



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 49 of 2006

Law of contract – lease

Once determined has no effect subsequent agreements- separate from the terminated lease.

ABDUL GAYUR YUSUF HASHAM.....APPELLANT

V E R S U S

NATIONAL HOSPITAL INSURANCE FUND.....RESPONDENT

JUDGEMENT

The Appellant herein was the Plaintiff in the original suit. He sued the Respondent (Defendant) for a total sum of Ksh.1,254,000/- made up as follows:-

(a) Rent for April, May & June	Ksh. 482,000/-
(b) Rent for July, August and September	Ksh. 489,000/-
(c) Rent for 1.10.2003 – 21.10.2003	Ksh. 114,000/-
(d) Agreed amount forof	Ksh. 150,000/-
(e) Agreed amount for repairs	Ksh. 12,000/-
(f) Three months rent in lieu of notice	Ksh. 489,000/-
Total	Ksh.1,743,000/-
(g) Less three months deposit	Ksh. 489,000/-
	Ksh.1,254,000/-

Net sum

The Appellant also claimed interest at commercial rates of 20% per annum till payment in full, costs and interest thereon and further or better relief.

After hearing the evidence from both the Plaintiff and the Defendant's representative the learned Chief Magistrate dismissed the Appellants suit in its entirety with costs to the Defendant. Being aggrieved with the lower court's decision, the appellant has come to this court by way of Appeal. Although the appeal consists of eight grounds, it raises one basic issue, whether a lease once terminated by valid notice, and a tenant has vacated the leased premises, is extended under the doctrine of constructive possession/occupation, and thereby making the erstwhile tenant liable for all the period he was in constructive occupation/possession. If this doctrine is upheld then the other prayers by the appellant would stand. If the doctrine is not upheld, then the entire appeal will also fail.

It is the duty of the first appellate court to review the evidence before the trial court and make its own findings and draw its own conclusion.

The appellants case as urged in the written submissions of his counsel Kiutha Arithi and Co Advocates is that the premises were not handed over to him until the 22nd October 2003, under the handing over/taking certificate, and notwithstanding the expiry of the notice of three months ending on

30th April, 2003 the Respondent had remained in constructive occupation/possession of the leased premises, and was thereby liable for the monthly rent for the period 1.05.2003 to 21.10.2003 inclusive when the handing over/taking over took place.

The learned trial magistrate observed that the handing over and receipt of the 29 keys by the plaintiff would itself signify the handing/taking over of possession of the premises. The trial court found as a fact that the Respondent vacated the premises promptly upon the expiry of the notice period and was never in control of the premises thereafter, that there was no agreement for the leasing of the premises on the basis of the terminated tenancy agreement. The trial court also concluded that alleged take over/handing over was of no consequence.

The learned trial magistrate further found that the certificate/handing over was invalid **ab initio** in as much as it was prepared by a stranger that is to say the Ministry of Roads, Public Works and Housing. It was also not signed by the alleged Respondents representative (one E.N. Bwisa) but by a person called Rex Laban whose relationship with the Respondent is unknown. The learned trial magistrate also found that the Respondent did not fail to vacate the premises after the expiry of the notice period, and did not also continue with actual or constructive occupation/possession of the premises thereafter.

I have examined both the evidence of the Appellant as well as that of the Respondent's sole witness M/s Janice Kanini. In his evidence in chief P.W.1 (Abdul Gafur Yusuf Hassan) testified inter alia a draft lease was prepared offering the premises to the Respondent on lease for 5 years and 3 months and that it had been agreed that each party would give a 3 months' notice of termination of lease. The appellant acknowledged receipt of the notice of termination of lease which expired on 30th April 2003. He testified that the Respondent did not however vacate the premises until 20th October 2003 when a handing/taking over certificate was signed between the Appellant and a representative of the Respondent.

P.W.1 maintained line of evidence upon cross examination. He agreed that the notice expired on 30th April 2003 but that the Respondent did not vacate as required. The premises were not repaired until mid October, 2003 and when he called them to take possession and that he also did not have the keys to the premises, and he could therefore not take possession.

On her part Ms Janice Kanini testified that, the Respondent gave the agreed 3 months to terminate the tenancy and vacated the premises in February 2003 even before the expiry of the three months' notice given. D.W.1 testified the appellant refused to take the keys from her and told her that he was dealing with the head office and was talking to them on some repairs to be carried out. This witness also testified that the Appellant was very much aware that the Respondent had moved out of the appellant's premises. She also testified that she was unaware of any repairs to be carried out and that the appellant took over the premises later without any repairs having been carried out.

In cross examination by Mr. Kiutha Arithi this witness opined that the Appellant deliberately avoided to take over the premises. When shown a letter (MFI) the witness testified that it is possible the parties may have agreed to carry out the repairs at sh.150,000/- Like in her evidence in chief she stated that the Appellant was not entitled to interest at commercial rates, the rent payable was in the first place above the market rate.

Having reviewed that evidence, I am of the considered opinion that the learned trial chief Magistrate (now Hon Mr. Justice J.R. Karanja) made correct findings, that the proper and agreed notice was given. The appellant accepted that notice. The Respondent according to the evidence of Janice Karimi vacated the premises in February 2003, well before the expiry of the notice period 3 months on 30th April 2003. The premises were not repaired even as at 20th October 2003 the day of the so called handover/taking over. So repairs were not the cause of the appellant's failure to assume control, and re-let his premises between 1.05.2003 to 20.10.2005. The learned trial magistrate opined that by refusing to assume control of his premises, and by later suing the Respondents for outstanding rental and further notice of termination, the appellant was trying to enrich himself unjustly.

The doctrine of unjust enrichment is not part of the common law and is therefore not part of our law. It postulates that no man shall reap where he did not sow; and if he does so, he should restore it to its rightful beneficiary. An influential and concise statement of the principle is to be found in the **American Law Institutes Restatement of the law of Restitution Quasi Contracts and Constructive Trusts**. It states that:-

“....a person who has been unjustly enriched at the expense of another is required to make restitution to the other”.

According to Chitty on Contracts, General Principles 27th Ed. Vol.1 Chapter 29 -011 at p. 1396-
“The principle of unjust enrichment requires first that the defendant has been “enriched” by the

receipt of a “benefit,” Secondly, that this enrichment is at the expense of the plaintiff and thirdly that the retention of the enrichment be unjust.”

In 1760 in the case of MOSES VS MACFERLEN (1160) 2 Burr, 1005, 1007, Lord Mansfield stated that the action for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied) or extortion or undue advantage taken of the plaintiff situation contrary to the laws made for the prosecution of persons under those circumstances.

In this case of course, there was no money paid by the appellant to the respondent. What the learned trial magistrate therefore meant by reference to **unjust enrichment** by the Appellant against the Respondent was that the Appellant should not extort any money from the Respondent in the reverse sense of that principle and that any such claim was a mistake do not reap where you have not sowed or first planted. In other words the principle had no application in this case. It is the appellant who had already received money from the Respondent by way of deposit and should not be claiming for more.

Turning to matters directly in issue the question is whether the tenancy was extended by constructive occupation/possession. In his written submissions to the lower court. Counsel the Appellant referred to the definition of constructive possession contained in Blacks Law Dictionary 8th And. P. 1201 as **control or dominion over property without actual possession of it**. I have looked at Blacks Law Dictionary and Possession is described as;

(1) the fact of having or holding property in ones power; the exercise of dominion over property

(2) the right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object”.

Salmond Jurisprudence 285, Glanville L. Williams Ed. 10th Ed. 1947 cited in Blacks Law Dictionary says: **“In the whole range of legal theory there is no conception more difficult than that of possession. The Roman lawyers brought their usual acumen to the analysis of it and since their day the problem has formed the subject of a voluminous literature while it continues to tax the ingenuity of the jurists. Nor is the question of one of mere curiosity or scientific interest, for its practical importance is not less than its difficulty. The legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, for example is evidence of ownership the possessor of a thing is presumed to be the owner of it and may put all other claimants to proof of their title”**.

When the appellant claims that the Respondent was in constructive possession of the erstwhile tenancy premises, he surely cannot mean that the Respondent was claiming any interest in the property, whether as owner or lessee. The term interest of lessee had been terminated in the manner agreed with the appellant by the three months. The respondent had surrendered the physical possession of the premises. With vacating the premises the Respondent had also demonstrated that it did not have the necessary **animus possidendi** the intention to appropriate to itself the exclusive use of the premises.

Only the Appellant himself would be able to answer the question why he refused to take control of his premises once the respondent had vacated them. He only can explain why he had to resort to the Ministry of Roads, Public Works and Housing for a Certificate of Hand Over/Take over. No evidence was adduced, nor did the unexecuted lease provide for any service from the said Ministry. I am unable to take judicial notice of the alleged fact that the Respondent being a parastatal had to get such certificate from the Ministry. On the contrary it is the hall mark of independent management that parastatal may seek such services from any Ministry or Government Department.

Besides the trial court founds as a fact that the said certificate was executed by one Rex K. Alban a stranger to the Respondent and therefore had no authority to commit or bind the Respondent. Such hand over/takeover certificate had no binding effect upon the Respondent, and was consequently valueless to the Appellant.

In conclusion therefore, once a tenancy has been determined in the manner agreed and unless the tenancy remains in possession no term can be implied that the tenancy remained in force in accordance with the terms of the terminated tenancy. Any questions relating to repairs, or other unsettled issues are regarded as breaches of the tenancy terms, not on extended tenancy on the basis of evenstrutive possession. Once the premises were vacated the Respondent ceased to be in exclusive possession of them to the exclusion of anyone else or the appellant owner. The appellants right in this scenario was to take over his premises immediately the notice expired renovate and lease them to another party or use them as he determines.

He had right to any notice or rents thereafter 30th April 2003.

The authorities cited have no relevance to this case. They was no “**handing over**” post the expiry of the termination notice on 30th April 2003. The appeal therefore fails on this fundamental issue, and also do fail are the subsequent claims to further rental and notice for the period 1.05.2003 to 20.10.2003 similarly the claims for interest on such sums also fails.

Finally, there remains the question of repairs, and the Respondents Deposit of three months’ Rent owing to Ksh.49,000/-. There is evidence that the Respondent did by its letter of 18th March 2007 agree to carry out repairs on-

- (a) the staircase
- (b) paint and
- (c) clean the offices

This is supported by the Appellant’s evidence in cross examination that he had talked to the Respondent’s Headquarters and agreed that he would carry out the repairs at Ksh. 12,000/- and repainting at Ksh. 150,000/-. The appellant did testify that he had not carried out the repairs as of the time of the hearing of the case because he had not found another tenant. Since he had however agreed on this sum, I would allow his appeal in the sum of sh.162,000/- for such repairs and painting. This sum should be therefore be set off from the deposit of Shs.489,000 and the blance of sh.327000 be paid over to the Respondent.

Save as aforesaid, the appeal is dismissed with costs to the Respondent. It is so ordered.

Dated signed and delivered at Meru this 15TH day of January 2010
M. J. Anyara Emukule

Judge.