same. If the application is dismissed then rule 8 of order XXXV empowers the court to order by and to whom, and when the costs shall be paid or to reserve them to be dealt with at the trial. The defendant having failed in his obligation under rule 2(1), the application should have succeeded. I would allow the appeal with costs in the High Court and in this court, and grant the reliefs prayed for in the plaint.

Dated and delivered at Nairobi this 31st day of March, 1983.

E.J.E LAW

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JUDGE OF APPEAL

A.A KNELLER

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JUDGE OF APPEAL

Z.R CHESONI

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR