IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Apaloo JJA & Masime Ag JA)

CIVIL APPEAL NO. 84 OF 1987

BETWEEN

ATTORNEY-GENERAL.....APPELLANT

AND

REVOLVING TOWER RESTAURANT.....RESONDENT

RULING

(Appeal from a Judgment of the High Court at Nairobi, Gicheru J)

April 15, 1988 **Platt, Apaloo JJA & Masime Ag JA** delivered the following Ruling.

A preliminary point was taken by the respondent/plaintiff urging the Court to strike out grounds 4 and 9 of the memorandum of Appeal. These grounds are as follows:

> "4. That the learned trial Judge erred in law and in fact in not making a finding that the formal lease having not been executed and registered, the tenancy was a periodical tenancy running from month to month;" and
>
> "9. That the learned trial judge erred in law and in fact in computing the anticipated profits for three years when the tenancy was in law a periodical tenancy as there was no executed lease."

Mr. Muite's submissions were that these grounds of appeal raised issues for the first time not canvassed in the Court below. He referred the court to *Tanganyika Farmers'Association Ltd v Unyamwezi Development Corp Ltd.* [1960] EA 620 where it was held that an appellate court has discretion to allow an appellant to take a new point if full justice can be done to the parties, but since the court was far from satisfied that the matter had been properly pleaded or that all the facts bearing upon the new point had been elicited in the court below the appellants could not now be permitted to argue a new case.

With those principles the Court would be fully in agreement; but we would point out that the power has been exercised by this Court recently in *Securicor Ltd v Combined Warehouses Ltd.*, Civil Misc Application No.67 of 1988, and we must always bear in mind that was said in *Amarshi Madhavji v Sardarilal Ltd* [1977] KLR 8 at p 14 where it was remarked that it would be intolerable for a court of last resort to be bound by a lower court's decision on a question of law which is manifestly wrong.

The Judgment of the High Court was referred to, where a letter dated 10th June 1985 was exhibited which

ended with the statement that a two years draft lease was being prepared. The learned Judge remarked:

> "It is now common ground that the subsequent lease was for a term of three years."

Later on the learned Judge concluded:

> "As I said at the beginning of this judgment, there is no dispute that the restaurant was to lease the 27th and 28th Floors at K.I.C.C. for a period of three years. From the findings I have made above, there is no doubt in my mind that the defendant is liable….. I enter judgment for the plaintiff against the defendant and dismiss the defendant's counterclaim, it is without any merit whatsoever. I award the plaintiff a sum of Shs 12,154,019/70 as general damages."

This figure appears to have been calculated in accordance with Exh 10 and covers loss in the way of investment under several heads, and profits for the lease period calculated over three years. Consequently the agreement for the period of three years was the basic finding of the plaintiff's right to run the restaurant in question for that period, and that led to the calculation of the loss of the plaintiff. Therefore if that period were to be cut down, the respondent anticipated a reduction in the calculation of damages. It was to meet this contingency that the preliminary point was taken, because grounds 4 and 9 of the memorandum did seek to cut down the period of three years to a periodical tenancy running from month to month; and no doubt it was anticipated that damages would not cover a period of three years.

It is not relevant at this stage to deal with the merits of any part of this appeal, but we note that in ground 3 of the memorandum, the appellant/defendant will urge that the Judge was wrong in law and in fact in making a finding that there was a lease between the appellant and the respondent for three years, while he conceded that the formal lease was never executed and the rent payable never agreed. It was not agreed, according to the appellant, that here was a three years' lease. What happened was that the learned judge did not answer the issues agreed for him to try on the pleadings. Moreover it was not agreed later, that the basic premise of the trial was that there was a three years lease.

It would seem that a lease for three years as such was not in the contemplation of the parties. The relevant agreed issues, No 2, reads as follows:

> "Whether the defendant agreed to lease the premises together with the necessary equipment for three years with an option to renew. And whether in partial fulfillment thereof the plaintiff entered into possession of the premises."

It would appear that the concern of this issue is to support an agreement for a lease, which being a contract, might be thought to require the formality of writing in accordance with section 3 of the Law of Contact Act (Cap 23). To offset the lack of writing, possession of the premises in part performance, is pressed in conformity with proviso (1) of section 3 above. This appears to mean that the court was to ascertain whether there was a validly formed contract agreeing to lease the restaurant for three years.

On the basis of this issue a concluded lease was not in issue and it is possible to say even at this stage, that no lease was executed or registered. It may be that the appellant has read a little more into the learned judge's words than is warranted. The learned judge had set out a letter dated 10th June 1985 in which it was said that a draft lease for two years was being prepared. The learned Judge probably intended to convey the idea that in a subsequent lease, the period was to be for three years. At the end of his judgment he said that the restaurant was to lease the premises for three years. The position may well have been that the learned judge was dealing with the case of an agreement for a lease, the length of such a lease to be three years. He thought three years had been accepted by the parties.

That would appear to conform with the pleadings. The Court's attention was directed to paragraphs 6 and 7 of the plaint, where the plaintiff alleged

> "that by a written agreement, the plaintiff was granted a lease of three years with an option

to renew. The rent therein was stipulated to be Kshs 20,000/=".

However, due to the capital outlay that the plaintiff invested and due to the fact that the defendant's equipment was non-operational, the parties agreed to reduce the rent to Kshs 10,000/= per month paid quarterly in advance. The plaintiff paid such rent.

The defendant, in paragraphs 6 and 7 of his defence, denied a written agreement, and stated that the plaintiff had merely been permitted to run the restaurant pending an agreement. The parties had agreed that the plaintiff was to pay rent of Kshs 10,000/= per month for the first three months and from then onwards Shs 20,000/= per month to be paid on a quarterly basis. As the period for running the restaurant was not stated, nor , as the period of three years was denied; and as the draft agreements referred to in the evidence envisage a period of three years, the learned judge had some ground at least for concluding that the parties were negotiating for a concluded lease for three years. It seems to have been in this connection that Mr. Muite claimed that the trial was based on the premise that the period was to be three years.

But of course as the appellant/defendant says, there was dispute, as to the terms of the agreement, and the judge had to try to unravel them. The appellant's position was that no agreement had been concluded, and of course, he could show that no contract had been executed. The agreement that the respondent should run the restaurant had never been concluded, certainly as to the rent to be paid. Secondly, if their had been such an agreement, the damages had been wrongly assessed. Thirdly it would seem that any contract had been abandoned in some way; and certainly possession had been given up, unconnected with fault on the defendant's part.

On the other hand the plaintiff claimed that the defendant's actions had compelled him to close his business on 23rd January 1986 and that due to this wrongful interference the plaintiff suffered different kinds of loss. The major loss my be said to be "anticipated loss during the lease period."

In this situation the appellant has introduced the concept of the plaintiff being a monthly tenant; arising no doubt of possession, the payment and receipt of rent, by virtue of Section 106 of the Transfer of Property Act. (See *Rogan Kamper v Lord Grosvenor* [1977] (No 2) KLR 123). Supposing that could be implied from the circumstances of the case, this is not a case of the landlord/appellant asking for possession. That has been given up without the respondent seeking specific performance claiming protection under the Landlord & Tenant (Shops, Hotels & Catering Establishments) Act (cap 301).

The question at stake is which party terminated the agreement for lease, and what damages flow from the breach? In case the appellant breached the agreement what damages would flow? It is not easy to see at once how the abandoned position of the respondent having been a monthly tenant, affects that position. The sort of damages which may be in point might be such damages as are explained in *Megary's & Wade's The Law of Real Property* 14th Ed. pp 587 et sec and 705 to 708. It might seem that the breach of contract would be the same whether or not the respondent would be implied to have been a monthly tenant until it gave up possession.

In these circumstances it is not surprising that the concept of a monthly tenancy did not creep into the pleadings, evidence of submissions of the parties. We would, with respect to the appellant, agree with the respondent, that the concept of a monthly tenancy is one put forward for the first time in this Court.

The final question is whether we should allow it to stand as the appellant contends we should, or strike it out as the respondent asks us to do. As it would appear to us that no intolerable situation has arisen, as Law JA referred to in *Amarshi*'s case, nor that the facts have been fully explored to show its relevance, we think that this is a case where we should strike out ground 4 completely and ground 9 to the following extent:

> "9. That the learned Judge erred in law and in fact in computing anticipated profits for three years."

Our intention is to delete the offending new point of law. If what remains is not what the appellant wishes

to argue, he can apply for the substitution of other words relevant to grounds 9 as truncated.

The costs of the objection we award to the respondent/applicant.

Dated and delivered at Nairobi this 15th day of **April , 1988**

H.G PLATT

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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Ag. JUDGE OF APPEAL