

COURT OF APPEAL ENUGU DIVISION
MONDAY 17TH DAY OF APRIL, 1989. CA/E/34/88
CORAM: A. I. KATSINA-ALU, G. A. OGUNTADE,
S. O. UWAIFO, JJCA

AFRICAN INSURANCE CO. LTD APPELLANT
AND
I.P. EZELUE RESPONDENT

MASTER & SERVANT - Tenancy - Creation of - Where accommodation is provided for a servant to enhance his performance - No tenancy is intended (H1)

MASTER & SERVANT - Contract of service - Termination - Where no period of notice of termination is provided - Then reasonable notice is inferred - Subject to status of employment (H2)

CONTRACTS - Licence - Breach - Damages - Licensee cannot by injunction enforce right to occupation - But he may claim damages for breach of contract (H3)

CONTRACTS - Licence - Revocation - Licensee who remains on land after his licence expires or is revoked - Is a trespasser (H4)

LANDLORD & TENANT - Tenancy - Creation - Basis - Intention of parties decides whether tenancy has been created - Or the relationship is merely that of licensor and licensee (H5)

FACTS

Plaintiff/respondent was an employee of defendant/appellant. Sometime in the year 1985, appellant wrote a dismissal letter to respondent. However, respondent contended that he had resigned his appointment earlier before the letter of dismissal was written. In order to enforce a right, respondent instituted this action for wrongful dismissal at the High Court of Anambra State, Onitsha. He claimed for N15,000.00 as special and general damages. In the meantime, respondent filed an interlocutory application seeking for an injunction to restrain appellant from ejecting him from an accommodation given

to him (as part of the contract of service) by appellant at No. 46 New Market Road, Onitsha.

Appellant claimed in their counter-affidavit to the application that respondent was a rent-paying tenant. Appellant did not deny that respondent got the accommodation by virtue of his employment with appellant. The amount of rent and terms of the tenancy were not disclosed. After several considerations, the learned trial Judge decided to grant the interlocutory application of respondent. Aggrieved, appellant appealed to the Court of Appeal Enugu Division, contending that the application was wrongly granted.

ISSUES FOR DETERMINATION

“(a) Whether a plaintiff/respondent against whom ejection process for recovery of premises had been commenced in the Magistrate court by a defendant/appellant Landlord can apply to the High Court and obtain an order for interlocutory injunction against the said defendant/appellant thereby staying further proceedings for recovery of possession already initiate against him in the Magistrate court.

(b) Whether it is just and convenient to grant an interlocutory injunction against defendant/appellant company restraining her from ejecting the plaintiff/respondent (sic) alleged was give to him for more effective performance of his duty in the defendant / appellant company where the plaintiff/respondent has resigned his said employment with the defendant / appellant company.

(c) whether section 25(3) and order 21 Rule 1 would apply in the present case to warrant the order of interlocutory injunction made against the defendant / appellant in the case.

(d) whether an order for interlocutory injunction can be granted in a situation where it is impossible to maintain the status quo ante litem motam in view of the fact that the plaintiff/ respondent voluntarily resigned his appointment alleging that his life was in danger.

(e) whether an order for interlocutory injunction can be granted where the applicant can be recompensated (sic) in damage if he won his suit against the plaintiff/respondent for wrongful dismissal.”

HELD (Unanimously allowing the appeal per **UWAIFO**

JCA)

MASTER & SERVANT - Tenancy - Creation of

1. Where accommodation is provided for a servant to enhance the performance of his services and is for the overall interest of the master, no tenancy is intended and non created.

The plaintiff in this case says that the accommodation was made available for the more efficient performance of his job. He made no reference to any tenancy or rent. The defendant on the other hand say the plaintiff is a tenant on rent but the circumstances of the tenancy and the rent payable were not furnished. In my view it was a mere housing arrangement made by the defendant for performance of his work. No tenancy in its true sense was created. What really happened was a contractual licence. In either case, however, the defendant company are in the position of landlord. If the plaintiff resigned his appointment as he claims, he has no right to remain on the property from the very moment of resignation. The licence is consequently and automatically revoked. His right to remain in occupation is tied to the existence of the contract of employment. (p. 1092 E/H)

MASTER & SERVANT - Contract of service - Termination

2. On the other hand, if he was unlawfully dismissed, he is entitled to the normal notice for terminating the contract and to that extent to remain in occupation of the said property for that period. He cannot protect that contractual right by injunction beyond that period of notice. The parties are governed by the terms of the contract of service. If no period of notice of termination is provided in the contract of service, then reasonable notice will be inferred, the length of which would depend on the nature and status of the employment. What the law provides is that a licensee is entitled to be given reasonable notice or notice under the terms of the contract, if any, before his licence may be revoked. (p. 1093 D)

CONTRACTS - Licence - Breach

- 3. A licensee has never been known to be able to enforce a contractual right to occupation although he may claim damages for breach of that contract. That of course would be damages for any such breach of contract and there is no remedy by injunction. It is only where a licence is irrevocable that its breach may, where possible, be prevented by an injunction.** (p. 1094 C)

CONTRACTS - Licence - Revocation

- 4. A licensee who therefore remains on land after his revocable licence expires or is revoked whether or not in breach of the contract is a trespasser.** (p. 1094 F)

LANDLORD & TENANT - Tenancy - Creation - Basis

- 5. The intention and conduct of the parties must be the deciding factors whether a tenancy has been created or the relationship was merely that of a licensor and licensee even though there was exclusive possession by one of the parties and the acceptance of an amount of rent by the other party.**

In my view, it is untenable that the plaintiff respondent in this case acquired a right that could be protected by injunction merely because as a employee of the defendant/appellant he was provided accommodation for the efficient performance of his job when, as is common ground, he has ceased to perform that job, whether by resignation or by wrongful dismissal. The plaintiff was a mere contractual licensee and not a tenant with a separate interest in the property in question. Even if there had been a tenancy created, the defendant / appellant is entitled to bring it to an end provided it complies with the Recovery of premises Law (Cap. 113) Laws of Eastern Nigeria, 1963. (p. 1094 G)

CASES REFERRED TO

Torbett v. Faulkner (1952) 2 T.L.R. 659

Facchini v. Bryson (1952) 1 T.L.R. 1386.

The Queen v. Spurell 1 L.R. Q.B. 72

Diocesan Synod of Lagos v. Dedeké (1956) L.L.R. 30

College of Medicine of University of Lagos v. Adegbite (1973) 5 S.C. 149

Nigeria Produce Marketing Board v. Adewunmi (1972) 1 All NLR 433

Olaniyan v. University of Lagos (1985) 2 NWLR (pt. 9) 599 S.C.

Ogunsami v. C.F. Furniture (W.A) Co. Ltd. (1961) All NLR 862

Monk v. Redwing Aircraft Co. Ltd. (1942) 1 K.B. 182 C.A.

Minister of Health v. Bellatti (1944) 1 All 238

Thompson v. park (1944) K.B. 408 C.A.

Mobil oil (Nigeria) Ltd. v. Johnson (1961) 1 All NLR 93

STATUTES REFERRED TO

High Court Law Cap. 61 Laws of Eastern Nigeria 1963, s. 25(1)(3)

Recovery of Premises Law Cap. 113 Laws of Eastern Nigeria 1963

LEAD JUDGMENT BY UWAIFO JCA

This is an appeal from a decision of Aneke J. delivered on 16 December, 1986 at the Onitsha High Court. He granted an interlocutory injunction restraining the defendant/appellant from ejecting the plaintiff/respondent from the accommodation they gave him at No. 46 New Market Road, Onitsha as part of the contract of service which existed between them.

I shall endeavour to state the facts relevant for a decision in this appeal as briefly as possible. The plaintiff was employed by the defendant as an Inspector in November, 1978. as at 22 October, 1985 he had risen to the position of Branch Manager Grade III, Onitsha on a salary of N7,275.00 a year. It was on that day the defendant wrote a letter of dismissal to the plaintiff. The plaintiff contends that he had resigned his appointment on 11 October, 1985 before the letter of dismissal was written. In his action for wrongful dismissal, the plaintiff sued for N15,000.00 as special and general damages and also for an injunction to restrain the defendant from ejecting him from No. 46 New Market Road, Onitsha.

Pleadings have since been exchanged. The plaintiff in the meantime on 9 July, 1986 brought an application for an interlocutory injunction to restrain the defendant from ejecting him from the above-stated address occupied by him as dwelling accommodation pending the determination of the substantive suit. The circumstances in which

that accommodation was obtained are stated in paragraphs 11 and 12 of the affidavit in support of the application, namely: "11. That as a result of the satisfactory performance of my duty to the Company, the Defendant gave me an apartment of two-bed-room-flat to live for more effective performance of my job. 12. That I packed in with my family and have been residing thereat."

The defendant as landlord had on 14 May, 1986 given one month's notice to quit the premises to the plaintiff and followed this up by action for recovery of possession in the Magistrate's Court. The defendant claim in their counter-affidavit that the plaintiff was their rent-paying tenant although not denying that he got the accommodation by virtue of his employment with them which was to enhance the effective performance of his job. The amount of rent is nowhere disclosed, nor are the terms of the tenancy.

The interlocutory application was brought under section 25(1) of the High Court Law (Cap. 61) Laws of Eastern Nigeria, 1963 which provides: "*The court may grant an injunction or appoint a receiver by an interlocutory order. In all cases in which it appears to the court to be just or convenient so to do.*" Section 25(3) then provides *inter alia* that: "*if, whether before, or at, or after the hearing of any cause or matter, an application is made for an injunction to prevent any threatened or apprehended waste or trespass, the injunction may be granted, if the Court thinks fit...*"

The learned judge directed his attention to what a plaintiff has to prove in an application for interlocutory injunction. He referred to the letter of resignation and that of dismissal and said: "*There is to my mind a clear legal question as to whether the applicant resigned or was in fact dismissed. There is therefore a possibility that the applicant if it turned out that he was dismissed has all existing right of being heard before his dismissal. I also find a prima facie case that this right has been infringed. I think this is all that the applicant is required to establish so far.*"

Later in the ruling the learned judge in reference to section 25(3) of the High Court Law observed:

"it is my considered opinion that section 25(3) of the High Court Law would apply to prevent a party from alienating the subject matter of the suit, in this case a flat, by seeking to eject the applicant therefrom even by legal means. In the special facts of this case the

threatened waste or trespass consists of the act of taking out action for the recovery of the premises in which the applicant resides by virtue solely of his employment which he claims in this suit has been wrongfully terminated. The order sought if granted would restrain the Respondents from seeking to recover the possession of those premises in the Magistrate (sic) Court until the suit is disposed of.” B

He finally concluded it was just and convenient to grant the interlocutory injunction. The appellant’s company has complained against this decision on seven grounds of appeal all to the effect that the interlocutory injunction was wrongly granted. In pursuance of those grounds of appeal, they have raised the following issues for determination: C

“(a) Whether a plaintiff/respondent against whom ejection process for recovery of premises had been commenced in the Magistrate court by a defendant/appellant Landlord can apply to the High Court and obtain an order for interlocutory injunction against the said defendant/appellant thereby staying further proceedings for recovery of possession already initiate against him in the Magistrate court. D

(b) Whether it is just and convenient to grant an interlocutory injunction against defendant/appellant company restraining her from ejecting the plaintiff/respondent (sic) alleged was give to him for more effective performance of his duty in the defendant / appellant company where the plaintiff/respondent has resigned his said employment with the defendant / appellant company. E F

(c) whether section 25(3) and order 21 Rule 1 would apply in the present case to warrant the order of interlocutory injunction made against the defendant / appellant in the case.

(d) whether an order for interlocutory injunction can be granted in a situation where it is impossible to maintain the status quo ante litem motam in view of the fact that the plaintiff/ respondent voluntarily resigned his appointment alleging that his life was in danger. G

(e) whether an order for interlocutory injunction can be granted where the applicant can be recompensated (sic) in damage if he won his suit against the plaintiff/respondent for wrongful dismissal.” H

With due respect to the learned judge he completely misunderstood what matters were in issue in the interlocutory injunction

proceedings. The question is not whether the plaintiff has a legal issue as to whether he resigned or was dismissed upon which to found a prima facie case for the grant of the interlocutory injunction regarding the premises but whether he showed a prima facie case to remain in possession of the said premises be it that he resigned or was dismissed
B from his employment. Again, the question cannot be whether there was threatened (sic) waste or trespass in respect of accommodation, as that obviously does not arise, but whether the defendant/appellant has a right to lawfully terminate the possession in any event.

C There are two possible interpretations of the status of the possession held by the plaintiff/respondent in respect of the premises in question. It is either a tenancy or a licence. In *Torbett v Faulkner* (1952) 2 T.L.R. 659 at 660 Denning L.J. observed:

*"If a servant is given a house for the greater convenience of his
D work, and it is treated as part and parcel of his remuneration, then he is a licensee, even though the value of the house is quantified in money; but if he is given an interest in the land, separate and distinct from his contract of service, at a sum properly to be regarded as a rent, then he is a tenant."*

E The distinction depends on the true relationship of the plaintiff with the accommodation and not on the label which the parties choose to put upon it: see *Facchini v Bryson* (1952) 1 T.L.R. 1386.

***Where accommodation is provided for a servant to
F enhance the performance of his services and is for the overall interest of the master, no tenancy is intended and non created.***

It is such occupation by a servant Cockburn C.J. described as "subservient and necessary to the service which it was his duty to render to his master". See *The Queen v. Spurell* 1 L.R. Q.B. 72 at 76.
G The case of *Diocesan Synod of Lagos v Rev Dedeke* (1956) L.L.R. 30 was decided on the Recovery of Premises Ordinance similar to the Law applicable in Anambra State. Rev Dedeke occupied the vicarage of St. Jude in his position of Vicar of St. Jude. The Bishop of Lagos deprived him of all rights and privileges attached to that position and requested
H him to vacate the vicarage. He refused, contending that he was a tenant as defined in the ordinance. Hubbar J held that his occupation was purely that of a servant occupying for and on behalf of his employer and was not a tenant within the definition of the Ordinance.

The plaintiff in this case says that the accommodation

was made available for the more efficient performance of his job. He made no reference to any tenancy or rent. The defendant on the other hand say the plaintiff is a tenant on rent but the circumstances of the tenancy and the rent payable were not furnished. In my view it was a mere housing arrangement made by the defendant for performance of his work. No tenancy in its true sense was created. What really happened was a contractual licence. In either case, however, the defendant company are in the position of landlord. If the plaintiff resigned his appointment as he claims, he has no right to remain on the property from the very moment of resignation. The licence is consequently and automatically revoked. His right to remain in occupation is tied to the existence of the contract of employment.

On the other hand, if he was unlawfully dismissed, he is entitled to the normal notice for terminating the contract and to that extent to remain in occupation of the said property for that period. He cannot protect that contractual right by injunction beyond that period of notice. The parties are governed by the terms of the contract of service. See *College of Medicine of University of Lagos v Dr. S.A. Adegbite* (1973) 5 S.C. 149 at 162; *Nigeria Produce Marketing Board v. A.P. Adewunmi* (1972) 1 All NLR 433 at 437; *Olaniyan v University of Lagos* (1985) 2 NWLR (pt. 9) 599 S.C. **If no period of notice of termination is provided in the contract of service, then reasonable notice will be inferred, the length of which would depend on the nature and status of the employment.** See *Ogunsami v. C.F. Furniture (W.A) Co. Ltd.* (1961) All NLR 862; *Monk v Redwing Aircraft Co. Ltd.* (1942) 1 K.B. 182 C.A. **What the law provides is that a licensee is entitled to be given reasonable notice or notice under the terms of the contract, if any, before his licence may be revoked.** Lord Greene M.R. in *Minister of Health v. Bellatti* (1944) 1 All 238 at 242 said inter alia:

“...it appears to me that, where a licence is granted and a question arises as to the lawful method of terminating it, the circumstances in which the licence came to be granted are matters most relevant to consider particularly when one is face with the question: How, and in what circumstance and in what conditions can the licence

be terminated.

Where a licence is granted under a contract, it may very well be that the contract will make express provision for those matters. Where it does, those express provisions with regard to termination of the licence and so forth must be observed. But what is to happen in a case
 B *where the contract is silent on those matters? I cannot take the view that there is some cast-iron principle of law which lays down for every type of contract, whatever the circumstances and whatever the purposes for which is always to operate. In my opinion, the rule is that*
 C *the implications of the contract on those matters are to be determined in view of all the relevant circumstances of the case.”*

A licensee has never been known to be able to enforce a contractual right to occupation although he may claim damages for breach of that contract. In *Kerrison v Smith* (1897) 2 Q.B. 445 at 451 it was said to be the law that
 D

“... a licence, even though it may have been made by deed and for valuable consideration, is revocable at any time by the licensor; the licensee cannot after revocation justify entering upon the land for the purpose of using the privilege; his only remedy against the licensor,
 E *where the revocation is wrongful, is upon the contract.”*

That of course would be damages for any such breach of contract and there is no remedy by injunction. It is only where a licence is irrevocable that its breach may, where possible, be prevented by an injunction. See *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd.* (1948) A.C. 173. **A licensee who therefore remains on land after his revocable licence expires or is revoked whether or not in breach of the contract is a trespasser.** See *Thompson v Park* (1944) K.B. 408 C.A.
 F

The Federal Supreme Court in *Mobil Oil (Nigeria) Ltd. v Johnson* (1961) 1 All NLR 93, approved *Minister of Health v Bellotti* (supra). It also approved *Isaac v Hotel de Paris Ltd.* (1960) 1 All E.R. 348 P.C. that **the intention and conduct of the parties must be the deciding factors whether a tenancy has been created or the**
 G **relationship was merely that of a licensor and licensee even though there was exclusive possession by one of the parties and the acceptance of an amount of rent by the other party.**
 H

In my view, it is untenable that the plaintiff respondent in this case acquired a right that could be protected by injunction

merely because as a employee of the defendant/appellant he was provided accommodation for the efficient performance of his job when, as is common ground, he has ceased to perform that job, whether by resignation or by wrongful dismissal. The plaintiff was a mere contractual licensee and not a tenant with a separate interest in the property in question. Even if there had been a tenancy created, the defendant / appellant is entitled to bring it to an end provided it complies with the Recovery of premises Law (Cap. 113) Laws of Eastern Nigeria, 1963.

It is inconceivable and indefensible that such a right in the defendant company to terminate possession by lawful means in the Magistrate's Court could be directly or indirectly impeded by an action for unlawful dismissal brought by the plaintiff in the High Court when such action in the High Court cannot be and is not intended to restore the plaintiff to his employment with the defendant. That in my opinion would amount to abuse of judicial process which would enable the plaintiff in the meantime to enjoy free and protected accommodation. Even in the unlikely event that such employment were to be restored, if the claim had been endorsed for that relief, the defendant company would have had no obligation to retain the plaintiff in that same accommodation. The privilege could be given in respect of another abode.

There can be no justification therefore to stop the appellant company by injunction from ejecting respondent from occupation. In fact they have done proper thing by not taking extra-judicial means to evict the respondent who remains in accommodation as a trespasser. In *Minister of Health v Belotti* (supra), Lord Greene M.R. said at 245: *"The courts of this country are open, and where persons are to be ejected from premises which they have lawfully occupied, the general expectation and hope would be that recourse would be had to the courts rather than to the high-handed method of ejectment."*

In my opinion, the facts of the present case are such that nothing should stand in the way of the appellant company from legitimately pursuing their right to eject the respondent.

This appeal accordingly succeeds. The decision of the lower court restraining the defendant from ejecting the plaintiff from No. 46 New Market Road, Onitsha until the determination of suit No. 0/203/86 is hereby set aside and the application is accordingly dismissed. I

assess costs in the court below at N150.00 and in this Court at N250.00 in favour of the defendant/ appellant.

KATSINA-ALU JCA

B I entirely agree. I have nothing to add.

OGUNTADE JCA

C I have read in advance a copy of the lead judgment just ready by my learned brother Uwaifo J.C.A. I agree that this appeal be allowed.

There was no basis for the lower Court to have clamped an interlocutory injunction upon the defendant/ appellant in the circumstances of this case. This was an ordinary master and servant relationship. It is not a case in which the employment of respondent was specially protected by statute. See *Vine v. National Dock Labour Board* (1957) AC. 500; *Shitta-Bey v. Public Service Commission* (1981) 1 S.C. 40 at 56 and *Olaniyan & 2 ors v. University of Lagos & Anor* (1985) 2 N.W.L.R (Part 9) 599.

That being the position, the general principle of law that the Court will not specifically enforce a contract of personal service unless there are special circumstances must prevail. See *McCelland v. N. Ireland Health Board* (1957) 2 All ER 129; *Francis v. Municipal Council of Kuala Lumpur* (1963) 3 All ER 633 P.C.; *Chief Okenla v J.M. Beckley & Ors* (1971) 2 All N.L.R. 174.

So that if at the end of the day, the lower Court was able to find that the employment of the respondent was wrongfully determined, all it could do was to award damages. The measure of such damages is represented by the salary or earnings the respondent could have received had the employment been determined by notice in accordance with the contract or the period of a reasonable notice the court may determine: see *P.Z and Co. Ltd. v. Ogedengbe* (1972) 1 All N.L.R. Part 1) 202; *Nigeria Produce Marketing Board v. A.O. Adewumi* (1972) 1 All N.L.R. (Part 2) 433. such damages, may if proved at the trial also include the loss on housing benefits which plaintiff has suffered as a result of his employment being wrongfully determine.

In this case there was a dispute about whether respondent

resigned his appointment or was wrongfully dismissed by the appellant. Whichever view the Court takes of that dispute at the day, it is clear that what the respondent would be entitled to are damages. The respondent was an employee to the appellant and once that relationship arising from contract has been brought to an end rightly or wrongly, the respondent ceased to be entitled to live in an accommodation which was given to him in consideration of his employment. He will of course have a right to damages for the loss of the use of the accommodation if he can show that he was improperly dismissed. B

The sole remedy of the respondent being in damages, the lower Court was patently wrong to make an order of injunction against the appellant under which the appellant could not evict the respondent from the accommodation given him. The approach of the lower Court overlooks the fact that the right of the plaintiff/respondent to live in the house given him by the appellant was tied inextricably to respondent's continued service under the appellant. Once he ceases to be a servant of the appellant, the plaintiff/respondent loses the right to remain in the accommodation provided by the appellant. C D

I would also allow this appeal with costs as ordered in the lead judgment. E

F

G

H