IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: PLATT, APALOO JJA & MASIME Ag JA)

CIVIL APPEAL NO. 120 OF 1987

BETWEEN

JAMES HENRY MUNDIAR .....APPELLANT

t/a Kabarak Development Services

AND

TRADEWHEEL KENYA LTD.....RESPONDENT

(Appeal from a Ruling and Decree of the High Court at Nairobi, Butler-Sloss J)

JUDGMENT

November 17, 1987, **Platt, Apaloo JJA & Masime Ag JA** delivered the following Judgment.

The Appellant, James Henry Mundiar appeals to this Court from the order of the High Court given on October 21, 1987 in which the learned Judge refused to grant an injunction. It was the view of the learned Judge that it would not be right for him to restrain the Defendant / Respondent "from remaining on or continuing in occupation of Shop No 2 situated on the ground floor of Tumaini House until further orders …." On the contrary, the learned Judge felt that it would be more satisfactory if the Defendant/ Respondent remained in the shop, so preserving the *status quo* until the hearing of the case.

The proceedings in this Court, commenced with an application for an injunction, in terms similar to that prayed for in the High Court, pending the hearing of the appeal. But after Counsel had opened the application, it seemed better to treat the application as the appeal, if that were convenient to both parties. It turned out that not only was it convenient to both Counsel, bu Mr. Makhecha has been able to file the appeal and we have been able to hear and determine it, which will no doubt save the parties a great deal of delay, because now the trial can proceed.

The Appellant/Plaintiff brought his suit, praying for a declaration that the Defendant is not entitled to enter or use the premises in question, and therefore praying for an injunction, to restrain the Defendant from remaining on or continuing in occupation of the suit premises. There were also various claims for damages. The Plaintiff's claim to these prayers was based on an alleged agreement between himself and the National Christian Council of Kenya, who own the suit premises, to lease the premises to the Plaintiff. Pursuant to that agreement, the Plaintiff was handed over vacant possession of the premises on

September 17, 1987. However, on September 19, 1987 in the absence of the Plaintiff, the Defendant wrongfully, illegally and forcefully entered into the premises, and despite repeated requests has failed to give the Plaintiff possession. Moreover, the Defendant has made sure of his position by changing and replacing the locks on the premises, and placing hired security guards to guard the premises.

The Defendant's case is that the Defendant Company, Trade Wheel Kenya Limited, knows nothing about the agreement for lease entered into between the owner of the shop and the Plaintiff. According to the Defendant, it took possession and occupation of the premises rightfully, legally and peacefully on September 15, 1987. That being so, the Defendant was perfectly entitled to change the lock and guard the premises.

It transpires from the affidavit of Mr. Mundiar, that he can support his claim to an agreement for a lease, and he says that he entered into possession to undertake renovations. The Defendant, he says, unlawfully trespassed upon his property. Attached to the affidavit is the correspondence between the Plaintiff, the Council, and the Council's agent, Kenya Trust Company Limited, together with evidence of their financial arrangements. Mr. Wycliff Musalia Mudavadi, the Manager of the Agents of the Council, explained the situation that the owner had first made an offer to the Defendant Company on August 5, 1987. This offer, according to Mr. Mudavadi, was subject to the approval of the landlord of the building, and payments were made on a purely without prejudice basis. On August 7, 1987 the landlord did not approve of the agreement made with the Defendant Company, and Mr. Mudavadi wrote to the Defendant Company withdrawing the letter of offer, and refunding their payment of Kshs 51,762. This sum of money was returned on September 18, 1987 which of course is an interesting date having in mind the date of the negotiation which were concluded on September 17, with the Plaintiff. Nevertheless Mr. Mudavadi stoutly supported the position of the Plaintiff as the approved tenant of the owner to whom possession had been handed.

That interesting state of affairs is further explained by Mr. John Harun a directo r of the Defendant Company in his affidavit dated September 23, 1987. Mr. Harun contends that on August 5, 1987 the owners' agent made an offer of the premises to the Defendant and that on August 7, 1987 the Defendant accepted the offer, complied with all the conditions, and paid the requisite quarter year's rent and service charges of Kshs 51,762. On September 15, 1987 the Defendant lawfully took possession of the premises. According to the Defendant, it was a concluded agreement without condition, and indeed, if one looks at the offer, it said that the agents wished on behalf of the principal to offer the premises to the Defendant. So as far as the Defendant is concerned, the Defendant is not a trespasser and if anyone were a trespasser, it would be the Plaintiff.

The learned Judge did not attempt to unravel this dispute but took the general view that the Defendant should remain in possession until the trial of the action. Mr. Makhecha for the Appellant sought to persuade this Court that the learned Judge had acted wrongly in principle in doing so. Looking at the memorandum of appeal, the Appellant contended that the learned Judge misdirected himself on the facts. The Judge was wrong on the question of who was in possession first. It was not right to say that the Defendant had a prior claim or that the *status quo* would be maintained by allowing the Defendant to continue in possession. These matters will of course be issues to be decided at the trial. But it cannot be gainsaid that the Defendant entered into his alleged agreement before the Plaintiff entered into his. Much will depend on whether the owners' agent was right in contending that the Defendant's agreement could be rescinded. Of course, at the moment, if one takes the position as seen by the owners' agent, the owner was entitled to rescind the contract of the Defendant and prefer the Plaintiff. However, weighing up those factual disputes, it is understandable that the Judge decided to let matters stand.

Mr. Makhecha referred us to *H C Berry Ltd v Brighton Sussex Building Society*, [1939] 3 All ER 217 and

Spottiswoode, Ballantyne & Co v Doreen Appliances Ltd and Barclay (London) Ltd, [1942] 2 All ER 65; for the proposition that where an agreement is subject to the execution of a formal agreement there is no binding contract. It is a matter of construction of the offer. In the case of each offer with which we are dealing in this appeal, there was a clause stating that other terms and conditions would be those that are the standard conditions contained in the lease document. It was

Mr. Makhecha's understanding of that clause that it was equivalent to the agreement being subject to contract or subject to a formal agreement being drawn up. Mr. Wambeyu for the Defendant took the opposite view, that the offers were really such as contained all the terms of the lease. We do not of course offer any views one way or the other on this contest, but merely for the sake of argument, except Mr. Makhecha's proposition. It simply means neither party had a concluded agreement upon which to rely. It is, of course, trite law that an agreement for a lease gives a party no interest in land by itself, due to the provisions for registration. It follows therefore, that neither party had any interest in this land.

The Defendant however is in possession and ownership is a matter of a superior right to possession. The Council is the owner and can recover the land from the Defendant, if indeed it has not divested itself of any part of its title by making a lease, nor on the other hand entering into a specifically enforceable agreement for lease. But the plaintiff cannot attack the relative weakness of the Defendant's title by pleading *just tertii*, namely that the Council owns the land. The Plaintiff can only attack the position of the Defendant, on the strength of some title of its own. (See *The Law of Real Property* by Meggary and Wade, 4th Ed pp 1005 to 1009.) The only "title" that the Plaintiff relies on is his permission to occupy the land given to him by the owner. It is not a case of a grant to use the land giving the plaintiff himself an independent interest in the land. The Defendant has disputed that the owner can contract with the Plaintiff, to allow the Plaintiff to use the land, and therefore, both parties having at one time been given the right to use the land, they are *in pari materia*. It is no use Mr. Makhecha protesting that the landlord has withdrawn permission to use the land from the Defendant, and given it to the Plaintiff. That gives the Plaintiff no better right than the Defendant claims. Thus, on Mr. Makhecha's own argument the learned Judge would have been well advised to leave matters as they stand.

There may be other considerations at the hearing of the case. We have not decided anything which may be put before the High Court at the trial. But we are satisfied that in the circumstances in this case, the learned Judge exercised his discretion in a reasonable manner, and that we should not interfere. It follows therefore that the appeal will be dismissed with costs which shall include the costs, if any, of the original application to this Court.

Dated and delivered at Nairobi this 17th day of November , 1987

H.G PLATT

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

JR.O MASIME

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AG. JUDGE OF APPEAL