REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 2567 OF 1977

A. ASSANAND.....PLAINTIFF

VERSUS

R.W. PETTITT.....DEFENDANT

RULING

March 5, 1978, **Hancox J** delivered the following Ruling.

The history of this case so far is that on January 17th 1977 documents were signed by both the plaintiff and the defendant, both were stated to be "Heads of Agreement", the one further headed "Sale of Mr R.W. Pettitt's residence Manyani Road East, Nairobi, " and the other "Sale of the Contents of Mr R.W. Pettitt's Residence Manyani Road East Nairobi".

Both these documents were annexed to the Plaint filed on November 15th 1977, which alleged that these 2 documents constituted enforceable agreements, that these agreements had been acted upon, that possession would pass in April 1977 and which claimed, *inter alia*, specific performance thereof, all necessary accounts and general and special damages. A caveat had been lodged in the Land Titles Registry in respect of the immovable property on 18.2.77.

Various matters were raised in the defence filed on, I think, February 8th 1978, including denials that the documents amounted to binding agreements, section 3(3) of the Law of Contracts Act Cap 23 *laches* and a general traverse.

In March 1978, according to his affidavit, the plaintiff's advocate was informed by Mr Deverell, who appears for the Defendant, that the defendant was leaving Kenya permanently. This was confirmed by an item in the *Daily Nation* of March 21st 1978 announcing the defendant's appointment as deputy chairman of the London based company of J H Minet & Co. The plaintiff accordingly filed an application for a temporary injunction to restrain the defendant from

> (a) dealing with or alienating the leasehold property concerned, which is under Land reference No LR 209/5919/10 at Manyani Road East. And
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> (b) removing the contents of the house listed in the exhibit SA3 to the affidavit in support, and from dealing with or alienating these articles.

This application came on *ex parte* on March 28th 1978 with a request, in view of the defendant's imminent departure from Kenya, it was said by April 12th, that it be heard in vacation. I directed,

however, that notice of the application be given to the other side and consequently Mr Deverell appeared to represent the defendant on March 30th. On that occasion Mr Deverell stated, *inter alia*, that he "may or may not" need an affidavit on the part of his client. In the event he did need an affidavit and it is because Mr D N Khanna, who now leads for the plaintiff, alleges that this affidavit was sprung on them at the last minute that he now seeks an adjournment to file an affidavit in reply to that replying affidavit.

I confess to being somewhat startled by this application (for an adjournment) for I thought it was the imminence of the defendant's departure from Kenya that had led the plaintiff and his then advisers to apply that the application for a temporary injunction be treated as one of extreme urgency because, if the house and the contents are sold by the defendant, as the plaintiff feared, then he would suffer irreparable injury and loss, the contents being stated to be uniquely matched and not duplicable.

The object of a temporary injunction, as Mr Khanna has reminded me, are, as stated by Cotton, L J in *Preston v Luck* (1884) 27 Ch D at p 505

> "to keep things in status quo, so that, if at the hearing the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual."

Broadly speaking three matters have to be considered by the Court in exercising judicially its undoubted judicial discretion whether to grant this very effective remedy, namely,

> (a) Whether the applicant has shown that he has a *prima facie* case with a probability of success: see for instance Spry, JA in *Mohamed v Haidara* [1972] EA at p 168 B and Cotton, LJ in *Preston v Luck (supra)* also at p 505.
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> (b) Whether on a consideration of the balance of convenience the plaintiff will suffer more if the injunction is not granted than the defendant will if it is – see Law, Ag V-P in *Devani v Bhadrina* [1972] EA 25
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> (c) Whether damages will be the adequate remedy: This is not so, for example, where "the disruption caused by the defendant's action is unjustified and so great that damages are not an adequate remedy". Per Sacks, LJ in *Evans Marshalls & Co Ltd v Bertola* [1973] 1 All ER at p 1007.

I now return to the plaintiff's application for this adjournment which is opposed by Mr Deverell. One matter which I consider relevant is that, on being asked about para 4 of the affidavit filed today, Mr Deverell made it clear that although his client was intending to travel around, outside Kenya, in the interim, he was not in fact leaving Kenya on a permanent basis (subject to the possibility of his returning to live here at a later date) until June. So the immediate urgency, if I may so call it, is not quite so pressing as it was.

I think and I quite agree with Mr Khanna, in a case such as this, that the parties are not limited to two or any other number of affidavits. It must depend on the circumstances. Mr Deverell dealt with each paragraph of his client's affidavit *seriatim* and submitted that none of them really was capable of springing any surprise on the plaintiff, that they covered matters such as verification of the defence, history of the matter leading up to the suit, future intention and so on, all of which were really matters personal to the defendant and within his own knowledge. Why, he asked, should Mr Khanna wish to traverse them by yet another affidavit and so on, possibly *ad infinitum*. However, if, which he strongly submitted was not the case, any of these matters did need to be refuted, he was prepared to treat them all as being in issue and argue the case on that basis. Mr Deverell said he was further prepared to undertake, though he submitted that he did not have to, that his client would not export the items of furniture other than those mentioned at the end of para 4 of his affidavit, and that in relation to those 6 specific items he would not undertake not to export them, but undertook not to dispose of them and to bring them back into the jurisdiction of the Court if so ordered. Mr Deverell's main submission was, however, that the filing of his affidavit was envisaged when the matter came on last week, that all the facts upon which the plaintiffs

wished to rely should have been stated in their opening affidavit, *a fortiori* if the application was *ex parte* for a temporary injunction.

Mr Khanna also referred to specific passages in the defendant's affidavit. He said that paras 2-2 & 3 consisted, in reality of argument; that his client must be able to point out what is not true; that he wishes to contradict the intentions expressed in para 4 and that as regards paragraph 5 the court can order specific performance under s. 54 (he obviously meant s. 52) of the Sales of Goods Act. Mr Khanna also referred to the case of *Fiat Kenya Ltd v Roble*, which is reported in 1973 EA at p 11, where specific performance was ordered of a contract of sale of a new Fiat 650/EL 52 passenger capacity bus for shs 92500/-. There was no evidence as to whether the specific bus which had been contracted for was still available.

Chanan Singh, J ordered specific performance of the contract by delivery of another new Fiat Bus of the same type. The Court of Appeal, by a majority, upheld the trial judge on the basis that the judicial discretion conferred by s. 52(1), in the words "if he thinks fit" was such that provided the judge had not been shown to have exercised his discretion improperly, unjudicially or unreasonably, the appellate court would not interfere with that discretion. Spry, Ag P dissented, holding that the evidence failed to show any reason why damages would not afford a sufficient remedy. In this case there is an issue of fact as to whether the furniture is antique or otherwise unique. It is obviously, in the aggregate, very expensive, as the parties (though there is no professional valuation of it as yet) valued it at £20000. Mr Khanna urges, from the very wording of the document regarding the furniture, that it shall be "part and parcel" of the agreement relating to the sale of the house and that neither aspect can be treated in isolation.

I feel bound to comment on the fact that under the Civil Procedure Rules, Order 39 Rule, 3, it is provided that the Court shall in all cases, except where it appears that the object of the injunction would be defeated by the delay, direct that notice of the application for the temporary injunction be given to the opposite party. The reason for that is part of the basic and wider rule that no order shall be made to anyone's prejudice unless he has had an opportunity of being heard. Yet the plaintiffs who are now vociferous in demanding the right to controvert the defendant's affidavit, yet sought to deny the defendants their right to be heard on the substantive application, even though the defendant was not then stated to be due to leave until April 12th.

Nevertheless, having said that, however innocuous Mr Deverell maintains the defendant's affidavit might be, it seems to me that Mr Khanna has advanced sufficient reasons to pursuade me that he should be allowed to reply to it. Whether that is in the eventual interests of the plaintiff I do not know. At all events, as it is the plaintiff who is making the application for an adjournment, and it is his substantive application for the temporary injunction, I feel that if he wants it, he should have it, remembering that Mr Deverell has come prepared and armed with formidable authorities to argue in opposition to the substantive application. That however goes to the question of costs, which I am include to reserve, (as it might be argued that the Court should ask the question "Was your affidavit really necessary" before dealing with the aspect of costs) but on which I will hear Counsel if they so wish.

One other matter. Mr Khanna referred me to s. 52 of the Indian Transfer of Property Act as an aspect of his submission that once an application is made to the Court concerning property, then any person to whose knowledge there is such an application pending, deals with it at his peril, that is to say it would be a contempt to move it. I have not examined the authorities on s 52, but the section itself expressly applies to immovable property which is in question during the active prosecution of any contentious suit relating thereto. But the plaintiff in this case has expressly protected himself as regards the immovable property by his caveat on the title. I do not see, in the absence of authority, any ground for extending that section by analogy to movable property, that is to say in this case, the items listed in Exhibit SA 3. I am not prepared to extract from Mr Deverell any undertaking of the nature he has very properly sought to give, and in one particular respect I do not think I can do so. That respect is the property to which the right is reserved to export if necessary. It is most unlikely, in the circumstances in this case that the Court would have any effective power to order the return of the 6 specified items once they have left the jurisdiction. And the Court will not in general order something to be done which it cannot enforce.

For these reasons, then, I grant the adjournment applied for. I decline to say anything in relation to the

remedies or otherwise open to the plaintiff should any of the property be moved.

Khanna: I ask there be an interim injunction to preserve the status quo, so that any order the Court may make in our favour is not ineffective. This is quite normal. Necessary for Court to preserve its discretion. Should be until disposal of suit or further order.

Deverell: Oppose. Effect is to give an injunction for an indefinite period without having merits heard at all. I offered certain undertakings. They either go on with the application or wait until its heard. Meanwhile stymied. If ultimately shown no case, great injustice will have been done. Not entitled to protection.

Khanna: Surprised. No court emasculates itself. Will set down at earliest opportunity. Any Judge. Not part heard. To say status quo shall not be preserved is absurd. No court will disable itself.

Deverrell: If my friend is worried we have offered an undertaking, except as to the 6 items. Same application as being made this morning. If you are condemning this then we should only give an undertaking as already offered. At the very most will have lost those specific pieces of furniture. Could bring them back or pay damages.

Khanna: How can the Court make any order permitting them to take it away. Suppose defendant dies. Plaintiff's rights should be preserved.

Court: I have not made any order.

Khanna: Paramount consideration to preserve status quo. I undertake to list it with all dispatch. Offer 7th or any convenient day. Things should be properly preserved. Not correct to substitute undertaking for injunction.

Pray grant it until the matter comes up again. Liberty to Deverrell to apply to discharge if any inordinate or inexcusable delay.

FURTHER RULING

With the utmost respect to Mr Khanna he is now applying for the very thing which came on this morning and which he has successfully applied to have adjourned. Having done that I cannot see that he can ask me immediately to grant something which must be fully heard on the merits and which we all came here, in the vacation, prepared to do today.

Moreover, when the matter was adjourned last week Mr Deverell did give a full undertaking then not to dispose of "the furniture" which then included the 6 items, until Tuesday that is today. If the plaintiff's case on the temporary injunction had been made out the undertaking would then have merged with the injunction, had it been granted, and been continuous with it.

However the plaintiffs chose not to go on with this injunction application. They sought an adjournment. The defendant is going to be amenable generally to the jurisdiction until June. If he wants the matter heard, and it is as urgent as he says, he can apply for as early a date as Court business will allow. The plaintiff could have had the whole of today, and indeed part of tomorrow. He did not avail himself of this. I do not dismiss the substantive applications. I merely adjourn it as the plaintiff himself has asked.

Khanna: Leave to appeal?

Order

I am not prepared to give leave to appeal against the "dismissal" of this application for an injunction. It has not been dismissed. There is nothing to appeal against.

March 5, 1978

HANCOX J