REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 306 of 2002

1. OLYMPIC ESCORT INTERNATIONAL CO. LTD.

2. OLYMPIC FRUIT PROCESSORS LTD.

3. KEZIAH WANJIKU NG'ANG'A.....APPELLANTS

VERSUS

1. PARMINDER SINGH SANDHU

2. NANAK ENTERPRISES WORKS LTD .....RESPONDENTS

(Appeal from the decision and decree of the High Court of Kenya at Nairobi

(Rawal, J.) dated 21st September, 2000

in

H.C.C.S. NO. 2925 OF 1997)

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JUDGEMENT OF THE COURT

Two issues on jurisdiction arise in this appeal and were argued before us although they were not specifically raised before the superior court. It is trite law, however, that jurisdictional issues may be raised at any stage, because jurisdiction is everything and without it, a court must down its tools. The first issue is whether *Order 35 rule (1) (b)* of the Civil Procedure Rules has any application to the facts of

this case, and the second issue is whether *Order 6 rule 13 (1) (a)* of the Civil Procedure Rules was applicable in the circumstances of the case. It is necessary to appreciate the salient facts of the case as extracted from the pleadings and affidavits on record, before we consider those issues:

M/S. Olympic Escort International Company Ltd ("*Olympic Escort")* were, at all times material to the suit, the registered proprietors of L.R. No. 209/4931/4 ("*the disputed property"*) in Gikomba area, Nairobi. On that property stands a go-down which was rented to *M/S. Nanak Enterpirses Works Ltd* ("*Nanak"*) to carry on the business of garage and motor repair works. That tenancy was subsisting as at 12th October, 1994 when another company known as *Olympic Fruit Processors Ltd* ("*Olympic Fruit"*) wrote to Nanak intimating that the disputed property was on sale. The letter was signed by one Peter G.N. Ng'ang'a (*Ng'ang'a*) as the Chairman and Managing Director of that company. He was also a director of Olympic Escort. Nanak, through its Managing director, *Parminder Singh Sandhu* (*Sadhu*) offered to buy the disputed property at the asking price of Shs. 3.5 million and Olympic Fruit, through Ng'angá, accepted the offer. Various payments were subsequently made by Nanak through cheques between November, 1994 and July, 1995 but these cheques were paid out to Olympic Fruit and one *Kezia Wanjiku Ng'ang'a* (*Keziah*). *Keziah* was the wife of Ng'angá and was also a director of Olympic Fruit and Olympic Escort.

There was no formal agreement for sale signed between Olympic Escort, the registered owner of the disputed property, and Nanak. Nor was there anything in writing to show in what capacity Olympic Fruit , Keziah or Ng'ang'a were transacting with Nanak in respect of the property. Apart from Olympic Fruit promising in November, 1995 that they would avail documents for transfer of the disputed property, nothing was heard further until February, 1996 when Sandhu instructed advocates to demand the documents of Title from Ng'ang'a, asserting that it was Ng'ang'a who had agreed to sell the disputed property. The demand does not appear to have been complied with. Instead, on 3rd July, 1997, Keziah, as director of Olympic Fruit, wrote to Nanak giving them notice of rental increment on the disputed property with effect from 1st August, 1997. Sandhu shot back through his advocates with a reply to Olympic Fruit asserting that Sandhu had purchased the disputed property and was the beneficial owner in occupation of it. The advocates threatened to file suit seeking orders for specific performance if the property was not transferred to Sandhu. That was on 15th July, 1997. True to his threats, Sandhu filed suit before the superior court on 20th November, 1997 when there was no compliance. He was the 1st plaintiff in that suit while Nanak was the 2nd plaintiff. He enjoined Olympic Escort, Olympic Fruit and Keziah as the defendants, but said nothing about Ng'ang'a.

The cause of action pleaded in the plaint is essentially in three paragraphs which may be reproduced:

"7. By an agreement evidenced in writing the first defendant contracted to sell to the first plaintiff and/or second plaintiff its property on LR. No. 209/4931/4 in Nairobi (hereinafter referred to as the suit property) for the sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/=).

8. (a) <u>In the alternative</u> to paragraph 7 above the first defendant agreed to sell to the first plaintiff and/or second plaintiff its property on LR. NO. 209/4931/4 in Nairobi for the sum of Kenya shillings three Million Five Hundred Thousand (Kshs. 3,500,000).

(b) In pursuance of the said agreement the first defendant through its agents 2nd and 3rd defendants received the sum of Kenya shillings three million five hundred thousand(Kshs.3,500,000/=) being the full payment of the purchase price of the said property.

(c) Pursuant to the said agreement, the first defendant allowed the first plaintiff and/or the second plaintiff possession of the suit premises, as beneficial owner, and it was agreed between the parties that since the purchase price of the suit property had been paid in full to the first defendant, the first plaintiff and/or the second plaintiff would seize (sic) paying rent and the defendants would make no demand for any rent.

(d) As an act of part performance, the second plaintiff thereafter took possession of the suit premises

as beneficial owner. By a letter dated 9th November, 1995, the second defendant undertook to cause to transfer the suit property to the first plaintiff and/or the second plaintiff.

(e) The plaintiffs have completed all the obligations under the said agreement.

9. In breach of the agreement referred to in paragraph 7 above alternatively in breach of the agreement referred to paragraph 8 above and notwithstanding requesting made by the plaintiffs, the first defendant has wrongfully failed and refused and continues to neglect and refuse to complete the said sale or take any steps towards such completion.

Nanak then pleaded that it had been unlawfully ejected from the disputed property and prevented from carrying on its business and for that reason, it sought an injunction to restrain further interference with its possession. It also prayed for damages. Nanak was subsequently reinstated in the disputed property by consent of the parties and the *status quo* was to be maintained pending the hearing and determination of the suit. The main prayer made by the two plaintiffs (Sandhu and Nanak) was for judgment as follows: -

"(c) Specific performance of the agreement under paragraph 7 above and/or alternatively of the agreement under paragraph 8 above by way transfer of the suit property to the first plaintiff or alternatively to the second plaintiff."

In the statement of defence filed on 22nd July, 1999, Olympic Escort denied ever entering into any sale agreement with Sandhu and/or Nanak. It denied giving authority to anyone for sale of the disputed property and averred that if there was any proposed sale it never crystalised since no consideration moved to Olympic Escort. As far as Olympic Escort was aware, it was only Nanak who were the tenants in the property and not Sandhu. Olympic Fruit and Keziah for their part pleaded, *inter alia*, that the monies they received was not intended for the purchase of any property since they held no interest in the disputed property and there was no express or implied authority to sell it. They also pleaded that there was no privity of contract between the two of them and the plaintiffs.

Sandhu and Nanak did not respond to that defence but instead returned to court on 12th May, 2000 and took out a Notice of Motion seeking one main prayer for summary judgment in their favour under *Order XXXV r 1* of the Civil Procedure Rules. In the alternative they sought a prayer for striking out the written statement of defence under *Order VI r 13 (1) (a)* of the Civil Procedure Rules. The application fell for hearing and determination before Rawal J, who in her ruling dated 21st September, 2000, granted summary judgment in terms of the prayer for a permanent injunction and the main prayer for specific performance. The reasoning by the learned Judge in arriving at that conclusion is not important for purposes of this judgment. Suffice it to say that the learned Judge was persuaded that there was a sale transaction in respect of the disputed property and that the full purchase price for it was paid to Olympic Fruit and Keziah who were impliedly the authorized agents of the property owner, Olympic Escort. She found that the correspondence exchanged between the parties was sufficient memorandum evidencing the sale and there was possession of it by the plaintiffs. Finally she was of the view that there was no impropriety in combining an application under *Order 35* of the Civil Procedure Rules with one under *Order 6 rule 13 (1) (a)*. It is against that ruling that the appeal before us was filed.

The memorandum of appeal puts forward 13 grounds of appeal, but as stated earlier, there are two central issues argued before us which are capable of disposing of the appeal. The following grounds of appeal capture the first objection raised, that there was no power donated under *Order 35 rule 1* to consider or grant the prayers sought in the notice of motion:

"*3. That in so far the application lay under Order XXXV Rule 1 the learned Judge misdirected herself on the applicability of provisions of the said Order and the superior court's summary jurisdiction to claims for reliefs other than for liquidated demands and trespass to land.*

4. .....

5. That the learned Judge misdirected herself in giving orders of injunction summarily on an application that did not invoke the Court's jurisdiction under provisions of Order XXXIX Civil Procedure rules and without any evidence justifying giving of permanent injunctive orders summarily.

6. That the learned Judge misdirected herself on the applicable law and the evidence.

7. That the learned Judge failed to find that the respondent's notice of motion was incompetent and did not lie for failure to state with precision on its face the several alternate grounds whereof application was made either under provisions of order VI Rule 13 or Order XXXV civil Procedure Rules.

8. ....."

In his submissions, learned counsel for the appellant Mr. Wamalwa referred us to *section 81 (2)* of the Civil Procedure Act which spells out the scope of the powers of the Rules Committee set up by Parliament under *section 81 (1). Sub-section (f)* of *section 81 (2)* provides for summary procedure in the following terms: -

"(f) summary procedure-

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only or on a trust; or

(ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined for non-payment of rent, or against persons claiming under such tenant;"

So that, the parameters on what ought to be covered under summary procedure are spelt out, and they cover only liquidated demands and recovery of immoveable property by landlords. The rules promulgated under those provisions, he submitted, do not, and cannot, be outside those parameters. The rule invoked in this matter was *Order 35 rule 1 (1) (b),* which provides:

"1. (1) In all suits where a plaintiff seeks judgment for –

(a) .....

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."

In Mr. Wamalwa's submissions, the cause of action pleaded in the plaint by the respondents in this appeal does not fall under the parameters set out under the Act and the Rules. What is pleaded is a contract of sale of property and the remedies sought are specific performance and injunction, both of which are not envisaged under summary procedure.

For his part, learned counsel for the respondents Mr. Sevany submitted that *section 81 (2) (f)* was not relevant for consideration since the application before the superior court was made under *Order 35 rule 1 (1)(b).* In his view, the rule provides for "*the recovery of land"* and there was no justification for limiting such recovery to a "*landlord"*. Any party may seek recovery of land summarily.

We have considered the submissions of both counsel in respect of the first issue raised in the appeal and we have no difficulty in resolving the conflicting views expressed by counsel. It is clear to us beyond peradventure that the provisions of *Order 35* of the Civil Procedure Rules were never intended to provide for summary procedure for recovery of land generally through orders for specific performance or injunctions. The rule must be consonant with the Act which in *section 81 (2) (f)* specifies that the recovery of immoveable property is by a landlord. The power exercisable in summary procedure is therefore statutory and not discretionary. The scope of the rule is precisely as defined and there is no discretion to go outside the actual wording of the rule. If anything else is added to the liquidated demand or the recovery of land by a landlord from a tenant, then the matter does not come within the definition of summary procedure and must be rejected.

It is common ground in the case before us that none of the parties was litigating in any capacity as a "*landlord"*or "*tenant"*. The pleadings reproduced above are specific on the cause of action. A sale transaction of immoveable property is alleged and orders for an injunction and specific performance are sought. We agree with Mr. Wamalwa that there is no provision in summary procedure, as it currently stands, for such remedies. As we are of the view that the superior court had no jurisdiction to deal with the application as presented before it under *Order 35 rule 1 (1) (b)* of the Civil Procedure Rules, the order which ought to have been made, and which we are inclined to make, is to strike out the notice of motion. With that finding it becomes unnecessary to examine the merits of the application under *sub-rule 2(1*) of *Order 35* to determine whether the appellants had shown by affidavit or otherwise that they should have leave to defend the suit, either conditionally or unconditionally. Even if we were to consider that issue, we would have found that there were *prima facie* triable issues raised in the defence and the replying affidavit on record. It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be *bona fide*.

As for the second issue of law raised, i.e the applicability of *Order 6 rule 13 (1) (a)* of the Civil Procedure Rules, we do not consider it necessary to examine it in any detail because the prayer was made in the alternative and could only therefore have been considered if the principal prayer failed. The analysis made of the application by the superior court focused on *Order 35 rule 1,* and the determination as to whether the defendants should have leave to defend. It was only at the tail-end of the ruling that the superior court rejected the objection raised on the competence of the application on the basis that there were conflicting procedural requirements and in the substance of the two rules relied on by the respondents here. Mr. Wamalwa reiterated in his submissions before us that it was improper to invoke *Order 6 r 13 (1) (a)* when there was affidavit evidence on record which the superior court analysed in arriving at its decision. Mr. Sevany on the other hand found no impropriety in combining the two prayers since it was expressly stated in the application that the only basis for seeking the order for striking out was because the defence was a bare denial.

We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned Judge. It matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under *Order 6 r 13 (1) (a)* was in contravention of *sub-rule (2)* of that order, it was not for consideration and we would have similarly struck out the application on that score.

All in all, this appeal is meritorious and must be allowed. We set aside the orders of the superior court made on 21st September, 2000 on the notice of motion dated 7th April, 2000 and substitute therefor an order striking out the notice of motion. The appellant shall have costs of the appeal and of the notice of motion before the superior court.

Dated and delivered at Nairobi this 3rd day of July, 2009.

S.E.O BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR