REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 1981 OF 1979

SHAH & ANOTHER.....PLAINTIFF

VERSUS

SHAH.....DEFENDANT

RULING

February 20, 1980, **Simpson J** delivered the following Ruling.

By a lease dated 20th May, 1974, the plaintiffs in this suit leased premises in Kimathi Street to the defendant for a term of 6 years expiring on 31st January, 1980. In their plaint filed 20th June, 1979, they claim that the lease has become forfeited for breach of a covenant contained therein and seek *inter alia* possession of the premises.

The defendant has filed a defence denying the breach and in a counterclaim prays to be relieved from forfeiture.

On 10th July, 1979, the plaintiffs filed a notice of motion applying for summary judgment.

While both the suit and the application were still pending the plaintiffs' advocates wrote to the defendant a letter dated 31st January, 1980 informing him that demolition of the premises would be commenced the following day. The letter was delivered at 4.30 p.m. on 31st January, 1980. Demolition was commenced as threatened on 1st February and on the same day the defendant applied for and obtained an *ex parte* injunction restraining the plaintiffs from demolishing the premises.

The plaintiffs now apply for setting aside the *ex parte* injunction and Mr Lakha who appeared with Mr. Hira for the defendant/respondent has raised a preliminary objection. The applicants he says are in contempt of court and cannot be heard. Mr D N Khanna strongly objected to the matter being dealt with a preliminary point but I accept Mr Lakha's view that it is a matter which should be dealt with *in limine* and that as it had been raised in the respondent's affidavit and committal was not sought he should be allowed to proceed.

The facts which are not in dispute are that while a suit for possession and an application for summary judgment were pending before the Court the plaintiffs proceeded to demolish the suit premises. The lease had expired the day before demolition commenced. The respondent says that by a letter dated 20th September, 1979, they exercised the option contained in the lease for a further lease of 6 years. The applicants describe this letter as fictitious.

Whether or not the option has been validly exercised I am of the opinion that the applicants are in contempt of court in starting to demolish premises which are the subject of a case instituted by them and pending in this Court.

As Lord Diplock said in *AG v Times Newspapers* (1973) 3 All ER 54 at p 71

> "……. In any civilized society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another. "Contempt of Court" is a genuine term description of conduct in relation to particular proceedings in a court of law which tends to undermine that system and to inhibit citizens from availing themselves of it for the settlement of their disputes. Contempt of court may thus take many forms."

At p 72 of the same judgment he said that once a dispute had been submitted to a court of law citizens should be able to rely on there being no usurpation by any person of the function of that court to decide it according to law. Conduct which is calculated to prejudice this requirement (among others) or to undermine public confidence that it will be observed is contempt of court.

These remarks were made in a different context as Mr Khanna rightly observed but the principles are of general application.

Mr Khanna citing the judgment of Lord Denning M R in *McPhail v Persons*, names unknown [1973] 3 A11 KR 393 urged that there could be no contempt in exercising one's legal rights. Lord Denning was discussing the remedy of self-help in relation to squatters who were guilty of the offence of forcible entry. Elsewhere (at p. 399) he said:-

> "In my opinion, therefore, when a tenancy has come to an end, the landlord is not entitled to take possession except by an order of the court; and on making the order, the court has power to fix a date for possession."

Mr Khanna, quoting the judgment of Finer J in *McGibbon v McGibbon* [1973] 2 A11 ER 836 said the injunction must bear same sensible relationship to the cause of action. In the present case the relationship is clear. The injunction restrains the applicant from ousting the respondents from possession of the suit premises.

As I have said I am satisfied that the applicant's conduct amounts to contempt of court. He has not however disobeyed an order of the court and I now have to consider whether or not I should refuse to hear their application. Mr Lakha urged me to refuse to hear it until the applicants had purged their contempt by paying for the restoration of the premises to their condition before demolition started. The respondent has already restored the premises at his own expense. He cited *Hadkinson v Hadkinson* [1952] 2 All ER 567 but in that case an order of the court had been disobeyed by taking a child out of the jurisdiction. The Court refused to hear the mother the who had done so until the child had been brought back. Lord Denning (at page 574) had this to say-:

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance."

Later (at p. 575) he said-:

> "I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it

> continues, it impeded the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

In the present case the applicants have impeded the course of justice by starting to demolish the suit premises while the suit was pending. Such demolition would have deprived the court of its power to make any enforceable order in the suit with respect to possession but that power has been restored by the *ex parte* injunction. It must not however be overlooked that the applicants have had no opportunity to put their case against the granting of the injunction. It would be less than just to refuse to hear them.

I think the respondent was justified in making his preliminary objection but I shall allow the applicants to proceed with their application. The costs of the preliminary objection are reserved pending the determination of the application.

February 20, 1980

SIMPSON J