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

**Civil Suit 849 of 1990**

**KENYA TEA DEVELOPMENT AUTHORITY……. PLAINTIFF**

**VERSUS**

**SAMUEL KANOGO RITHO…….DEFENDANT**

**JUDGMENT**

The Plaintiff herein, Kenya Tea Development Authority, a statutory corporation, filed this suit on or about 15th February 1990 as would appear from the now faded Court stamp on the Plaint dated 15th February 1990. The Corporation has sued the Defendant Mr. Samuel Kanogo Ritho pursuant to an agreement to lease the Defendant's property known as L.R. No. 209/7314 situate in Nairobi, for a term of two years commencing 19th September 1989, at a monthly rent of Kshs.30,000/=. According to the Memorandum of Agreement for lease executed by the parties on 15th September 1989, the said rent was payable quarterly for the first three months, that is to say, from 19th September 1989 to 18th December 1989 and thereafter, every six months in advance. It is worthy of note that the said Memorandum of Agreement was drawn by the Defendant.

It is common ground between the parties as appearing from the pleadings and the evidence adduced by both sides that the Plaintiffs paid the agreed amount for the first quarter on 15th September 1989 and took possession of the premises in accordance with the terms and conditions contained in the Memorandum of Agreement. However on 20th December 1989 the Plaintiffs wrote to the Defendant what they purported to be a notice of three months to terminate the lease and vacate the premises. Along with the said notice the Plaintiffs enclosed their Cheque No. A15076 dated 20th December 1989 in the sum of Kshs.90,000/= expressed to represent "the quarterly rent due under the lease until determination thereof." (underlining supplied).

The Defendant declined to accept the notice and by a letter dated 2nd January 1990 referred the Plaintiff to the terms of the Memorandum of Agreement for lease and expressly stated that "THE NOTICE IS NOT ACCEPTABLE." Consequently the Defendant refused to re-enter into possession maintaining that a valid lease had been entered into by virtue of the Memorandum of Agreement for lease which according to the Defendant continued to subsist and would so subsist until 18th September 1991. The Plaintiff on the other hand maintained that the lease, if any, had been effectively terminated by the notice of 20th December 1989 and neglected to pay any further rent thereby causing the Defendant to distress for rent allegedly due. The Defendant engaged auctioneers who in turn proclaimed against thee of the Plaintiff's motor vehicles registered as KRJ 174, KYF 102 and KWU 518. The Plaintiff then moved to Court and filed this suit seeking the following reliefs under the plaint previously referred to.

**a) A declaration that the tenancy has terminated.**

**b) A declaration that it is not in arrears of rent and is not liable to the pay further rents to the**

**Defendant**

**c) A permanent injunction to restrain the Defendant from levying distress upon the Plaintiff's chattels**

**d) Costs of this suit plus interest at Court rates.**

The Defendant filed a Defence and Counterclaim denying the legality of the Plaintiff's notice of 20th December 1989 stating that the same was in breach of contract and maintaining that the lease agreement was valid and subsisting for two years. The Defendant averred in this Defence that the lease being valid and subsisting as aforesaid the Plaintiff was in arrears of rent and that the distress for the same was legal and valid under the provisions of the Distress For Rent Act, Chapter 293 of the Laws of Kenya.

Whilst praying for the dismissal of the suit the Defendant therefore Counterclaimed against the Plaintiff for:

**a) A declaratory judgment that the Plaintiff is bound by the terms of the lease agreement and should therefore be condemned to pay rent for the entire period of two years.**

**b) A declaratory judgment that there was no effective handing over of the premises and that the Plaintiff was bound to take care of the same**

**c) General damages for breach of contract**

**d) An order for the Plaintiff to redecorate and repair the premises and then vacate**

**e) Costs of the suit**

**f) Interest at Court rates until payment in full**

**g) Such further or other relief as the Court would deem fit and just.**

The Plaintiff thereafter filed a Reply to Defence and Defence to Counterclaim joining issue with the Defendant on his defence and reiterating the contents of the Plaint.

The Plaintiff emphasized in its defence to the Counter claim that there having been no formal lease executed and registered there was no binding agreement between the parties to warrant the demand for rent or the distress therefor. In the same breath the Plaintiff maintained that the "previous tenancy had determined." Interestingly, these contentions are not in the alternative. The Plaintiff relinquished possession of the suit premises sometime in June 1990 when it withdrew security engaged to guard the same and posted the keys to the Defendant. The occupant of the premises had vacated sometime late January or early February 1990.

On 5th March 1992 the Defendant filed an amended Defence and Counterclaim pleading inter alia fraud on the part of the Plaintiff in removing distrainable goods from the suit premises and seeking compensatory orders for monies the Defendant expended in restoring the premises into good order after the Plaintiff vacated in June 1990. the Defendant's Amended Defence and Counterclaim also includes a prayer for payment of interest at bank rates on the sums expended by him in the restoration works and in paying utility bills left unpaid by the Plaintiff. In addition to the reliefs earlier sought under the Defence and Counterclaim the Defendant now seeks, inter alia, the following additional orders.

**a) A declaratory judgment that the parties are bound by a contract of lease for two years with effect from 19th September 1989**

**b) A declaratory judgment that the Plaintiff entered into a valid and binding contract with the intention to defraud the Defendant**

**c) A declaratory judgment that the Plaintiff removed its movable goods from the suit premises with the intention to defraud the Defendant d) A declaratory judgment that the Plaintiff unilaterally purported to terminate the lease agreement.**

**e) An order for exemplary damages**

**f) A declaratory judgment that the Defendant is entitled to interest at bank rates.**

Upon being served with the Amended Defence and Counterclaim, the Plaintiff, without leave of the Court filed an Amended Plaint to include an additional prayer for general damages for wrongful distress. The sole witness called by the Plaintiff stated in cross-examination that she had not seen the said amended Plaint prior to the crossexamination and was unsure of what prayers her employer, the Plaintiff, was seeking thereunder. Having reserved my ruling on the propriety or otherwise of the said amended Plaint I now find that the issue is capable of being determined here and now. It is clear that general damages for wrongful distress are not part of the issues framed and filed by the Plaintiff, the only issues from the Plaintiffs' point of view being

**1) Whether there exists a valid contract between the parties;**

**2) The nature of the contract, if any;**

**3) Whether such contract was terminable by notice of either party?**

**4) When the contract determined**

**5) Whether the distress by the Defendant was lawful**

**6) Whether the Defendant was entitled to distress upon the Plaintiff's goods.**

The above issues are limited to the declaratory orders sought in the original Plaint and no arguments were tendered to support the claim for general damages either in evidence or submission by the Plaintiff's Counsel whose closing remarks or conclusion submits only:

> **"that the tenancy herein determined on notice as it was a periodic tenancy based on an agreement for lease. That the said agreement for lease did not provide for a period of notice and therefore the relevant notice is half the period for which rent is payable which in this case is 3 months. That the money deposited in an interest earning account in the joint names of the advocates…..herein should be utilized to reimburse the defendant for the repairs to the interior of the building(s) and the balance be released to the Plaintiff. That the Defendant be ordered to pay the costs of this suit."**

According to submissions herein the monies referred to hereinabove were ordered to be deposited in an interest bearing account to secure the rent allegedly payable when the distrained motor vehicles were returned to the Plaintiff.

The proper assumption in the circumstances would be that the Plaintiff has abandoned the claim for general damages which was the only addition contained in the amended Plaint. This being the case, the Court need not rule on the amended Plaint and shall accordingly disregard it.

The dispute in this suit emanates from the Memorandum of Agreement for lease dated 15th September 1989 the terms of which are not disputed. What is in dispute is the meaning purport and effect of the same. Having considered the statement of issues filed separately by either of the parties hereto, their respective pleadings, evidence and submissions I am of the view that the real issues for determination herein can appropriately be narrowed down as follows:

**1. Does the Memorandum of Agreement for lease executed by the parties on 15th**

**September 1989 constitute a valid contract for lease enforceable as a lease?**

**2. If so what are the terms as to termination if any?**

**3. Under the terms of the said Memorandum, was the Plaintiff entitled to issue the 3 months termination notice dated 20th December 1989 and if so when, if at all, did the said notice take effect?**

**4. Was the Defendant entitled to reject the notice issued on 20th December 1989?**

**5. Was the Plaintiff liable under the Memorandum of Agreement to pay rent to the Defendant and was any such rent due and owing at the time the notice to terminate was issued and/or expired?**

**6. Was the Defendant entitled to levy distress pursuant to the Memorandum and if so, was the distress on the Plaintiff's motor vehicles outside the leased premises lawful?**

**7. Should this honourable Court deem the contract for lease as having been validly terminated by the Notice of 20th December 1989 and uphold the Plaintiff's claim against the Defendant or should the Court find the said notice invalid and void and treat the contract as having subsisted for two years from 19th September 1989 whereby the Defendant's Defence be upheld, the Plaintiffs suit against him be dismissed and the Defendant's counter claim be allowed?**

**8. Should the Defendant's Counterclaim be allowed, is he entitled to interest at Bank rates for the monies expended by him in restoring the suit premises and/or meeting the Plaintiff's liabilities under the agreement for lease?**

**9. Who as between the Plaintiff and the Defendant is entitled to the monies deposited herein in the interest bearing account at Housing Finance Company of Kenya or are both parties entitled to the same?**

**10. Should the Court find both parties entitled to the said sums, in what proportions should the said sum be paid to either party?**

As stated earlier in this judgment the agreement for lease and the terms thereof are not disputed. The facts of the case as relates to the execution of the agreement, the issuance of a termination notice by the Plaintiff and the rejection of the same by the Defendant, the vacation of the premises by the Plaintiff and the retaking of possession by the Defendant are also not disputed. This notwithstanding the parties are totally opposed as to whether the agreement dated 15th September 1989 is legally binding and enforceable as a lease. Each party has submitted numerous authorities to support its position. Basically the Defendant's main contention is that the agreement of 20th September 1989 did not give rise to a valid and binding lease between the parties having not been registered. The Plaintiff supports this argument with the provisions of Section 3(1) of the Registration of Titles Act which states that no title or interest in land can pass under an unregistered instrument. The Plaintiff further contends that the agreement was merely an agreement for a lease which, by virtue of the Plaintiff paying rent and occupying the premises, created a periodic tenancy with the intention to execute a proper lease. In support of this contention the Plaintiff relies on Clause 14 of the Memorandum of Agreement which reads as follows:

> **"14. The Lessee shall execute a proper lease to <u>be drawn in pursuance with this Memorandum by the Lessor's advocates.</u> The Lease shall include all other clauses which are normally included in a lease of this nature."**

In his submissions, Counsel for the Plaintiff contends that the use of the mandatory term "the lessee shall….." implies that the execution of a formal contract was further on the explanation given in Halsbury's Laws of England 2nd Edition Volume XX at Page 42; paragraph 47 which reads as follows:

> **"……it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact be completed. In the former case there is no enforceable contract, but in the latter case there is a binding contract."**

I find the Plaintiff's Counsel's submissions on this issue confusing. Whereas in paragraph 1 of his "Analysis of Issues" at page 6 he states that the Memorandum of Agreement is "a binding contract between the parties" by virtue of Section 32(2) of the Registration of Titles Act, he goes later on to say that

> **"….As such the agreement is incomplete without the said formal lease being executed and cannot be enforced."**

The Plaintiff in its submissions through Counsel also contends on one hand that "there is no valid and binding lease between the parties herein" then on the other hand goes to say in number 3 of his analysis that

> **"either party was at liberty to terminate the tenancy by giving notice."**

The above notwithstanding the Plaintiff goes to justify its notice of 20th December 1989 which is clearly expressed to have been issued pursuant to and in respect of the Memorandum of Agreement. This clearly demonstrates that the Plaintiff did recognize the agreement as binding unless terminated by notice or otherwise. It is obvious from the Plaintiff's conduct and submissions that it did consider the agreement with the Defendant as valid and binding albeit between 19th September 1989 and 20th March 1990, the date on which its termination notice was intended to expire. Having studied the agreement in question and based on the evidence adduced before me, by both parties, there is no doubt in my mind that when executing the Memorandum of Agreement for Lease dated 15th September 1989 the parties herein intended that the same operate as a binding agreement for the leasing of the Defendant's premises, particularly since the Plaintiff took possession and paid the rent due as per the said Memorandum prior to the execution of a formal lease. It is evident from the Plaintiff's receipt No. 14591 produced herein that the rent was paid upon execution of the Memorandum of Agreement on the 15th September 1989 although possession was taken on the effective date of 19th September 1989. The agreement is comprehensive in its terms and contains all the essential terms for the creation of a landlord and tenant relationship. It is not correct to say, as submitted by Counsel for the Plaintiff that the agreement has no termination clause. Clause 15 which provides for re-entry by the Landlord in the event of default of payment of rent and or performance of any of the Lessee's covenants is in law a termination clause. What the agreement lacks is a clause for termination at the Lessee's option save in circumstances stated in paragraph 18 thereof, that is, if the Lessee eases to carry on business in Kenya, whereupon the Lessee would be entitled to terminate the lease by paying three months rent from the date of vacating the premises.

Even in the absence of a registered lease the law is that such an instrument can and does operate as a valid contract between the parties as held in the East Africa Court of Appeal decision of SOUZA FIGUEIREDO & COMPANY –vs- MOORING HOTEL COMPANY LIMITED [1960] E.A. 926 in which the principles in WALSH –vs- LONDSDALE (1882) 21 Ch.D. 9 were upheld. In the latter case the Court held that

> **"a person who enters into possession of land under a specifically enforceable agreement for a lease is regarded in any Court which has jurisdiction to enforce the agreement as being in the same position as between himself and the other party to the agreement as if the Lease had actually been granted to him."**

I find that the above two authorities submitted by the Defendant do support his position that the Memorandum of Agreement herein does constitute a valid contract enforceable as a lease notwithstanding the absence of a formal lease. The Court cannot accept the Plaintiff's contention that the execution of the

Memorandum and the operation of its terms, and or the taking of possession by the Plaintiff was done "pending the execution of the formal lease." In my view, the provisions of Clause 14 of the Memorandum mandates only the Lessee to "execute a proper lease…. to be drawn by the Lessor's advocates." Properly interpreted the said clause tends to bind the Lessee further to the contract and restrict its possibilities to contract out, not the reverse. The words "pursuance with this memorandum" clearly show that the memorandum is not subject to the intended proper lease but that the latter would be executed in furtherance to the Memorandum of Agreement. This being the case the authorities submitted by the Plaintiff to support its contention that there was no valid agreement in the absence of the formal lease are distinguishable in that the agreements therein were expressly stated to be "subject to contract." See:

(1) CHILLINGWORTH –vs- ESCHE [1924] Ch.D 97

(2) WINN –vs- BULL (1887) Ch. D 27

(3) H.C. BERRY LTD –vs- BRIGHTON & SUSSEX BUILDING SOCIETY [1939] 3 All E.R 217

(4) DOE –vs- PULLEN 2 BING 748

(5) RIDGWAY –vs- WHARTON [1857] H.L.C. 238

as submitted by the Plaintiff. In all these cases the execution of a formal lease was a condition precedent. Thus in ROSSITER –vs- MILLER (1878) A.C. 1124 the Court held that unless the drawing up of a contract made a condition precedent essential to the contract becoming effective the contract will be construed as valid on the unconditional acceptance of the offer. The facts in the "ROSSITER" case are similar to the present case in that an oral offer was made for the sale of land under certain printed conditions.

The offer having been accepted "subject to the particulars printed on the plan" a contract was held to have come into place in the absence of a formal instrument since the conditions of the sale had been contemplated in the offer and accepted. Clause 14 of the Memorandum of Agreement cannot be said to have the effect of a condition precedent particularly since it relates only to the Lessee alone and not both the Lessee and Lessor.

I see nothing in the Memorandum of Agreement to cause one to conclude as urged by the Plaintiff that the tenancy herein should be construed as a periodic one since the terms of the agreement are comprehensive and clear. The agreement does not leave anything for negotiation and cannot thereafter be said to have been entered in anticipation of the formal lease. Having found no legal basis for the Plaintiff's contention that the agreement herein is a periodic tenancy terminable by notice by either party and instead finding that the same is only terminable under clauses 15 and 18 thereof I am bound to find that the Plaintiff's notice of 20th December 1989 was issued contrary to the terms of the agreement and is therefore illegal and of no effect. I accept the Defendant's submission that the same is an attempt to unilaterally repudiate a validly existing agreement which is not permissible in law. It is quite clear from evidence that the Plaintiff's desire to terminate the contract was mooted by the termination of its General Manager's employment and was not contemplated at the signing of the agreement. A party cannot in law alter the terms of an agreement to suit itself or at its convenience. Accordingly I find that the Defendant was entitled to reject the said notice and treat the contract as subsisting under the terms thereof.

As with other terms, the payment of rent and the mode of payment is clearly spelt out in the Memorandum of Lease. Indeed the Plaintiff in its evidence through PW1 admits that rent was payable quarterly for the initial three months period and every six months (in advance) thereafter. The Plaintiff paid the quarterly rent on signing the agreement. It follows from my finding the notice issued by the Plaintiff invalid that six months rent was due on the 19th December 1989 to cover the period upto 18th June 1990.

This being the case the Defendant was entitled to levy distress for the same under Clauses 15 and 16 of the Memorandum of Agreement as well as under the provisions of Section 3(1) Of The Distress for Rent

Act (Chapter 293) which, as rightly submitted by the Plaintiff's advocate, gives the same rights for distress as obtains under the English Common Law.

The said section provides as follows:

> **"Subject to the provisions of this Act any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the Common Law of England in a similar case."**

The common law position in cases similar to the present one is clearly spelt out in the case of WALSH – vs- LONDSDALE (Supra) as follows:

> **"A lessee in occupation under an executory lease is subject to the same right of distress as if a lease had been granted and if……. under the terms of the lease rent would have been payable then distress is lawful."**

In light of the above I find that the Defendant was entitled to distrain for rent due in accordance with Clause 16 of the Memorandum of Agreement. However, the motor vehicles distrained herein were so distrained not at the suit premises but at the Plaintiff's offices an act which the Plaintiff say is unlawful and illegal. The Defendant has attempted to justify the distress by claiming that the Plaintiff, having fraudulently removed its goods from the suit premises, then the Defendant was entitled to attach the motor vehicles as he did. I find no legal basis for this contention. Although Sections 9 and 11 of the Distress for Rent Act provides that a landlord may distrain and sell goods fraudulently carried out of the suit premises and may break open any house to seize the same, no evidence was adduced before me to show that the motor vehicles attached by the Defendant had been removed from the suit premises. Neither did the Defendant offer any evidence of the alleged fraud. Clause 16 of the Memorandum of Agreement provides specifically for the powers of a party to distrain expressly stating that the same to extend to

**"any tenant's movable not otherwise distrainable by law which may from time to time be thereon."**

The contract limits the power to distress upon the tenant's goods found on the premises and must be taken to have excluded the operation of the statute. In the premises I find that although the Defendant was entitled to levy distress upon the Plaintiff's goods, the proclamation and attachment of the Plaintiff's motor vehicles away from the suit premises was, in the absence of evidence that the same had been removed therefrom was wrongful. However the said does not in my view affect the parties' position herein since the Defendant was legally entitled to levy distress for rent rightfully owing. In any event the motor vehicles have since been restored to the Plaintiff.

Having found that there was indeed a valid contract between the parties herein which could not be and was not terminated by notice issued by the Lessee as purported herein and also that the Defendant was entitled to reject such notice, it follows then that the agreement under the Memorandum of Agreement was valid and subsisting upto and until 18th September 1991 or when another tenant was put in possession whichever was earlier. The Defendant did not tell the Court on what date that took place. It is not clear however why the Defendant after receiving his keys by post in June 1990 took over one year to lease the property again. He has not in his evidence shown the Court that he had any difficulties in finding a tenant and appears not to have made any attempts to minimize the loss occasioned by the Plaintiff's vacating of the premises. This notwithstanding the Defendant's losses as particularized in the Counterclaim and supported by various receipts produced in evidence do not appear to have been specifically challenged by the Plaintiff. The only defence to the Counterclaim is that the Plaintiff is not liable to compensate the Defendant for costs of replanting the garden, arguing that the Plaintiff was not under any obligation to take care of the garden and maintain it. There can be no valid ground to support this reasoning considering that the Plaintiff had rented the whole of L.R. No. 209/7314 a plot measuring 0.75 acres. It would be inconceivable for the landlord to maintain the garden whilst the Defendant was in occupation. In the absence of a valid rebuttal of the Defendant's Counterclaim I have no option but to allow the same save for the prayer for damages which was abandoned at the hearing. Further as no

evidence was placed before me to support the claim that the monies of expended by the Defendant in restoring its premises was borrowed I disallow his various claims for interest at bank rates.

Taking all the above into consideration and in view of my various findings hereinabove I am of the considered view that the Plaintiff has failed, on the balance or probabilities, to prove its case against the Defendant and the same is hereby dismissed with costs to the Defendant.

On the other hand I find that the Defendant has on the balance of probabilities, proven his Counterclaim against the Plaintiff and I consequently enter judgment as prayed in the Amended Defence and Counterclaim but disallowing the claim for general damages which was abandoned at the hearing and which by consent of the parties substituted with a prayer for liquidated damages amounting to Kshs.1,229,364. Prayers aaa, aaaa are also disallowed, the alleged fraud having not been proven against the Plaintiff. Prayers (c) and (e) have also been overtaken by events and cannot be granted.

evidence having not been adduced to support the claim for exemplary damages, prayer dd of the amended Defence and Counterclaim is also disallowed. In the premises having so entered judgment for the Defendant on the Counterclaim, I order that the sums held in the joint account be utilized to meet the Plaintiff's liability to the Defendant herein and any balance thereof to be paid out to the Plaintiff. Interest on the award as per this judgment shall be at Court rates from the 19th of December 1989 until payment in full.

The Plaintiff shall pay to the Defendant costs of the Counterclaim with interest at Court rates, the same to be taxed by the taxing officer of this Honourable Court.

Dated and Delivered at Nairobi this 30th day of September 2005.

**M.G. Mugo**

**Judge**

***In the presence of***

***Kibicho for the Plaintiff***

***N/A for the Defendant – Defendant present***