**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**
**Civil Suit 254 of 2004**

**VELJI SHAMJI CONSTRUCTIONS LTD ............................................ PLAINTIFF**

**VERSUS**

**WESTMALL SUPERMARKET LTD .................................................. DEFENDANT**

**Coram: Before Hon. Justice Mwera**
**Omwenga for plaintiff**
**Mburu for defendant**
**Court clerk – Kazungu**

**RULING**

When the court was about to hear the dispute as per the plaint herein the defendant put forth a preliminary point which Mr. Mburu argued on two fronts:

First that the tenancy agreement contained an arbitration clause and so the parties should go that way and secondly that the litigants herein conducted themselves in such a manner as to change the character of the original tenancy to a controlled one, that should be governed under the popularly referred to Land-lord & Tenant Act (Cap. 301).

Mr. Omwenga did not agree saying that all his client sought was a declaration that this tenancy had expired by effluxion of time, among other reliefs. After hearing both sides the court is of the view that the preliminary objection should not be upheld.

The parties entered into a tenancy of 5 years and 3 months over the subject premises with effect from 1st March 1999 to 31st May 2004. Thus by the time this suit was brought the defendant had overstayed for some 6 months in the premises. That was not a controlled tenancy which started by yielding rents of Kshs. 20,000/- per month (increasing over the tenancy period).

The issue of arbitration was incorporated in the agreement as per clause (ee) which read in part:

> **“(ee) t*o yield up the premises at the expiration or determination of the term hereby granted ...................."***

The tenancy added under (e) of the said (ee) that if the tenant requested to extend the tenancy three months before the expiry date, the landlord (the plaintiff here) would consider to grant the same so long as the tenant shall not have breached or failed to observe the covenants of the agreement. That if there was no difference on the question of rent, the tenant would vacate the premises except that:

> ***“....................... in case of any difference touching (on) this clause the same shall be determined by a single arbitrator ....................... “ (underlining added)***

This court understands the above term of the tenancy agreement to be that an arbitration would be resorted to only in the event of the lease expiring or being terminated and if the tenant sought to extend the period, yet a difference about rent payable arose then and only then would parties go to arbitration.. The arbitration was not about the whole tenancy which, though not registered nonetheless, acted as a contract between the parties and a valid one at that (see Bachelor’s Bakery Ltd Vs Westlands Securities Ltd [1992] KLR 366). Thus the defendant has not successfully argued that his suit goes for arbitration and

not trial. Infact the lease expired, the defendant did not seek its extension and the question of rent is not the one that falls to be determined by this suit.

On the argument that the tenancy became a controlled when the plaintiff at some point agreed to a lesser monthly rent than agreed, this court does not agree. The definition of a controlled tenancy under Section 2 of Cap 301, which this court sees no use in reproducing, does not contain a factor of accepting reduced rents from those initially agreed.

In sum the preliminary objection is rejected with costs to the plaintiff. The suit to be set down for trial as soon as the diary allows.

orders accorddingly

Deliverd on 8th september 2005

**J W MWERA**

**JUDGE**