



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 326 OF 2002

HASMUKH KHETSHI SHAH APPELLANT

AND

TINGA TRADERS LIMITEDRESPONDENT

(Appeal from a ruling of the High Court of Kenya

Nairobi (Githinji, J) dated 5th November, 2002

in

H.C.C.C No. 1281 of 2001)

JUDGMENT OF THE COURT

The appeal before us is of an interlocutory nature and that being so, it is not necessary and it would not be right for us to make definitive conclusions on facts and issues which are yet to be canvassed in the superior court. Although it is an interlocutory appeal, it was argued as if it was the final appeal and for that reason a brief background will be necessary.

The appellant herein, Hasmukh Khetsh Shah (as the plaintiff in the superior court), sued the respondent, Tinga Traders Limited (as the defendant) and as per the plaint dated 31st July, 2001 sought the following reliefs against the respondent:-

- “1. An injunction to restrain the Defendant, whether itself or its servants or agents or bailiffs or auctioneers or otherwise howsoever be restrained until the hearing and disposal of this suit or until further Order from interfering with the quiet possession and use of the portion of premises on Plot No. 209/525/21, Nairobi occupied by the Plaintiff or evicting the Plaintiff from the suit premises.
2. A declaration that the Plaintiff has a right to quiet possession of the said premises until lawful determination of its tenancy through the Court or the Rent Restriction Tribunal.
3. A declaration that the change of user obtained by the Defendant is unlawful and is null and void.
4. The Judgment be entered for the sum of K. Shs. 355,220/- as per paragraph 10 with interest from the

date of filing this suit.

5. Costs of this suit with interest from the date of filing the suit.
6. Any other alternative relief that this Court may deem fit to grant”.

Simultaneously with the said plaint, the appellant also filed a chamber summons stated to have been brought under “**Order XXXIX R 1, 2, 3, s. 3A** of the Civil Procedure Act, Inherent Jurisdiction of the Court, other enabling Provisions of Law (Practice and Procedure Rules)” seeking the following orders:-

- “1. That service of this application be dispensed with at the first instance as the Defendant is likely to dispossess the Plaintiff by force any moment.**
- 2. The Defendant whether themselves or their servants of agents or bailiffs or auctioneers or otherwise howsoever be restrained until the hearing and disposal of this suit or until further Order from interfering with the quiet possession and use of the portion of premises situated on Plot No. L.R. No. 209/525/21, Latema Road, Nairobi occupied by the Plaintiff.**
- 3. The Plaintiff undertakes to abide by any order this Court may make as to damages in case this Court shall be of the opinion that the Defendant shall have sustained any by reasons of the Order of injunction, which the Plaintiff ought to pay.**
- 4. That the cost of this application be provided for”.**

That application was based on the following grounds:-

- “(a) The Notice to vacate dated 22nd May 2001 is invalid and ineffective.**
- (b) The Plaintiff is a protected Tenant under the Provisions of Rent Restriction Act.**
- (c) The Change of user has been obtained without following the laid down procedure and is null and void.**
- (d) The Defendant has failed to produce and furnish to the Plaintiff, the following documents:**
 - 1. Copy of the application made to the Commissioner of Lands for change of user.**
 - 2. Copy of the Public Notice given in the press and please identify the daily newspaper.**
 - 3. The minutes of the Town Planning Committee authorising and recommending the change of user.**
 - 4. Copy of any site inspection report prepared by the Landlord’s planner in support of the application.**
 - 5. Copy of the Public Notice affixed on the conspicuous part of the building. Please identify that part of the building where it was affixed.**
 - 6. Copy of the Approved plan for converting the flats into offices.**
 - 7. Photocopy of the old title and the new title relating to the premises”.**

It was that application for a temporary injunction that was placed before Githinji J. (as he was then) for determination. The learned Judge considered the rival submissions presented on behalf of the parties and in the end came to the conclusion that an injunction in the circumstances of the case would contravene the law and hence dismissed the appellant’s application. In dismissing the application the learned Judge

concluded his ruling thus:-

“There is no mystery about the change of the user of the premises to strictly commercial. I take judicial notice that upon expiry of a leasehold interest, the Government grants a new lease on terms and conditions that it sets. It can even change the zoning of the area where the premises are located. The defendant has denied that it played any role in setting the terms and conditions under which a new leasehold interest would be granted.

The defendant has given plaintiff notice to vacate in order to comply with the conditions in the new grant which does not authorize the use of the premises for residential purposes. In the circumstances of this case defendant has not breached any terms of the agreement in giving notice to terminate the tenancy.

The remedy sought is equitable. Equity follows the law. The law now allows the use of the premises for commercial purposes only.

Defendants would be in breach of the conditions of the lease if it was to use the premises partly for residential purposes and the lease would be liable to forfeiture.

Plaintiff purports to challenge the defendant’s title in its present form. He is estopped by Section 121 of the Evidence Act from challenging the defendant’s title. In any case, it is the Government which sets the conditions as to use and not the defendant. Plaintiff has not joined the Government as a party to this suit.

An order of injunction in the circumstances of this case will contravene the law and make the defendant flout the law. It is not just and equitable to grant an order of injunction.

For those reasons, I dismiss the application with costs”.

It is that order of dismissal that provoked this interlocutory appeal, in which the appellant, through counsel, filed a memorandum of appeal setting out 40 grounds of appeal! Some of the grounds make very interesting reading. Sample this:-

“8. The learned Judge failed to appreciate that no protected tenant in Kenya can be dispossessed without a valid Notice of Termination and the eviction order issued either by the Rent Restriction Tribunal (which is discretionary) or by the Business Premises Rent Tribunal. No tenant can be subjected to forcible eviction in any civilized country not to speak of Kenya which is peaceful, stable and where the rule of law prevails.”

And sample this too:-

“14. The learned Judge misdirected himself in not holding that in Kenya, unlike Kosovo, no person can be evicted without a Court or Tribunal Order obtained after the due process of law.”

This appeal came up for hearing before us on 6th December, 2007 when Mr. M.G. Sharma and Mr. M. A Khan appeared for the appellant while Mr. Kioko Kilukumi appeared for the respondent.

In his submissions, Mr. Sharma took us through the Amended Plaintiff, the defence and the counter-claim. It was his contention that the core of the matter was the Notice of termination of the tenancy, on the ground that the premises were to be converted to shops and offices. The rest of Mr. Sharma’s submissions dealt with most of the issues in dispute ending up by stating that the notice that was given was invalid and therefore there was no proper termination.

On his part, Mr. Kilukumi submitted that this Court was being asked to disturb the exercise of discretion by a Judge of the superior court. He submitted that it had not been demonstrated that the Judge was wrong in the exercise of his discretion. Mr. Kilukumi contended that the ruling of the superior court

was given after full consideration of affidavit evidence from the parties to the dispute.

As we have already stated, this is an interlocutory appeal arising from the ruling of Githinji J. (as he then was) delivered on 5th November, 2002. In order to appreciate the nature of the dispute, we reproduce herein the salient paragraphs of the plaint which stated:-

- “1. The Plaintiff is an adult male carrying on business in Nairobi and his address for the purpose of this suit is care of M.A. Khan, Advocate, Cotts House, Wabera Street, P.O. Box 45100, Nairobi.**
- 2. The Defendant is a Limited Liability Company incorporated in Kenya and having its registered office situated at Nairobi. (Summons will be served through the Plaintiff’s advocate’s chambers.)**
- 3. The Defendant is the registered owner of L.R. No. 209/525/21, Latema Road, Nairobi together with buildings erected thereon consisting of seven shops on the ground floor and two residential flats on the 1st Floor.**
- 4. The Plaintiff above named has been in occupation of the residential flat on the 1st floor of the suit premises since 1st October 1974 and started paying monthly rental of K. Shs. 800/- at that time.**
- 5. The Defendant through coercion and with threats of eviction forced the Plaintiff to increase the monthly rental from time to time from K. Shs. 800/- to 2,400/- per month.**
- 6. The Plaintiff has been paying the monthly rental of K. Shs. 2,400/- since 1995 and is a protected tenant under the Provisions of the Rent Restriction Act.**
- 7. The Plaintiff has occupied two shops on the ground floor since 1989.**
- 8. The Defendant purchased the suit property for the sum of K. Shs. 550,000/-. The Defendant obtained a loan of Shs. 200,000/- on the security of the suit Property and further took a deposit of Shs. 200,000/- from the Plaintiff. The Defendant insisted on taking a deposit of K. Shs. 200,000/- from the Plaintiff when the flat was let to the Plaintiff and he paid the deposit of K. Shs. 200,000/- to the Defendant.**
- 9. The Defendant is obliged to give 12 months notice as agreed with the Plaintiff in October in 1974, but has only given 2 months notice to terminate the tenancy of the Plaintiff. The Plaintiff avers that his tenancy has been unlawfully terminated. Even under the provisions of the Rent Restriction Act the Defendant should have given six months notice under the provisions of Section 14 of the Rent Restriction Act.**
- 10. The Defendant was not entitled to increase the standard rent of Shs. 800/- without the approval and sanction of the Rent Restriction Tribunal. The Plaintiff claims the refund of Shs. 355,200/- being the amount paid in excess of the standard rent from 1974 to 2001.**
- 11. The Defendant always resorted to unlawful and unethical methods to get rid of the Plaintiff through Mrs. Anne Chemboyo who was occupying the next-door flat and left the said flat last year.**
- 12. The Defendant offered the lease of the said flat occupied by the Plaintiff for two years from 1st January 1996 at a monthly rent of K. Shs. 2,400/-, which was not acceptable to the Plaintiff.**
- 13. The Defendant gave Notice of Termination dated 22nd May 2001 to the Plaintiff requiring the Plaintiff to vacate the suit premises on or before 1st August 2001. The said notice is invalid and ineffective having been given in flagrant disregard of the provisions of Rent Restriction Act.**
- 14. The suit property was built/constructed in accordance with the Special Conditions as to user contained in the Original Title Deed issued by the Commissioner of Lands as stated in paragraph 3**

of the Plaintiff.

15. That the lease of the suit property was extended for 50 years from 1995 and the new title was issued to the Defendant which contained the change of user from “Shops and Flats” to “Shops and office only”. The said change of user has been procured by the Defendant without following the laid down procedure and is thus unlawful and null and void.

16. The Plaintiff remains a protected Tenant unless and until the Rent Restriction Tribunal lawfully determines the tenancy”.

We hasten to point out that this plaint dated 31st July, 2001 was later amended when the appellant filed an Amended Plaint dated 1st October 2001. The Amended Plaint introduced only two new paragraphs which were as follows:-

“18. The plaintiff paid the sum of K Shs. 200,000/= to the Defendant in 1974 which was refundable with interest of 4% and the Plaintiff claims the same which totals to K Shs. 600,000/= by the end of July, 2001.

19. The plaintiff was not aware of his statutory rights to claim the refund of the excess rent paid to the Defendant until his advocate advised him in July 2001.”

In view of the foregoing paragraphs, the Amended Plaint contained the following additional paragraph in the reliefs sought:

“7. The plaintiff claims the sum of K. Shs. 600,000/= with interest at the court rates under paragraph 18 with interest from the date of filing this suit.”

We have set out the salient paragraphs of the plaint and also reproduced a portion of the ruling delivered by the learned Judge, which indicate that this was, indeed, a landlord and tenant dispute. The respondent was the registered owner of the suit premises situated along Latema Road within the City of Nairobi. The appellant has been in occupation of the residential flat on the 1st floor of the suit premises since 1st October 1974. It was contended that the respondent sought to evict the appellant from the premises on the ground that the suit premises were to be converted into shops and offices. It must be added here that the appellant contended that he had occupied two shops on the ground floor in addition to the residential flat on the first floor. It is the notice of termination issued by the respondent that was resisted hence provoking this litigation. It was therefore the appellant’s contention that the respondent be restrained by a temporary injunction from interfering with the quiet possession and use of the portion of the suit premises pending the hearing and final determination of the suit.

The issue then before the learned Judge was whether sufficient material had been placed before him to warrant the granting of the injunction sought. The learned Judge considered all that was urged before him and came to the firm conclusion that an order of injunction in the circumstances of this case would contravene the law. Hence, he dismissed the application. The main issue before us now is whether the learned Judge was right in refusing to grant the injunction sought by the appellant. It must be stated on the outset that the granting of an interim injunction is an exercise of judicial discretion. The principles by which both this Court and the High Court have for years been guided in deciding whether or not to grant a temporary injunction were firmly stated by Spry VP in Giella v. Cassman Brown & Co. Ltd [1973] EA 358 at p. 360 as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of conveniences”.

In that same case Spry VP said:-

“First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially (Sargent v. Patel (1949), 16 EACA 63).”

Having considered the pleadings in this matter, the chamber summons before the superior court, the ruling given thereon and submissions made by Mr. Sharma and Mr. Kilukumi, can it be said that the superior court Judge did not exercise his discretion judicially?

We have given this matter very careful consideration and it would appear that counsel on both sides were carried away in their desire to bring this dispute to an end by making submissions on the entire dispute as if this was the final appeal. This, of course, is not the final appeal. What we are concerned with is the ruling on the chamber summons application for a temporary injunction. Once that injunction was refused, it was still upon the parties, to set down the main suit for hearing. The appellant was, of course, entitled to file an appeal against that ruling. This is the appeal that we have been dealing with. The main dispute remains pending in the superior court. As regards this appeal, we are of the view that the learned Judge cannot be faulted in the manner in which he dealt with the chamber summons application. We are satisfied that he exercised his discretion judicially.

By way of conclusion, all we can say is that it would appear that counsel appearing for the parties went too far in presenting their case in this matter which is of an interlocutory nature. It is for that reason that we have refrained from making any final determination on matters which are still pending in the superior court. This view is reflected in **Teresa Shitakha v. Mary Mwamodo and four others [1982-88] 1 KAR 965** at p. 970 in which this Court said:-

“We stress the nature of these successive interlocutory applications, because, in their enthusiasm for the merits or demerits of the main case, counsel have tended to lose sight of the principles by which both this court and the High Court have for years been guided in deciding whether or not to grant a temporary injunction. These principles were firmly stated by Spry VP in Giella v Cassman Brown & Co. Ltd [1973] EA 358 at 360. They are:

‘First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.’”

The above applies to the facts of this appeal. The upshot of all the foregoing is that this appeal lacks merits and we order that the same be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 8th day of February, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR