



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 2184 OF 1982

NARMADASHANKER JATASHANKER DAVE

JASHUBHAI MOHANBHAI PATELPLAINTIFFS

VERSUS

ZUROBI LIMITED DEFENDANT

JUDGMENT

The court was moved under Order XXXV rule 2 of the Civil Procedure Rules (the Rules) for summary judgment to be entered for the plaintiff as prayed in the plaint (with or without an inquiry as to the mesne profits) and for costs of the application to be awarded to the plaintiffs. The plaintiffs filed two affidavits in support of the application.

Mr Esmail for the plaintiffs stated that the plaintiffs are landlords who let a portion of their building to the defendant by a lease dated January 30, 1980 that there had been a breach of the conditions of the lease because the defendant has sublet or assigned or given possession of the property to somebody else, that the consent of the landlords was not sought, that the covenant as regards subletting is an absolute one and that the landlords elected to forfeit the lease in May, 1982. Mr Esmail referred to paragraph 3 and 4 of one of the affidavits of plaintiffs, compared that with paragraph 3 of the replying affidavit sworn by lease and then urged that the defendant's affidavit was a blanket denial and that neither the defence nor the replying affidavit had any details of the relationship between the defendant and the other company. It was submitted that annexure B is proof of sub letting, that annexures D and C amount to an admission that possession had been given to a third party and that annexure E is confirmation from the third party that it is in possession of the premises in question. The defendant, argued Mr Ismael has given no explanation how and why the third party is trading from the premises and why it is in possession.

Mr Havelock replying for the defendant invited the court to examine paragraphs 2 and 3 of the defence and hold that there is a triable issue if the defendant has sublet as alleged. Mr Havelock agreed that clause 7 of the lease is an absolute prohibition but argued that the defendant maintains there was an implied term. That alone, argued Mr Havelock constitutes a triable issue. Mr Havelock thought that paragraph 4 of the defence contains facts which would explain the relationship between the defendant and the other body, especially as the name of the company includes that of the defendant. The court was asked to hold that the replying affidavit of lees basically confirms what there is in the defence. Mr Havelock criticised the affidavit of Dave the plaintiff's business attorney and said matters raised therein should be raised at the trial. Mr Esmail's reply was that a defence should raise bona fide triable issues,

that paragraph 4 of the defence is a speculative proposition and that the detailed lease does not provide a basis for implying any term.

The issue here is the defendant has shown by affidavit or otherwise that it should have leave to defend the suit.

If the defence raises a triable issue then the defendant will have shown that it should have leave to defend. 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 defendant. A triable issue should be one on which a defendant would succeed in an action. A defence which is hopeless, which raises no reasonable issue in answer to a plaintiff's claim and whose clear purpose is to delay the inevitable judgment in favour of a plaintiff would be held to raise no triable issue.

The defence in this action has to be considered in relation to the plaint and to the affidavit including the annexures. Clause 7 of the lease in question is an absolute prohibition. There is evidence that a body called Zurobi Quadra Sales Ltd is in possession of the material premises and is carrying on business within the premises. The contract of lease was between the plaintiffs and Zurobi Ltd. The name of the body or firm in possession includes that of the defendant. The defendant is adamant that it has not parted with possession, sublet or assigned the premises. There appears to be some connection between the defendant and the firm in possession. In paragraph 4 of the defence it is stated inter alia that the defendant has an interest in Zurobi Quadra Sales Ltd. There is nothing said about the nature or extent of the interest. There is an issue in that claim or interest which a Judge should hear about and determine. It is important to bear in mind the necessity of caution in dealing with applications for summary judgment. Here the defendant has consistently denied the plaintiff's claim and has supported the denial of subletting by a serious indication of an interest in the firm in possession.

It seems to me risky indeed to summarily reject the defendant's denial at this stage. For the reason given, I would dismiss the application. The defendant will have unconditioned leave to defend. Costs in the cause.

Leave to appeal

J.O NYARANGI

JUDGE

19.11.82

Esmail for Plaintiff

No appearance for Defendant

Court - Judgment delivered

JO Nyarangi

Judge



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