REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: MADAN & Kneller, J A & chesoni, Ag. JA)

CIVIL APPEAL NO 4 OF 1983

BETWEEN

NARMADASHANKER JATASHANKER DAVE

JASHUBHAI MOHANBHAI PATEL.....APPELLANTS

AND

ZUROBI LIMITED.....RESPONDENTS

(Appeal from an Order of the High Court of Kenya at Nairobi (Nyarangi, J.) dated 19th November, 1982 in

Civil Appeal No 2184 of 1984)

JUDGMENT OF MADAN, J A

The appellants are landlords as owners of parcel of land reference number 209/4360/24 Nairobi. They let to the respondent a portion of the buildings thereon, referred to as "Shop A and Store A" for a term of five years and three months from January 1, 1981. The lease contained inter alia the following covenant:

"(7) Not to transfer assign sublet or part with the possession of the demised premises or any part thereof under any circumstances whatsoever and it is hereby expressly agreed and declared that if there shall be any breach by the Lessee of the forgoing provisions of this clause it shall be lawful for the Lessors to re-enter upon the demised premises without notice and thereupon the term hereby created shall determine absolutely but without prejudice to the Lessors' right of action or remedy to claim damages on account thereof, and provided further where the Lessee for the time being is a private limited liability company then for the purpose of this sub-clause transfer of the beneficial interest in more than fifty percent of the issued share capital of the Lessee shall constitute an assignment of this Lease."

The respondent sublet or assigned or parted with possession of the demised premises or part thereof to an occupier named “Zurobi Quadra Sales Limited”, without the appellants’ knowledge or consent in breach of their aforesaid covenant. The appellants forfeited the lease.

The appellant instituted proceedings against the respondent for recovery by vacant possession of the

demised premises and mesne profits. They also followed up with an application for summary judgment as prayed to be entered against the respondent.

A director of the respondent company swore an affidavit in reply. He deponed that the respondent had not parted with possession, subject or assigned the demised premises or part thereof.

At the hearing of the application for summary judgment, Mr Havelock for the respondent agreed that Clause 7 of the lease absolutely prohibited the respondent, also accepted by the learned judge, form parting with possession etc of the demised premises. He however maintained that there was an implied term. He did not state to do what. If he intended to say that consent would not be unreasonably withheld, consent was never applied for. The absolute prohibition in the covenant to sublet under any circumstances whatever excluded any such latitude.

The learned judge found that there was evidence that Zurobi Quadra Sales Limited was in possession and was carrying on business within the demised premises. He also said that there appeared to be some connection between the respondent and "the firm in possession in which the respondent claimed to have an interest though nothing was said about the nature or extent of the interest. In contradiction, however, the learned judge said it was an issue in that claim or interest which a judge should hear or determine as the respondent had consistently denied the sub-letting and supported its denial by a serious indication of an interest in the firm in possession.

The learned judge also said that a triable issue would be deemed to have been raised if the defence contains an issue which would constitute an arguable case on behalf of the defend ant. A triable issue should be one on which a defendant would succeed in an action. He gave unconditional leave to defend.

The learned judge having found that the demised premises had been sub-let, and also the there was no indication of the nature of the respondent's interest in the firm in possession there was no support for his view. I consider that as the extent of the respondent's interest was not disclosed to the court because of the prohibition in the covenant in respect of it that also put these respondent's bona fides in doubt. The defence was a sham which did not raise any triable issue, even one which may succeed in an action. There was nothing shown for a judge to hear or determine in an action. The application for summary judgment ought to have succeeded.

I would allow the appeal with costs, set aside the order of the High Court and substitutes therefore an order entering judgment as prayed for the appellant with costs of the suit and the application for summary judgment. As Kneller JA and Chesoni Ag JA agree, it is so ordered.

Dated at Nairobi this 11th day of October, 1983.0

C.B. MADAN

JUDGE OF APPEAL