



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

Civil Suit 382 of 1996

1. MOHAMED SHARIFF ALI

2. AHMED SHARIFF ALI.....PLAINTIFFS

-VERSUS

KASSIM ABDALLA JUMAT/A SANAA GALLERY..... DEFENDANT

RULING

On 3/5/1995 a "Title Deed" was issued by the Land Registrar Mombasa under the Registered Land Act (Cap 300) Laws of Kenya, in respect of Land Title Number MOMBASA/BLOCK XXX1/.10. It certified that:- "Mohamed Shariff Ali and Ahmed Shariff Ali are now registered as the absolute proprietors of the land comprised in the Title, subject to the entries in the register relating to the Land and to such of the overriding interest set out in Section 30 of the Registered Land Act as may for the time being subsist and affect the land." There was an encumbrance registered against the Title when it was issued. That was

"A lease dated 28/3/1991 to Kassim Abdalla Juma T/A Sanaa Gallery for 5 years and 3 months from 1/4/91 at the monthly rent of Shs.3,500/=, office Shop on ground floor." It was registered on 24/4/1995 - about 9 days before the Title was issued to Mohamed and Ahmed. - J2 - At the time the Lease was entered into, Mohamed and Ahmed were not the owners of the property. The owners were Hatimali A bdeali Taheralli, Mustafa Abdeall Taheralli and Saifuddin Abdeali Taheralli.

The lease term was to expire at the end of 5 years and 3 months from 1/4/91 that is to say on 30/6/1996. But the property was sold and transferred to Mohamed and Ahmed subject to that lease on 3.5.95. Amongst other provisions it had been agreed between Sanaa Gallery and the former owners that Sanaa Gallery would:-

",... Yield up the leased premises with the fixtures and additions thereto (other than the removeable fixtures or fittings added by the Lessee) at the determination of the term hereby created in such state of repair as shall be in accordance with the Lessee's covenants herein before contained." Upon purchasing the property, Mohamed and Ahmed served notice on Sanaa Gallery on 27.3.96 (that they should hand over vacant possession of the property upon expiry of the Lease term. They threatened that they would not accept any rental payments after June 1996 but would instead charge Shs.2000/= per day as damages from 1.7.96 if vacant possession of the property is not handed over as notified.

Sanaa Gallery responded on 11.7.96 stating that they did not enter into any lease agreement with Mohamed & Ahmed and asserting that they were protected tenants under Chapter 301 Laws of Kenya since they had been paying rent on a monthly basis. They refused to vacate.

One week later Mohamed & Ahmed came to Court and filed this suit on 18.7.96. They pleaded ownership of the property and the written lease whose term had already expired. They prayed for vacant possession and for Mesne profits at the rate of Shs.2000/= per day from July 1996 until possession is delivered up.

Sanaa Gallery took up their assertions in the defence filed on 7.8.96 that there was no priority of contract between them and Mohamed & Ahmed. They also pleaded the lease itself was not enforceable because it was not in the prescribed form and was not registered in the prescribed names. It could not therefore grant any interest in the property. They asserted that they continued to occupy the premises even after the expiry of the term with the consent of Mohamed & Ahmed and were therefore periodic tenants protected under Chapter 301 Laws of Kenya. For that reason the High Court has no business entertaining the suit for lack of jurisdiction.

As an alternative pleading without derogating from the legal objectives Sanaa Gallery averred that there has never been any lease signed between them and Mohamed & Ahmed and therefore the two cannot purport to terminate or decline to renew a non-existent lease between them. They protested the rate of Mesne profits demanded as punitive and asserted that the plaintiffs were only entitled to monthly rent after 30.6.96.

Mohamed and Ahmed saw no substance in such defence and felt that they were entitled to summary Judgment for vacant possession of the property as prayed in their plaint and whether there should be an order for payment of Mesne profits.

For the Applicants it was urged by Mrs. Ali that upon the purchase and transfer of the property all interests and encumbrances were also transferred. She cited S. 91 of the Registered Land Act (RLA) on the effect of transfer on agreements in leases and S. 93 on Transfer subject to lease and submitted that when property is transferred it is transferred subject to the lease. There is no need to notify the Lessee. Mrs. Ali also referred to S. 28 of the Act on the Rights of the proprietor, of land and submitted that those rights are absolute and only subject to the Leases and other encumbrances shown in the Register and to the overriding interests under S. 30 of the Act none of which are applicable here. So that, once the proposition that a lease need not be registered for. Cap 301 to apply. It need only be written and for a period, not exceeding 5 years. • The written lease in this matter was for a period in excess of 5 years and was valid between the parties whether or not it was registered. She also cited CA2/78 BACHELORS BAKERY VS. WESTLANDS SECURITIES LTD. for the proposition that a Landlord is entitled to possession of property at the end of the term without notice. It was stated in that case that: "the Landlord & Tenant Act does not have the effect of assuming jurisdiction over tenancies created by an agreement in writing by which the parties have contracted for a term exceeding five years," Mrs. Ali prayed for grant of the order sought on those grounds.

Sanaa Gallery opposed (the application through Mr. Kimani, their advocate. Although Mr. Kimani abandoned the contention made in the statement of defence that this court has no jurisdiction to deal with the matter, he nevertheless assailed the application on technical grounds before reverting to the Reply Affidavit which under O 32 r(2) should be the basis for showing that the defendant should have leave to defend. Only one ground of opposition is raised in the grounds filed on 2.12.96. That is

"There are triable issues." The technical grounds raised are firstly that the Affidavit, sworn in support of the Application is not supported by proper Exhibits and therefore in the absence of those exhibits the affidavit remains a bare assertion which should not be relied on. The

exhibits referred to are the Title Deed exhibited to show ownership of the property by Mohamed and Ahmed and the Registered lease between Sanaa Gallery and the former owners of the property. The focus of the objection was that these were only photocopies and not originals and they did not accord with the requirements of the Evidence Act production on production of documents evidence. Mr. Kimani cited S.2 of the Evidence Act to show that it applies to Affidavits and S.68 to show that the originals should have been attached to the Affidavit. He also attached the leased documents on the basis that the document annexed is not the one that was stamped during the Registration process in which event it would not be in compliance with S.19 of the Stamp Duty Act and is thus inadmissible in evidence. Again even if the lease document was registered, it was not in the prescribed form and is therefore not admissible in evidence and it cannot confirm any interest in the land.

As for triable issues which must await the main trial Mr. Kimani submitted that the question of priority of contract is a serious one for trial. That is because the lease is not between the plaintiffs and the defendants. The other triable issue is whether by acceptance of rent between 27.3.96 and 30.6.96, the plaintiffs consented to the continued occupation of the premises by the defendants. He referred to the Replying Affidavit which lists down the other triable issues as

- whether or not the holding over is with or without the consent of the plaintiff.
- whether or not a periodic tenancy has been created as a result of holding over.
- whether or not the act of accepting rent after issuance of the plaintiff's Advocate's notice can be construed as consent or acceptance of the defendant as a tenant.
- What is the legal effect of non-transfer of the lease to the plaintiffs.

- whether Shs. 2000/= per day as Mesne profits is exorbitant. Mr. Kimani then brought on the question of "priority of Estate" as the only common bond between the parties. By this I understand that the parties held interests in the same property which were mutually exclusive. A transferee of a parcel of land according to him cannot interfere with a sitting tenant unless by a separate agreement the rights of the lease have also been transferred. Unless there is such an agreement, the transferor has no interest at all in the lease. In this case it has not been shown that there was an express transfer of the Lease to the plaintiff and in that case they cannot sue on that lease.

For those reasons Mr. Kimani submitted that the defendant should have unconditional leave to defend the suit. He cited CA 35/77 CONTINENTAL BUTCHERY LTD. VS. SAMSON MUSILA NDAIWA for the proposition that the plaint, defence, the counterclaim and reply to defence if any and Affidavits in support of and in reply as well as all relevant issues and circumstances are all proper material for consideration in an application of this nature.

Finally Mr. Kimani submitted that if the defendants' objections are overruled and the application is granted, the court will consider that the defendants have been carrying on business in the premises and any order given would show the business of balance. He requested for a 12 month period within which the defendants would vacate.

I have anxiously considered these submissions and all the material placed before me. I agree with Mr. Kimani and the proposition made on the authority cited by him that all such documents and circumstances be considered. But it is also stated that each case shall be considered on its own merits.

Madan J.A. gave the reason for that:

"It is not difficult to understand the meaning of the straightforward provisions of Order 35. What is difficult is to apply the effect of the meaning to different applications for summary

judgment each of which presents its own set of facts, its own set of circumstances and its own set of controversies between parties. What is difficult is to construe the true purport of the Affidavits to reply which each time came up with new maneuvers, new logistics, new strategy and tactics with the object of obtaining leave to defend... sometimes a shabby skirmish..... There is no limit to the ingenuity of defendants aided by advocates, in offering new material to slip out of the provisions of Order 35. There is also no limit to the acumen of Judges to deal with the Legal jumble." Some of that ingenuity is, with respect, quite evident in this application. For I am persuaded that the application is well founded as there are no triable issues of fact worth submitting for full trial.

I see no substance in the technical objections raised that the Application contains only have assertions of the ownership of the property by the plaintiffs/ and the Lease agreement. The Evidence Act is applicable to Affidavit subject to any Act or any rules of court. The Civil Procedure Rules make provision for proof of facts by way of Affidavits under Order 18 and Order 35 under consideration here provides for the names of making the application. If it was the desire of the Defendants to see the originals of the documents served on them with the application, there are provisions for demanding that such documents be produced and or inspected before the hearing of the application. Annexures to Affidavits filed with applications under O 35 are invariably photocopies which unless there are express objections made in the Affidavit in reply, remain prima facie evidence of the fact they intend to prove. I see no pleading in the defence nor averment in the Replying Affidavit that the property did not belong to the plaintiffs as absolute proprietors. I see no basis for objecting to the lease document either. It was clearly stamped before it was lodged for Registration and was duly Registered on 25.4.95. There is no evidence before me to be contrary. At all events I consider these objectives to be purely academic. That is because the Defendants themselves have sworn in their Reply that they paid rents to the plaintiffs for the months of April and May 1996 and it is indeed on that basis that they seek a finding that the plaintiffs consented to their occupation of the premises as their tenants after the expiry of the lease. Such an averment cannot be made by one who considers either a total stranger.

I overrule the technical objections and find on the evidence before me that the property in issue was lawfully owned by the plaintiffs by way of purchase and transfer as at 3.5.95. I also find that there was an existing lease before such purchase between the defendants and the previous owner on the terms stated in that lease which was registered in the encumbrance section against the Title.

Having so found, the issues posed as triable issues become issues of law which can be summarily determined. The first is whether there was priority of contract between the plaintiffs and the defendant, this may be considered together with the submission that there was only a "priority of Estate" between the parties and nothing more. The submission I believe is made because on the face of the Lease document, the parties in this suit are not the persons from whose communications with each other the document resulted. On this basis, the lease agreement cannot confer rights or impose obligations arising under it on any person except the parties to it. That is the essence of priority of contract. But it is only any general rule which has various statutory and equitable exceptions and situations in which a third party can acquire rights under a certain contract.

In this particular case I am satisfied that the provisions of the Registered Land Act provide a complete answer to the issue raised. In this respect I agree with the submission of Mrs. Ali that upon the Registration of the plaintiffs as the proprietors of the land they acquired absolute rights under S.28 of the Act subject only the encumbrance registered against the Title; in this case.

The lease ran its full course upto 30.6.96. Rent was paid by the defendants and accepted by the plaintiffs upto that date. It was lawful rent payable and receivable under the terms of the Lease. But in March 1996 the plaintiffs gave notice to the defendants that they would not

renew the lease and wanted vacant possession upon expiry of the Lease. In point of fact there was no provision in the lease for any option to renew the lease. On the contrary there was a specific clause, reproduced above, that the defendants would yield up the leased premises. The notice served would in the circumstances be a superfluity. It is also a superfluity because under S.64 RLA once the term of a lease expires the lease determines absolutely unless a claim be made thereafter for holding over under S.52. Acceptance of rent after determination of the lease is evidence of consent.

The Affidavit of the Defendant says rent was paid and accepted between the date of the Notice and the date of expiry of the lease. This it is asserted signified consent and therefore there is a triable issue. This cannot be so. As I have stated above the notice given was unnecessary because the lease term was expiring in any event. The defendants were liable for payment of rent up to the end of the term. There can be no case for holding over before 30.6.96. There is no averment or Affidavit evidence from the defendants that they paid any rent or any rent was accepted by the plaintiffs after 30.6.96. I accept the plaintiffs Affidavit evidence that they did not accept or receive any such rent. Indeed they had made their intentions of not accepting the rent three months before the term ended and filed this suit 18 days after refusal to hand over vacant possession. The triable issues posed are therefore, in my view a red-herring.

The only issue that would have been triable is whether the plaintiffs are entitled to Shs.2000/= per day as mesne profits as these would have been in the nature of damages. But the claim was abandoned at the hearing hereof. I do not find it unreasonable for the plaintiffs to claim mesne profits at the rate of the rental payments on the property until vacant possession is given.

I am largely in agreement with the submissions of Mrs. Ali in this matter and I see no reason why the plaintiffs cannot have the orders they seek. I grant the application for vacant possession as prayed and order that mesne profits at the rate of Shs.3,850/= per month from 1.7.96 be paid to the plaintiffs until vacant possession is given.

It remains for me to consider whether I should exercise my inherent powers as requested by Mr. Kimani to grant the defendants a period of 12 months to vacate.

It was clearly the responsibility of the defendants to hand over vacant possession of the leased premises at the expiry of the term of Lease. They had notice of that 5 years and 3 months before they took possession of the premises. As the court of Appeal said in JESSE MWAURA VS HAJRABAISULEIMAN CA3 3/85 (UR).

"when a lease is expired the tenants responsibility is not at an end; for if the premises are in possession of an undertenant the landlord may refuse to accept possession and hold the original Lessee liable for the Lessor is entitled to receive absolute possession at the end of the term." The defendants refused to discharge this responsibility on untenable grounds and forced the plaintiffs to seek the orders of this court. They have now occupied the property for a period of about 11 months without the consent of the Landlord and without making any payments for such occupation. In these circumstances I am not inclined to grant a further period of 12 months to the defendants before the plaintiffs can fully enjoy the fruits of their investment.

However if the mesne profits up to and including 30.9.1997 are fully paid within the next 14 days, the defendants may have up to 30.9.97 to hand over vacant possession. In default of such payment, the orders herein shall take effect forthwith.

Dated at Mombasa this 23rd day of May 1997.

P.N. WAKI

JUDGE