IN THE SUPREME COURT OF UGANDA

AT MENGO

CIVIL APPEAL NO.34 OF 1992

BETWEEN

SHIV CONSTRUCTION CO. LTD :: :: :: :: :: :: APPELLANT

AND

ENDESHA ENTERPRISES LTD : : : : : : : : : : : :RESPONDENT

(Appeal from the Ruling of the High Court of Uganda at Kampala

(Ag. Judge Mr. Justice L. Ongom dated 13/12/92)

IN

HIGH COURT CIVIL SS. CASE_NO.302/91

JUDGEMENT OF PLATT J.S.C.

This is an appeal against the order of a temporary injunction. Before I deal with the issues on appeal a preliminary point was taken that the appeal was incompetent because the notice of appeal had not been filed in the High Court as required by Rule 74 of the Supreme Court Rules. The notice of appeal was lodged in both courts, and while the notice was apparently first brought to the Supreme Court, it was later lodged in the High Court on the 1st July, 1992. As this court had allowed the appeal to be lodged in 7 days from the 25th June, 1992 it was lodged within time. There is no fault if the notice of appeal is filed in both Courts, the Supreme Court and the High Court, so long as the lodgment in the High Court is within time. Consequently the court dismissed the preliminary objection and these are the reasons for that order.

Endesha Enterprises Ltd., a newly formed Company brought an action against one of its promoters, namely Shiv Construction Ltd., seeking general damages. The agreement, which had been called the joint venture agreement, was entered into on 7th December, 1988. In it Shiv Construction Ltd, was to take 5% of the shares in Endesha Enterprises Ltd, and its part in the formation of the new venture was to provide land, labour, machinery and tools to erect a go-down for the new Company. Shiv Construction Ltd. was in fact the owner of the land described as Plot M 277 at Nakawa. The agreement states that the extent of the land is 0.43

hectares, which, according to documents from the City Council of Kampala should perhaps be only 0.389 hectares. Endesha Enterprises was to provide the building materials and other "accessories" required to erect a go-down on the land of Shiv Construction Ltd and to import the necessary machinery which would contribute to its 95% share holding. The land was to become part and parcel of the new company's assets. Unfortunately, the parties fell into a dispute of some sort. The Plaintiff, the Endesha Enterprises Ltd. , claimed that the Defendant Shiv Construction Ltd., failed to transfer the latter's land to the plaintiff, although the plaintiff had fulfilled its obligation under the agreement. The plaintiff had, for instance, provided the machinery required by the new company. But due to the defendant's refusal to give the plaintiff access to the new go down to install the machinery, the machinery had not been installed. The defendant's breach of contract had caused the plaintiff loss.

The defendant Shiv Construction Ltd. defended itself in the following way, according to the amended written statement of defence. Apart from a technical objection (which was not pursued in this court) the burden of the defence is that the defendant did not agree to transfer 0.389 hectares of land as the portion of land which was the subject matter of the agreement. The land was to be surveyed arid measured before clause 4 of the agreement had the blank spaces filled in. (That would refer to Plot M 477 measuring 0.43 hectares). It was a fraud to prematurely fill in the blank spaces. The defendant alleges that the agreement was ultra vires the convenants in the defendant's head lease. Alternatively, the defendant claimed that the defendant itself provided a considerable part of the prefabricated structures of the building materials, and challenged the Plaintiff's assertions that the machinery had been ordered. The defendant counterclaimed for general damages as mesne profits for sixteen months at the rate of U.S. $4000 per month.

The general issues from these pleadings is whether the joint venture agreement was broken by the defendant. The plaintiff's director Mr. D.P. Haria in his supporting affidavit made the points that the land n question formed the basis of the plaintiff's claim, so that any letting or disposal to a third party would prejudice the plaintiff's interests, and damage would be irreparable. The defendant was trying to let out or dispose of the land without the knowledge and express consent of the plaintiff.

Mr. Jadva Patel a director of the Defendant company expressed the view in his affidavit in reply, that the joint venture was only made in respect of that part of land on which the go-down was erected. The transfer of this land was subject to the importation of machinery from

Italy. This machinery was never imported and that was a fundamental breach on the Plaintiff's part, discharging the defendant's obligation to transfer the land. The joint venture agreement was also discharged because the area of land had been described as larger than it really is. There was fraud in filling up the spaces in the agreement. The agreement had irretrievably broken down and required "winding up." Then comes paragraph 9-

"9. That if an injunction is granted against the respondent for property owned by itself and which it can rent out it would cause injustice."

In paragraph 10 it is contended that no sale of the property is permitted by the City Council.

In a supplementary affidavit, Mr. Haria agreed that the acreage was 0.389 hectares. He contended that the City Council of Kampala, had in effect, acknowledged the situation on the land. There was no breach of importation, because the go-down had not been completed, so that the machinery could be erected. On the other hand the plaintiff had invested some shs. 200 million in the project, so that it would suffer seriously if no injunction were granted.

The learned Judge weighed up these disputes and the submissions of the Counsels, and came to conclusions which may be summarised as follows:

1. The learned Judge noted that the application had been (brought under Order XXXVII Rule 1 (a) of the Civil Procedure Rules. That provision permits an injunction where the suit premises may be in danger of being alienated.

2. The learned Judge correctly directed himself on the principles to be applied.

3. The learned Judge sought to hold the status quo until the disposal of the suit. There was no fraud or impedement to the suit.

4. On the balance of convenience, it was held that the plaintiff would suffer greater injury if the injunction was not granted, than the defendant might sustain if it was granted. The conclusion of the learned Judge was that the temporary injunction must be granted;-

"to restrain the defendant/respondent Company its officers, servants and agents from selling renting, sub-letting, transferring or in any way, parting with ownership and possession of Plot M 477 Nakawa Industrial Area, including its development until other orders of (the) Court. The defendant/respondent shall be at liberty to move the Court to dismiss the head suit if the

plaintiff does not take steps to fix it for hearing within 3o days. I order that costs of this pending application do abide the event of the final disposal of the pending suit."

The Defendant Shiv Construction Company did not take advantage of the unusual subsidiary order at the end of the granting of the temporary injunction. The learned Judge gave his decision on the 13th December, 1991. No further step has been successfully taken to set the suit down for hearing to determine the rights of the parties. Time was taken to bring this appeal, when the suit might very well have been disposed of and the temporary injunction thereby lifted.

However, the appeal was taken on four grounds. They are unfortunately not of great merit. Ground 1 concerns the granting of the injunction on mere suspicion that the property was likely to be disposed of by the appellant without real evidence to that effect. In ground 2 it is said that the learned Judge had failed to consider the inconvenience to the Appellant by being denied rent in respect of premises constructed before the joint venture agreement. Thirdly it was said that the joint venture was an illegal contract tainted with fraud. Finally it is said that the learned Judge did not properly address his mind to the principles guiding the granting of a temporary injunction. In general, the appellant really brought this appeal on the first ground and to some extent on the second.

On the first ground that there was mere suspicion that the property would be alienated, the learned Judge was surely right when he held that the Appellant/Defendant's attitude was that he should be able to sub-let.

Looking at the evidence afresh two aspects call for attention. One was that the Appellant/Defendant had built a workshop, office and flat before the joint venture. The area of land which these buildings occupied had not been intended for transfer. They were to he separate from the go down which was to be erected as part of the joint venture. The injunction should not cover the defendant/appe1ant's own buildings, and it should be able to sub-let them.

There is no evidence of any kind to support this contention. The joint venture agreement does not distinguish between the land to be transferred to the plaintiff/respondent and the land to be retained by the defendant. how the acreage came to be inserted in clause 4 of the agreement may be one question; how the division of the land was not part of the agreement is

much more important on this aspect of the case .Nor is it in evidence whether such a division would indeed be a practical proposition. There is no firm indication that a division of plot M 477 had been intended, which is after all only about an acre. But to make this claim certain indicates that the appellant wished to use the property independently.

Secondly, it became clear even in argument before this court that the appellant wished to sublet what it considers its own property in order to gain U.S. $4000 per month. That is the figure in the counterclaim. The appellant considers that the joint venture agreement is at an end. It considers that it is harsh to refuse it permission to allow it to sublet. There was every reason to believe that the appellant would alienate the property or part of it, if the injunction had not been imposed.

Now, there are cases where the courts have held that mere suspicion is not enough to support a temporary injunction. But it is clear that in this case, there was ample material before the learned Judge upon which he could reach the conclusion that he did.

The second ground of appeal has now been covered in general. But the balance of convenience was sought.

Choosing GIELILA v. CASMAN BROWN (1973) E.A 358 as the locus Classicus in Uganda and East Africa, the Court of Appeal for East Africa laid down the approach which would guide the courts in such a matter. The applicant must show a prima facie case with a probability of success. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which could not be compensated in damages. When the court is in doubt it will decide the application on the balance of convenience. It is also a matter of concern to the court whether a valid contract has been made.

There is nothing invalid in the joint venture agreement as such. According to the terms of the applicant's lease, it could not sublet without consent. There is nothing on the record to show that such consent was not or could not have been obtained. Indeed in clause 4, the appellant agreed to assist in the transfer of title into the new Company's name. Prima facie, that must have meant that the appellant saw no impediment to obtaining the consent necessary, which would not normally be withheld, then the agreement would come to an end. But there is no evidence that that was or would be the fate of this agreement.

Then it is said that the agreement was tainted with fraud. That is clearly a factual issue to be determined at the trial. It could go either way. Assuming that the learned Judge considered that the arguments were somewhat equally balanced, it is difficult to find any ground upon which this court could interfere with the Judge's conclusion.

The land was certainly the basis of the agreement as the go down was to be constructed upon it. Both sides may have invested in this concern; but if it is true that the respondent/plaintiff invested shs. 200 million and had a 95% stake in the enterprise to lose those assets would be an irreparable loss. In the case of disputes over land, damages are not usually sufficient as compensation. The appellant/defendant, on the other hand, would be able to use the workshop, office and flat as before. He was not prevented from carrying out his normal occupation of these premises. Whatever enterprise he was carrying on in these premises he could continue. All that the appellant could not do was alienate the land. It could not do so in any case without the consent of the City Council. While such consent could not be unreasonably withheld in normal circumstances, the appellant was asked to maintain the status quo pending the trial Court's determination of the disputes between the parties. The appellant has taken its time to have these issues resolved. When one balances the two sides of this dispute, it is clear that the respondent/plaintiff had more to lose than the appellant. Nothing was said as to the inability of either side to pay damages or compensation; so that nothing turns on that possible aspect of a case such as this.

Taken all round, even if one were to have in mind such a penetrating judgement as AMERICAN CYNAMID CO, v. ETHICON LTD (1975) 1 ALL E.R. Q4 it is plain that the learned Judge approached his task judicially, and weighed up the case for each side adequately. The only fault that I could find is that the subsidiary orders given were improper. It is not right to order that the present appellant may be at liberty to move the court to dismiss the head suit if the plaintiff does not take steps to fix it for hearing within 30 days. The proper order is that the temporary injunction will be lifted, if, by a certain time, the suit has not been set down for hearing. The second fault was that the Plaintiff/Respondent as applicant for the injunction should have been required to enter into an undertaking as to damages. Lastly the order for costs is correct. The costs should be in the cause as the applicant was successful on the summons. If the applicant had failed, the costs would have been ordered against it. This was considered in GIELLA vs. CASMAN BROWN above at p. 361.

Accordingly I would maintain the temporary injunction, and in principle dismiss the appeal. But I would vary the subsidiary orders as follows: —

(a) I would order that the temporary injunction be lifted if within 4 months, from today's date, the suit is not set down for hearing.

(b) the respondent/plaintiff, which applied for this injunction, must give an undertaking to pay the Appellant damages, to cover the loss which the appellant may have suffered due to the injunction, if the suit is dismissed.

(c) As the plaintiff/respondent successfully applied for the injunction, the costs of the application will be costs in the cause.

As far as this appeal is concerned the Respondent will have the costs of this appeal.

Delivered at Mengo this 6th day of August, 1993.

H.G. PLATT

JUSTICE OF THE SUPREME COURT

JUDGEMENT OF MANYINDO, D.C.J

I have had the benefit of reading in draft the judgement of Platt - JSC. I agree with it, and as Odoki JSC.I agree with it and as Odoki JSC, also agrees there will be an order in the terms proposed.

Dated at Mengo this 6th day of August, 1993.

S. T. MANY I NDO

DEPUTY CHIEF JUSTICE

JUDGEMENT OF ODOKI, J.S.C.

I have read in draft the judgement prepared by Platt J.S.C. with which I am in full agreement. I concur with the orders proposed by him.

Dated at Mengo this 6th day of August, 1993.

B.J. ODOKI

JUSTICE OF THE SUPREME COURT