**Nsubuga and another v Mutawe**

**Division:** Court of Appeal at Kampala

**Date of judgment:** 25 October 1974

**Case Number:** 25/1974 (5/75)

**Before:** Spry Ag P, Mustafa and Musoke JJ

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**Sourced by:** LawAfrica

**Appeal from:** High Court of Uganda – Wambuzi, C.J

*[1] Injunction – Interlocutory – Ex parte – Leave to dispense with service on defendant must be asked*

*for and obtained – Defendant must be served with plaint, summons and affidavits – Civil Procedure*

*Rules, O.* 37*, r.* 3 (*U.*)*.*

*[2] Injunction – Interlocutory – Probability of success and irreparable loss must be shown.*

*[3] Landlord and tenant – Landlord’s title – Tenant may not challenge at date of tenancy but may show*

*it has determined.*

**JUDGMENT**

The following considered judgments were read.

**Mustafa JA:** The respondent (whom I will call the plaintiff) had filed an action in the High Court of Uganda against the appellants (whom I will call the first defendant Nelson and the second defendant Diamond Trust Ltd.). The first defendant is an auctioneer and the second defendant a limited liability company. The second defendant was and still is the registered proprietor of premises known as Diamond Trust Building. The plaintiff had occupied a shop in the said premises as a tenant of the second defendant. The plaintiff had not paid rent due amounting to Shs. 9,724/30 in April 1973, despite demand, and the second defendant distrained for rent through the first defendant, and locked up the shop occupied by the plaintiff with the plaintiff’s goods inside it. The plaintiff filed the suit praying, *inter alia*, for a temporary injunction to restrain the defendants from detaining the said goods and for damages for trespass, wrongful eviction and detinue. The plaint was filed on 19 April 1973, and on the same day, by chamber summons supported by affidavit, the plaintiff obtained from Manyido, J. an *ex parte* temporary injunction restraining the defendants from interfering with the plaintiff’s occupation of the shop and the seizing of the goods. The plaintiff continued to remain in possession. On 2 May 1973, the defendants by notice of motion applied to the High Court to set aside the order of Manyindo, J. The plaintiff filed an affidavit in reply and the application came before Wambuzi, C.J. After hearing Wambuzi, C.J. upheld the order of Manyindo, J., but varied it to require the plaintiff to deposit the amount of arrears of rent, namely Shs. 9,724/30, in court until the determination of the suit. The defendants have now appealed to this Court. I will only refer very briefly to the *ex parte* application before Manyindo, J.I do not see any reason why an *ex parte* application was made. The defendants distrained for rent on 17 April 1973, and gave the plaintiff 14 days to pay the arrears of rent and charges. On 19 April the plaintiff sought an *ex parte* temporary injunction. No reason was given why notice was not served on the defendants. There was no application, formal or otherwise, for service on the defendants to be dispensed with. Nor was there any prayer in the chamber summons for directions as to service or for its dispensation. The only reason urged before Manyindo, J. by the plaintiff for the grant of the order was that he was a tailor and had to deliver clothes to his customers. There was not the slightest attempt to comply with the provisions of O. 37, r. 3 of the Civil Procedure Rules, see *Noormohamed v. Kassamali* (1953), 20 E.A.C.A. 8. I may state that the provisions of the Kenya O. 39, r. 1 in *Noormohamed’s* case are identical to those in O. 37, r. 3. Again the defendants alleged that they were served only with the restrictive order of Manyindo, J. on 20 April, without a copy of the plaint, chamber summons or supporting affidavit. The whole procedure was highly irregular. Even on the merits I doubt if the scanty facts placed before Manyindo, J. were sufficient for the granting of the application. However, when the matter came before Wambuzi, C.J., both the parties had ample opportunity to place their facts and arguments before the Court. The brief facts were these. The second defendant had, on 5 April 1973, demanded payment of rent from the plaintiff. On 10 April the plaintiff, through his advocate, forwarded a cheque, post-dated to 17 April, for the sum due to the second defendant. The second defendant accepted the arrangement. On 16 April the plaintiff informed the second defendant that he had instructed his bank to stop payment of the cheque. On 17 April the defendants distrained for rent, and the plaintiff obtained a temporary injunction on 19 April from Manyindo, J. On the matter coming up before Wambuzi, C.J. on a notice of motion filed by the defendants for the setting aside of the order of Manyindo, J., the plaintiff, in his affidavit filed in reply, stated *inter alia*: “. . . it came to my notice that the second defendant was owned by departed non-citizen Asians and that consequently by operation of law the said premises were no longer vested in it and I decided to withdraw the payment of rent I had made until the position was clarified.” In his ruling the Chief Justice stated *inter alia* “. . . The question is whether the applicant is the owner of or has a claim in the property in question so as to be entitled to the rent . . . S. 1 (1) of the Rent Decree 1973 (Decree 5/73) reads as follows: ‘(1) Notwithstanding any provision in any lease, sublease or tenancy agreement, every property belonging to a departed Asian shall vest in the Government for the same estate, interest, right, obligations and liabilities as the same were previously vested in the departed Asian.’ S. 2 of the same decree provides: ‘(2) Subject to the provisions of section 4 of this Decree, every person who is allocated by Government any dwelling house or business premises or part thereof which is vested in the Government by or under section 1 of this Decree, shall pay to the Minister such rent as may be fixed from time to time by the Minister.’ In the circumstances of this case it would appear that there is a triable issue regarding who owns the premises in question and the person or authority to whom or which the rent is payable . . . The answer will depend on who is entitled to the rent which is the subject matter.” As I have stated earlier the second defendant is a limited liability company. There was no evidence adduced at all as to who or what the shareholders of the second defendant were. No register of shares was produced and no official from the Registrar of Companies department was called, and in such circumstances I fail to see how it could be said that the second defendant “was owned by departed non-citizen Asians”. I will now deal with the term “departed non-citizen Asian”. Decree No. 17 of 1972 is intituled “A Decree to cancel Entry Permits and Certificates of Residence held by certain persons in Uganda and for other purposes connected therewith”. S. 1 of this Decree reads: “1. Notwithstanding any provision of the Immigration Act, 1969, to the contrary, but subject to the provisions of section 2 of this Decree, on or after the commencement of this Decree, every entry permit or certificate of residence issued or granted under the provisions of the Immigration Act, 1969, to any person who is of Asian origin, extraction or descent and who is a subject or citizen of any of the countries specified in the Schedule to this Decree shall cease to have any validity whatsoever.” The schedule named India, Bangladesh, Pakistan, U.K. and Northern Ireland. Decree 27 of 1972 was intituled “A Decree to make provision for the Declaration of Assets by Non-Citizen Asians leaving Uganda and for other purposes connected therewith”. S. 1 of this Decree reads: “1. No person leaving Uganda by virtue of the provisions of the Immigration (Cancellation of Entry Permits and Certificate of Residence) Decree 1972 (in this Decree referred to as the departing Asian) may ( *a*) t ransfer any immovable property. . .” In terms of the two Decrees a “departed non-citizen Asian” therefore is one who is a citizen of certain specified countries and who is of Asian origin, extraction or descent and whose permit or certificate of residence was annulled by Decree No. 17 of 1972 and who has left Uganda. Decree No. 30 of 1972 amended Decree No. 17 of 1972, and included persons of Indian, Pakistani or Bangladesh origin regardless of citizenship. Decree No. 5 of 1973, referred to by the Chief Justice was to make provision for the vesting of abandoned property belonging to departed Asians in the Government. S. 11 of this decree defined “departed Asian” as “Non-Citizen Asian and Uganda Citizen Asian whose property is abandoned”. Decree No. 5 of 1973 was repealed and replaced by Decree 27 of 1973 and s. 1 of Decree No. 27 of 1973 reads in part: “1.(1) No person who has to leave Uganda as a result of the Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree, in this Decree referred to as the ‘departing Asian’, may after the 6th day of October, 1972 ( *a*) . . . ( *b*) . . . ( *c*) w here such person owns a company (i) . . . ( ii) . . . (iii) a ppoint new directors . . .” As I have said earlier no evidence was adduced at all as to who were the “owners” or more accurately the shareholders of the second defendant, or whether some or all of them were “departed Asians”, or if the property in question was abandoned. It may well be that some shareholders were Africans, or Europeans or Asians who have not departed. I do not know if there is any definition of an “Asian owned” limited liability company; none was submitted by counsel either in the court below or before us. There seems to be some sort of definition of an “African owned” company in the Interpretation (Special Provisions) Act (Cap. 17). S. 2 reads: “2. In any Act of Parliament or Ordinance enacted before the 19th July, 1963, unless it is expressly provided otherwise or the context otherwise requires, references to a native or to an African shall be construed as references to a person who is a member of an indigenous African tribe or community or to a body corporate or unincorporated entirely composed of such persons, and references to a non-native or to a non-African shall be construed accordingly.” I do not understand the reference to “enacted before the 19th July, 1963”, but it seems that “African” can perhaps be applied to a corporate body if the members are “entirely” Africans. By parity of reasoning, perhaps, a body corporate may be termed “Asian” if the members are entirely composed of “Asians”, assuming that a notional legal entity like a limited liability company can be racially classified. As, however, no evidence was adduced, I think that the plaintiff’s bare allegation that the second defendant was “owned by departed non-citizen Asians” might well be unfounded and could not be acted upon. With respect I think that the Chief Justice erred in assuming, without any evidence before him, that the provisions of Decree No. 5 of 1973 applied to the second defendant. The onus was on the plaintiff to establish that the second defendant was owned by “departed Asians” within the meaning ascribed to this term in Decree No. 5 of 1973, but no attempt was made to discharge it. The refusal of the Chief Justice to set aside the temporary injunction was based on an unwarranted assumption unsupported by an iota of evidence, and on this ground alone I think we should allow the appeal and set aside the temporary injunction granted to the plaintiff. I do not propose to deal in any detail with the other grounds of appeal in the circumstances. I will however refer to a few matters argued in the appeal. Mr. Mulenga for the plaintiff has submitted that the second defendant was owned by “departed Asians” because of what the manager of the second defendant had stated in his affidavit, namely: “That the applicant/defendant company was on 22 February 1973 allocated as a going concern to the Muslim Supreme Council.” Mr. Mulenga submitted that the second defendant had admitted that it was owned by departed Asians, as it was allocated to the Supreme Muslim Council. I find no such admission. What the manager stated was the fact of the purported allocation, not that the allocation was rightly made in the context of the relevant Decrees. If Mr. Mulenga was to rely on the affidavit of the manager, then the plaintiff ought to have paid his rent to the second defendant, as the second defendant was acting as the agent of the Muslim Supreme Council. Mr. Mulenga has submitted that his client was not sure to whom to pay rent, the Supreme Muslim Council or the Government. I do not see how the plaintiff could have been in doubt. If the second defendant was owned by departed Asians and its assets allocated to the Supreme Muslim Council, then the plaintiff had to pay rent to the Supreme Muslim Council through the second defendant, as only the allocate has to pay rent to the Minister for allocated property, see s. 2 of Decree No. 5 of 1973. It is perhaps doubtful if the plaintiff withheld his rent because he was not sure who was entitled to receive it. On 10 April 1973 he had forwarded a cheque for the rent to the second defendant, post-dated to 17 April 1973. On 16 April, a day before the cheque was due to be paid, he stopped payment. In his affidavit he stated “it came to my notice that the second defendant was owned by departed non-citizen Asians . . .”. It is remarkable that he did not say when this came to his notice. The Muslim Supreme Council was alleged to have been allocated the second defendant as a going concern on 2 February 1973. It would be stretching credulity too far to suggest that the plaintiff came to know of this on 16 April, a day before his post-dated cheque for rent was due to be paid. As regards the conditions for the grant of an interlocutory injunction, I think they are now well settled in East Africa. I would refer to a decision of this Court, *Giella v. Cassman Brown*, [1973] E.A. 358, an appeal emanating from the Uganda High Court. Briefly two of the main ones are (1) the applicant must show that he has a probability of success and (2) that unless the injunction is granted the applicant would suffer irreparable damage which would not be adequately compensated for by an award of damages. As regards the first point, that of probability of success, the plaintiff had not, on the evidence adduced, shown how he could succeed, let alone probably succeed. As regards the second point it is difficult to imagine how a tailor like the plaintiff could have suffered irreparable loss by a delay in handing over clothes to his customers, which could not have been compensated adequately by an award of damages. No interim injunction should have been granted in this case as neither of these two conditions had been satisfied. The Chief Justice held that the provisions of O. 37, r. 1 (*a*) are to be interpreted and applied in complete isolation, without reference to other rules or laws. O. 37, r. 1 (*a*) reads: “1. Where in any suit it is proved by affidavit or otherwise– ( *a*) t hat any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying or preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders”. With great respect I think that the Chief Justice erred in so holding. The grant of a temporary injunction in terms of O. 37, r. 1, in so far as notice to the opposing party is concerned, is controlled by the provisions of r. 3, see *Noormohamed v. Kassamali Madhani* (*supra*), and is subject to certain conditions being fulfilled, see *Giella v. Cassman Brown* (*supra*) and *E.A. Industries v. Trufoods*, [1972] E.A. 420. I would allow the appeal and set aside the temporary injunction granted to the respondent, originally by Manyindo, J. and subsequently varied by Wambuzi, C.J. I would award the costs of the appeal to the appellants. I would set aside the orders for costs in the High Court and substitute there for an order for costs in favour of the appellants in the High Court.

**Spry, Ag P:** I have had the advantage of reading the judgment of Mustafa, J.A. I am in agreement with it, and there is only one comment I would add. Mr. Mpanga, for the appellants, argued strongly that a tenant is not entitled to challenge the title of his landlord. With respect, that is not the law. A tenant may not, during the continuance of the tenancy, deny that the landlord had title at the beginning of the tenancy. That is set out in s. 114 of the Evidence Act (Cap. 43), which was derived from s. 116 of the Indian Evidence Act 1872, which was itself a codification of the common law. There is, however, no estoppel precluding a tenant from showing that his landlord’s title has been determined, whether by act inter partes or by operation of law (per Cockburn, C.J., obiter, in *Delaney v. Fox* (1857), 140 E.R. 618). When the present suit comes to trial, it will be open to the respondent to adduce evidence to prove that the title of the second appellant has been determined by operation of law. I agree with Mustafa, J.A., that on the application for an injunction, the respondent adduced no evidence to show any probability of success on this issue. As Musoke, J.A., also agrees that the appeal should be allowed, there will be an order in the terms proposed by Mustafa, J.A.

**Musoke JA:** I have had the advantage of reading the judgment in draft of Mustafa, J.A. and I agree with

it.

*Appeal allowed*

For the appellants:

*AF Mpanga* (instructed by *Mpanga and Mugerwa*, Kampala)

For the respondent:

*JN Mulenga* (instructed by *Ibingira & Mulenga*, Kampala)