



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2260 OF 1982

NEWSTANLEY HOTEL LIMITEDPLAINTIFF

VERSUS

ARCADE TOBACCONISTS LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff has sued the Defendant for possession of a shop in the occupation of the Defendant on plot LR 209/2340 Nairobi.

The Plaintiff alleges that the Defendant went into possession of the subject premises under the terms of an agreement for a lease made on September 5, 1977 from July 1, 1976 for a term of six years. The lease had therefore run on June 30, 1982.

The Plaintiff became the owner of the property by way of transfer under the Registration of Titles Act (cap 281) in February of 1978. The Defendant continued to pay the rent at all material times to the Plaintiff, and since the sub-lease contained an express provision that pending execution and registration of the sub-lease the Defendant should be bound by all the terms and conditions thereof as if the sub-lease had already been completed, the Plaintiff says that he stands in the shoes of the vendor of the property to him as landlord of the premises. Since the tenancy has expired by effluxion of time at the end of June 1982 and since request has been made by the Plaintiff to the Defendant to vacate premises the Plaintiff is entitled to possession and mesne profits.

The defence filed admits there was an agreement but denies that it created a sub-lease for a term of six years and further alleges that it was not an instrument capable of creating any interest on the said property. Even if, says the defence, there was a valid agreement the Plaintiff is a stranger to it and is estopped from purporting to benefit from the terms of it.

The defence case is that the sub-lease terminated, upon the sale from its landlord to the Plaintiff, and since the Defendant stayed in occupation and paid rent, a month to month tenancy was thereby created as between the Plaintiff and the Defendant and that tenancy is controlled under cap 301. That would mean that this court has no jurisdiction in this matter which must go to the Business Premises Rent Tribunal. Nor can possession be obtained except as provided under cap 301.

It is agreed between the parties that there is only one issue in this case for me to resolve, and that is whether the agreement between the previous owner Kulia Investments Limited and the Defendant ensures to the benefit of the Plaintiff after sale of the subject property by Kulia Investments Limited to New Stanley Hotel Limited of the freehold registered under the Registration of Titles Act.

It is agreed between the parties that the sub-lease between the vendors to the Plaintiff, Kulia Investments Limited and the Defendant was never registered. Under cap 281, The Registration of Titles Act section 32 it is therefore ineffectual to pass any interest in land on transfer to the Plaintiff. The legal title is not subject to this sub-lease and there can be no dispute about that.

It is therefore necessary to consider this case in terms of my equitable jurisdiction in respect of which the following considerations apply:

(1) There is no dispute between the parties, and clear authority has been quoted for the proposition that the sub-lease, being, an equitable interest can be enforced between the parties to it but cannot affect third parties *Batchelor's Bakery v Westlands Securities Ltd* HCCA 2/78 (Kenya). In my view the equitable doctrine is such that unless other considerations apply, the parties to the agreement in this case are Kulia Investments and the Defendant. The Plaintiff therefore is a third party to that agreement. There is no privity of contract between the Defendant tenant and the Plaintiff.

(2) It has been pointed out on behalf of the Plaintiff by Mr Shah that in equity, if the Plaintiff purchased with notice of the tenancy of the Defendant, the courts would enforce the equitable agreement against the Plaintiff as a purchaser with notice. He argues that it would be wrong to hold that the Plaintiff was bound by the tenancy but that the Defendant is not since if an agreement is to be enforced it must be enforced on both parties. It would not be equitable to decide otherwise.

(3) Mr Shah also says that the draft lease which forms the basis of the agreement to lease says specifically that the expression "the lessor" who were Kulia Investments Limited were set out to include its successors and assigns where the context so admits and he therefore submits that part of the agreement between Kulia investments and Defendant was that the Defendant would be bound to deal with the successors or assigns of Kulia Investments. He claims that the Plaintiff, New Stanley Hotel Limited, is such a successor or assign.

With respect I cannot agree with Mr Shah. New Stanley Hotel was a purchaser of the head lease. The contract between Kulia Investments and New Stanley Limited related solely to the head lease under grant from the Government. The details of that purchase did not concern the sub-lease in question. It was, as has been pointed out, possible for New Stanley Hotel Limited to insist that all the leases in the building including this one be registered before transfer, or that assignments of each of the leases be prepared and executed. Had that been done New Stanley Hotels Limited would have become an assign. They are not at present.

It is worth noting under this head that there were steps affecting both the legal title and the equitable interests which New Stanley Hotels Limited could have taken at the time of purchasing the interest of Kulia Investments to see that they gained the benefit of and the duties under any sub-leases which were in existence. The arguments and facts does not indicate why New Stanley Hotels Limited elected not to take those steps.

I have been supplied by Mr Shah with a copy of an extract from the *Law of Transfer in British India* 5th Edition volume 1 by Mr H S Gour. Under the title Sale of Immovable Property in paragraph 1187 on page 771 appears a paragraph titled "Benefit of the contract runs with the land. The benefit of the covenant for title runs with the land and"... will ensure to the benefit of future purchasers and alienees."

I have also been provided with a copy of paragraph 3046 from the same publication entitled "Rights of the lessors transferee. The rights of the lessor which pays with the transfer are usually those rights which are a part of the covenant which runs with the land."

According to Mr Shah these extracts show that the transferee of Kulia Investments, that is New Stanley Hotels Limited got the benefit of the covenant for title, and as the lessors transferee, with it pays the rights of the lessor.

There are two objections to this. The first quote from paragraph 1187 clearly relates to a covenant for

clear title running with the land on the sale of that land to someone else. The covenant for clear title referred to is the title to the head lease and not the sub-lease. The head lease is a legal interest in the land. The sub-lease is not.

The second objection relates to paragraph 3046 above quoted. It appears to me that this paragraph contemplates a transfer of a lease which happened in respect of the head lease in this matter but not in respect of the sublease.

On either ground in my view had any of the arrangement between Kulia Investments Limited and New Stanley Hotels Limited affect the equitable rights and duties existing between the Plaintiff and the Defendant.

Mr Oraro's reply to this matter was that where a purchaser acquires a property with tenants in it, once he accepts the rent for the first month they become tenants from month to month unless there is a lease or assignment between the tenants and the new landlord, much as I have said above in relation to the legal title. Such a tenancy would be a statutory tenancy under cap 281 in these particular circumstances.

Mr Oraro also pointed out, as I have above, that the Plaintiff could have sought an assignment of the contract or had the lease registered in order to make it affect the legal estate when it would have become a contract *in rem* affecting third parties. He pointed out that section 107 of the Transfer of Property Act requires that a lease for more than one year can only be acquired by registration and that section 40 of the Registration of Titles Act (cap 281) also requires registration of such documents. Since the case law shows clearly in Kenya that such leases are deemed to be binding *inter partes* but not on third parties he asked how the benefit of the lease could pass by operation of law. I agree it cannot. He says that this lease was only an agreement to enter into a lease which Kulia Investments could enforce, but which a third party could not. He also pointed out that the agreement in question could not have been registered as a sub-lease itself because it did not comply with the requirements as to execution under section 58(4) of the Registration of Titles Act and that a plan was yet to be made of the premises.

He referred me to *Batchelors Bakery Limited v Westlands Security Limited* and the judgment of Madan, JA as he then was. This case related to an agreement for lease for a term of six years which was acted upon by the parties in which the appellant tenant was saying that the agreement for lease was invalid and no lease was registered as required by section 107 of the Transfer of Property Act and that therefore since it was not registered his occupation became a lease from month to month. It was decided that such a contract is valid *inter partes* even in the absence of registration but it gives no protection against the rights of third parties.

Therefore said Mr Oraro there was no provision in law under which the purchaser could acquire rights and that an agreement *inter partes* could not be assigned to a third party without a specific agreement with the tenant. Since the tenant was not a party to the sale, the terms of the sale were extraneous to the issues between the Defendant and the Plaintiff and therefore the Plaintiff had no right to possession and the Plaintiff should therefore be dismissed.

Accepting that the agreement although unregistered was binding between the parties to it that is Kulia Investments Limited and the Defendant and bearing in mind that, if this suit was taken for some reason by the Defendant as tenant against the new owner New Stanley Hotels Limited, it would seem to me quite clear that equity would interfere to see that the tenancy was enforceable against New Stanley Hotels as a purchaser with notice.

Can it be said then that the tenancy is enforceable against the landlord, by the tenant, but not by the tenant against the landlord? I cannot think that that is the law. The same principle of equity would interfere to see that the equities were equal despite the absence in both cases of privity of contract between the parties.

When the Plaintiff took transfer from Kulia Investments, notice, if not actual, would be implied from inspection which would have revealed the Defendant as tenant. Rent appears to have been paid to the

Plaintiff thereafter in terms of the lease, and it would follow that, although the agreed facts are that the Defendants had no knowledge of the dealings between the Plaintiff and Kulia investments until after the event, the Defendant acted, by paying rent to the Plaintiff in accordance with the tenancy which would have in any event been implied against the Plaintiff on the suit of the tenant. Since these are considerations of general leasehold law, the fact that the tenant might have been able to get the benefit of a controlled tenancy only rests upon the prior question of whether there was a lease enforceable *inter partes* after the Plaintiff acquired its interest, and therefore cap 301 is irrelevant to the general equitable position, for cap 301 does not apply to premises let for more than five years.

Therefore, even though there were steps which the Plaintiff could have taken to regularise the position at the time of transfer to avoid the necessity of the application of equitable principles, nevertheless I am of the view that equity requires me to say that after the Plaintiff acquired the interest of Kulia Investments, the Defendant was in possession under the terms of the original agreement for lease which was enforceable then *inter partes*. It terminated by effluxion of time on June 30, 1982 and therefore the Plaintiff is entitled to Possession and to Mesne Profits from July 1, 1982 to date of possession. I resolve the sole issue in favour of the Plaintiff.

Judgment for Plaintiff as prayed with costs and interest.

Dated and Delivered in Nairobi this 22nd day of January 1986.

D.C.PORTER

JUDGE