IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Madan, Nyarangi JJA & Platt Ag JA)

CIVIL APPEAL NO 45 OF 1984

BETWEEN

WJ BLAKEMAN LTD.....APPELLANT

AND

ASSOCIATED HOTEL MANAGEMENT.....RESPONDENT

JUDGMENT OF PLATT Ag JA

The High Court in Mombasa, held that the defendant owed shs 55,000 as rent to the plaintiff, and the defendant being aggrieved by that decision has appealed to this court.

The premises in question were a block of flats called the Cowrie Shell Apartments, in which there were some 12 flats. On April 1, 1977, the owner of the premises, a certain Mr Kahara, had entered into three agreements whereby the defendant company, WJ Blakeman Limited agreed to rent some 8 flats for different periods of time. Thus flats one, two and three were to be leased for six months; flats four and five for 12 months; and flats six, seven and eight for 36 months. The defendant should therefore have given up possession of flats one, two and three by October 1, 1977; flats four and five by April 1, 1978; while the defendant could continue in occupation of flats six, seven and eight up to April 1, 1980. But no leases were registered and the defendant held the flats from month to month at an agreed rent for each flat of shs 2,500 per month. This situation continued until June 1978, except that at some time before then, the defendant had given up the possession of flats seven, eight and retained the first six flats only.

Mr Kahara also “leased” the whole of his premises, ie the 12 flats and the premises with the swimming pool to the plaintiff company. There was an agreement in May 1978 which was not registered, although it was to last for 3 1/2 years commencing on June 1, 1978 at a rent of shs 20,000 per month. Without registration, there was no lease as such, but the plaintiff company took possession of the premises on June 1, 1978 and paid the rent. That is to say, the plaintiff company respected the possession of the defendant company, which was in occupation of six flats but took physical control of the remaining six flats, and controlled the occupied six flats as if the plaintiff company were in control of the whole premises. The plaintiff company then proceeded to negotiate the removal of the defendant company as occupier, and by offering alternative accommodation, which was satisfactory to the defendant company, acquired possession of two of the six flats at the end of August 1978, and the remaining four flats at the end of September 1978.

There is no doubt that the defendant company knew of the agreement to lease the premises between Mr

Kahara and the plaintiff company. There was correspondence, between the plaintiff company's directors in which the defendant company was informed of the plaintiff company and the defendant company's take-over, and by the May 25, 1978 the defendant company was asked to pay the rent to the plaintiff company from June 1, 1978. There is also a letter dated May 24, 1978 in which the defendant company referred to a meeting between it and Mr Kahara whereby it was agreed that Mr Kahara should be able to proceed to let the whole premises. It is true that at that time the defendant company wished to enter into leases of at least four flats and preferably six flats on a long term basis. Indeed, the defendant company may have had options to renew the other leases of 1977; but in the long run, as the defendant company agreed to take up occupation in the alternative accommodation offered by the plaintiff company, nothing turns on this condition. The defendant company knew perfectly well from June 1, 1978 that the plaintiff company had taken over the entire premises from Mr Kahara, as indeed the defendant company had accepted in its letter of May 24, 1978. Nevertheless, the defendant company refused to pay rent to either Mr Kahara or the plaintiff company; and this is the cause of the dispute in this case. The rent claimed was shs 45,000 for the six flats in the months of June, July and August and shs 10,000 for the four flats in the month of September.

The learned judge observed, that the plaintiff company had brought this suit on the basis, that Mr Kahara had transferred to the plaintiff company the right to receive the rents by the defendant company; whilst on the other hand the defendant company denied any knowledge of the agreement between Mr Kahara and the plaintiff company. The defendant company's contention was that there was no privity of contract or estate existing between the plaintiff company and the defendant company, and therefore the defendant had no liability to pay rent to the plaintiff company. Moreover, the course of conduct by which the defendant company vacated the flats, did not imply or create an agreement between the parties for the payment of rent by the defendant company; and it was not otherwise expressly agreed. However, on reviewing the agreed facts and the correspondence, the learned judge found for the plaintiff company on the grounds, that the defendant company knew that by continuing in occupation some payment ought to be due, as the defendant company said in its letter of April 24, 1979, even if that was subject to negotiation. The learned judge felt that it appeared to be only natural and reasonable that the defendant company should pay the rents for those flats which it occupied between June and September 1978. But however, that may be, he answered the defendant company's legal point by saying that in accordance with section 109 of the Transfer of Property Act as read with the definition of lease in section 105, Mr Kahara had transferred his interest in the property to the plaintiff company, in such a way that the plaintiff company stood in the position of the lessor. Therefore the plaintiff company was entitled to claim rent from the defendant company for the six flats between June and September as indicated above.

The defendant company objects to these findings in its memorandum of appeal which may be summarised as follows. At the centre of the argument, is the assertion that there is lack of privity of contract and estate. It is urged that there was no transfer of the property leased from the owner, Mr Kahara to the plaintiff company in accordance with the provisions of section 109 of the Transfer of Property Act. The defendant company had not been wrong in stating that it had no liability to pay rent; nor did any estoppel arise between the parties to prevent the defendant company from asserting that it had no liability to pay rent. The plaintiff company had no superior title to the defendant company, which gave the plaintiff company the right to receive rents from the defendant. Finally it is said, that as the plaintiff company was only a tenant on a monthly basis by operation of law it had no right to receive rents from the defendant, for premises occupied by the defendant company also as monthly tenants. These grounds of appeal raised matters of principle which are important, although as the learned judge said, they do not attract great sympathy on a practical level. It should at least be said that in seeking clarification of these principles the parties in a very agreeable manner called no evidence, but isolated these problems in a statement of agreed facts and agreed correspondence.

To begin with, it must be ascertained what position the parties find themselves in. It was accepted that if the agreement to lease is one for a period of more than a year, then the least must be registered. As the first three flats were leased for six months on a monthly basis, no registration was required under section 107 of the Transfer of Property Act. Similarly the second lease for one year came in the same category. But the third lease, being unregistered, it became void as it concerned a lease for a period of more than one year. In each case the defendant company was either holding over under section 116 of the Transfer

of Property Act as in the first two leases or held on a monthly tenancy because of possession and payment of rent under section 106 of the Transfer of Property Act. On the other hand, the plaintiff company was in no better position since the agreement which it entered into was for a lease for a period of greater than a year and therefore required registration. However, the personal covenants survived and to the extent that there was implied by law a monthly tenancy arising out of possession and payment of rent the oral agreement survived. In the defendant company's case there was actual physical possession and payment of rent until June and physical possession continued until August and September.

It seems to be queried whether these implied tenancies come within the scope of section 109 which provides as follows:-

"109 If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him."

The question is whether Mr Kahara as the lessor had leased the property to the defendant company, and this in turn depends on whether the monthly tenancies can be described as leases under section 105 of the Transfer of Property Act. That section provides that a lease of immovable property is a transfer of a right to enjoy such property made for a certain time express or implied in consideration of a price. Periodic leases which include tenancies from month to month, come within the section and they may be implied. It follows that the leases and agreement for a lease Mr Kahara had made with the defendant company continued as periodic leases at the time when he made his further agreement with the plaintiff company.

The plaintiff company's possession raises this difficulty, that whilst the plaintiff company could take possession, physically of the ground and six of the flats, it could only at best take constructive possession of the remaining six flats occupied by the defendant. It could therefore have a monthly tenancy on the rent agreed of the whole premises, if the constructive possession of six of the flats was sufficient possession. Understandably, Mr Ransley for the defendant/appellant queried this, and argued that the implication of the monthly tenancy could only arise on physical possession together with payment of the rent. On the other hand, Mr Inamdar for the plaintiff/respondent, proposed that it was sufficient in this particular kind of case, where there were concurrent leases, if the plaintiff took possession of such parts of the property as were unoccupied and took constructive possession of the six flats which were occupied.

There does not seem to be any authority on this exact point in East Africa which seems surprising. However, in *Mulla's Commentary on the Transfer of Property Act in India*, when dealing with an oral agreement of lease accompanied by delivery of possession, it is said that it is not necessary that possession should be physical; constructive delivery is sufficient. The authority quoted has been presented to us, and indeed, it is right here to thank counsel for the trouble they have taken in compiling the authorities and legislation relevant to this case. It has greatly helped us.

Mr Inamdar referred us to *Mohan Lal vs Ganda Singh* (1943) AIR (30) Lahore 127. It will be useful to set out section 107 of the Transfer of Property Act:

"A lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession."

On these provisions it was held that:

"It is not necessary that delivery of possession must be physical at the time of the agreement. The delivery of constructive possession is quite sufficient for the purposes of section 107."

There was no particular explanation given, although an analogy was drawn with such delivery of possession to complete a gift made by a Muslim or Hindu, which should be sufficient under section 107.

Gour's Law of Transfer 8th Ed. Vol. IV page 3966 is more illuminating.

"In *Mohan Lal vs Ganda Singh* followed in *Jainarain Chaudhary vs Bisseswara Prasad* (AIR (1954) Patna 304) which is a full bench case, it was laid down that a rent deed or *Kabuliyat* not compulsorily registrable under the Registration Act, executed by a tenant in favour of the landlord, if not registered can be relied upon and looked into for the purpose of establishing the relationship existing between the parties, that is for the purpose of proving the oral agreement of the lease and its terms. It was further held in that case that physical delivery of possession was not necessary and delivery of constructive possession is quite sufficient for the purpose of section 107 of the Transfer of Property Act. In that case the facts were that the lessee who was the owner of the house, executed on the same day first a deed of mortgage with possession and then a *Kabuliyat* agreeing to pay rent for the house in favour of the mortgage, that is there was no transfer of actual possession between the parties either under the mortgage or the lease. But in the circumstances of the case it was held that there was delivery of constructive possession and it was enough for the purpose of section 107."

That is an illustration of a situation where the parties never contemplated full possession. But the lease depended on constructive possession.

It is not of course, a case under section 109 of the Transfer of Property Act. There being no exact authority on this point under that section, at least not one brought to our attention, the matter will have to be examined on first principles.

What is it that the law requires to impute a monthly tenancy? It should be such an action on the part of the intending lessee, that illustrates that the parties must be taken to have intended that the lessee wishes to take the property, and the intending lessor to give him the property on payment of rent, so that a tenancy can arise. The outstanding features are possession and payment of rent. Would not that possession be such possession as was envisaged in the transaction? If section 109 of the Transfer of Property Act is to be enforced, the lease envisaged could only be one where the transferee would have constructive possession, while the original lessee's lease was still running. Therefore either the lease to the transferee can only be a formally constructed lease, or, a tenancy may arise by constructive possession. There seems no reason in principle to restrict section 109 to the cases where the transferee's lease complies with all formalities, denying the transferee of the possibility of a tenancy on the basis of constructive possession and payment of rent. Mr Inamdar was careful to note that his argument could only extend to certain types of transactions, and that it might well be that constructive possession will not be a suitable type of possession in all cases. It would be unwise to anticipate the cases in which constructive possession would be sufficient and those in which it would not. But from the nature of the concurrent lease envisaged by section 109 this must be one example where it would surely suffice.

If that is so, then the plaintiff company had acquired a monthly tenancy falling within the definition of a periodic lease from month to month, which would continue after the defendant company's leases were given up. There is no reason to support the argument that this situation is not one which falls within section 109. The plaintiff company's situation was that it would possess all the rights of Mr Kahara including the right to claim rent from the defendant company. The latter knew of the transaction between Mr Kahara and the plaintiff company and indeed agreed that it should continue, and consequently it must have known that it had to pay rent to the plaintiff company. The defendant having paid no rent to anyone is liable to pay rent to the plaintiff for use and occupation.

In my opinion therefore, the learned judge came to the right conclusion in applying the provisions of the Transfer of Property Act to the circumstances of the case before him. Consequently it is unnecessary to consider whether the defendant company was estopped from either denying the plaintiff's title or denying that rent was due because the defendant company had acknowledged that some rent must be due to either the plaintiff or Mr Kahara. Furthermore, it is unnecessary to consider whether the agreement between the plaintiff and Mr Kahara amounted to an assignment within section 130 of the Transfer of the Property

Act. Those aspects of the argument can be left to another occasion.

It is sometimes dangerous to compare the position in England in property matters, because the law is differently codified and because the equitable jurisdiction is of a greater extent, for example, in such matters as the doctrine of *Walsh v Lonsdale*. Nevertheless it is some indication that the views expressed above are well founded because they are not entirely alien to some English notions. For instance, in *Woodfall's Landlord and Tenant* Vol I 28th Ed p 246, it is explained that a concurrent lease is one granted for a term which is to commence before the expiration or other determination of a previous lease of the same premises to another person. Such a lease is said to take effect in reversion expectant upon the earlier term, which may be either shorter or longer than the concurrent term. It operates as an assignment of the reversion during such time as the terms run concurrently. It is thought that it may be created by parol since the concurrent lease is one taking effect in possession since it entitles the lessee to receipt of the rents and profits. That conclusion is not enthusiastically accepted by other writers. However, even if the position of parol leases is not entirely clear in England there is no authority there against the propositions based on constructive possession and payment of rent. The tendency seems to favour that position.

Accordingly it is my view that the learned judge came to the right conclusion and I would dismiss the appeal with costs.

Madan JA. 'Possession' is a teasing topic whenever it arises. It does not hold one straight-forward meaning, it has various meanings different in different situations so that the ownership of property cannot be affixed with unencumbered ease.

"Possession' is a word that, perhaps like a great many words, is incapable of an entirely precise and satisfactory definition, Stable J in *Bank View Mill Ltd and Others v Nelson Corporation and Feyer & Co (Nelson) Ltd* (1942) 2 All ER 476 at p 486 (E&F). The term 'possession' is always giving rise to trouble. Viscount Jowitt said in *United States of America and Republic of France v Dolfus Mieg et Compagnie, SA & Bank of England* (1952) 1 All ER 572 "The person having the right to immediate possession is, however, frequently referred in English law as being the "possessor" – in truth, the English law has never worked out a completely logical and exhaustive definition of "possession" ". "For my part I approach this case on the basis that the meaning of possession depends on the context in which it is used", per Lord Parker CJ in *Towers & Co Ltd v Gray* (1961) 2 All ER 68 at p 71.

The court recognised both actual and constructive possession in *R v Cavendish* (1961) 2 All ER 856 at p 858. "Possession" includes receipt of rents and profits or the right to receive the same, if any (Law of Property Act, 1922 s 188 (3)).

The following passage from *Words and Phrases Legally Defined*, Vol 4 p 151 illustrates:

"Possession" is a word of ambiguous meaning, and its legal senses do not coincide with the popular sense ... The word "possession" is sometimes used inaccurately with the right to possession. This right to possess is a normal incident of ownership; but an owner's right to possess may be temporarily suspended, for example, he has bailed the goods to a bailee for a term; and, conversely, the right to possess may exist temporarily in one who is not the owner, for example, a bailee".

The appellant was estopped from denying liability on the premises that not only it did not pay the rent to the original landlord, it also remained acquiescently in possession of the flats knowing that the respondent was paying the rent therefore to its use and benefit, and also to its own detriment for the appellant was refusing to reimburse the respondent.

The action against the appellant was not *in rem* but an action *in personam*. No registered lease therefore was needed to affix the appellant with liability for rent for the flats occupied by it. The respondent acquired an interest therein under an agreement enforceable by specific performance; and also by virtue of actual possession of the property though a part of it took the shape of constructive possession, but without eroding the respondent's right to enjoy all the benefits of ownership by possession including the

receipt or the right of receipt of rent.

I agree with the conclusion reached by Platt, Ag JA. As Nyarangi JA also agrees the appeal is ordered to be dismissed with costs.

Nyarangi JA. I agree. In *Souza Figueiredo & Co Ltd v Moorings Hotel Co Ltd* [1960] 926, by an agreement the respondent let premises to the appellant for a term exceeding three years under the sub-lease, registration of the agreement was refused, the appellant took possession of the premises and it was later contended that the unregistered agreement was ineffectual to create any estate or interest and the contract to pay rent was unenforceable. It was held that whereas the agreement could not operate as a lease it could operate as an agreement inter parties which if followed by possession and payment of rent creates a tenancy from month to month: See also *Rogan – Kamper v Lord Grosvenor* (No 2) 1977 KLR 123 and *EA Power & Lighting Co Ltd v The Attorney General* [1978] KLR 217. The decision in *Mlay v Phoneas* [1969] 563 which was relied on by Mr Ransley in his contention that the provisions of a document which is not valid could not be used against a third party is clearly distinguishable from *Figueiredo and Rogan – Kamper* because the agreement inter parties does not operate as a lease.

Dated and delivered at Nairobi this 8th day of May, 1985.

H.G.PLATT

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JUDGE OF APPEAL

C.B.MADAN

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR