IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Sir James Wicks CJ, Wambuzi & Law JJ A)

CIVIL APPEAL NO. 30 OF 1977

BETWEEN

DORIS MORGAN.....APPELLANT

AND

F.STUBENITSKY.....RESPONDENT

(Appeal against the Decision of Kneller J in the High Court Nairobi on 13th January 1977 Civil Case No 282 of 1975)

JUDGMENT

The appellants, who are husband and wife, are the joint owners of a house in Nairobi, which they wanted to let. Accordingly, they placed an advertisement in a local newspaper on 22nd May 1974, in the following terms:

Riverside Drive pleasant executive house furnished three bedrooms, two bathrooms, one en suite, established flat, garden. Lovely trees. Immediate possession £175 to approved tenant. Voucher EAS/ 2852.

To this advertisement the respondent replied, on notepaper headed “World Bank. International Bank for Reconstruction and Development. International Development Association,” in the following terms:

Your advertisement of today for a three bedroomed house on Riverside Drive interest us very much. We are an expatriate family of four (two children, aged six and three); I work for the World Bank, and expect to stay in Nairobi for at least another two years. My employer would pay the rent on a six-month advance basis; and would also be responsible for repainting the house upon termination of the rental agreement. We would appreciate an early opportunity to see the house

The respondent’s wife, Mrs Stubenitsky, visited the house at 10.15 am on 28th May 1974 and was shown round by the second appellant. Mrs Stubenitsky was apparently satisfied with the house, and the two ladies wrote and signed the following at the foot of Dr Stubenitsky’s letter of 22nd May:

Agreed to take the house by 1st June.

(Signed) Mrs Ella Stubenitsky

Agreed to let the house as from 1st June 1974.

(Signed) D A Morgan.

For some unexplained reason, Dr Stubenitsky, at about 1.30 pm on the same day (ie 28th May) telephoned the appellants and told them that he did not want the house. Correspondence was then exchanged, culminating in a letter from the respondent's advocates dated 1st August, 1974 denying all liability, on the ground that "There was no binding contract, and our client does not accept your claims for damages". The appellants then, on 10th February 1975, filed a plaint claiming damages for breach of an agreement in writing allegedly made between the appellants and the respondent by his agent (Mrs Stubenitsky) on 28th May 1974. The defence was, substantially, that if there was any agreement, there was no note or memorandum thereof such as to satisfy the Law of Contract Act.

When the suit came for hearing the sole issue, apart from damages, was whether there was a note or memorandum in writing sufficient to satisfy the Law of Contract Act, the relevant provision of which is contained in section 3(3):

No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it ...

It is common ground that the trial judge (Kneller J) correctly directed himself in his approach to the issue before him. He said:

A tenancy agreement is an interest in land ... There was this letter signed by Dr Stubenitsky and a note on it signed by Mrs Stubenitsky. It is right to look at the advertisement, the letter and the notes on it together, *Long v Millar* (1879) 4 C P D 450, *Timmins v Moreland Street Property Co Ltd* [1958] 1 Ch 110. These, read together, should spell out in clear certain terms these details:

The parties;

The subject-matter;

The demise;

The term; and

The consideration.

The judge then went on to consider whether the written agreement relied on by the appellants contained these items, and came to the conclusion that the requirements of section 3(3) were not satisfied. He accordingly dismissed the suit, with costs. He rightly went on to consider the claim for damages, in case he was wrong on the issue of liability; and found that, had the appellants succeeded on that issue, he would have awarded them damages of Shs 6560/80. In arriving at this figure, the judge refused to allow the appellants' claim for rent for the month of June 1974, as they had recovered one month's rent in lieu of notice from the previous tenant, who had vacated the premises without notice during May 1974.

This appeal is brought mainly against the finding that the requirements of section 3(3) of the Law of Contract Act were not satisfied, and also against the exclusion from the computation of damages of Shs 3500, being rent for the month of June 1974. At the hearing of the appeal, Mr Le Pelley appeared for the appellants, and Mr Deverell for the respondent.

In so far as the appeal relates to rent for the month of June, I think it has merit. If a binding agreement was concluded between the parties, then with all due respect to Kneller J, I do not see how the recovery of one month's rent from an earlier tenant in lieu of notice can possibly operate to relieve the respondent of his obligation to pay rent for the month of June. The liabilities of two separate and distinct tenants are two

separate and distinct matters, and the respondent cannot, in my view, be relieved of his obligation to pay rent for the month of June, assuming that he became a tenant as from the first day of that month, merely because his predecessor made a payment of one months' rent in discharge of a contractual obligation under an agreement to which the respondent was a stranger. The payment made by the predecessor was not rent for the month of June, but was a payment in the nature of damages for his breach of contract. I can see no reason why the respondent should have the benefit of this payment.

The main grounds of appeal, however, present a much more difficult problem. In one respect the judge misdirected himself; this is conceded by Mr Deverell. The judge posed the question: "Was the subject-matter the house or the house and the flat?" But there was no flat. The judge was misled by the comma which appeared in the advertisement after the word "flat". What should have appeared was "established flat garden" and not "established flat, garden". There was in fact no ambiguity or lack of clarity as to what was the subject of the demise, which was the house and its established flat garden. The other points which led to the judge holding that the agreement lacked sufficient clarity were: (a) was the lessor the first appellant or the second appellant or both? (b) was the lessee the respondent or his wife or both, or was it the World Bank or whoever was the respondent's employer? (c) what was the term, six months, or two years, or a month-to-month tenancy to be implied under section 106 of the Transfer of Property Act?

As regards question (a), the second appellant endorsed the respondent's letter of 22nd May 1974, with the words "agreed to let the house as from 1st June" and added her signature. She was one of two joint owners, and would have been a joint landlord. It is not disputed that she was also the other joint owner's agent, and I should have thought that in these circumstances the landlord was defined with sufficient clarity. We were not referred to any authority on this point, nor have I been able to find any, but in my view the prospective landlord was sufficiently described in the agreement, and I respectfully differ from the judge on this point. As regards question (b), I find myself in full agreement with the judge. The agreement is not clear as to who was the intended tenant. The respondent's letter of 22nd May 1974, although signed by him in his personal capacity, was written on official World Bank notepaper. In it he says, *inter alia*:

My employer would pay the rent on a six-month advance basis, and would also be responsible for repainting the house upon termination of the rental agreement.

This is consistent with the respondent negotiating on behalf of his employer, with the intention that the employer should become the tenant. There is certainly a degree of ambiguity as to whether the respondent was prepared personally to undertake the responsibility of a tenancy, and of the obligations resulting therefrom.

As regards question (c), which relates to the term, the written agreement is in my view equally ambiguous and lacking in clarity. The respondent speaks of expecting to stay in Nairobi "for at least another two years," and of his employer paying the rent "on a six-month advance basis". There is no certainty as to the term, and the reference to six months' rent being paid in advance excludes, to my mind, any justification for the implication of a monthly tenancy. Nor would such an implication be consistent with the plaint, which alleges a term of two years.

It follows from what I have said that, in my view, the agreement on which the suit was founded was not an agreement in writing within the meaning of section 3(3) of the Law of Contract Act, being deficient in at least two respects, in that it did not spell out in clear certain terms the identity of the proposed tenant or the duration of the proposed term. For these reasons I think Kneller J came to a correct decision in dismissing the suit, and I would dismiss this appeal.

10th November. **Wambuzi JA** read the following Judgment. I have had the benefit of reading in draft the judgment prepared by Sir James Wicks CJ and I agree that this appeal must fail. The main question before us is whether there is an agreement, memorandum or note in writing sufficient to satisfy the requirements of section 3(3) of the Law of Contract Act. From the evidence the alleged agreement was to be found in two different documents namely the advertisement in' the East African Standard newspaper and a letter written to the advertiser in that paper by Dr Stubenitsky, the respondent, indicating his interest in the

property on which were written some notes. It is common ground that Kneller J in the court below addressed his mind to the correct law, when he considered these documents together in order, to determine whether they constitute a sufficient memorandum or note in writing for the purposes, of the Law of Contract Act. In other words, do these documents read together spell out in clear terms, the parties, the subject-matter, the demise, the term and the consideration?

As regards to the parties, the notes on the letter of 22nd May 1974 indicate that Mrs Ella Stubenitsky agreed to take the house and Mrs Morgan agreed to let the house. So, on the face of the notes, one was the tenant and the other the landlord. It may well be that both ladies were acting for themselves as well as their husbands; but I do not think that this point is material. What consideration did Mrs Ella Stubenitsky offer for her tenancy, or (if she was acting for her husband) her husband's tenancy? It does not appear that the two ladies discussed the question of rent. They certainly made no note of it. It is argued by Mr Le Pelley for the appellants that the consideration is specified in Dr Stubenitsky's letter of 22nd May, 1974, read together with the advertisement which asked for rent at £175 a month. The material part of that letter reads:

I work for the World Bank, and expect to stay in Nairobi for at least another two years. My employer would pay the rent on a six-month advance basis, and would also be responsible for repainting the house upon termination of the rental agreement.

So, it is argued in effect, that when Mrs Stubenitsky agreed to take the house she agreed to pay the reserved rent. She was the agent of her husband who wrote the letter on which the notes were made. With respect to counsel, the husband did not, in my view, agree to pay that rent either. He said that his employer would pay the rent and would also be responsible for repainting the house upon termination of the agreement. As these are some of the main obligations of a tenant, the natural question to be asked is who was to be the tenant, the World Bank or Dr Stubenitsky? The doctor did not say that he was an agent of the bank with authority to bind it. Indeed, Mr Le Pelley argues that he was not such an agent. I find it difficult in these circumstances to say that there was any agreement between Mrs Stubenitsky and Mrs Morgan on the question of rent. Although in my view it seems clear who the landlord was, I do not think that the agreement is clear on who the tenant was. Further, even if it is accepted that Dr Stubenitsky was the tenant, the agreement would still lack consideration as he offered none.

As regards the term of the lease, this too was vague. Even in the context of this case I do not think that, merely because Dr Stubenitsky expected to stay in Nairobi another two years, he was thereby agreeing to take a lease for two years. It is to be noted that the advertisement is silent as to the duration of the lease offered by the appellants and this question does not appear to have been discussed by the two ladies either. In these two respects I think that the agreement did not satisfy section 3(3) of the Law of Contract Act, and the judge in the court below came to the correct decision.

I do not think it is necessary to consider the second point argued by Mr Le Pelley relating to damages as, in my view, it would not arise.

10th November. **Sir James Wicks CJ** read the following Judgment. This is an appeal from the decision of the High Court whereby a suit brought by the appellants for damages for breach of an alleged agreement for a tenancy of what was described in the plaint as an executive-type house in Riverside Drive, Nairobi, was dismissed with costs. It raises a short point for our determination.

The facts were that, on 22nd May 1974, an advertisement appeared in the East African Standard offering a furnished house in Riverside Drive for letting at a rent of £175. It was under a voucher number and the respondent, on the same day, wrote the advertiser a letter on the paper of the International Bank for Reconstruction and Development, International Development Association, Regional Mission in Eastern Africa, in which he said:

I work for the World Bank, and expect to stay in Nairobi for at least another two years. My employer would pay the rent on a six-month advance basis, and would also be responsible for repainting the house upon termination of rental agreement.

The respondent's wife met the second appellant at the house where the former wrote over her signature at the bottom of the respondent's letter, "Agreed to take the house by 1st June", and the latter wrote over her signature, "Agreed to let the house as from 1st June 1974". At about 1.30 pm, on the same day, the respondent informed the first appellant that he did not want the house.

Was there a sufficient note or memorandum of an agreement satisfying the requirements of section 3(3) of the Law of Contract Act? The first element is the parties to the note or memorandum. Was the respondent established as being the lessee or tenant?

The first appellant himself seems to be in doubt on this matter. In a letter addressed to the respondent's wife he said:

Finally please note that unless I receive an answer to my query as to in what capacity it is going to be said Mrs Stubenitsky signed the paper undertaking the tenancy I must preserve my rights to join both of you and perhaps the World Bank as well as defendants to any civil suit.

I have set out part of the letter written by the respondent to the advertiser, and it will be remembered that he said that he worked for the World Bank and that his employer would pay the rent. The parties to a lease are the lessor and lessee; and where a sum of rent is reserved that is the consideration. I find it impossible to say that the respondent undertook to pay the rent, which leads to the inescapable conclusion that he was not a party to the consideration, and not a lessee or tenant.

There were issues on the other elements of the note or memorandum pleaded, such as the subject-mater, the demise and the term. It is not necessary, and might be improper, for me to consider these matters for the reason that others, who are not parties to this action, are mentioned, and it is possible that they may be parties to litigation on the same subjectmatter. It is sufficient for me to say that in my opinion the written agreement did not satisfy the requirements of section 3(3) of the Law of Contract Act.

For these reasons I would dismiss the appeal. As the other members of the Court agree, it is so ordered that the appeal be dismissed with costs.

Appeal dismissed with costs.

Dated and Delivered at Nairobi this 10th day of November 1977.

S.J.WICKS

.....

CHIEF JUSTICE

S.W.W.WAMBUZI

.....

JUDGE OF APPEAL

E.J.E.LAW

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR