



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 989 OF 1999**

**JANI INVESTMENTS LIMITED.....PLAINTIFF**

**-VERSUS-**

**MAVALS KENYA LIMITED.....DEFENDANT**

**RULING**

The applicant is asking for the defence to be struck out and judgment to be entered in favour of the plaintiff on the ground that this defence does not raise triable issues.

**Evidence:**

The application is supported by an affidavit sworn by **Suresh Amin** who is a Director of the Plaintiff Company and who explains that the relationship between them is contractual arising from a lease dated 14.11.99 for a period of 6 years running from 1.7.1992 to 30.6.1998. That after the expiry of this period the defendant had agreed to vacate the premises. The defendant has not accepted any rent after the expiry of the lease. The defendant filed a defence to the claim in which the defendant raises the issue that it last executed a lease for the premises in 1987 for a period of 5 years and three months. It is further said that if there was any other lease the same was not executed and or signed by the defendant and therefore it is void. It therefore became a monthly tenancy. Having filed a reference with the Tribunal, the defendant is not a trespasser and the matter should await determination by the Tribunal. The Replying Affidavit is by Mr. Githinji defendant's advocate on behalf of the Director's of the Defendant Company who are said to be in Britain. The facts are deponed in support of the defence and maintains that the matters raised in the defence are triable issues which would entitle the defendant to defend the claim.

**Findings:**

The first issue raised by the defence is that what is between the parties is a monthly tenancy. A copy of the lease is annexed to the application and it shows that it was executed by the parties and or the defendants and signed by **Osman Abdel Rahim Mohamed**. It is not denied that this lease was subsequently registered but it is said that the defendant's directors are **Salaheldmi Fadil Suleman** and Caroline Shallery who are said not to be the signatories to this lease. It is however clear from the evidence that the relationship of Landlord and Tenant existed between the parties and that both parties agree that the tenancy came to an end by effluxion of the period in the lease. That the lease had been registered it would mean that it had been properly executed. The defendant has not in the defence or in the replying affidavit denied that the lease had been registered and it is not possible that the defendant was not aware of its existence and to maintain so as alleged in paragraph 4 of the replying affidavit is stretching the imagination too far. This letter dated 21.9.98 from **M/s Swaleh Kenyeki & Company Advocates** for the Defendants to M/s C.S. Joshi & Joshi Company Advocates makes reference to the lease.

The letter confirms that the Defendant would vacate the premises but raised the issue of the partitions. This letter is not written on a without prejudice basis and the defendants have not shown any reason why the court would not take its contents in consideration. The letter therefore confirms that there was a lease between the parties, which had come to an end. The reasons given by the defendant that it was written on a without prejudice is incorrect. There were no negotiations on the issue of the tenancy between the parties at the time the letter was written. Indeed it is categorical on the issue of the tenancy that the defendants would vacate. The only issue raised in the letter was whether the defendant would be allowed to find a tenant who would pay for the partition. This cannot be called negotiations because the terms of the lease required that the defendants leave the premises in the conditions they were given. I reject the contention that the letter was written on a without prejudice and I find that there was a lease between the parties and that the defendant was aware of it. The defendant was paying the rent when the lease expired and that rent was being paid on the terms of the lease and not on monthly basis.

The other issue raised in the objection to this application is that the defendant has filed a reference to the tribunal and therefore the plaintiff should await the outcome of the Tribunal. It is true that a reference has been filed in the Tribunal. This reference is based on the premises that this is a controlled Tenancy. The defendant's position is that when the Tenancy came to an end it reverted to a monthly Tenancy and therefore became a controlled Tenancy. The Plaintiff's position is that this could have been so if there was a "holding over" which was acquiesced by the Landlord which was not the case here since the Landlord has not accepted any rent after the expiry of the lease. I have looked at the Copy of the Lease which is annexed and as I have observed the parties acted on this lease as evidenced by the conduct of the parties through payment of rent until the end of the term of the lease. The Tenant, the defendant had not denied the existence of the lease if anything the letter of 21 by its advocates confirmed the existence of the lease. The defendant at this stage is estopped from denying its existence.

Since the reference to the Tribunal was based on this fact that there had been no lease. I find that the reference was based on the wrong premises, as there was a lease. The only circumstances under which there could be a Monthly Tenancy after the expiry of the lease is when there is a holding over which is accompanied by payment of rent or other overt act on the part of the lessor indicating a recognition of the Tenancy. Here in this case the rent had not been accepted and there was no overt act on the part of the lessor which acknowledges the Tenancy. There was no evidence that the lessor that there was acceptance of the continuance of the Tenancy, to the contrary all the evidence shows that the lessor did not want the tenancy to continue after its expiry.

I therefore find that there was no monthly Tenancy created by holding over after the expiry of the lease and consequently the tribunal reference is therefore not relevant to these proceedings.

I **hold** that the present proceedings can not be held in abeyance by the Tribunal reference.

Having found that there was a lease and there was no holding over the defence does not raise any other issues which could amount to triable issues. Under these circumstances the defence is a sham meant to delay the giving up the vacant possession of the premises.

### **RULING**

Based on these findings as there are no triable issues raised by the defence, the application shall be allowed and the defence struck off and judgment entered for the plaintiff. The defendant shall pay the costs of these proceedings.

Delivered and dated this 22nd day of February, 2000.

**KASANGA MULWA**

**JUDGE**