IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Simpson CJ, Potter JA & Kneller Ag JA)

CIVIL APPEAL NO. 6 OF 1982

BETWEEN

SUNDERJI...APPELLANT

AND

CLYDE HOUSE COMPANY LTD...........................RESPONDENT

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

JUDGMENT

Potter JA This is an appeal from a judgment of Sachdeva J given summarily under order XXXV of the Civil Procedure Rules, in which the respondent as plaintiff landlord was awarded possession of the suit premises and other relief against the appellant as defendant tenant. The suit premises are a shop in Clyde House, Kimathi Street, Nairobi, and it is common ground that the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) (herein referred to as "the Act") applies. The learned judge gave judgment for the respondent landlord on the footing that there was no "controlled tenancy" of the suit premises within the meaning of section 2(1) of the Act. The main question before this court is whether the pleadings and affidavits disclose a *bona fide* triable issue or issues as to whether or not the tenancy was a "controlled tenancy."

A tenancy agreement was drawn up on a printed form and signed by the appellant as tenant on February 17, 1976. The suit premises and the parties were identified, and the rent was specified. The period of the lease was stated to be five years and three months. Occupation was to commence on January 1, 1976, but the agreement was not signed until February 17, 1976, and the tenant went into occupation on March 1, 1976. Whatever arguments may be advanced in connection with these dates, one thing is clear – the period of the tenancy was on any view of the matter for more than five years. The last sentence in the agreement above the tenant's signature was:-

"This is to confirm that you are taking over the possession of the above mentioned premises subject to the terms and conditions of the lease to be drawn up by the landlord's Advocates."

The relevant provisions of the interpretation section of the Act are as follows:-

"2 (1) For the purposes of this Act, ... "controlled tenancy" means a tenancy of a shop...

(a) which has not been reduced into writing; or

(b) which has been reduced into writing and which

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(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii)

....

“tenancy” means a tenancy created by a lease ...... by an agreement for .... lease .... , by a tenancy agreement .... ”

The respondent landlord’s case is that the agreement was an enforceable agreement for lease and thus a “tenancy” as defined in the Act, but was not a controlled tenancy because it was reduced into writing and was for a period exceeding five years. The appellant tenant’s case is that, by reason of the last sentence of the agreement quoted above, the agreement is not enforceable and did not create a “tenancy”, but is what has been aptly described as an “agreement to agree.” The appellant referred to Woodfall on Landlord and Tenant, 28th edition volume 1 at pages 131 to 132, and to the case of *Spottiswoode v Doreen* [1942] 2 ALL ER 65.

The appellant further contends that the agreement of February 17, 1976 did not contain all the terms of the proposed lease, because it was orally agreed that the lease should contain a clause whereby the tenant could terminate the tenancy if she was refused a trade licence in respect of the suit premises. A tenancy agreement containing such a term would be a “controlled tenancy”’ because it contained “provision for termination, otherwise than for breach of covenant, within five years from the commencement” of the tenancy; see sub-paragraph (b) (ii) of the definition of controlled tenancy in section 2(1) of the Act.

The appellant’s defence contained the following:-

“In the further alternative if the agreement referred to in paragraph 4 of the plaint created a tenancy in favour of the defendant (which is denied) then the same was subject to terms and conditions of the lease to be drawn by the plaintiff’s advocates; such lease drawn by the plaintiff ’s advocates contained provisions for termination of the defendant’s tenancy otherwise than for breach of covenants within five years from the commencement thereof.”

In her affidavit in the High Court proceedings the appellant deponed:-

“4. The first time either of us saw the said Ravi Prinja in connection with the tenancy of suit premises was in February, 1976, when after negotiations, all the terms of the tenancy were agreed with him. On February 17, we went to the said Ravi Prinja’s office when he set out the terms of the tenancy in writing (Exhibit “AM 1” to the said affidavit of Ashok Mediratta). I then signed the said document, immediately after which the said Ravi Prinja handed over to us the keys of the suit premises and I have been in occupation of the same since then.”

“5. Before I signed the said agreement it was first clearly agreed between us and the said Ravi Prinja that I would be entitled to terminate the tenancy of the suit premises at any time if I was refused a trade licence in respect of the suit premises. This condition was also accepted by the said Ashok Mediratta who promised us that appropriate provisions would be made in the lease.”

The husband of the appellant deponed in an affidavit to the same effect. Mr Ashok Mediratta, Managing

Director of the plaintiff landlord company, in his affidavit filed in the High Court proceedings, having described the signing of the agreement of February 17, 1976, deponed as follows:-

"8. Instructions were given by my company to Messrs Gautama and Kibuchi to prepare a lease after having a draft thereto approved by the defendant or on her behalf.... Now produced and shown to me marked "AM 2" is a true carbon copy of a draft lease prepared by Gautama & Kabuchi which my Company did not at any time see until recently and which was forwarded to the defendant's advocate Aziz Mohamed at the request of the defendant....."

The draft lease exhibited to the affidavit of the plaintiff's Managing Director contained the following provision in clause 5:-

"(vi) Provision for determination of lease by the lessee by three (3) months's notice of Trade Licence refusal."

Two further affidavits, one of Mr Ashok Mediratta and one of Mr Ravi Prinja, were filed without leave of the court on the day before the hearing of the notice of motion, and were objected to by the appellant and were not admitted in the proceedings.

The learned judge in his ruling had this to say of these defences:-

> "It is true that the agreement states that, "This is to confirm that you are taking over the possession of the above mentioned premises subject to the terms and conditions of the lease to be drawn by the landlord's advocates"

but in my judgment that does not detract from the validity of the agreement entered into between the parties. All the essential terms of an agreement relating to an interest in land are contained in it, and either party could specifically enforce it and, as stated above, the defendant did attempt to place reliance upon it to enforce her rights. Both the defendant and her husband state in their respective affidavits that "after negotiations <u>all</u> the terms of the tenancy were agreed with him." (Mr Prinja). They do continue to allege that it was expressly agreed between them and Mr Prinja <u>before</u> the defendant signed the said agreement that she was entitled to terminate the tenancy if she was refused a trade licence, but this condition was not incorporated in the written agreement which embodied <u>all</u> that the parties had agreed. I also do not consider that it is permissible to look at the draft lease which was never approved and consequently never superseded the written agreement between the parties."

With respect, I do not think that the learned judge was right to dismiss these defences as not raising triable issues. The first issue, as to whether the agreement of February 17, 1976 was in law an enforceable agreement or a mere "agreement to agree", was dealt with by the learned judge without reference to any of the large body of case law material to the issue (it does not appear from his notes that any of that case law was referred to him). In my opinion the issue as to the application to the agreement of February 17, 1976 of the case law typified by the decision in *Spottiswoode's* case, is an issue that should be tried with full argument on the law and not one which should be dealt with summarily in the way it was.

The second issue is one of fact, namely whether there was an oral agreement for a provision in the intended lease entitling the tenant to determine the lease prematurely in the event of her failing to obtain a trade licence. The fact was pleaded in the defence, deponed to in the affidavits of the appellant and her husband and possibly supported by the draft lease. I do not agree with the learned judge that it was not permissible for him to look at the draft lease "because it was never approved and consequently never superseded the written agreement between the parties".

A copy of the draft was exhibited to an affidavit filed by the plaintiff landlord. The important question, which the learned judge did not and could not investigate on a summary hearing, is how did that provision for premature determination of the lease upon refusal of a trade licence find its way into the draft lease? When the facts are fully investigated, that provision of the draft lease may or may not support the appellant's case.

Other defences were adumbrated before us, as they were before the learned judge, but as I am of the view that this case must go to trial, it would not be helpful to the trial judge to say any more. I respect the learned judge's valiant attempt to dispose of this case summarily, undoubtedly in the interests of economy of time and money, but I fear that the excessive use of summary powers, both in the civil and the criminal law, leads only to multiplication of the expenditure of time and money. I would allow this appeal, set aside the summary judgment of the High Court, order that the appellant have unconditional leave to defend, and award the appellant the costs of this appeal and of the proceedings of the High Court which led to this appeal, but for only one advocate.

Kneller Ag JA. Potter JA has set out the relevant facts and issues in this appeal so I will not repeat them.

I agree that the pleadings and affidavits disclosed *bona fide* triable issues including the effect of the last two printed lines of the document Equity Estate Limited, the landlord's agents, prepared and the tenant confirmed with her signature, the draft lease with its reference to termination of the lease by three monthly notice by the tenant if she were refused a trade licence, her caveat of October 19, 1976 claiming a lessee's interest based on the Equity Estates Limited document, the landlord's acceptance of rent for two months after the tenant had occupied the premises for five years and three months, the lack of a registered lease by the date of the landlord's application for summary judgment to the High Court and, in sum, whether or not the tenancy was a controlled one within the definition of that expression in section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301).

I would allow the appeal set aside the summary judgment of the High Court, give unconditional leave to the appellant to defend and award the appellant the costs here and below but only for one advocate.

Simpson CJ. I agree that this appeal should be allowed for the reasons stated by Potter JA. I agree also with the orders proposed by him and since Kneller Ag JA, also agrees it is ordered that the appellant shall have unconditional leave to appeal and the costs here and in the court below. A certificate for two advocates is refused.

Dated and Delivered at Nairobi this 28th day of May 1982.

A.H.SIMPSON

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CHIEF JUSTICE

K.D.POTTER

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JUDGE OF APPEAL

A.A.KNELLER

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR