IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

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

CIVIL APPEAL NO 44 OF 1975

ABEL SALIM

OMAR ADAM YUSUF

SALIM AHMED ALI

SAID SALIM SAMIN

MOHAMED SAID ALI ……..… PLAINTIFFS

VERSUS

SF OKONG'O

IDAH OKONG'O

MBARAK JAIDI ……..DEFENDANTS

JUDGMENT

The appellants (whom I will call "the plaintiffs") alleged that the first and second respondents ("the first and second defendants") had agreed to lease them certain premises at Munyu Road, Nairobi. They further alleged that in breach of their agreement the first and second defendants leased the same premises to the third respondent ("the third defendant") and that the third defendant had procured the breach of the agreement to lease to the plaintiffs by the first and second defendants. The plaintiffs filed an action in the High Court claiming, *inter alia*, as against the first and second defendants, an order for specific performance of the agreement to grant a lease; and as against the third defendant, a declaration that the lease between the first and second defendants was invalid, and as against all the defendants, delivery of possession of the premises to the plaintiffs.

The plaintiffs also took out an *ex-parte* chamber summons for an interlocutory injunction against the defendants. The trial judge granted the interlocutory injunction and ordered that the first and second defendants be restrained from parting with possession of the premises at Munyu Road and that the third defendant be restrained from occupying the premises until further order of the court. However, the trial judge also ordered that the relevant documents of the chamber application be served on the defendants, and heard the arguments of counsel on the matter. After hearing submissions by advocates on both sides, the trial judge on 11th April 1975 discharged the interlocutory injunction and dismissed the plaintiffs'

application with costs. From that ruling the plaintiffs have appealed with leave.

At this stage I think that it would be convenient if I set out briefly the facts all alleged by the parties to the dispute in their affidavits. The plaintiffs claimed that on 16th November 1974 the first and second defendants, the owners of the suit premises, orally agreed to grant them a monthly tenancy for the purpose of running the business of a restaurant and boarding house as from 1st December 1974 at a monthly rent of Shs 9500 for the first six months and thereafter of Shs 10,000 per month, with a deposit for three months' rent in advance. Thereafter the first defendant, in the presence of the second defendant, wrote down on a piece of paper the agreed terms, eg the names of the first defendant and second defendant, together with their telephone numbers, the plot number, the number of rooms in the building, a reference to rent at Shs 9500 per month for six months, and at Shs 10,000 thereafter, and the word "deposit", without any sum mentioned. On the reverse was a reference to a meeting on 19th November 1974 (which was later altered to 18th November 1974) at 10.00 am The plaintiffs deposited Shs 30,000 on 19th November 1974 with the defendants' advocates and obtained a receipt dated the same day stated to be "payment of deposit on a/c M/s Abel Salim and others" (Abel Salim being the first plaintiff). The plaintiffs alleged that the first and second defendants told them to take possession of the premises which were vacant and unlocked and to repair and furnish them at their own cost. The plaintiffs also alleged that at that stage they agreed to a lease for a period of five years and one month at the request of the defendants. They were to go to the defendants, advocates' premises to sign the lease on 21st November 1974. The plaintiffs alleged that they took possession of the premises on 19th November and entered into a contract for the repair of the premises and placed an order for furniture and fittings. On 21st November the plaintiffs were informed by the defendants' advocates that the suit premises had been leased to the third defendant on 20th November at Shs 10,000 per month. On 22nd November the plaintiffs discovered that a lock which they had put on the premises had been broken by one of the defendants.

The first and second defendants denied that they ever concluded an agreement to lease with the plaintiffs. They stated that only negotiations for an agreement took place. The first defendant alleged that he met the fourth plaintiff and that the fourth plaintiff offered a monthly rent of Shs 9500 for the first six months and thereafter at Shs 10,000 per month. He said he had wanted Shs 10,000 a month, a cash deposit of three months advance rent, and that as the fourth plaintiff could not write he wrote down the details of the offer on a piece of paper as the fourth plaintiff wanted to discuss the matter with his, ie the fourth plaintiff's, partners. He also put down his and the second defendant's names and telephone numbers. He stated that he also wrote down his own proposals on a separate piece of paper which he gave to the fourth plaintiff but this was not produced by the fourth plaintiff. He denied ever giving possession of the premises to the plaintiffs. He further stated that he let the premises to the plaintiffs. He further stated that he let the premises to the third defendant on 19th November 1974 at Shs 10,000 per month; it seems that he had been having discussions with the third defendant from 11th November, at about the time he was having discussions with the plaintiffs.

The third defendant stated that he knew nothing about any transaction between the plaintiffs and the first and second defendants, and he denied procuring the breach of any agreement between them. He has been in possession of the premises since 25th November 1974.

It will be seen that there was a basic conflict between the parties on their affidavit evidence.

The trial judge in his ruling on the application for an interlocutory injunction stated that he was asked to make the ruling on a preliminary point of law whether there was a valid contract between the plaintiffs and the defendant owners of the suit premises for the lease of them. In my view it is unusual to rule on such an application on a preliminary point of law, especially as the facts are in dispute. The trial judge posed two issues:

(1) was the transaction on 16th November 1974 between the plaintiffs and the owner defendants a valid and binding lease? and (2) if a memorandum or note was required, was there a sufficient memorandum or note? In the course of this ruling he said: "whether or not there was the tenancy agreement is a matter to be decided upon evidence". He then went on to decide whether an oral tenancy agreement is tenable in law. He held that an oral tenancy, being a contract for the disposition of an interest in land, is not

maintainable in law, in view of section 2(3) of the Law of Contract (Amendment) Act 1968 (hereafter called "the Act") which reads:

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 authorized by him to sign it …

He held that, as the plaintiffs were not in possession of the suit premises, the *proviso* to section 2(3) was not applicable. He then dealt with the memorandum or note. He found that it was not signed by the defendants, the parties to be charged. On that basis he held that the note failed to satisfy the requirements of section 2(3) of the Act. He concluded that, in the absence of a sufficient memorandum or note evidencing the agreement, no *prima facie* case was made out upon which he could grant an injunction, and he thereupon dismissed the application.

Mr Salter for the plaintiffs has made a number of criticisms of the trial judge's ruling. He submitted that an oral tenancy may be a valid and binding lease. The trial judge appeared to hold that a tenancy of whatever duration, to be valid, must be in writing. Mr Salter submitted that section 106 of the Indian Transfer of Property Act, which is applicable to Kenya, would seem to indicate that an oral tenancy from month to month, as this one is, is a valid lease. He submitted that the trial judge confused "validity" with "enforceability"; section 2(3) of the Act is only concerned with a procedural bar to an action in Court, not with the validity of a lease. The opening words of the section read: "No suit shall be brought…" An "unenforceable contract" is one which the law will not enforce by direct legal proceedings, but is nevertheless recognized by law as valid so that it may be indirectly enforceable, see 9 *Halsbury's Laws of England* (4th Edn) paragraph 207.

If I understood Mr Salter correctly, he appeared to submit that there was a conflict between the provisions of section 2(3) of the Act and the relevant provisions of the Indian Transfer of Property Act. He referred to the Law of Contract Act of Kenya, and called attention to the repealed section 3 of that Act, especially section 3(3) which declared that the Statute of Frauds of the United Kingdom "shall not apply to Kenya". The Statute of Frauds and its amending Act referred to some classes of contracts which would be unenforceable unless evidenced by some memorandum or note in writing, see 8 *Halsbury's Law of England* (3rd Edn) paragraphs 151 et seq. A contract for the disposition of an interest in land was one of those classes. Section 3 of the Law of Contract Act contained provisions requiring such a memorandum or note concerning two classes, (1) a promise to answer for the debt, default or miscarriage of another, which was covered by the Statute of Frauds; and (2) another matter not covered by the Statute of Frauds. The Act, which amended the law of Contract Act repealed section 3 and replaced it with the provision that a suit on a contract for the disposition of an interest in land should not be brought in a Court of law unless the contract was evidenced by a memorandum or note in writing. The Act, in amending the Law of Contract Act, merely substituted one class of contract covered by the Statute of Frauds for another class. In any event the Act deals with the enforceability in a Court of law of a lease, not its validity. I myself can see no conflict; and, in any case, the Act being a later enactment would supercede any inconsistent provision in the Indian Transfer of Property Act, if there is any conflict.

From the affidavit evidence of the plaintiffs, it was alleged that they were given possession of the suit premises on 19th November 1974, but that on 21st November one of the defendants removed the lock which the plaintiffs had placed on the premises. Mr Salter submitted that an oral tenancy accompanied by delivery of possession would be an enforceable lease, even if it was not in writing. He relied on the equitable doctrine of part performance as expressed in *proviso* (i) to section 3 of the Act which reads:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract:

(i) has in part performance of the contract taken possession of the property or any part thereof:

Whether or not there was any delivery of possession would be a question of evidence. The defendants denied that such possession was ever given; there was the plaintiffs' evidence that the lease was to

commence on 1st December 1974 in which event it might be argued that what was given was perhaps a right to view or a licence to inspect the premises; there would be the question whether the essential elements required to establish the part performance which would dispense with a memorandum or note in writing had been complied with; and certain other matters might have also to be looked into. The trial judge in his ruling stated: " The *proviso* to the section [of the Act] is not applicable to the present case as the plaintiffs are not in possession of the suit premises". It is true that at the time of the filing of the suit the plaintiffs were not in possession, but the trial judge did not consider whether they were ever in possession. It would seem that the trial judge arrived at a conclusion on one aspect of the case before hearing the evidence.

In considering the piece of paper submitted by the plaintiffs, the trial judge stated that the document was not signed by the owner defendants, the parties to be charged, and therefore it did not satisfy the requirements of section 2(3) of the Act. But the trial judge did not consider whether the name of a defendant written in his own handwriting might in certain circumstances amount to a signature, see *Tourrett v Cripps* (1879) 48 L J Ch 567, nor did he consider whether the receipt for Shs 30,000 issued by the defendants' advocates to the plaintiffs was a connected document.

Two documents may be read together, when one refers to the other, so as to constitute a complete memorandum, see 8 *Halsbury's Laws of England* (3rd Edn), paragraph 167. A Court might, in suitable cases investigate the surrounding circumstances to see whether a defective document might be perfected, see *Leeman v Stocks* [1951] Ch 942 at 951. The trial judge decided that the note in writing was insufficient solely on the basis that it was not signed by the owner defendants. It may well be that, after a full consideration of all the available evidence, a Court would still find that all the essential and material terms of the contract were not contained in the note which would then be insufficient; for instance, there was no mention of the date of commencement of the term, see 23 *Halsbury's Laws of England* (3rd Edn), paragraph 1048. But the time was not yet for the trial judge to arrive at a conclusion.

The trial judge held that because an oral tenancy must be reduced to writing, and as the writing produced was insufficient to satisfy the requirements of section 2(3) of the Act, the plaintiffs had not made out a prima facie case, and he therefore rejected the application. The trial judge, in his ruling, had stated earlier "whether or not there was the tenancy agreement is a matter to be decided upon evidence". Despite that proper direction, he seemed to have decided, without having heard evidence, that the plaintiffs had no case against the defendants. With respect, I think that the trial judge had passed judgment prematurely.

I will now deal with the crucial issue, ie whether the plaintiffs had made out a case for the grant of an interlocutory injunction to (1) restrain the owner defendants from parting with the possession of the suit premises, and (2) restrain the third defendant from occupying or in any way dealing with the suit premises. In granting or refusing to grant an interlocutory injunction, a Court exercises its discretion. I am of the view that the conditions for the grant of an interlocutory injunction are now well settled in East Africa, and I can see no reason to depart from them. These are stated in *Giella v Cassman Brown and Co Ltd* [1973] EA 358 at 360. The decision of the English House of Lords to the contrary in *American Cynamid Co v Ethicon Ltd* [1975] 1 All ER 504 does not alter the situation here. The conditions are: (1) the probability of success; (2) irreparable harm which would not be adequately compensated for by damages; and (3) if in doubt, then a balance of convenience.

I will deal with the condition concerning the question of irreparable harm if the injunction is not granted. In this case the plaintiffs had no possession of the premises when the suit was filed; the third defendant had. In my opinion, the plaintiffs were in fact suing for breach of a contract to lease, and I cannot see why, if they were successful, they could not be adequately compensated by an award in damages. There is no question here of maintaining the status quo until the hearing of the suit. The plaintiffs were in effect asking for the grant of a mandatory injunction, not an injunction of a restraining nature; they were asking for the existing tenant, the third defendant, to be evicted and for themselves to be put into possession.

As regards the probability of success, the less I say about it at this stage the better. But the plaintiffs will have to discharge the burden of establishing that the memorandum or note would satisfy the provisions of section 2(3) of the Act.

As Mr Kwach has rightly pointed out, what the plaintiffs were seeking was an order for specific performance of an alleged contract to lease which is the subject of dispute before trial. I can see no reason to grant the interlocutory injunction, and I think that the application was misconceived. I agree with the trial judge, though for different reasons, that the plaintiffs application must be dismissed.

As regards the costs of this appeal, I think that the plaintiffs had to bring it on account of the findings of fact made by the trial judge in his ruling.

As the ruling stands, the trial judge has found that the plaintiffs had not made out a *prima facie* case, that the oral tenancy agreement was invalid and that the memorandum or note in writing was insufficient to satisfy the provisions of section 2(3) of the Act. These findings if allowed to stand would seriously prejudice the plaintiff's case when it comes up for trial. The plaintiffs were right to challenge these premature findings. However, although the plaintiffs have succeeded on these issues, they have lost in the event. I would therefore dismiss the appeal, and award the defendants half the costs of the appeal.

Wambuzi P. I have read the judgment prepared by Mustafa JA and I agree with his conclusions and the proposed order, and as Law V-P also agrees, it is so ordered.

Law V-P. I have read the judgment prepared by Mustafa JA. I agree with his conclusions and with the order proposed, and cannot usefully add anything.

Appeal dismissed.

Dated at Nairobi this 14th day of January 1976

S.W.W. WAMBUZI

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PRESIDENT

E.J.E. LAW

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VICE – PRESIDENT

A.MUSTAFA

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JUDGE OF APPEAL