IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law Ag P, Mustafa Ag V-P & Musoke JA)

CIVIL APPEAL NO. 5 OF 1976

BETWEEN

AMARSHI MADHAVJI.....APPELLANT

AND

SARDARILAL LIMITED.....RESPONDENT

(Appeal from the Judgment of the High Court (Chesoni J) Dated 4th February 1976 in Civil Case No 1443 of 1974)

JUDGMENT

The plaintiffs are owners of premises situated at Oginga Odinga Road, Kisumu. They had leased the premises to the first defendant, and the lease expired on 31st December 1970. The first defendant held over from 1st January 1971 and the plaintiffs then filed a suit against the first defendant for possession of the premises. On 21st May 1971 a consent decree was entered which reads:

(1)That the defendant do deliver to the plaintiff possession of the suit premises, namely three shops and three stores being part of the plot land reference No 1148/28/XXXIX, Kisumu on such date as the defendant may decide.

(2)That the defendant do decide and inform the Court of such decision and such date as the defendant may decide.

(3)That if the defendant fails to inform the Court of such decision and such date on or before 31st August 1971 then the defendant do deliver possession of the said premises on or before 31st October 1971.

(4)That the defendant do pay to the plaintiff mesne profits at the rate of Shs 2370 per month from 1st January 1971 to 15th March 1971 and at the rate of Shs 3600 per month from 16th March 1971 until the date of delivery of possession as per clause (1) or (3) hereof.

(5)That if the defendant company decide to inform the Court as to when they would deliver vacant possession of the suit premises to the plaintiff, the defendant company to occupy the premises as up to such period as it has decided and the terms and conditions of such occupation to be the same as per expired lease except the period of lease (which shall be the same as the defendant company decides in accordance with paragraph 2 hereto) and the amount of mesne profits (which shall be Shs 3600 per month).

(6)That the defendant do pay to the plaintiff 7/10th of the costs of the suit to be taxed and certified by the taxing officer of this Court.

(7)That either party be at liberty to apply to the judge in chamber.

I must say that the terms of the consent decree were unusual. There was nothing to prevent the defendant from opting to remain in occupation for, say, ten or twenty years. In the event, the defendant only opted to remain in occupation until 17th May 1975, and duly informed the Court in accordance with paragraph 2 of the decree of its decision.

On 1st November 1973 the first defendant sold its bookselling business which it carried on in a part of the premises to the second defendant, who in turn handed over possession to the third defendant.

On or about 20th November 1973, the first defendant through its advocates applied to the plaintiffs for consent to "assign 2 /3 rds of the shop to Mr Ogot [the second defendant]". The letter was addressed to Damodar Jamnadas & Co Ltd; the plaintiffs were owners of the premises as Damodar Jamnadas and Co. The plaintiffs did not reply to the letter, the reason, as stated by Mr Khanna for the plaintiffs, being that the limited company was never owner of the premises. Sometime in October 1974 the plaintiffs filed an action against all the three defendants praying for a declaration that neither the second nor the third defendant was entitled to remain in possession of the premises assigned or sub-let to them by the first defendant, which had no interest or estate to assign or sub-let and for possession of such unlawfully occupied premises and mesne profits at Shs 1200 per month from 1st November 1973 until delivery of possession. The first defendant filed a written statement of defence and in it contended, *inter alia*, that the consent decree operated to create a new and fresh tenancy in its favour and that the plaintiffs were not entitled to sever and split a single tenancy into two, and that in any event the plaintiffs had accepted a sum of Shs 2400 per month from the third defendant since 1st January 1974 and had full knowledge that the third defendant had been in occupation since that date. The second and third defendants in their joint statement of defence claimed that the first defendant had sold them the bookseller's business and had assigned or sub-let to them the premises in which the business was carried on, but curiously enough also contended that there was a resultant tenancy between the third defendant and the first defendant/ plaintiffs.

By a notice of motion filed on or about 31st October 1974, the plaintiff moved the Court for final judgment under the Civil Procedure Rules, order 35, rule 1, against the defendants for possession of the premises described in the plaint and for mesne profits at Shs 1200 per month from 1st January 1973 until delivery of possession and costs. The application was heard by Chesoni J on 10th December 1974 and was adjourned to 1st October 1975, when the hearing was completed. Chesoni J gave a ruling on 4th February 1976 refusing the application and the plaintiff appealed from that decision.

Chesoni J held in his ruling that "mesne profits" is the name given for damages for trespass against a tenant who holds over and that the first defendant became a trespasser on 1st January 1971 when it held over, after the expiry of its lease. The sum of Shs 3600 per month payable by the first defendant in the consent decree was for damages payable by it for trespass. As a trespasser the first defendant had "no right to pass over and if he does so the party claiming through him becomes a trespasser too". He held that the consent decree only protected the first defendant's personal right to occupy the premises. Despite that conclusion, Chesoni J went on to hold that it had not been established whether the payment of Shs 2400 per month by the third defendant was payment of mesne profits on behalf of the second defendant or on its own behalf and "what the payment was for". He also held that the plaintiffs could only ask for mesne profits from the second and third defendants if they had been at some stage their lawful tenants, not otherwise. He also stated that the second and third defendants had not "pinpointed any precise issue or question in dispute which ought to be tried. It is not necessary to do so". He then came to the crucial part of his ruling which apparently was the reason why he dismissed the plaintiffs' application. He stated:

I am satisfied that for the reasons which emerge from the defendant's affidavit and defence there ought to be a trial. This was not an obvious and clear case for summary judgment.

Mr Khanna for the plaintiffs submitted that Chesoni J misdirected himself when he, in effect, thought that it was relevant to the plaintiffs' application to establish whether the payment of Shs 2400 by the third defendant was on its own behalf or on behalf of the second defendant; again when Chesoni J stated that the plaintiffs could not claim mesne profits from the second and third defendants if they had never been his lawful tenants; and also that it was not necessary for the defendants to pinpoint the issue or question in dispute. I agree that Chesoni J erred on all these three holdings. However, the main thrust of Mr Khanna's submission was directed to Chesoni J's finding that the first defendant was a trespasser when it held over on 1st January 1971, since when it was ordered to pay damages as a trespasser in the form of mesne profits for its personal occupation of the premises and as such trespasser it had no right or interest or estate to pass over to the second or third defendants; and as a result the second and third defendants became trespassers in the portion of premises occupied by them as well. Mr Khanna submitted that it would follow logically from that finding that the plaintiffs' application for possession must succeed.

He submitted that since the first defendant was a trespasser, its letter applying for consent to lease part of the premises to the defendants was irrelevant, as it had no estate to pass over, apart from the fact that the letter was addressed to the wrong party, to a limited company, and not to the partnership. He laid great stress on the term "mesne profits", stating that it could not mean rent but only damages for trespass to property. The unauthorised payment of Shs 2400 per month by the third defendant into a bank account of the plaintiffs could not possibly create a relationship of landlord and tenant between them as there was a complete absence of consensus or mutuality. The plaintiffs' failure to return such payment paid into their bank account was irrelevant to the issue of trespass by the third defendant, as there was no duty on the part of the plaintiffs to return such unauthorised and unsolicited payments.

Mr Gautama for the first defendant briefly referred to the confusion concerning the reliefs asked for in the notice of motion in respect of the number of rooms and stores allegedly in the third defendant's occupation and the amount of mesne profits relating thereto. He submitted that the consent decree had to be construed for its proper meaning and effect and, if properly construed, it was clear that the first defendant was not a trespasser, for it remained in occupation of the premises with the consent of the plaintiffs on the conditions contained in the expired lease, with the exception of the term and the rental payment. He submitted that the overriding intention and tenor of the decree has to be looked at and that the term "mesne profits" was used loosely and ineptly, and that the use of that term could not convert the first defendant into a trespasser.

Both Mr Khanna and Mr Gautama referred to the need, in construing the decree, to keep in mind its overriding intention and tenor, and to reject any provision which would be repugnant to its overriding intention. Mr Gautama submitted that Chesoni J was perhaps unfortunate in the language he used, and was rather unclear in his meaning, but there was, however, no doubt that Chesoni J was positive that there were obvious good grounds in the pleadings and the affidavit filed by the defendants to warrant the refusal by him of the plaintiffs' application for summary judgment. Mr Rachier for the second and third defendants submitted that his clients were lawful sub-tenants of the first defendant, but somewhat incongruously went on to state that his clients were paying Shs 2400 to the plaintiffs which the latter had been accepting and, presumably on that ground, his clients had become direct tenants of the plaintiffs. However, he appeared to associate himself with Mr Gautama's submissions concerning the status of the first defendant *vis-à-vis* the plaintiffs in respect of the suit premises.

In his final submission Mr Khanna contended that Chesoni J had construed the consent decree to mean that as from 1st January 1971 the first defendant was a trespasser and had no interest or estate to pass over, and that, in the absence of a notice of cross-appeal by the defendants, that interpretation was final and conclusive and not open to question. The title of the second and third defendants could not be better than that of the first defendant from whom they obtained it, and so all were trespassers. But Chesoni J also made some other findings which led him to reach a conclusion inconsistent with such a construction of the consent decree. With respect, I think that Chesoni J was perhaps in some confusion.

There is merit in Mr Khanna's submission, in view of the provisions of rule 90(1) of the Court of Appeal for East Africa Rules. There was no notice of cross-appeal against Chesoni J's construction of the consent decree. Nevertheless the appeal was argued before us by counsel on both sides on the true intention and

tenor of the decree, and Mr Khanna's contention that such argument was barred only came when he was replying to Mr Gautama's and Mr Rachier's submissions. I think that Mr Khanna's objection came somewhat too late, as that point had become a live issue before this Court. In any event Mr Khanna was in no doubt that this was the kernel of the appeal, and in his submissions to us, he repeatedly referred to the true intention and tenor of the decree. He could not have been taken by surprise; to prevent surprise is a primary reason for the need of notice of such cross-appeal to be given. If objection had been taken to Mr Gautama's submissions on this point, an application might have been made to lodge a notice of cross-appeal, and it was likely that such application would have been granted, on terms, if necessary. This is not a new point of law; it was canvassed below and before us, before Mr Khanna made his objection. I refer in this instance to a passage in *Warehousing and Forwarding Co of East Africa Ltd v Jafferali & Sons Ltd* [1963] EA 385 where Lord Guest, delivering the judgment of the Privy Council, said, at page 390, quoting from *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480:

When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the courts below. But their lordship have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

With respect I accept that proposition of law. If a new point of law raised for the first time in a Court of last resort could be entertained in the interests of justice, I am satisfied that the lack of a notice of cross-appeal does not necessarily prevent this Court from reviewing the construction of a document which has been the subject of legal submissions before it and below. Here we are faced with the construction of a decree by a trial judge which was obviously wrong.

This was a consent decree; the terms were agreed to by the parties, and such agreed terms were incorporated in the decree on their joint application to the judge. On 21st May 1971 the first defendant occupied that premises with the consent of the plaintiffs; it could not, as from that date, be a trespasser. The first defendant was probably a trespasser from 1st January until 20th May 1971, and as I read the consent decree, could again be a trespasser after 17th May 1975 if it remained in possession. Between the period 21st May 1971 and 17th May 1975 the first defendant was occupying the suit premises with the consent of the plaintiffs and, the use of the term "mesne profits" notwithstanding, could not possibly be a trespasser. The first defendant might be a tenant for a term, a licensee with an irrevocable licence until 17th May 1975, a bare licensee or a permissive occupier with leave and licence; but it was not a trespasser.

It seemed that Chesoni J oscillated between a finding that the defendants had no defence and that they had some arguable defence; in the result, he concluded that it was not an appropriate case for summary judgment to be entered in favour of the plaintiffs as he was of the view that there were triable issues. I think that Chesoni J exercised his discretion properly in granting unconditional leave to the defendants to defend.

I do not think that it is necessary for me, for the purpose of this appeal, to decide on the adequacy or otherwise of the letter from the first defendant seeking consent to sub-let, whether payment by the third party into the plaintiffs' bank account could, in certain circumstances, be considered as payment of rent, or whether it was permissible for the plaintiffs to seek reliefs in a summary judgment which did not exactly accord with those in the plaint filed. These are all matters of peripheral significance, and do not affect the central issue in this appeal, which was whether Chesoni J was right in granting the defendants unconditional leave to defend on the ground that there were triable issues. I am satisfied that Chesoni J came to the right conclusion and I would dismiss this appeal.

As regards costs, I think that the defendants were at fault in not giving a notice of cross-appeal. They have succeeded, as it were, on an issue which was not properly pleaded, and must be mulcted in costs. In the

circumstances I would make no order for costs of the appeal.

Law Ag P read the following Judgment. I entirely agree with the judgment of Mustafa Ag V-P, which I have had the advantage of reading in draft. I am unable to accept Chesoni J's finding that the first defendant was a trespasser after the date of the consent decree, when he was allowed to remain in occupation, for a term to be selected by him, on the same terms and conditions as those contained in the expired lease. What the first defendant's exact status was is a matter which will have to be decided at the trial, but it cannot have been that of a trespasser as the occupation was with the consent of the plaintiffs, for a term which the first defendant was allowed to select at its complete discretion. I also find it difficult to accept that the plaintiffs were entitled to disregard the first defendant's letter of 20th November 1973, asking for consent to assign, merely because it was addressed to the plaintiffs as a limited company instead of as a firm. That the plaintiffs in fact received that letter is apparent from an advocate's letter, dated 14th June 1974, written on their behalf.

M Khanna, for the plaintiffs, submitted that as there had been no crossappeal against the finding that the first defendant was a trespasser at the material time, the appeal should be decided on the basis that the first defendant was a trespasser, and accordingly had no estate capable of transfer or assignment. I agree that this matter should have been the subject of a cross-appeal, but as the point was fully canvassed before Chesoni J, and before us, I do not see any reason why this Court should feel bound to accept a proposition of law with which it does not agree merely because it has not been made the subject of a cross-appeal. The failure to crossappeal can be dealt with in the order for costs, as Mustafa Ag V-P has proposed. It would be intolerable for a Court of last resort to be bound by a lower court's decision on a question of law which is manifestly wrong.

I agree with Mustafa Ag V-P that this appeal fails. As Musoke JA also agrees, it is so ordered. The appeal is dismissed, but there will be no order for costs of the appeal.

Musoke JA. I agree with the judgment of Mustafa Ag V-P.

Appeal dismissed. No order as to costs.

Dated and Delivered at Nairobi this 19th day of January 1977.

E.J.E.LAW

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AG. PRESIDENT

A.MUSTAFA

.....

AG.VICE PRESIDENT

J.S.MUSOKE

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR