REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU
CORAM: KWACH, TUNOI & SHAH, JJ.A

CIVIL APPEAL NO. 238 OF 2001

BETWEEN

AGIP (K) LIMITED…….…… 1ST APPELLANT

SHELL & BP (MALINDI) KENYA LIMITED ……. 2ND APPELLANT

AND

MOHIDEEN ALIBHAI GILANI…….…… RESPONDENT

(Being an appeal from the ruling and decree of the

High Court of Kenya at Nakuru (Mr. Justice Rimita) dated 30th March 2001

in

H.C.C.C. NO. 509 OF 2000)

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JUDGMENT OF THE COURT

Mohideen Gilani, the respondent in this appeal (hereinafter called *"the plaintiff*") is the registered proprietor of Plot LR. No. Nakuru Municipality/Block 7/557 (hereafter called "*the suit premises").*

By a lease dated 17th December 1987, the plaintiff let the suit premises to Agip (Kenya) Ltd, the first appellant (hereinafter called "*the first defendant"*) for a term of 30 years commencing 1st November 1987 at an agreed rent payable yearly ranging from Shs 120,000/- to Shs 187,500/- in the manner agreed in the lease.

Under the terms of the lease, the first defendant was entitled at its own cost to erect and complete a petrol service station and other buildings on the suit premises. Although the lease was for a fixed term, it contained a clause for earlier determination in the following terms:-

"3(iii) In the event of the lease hereby granted being determined for any reason attributed to the

Lessor prior to the expiration of the said term then the Lessor will refund to be Lesser forthwith in one lump sum such sum or sums calculated at the ra te of Shs 9700/ - for each month or part of a month of the period from the date or such determination to the end of the term hereby created AND such payment will be made by the Lessor to the Lessee before the demised premises are vacated by the Lessee who s hall be entitled to remain in occupation of the demised premises without further payment of rent until the aforesaid payment is made to him by the Lessor." (underlining orders).

In October 2000, the plaintiff decided without assigning any reason to determine the lease believing that he could lawfully do so under Clause 3(iii). He instructed his Advocates to send a notice of termination. So on 27th October, 2000 the firm of Sheth & Wathigo Advocates wrote to Shell & BP (Kenya) Ltd, the second appellant, (hereinafter called "*the second defendant"),* as follows:-

"Dear Sir,

RE: M.A. GILANI AND AGIP (KENYA) LTD

We act for Mr Mohideen Gilani and refer to the Lease dated 17 th December 1987 between our said client and Agip (Kenya) Ltd whereby our client lea sed to Agip (Kenya) Ltd their petrol station on Nakuru Municipality Block 7/557.

Invoking Clause 3(iii) of the Lease our client hereby gives you notice that he wishes to terminate the said Lease.

Kindly confirm your agreement to our client's said propo sal by return of mail.

Yours faithfully,

R. SHETH"

The second defendant replied on 28th November 2000 challenging the plaintiff's right to terminate the lease under Clause 3

(iii) in the following terms:-

"Dear Sir

NAKURU MUNICIPALITY BLOCK 7/557 – M. A. GILANI

We refer to your letter dated 27 th October 2000 concerning our lease of the above premises.

Please note that the lease does not confer your client with any colour of right to undertake the threatened termination. We trust that you shall advise your client to honour the said lease and refrain from illegal actions.

Any ill advised interference with our tenancy and quiet possession will be vigorously defended at your client's risk as to all attendant legal consequences.

We hope that thi s manner or correspondence is at rest and look forward to a continued good relationship at Nakuru with your client.

Yours faithfully,

Shell & BP Malindi (Kenya) Ltd

Lawrence Kinyanjui."

The second defendant's optimism for better relations were totally misplaced because the plaintiff was determined to terminate the lease. He instructed the firm of Mirugi Kariuki & Company Advocates to file a suit, but before we go into this, we think we ought, for the sake of clarity to explain that the first defendant had by a Special Resolution of the Company changed its name to Shell & BP (Malindi) Kenya Ltd. In the plaint filed on 30th November, 2000 the plaintiff averred inter alia:-

> ***"(5) Pursuant to the aforesaid Clause the plaintiff decided to determine the le ase and notified the defendant on or about 27 th October, 2000 and thereafter arranged to pay the first defendant his dues from the determination of the lease but the first defendant and its agent the second defendant refused and/or neglected to honour the determination maintaining that the action was unlawful.***
>
> ***(6) The plaintiff has at the filing of this suit deposited with the court the sum of Kshs 1,969,100/ - as at end of November 2000, being the moneys due pursuant to paragraph 4 of the plaint."***

The plaintiff sought a declaration that the lease dated 28th December, 1987 had been lawfully terminated and also asked for a perpetual injunction restraining the defendants from interfering with his enjoyment and use of the suit premises. The defendants filed a defence and disputed the plaintiff's right to terminate the lease under Clause 3 (iii). They contended that the clause did not confer upon the plaintiff the right to terminate the lease. They raised a counterclaim for a declaration that the plaintiff's purported termination of the lease was null and void and prayed for a perpetual injunction restraining the plaintiff from interfering with their peaceable and quiet enjoyment of the suit premises.

Both sides applied for temporary injunctions under ***Order XXX1X*** of the Civil Procedure Rules, but for the purposes of this appeal, we need not concern ourselves with the fate of those applications. On 6th January, 2001 the plaintiff's Advocates applied for summary judgment and dismissal of the plaintiff's counterclaim under Order XXXV rule 1 of the Civil Procedure Rules. It was contended on behalf of the plaintiff that the defendants had no defence to the plaintiff's claim and that the counterclaim did not lie. *Rimita J* heard the application, struck out the defence and entered judgment for the plaintiff. He also dismissed the defendants' counterclaim with costs. It is against that decision that the defendants have appealed to this Court.

The learned Judge held that Clause 3 (iii) of the lease gave the plaintiff the right to terminate the lease at any time and that the plaintiff had acted lawfully in terminating the lease under that clause. In the course of his ruling the learned Judge said:-

> ***"It is clear that the plaintiff gave notice to the defendant an d made it clear that he did not intended to continue with the lease agreement. As far as he was concerned it was over. I think despite protests from the defendants Clause 3 (iii) of the lease applied.The counterclaim only prays for the prayers in the p laint but in the reverse. The defendants will have no leave to defend or prosecute the counterclaim."***

Although the learned Judge could have expressed himself more clearly, we believe that what he intended to say was that Clause 3 (iii) of the lease gave the plaintiff the power to terminate the lease at any time and consequently the defendants had no defence to the plaintiff's claim. And having arrived at that conclusion he saw no substance in the defendants' counterclaim. The defendants have put forward 5 grounds of appeal but for the purposes of our decision we shall confine ourselves to grounds 1 & 2 only. The complaint in ground 1 of appeal is that the learned Judge erred in law and fact when he entered summary judgment against the defendants under ***Order XXXV*** rule 1 of the Civil Procedures Rules. At the time the plaintiff purported to terminate the defendants' tenancy there was no allegation that the defendants were in breach of any covenants or had failed to pay the agreed rent. Section 53 (a) of the Registered Land Act (Cap 300) provides:-

> ***"53. Save as otherwise expressly provided in the lease and subject to any written law governing agricultural tenancies, there shall be implied in every lease agreement by the***

lessor with the lessee binding the l essor: -

(a) that, so long as the lessee pays the rent and observes and performs the agreements and conditions contained or implied in the lease and on his part to be observed and performed, the lessee shall and may peaceably and quietly possess and enjoy the leased premises during the period of the lease without any lawful interruption from or by the lessor or any person rightfully claiming through him."

As we have already said the defendants were paying the reserved rent and observing and performing the other terms and conditions of the lease, they were, in law, entitled to peaceable and quiet possession. Quite apart from this, the clause on which the plaintiff relied to terminate the lease gave him no such power. The clause states ***that in the event of the lease being determined for any reason attributable to the lessor*** , then the lessee is to be compensated in the manner stated under the clause. This clause does not give the lessor the right to terminate the lease. If that was the intention, the clause would have been framed differently. It would have simply provided that the lessor could terminate the lease before the end of the agreed term. But that is not what the clause says. It says that if the lease is determined for any reason attributable to the lessor. This envisages a situation where the lessor has done something which results in the lease being determined, for instance, if he contracts to sell the suit premises to a third party with vacant possession or if he transfers his interest to a new owner and the new owner refuses to recognize the defendants' lease. In that event the lease will be determined for a reason attributable to the plaintiff. It is something which the plaintiff has done which is the cause of the determination. Accordingly we are of the opinion that Clause 3 (iii) did not give the plaintiff the right to terminate the defendants' lease and in purporting to do so the plaintiff acted unlawfully.

There was a clear averment in the defence that the plaintiff had no right to terminate the lease. That was a valid defence to the plaintiff's claim and the defendants should have been allowed to urge it. In view of this, we think the learned Judge erred when he held that the defendants had no defence to the plaintiff's claim. This ground of appeal therefore succeeds and is allowed.

The second ground of appeal relates to the dismissal of the defendants' counterclaim. The reason given by the learned Judge for dismissing it was that it sought identical reliefs to those in the plaint. In the particular circumstances of this case, the most important relief the defendants could have sought was a declaration that the plaintiff was not entitled to terminate the lease. The fact that the plaintiff had also sought a declaration that he had validly terminated the lease was no bar to the defendants asking for a declaration that the defendant had acted unlawfully.

The defendants also averred that they enjoyed the statutory protection given by ***section 53 (a)*** of the Registered Land Act (Cap 300). This was a substantial point and we are somewhat puzzled that the learned Judge did not deal with it at all in his ruling. It seems to us that if the learned Judge had dealt with this point it would have occurred to him that the plaintiff had no right to terminate the lease.

In failing to do so there can be no doubt that the learned Judge erred.

For these reasons, we allow this appeal and set aside the ruling and decree of Rimita J dated 30th March, 2001. The defendants' defence and counterclaim are hereby reinstated and the defendants are given unconditional leave to enter and defend. The plaintiff's Notice of Motion dated 6th January, 2001 is dismissed with costs. The plaintiff to pay the defendants their costs of this appeal.

Dated and delivered at Nakuru this ….. day of ……., 2003.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

…….

JUDGE OF APPEAL