IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: LAW, MILLER JJA & KNELLER Ag JA)

CIVIL APPEAL NO 59 OF 1981

PYARALLY POPAT RAJWANI ……………..APPELLANT

VERSUS

DAVID RODEN …………………………..RESPONDENT

(Appeal from a ruling of the High Court at Nairobi Trainor J dated 28th

May, 1981 in Civil Case No 1304 of 1980)

JUDGMENTS

Law JA. This appeal concerns two inter-related suits, and necessitates a careful examination of the back ground in view of the complex issues of fact and law involved. The appeal is from a ruling, described as a judgment, by Trainor J dismissing an application by the appellant, the defendant in Civil case No 1304 of 1980, praying for the plaint in that suit to be struck out. The plaintiff in that suit is the respondent in this appeal. The grounds upon which the application was based was that the matters averred in the plaint in civil case No 1304 of 1980 were *res judicata* by reason of a decision by Simpson J (as he then was) in another suit, civil case No 2380 of 1980, between the same parties, instituted after civil case No 1304 of 1980, but decided before the application the subject of this appeal, so as to constitute a "former suit" for the purpose of section 7 of the Civil Procedure Act ("the Act") which deals with *res judicata*. I shall hereinafter refer to civil cases, No 1304 and No 2380 simply as "1304" and "2380" respectively.

Both these suits arise out of a dispute between a landlord (Mr Rajwani) and his tenant (Mr Roden). Mr Rajwani was the plaintiff in 2380, and Mr Roden was the plaintiff in 1304. I shall refer to them as "the landlord" and "the tenant" respectively hereinafter. The tenant became tenant of the landlord's house, No 11 on plot L R 209/407, Ngong Road, Nairobi, on 1st April, 1978, at a rent of shs 4,000/- a month. By his plaint in 1304, the tenant pleaded that the tenancy was for a term of two years, but by his defence in 2380, filed four months later, the tenant admitted that he was a monthly tenant. This is undoubtedly correct, as there was no registered lease, so that even if a two year term was agreed, the tenancy is deemed by section 106 of the Transfer of Property Act to be a tenancy from month to month, terminable by 15 days' notice.

On 29th November, 1979, the landlord served notice on the tenant of his intention to increase the monthly rent to shs 6,250/- a month from 1st February, 1980, a date which he subsequently altered to 1st April, 1980. On 4th January, 1980, the tenant informed the landlord that he was not prepared to pay the higher rent and he gave notice of his intention to terminate the tenancy and to vacate the premises on 31st March, 1980. In the event he did not do so, but remained in occupation during the months of April and May. On the 31st May, 1980, he purported to terminate the tenancy, apparently by leaving the keys of the

suit premises outside the landlord’s house. He does not appear to have given any notice of his intention to do this. The keys mysteriously disappeared. The landlord did not resume possession until 16th June, 1980, when he had to break into the house, incurring expenses for a locksmith, fitting new locks and so on.

The main question, common to both suits and to this appeal, is what was the tenant’s status after the 31st March, 1980. According to the tenant, by his plaint in 1304, he was allowed to remain in occupation as a monthly tenant at the original rent. He duly paid shs 8,000/- as rent for April and May, but his cheque was returned by the landlord, who on the 8th May, 1980, successfully levied distress for double rent for April and May under section 14 of the Distress for Rent Act, (Cap 293) on the basis that the tenant was holding over after the expiry of his notice of intention to quit the premises. The distress was lifted on the tenant depositing shs 25,000/ - in court.

By his suit 1304 the tenant alleged that this distress was unlawful, and he claimed damages and other reliefs.

By his suit 2380 the landlord claimed –

(a) shs 4266/65, being double rent for the period 1-16 June, 1980, which period was not covered by the distress;

(b) shs 400/-, being the expenses incurred in re-entering the locked house;

(c) shs 18,874/80 being the cost to the landlord of restoring the house “to its proper condition as when let”; and

(d) shs 8,800/- loss of rent for the period 17th June to 31st July, 1980, the period requisite for restoring the house to its original state.

It should be noted that the plaint in 2380 made no claim for double rent for the months of April and May, 1980, this claim having been satisfied by the levying of distress.

On the 15th September, 1980, the landlord by notice of motion in 2380 moved the court for summary judgment, under Order XXXV rule 1, for the liquidated claims included in the plaint as listed above, totaling shs 32,340/65. Simpson J held that there was “at least one triable issue”, and he instanced the quantum of the claim for the cost of restoring the house to a tenantable condition. He gave the tenant unconditional leave to defend. On the summons for directions in 2380, taken out on 4th November, 1980, the parties agreed to refer to the court preliminary points of law, namely, that notwithstanding the giving of unconditional leave to defend, the landlord was entitled to summary judgment for double rent for the 16 days in June, and for the locksmith’s charges, and the cost of new keys and locks. This matter again came before Simpson J. Referring to his earlier ruling on the application for summary judgment, Simpson J said that the triable issue on which he gave leave to defend was the claim for restoring the property to its original state. He proceeded to give judgment in favour of the landlord for double rent for the 16 days in June, saying “I think he (the landlord) is entitled to judgment under that head without waiting for determination of the other issues” on the ground that the tenant “failed to deliver up possession on 31st May, 1980.”

Armed with this decision, the landlord then applied in 1304 by Chamber Summons under Order VI rule 13 for the plaint in that suit to be struck out. This application came before Trainor J. Mr D N Khanna for the landlord submitted that Simpson J’s award of double rent for the 16 days in June necessarily involved the proposition that the tenant was also liablefor double rent for the months of April and May, 1980, because the tenancy was only determinable by notice of intention to terminate the tenancy, which became effective on 31st March. That notice was the only notice given, so that the tenant held over from 1st April to 16th June. This was a single and uninterrupted period, and in awarding double rent for the 16 days in June, the question of the tenant’s liability to pay double rent for the rest of the period was an inescapable consequence of the award of double rent for the 16 days, which could not have been awarded on anyother

basis. The tenant's liability to pay double rent for April and May was accordingly *res judicata*, and the distress levied for that period was accordingly lawful, and the whole basis for the tenant's suit for damages for wrongful distress fell away, and his plaint must be dismissed. Had there been a claim for double rent for April and May in 2380, summary judgment must have been given for those months, in Mr Khanna's submission, as judgment for double rent for the 16 days in June could not have been awarded on any other basis than that the holding over was from the 1st April and was continuous. The plaint in 2380 did not include a claim for double rent for April and May because it had been satisfied by the alternative remedy of distress.

Trainor J dismissed the application to strike out the plaint in 1304 on two grounds. The first was, that in giving the tenant unconditional leave to defend, Simpson J gave leave to defend on the entire claim for double rent, including April and May, so that the issue of double rent for April and May "was very much at large". The second was that Simpson J had made it clear that he had awarded double rent for the 16 days in June solely on the basis that the tenant had not effectively handed over possession on 31st May by leaving the keys outside the landlord's house in the latter's absence, so that, in Trainor J's words, Simpson J"was explicit in his ruling that he was giving judgment for double the rent for that period (i.e. the 16 days in June) only because of the plaintiff's admission of the abortive effort to hand over possession."

From that decision the landlord, represented by Mr D N Khanna, has appealed. Mr Gathenji appeared for the tenant, and also submitted a "Notice of Grounds for Affirming the Judgment" which does not raise any new points but is merely an affirmation of the grounds relied on by Trainor J in arriving at his decision.

At the outset I would say that I agree with Mr Khanna that Trainor J was in error in basing his decision, at any rate in part, on Simpson J having given the tenant leave to defend in 2380 on the claim for double rent for April and May. With respect, Simpson J did no such thing, as the plaint in 2380 made no claim for such rent, it having already been recovered by distress. As regards the other ground for his decision that *res judicata* did apply by reason of the award of double rent for the 16 days in June, Trainor J rightly pointed out that this award was expressly stated by Simpson J to be on the basis that the tenant had not effectively handed over possession on 31st May. Mr Khanna submitted that this cannot have been the true basis for the award, because liability for double rent is only incurred by a tenant who holds over after the expiry of notice given by him of intention to quit the premises, under section 14 of the Distress for Rent Act, and there is no evidence whatsoever of any notice having been given expiring on 31st May. The inevitable conclusion, submitted Mr Khanna, is that Simpson J awarded double rent for the 16 days in June on the basis that that period was part of a continuous, uninterrupted holding over commencing on 1st April, the day after the notice admittedly given by the tenant. Mr Khanna cited *Spens v I R C* [1970] 2 All ER 295 in support of the proposition that estoppel *per res judicatam* applies not only to what is expressly decided, but also to what is assumed and admitted and is fundamental to what is decided. As Megarry J said *Spens*' case, at page 301 –

"The distinction between what is fundamental to the decision and what is merely incidental and collateral to it .... may no doubt often be difficult to make: see, for example, Spencer Bower and Turner, Doctrine of *res judicata*. There it is said that one must enquire with 'unrelenting severity' whether the decision on which it is sought to found the estoppel is so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than that will do".

Mr Khanna submitted that Simpson J.'s reference to the abortive handing over of the keys was only made in relation to the extent of the period of holding over: did it terminate on 31st May or on 16th June, when the landlord forcibly re-entered? Simpson J found that the holding over did not terminate until 16th June, and he gave summary judgment for double rent for the 16 days in June. This can only have been the basis that the holding over was continuous from the expiry of the tenant's notice which expired on 31st March. No other notice was pleaded or suggested, nor could Mr Gathenji point to any later notice being given by the tenant, and Simpson J, who had referred to section 14 of the Distress for Rent Act in his ruling, must have been aware that double rent is only payable by a tenant who holds over after his notice of intention to quit has expired. He did not award double rent for the 16 days in June *per incuriam*, on the basis that

the tenant's unilateral attempt to end the tenancy, without notice, by handing over the keys to the house on 31st May, gave rise in itself to liability for double rent thereafter. A tenant cannot, without giving a valid notice, put an end to a tenancy from month to month, which persists until a valid notice is given, or the landlord re-enters.

After anxious deliberation, I find myself in agreement with Mr Khanna's submissions. I am satisfied that Simpson J's award of double rent for the 16 days was not made *per incuriam*, but that it is fundamental to that decision that the 16 days were part and parcel of a longer and continuous period of holding over, commencing from the expiry of the only notice given by the tenant, which expired on 31st March, 1980. Simpson J did not give judgment for double rent for April and May, because he was not asked to do so. It was not part of the landlord's claim as he had recovered the double rent for that period by levying distress. Simpson J could not, and would not, have awarded double rent for the 16 days in June unless those days were part of the longer and continuous period of holding over which included the months of April and May. It follows that in my view the tenant's claim for damages for, unlawful distress is untenable, and that his plaint must be struck out. By reason of *res judicata*, the tenant must be held to have been holding over after the 31st March, 1980, and thus liable for double rent thereafter, so that the distress was lawful. I would accordingly follow this appeal, with costs, and make the following consequential orders –

(1) That the ruling (described as a judgment) by Trainor J dated 25th May, 1981, dismissing the landlord's application for the plaint in 1304 be struck out, be set aside, and a ruling and order striking out the plaint substituted, with costs of that application to the landlord.

(2) That suit No 1304 of 1980 be dismissed, with costs to the landlord.

(3) That out of the shs 25,000/- deposited in court by the tenant, the following sums be paid to the landlord –

a) shs 16,000 being double rent for the months of April and May, 1980

b) shs 2,950/- being bailiff's charges and expenses for security guards, paid by the landlord, with interest at court rates from 13th May, 1980 the date of the suit.

(4) That the balance of the said sum of shs 25,000/- if any after payment of the sums and interest payable under paragraph (b) above be retained in court against payment of the landlord's taxed costs recoverable by him under paragraph (a) above.

As Miller JA and Kneller Ag JA agree, it is so ordered.

Miller JA. I have had the benefit of reading the draft judgment of Law JA in this appeal. I agree with it and the orders he has proposed.

Kneller Ag JA. I have read the judgment of Law, JA in draft and agree with the reasoning and proposed orders in it. It is unfortunate that the parties' advocates did not ask for the two actions to be consolidated and that there was no appeal from the decision of Simpson J as he then was, in 2380 before Trainor J came to deal with the application in 1304 because then there would have been no need for this appeal.

Dated and Delivered at Nairobi this 26th Day of August, 1982

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

A.A.KNELLER

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Ag JUDGE OF APPEAL