



**IN THE COURT OF APPEAL FOR EAST AFRICA**

**AT NAIROBI**

**( Coram: Wambuzi P, Mustafa & Musoke JJ A )**

**CIVIL APPEAL NO. 9 OF 1977**

**BETWEEN**

**RIOKI ESTATE CO (1970) LTD.....APPELLANT**

**AND**

**KINUTHIA NJOROGE.....RESPONDENT**

**( Appeal from the Judgment of Chesoni J in the High Court dated 2nd March 1976 in Civil Case No 1200 of 1974 )**

**JUDGMENT**

The appellant, a limited liability company, brought an action in the High Court against the respondent claiming vacant possession of a house on certain agricultural land and mesne profits. By an agreement between the parties entered into in April 1972, the appellant agreed to lease the house to the respondent at a monthly rental of Shs 800 "provided the [respondent] used the house for residential purposes only". It was alleged in paragraph 5, 6 and 7 of the plaint as follows:

5. In breach of the said agreement the [respondent] used the said house for business, namely the entertainment of tourists.
6. No consent required under section 6 of the Land Control Act has been given to the transaction.
7. No consent has been obtained under the Land Control Act and the [respondent's] tenancy is therefore illegal and void.

A written statement of defence was filed by the respondent but certain defences, not relevant to this appeal, were struck out; and as a result the appellant obtained summary judgment whereby the Court ordered immediate delivery of vacant possession, dismissed the prayer for mesne profits and made no order as to costs. The appellant now appeals to this Court against the dismissal of the claim for mesne profits and the refusal to be granted costs in the High Court.

As regards mesne profits, the position would appear to be this. After the agreement of April 1972, the

respondent went into possession of the house and paid the reserved rent until the end of June 1973, that is for about fourteen months. Thereafter the appellant refused to accept any rent from the respondent and demanded vacant possession. It would appear from the pleadings that the appellant took this course for one or possibly two reasons. First, because the respondent acted in breach of the tenancy agreement by using the house to entertain tourists for which purpose no consent had been obtained under the Land Control Act. Secondly, because the actual leasing of the premises was illegal and void for want of consent under the Act. Whatever the reason, however, the appellant claimed he was entitled to mesne profits from 1st July 1973 until delivery of vacant possession. On this issue, Chesoni J having held the agreement between the parties to be void for all purposes under section 6(2) of the Land Control Act, a matter which was not disputed, went on to consider the provisions of section 7 of that Act. He then said:

Thus, the [respondent], if he has paid the [appellant] any money or valuable consideration under the agreement of 20th April 1972, which I have said is void by virtue of section 6(2) of the Land Control Act, that money or consideration is recoverable as a debt by the [respondent], from the [appellant] herein. This means that the [appellant's] prayer for mesne profits cannot succeed. At any rate mesne profits are damages for trespass which are payable by a tenant who holds over after the lawful determination of his tenancy. There was no tenancy here so the question of holding over does not arise. Furthermore, and this is very important, any payment or receipt of money and remaining on the said land in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or remains in possession in furtherance of the avoided agreement or of the intentions of the parties to the avoided agreement would constitute a criminal offence under the said Act, and render the [appellant] and [the respondent] liable to prosecution; see section 22 of the Land Control Act.

The first ground of appeal is that:

The judge erred in law and in fact in not finding that the respondent had ceased to hold under the agreement from 1st July 1973 when the appellant refused to accept rent and demanded possession.

I find no merit in this ground of appeal. If both parties in the court below accepted that the agreement of April 1972 was void for all purposes and the trial judge so found, how could the respondent have held under a void agreement until 30th June 1973" The wording in section 6(2) of the Land Control Act is that such an agreement is "void for all purposes". I should have thought that failure to obtain the necessary consent in accordance with the Act vitiated the agreement. Faced with this Mr Okwach, for the appellant, shifted his ground and submitted that the claim for mesne profits was based on the order of the court below granting the appellant vacant possession. This submission was also difficult to maintain. Counsel could not show how mesne profits could flow from the order for vacant possession. Mr Okwach then made his final shift in position; and rested on the submission that, as the agreement between the parties was void and the appellant had demanded vacant possession, the respondent's continued occupation of the premises was wrongful and the respondent was accordingly liable to pay mesne profits. Counsel submitted that mesne profits under the law of Kenya may be paid for all wrongful occupation, which may not necessarily be holding over after the determination of a tenancy. I think that there is some merit in this argument, particularly having regard to the definition of "mesne profits" in section 2 of the Civil Procedure Act. The section provides:

Mesne profits, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.

However, in one of the two cases relied on by Mr Okwach, *Heptulla Bros Ltd v Jambhai Jeshangbhai*

*Thakore* [1957] E A 358, the main issue was whether, in view of the terms of the document which purported to be a registrable lease, the appellants were tenants or licensees in respect of the part of the shop which they occupied. I think it was in this context that Briggs J A said (at page 362) in the passage relied on by Mr Okwach that the meaning of "mesne profits" in this country appears to be wider [than in England] and to extend to all cases of wrongful possession of land." Briggs J A went on to say (also at page 362):

but when damages are sought for trespass by a former licensee whose licence has been lawfully determined, I know of no rule that the damages must be only such as would have been payable as mesne profits if the licensee had been a tenant.

In my view, there was still some element of holding over after the determination of the licence. In the second case, *Chemelil Sisal Estate Ltd v Makongi Ltd* [1967] EA 166, Mr Okwach relied on a *dictum* by Duffus J A. The facts of that case are somewhat similar to the facts of this case. It concerned the leasing of some agricultural land and failure to obtain the consent of the divisional land board under the Land Control Regulations 1961, then in force. The main issue before the Court was whether there had been a dealing in land in the course of which moneys paid were recoverable by reason of the fact that the dealing was void. Duffus J A observed at page 177:

Regulation 9 prohibits any dealing with agricultural land in a declared area unless the required consent is first obtained and any such dealing is not only illegal but is declared to be absolutely void for all purposes. This would mean that any person entering into possession of land subject to these regulations in pursuance of a transaction for which consent has not been obtained does so illegally, and on the other hand that any person paying money or other valuable consideration in pursuance of such a transaction does so under an illegal contract ... The original consent of the owner to the entry on his land having, by statute, been declared illegal and absolutely void for all purposes, it would appear to follow that any person entering the land by virtue of such an illegal consent is unlawfully on the land, and as the consent was void from the time it was given, that his original entry was also illegal, and accordingly that the owner might be able to successfully maintain an action for trespass or for recovery of possession with a claim for mesne profits ...

Quite clearly the reference to mesne profits was made *obiter* as the position referred to did not arise in that case and the matter was not argued. The position has, however, arisen in this case and naturally the observations of Duffus JA must be weighed in the light of the circumstances. It is common ground that the lease under which the respondent was granted entry to the premises is void. I think it follows that, from the moment the appellant demanded vacant possession, the respondent was not entitled to remain in possession and his continued possession of the premises was therefore wrongful. The question before us is whether mesne profits are payable in view of the wrongful possession, in this case between the date of the demand for vacant possession (1st July 1973) and 28th May 1976 (when vacant possession was delivered). In answering this question in the negative, Chesoni J referred to section 7 of the Land Control Act, which provides that any money or valuable consideration paid by virtue of a void transaction shall be recoverable as a debt from the person to whom it was paid, but without prejudice to section 22 of the Act. The latter section makes it an offence to pay or receive money or to enter or remain in possession in furtherance of a void transaction punishable with a fine or imprisonment. In other words Chesoni J appeared to ask the question: if the written law requires the landlord to refund any rent paid to him by virtue of a void transaction, how can a Court order the would be tenant to pay mesne profits owing out of the same void transaction" I think that I would leave this general question open as to what was the intention of the Legislature as the matter has not been argued before us. On the particular facts of this case, however, Mr Gautama, for the respondent, submitted (and, I think, justifiably) that the real basis of the appellant's claim in this case was the breach of agreement in respect of the user of the

premises and was not for the tort for wrongful occupation. Counsel referred to paragraphs 3 and 4 of the plaint and argued that reference to the void agreement was an excuse to get the respondent out of the premises for allegedly using them to entertain tourists instead of using them solely as a residential house. Counsel submitted, in effect, that in these circumstances it would be wrong to permit the appellant to make money out of a void transaction. Referring to the *dictum* of Duffus JA in the *Chemelil* case, counsel submitted that at the time that case was decided there was no criminal offence created under the regulations then in force; that now a criminal offence is created under section 22 of the Land Control Act, and what the appellant is now asking for is compensation for an illegality. I am not sure that I agree with counsel all the way. It is clear, however, that the appellant continued to receive rent for the premises from 20th April until 30th June 1973, some eleven months after the transaction became void. During that period both parties were involved in an illegal transaction. The pleadings show a complaint that the respondent used the property for purposes other than the agreed purposes and this may well have been the real reason for demanding vacant possession. There is a denial in the written statement of defence that the premises were let only for residential purposes. In other words, a denial of the alleged breach of the agreement. In these circumstances, it may well be that the respondent believed he was entitled to remain in possession until the dispute in regard to user was settled. Delivery of vacant possession was ordered for a different reason on 2nd March 1976, and the order was complied with, we are told, some two months later. In these circumstances, I would, like the trial judge, refuse to order mesne profits to be paid. To make such an order would be to give back to the appellant by way of mesne profits what the statute deprived him of in the form of rent by section 7 of the Act. I am alive to the fact that the appellant declined to accept rent after his reason for demanding vacant possession appears to have been breach of the agreement and not so as to avoid an illegal transaction. It may well be that in a proper case mesne profits may be payable but I am not satisfied that this is such a case. In my view the first two grounds of appeal must fail.

The third and last ground of appeal relates to costs. In this connection Chesoni J said:

Both parties were equally responsible for applying for the land control board's consent, but neither did. They are equally to blame. This is a case where there should be no order as to costs and I shall make  
none.

The judge said subsequently,

... no evidence that the [appellant], who had put the [respondent] in possession before consent had been applied for and obtained, took any steps within the three months statutory period to apply for consent. He did nothing and [nor] did the [respondent]. It is much later that he asked the [respondent] to vacate and that was not on the ground that no consent had been obtained, but it appears because he felt the [respondent] was using the premises for purposes other than residential.

While Mr Okwach conceded that either party could have applied for consent, he submitted, however, that the appellant had to bring this action to obtain possession and was successful. Counsel also referred to the proviso to section 27 (1) of the Civil Procedure Act to the effect that costs shall follow the event unless a Court shall for good reason otherwise order. He relied on *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA287 and *Wambugu v Public Service Commission* [1972] EA 296. Although the judge did not say so in so many words, the appellant succeeded only on the prayer for vacant possession and failed on the other prayer for mesne profits. In my view that alone could have been sufficient justification for not making any order as to costs. However, the judge was of the view that both parties were to blame as neither took any steps to obtain the necessary consent which resulted in the transaction between the two parties becoming void and culminated in the appellant demanding vacant possession, not apparently because the transaction was void but because, so it was alleged, the

premises were being put to user contrary to the agreement. He furthered the illegality for nearly a year by receiving rent. It may well be that the judge held the appellant's part in the matter as misconduct which would, on the *Wambugu* case relied on by counsel, be sufficient reason for depriving the successful party of his costs. Be that as it may, I would think that the trial judge gave his reason for refusing costs to the appellant and I do not think it is open to this Court to examine the sufficiency of the reasons given. It would be a different matter if it were shown that the reason does not amount to good cause and I do not think that is the case here. In my view the third ground of appeal must also fail. In the circumstances I would dismiss the appeal with costs, and as the other members of the court agree it is so ordered.

**Mustafa JA** delivered the following Judgment. I agree with the judgment delivered by Wambuzi P and I will only add a few words of my own. The respondent occupied a house on agricultural land belonging to the appellant under an agreement which, *inter alia*, provided that the house was to be used only for residential purposes. No consent to the agreement was applied for or obtained under section 6(2) of the Land Control Act, and as such the agreement was void for all purposes.

The respondent occupied the premises in April 1972 and paid rent which was accepted by the appellant until June 1973. The appellant then refused to accept any further rent and asked the respondent to vacate the premises, which the respondent refused to do. The appellant filed a suit in the High Court claiming vacant possession and mesne profits from July 1973 to date of recovery of possession. The grounds stated in the plaint are: (1) in breach of the agreement the respondent had used the premises for business, namely the entertainment of tourists; and (2) as no consent to the agreement was obtained in terms of section 6 of the Land Control Act the transaction was illegal and void.

Chesoni J granted the prayer for vacant possession but refused that for mesne profits; he also made no order for costs. The appeal is against the order refusing mesne profits and costs.

The claim based on a breach of user in terms of the tenancy agreement is untenable, as the agreement is totally void and cannot be relied on to establish a breach of any condition contained in it. The question of mesne profits is slightly more complicated. Section 7 of the Land Control Act provides that money paid in the course of a transaction voided by section 6 shall be recoverable as a debt by the payer from the payee and section 22 of the said Act provides that any person who pays or receives money in furtherance of an avoided transaction shall be guilty of a criminal offence.

In this case the appellant was trying to recover mesne profits from the respondent on the ground that the agreement was void and illegal for lack of consent, and therefore the occupation by the respondent of the premises was wrongful, and in the circumstances mesne profits were recoverable. However, on the facts of this case, it is clear that the appellant acted in concert with the respondent in initiating and continuing with this void and illegal transaction; the appellant had received rent for fourteen months or, at least, for eleven months, from the respondent in circumstances which offended the penal provision of section 22 of the Land Control Act. In such circumstances can the appellant be allowed to continue to take advantage of his own wrong to recover rent under the guise of mesne profits from the respondent" I do not think so.

As regards the order of the trial judge concerning costs, he gave a valid reason for refusing to make an order for costs. In doing so, he was exercising a discretion. I can see no reason to interfere with the exercise of that discretion. I concur in the order proposed by Wambuzi P.

**Musoke JA.** I entirely agree with the judgment of Wambuzi P that this appeal should be dismissed

with costs.

On the question of costs in the High Court, I think Chesoni J was right, in the circumstances of this case and for the reasons he gave, to deprive the appellant of the costs of the suit despite the appellant's partial success; and I agree that this Court should not interfere with the judge's exercise of his discretion in this matter.

*Appeal dismissed with costs.*

**Dated and Delivered at Nairobi this 26th day of July 1977.**

**S.W.W.WAMBUZI**

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**PRESIDENT**

**A.MUSTAFA**

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**JUDGE OF APPEAL**

**J.S.MUSOKE**

.....

**JUDGE OF APPEAL**

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