



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA DISTRICT REGISTRY**

**CIVIL APPEAL NO. 120 OF 2001.**

**MULTI INVESTMENT LIMITED.....APPELLANT**

**VERSUS**

**SALAMBO LIMITED.....RESPONDENT**

**J U D G M E N T**

The appellant/Landlord was and is the registered Proprietor of a leasehold known as Mombasa/Block XX/91, Moi Avenue, Mombasa (hereinafter referred to as the premises). It would appear from the evidence of Ramchand Hiranana Gidoomal the appellant's only witness before the Business premises Rent Tribunal that Salambo Ltd. occupied the premises on the basis of a letter signed by both parties with effect from the 1st day of January 1985 and that there was no formal lease registered.

The letter created a lease for a period of two years subject to renewal for one year by the Respondent at a monthly rent of KShs.10,000/=. The original lease was due to expire on 31st December 1986, however the tenancy relationship continued even without any formal extensions but what is evident is that rent payable per month kept on increasing so that by 1987, the rent was fixed by consent in form of a letter at KShs.14,000/=.

The Respondent was to carry out the business of a Restaurant, bar and a nightclub. It was the evidence of the appellant before the Business premises Rent Tribunal that they discovered in September 1992 that the Respondent had assigned, sublet and or parted with possession of the premises without their consent to one Salambo Investments Ltd. It was claimed by the appellant that it was as a result of this discovery that one of the Respondent was served with a notice of termination dated 4th June 1992 which notice was also copied to Salambo Club also known as Salambo Proprietary Club.

The notice was served upon the Respondent pursuant to the provisions of Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, 1965 (Cap. 301 Laws of Kenya), on the ground that the Respondent had assigned and parted possession of the premises without the consent of the appellant, the landlord. Upon receiving the notice, the Respondent/Tenant filed a reference at the Business Premises Rent Tribunal, pursuant to the provisions of section 6 of the Landlord and Tenant (Shops, Hotels and catering (Establishments) Act, 1965.. Ramchand Gidoomal, the appellant's witness was thoroughly cross-examined by the Respondent's Advocate during the trial before the Business Premises Rent Tribunal where he conceded that he wrote a letter dated 18th July 1989 authorising the Respondent, Salambo Ltd. to transfer and or hand over the tenancy of the premises to

Salambo Proprietary Club with effect from 1st July 1989.

However it was also his contention that Salambo Proprietary Club did not take over possession of the premises because there was no formal lease and for non-payment of rent. The appellant's witness also conceded before the Business premises Tribunal that there were discussions going on between himself as a representative of the appellant and one P.T. Kinyua on behalf of the Respondent. There were various correspondences exhibit before the Business Premises Rent Tribunal indicating there were discussions between protagonists with the aim of reaching at a settlement.

The Respondent's side of the story before the Business premises Rent Tribunal was that Salambo Proprietary Club was registered after the appellant approved their intention to take over possession of the premises from Salambo Ltd. The Respondent called two witness namely Francis Wanjohi and Papius Thuku Kinyua who though gave conflicting testimonies but were in agreement on the fact that Salambo Proprietary Club was running or operating the business in the suit premises with the consent of the appellant vide letter dated 18th July 1989.

The learned Business Premises Rent Tribunal's Chairman declined to approve the appellant's/Landlord's Termination Notice and allowed the Respondent/Tenant's reference. The learned Chairman also found that the appellant duly gave consent to the Respondent to assign the lease to Salambo Proprietary Club. Secondly, the chairman also found that the Respondent had a right to assign, sublet or part with possession of the tenancy without the Landlord's consent when the lease is silent and by virtue of above Salambo Proprietary Club became a tenant by the definition of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, 1965 (Cap. 301 Laws of Kenya).

Being dissatisfied with the Tribunal's decision, the appellant appealed to this court.

The appellant was represented by Mr. H.AT. Anjarwalla who proposed to argue together the eleven grounds of appeal set in the Memorandum of Appeal. The Appellant's attack on the Tribunal's approval of the letter dated 18th July 1989 is on the basis that the lease agreement which arose out of the contents of that letter was never executed. The letter was produced as defence exhibit No.1 before the Business premises Rent Tribunal. The learned Counsel submitted further that the Tribunal Chairman erred in holding that there was a tenancy between the appellant and Salambo Proprietary Club whereas there was no evidence to support that view.

It was also his submission that the tenancy between the appellant and the Respondent had lapsed sometimes in December 1986 and that there was no evidence of an extension hence the tenancy continued as a month to month tenancy, therefore the Provisions of S.3 of Cap. 301 came to play. It therefore meant that without the consent of the appellant/Landlord there is was no lawful assignment to Salambo Proprietary Club by the Respondent/Tenant. Consequently the appellant sought for the following prayers on appeal:-

- (i) This appeal be allowed with costs.
- (ii) The judgment given by the Tribunal to be set aside.
- (iii) The appellant's Notice of termination to be ordered
- (iv) The respondent and/or Salambo Proprietary Club or any other occupier of the suit premises in Mombasa/block XX/91 be allowed to vacate and hand over possession of the suit premises to the appellant.
- (v) The appellant be given cost of the reference to the tribunal.
- (vi) The Respondent, and/or Salambo Proprietary Club or any other occupier of the suit premises be ordered jointly and severally to pay Mesne profit and or damages at the rate KSh.46,391/= per month from the date of the aforesaid judgment till delivery of vacant

possession to the appellant.

Mr. James Gathuku appeared for the Respondent who opposed the appeal and submitted to the effect that the letter dated 18-7-89 signified that the assignment of the premises by the Respondent to the Salambo Proprietary Club was sanctioned by the appellant. He also submitted that the appellant had verbally consented to Salambo Proprietary Club to take over possession of the premises and the letter of 18.7.89 was only to specify the terms to the advocate who had been instructed to draw the lease agreement. It is important to reproduce the contents of the aforesaid letter addressed to the firm of Gikandi & Co. Advocates, Bima Towers, Mombasa from Multi- Investments Ltd. (the appellant).

**“RE: SALAMBO PROPRIETARY CLUB**

**We have agreed with Mr. Francis Wanjohi to give him lease for 5 years 1 month on the following conditions.**

**1. Rent for the first 2 years (from 1st July 1989 to 30.6.1991) would be KShs.16,800/= per month payable in advance free from all deductions including bank charges on upcountry cheques 2. Rent for next 3 years 1 month (from 1.7.1991 to 31.7.94) there will be 20% increase, that is rent then would be KShs.20,160/= per month, payable in advance, free from all deductions including bank charges on upcountry cheques. 3. Any increase in site value tax will be payable by the tenant proportionately.**

**4. Tenant will not sub-let the premises without written consent from the landlord.**

**5. Water, electricity and telephone charges will be borne by the tenant.**

**6. Lease is to be prepared by the Landlord’s Lawyer’s costs to be paid by tenant.**

**Thank you.**

**Yours faithfully,**

**MULTI-INVESTMENT LTD.**

**RAMCHAND GIDOOMAL**

The Respondent’s Counsel also pointed out the fact that the appellant’s prayers in paragraph 4 and 6 of the Memorandum of Appeal cannot be competently granted by the appellate court because they were not the issues before the Tribunal. The appellant’s Counsel attempted to allude that under Sections 12 & 15 of Cap. 301 Laws of Kenya this court has jurisdiction. I will start with the last issue by stating that what was before the Business Premises Rent Tribunal was a Notice of termination and a reference. There was no prayer for the eviction or removal of other tenants whether illegal or legal other than the appellant. I am in agreement with the submissions of the Respondents Counsel’s view that, I have no jurisdiction to issue such prayers at the appellate stage. And even assuming I had the jurisdiction to do so, the parties sought to be ejected must be given a chance to be heard over the issue.

I will be breaching the rules of natural justice if I issued the orders prayed for without calling upon the other side to give their story. I will therefore decline to grant prayers of paragraphs 4 and 6 of the Memorandum of appeal. The Tribunal’s Chairman considered at length the issues being now being raised on appeal by the parties when they appeared before him. The appellant’s complain is that the chairman erred in finding that there existed a lease between the appellant and the Respondent based on the letter dated 1.1.85. Actually there was no such a letter but there was one which was undated indicating that the lease would commence with effect from 1.1.85 for a period of 2 years and subject to renewal for 1 year. According to the appellant, this lease lapsed in December 1986 and that the lease between the appellant became a month to month tenancy under Cap. 301.

I must point out that no evidence was given before the Tribunal to establish the fact that the tenancy became a month to month tenancy. The evidence on record show the contrary. It would appear that the terms creating the tenancy of 1.1.85 continued after December 1986 save for change on the rent payable per month. This piece of evidence is contained in Defence exhibit No.7 which is a letter dated 20.1.1987. The letter is addressed to the appellant and reads:-

**“We refer to our yesterday’s meeting with Mr. Francis Wanjohi and confirm that we have reached an amicable settlement concerning the increase of rent on the following terms and conditions:**

**(a) Rent would be Kshs.14,000/= per month with effect from 1st January 1987 payable in advance.**

**(b) Any increase in Municipal site value tax will be born by all tenants proportionately.**

**We agree and confirm the above agreement with M/s. Multi-Investments Ltd.**

**MANAGING DIRECTOR**

**MANAGING DIRECTOR**

**M/S MULTI-INVESTIEMNT LTD**

**M/S SALAMBO LTD.**

**(LANDLORD)**

**(TENANT)**

**Thank you**

**Yours faithfully**

**, MULTI-INVESTMENTLTD**

.” The Chairman appears to have taken the view that the terms of tenancy of 1.1.85 were extended. That agreement was silent on the issue of sub letting, assignment or parting with possession. There being no other evidence before him to show a contrary view, I think the learned Tribunal Chairman arrived at the correct decision and applied the correct principles. I will therefore overrule the appellant submission to fault the chairman’s decision.

The remaining issue is whether the Tribunal Chairman erred in finding that the appellant had given consent to the Respondent to sublet, assign and or part with possession. It is evident that there has never been any formal lease registered over the premises. The parties seem to have relied on very simple letters to define their rights in the suit premises. The tenancy between the appellant and the Respondent was created by a simple letter which was even undated but the parties acknowledged the same to have created legal rights. The appellant did not challenge the legality of the undated letter but has opted to challenge the one dated 18.7.89. The appellant does not deny that they signed the aforesaid letter.

The appellant’s complaint is that there was no registered lease and no rent payments were made by the new tenant i.e Salambo Proprietary Club. The appellant conceded before the Tribunal Chairman that he acceded to the Respondent to assign the lease to Salambo Proprietary Club. I find that the Tribunal Chairman was right to arrive at a decision that the appellant had legally consented to the Respondent to assign and part with possession to Salambo Proprietary Club. I have not been convinced from the evidence presented to the Tribunal that the learned Chairman erred or arrived at the wrong decision. What is clear in the evidence before the tribunal was that there was cold relationship between the appellant and the Respondent’s assignees, which in my view does not have to change the existing legal positions already established when the parties had a cordial relationship. I also agree with the Tribunal Chairman that there is a legal tenancy relationship between the appellant and Salambo Proprietary Club by virtue of the letter dated 18.7.89 which in my view formalized the Club’s occupation commenced on 1st July 1989 in place of the Respondent. The aforesaid letter was not denied by the appellant nor was it declared as a fraud or a forgery. In any case the previous tenancy relationship between the appellant and the

Respondent were commenced by a way of a letter like the tenancy now in dispute.

The later tenancy which came into existence on the 1st day of July 1989 was for a period of 5 years 1 month, hence the same was outside the jurisdiction of the Landlord and Tenant (Shops Hotels and Catering Establishments) Act Cap 301 of the Laws of Kenya. The appellant's attempt to issue a Notice of Termination to the Respondent was of no consequence and superfluous because already the Respondent had parted with possession and this fact was fully within the knowledge of the appellant which they attempted to conceal or deny before the Tribunal.

In the circumstances, for the reasons I have attempted to set out, I consider that the appeal should be, as it is dismissed with costs and the determination of the Business Premises Rent Tribunal upheld.

**Read and Delivered this 3rd day of June, 2003**

**J.K. SERGON**

**J U D G E**