REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CORAM: GICHERU, TUNOI & O'KUBASU, JJ.A.
CIVIL APPEAL NO. 285 OF 2000

NOORLANDS LIMITED ..... APPELLANT

AND

RAVJI KARSAN PATEL ..... RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Mombasa (Hon. Mr. Justice Hayanga) dated 16th December in H.C.C.C. NO. 155 OF 1999)

****

JUDGMENT OF THE COURT

The appellant company, Noorlands Limited , is the defendant in Civil suit Number 155 of 1999, filed by the respondent in the High Court of Kenya at Mombasa. By its plaint dated 2nd January, 1999, the appellant averred that it is the owner of all that piece of land known as Mombasa/Mainland South/Block 1/34, Likoni, "the suit property" , and, that the respondent is its tenant at a monthly rental of Shs. 3,500/=. By a notice to quit dated 24th February, 1997, the appellant had duly terminated the tenancy but the respondent had wrongly held over. It therefore claims vacant possession of the suit premises, arrears of rent and mesneT hper orfeistpso nidne ntth ef isluemd oaf wSrhist.t5e3n5 ,5s0t0a/t=e.ment of defence and a counterclaim. In it the respondent pleaded that the appellant had offered to sell to him the suit property at an agreed price and which sum he had deposited with his named counsel. However, the purchase price and the amount of the deposit were not disclosed. Later the sale was frustrated and it became impossible to complete.The respondent had occupied the suit property for 21 years and had carried out massive developments of a capital nature and in the event that he was ordered to vacate it then the Court should assess the quantum of the developments he had effected on the suit property on quantum meruit basis and the appellant should be ordered to refund the amount found due to the respondent.

On 15th July, 1999, the respondent applied for summary judgment under Order XXXV rule 1 for orders:-

"1.That Summary Judgment be entered for the

Defendant against the Plaintiff in the sum of Kshs.700,000/= plus costs and interest.

Which application is based on the following grounds:-

(a)That the Plaintiff received the sum of

Kshs.700,000/= as a deposit for an

agreement that has totally failed

and that sum should be refunded

to the Defendant immediately as continued

withholding of that money by the Defendant

amounts to a case of unjust enrichment which

is unjust and unreasonable."

In the affidavit in support of the application, the respondent deponed that he had paid Shs.700,000/= to the advocate for the appellant as a stakeholder on the date of signing the Agreement of Sale; that the suit property is an agricultural land and since consent was never applied for within six months from the date of execution of the Agreement, the transaction had been rendered null and void; and that though the appellant was selling the suit property on the basis that it was free from all encumbrances he had discovered that there are squatters on it.

The replying affidavit stated that:-

"3.That pursuant to the agreement the Defendant

paid a deposit of Shs.700,000.00 but

failed to complete the sale

inspite of the fact that the Plaintiff

was ready and willing to

complete the same.

4.That the Defendant has been a tenant of the

Plaintiff and in occupation of

the said property since 1981 and is

fully aware of the state of the same.

5.That I have been advised by the Plaintiff's

advocate Messrs C.B. Gor & Gor

and I verily believe the same to

be true that the sale of the said

property is not subject to the

Land Control Act."

In a reserved ruling, the learned Judge held that it is implicit in the pleadings that the suit property was an agricultural land. He thought that the defence lacked bona fides and was shadowy. He granted leave to the appellant to defend the counterclaim on condition that it deposited Shs.700,000/= into court within a

given period and in default judgment would be entered against it.

From this decision the appellant, represented by Mr. Gor, has preferred this appeal. His main submission is that the learned Judge erred in failing to hold that the counterclaim is for the taking of accounts and not for the claim of specific amount of Shs,700,000/=. Mr. Gor also argued that the suit was not for conditional leave to defend and the learned Judge was at fault in so holding.

In our view, it is difficult to resist Mr. Gor's submissions. It is manifestly clear from the perusal of the counterclaim that the respondent had only sought an order for the taking of accounts. There is no specific claim for any amount allegedly owing to the respondent. There is no liquidated demand; and moreover, the respondent had not positively sworn to the facts verifying the cause of action and the sum of Shs.700,000/= claimed.

The appellant we think, had shown that it has a good defence to the action on the merits. The pleadings and the affidavits put forward were not sham and leave to defend should have been given unconditionally. The learned Judge had no discretion.

As this is an interlocutory appeal, we will desist from expressing our views over several issues which are still due for trial.

We allow this appeal. The judgment and/or ruling dated 16th December, 1999, is set aside. The notice of motion dated 15th July, 1999, is dismissed with costs. The appellant shall have the costs of the appeal.

Dated and delivered at Mombasa this 20th July, 2001.

J. E. GICHERU

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR