IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Madan, Law JJA & Hancox Ag JA)

CIVIL APPEAL NO. 13 OF 1982

BETWEEN

L K MWANTHI...APPELLANT

AND

S K MWITHIMBU...............................1ST RESPONDENT

F M IMANENE.....................................2ND RESPONDENT

JUDGMENT

Madan In this appeal, the respondents are landlords (hereafter referred to as the plaintiffs) of their business premises situated in Meru. The appellant (hereafter referred to as the defendant) agreed to rent a shop in the plaintiffs' business premises at the monthly rent of Kshs 4,500 from, according to the plaintiffs, May 1, 1979, and, according to the defendant, from September 1, 1979. The plaintiffs filed a suit against the defendant for the recovery of Kshs 45,000 being arrears of rent for ten months, the averment in their plaint being:

> "The plaintiffs' claim against the defendant is for a sum of Kshs 45,000 being arrears of rent for a period of ten months from May 1, 1979 at the rate of Kshs 4,500 per month ..."

In his defence, the defendant denied owing Kshs 45,000 arrears of rent for ten months from May 1, 1979 as alleged; that the tenancy did not commence on May 1, 1979 but on September 1, 1979 and there was case No 133 of 1981 pending in the Business Premises Rent Tribunal on the same issue of arrears of rent between the parties.

The plaintiffs persisted in their attack with an application for summary judgment under Order XXXV rule 1. The affidavit in support of the application sworn by one of the plaintiffs deponed that the defendant was "Justly and truly" indebted to them and was so indebted at the commencement of the suit in the sum of Kshs 45,000 being arrears of rent for ten months due and owing in respect of the months of October, November and December, 1980 and for the seven months of January to July, 1981; that the Business Premises Rent Tribunal case No 133 of 1981 was withdrawn by the landlords' advocate.

The defendant's affidavit in reply reiterated that he was not indebted to the plaintiffs for the rent claimed for the ten months, he having paid the same and that the Rent Tribunal case had not been withdrawn, it was partheard and still pending. The plaintiffs swore a supplementary affidavit which was filed without leave of the court. With the addition of certain other matters, they again deponed that the defendant was "truly and justly" indebted to them in the sum of Kshs 45,000 *as set out in the plaint* (stress mine).

The learned judge entered summary judgment for the plaintiffs.

The defendant has appealed. He filed the record of appeal as required by the Rules of this Court. Later, he filed a supplementary Record of Appeal containing copies of the case papers and proceedings before the Tribunal. The plaintiffs filed Notice of Preliminary Objection to the filing of the Supplementary Record arguing that it had been filed without leave of the court. However, they would be willing for the court to examine the original record of the Tribunal's case No 133 of 1981 which was made available. The plaintiffs' advocate, Mr Gautama, argued that the supplementary Record constituted additional evidence which could not be produced in the manner in which it had been done. Rule 85(1)(k) of the Rules of Court provides

> "such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant ..."

It enables a supplementary record to be filed for the purpose stated without the leave of the court. It is but right that all documents necessary for the proper determination of the appeal should be brought to the notice of the court. The Supplementary Record did not constitute additional evidence, it merely augmented the original record of appeal by other documents which already existed and which were inadvertently omitted from the original record of appeal but which were necessary for the proper determination of the appeal.

The defendant's first two grounds of appeal are:

1. The learned judge erred in law in proceeding with the case in view of the averment in the defence and in the affidavit in reply that the matter in issue in the suit was also directly and substantially in issue between the same parties in the previously instituted proceedings before the Tribunal in case No 133 of 1981.
2. Section 6 of the Civil Procedure Act was a clear bar to the court proceeding with the suit.

It thus became necessary that we should acquaint ourselves with the nature of the pleadings, in this instance I will call them so, and the proceedings before the Tribunal in order to decide the merits of the first and second grounds of appeal. Even so, the plaintiffs were also willing for us to examine the original record of the Tribunal's case No 133 of 1981.

Section 6 of the Civil Procedure Act reads:

> "6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

It seems to me on a perusal of the Supplementary Record that the dispute between the parties before the Tribunal was in respect of rent for the months of May to August, 1979 which the defendant denied owing saying that he went into possession of the premises on September 1, 1979. Therefore, assuming that Section 6 applied, I do not find it necessary to decide it, the matter in issue in the suit was not also directly and substantially in issue in the proceedings before the Tribunal. The plaintiffs, though their plaint did not say so, made it clear in their first affidavit that they were claiming rent for the ten months of October, 1980 to July, 1981. However, the averment in the plaint spoke about the claim being for a period of ten months from May 1, 1979.

The plaintiffs also went on record before the tribunal as saying that the defendant had not paid the rent since September, 1979. Notwithstanding this mix-up in the written word, the nature of the litigation was clear enough. So I think, as I have already stated, the matter in issue in the suit and in the proceedings before the Tribunal was not directly and substantially the same. As the third ground of appeal does not influence the decision I have reached, I will leave it.

The fourth ground of appeal is so intensely vague that it could prove disastrously ineffective for the defendant. It reads:

> "4. That the learned trial judge failed to appreciate that there was a hiatus in the claim as propounded in the plaint and as deponed to in the affidavit in support of the summary judgment application."

Mr Khanna for the defendant submitted that the application for summary judgment was incompetent. He drew our attention to Order XXXV rule 1(2), rule 9 and Form 3A in Appendix A in the Civil Procedure Rules which respectively read as follows:

> Rule 1(2): "The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed."
>
> Rule 9: "Form Nos 3A and 3B of Appendix A, adapted to circumstances, shall be utilised for the respective purposes for which they are designed."
>
> Form No 3A:
>
> "(Title)
>
> I................... of .... make oath and say as follows:
>
> 1. The defendant(s) .... is (are jointly) .... and truly indebted to .... in the sum of Kshs .... for .... and was (were) so indebted at the commencement of this suit. The particulars of the said claim are set out in the plaint filed herein.
> 2. I verily believe that there is no defence to this suit.
> 3. ...."

It seems that a word is missing in paragraph 1 above after the words (are jointly). The word could only be 'justly'.

However, I think what the defendant is trying to say is that the application for summary judgment was not supported by an affidavit of the plaintiffs verifying the cause of action as required, and in particular the words " I verily believe that there is no defence to this suit" set out in paragraph 2 of Form No 3A above were omitted from both affidavits of the plaintiffs. This is correct. The plaintiffs' two affidavits did however contain the sworn statements that the defendant was "justly and truly" and "truly and justly" indebted to them in the sum of Kshs 45,000. Though it does not strictly comply with Form No 3A, it can be taken, in this case, as another way of verifying the plaintiffs' belief that there is no defence to the suit. A plaintiff who so swears must also verily believe that there is no defence to the suit.

The Annual Practice points out (The Supreme Court Practice (1982) Vol L p 163) that the affidavit must fulfil the following two requirements:

1) it must verify the facts on which the claim or part of a claim to which the application relates is based; and

2) it must state the deponent's belief that there is no defence to that claim or part, or no defence except as to the amount of any damages claimed.

The plaintiffs not having strictly complied with the manner of making the application for summary judgment as prescribed, I am of the view that in this particular case, the situation is saved for the plaintiffs by Section 72 of the Interpretation and General Provisions Act (Cap 2). It enacts:

> "72. Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an

> instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

'document' is defined in the same Act:

> " 'document' includes any publication and any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter."

As an affidavit is a "repository of evidence or information", I have picked up this expression from *Cassidy v Engwirda Constructions Co* [1967] QWN 16, and as also the deviation from Form No 3A did not affect the substance of the plaintiffs' first affidavit, on the contrary it expressly named the ten months in respect of which the rent was being claimed, nor was it calculated to mislead, in as much the specific months were clearly set out, the shortcoming in the affidavits did not make them "void" to merit dismissal of the application. Any defects or omissions in the original affidavit may be cured or supplemented or supplied by an affidavit made subsequently and the court looks at the matter both on jurisdiction, and on merits, "at the end of the day" on the affidavits which have been filed: *LesFils Dreyfus etc v Clarke* [1958] l WLR 300, CA). (*The Annual Practice*, supra).

There was, however, a triable issue which was whether the tenancy commenced on May 1 or September 1, 1979. No one reading the averment in the plaint "arrears of rent for a period of ten months from May 1, 1979" could be expected fairly to say that the plaintiffs were claiming rent for ten months from September 1, 1979. The cause of action which the plaintiffs verified in their supplementary affidavit was "as set out in the plaint."

Leave to defend ought to have been granted. On the face of it, this case was capable of persuasively inducing, and it did succeed in inducing, the court to enter summary judgment, yet it was not deserving of a total or summary refusal of leave to defend. It was a case in which judicious restraint had to be exercised to resist the inducement for the summary procedure is a drastic remedy. However it was also not a case in which leave to defend could be properly granted unconditionally. It was a proper case for the grant of conditional leave to defend.

I would allow the appeal with costs, set aside the decree of the High Court, and substitute therefor an order granting leave to defend conditionally subject to the defendant depositing in court the sum of Kshs 45,000 by January 31, 1983. The costs of the application for summary judgment to be in the cause. As Law JA and Hancox Ag JA agree, it is so ordered.

Law JA. I agree with the judgment delivered by Madan JA and I concur with the orders proposed.

Hancox Ag JA. I agree and would only add that in my opinion, there were triable issues, that is to say issues or questions in dispute which ought to be tried and disclosed in this case. It may be that the documentary evidence indicated that the rent for the months of October 1980 to July 1981 inclusive was not paid, but the period stated in the plaint was "ten months from May 1, 1979". Mr Gautama, who appears for the respondent landlords, suggested that this should be taken as "ten months since May 1, 1979," thus enabling the allegation to cover any ten months' period between that date and until the plaint was filed on October 19, 1981. I do not so read it and I doubt if the ordinary reasonable lay or even professional readers would understand thereby that what was being alleged was some period other than the ten months commencing May 1, 1979. Interwoven with this was the defence allegation that the tenancy only commenced from when the appellant took possession, namely September 1, 1979 which Mr Kirugara submitted to the learned Judge raised a triable issue. For my part, I do not think this was sufficiently clear case within *Zola v Ralli Bros* [1969] EA at p 694 for the absolute denial of leave to defend.

To some extent, the defendant is responsible for his present situation, for in para 2 of his defence, he hereby denied owing the Kshs 45,000 as arrears of rent for ten months from May 1, 1979, "or any period

or any sum at all". When faced with the supporting affidavit, referring to the subsequent period, all the defendant did in his affidavit in reply of February 5, 1982 was to say that he had in fact paid the rent for those months and proposed to challenge the rent book exhibited. Thus, in both instances, the appellant did not "condescend" to do more in effect than merely traverse the allegation, a passive course which Law JA said in *Zola v Ralli Bros*, the defendants adopted at their peril. Even in his memorandum of appeal the appellant only mentions a 'hiatus' between the plaint and the application for summary judgment, without any firm indication as to where the 'hiatus', lay.

There are cases where the court to which a summary judgment application is made is not satisfied with the *bona fides* of the defence and the Judge in this case obviously felt uneasy about it. Recent decisions show that where the court feels this, and the defence can be described as "shadowy" or "dubious", then conditions for giving leave to defend should be imposed. In the instant case, I consider the appellant should have been required to deposit a sum equivalent to ten months' rent in court as a condition for leave to defend.

As to the other substantial point, namely that the matter in issue was in issue in the Business Premises Rent Tribunal, and thus the Judge should have stayed the suit before him under Section 6 of the Civil Procedure Act, the indications from the Supplementary Record of Appeal, whether the case before the Tribunal be Number 16/80, Number 6 of 1980 or Number 133 of 1981 (the latter having unilaterally been sought to be withdrawn) are that the question of four months only was in dispute and not ten months. None of those four months accord with those referred to in the application for summary judgment.

Assuming therefore that the word "proceeding" in the section is referable to a hearing before the Tribunal, but that it does not have the same jurisdiction as the High Court in matters with which it deals (as does the Rent Tribunal under the Rent Restriction Act (Cap 296) Section 31) and whether or not Section 12(e) enables it to deal with all disputes as to arrears of rent, I nevertheless consider that the matter in issue in this suit was not directly or substantially in issue before the Tribunal. In my opinion the Grounds of Appeal, namely grounds 1 and 2, should fail.

In view of the foregoing I agree with the order proposed by Madan JA.

Dated and delivered at Nairobi this 30th day of November, 1982.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

A.R.W HANCOX

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR