REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 222 OF 2011

HARBOUR HOUSE LIMITED ……..…… APPELLANT

V E R S U S

MAERSK KENYA LTD ……RESPONDENT

(Being an appeal from the Ruling and Decree of the Chief Magistrate the Hon. Rosemelle Mutoka (CM) delivered on 3rd December 2010 in Mombasa RMCC No. 2946 of 2004)

JUDGMENT

1. The Respondent, **MAERSK KENYA LIMITED**, were tenants on the premises on Plot 23 Section XXI Moi Avenue Mombasa, which property is registered in the Appellant's **HARBOUR HOUSE LTD**, name. Respondents had rented various suites on that property. Before their term of lease period determined Respondents wrote to Appellants by their letter dated 21st May 2003 giving Notice to terminate the leases in respect of the four suites they occupied.

2. Although in the letter of offer of suite No. 3 on second floor provided the Notice period of termination by the lessee to be three months the earlier letter offer of suit No. 1 & 2 of 3rd floor provided a Notice period of termination of six months. I will not dwell much on that divergent notice period because parties are in agreement that Respondents notice of termination of lease was to take effect on 30th November 2003, six months later.

3. Respondent did not surrender the suites by 30th November 2003. The suites were surrendered on 2nd April 2004. According to the Appellant Respondents were liable to pay double rent of Kshs. 1,143,255 for the period from 30th November 2003 upto 2nd April 2004 as provided under Section 14 of the Distress For Rent Act Cap 293. The Respondent's case was that there was an agreement that Respondent would retain possession of the suites after the lease determined for purpose of Respondent carrying out painting and repairs. Respondent therefore pleaded acquiescence of Appellant. Further in view of that alleged acquiescence Respondent's case is that a new term of tenancy was created, after the formal lease determined on 30th November, 2003 as provided under Section 116 of the Transfer of Property Act, (T.P.A) (now repealed).

4. Respondent had counter-claimed for the deposit of Kshs. 319,767.30, paid to Appellant at the start of the lease period.

5. The trial Court after receiving parties' evidence dismissed Appellant's case but entered judgment

for Respondent for Kshs. 319,767.30 plus costs. Appellant was aggrieved by that judgment and has preffered this appeal.

6. Before identifying the issues for determination I wish to deal with an issue raised in the ground of the appeal, to the effect that the trial Court's judgment contravened Order 21 Rule 1 and 3 of the Civil Procedure Rules. Learned Counsel for Appellant, Mrs. Nyange, submitted in support of that ground and stated that the judgment of the trial Court was not pronounced and dated in open Court. That submission however is not supported by the record of the lower Court. Rather the trial Court's judgment was dated 3rd December 2010 and it shows it was read before Miss Lutta for the Plaintiff, now the Appellant in this appeal. That is all I wish to state on that ground of appeal. There was no contravention of Order 21 Rule 1 and 3 of The Civil Procedure Rules.

7. Appellant has presented too many and very long grounds of appeal which in my view will be addressed by 3 broad issues; that is-

i. **Was there a creation of a new contractual relation between the parties after 30th November 2003;**

ii. **Was the Appellant entitled to claim double rent for the period between 30th November 2003 and 2nd April 2004 from the Respondent or was Appellant stopped from so claiming by the doctrine of estoppels; and**

iii. **Did the trial Court err in entering judgment in favour of the Respondent for the deposit.**

8. As I begin to consider the above issues I do so consciously that I have a defined role as the first Appellate Court. I am required to reconsider the evidence tendered at the trial, evaluate it and draw my own conclusion, bearing in mind that I have neither seen nor heard the witnesses and I should make due allowance in that regard: See **KENYA PORT AUTHORITY –Vs- KUSTON (KENYA) LIMITED [2009]2EA 212**.

ISSUE (i)

9. Respondent through its Learned Counsel Mr. Sitonik, submitted that Appellant was in contact with Respondent throughout the period from 30th November 2003 up to surrender of keys on 2nd April 2004 (which for convenience I shall refer to as extra months) relating to the painting and renovations that were being undertaken by Respondent. Learned Counsel also referred to invoices sent by Appellant to Respondent for payment of the normal rent for the extra months arguing that these evidenced that there was intention to create a new contractual relationship for the extra months.

10. Having laid that basis of argument learned Counsel submitted that the extra months were chargeable as provided in Section 116 of TPA. That Section provides-

"116. If a lessee or underlessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106. Illustrations

a. **A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.**

b. **A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent.**

B's lease is renewed from year to year."

11. Appellant in opposition to those submissions by Respondent submitted that the invoices raised by it were for the rent provided in the previous leases.

12. On the argument that a new term was created as per Section 116 of TPA Appellant submitted that to the contrary the Section would create a new term of tenancy only after the lease was determined.

13. Appellant in opposition to those submissions by Respondent submitted that the invoices raised by it were for the rent provided in the previous leases.

14. On the alleged agreement by Appellant for Respondent to retain the premises for purposes of painting and renovating Appellant responded by stating that Respondent had a legal and contractual obligation to carry out repairs and paint with a view to surrendering the premises in the state they were at the time of taking possession.

ANALYSIS

15. PW1 was Appellant's caretaker of the building. On being cross examined by Respondent's Counsel he stated-

> **"They [Respondents] never said what they were doing in the building after the expiry of the lease."**

The tenor of the evidence and that of PW2, the Director of Appellant is to the effect that on receiving Respondent's Notice to terminate lease, before the five (5) years lease period expired, she discussed with different representatives of the Respondent requesting them to renovate the premises they had occupied. PW2's evidence is supported by the Appellant's letter dated 29th October 2003 to the following effect-

> **"29th October 2003**
>
> **Mr. Lars Jensen**
>
> **Maersk Kenya Ltd**
>
> **P.O. Box 89911**
>
> **MOMBASA**
>
> **Dear Sir,**
>
> **RE: RETURN OF OFFICE SUITES AT HARBOUR HOUSE**

1. **Suite No. 1 & 2 on level 3**
2. **Suite No. 4 on level 2**
3. **Suite No. 3 on level 2**

> **With reference to the above kindly note that your deposit with us at the moment is Kshs. 319,767.30. We will return this to you after the power bills have been paid and the office suites renovated to the original design as you took it.**
>
> **The power meters should be one for each office suite and the paint scheme is white for the offices.**

Kindly note that this should be done by the 30th November 2003 when your lease terminates.

Thank you for being our tenants and we wish you all the best in the future.

Yours faithfully,

MRS. S. JIWAN."

That letter was responded to by the Respondent by their letter of 26th November 2003 which is as follows-

"26th November 2003

Mrs. S. Jiwan

Habour House Management

MOMBASA

Dear Madam,

RE: REDECORATION OF OFFICE

Maersk Kenya Ltd hereby confirms that we, in accordance with our mutually agreed contract, will redecorate and leave the lease in good and tenable condition and repair.

The refurbishment will be for Maersk Kenya Ltd's account.

Yours faithfully,

For: Maersk Kenya Ltd

LARS JENSEN

MANAGING DIRECTOR."

16. Respondent's evidence was tendered by their manager, who confirmed that she joined Respondent's Company in the year 2006, after the period with which this case is concerned. It follows therefore the evidence that Manager tendered, that there was a conversation between parties, whereby it was agreed Respondent would retain the premises for purpose of painting, is hearsay evidence and is rejected. What I see from Defence Exhibit No. 3 is the Respondent reiterating their commitment to live-up to their obligation to paint and renovate the premises. It seems that the renovations were necessary because Respondent witness stated in evidence in chief that-

"The Defendant (Respondent) had modified the offices to suit its need and we were to renovate the premises to what (sic) we found it."

This witness did also say that the Respondent had moved to TSS Towers, during the period of the extra months.

17. It therefore follows from the above analysis of evidence tendered that that evidence does not support the contention of the Respondent that a new contract was formed by implication or through conversation.

18. On the submissions made in respect of Section 116 TPA, I do reject the same. The reading of Section 116; it will be noted I reproduced its two illustrations above; in my view makes it clear that a new term of tenancy is created when firstly the lease term has determined, and secondly the landlord continues to receive rent. My understanding is that such a new term of tenancy "kicks in" when the contractual period of the original lease determines. In this case the lease term had not determined by expiry of the lease term. The illustrations of that Section make that position clear. Further margin notes of that Section are "***Effect of holding over***." The Black's Law Dictionary 8th edition defines holding over as-

> **"A tenant's action in continuing to occupy the leased premises <u>after the lease term has expired</u>."** (emphasis added)

That definition re-emphasises my finding above.

19. I therefore find the first issue in favour of the Appellant.

<u>ISSUE NO. (ii)</u>

20. The claim of the Respondent that Appellant was stopped from claiming double rent under the doctrine of estoppels is partly dealt with in the first issue. There was no conduct or action by Appellant which could constitute estoppels. The fact Appellant issued invoices for the normal rent does not estopp its claim for double rent. The claim for double rent is based on the provisions of Section 14 of the Distress of Rent Act Cap 293 which is as follows-

> **"Tenant holding premises after time notified to pay double rent**
>
> **If a <u>tenant gives notice to his landlord of his intention to quit</u> the premises held by him, at a time mentioned in the notice, <u>and does not accordingly deliver up the possession thereof</u> at the time specified in the notice, then the tenant or his executors or administrators shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for and recovered at the same times, and in the same manner, as the single rent or sum could be levied, sued for or recovered before the giving of the notice; and the double rent or sum shall continue to be paid while the tenant continues in possession, and the double rent may be distrained for in the same manner as is provided in this Act for distraint for rent."** (emphasis mine)

This Section in my view, unlike Section 116 TPA, covers situation where the determination of the lease occurs before the end of the term of the lease. The Section refers to a scenario where the tenant, as in this case, gives notice to quit the premises before the end of the term of lease but then fails to deliver possession.

21. Appellant through its Counsel demanded double rent as far back as 16th January 2004 through a letter. PW2 alluded to that in examination in chief and when she was cross examined by the Respondent's Counsel she was not questioned about that letter and accordingly it can be presumed that the Respondent did not deny that letter. That letter was not even the subject of examination in chief of Respondent's witness.

22. It follows that Appellant was entitled to claim double rent for the extra months as provided under Section 14 of Cap 293. The Respondent, relied on the case **<u>KIBIRO & ANOTHER –Vs- KENYA BROADCASTING CORPORATION [2004]eKLR</u>** where the facts do not match the facts in this case. In that case the Judge made the following finding-

> **"With respect, I don't think that the matter at hand is governed by the Distress for Rent Act. Instead, the circumstances of this case tend to indicate that after the expiry of the lease, the landlady did not take any steps to recover the premises. By the necessary implication, she acquiesced in their continuing in possession, and that would imply**

consent for them to do so under S. 116 of the Transfer of Property Act. If this is correct, then the tenancy became one from month to month under S. 106 of the same Act. For this reason, the Plaintiff will be entitled to monthly rent for 8 months."

I am not sure the step of recovering of possession as was referred to by the Judge in the case of **KIBIRO & ANOTHER** (supra) but if in any case it was forcible recovery of any form it would have been a Criminal offence as provided under Section 90 of the Penal Code as follows-

"Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or in threats or in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter on the land or not, is guilty of the misdemeanor termed forcible entry."

I find no acquiescence on the part of the Appellant. The second issue also is

found in favour of the Appellant.

ISSUE NO. (iii)

23. Having found that Appellant was entitled to claim from the Respondent double rent Respondent was not entitled to judgment in its favour for the deposit claimed in the Counter claim. Accordingly the learned trial Magistrate erred to have entered judgment for the Respondent.

24. The third issue, therefore, is also in favour of the Appellant.

CONCLUSION

25. The consequential orders of this judgment are as follows:-

a. **The judgment of the lower Court is hereby set aside and is substituted with the following orders-**

   i. **Judgment is hereby entered for the Appellant for Kshs. 1,142,255.00 less Kshs. 319,767.30 plus interest on that amount from the date the lower Court case was filed until payment in full.**

   ii. **Appellant is awarded costs of both the lower Court and costs of this appeal.**

DATED and DELIVERED at MOMBASA this 26TH day of FEBRUARY, 2015.

MARY KASANGO

JUDGE