REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 55 OF 2004

DUBAI BANK KENYA LTD. ……..……. PLAINTIFF

VERSUS

INSURANCE COMPANY OF EAST AFRICA LTD. ……..….. DEFENDANT

J U D G E M E N T

1. This suit was instituted by the Plaintiff vide its Plaint dated 29th January, 2004. The Plaintiff is a limited liability company duly incorporated under the provisions of the *Companies Act, Cap 486 of the Laws of Kenya*, and is licensed to carry on banking business under the *Banking Act, Cap 488 of the Laws of Kenya*. The Plaintiff has been carrying on its banking business at the I.C.E.A Building situated along Kenyatta Avenue, Nairobi as the tenant of the Defendant, the Insurance Company of East Africa. The Defendant is also a limited liability company registered pursuant to the provisions of the Companies Act, Cap 486 of the Laws of Kenya. The Plaintiff, in the instant suit, contends that the tenancy agreement has not been reduced into writing and it is therefore a controlled tenancy within the meaning of **Section 2** of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 of the Laws of Kenya* (hereinafter "the Act"). It is also the Plaintiff's contention that the purported letter of termination dated 13th January, 2003 by Knight Frank Kenya Ltd, the duly appointed agents acting on instructions from the Defendant, was null and void and in breach of **Section 4 (2)** of the Act in that no notice and/or valid notice was issued in accordance with the statutory provisions of the Act. The Plaintiff contends that it is a different entity from Mashreq Bank PSC, with whom the Defendant had entered into a Lease agreement and that, in any event, no Assignment of Lease had been executed between itself and the Defendant and therefore, as such, the existing tenancy was a controlled one. It is therefore the Plaintiff's prayer that the notice dated 13th January, 2003 by the Defendant be declared null and void; that the tenancy be declared a controlled tenancy and that there be a permanent injunction restraining the Defendant by itself, servants and/or agents from terminating or purporting to terminate the Plaintiff's tenancy otherwise than in accordance with the provisions of **Section 4 (2)** of the Act.
2. The genesis of the suit goes back to sometime in April, 2000 when the Plaintiff took over the management and operations of what was then known as Mashreq Bank PSC. By a Lease agreement dated 1st February, 1982 the Bank of Oman (which was later renamed Mashreq Bank PSC through a Resolution by the Chairman and Directors dated 6th January, 1993) leased the suit

premises from the defendant. The lease term was twenty-two (22) years commencing on the aforementioned date. Mashreq Bank PSC had taken over the lease of the premises at a rent agreed upon between themselves and the Defendant in a Lease Agreement dated 2nd July, 1985 and a further Variation of Lease executed on 28th August, 1998. The contention, by the Plaintiff, is that vide a letter dated 13th January, 2004, the Defendant, through its agents, purported to issue a termination letter, which according to it, was not in accordance with the Section 4 (2) of the Act. The Plaintiff also alleges that it is a distinct, separate and independent entity from Mashreq Bank PSC, the lessee and former tenant of the Defendant, with whom the said Lease agreement was entered into. It was neither an assignee under the agreement, nor had it executed the same or had any new Agreement been reduced into writing. It is therefore, the Plaintiff's contention that it is a controlled tenancy, as per the agreement with the Defendant, and as such, the provisions of the Act apply in this instant.

3. The Defendant refutes the allegations as set out by the Plaintiff. It is contended that when the Plaintiff took over from Mashreq Bank PSC, it had all the rights, liabilities and duties vested in the latter transferred to it. This, it is alleged, included the Lease and the terms thereof, to which the Plaintiff was now subject to. In the testimony of **Maina Mwangi**, DW1 the Head of Property Management at Knight Frank Kenya Ltd (the Defendant's duly appointed agents) testified that by a letter dated 20th April, 2000, Mashreq Bank PSC with the approval of the Central Bank of Kenya, had transferred its business to the Plaintiff, and that all the Leases existing would be assigned to the Plaintiff. It is the Defendant's contention that the tenancy is not a controlled tenancy and, as such, was terminable, and was indeed terminated by the issuance of the notice of termination dated 13th January, 2012. These allegations were set out in the submissions of the Defendant dated 15th November 2011.
4. From the documents tendered as evidence before the Court, the Plaintiff, in a letter dated 31st May, 2000, sought to have a re-negotiation of the lease terms in the Lease agreement pertaining to the rent, asserting that the same was a bit on the high side. Further, in a letter dated 14th July, 2000, the Plaintiff reiterated its position on the issue of rent as per the Lease, postulating that the same was exorbitant and went as far as threatening to vacate the premises. It is apparent that the agreement was entered into between the parties on the supposed representation and conduct of the Plaintiff, who the Defendant claimed, entered into a pre-existing Lease agreement on the terms set out therein. Essentially, as portended by the Defendant in its submissions, the Plaintiff is now estopped from denying the facts as they are, i.e. that the lease was assigned to it, following its conduct and representation, and in following the decisions as postulated in **Rodenhurst Estates Ltd v W.H Barnes Ltd (1936) 2 All ER 3**.
5. It appears that the issues that the Court will have to determine are whether:-

a. The Plaintiff's tenancy is governed by the terms and conditions as set out in the Lease agreement dated 1st February, 1983 and by the further Variation of Lease dated 28th August, 1998;
b. Whether the Plaintiff is bound by the provisions of the said Lease agreement and the Variation of Lease as above or whether the Plaintiff enjoys a controlled tenancy as per the provisions of the Act; and
c. Whether the notice to terminate issued by the Defendant dated 13th January, 2012 purporting to terminate the tenancy was valid and in accordance with the terms and conditions of the Lease agreement or **section 4 (2)** of the Act.

6. **Whether the Plaintiff's tenancy is governed by the terms and conditions as set out in the Lease agreement dated 2nd July, 1985 and by the further Variation of Lease dated 28th August, 1998.**

The issue of transfer, acquisition, mergers and takeover of corporations is covered under various regimes of law in Kenya including the Companies Act, the Capital Markets Authority Act, the Transfer of Business Act and the Law of Contract Act. It cannot be denied that indeed there was a sale and transfer of Mashreq Bank PSC assets and liabilities to the Plaintiff. This is evident from the various correspondence between the Plaintiff, Defendant, the Defendant's agents, Deloitte & Touche

and the Central Bank of Kenya. In a letter dated 20th April, 2000 from Deloitte & Touche, the Accountants for Mashreq Bank, addressed to the Defendant's agents, Knight Frank Kenya Ltd., the Defendant was indeed notified of the sale and transfer of the said Bank to the Plaintiff. The letter in part reads:

> **"We refer to our meeting of 10th April, 2000 when we advised you that our client, Mashreq Bank PSC, who occupy I.C.E.A Building had, with the approval of the Central Bank of Kenya, *transferred its assets and liabilities to Dubai Bank Kenya Ltd of P.O BOX 11129 Nairobi.*** (emphasis mine). **We attach for your information copies of the approvals from Central Bank of Kenya dated 7th March, 2000 to our client and of March 2000 to Dubai Bank of Kenya Ltd."**

Further in a letter dated 7th March, 2000 from the Central Bank of Kenya addressed to the Country Manager- Mashreq Bank PSC, it reads in part:

> **"We are pleased to confirm that the Minister of Finance has granted approval for Mashreq Bank PSC to *transfer the Kenya branch license to Dubai Bank Kenya Ltd upon completion of the transfer as per the sale agreement."*** (emphasis mine)

In the Variation of Lease dated 28th August, 1998, it is provided that the term "tenant" would be deemed to include its "successors and assigns". The term successor as defined in the 9th Edition of Blacks' Law Dictionary at page 1569 elucidates;

> **"A corporation that, through amalgamation, consolidation or other assumption of interest, is vested with the rights and duties of an earlier corporation."**

Upon the subsequent sale and transfer of the assets and liabilities of Mashreq Bank PSC to the Plaintiff, the latter took over the management and operations of its predecessor. Pursuant to the provisions of the *Transfer of Business Act, Cap 500 of the Laws of Kenya*, **Section 3 (1)** with regards to the transfer of a business, it is provided that:

> **"(1) Whenever any business or any portion of any business is transferred, with or without the goodwill or any portion thereof, *the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor,* unless due notice in accordance with this Act has been given and has become complete."** (Emphasis mine).

It would seem therefore, from the foregoing, that the Plaintiff was an assignee or successor, following its purchase of all the assets and liabilities of Mashreq Bank PSC as per the sale agreement and thus a transferee incurring liability under **Section 3 (1)** of the Transfer of Business Act.

7. By a letter dated 14th July, 2000 the Plaintiff wrote to the Defendant's said agents, claiming that the rent under the present Lease was on the high side, and as had been requested, in an earlier letter, it wished to renegotiate the terms of the Lease in this regard. The letter reads in part:

> **"We had shown you the alternatives we have and since the rents payable to you under the present lease are almost three times more than those available, it has become uneconomical to continue to pay these exorbitant rents."**

This was a follow up to a letter dated 31st May, 2000 where the Plaintiff addressed the Defendant's agents as follows:

> **"We kindly request you to look into the possibility of re-negotiating the rent for the subject premises as it is now considered to be on a very high side."**

The subject premises referred to in the letter was the space occupied by the Plaintiff, owned by the Defendant, which premises were exactly the same that had been occupied by its predecessor, Mashreq Bank PSC. After the transfer of the business to the Plaintiff, it went on to occupy the same space and even negotiated for a review of the rent, to which the Defendant responded in its letter dated 23rd June, 2000. The rent paid was in accordance with the Variation of Lease dated 28th August, 1998, and the Plaintiff had continued to pay the rents as stipulated therein. By its conduct and inference, the Plaintiff had taken over the Lease between the Defendant and Mashreq Bank PSC. Further, the Plaintiff had made a representation that it was willing and able, to take over the Lease from the previous occupiers of the premises by requesting the advocates of the parties to draft an Assignment of Lease for execution. Despite that document being sent to the Plaintiff and/or its advocates under cover of a letter dated 13th May, 2001, the same was never executed by the parties. However, the Plaintiff still paid the rents in accordance with the Lease agreement. Subsequent reminders did not yield any response, as was evidenced from the letters dated 25th June, 2003, 22nd September, 2003, culminating in the one dated 31st October, 2003.

8. From the foregoing, the Plaintiff was the successor to Mashreq Bank PSC, having taken over its business interest in Kenya. It can also be inferred that the Lease agreement entered between the Defendant and Mashreq Bank PSC had been "assigned" to the Plaintiff, by its representation and conduct in the circumstances. Had it not intended to take up the Lease agreement, this should have been informed to the Defendant, either expressly, or by conduct i.e. by ceding vacant possession to the Defendant. It would seem therefore, with every intention and by its actions, the Plaintiff had wanted to occupy the premises of its predecessor, and expressed such interest by paying the rent payable as under the Lease agreement and by taking up occupation of the premises. As was reiterated in **Rodenhurst Estates Ltd v W.H Barnes Ltd** (supra), once the Plaintiff decided to pay the rent to the Defendant, it was assumed that it had decided to have the Lease agreement assigned to it, in the absence of any other indication or inference to the contrary. In the aforementioned case, the Appellate court in dismissing the appeal held, inter alia:

> **"…… You start with the assumption that what was intended was a legal assignment as part of a much bigger transaction for the sale of a whole business to a company…….. That is how the story starts, and that is followed up by the granting of the license itself in these terms- and, in fact- though the details were not known- by the transfer of the business to the Company as a going concern.**
>
> **It is those circumstances that the company thereafter paid the rent, and quite plainly paid it, not as agents of W.H Barnes- who for all practical purposes had ceased to exist- as before this action occurred he had in fact ceased to exist- but on their own account. Moreover, they put up over these premises their own name. In this case, it is perfectly plain from the correspondence and the facts that the Defendants did pay the rent and paid it in their own name and they did a good deal in the nature of attorning to the Plaintiff as their tenants and certainly asserted impliedly, if not expressly, that they were the lessor's tenants. Moreover, the landlords, I am quite satisfied, received the rent from them on the footing that the Company was their tenant."**

I find that the Defendant relied on the representation and conduct of the Plaintiff that the Lease agreement was intended to be assigned to the Plaintiff, in the absence of any other contract to the contrary. Ibrahim, J (as he then was) in his said Ruling on the application by the Plaintiff (for, *inter-alia*, a temporary injunction restraining the Defendant from terminating or purporting to terminate the Plaintiff's tenancy) such being delivered on 11th June, 2007, reiterated as follows:

> **"I am inclined to be persuaded by the said conclusion and application of the law in this case. The Defendant herein relied on the representation that the Plaintiff had bought all the assets and liabilities of Mashreq Bank PSC, the lessee on the premises and that they would have the existing leases assigned to the Plaintiff. In reliance upon this representations which were express and also implied by the Plaintiff's**

subsequent conduct, the Defendant allowed the Plaintiff, complete strangers to occupy the premises and to pay rent as tenants on the same terms and conditions set out in the said existing leases. The Plaintiff does not explain in what other capacity they were or could have been allowed to take over the premises and to pay the rent. The intention of the parties and their position was quite clear as early as April - May 2000. I think that there was privity of contract between the Plaintiff and the Defendant with regard to the Lease due to the intended assignment which was contemplated to be perfected when the Plaintiff's advocates were to contact the Defendant's. The lawyers did not do this and instead claimed the tenancy was a controlled tenancy. I think that estoppel would apply herein.

It is true that the intended assignment of lease has not been executed or registered. However, there is no doubt that the Defendant may have a cause of action for the execution of the assignment instrument which captures the intention of the parties at the material time the Plaintiff took over the premises of the previous tenant, Mashreq Bank PSC. In any case what is before me is not an application for the enforcement of any assignment but an application for injunctive orders to restrain the Defendant from termination of the Plaintiff's tenancy. At this stage, it appears to me that what regulates the relationship between the Plaintiff and Defendant is the existing leases which the Plaintiff at his own free will and volition took over from Mashreq Bank psc with the acquiescence of the Defendant which relied on the representation that the same would be legally assigned to the Plaintiff. The injunction is sought on the basis that the Plaintiff would be entitled to a declaration that the tenancy is a controlled tenancy within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. I do not see any evidence or material which is likely to support or sustain the grant of such a relief."

9. It was therefore, manifestly evident both back in 2007 and also today in 2013, that the Plaintiff and Defendant had for all intents and purposes, entered into an agreement that was governed by the terms and conditions set out in the Lease agreement and the Variation of Lease aforesaid. There is no evidence that has been adduced before this Court to show that the contrary is applicable. I find that the parties did enter into an agreement to lease, which was by representation and inference, to be governed by Mahreq Bank's existing Lease as varied. This is evidenced by the Plaintiff's subsequent conduct and payment and receipt of rent by the Plaintiff and Respondent respectively. The upshot is that the agreement entered into by the Plaintiff and Defendant was governed by, and is subject to the terms and conditions, as set out by the Lease dated 28th August, 1998 and the Variation of Lease dated 1st February, 1993.
10. **Whether the lease agreement or otherwise, that the Plaintiff enjoys, is under a controlled tenancy as per the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.**

In the submissions filed on behalf of the Plaintiff dated 26th October, 2011, at paragraph 13, the Plaintiff referred to the case of **Rogan Kamper v Lord Grosvenor (No. 2)(1977) KLR 129** where Mustafa, JA held *inter alia*:

"Here the tenant had entered into possession of the premises with the permission of the landlord. There was consensus and a tenancy was created by the payment and receipt of rent; see Jagat Singh Bains v Ishmael Mohamed Chogley (1949) 16 EACA 27. What sort of tenancy was created?...in terms of Section 106 of the Transfer of Property Act "in the absence of a contract to the contrary (emphasis mine) **this would be a lease from month to month, terminable by fifteen days' notice expiring with the end of the month of tenancy."**

The Plaintiff also referred to **Section 2 (1)** of the Act with regard to the definition of a controlled tenancy, which Act provides;

"Controlled tenancy means a tenancy of a shop, hotel or catering establishment;

a. **Which has not been reduced into writing."**

However, the ruling by Mustafa, J reiterates that a tenancy would only be deemed to be controlled *if* there was no written contract. If (and to which the learned Judge referred by pointing to the provisions of Section 106 of the Transfer of Property Act), there is a contract to the contrary, the same will be construed not as a controlled tenancy, but a tenancy expressly so entered into between the parties. In my view, the Plaintiff is estopped from denying that indeed there was a Lease agreement that had, evidenced by parties' intentions and purposes, representation and conduct, been entered into, even though the intention had not been expressly stated by the parties.

11. In the case of **Century Automobiles Ltd v Hutchings Biemer Ltd (1965) EA 305**, the Court of Appeal, in allowing the appeal by the appellant, laid down the necessary principles by which an estoppel would operate. This included a clear and unequivocal representation – an intention that it should be acted upon and was acted upon in the belief of its truth. The Court of Appeal in its determination at page 310 referred to the case of **Nurdin Bandari v Lombank Tanganyika Ltd [1963] EA 304**, where Newbold, JA (as he then was) held:

> **"The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of the representation, acted upon it."**

The action by the Plaintiff in taking over the premises formerly occupied by Mashreq Bank PSC and paying rent to the Defendant, in accordance with the Lease agreement, was a clear indication of its intention of taking over the premises and Lease. This representation, coupled with the subsequent action of paying the rent, was sufficient reason for the Defendant to believe that the Plaintiff's intention was to be its tenant, subject to the terms of the Lease and the Variation of Lease. No other contradicting reference can be inferred from the parties' conduct in the circumstances. It would therefore follow, and distinctively so, from the tenets espoused in **Rogan Kamper v Lord Grosvenor** (supra), that there was a contract, parties to which were the Plaintiff and Defendant, which although not reduced into writing, was in accordance with the terms of the Lease and the Variation of Lease entered into by Mashreq Bank. For these reasons, therefore, I find that the tenancy was not a controlled tenancy as per the definition in Section 2(1) of the Act.

12. **Whether the notice to terminate issued by the Defendant dated 13th January, 2004 purporting to terminate the tenancy was valid and in accordance with the terms and conditions of the lease agreement.**

In the Variation of Lease dated 28th August, 1998 it was deemed that the said Lease would be supplemental, subject to any expressly stated changes, to the Lease agreement dated 2nd July, 1985. At Clause 2(o) of the Lease, it is provided that:

> **"Not to transfer the benefit of this lease without the written consent of the landlord and (if the same is required) of any charge having a security over the land the building first had and obtained (such consent not to be unreasonably withheld in the case of a responsible and respectable transferee and if the transferee is a company such company to provide the landlord directors' guarantees for the proper fulfillment of the tenant's obligations under this lease including the obligation to surrender the premises at the expiry of the lease) AND not to sub-let or part with the possession of the premises or any part thereof without the written consent of the landlord and any chargee as aforesaid (such consent not be unreasonably withheld in the case of a reasonable and respectable sub-tenant) PROVIDED THAT the landlord need not consent to any transfer, sub-letting or parting with possession which would**

create a controlled tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Upon any breach of this covenant the landlord may give notice of re-entry upon the premises and re-enter and determine the lease."

It has already been established that indeed the Defendant did allow the premises be transferred to the Plaintiff. There is no termination clause in the Lease, but it is ascertainable from Clause 2(o) that there are two instances when the Lease could be terminated:

1. Breach of the covenant; and
2. Expiry of the Lease.

The term of the Lease was for a period of twenty-two (22) years, commencing on 1st February, 1982. The time when the said Lease would expire would be on or about 31st January, 2004. In a letter dated 13th January, 2004, the Defendant's agents wrote to the Plaintiff, informing them that the term of the lease would be expiring on 31st January, 2004 and that the term would not be renewed. The letter reads in part:

"This is to remind you that the lease in favour of Mashreq Bank PSC expires on 31st January, 2004. As advised in our letter dated 31st October, 2003, the landlord shall not renew your lease. Kindly therefore prepare to handover the premises to us, duly redecorated and reinstated, by close of business on 31st January, 2004."

The Lease, therefore, was to terminate at the expiration of the lease term as envisaged in the same at Clause 2(O). The Plaintiff responded by filing the present suit herein, claiming that the tenancy was a controlled tenancy. It had maintained that the notice letter dated 13th January, 2004 was therefore null and void as it was not issued in accordance with the provisions of **Section 4 (2)** of the Act.

13. The Plaintiff was well aware, as it had been adequately informed by the Defendant, that the lease term was to expire on 31st January, 2004. It would have had ample time to make alternative arrangements with either the Defendant, whom it seems had been reasonable all along in accommodating it at the premises, or to move its premises and apply to the Central Bank of Kenya for a change of address as per **Section 8 (2)** of the *Banking Act*. The Plaintiff instead, chose to institute this suit against the Defendant, on allegations that the termination was null and void. With reference to Clause 2(O) of the Lease, it was incumbent upon the Plaintiff to give vacant possession of the premises once the term of the Lease had expired. In my view, the Plaintiff cannot complain that the said letter dated 13th January, 2004 the Defendant did not comply with the procedure of terminating controlled tenancies. This was not a controlled tenancy and, as such, the said provisions of the Act, as relied upon by the Plaintiff, are inapplicable in this instance. The Defendant through its appointed agents, issued a notice informing the Plaintiff of its intention to terminate the Lease upon the expiration of the twenty two (22) year term thereof. It was therefore well within its rights so to terminate the same.
14. In consideration of the foregoing, I find that the Plaintiff has not established to the satisfaction of this Court, that the allegations contained in its Plaint dated 29th January, 2004 are well founded. The Plaintiff has not shown by what other alternative, other than by means of the transfer of the liabilities of Mashreq Bank PSC, how it took occupation of the premises owned by the Defendant. I would adopt the finding in the **Roadenhurst Estates** case (supra) which I find to be factually almost on all fours with the matter before me. Further I find that the tenancy as between Plaintiff and Defendant was governed by the Lease agreement dated 2nd July, 1985 as varied on 28th August, 1998. Lastly, I hold that the notice issued to the Plaintiff dated 13th January, 2004 is valid and in accordance with the Lease terms and conditions. The Plaintiff's suit is hereby dismissed, with costs to the Defendant.

DATED and delivered at Nairobi this 31st day of October, 2013.

J. B. HAVELOCK

JUDGE