



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1981 OF 1979**

**1. PRABHULAL G.SHAH**

**2. S. PRAMBHULAL SHAH.....APPLICANTS**

**VERSUS**

**RAMESH MEGHJI SHAH.....RESPONDENT**

**RULING**

This is an application by the plaintiffs/landlords in a suit for possession to set aside an ex parte injunction obtained by the defendant/tenant restraining the plaintiffs from demolishing and interfering with the conduct of the suit premises and ordering them to restore and reinstate the portion demolished forthwith. I have previously considered and dismissed a preliminary objection to the applicants being heard on the grounds of their contempt in starting demolition while the suit was pending.

The premises are occupied as a shop. The lease was for six years expiring on January 31, 1980. It was not therefore subject to the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act (Cap 301). In the suit the plaintiffs seek (inter alia) possession of the premises on the ground that in breach of a covenant to pay a proportion of site value tax within 7 days of receiving notice from the plaintiffs the defendant had failed to pay the sum of Kshs 27,125 for the year 1979 due notice having been given on May 17, 1979.

The lease accordingly became liable to forfeiture, the plaintiffs claim, and they are entitled to possession. The defendant remained in possession. On June 15, 1979 the plaintiffs served notice in writing of their intention to determine the lease pursuant to Section 111(g) of the Transfer of Property Act and on June 20, 1979, they filed this suit.

A defence and counter-claim was filed on July 16, 1979, and the amount was paid into court the same day. The defendant denies any breach, states that the sum claimed had been tendered to the plaintiffs on June 18, 1979, admits remaining in possession but denies that the lease is forfeited. In the counter-claim he asks for the suit to be dismissed, relief from forfeiture under Section 114 of the Transfer of Property Act and costs.

At about 4.30 pm on January 31, 1980, the day the lease expired by effusion of time, the defendant was notified in writing by the plaintiffs' advocates that demolition for the purposes of reconstruction

would commence the following day. Demolition started early the next morning before the defendant's shop was opened. The defendant at once applied ex parte for a temporary injunction. In his affidavit he states that by letter dated September 20, 1979, he gave notification of his desire to exercise the option contained in clause 4(e) of the lease to occupy the premises for a further 6 years from February 1, 1980. An ex parte injunction was granted and it is this injunction which the landlords now seek to have set aside.

Mr DN Khanna appeared for the applicants and Mr Lakha with Mr Hira for the respondent. It will be convenient to consider first Mr Khanna's submissions relating to the affidavit in support of the application for the injunction and the order of the learned Judge.

The Judge ordered service to be dispensed with. Mr Khanna submitted that there was no evidence to justify such dispensation, that the landlords could have been served within half an hour and that demolition had already been stopped by the intervention of the police. I think with respect that on the evidence before him, the learned Judge was fully justified in ordering service to be dispensed with. Demolition had started and service would have involved delay not only in effecting service but also in instructing advocates who might not be immediately available and in a position to take prompt action. In the meantime serious damage might have been caused to the premises, in which the applicant carried on his business and to his goods. Mr Khanna contended that the applicant had concealed the material fact that demolition had been stopped but having regard to all the circumstances this might have been no more than a temporary respite and it is likely that at the time that fact would not be thought to be material and that the concealment was not deliberate. Although it was not stated explicitly that the matter was so urgent that if notice were served the mischief would be done before the injunction could be obtained it must have been clear to the Judge on the basis of the affidavit before him that this was indeed so.

The applicant stated in his affidavit that he was prepared to give an undertaking as to payment of damages. The learned Judge unfortunately overlooked this in the order he made. Such an undertaking should have been obtained and the injunction made subject to it. This alone however is insufficient reason for setting aside the injunction since it was subsequently continued subject to the usual undertaking.

Mr Khanna contended that the injunction had no relation to the subject matter of the suit, that the court could grant an injunction only to support a legal right and the respondent was a trespasser with no legal right to possession. He cited a number of English cases dealing with the interpretation of Section 25(8) of the Supreme Court of Judicature Act, 1873, which provides -

“An injunction may be granted by an interlocutory order of the court in all cases where it shall appear to the court to be just or convenient that such order should be made.”

It was not disputed that this is applicable to Kenya and is a provision in relation to injunctions in addition to the provisions of Order XXXIX.

In *Montgomery v Montgomery* [1964] 2 All ER 22 Ormrod J said that it was a fundamental rule that the court will grant an injunction only to support a legal right.

A less restricted construction was given in the other cases cited by counsel. In *Winstone v Winstone* [1959] 3 All ER 580 Winn J said:

“In my view these words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which

the application for injunction is made.”

This view is applicable more to an injunction sought by a plaintiff or petitioner than to a defendant or respondent and the following passage from *Des Salles d'Epinoix v Des Salles d'Epinoix* [1967] 2 All ER 539 is I think more in point:-

“Clearly any injunction sought by a defendant or respondent to proceedings initiated by a plaintiff or applicant must bear some appropriate relation to the subject matter of the relief claimed in the proceedings already initiated.”

Finer J in *McGibbon v McGibbon* [1973] 2 All ER 836 said an injunction must bear some relationship to the cause of action.

The injunction obtained does, I think, bear an appropriate relation to the subject matter of the relief claimed in the proceedings initiated by the plaintiffs. They seek an order for possession. The defendant seeks to remain in possession. If the defendant succeeds his possession up to January 31, 1980 will be legalised. If he succeeds in proving that there has been no breach of any of the covenants contained in the lease he will be entitled to a new lease for a further term of 6 years provided, as he claims he gave notification of his desire to exercise the option. Were it not for the injunction the demolition of the premises would have destroyed the opportunity to exercise this right. The defence and counter-claim makes no reference to the option because it was filed before the defendant sought to exercise his right.

The question of self-help to which I adverted briefly in my ruling on the preliminary objection was again raised by Mr Khanna. I would only say that if the principle of self-help is applicable in Kenya – a matter on which I express no opinion - the demolition of premises while the defendant was in possession and while his property and shop goods were inside can not in my opinion be described as the exercise of no more force than is necessary to eject the defendant or as eviction in a peaceable manner.

I turn now to the pleadings in the suit and the facts disclosed in the affidavits filed. The lease provides in clause 2(c) for payment by the lessee to the lessors by way of additional rent of one-third of the annual sum payable by the lessors in respect of site value tax of the premises within seven days of notice in writing from the lessors, this amount to be deemed to be rent due for the purposes of levy of distress for rent.

Notice to pay Kshs 27,125 was given on May 17, 1979. A cheque issued on May 30, 1979 for the amount due was dishonoured.

On June 8, the landlords instructed court brokers to distrain the goods and chattels of the defendant. The defendant's advocate, apparently overlooking the provisions of clause 2(c) of the lease providing that the site value tax would be deemed to be rent due wrote to the brokers on June 13, threatening a suit for damages unless they desisted from levying distress. The brokers accordingly desisted.

On June 12, the defendants advocate wrote to the landlords seeking their consent to part with possession of the premises to intending purchasers of the business. The timing of this letter coupled with the dishonour of the defendant's cheque suggests the existence of financial problems.

The landlords thereupon on June 15, through their advocates gave notice of their intention to determine the lease in accordance with Section 111(g) of the Transfer of Property Act for breach of the covenant to pay one-third of the site value tax and informed the defendant's advocate that in the circumstances there could be no question of granting permission to assign or sublet the premises. The

suit was filed 5 days later, the defendant having in the meantime rendered a banker's draft for the amount due, which was refused.

In his defence the defendant denies having committed any breach of the covenants in the lease and denies that the lease is forfeited. He claims to be relieved from forfeiture and asks for costs.

Section 114 of the Transfer of Property Act provides that if a lessee pays or tenders rent in arrear, interest and full costs the Court may relieve the lessee against forfeiture. This relief is discretionary. In this case the defendant issued a cheque which was dishonoured, wrongly prevented the levying of distress, tendered the amount due without interest or costs, denies any breach of the covenant in question despite clear evidence of such breach and asks for the suit to be dismissed with costs. In the circumstances it seems to be unlikely that any court would grant relief from forfeiture.

Even if relief from forfeiture were to be granted the defendant's entitlement to a new lease for a period of six years was conditional upon a written request made by him at least three months before the expiry of the term and the absence at the time of the request of any breach of the agreements and covenants in the lease. The written request allegedly made on September 20, 1979, was not sent by registered post and no receipt was obtained from the landlords. If in fact such request was duly made it was made after the defendant had failed to pay the site value tax, that is at a time when he was in breach of a covenant in the lease. The defendant thus lost this right to a new lease.

In the circumstances the application succeeds. The ex parte injunction dated February 2, 1980, is discharged and set aside. An inquiry into damages resulting from the injunction is ordered to be held before a Deputy Registrar who will submit his findings to me whereupon a date will be fixed for further orders. The plaintiffs seek a secured undertaking as to damages but I consider it unnecessary now to make such order. The defendant will pay the plaintiffs' taxed costs of this application and costs of and incidental to the injunction.

By a chamber summons filed on April 9, 1980, and heard at the same time as the foregoing application the plaintiffs under the provisions of Order XXXIX seek a permanent injunction restraining the defendant from trespassing in the shop premises occupied by him.

Even if relief from forfeiture were to be granted the lease has now expired and the tenant being in breach of a covenant in the lease is not entitled to a new lease. He is a trespasser. Having set aside the ex parte injunction granted to him it might be thought illogical and unreasonable to refuse the injunction sought by the plaintiffs and oblige them to take further proceedings.

On the other hand, as Mr Lakha submitted, the injunction is sought on a basis other than that in the substantive suit and there is no provision either in Order XXXIX or in the Supreme Court of Judicature Act 1873, for granting a permanent injunction in interlocutory proceedings.

I must, I think, refuse the injunction sought by the plaintiffs but in the exercise of the inherent power of the Court and subject to the necessary permission being given by the appropriate authorities I give leave to the plaintiffs to proceed with the demolition of the premises occupied by the defendant without further notice to the defendant and without further application to the Court at the expiration of thirty days from today.

The plaintiffs will pay the defendant's costs of this application.

**Dated and Delivered at Nairobi this 9th day of April 1980.**

**A.H.SIMPSON**

**JUDGE**



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