**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCA CASE NO. 29 OF 2019**

**KALYAN KARSAN PATEL.....APPELLANT**

**VERSUS**

**MOHAMED HASHIM AMHED**

**MANSOOR AHMED ABDULKAR1M**

(*Suing as the personal Representatives of the Estate of MOHAMED HAJI ABDULKARIM*)**....RESPONDENTS**

**JUDGEMENT**

The Appellant being dissatisfied and aggrieved with the judgement and decree of the Honourable Chief Magistrate E.K. Makori delivered on the 30th October 2018 appeals to this court on the grounds that;

1. That the Learned Magistrate erred in fact and in law in failing to appreciate and consider both the contents and legal purport of the Written Submissions filed by the Defendant therein or at all in arriving at such a decision.

2. That the Learned Magistrate misdirected himself on the law in declaring the tenancy as having been determined by operations of law when he had rightful found as a fact that the Plaintiffs' continued receipt of rent meant that the Plaintiffs had acquiesced and condoned the stay of the Defendant on the suit property.

3. That the Learned Magistrate misdirected himself on the law in respect of the tenancy relationship subsequently created and subsisting between the Parties when he failed to appreciate that the notice of termination of tenancy served upon the Defendant was conditional upon the Defendant paying the enhanced monthly rental sum of Kshs. 2,000/= and to which the Defendant acceded to and has continued to remit to the Plaintiff without default thereby rendering the notice of termination of tenancy in effective and superfluous.

4. That the Learned Magistrate failed to appreciate that after determination of the initial Lease the Defendant continued to remain in occupation of the suit Property and remitting the new monthly rent sum of Kshs 2,000/= which reviewed rental sum the Plaintiff had continually accepted and the Defendant was to that extent deemed to be a tenant holding over the suit property on a periodic tenancy and on the same conditions as those of the previous Lease and that no subsequent notice of termination of the periodic tenancy has been issued to the Defendant subsequent to payment and receipt of the enhanced monthly rental sum.

5. That the Learned Magistrate erred in fact and in law in ordering the Defendant to give vacant possession to the Plaintiff of all that Land known as Parcel No. 20/Section I/M.S Likoni when in fact there was no notice of termination of the Defendant's resultant periodic tenancy.

The Appellant prays that;

a. The Judgment and Decree of the Honourable E.K. Makori, CM entered on the 30th of October, 2018 be set aside;

b. The Costs of this Appeal be awarded to the Appellant; and

c. Any other or further relief that this Honourable Court may deem, fit and just to grant.

The Appellant submitted that the Respondents did permit and consent to the Appellant being in exclusive possession of the suit property and the Appellant on the other hand had been diligently paying the enhanced rent throughout his occupation of the suit property. That the tenancy

relationship was a periodic lease. That the notice issued on 18th March 1993 was invalid and had no effect as there still existed a tenancy relationship between the Appellant and the Respondents which superseded the notice. That payment by the Appellant to the Respondent cannot be equated to mesne profit as the Appellant was never a trespasser.

This court has considered the appeal and the submissions therein. The Trial Court declared that the tenancy between the Appellants and the Respondents had been terminated by operation of the law on the 30th April 1993 and as a result the Appellant ought to clear all the rental arrears of Kshs. 2000/= within one month as envisaged in the lease. The Appellant was also required to give vacant possession to the Respondent of the suit land within one month from the date of the judgement. PW1 testified before the trial court that his deceased father entered into a tenancy agreement with the Appellant for 10 years commencing 1st July 1978 and terminating on 30th June 1988 in respect of the suit property at a rent of Kshs. 400 per month. At the expiry of the lease it was reviewed to Kshs. 1000/= per month. On 24th June 1992 the landlord revised the rent to 2000/= per month. On 18th March 1993 the landlord forwarded a lease to that effect for execution with a notice to terminate indefault. The Appellant who was the defendant in the trial court never adduced any evidence in this matter.

The Respondents submitted that in the instant appeal, the Appellant concedes that he entered the suit property and owns the house without land through consent and permission given by the registered proprietor of Plot 3891 and his successors in title thereto. Having conceded that the house without land was erected with permission, it follows that if such permission is withdrawn or cancelled then the house must be removed. That the lack of a termination notice or impropriety of a notice cannot defeat a suit for vacant possession where a tenancy has been terminated. The notice may be issued by the Court in order to give the Tenant sufficient period within which to vacate from the property. The Trial Court in this instant case did so. Given that the Appellant has since the year 1993 when the Deceased Plaintiff issued the termination notice, the Appellant has a whopping 25 (Twenty Five) years to vacate from the said subject property. The said one-month notice, considering that the tenancy was a monthly tenancy was sufficient and legally sound in the circumstances. That upon issuance of the termination notice and then filing of the suit before the Trial Court and pursuing the suit, showed that the Respondent had withdrawn consent for the Appellant to continue being on the subject property. This sufficiently implies the termination and further manifestation that the Respondent wanted to have vacant possession of the land. That thereafter, all payments were received on a without prejudice basis and on account of mesne profit. This means that despite continuous payments by the Appellant, the payments were received without prejudice to the suit which was before Court for vacant possession. This meant that the Respondent had not recanted the termination of the tenancy. Further, by the same being received "on account" of mesne profits, it means that should mesne profits have been granted by the Court which is, of course, payable due to the continuous stay by the Appellant despite termination, then the payments received would be calculated against any mesne profits that would be granted. That post-issuance of the notice, there has never been any action by the Respondent which are contrary to the demand for vacant possession. The suit being in Court itself and not having been withdrawn sufficiently proves this position and clearly implies no permission or consent. A clear lack of a consensus ad idem cannot connote consent.

They submit that the Honourable magistrate's judgment was sound and in those circumstances, they pray that this appeal be dismissed with costs, especially due to the fact that the substratum of this appeal does not exist anymore and the fact that the appellant herein failed to produce any witnesses and to adduce any evidence.

This court has considered the appeal and the submissions therein. It is apparent from the pleading and documents by both the Plaintiffs and the Defendants that there was no written lease agreement over the Suit Property. I believe section 52 of the Registered Lands Act provides the answer. It states as follows:

> "52(1*) where a person, having lawfully entered into occupation of any land as lessee, continues to occupy that land with the consent of the lessor after the determination of the lease, he shall, subject to any written law governing agricultural tenancies and in the absence of any evidence to the contrary, be deemed to be a tenant holding the land on a periodic tenancy on the same conditions as those of the lease, so far as those conditions are appropriate to a periodic tenancy.*
>
> *(2) for the purposes of this section, the acceptance of rent in respect of any period after the determination of the lease shall, if the former tenant is still in occupation and subject to any agreement to the contrary, be taken as evidence of consent to the continued occupation of the land."*

The defendants were therefore in periodic tenancy of the suit premises. In W.J BLAKEMAN LTD VS ASSOCIATED HOTEL MANAGEMENT SERVICES LTD [1986] KLR 156 the Court of Appeal held that the outstanding features of a monthly tenancy are possession and payment of rent. Section 57 (2) of the Land Act provided that:

> "*If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.*"

Section 57(4) of the Land Act provides how a periodic tenancy may be terminated. The one month notice allegedly issued by the Plaintiff's to the Defendant has been contested. Be that as it may, on 18th March 1993 the landlord forwarded a lease to that effect for execution with a notice to terminate indefault. The Appellant failed to execute the revised lease. From the correspondence on record it is clear that subsequent rent payments were received by the Respondents without prejudice to the termination notice. I find the same was sufficient and lawful in the circumstances. I find that the trial magistrate did not err in fact and in law when reaching his decision. In Mwanasokoni vs. Kenya Bus Service (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the judgment as it was based on cogent evidence. This appeal is dismissed for lack of merit with costs to the Respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2022.**

**N.A. MATHEKA**

**JUDGE**