IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJA)

CIVIL APPEAL NO. 2 OF 1978

BETWEEN

BACHELOR'S BAKERY LTD .....APPELLANT

AND

WESTLANDS SECURITIES LTD.....RESPONDENT

JUDGMENT

Law JA By a plaint filed on December 30, 1975, in the High Court at Nairobi, the plaintiff (now the respondent) sought possession of a shop which it had demised to the defendant (now the appellant) by a written Agreement for Lease dated September 11, 1969, for a term of six years from October 15, 1969, at a monthly rent of Kshs 2,800. The appellant duly went into possession and paid the agreed rent, but refused to deliver up possession and vacate the premises on the expiry of the said term of six years on October 14, 1975. The respondent also claimed the sum of Kshs 5,623.40 allegedly due by the respondent in respect of 14 days arrears of rent, water and conservancy charges and site value rates; mesne profits from October 15, 1975, until actual delivery of possession and other reliefs. By its defence dated January 30, 1976, the appellant pleaded that the Agreement for Lease, not having been registered under the Registration of Titles Act, was invalid in law in creating a six year term, but resulted in a manufacturing or a monthly tenancy only terminable by a requisite notice to quit. No such notice had been given. Alternatively the appellant pleaded that if the Agreement for Lease was held to be valid in law in creating a six year term, the respondent accepted rent after the expiry of that term which in law had the effect of creating a yearly or a monthly tenancy protected under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, hereinafter referred to as "the Landlord and Tenant Act", and only terminable by a notice under Section 4 of the Act and then by an order made on a reference by the Business Premises Rent Tribunal. The appellant also denied its liability to pay any sum in respect of outstanding rent, water or site value tax liability, or in respect of mesne profits.

On January 21, 1976, the respondent applied by Notice of Motion for summary judgment as prayed in the plaint, under Order XXXV rule 1 of the Civil Procedure Rules. The application for summary judgment was heard by Simpson J (as he then was). The learned judge delivered his ruling on February 9, 1977. He held, *inter alia*, that the Agreement for Lease provided for the execution by the parties of a formal lease, which was never done, the parties being content to abide by the Agreement which they regarded as a contract which was binding on them. It was capable of being specifically enforced, and did not require to be registered, as proviso (e) to Section 4 of the Registration of Documents Act (Cap 285) exempts from registration documents merely creating a right to obtain another document. An agreement to grant a lease in such a document, see *Grosvenor v Rogan-Kamper* [1974] EA 446. The learned judge's conclusion was that in this case there was a tenancy of a shop which had been reduced into writing and was for a period

exceeding five years. It was not therefore a controlled tenancy within the meaning of Section 2(1) of the Landlord and Tenant Act, and the landlord (the respondent in this appeal) was entitled to possession at the end of the term without notice. The parties had acted and relied on the Agreement for Lease as a binding contract between them, and as the learned judge pointed out, the tenant (the appellant in this appeal) had not claimed that it was invalid until after the term of six years stipulated in the Agreement had expired. The learned judge accordingly entered judgment for the respondent for possession and for the sum of Kshs 5,623.40 as claimed in the plaint, with interest and costs. He held that the respondent was entitled to mesne profits, and that the only triable issue was the assessment of the quantum of mesne profits, which should be decided by the Registrar.

From this decision the appellant, represented by Mr DN Khanna, has appealed. The respondent, represented by Mr S Gautama and Mr F Adam, supported the judgment of the learned judge.

Mr Khanna took us through the general law relating to the creation of interests in land, as contained in such Acts as the Transfer of Property Act, and as expounded in such cases as *Bains v Chogley* (1949) 16 EACA 27 and *Rahman v Gudka* [1957] EA 4, in which cases it was held, applying Section 107 of the Transfer of Property Act, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument. There was no registered instrument in this case, so that in Mr Khanna's submission, what resulted was a monthly tenancy in terms of Section 106 of the Transfer of Property Act, so that the tenancy in this case being for a period not exceeding five years, it was a "controlled tenancy" within the definition of that expression in Section 2(1) of the Landlord and Tenant Act, and thus within the exclusive jurisdiction of a Tribunal appointed under Section 11 of that Act and terminable only in accordance with the procedure prescribed by Section 4 of that Act.

Mr Gautama did not dispute the correctness of Mr Khanna's exposition of the general law. He relied exclusively on the written agreement between the parties providing for a six-year term, which he submitted took the matter outside the Landlord and Tenant Act. He pointed to the definition of controlled tenancy in Section 2(1), which excludes from control a tenancy which has been reduced into writing and is for a period exceeding five years, and to the definition of "tenancy" in the same section which makes it clear that, for the purposes of the Landlord and Tenant Act, it includes a tenancy created by a tenancy agreement. The Landlord and Tenant Act is a special Act designed for the protection of tenants; it is later in date than the Transfer of Property Act and to the extent that the Landlord and Tenant Act conflicts with the Transfer of Property Act, its provisions prevail. This last submission finds support in ground 16 of the appellant's memorandum of appeal which appears to recognize that the Landlord and Tenant Act supersedes the Transfer of Property Act where they conflict.

In my view Mr Gautama's submissions are correct and must prevail. It is clear to me that the Landlord and 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. That is precisely the position here. The parties, by an agreement in writing, contracted for a term exceeding five years. This agreement was a contract to the contrary, within the meaning of the opening words of Section 106 of the Transfer of Property Act, thus excluding the deeming provisions of that section as to the duration of certain leases in the absence of written contract. Such an agreement is valid inter partes even in the absence of registration, although it gives no protection against the rights of third parties, see *Grosvenor v Rogan-Kamper* (supra). The later decision in *Rogan-Kamper v Grosvenor* (Civil Appeal No 33 of 1976, unreported) does not seem to me to affect the position, as the claim in that case was based entirely on an unexecuted lease and not on an agreement for a lease, as is the case here. The appellant has had the full benefit of the term which it freely negotiated, and I agree with the learned judge that it was bound to give up possession on the expiration of that term.

As regards the summary judgment for Kshs 5,623.40 it is made up of a claim for rent for the last 14 days of the term (Kshs 1,264.50) which was clearly due and unpaid, and for Kshs 4,438.90 in respect of water, conservancy and site value rates. The appellant in its defence claimed to have discharged its liability in respect of these matters but was unable to satisfy the trial judge that it had done so. The onus was on the appellant to show that it had discharged this liability. It did not do so. Mr Khanna submitted that judgment on this issue should not have been entered without the respondent being cross-examined on its

affidavit and supporting exhibits. No application to this effect was made at the trial nor were any supporting exhibits or receipts relating to this issue produced to the court by the appellant. As the learned judge noted in his ruling:

> "Liability for conservancy charges and a proportion of site value tax is not disputed nor is the amount claimed disputed."

In my view summary judgment was rightly entered in respect of these matters.

For these reasons, I would dismiss this appeal, with costs. With some hesitation, bearing in mind that Mr Khanna appeared alone, I would not certify for two advocates.

Madan JA. I respectfully agree with the judgment just delivered by Law JA.

The appellant found itself in an inescapable position by having entered into an agreement in writing for a lease for a term of six years, which was acted upon by the parties, the appellant not questioning its validity until after the expiry of the term provided for in the agreement.

The appellant now contends that the agreement for lease entered into by it with the respondent landlord was invalid as no lease was registered as required by Section 107 of the Transfer of Property Act, 1882 which enacts that a lease of immovable property for any term exceeding one year can be made only by a registered instrument. The appellant also contends that as a result of non-registration of a lease pursuant to the agreement the appellant's occupation of the shop became a lease from month to month under Section 106 also of the Transfer of Property Act, and being thus reduced to a period less than five years, it also became a "controlled tenancy" as defined in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) within the exclusive jurisdiction of the Tribunal appointed thereunder, and determinable only in manner provided in Section 4 thereof (hereinafter to as the Act).

A "controlled tenancy" is defined in Section 2 of the Act as follows:

> " 'controlled tenancy' means a tenancy of a shop, hotel or catering establishment -
> a) which has not been reduced into writing; or
> b) which has been reduced into writing and which:
>
> > (i) is for a period not exceeding five years; or
> > (ii) contains provision for termination, otherwise than for breach of covenant, within five years form the commencement thereof; or
> > (iii) ……..."

The Act is legislation of a special nature enacted solely for the protection of tenants. It allows the parties a choice of occupation of premises under a controlled or uncontrolled tenancy, in the first case, within the ambit, and in the second case, outside the ambit of the Act. In the instances to which the provisions of the Act are declared to apply, it overrides any other written law which is in conflict with its provisions. Notwithstanding the provisions of Section 107 aforesaid, which is contained in an earlier Act, therefore secondary to the provisions of the later legislation of the Act, the Act sets up a new mode, which did not exist before, of creating a valid tenancy of immovable property for any term exceeding one year by a specifically enforceable agreement in writing without registering the instrument; and if the agreement confers a right to obtain a lease thereunder for a period exceeding five years, it is an uncontrolled tenancy and outside the ambit of the Act which then loses jurisdiction over it. The Act is a cleverly conceived piece of legislation.

The uncontrolled tenancy thus created for a period exceeding five years is not altered into a controlled tenancy for it does not become a tenancy for a period less than five years, nor can it be deemed to be, as stated in Section 106 aforesaid, a lease from month to month, because an instrument under the agreement is not registered. In my opinion, Section 106 is intended to regulate the giving of notice prior to determination of the lease by parties who have not themselves provided for it. It has no application to the

period of the lease which is agreed by the parties in the agreement and therefore prevails. I agree 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 *Grosvenor v Rogan-Kamper* [1974] EA 446. In this case there was a specifically enforceable tenancy agreement in writing for a lease for a term exceeding five years. The Act recognises the validity of an agreement for a lease in the definition of "tenancy" which is:

> " 'tenancy' means a tenancy created by a lease or underlease, by an agreement for or assignment of a lease or under-lease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee as such."

If the legislature had intended that Section 107 or Section 32 of the Registration of Titles Act, (Cap 281), should still apply, first, it would not have gone to the trouble of enacting the definition of "controlled tenancy" in the form in which it did; secondly, it would have been the easiest of things to have said so.

There is really no conflict with the decision in *Bains v Choglay* (1949) 16 EACA 27 and the other cases similarly decided by the Privy Council and our former Court of Appeal to which we have been referred. The decisions in these cases were and they remain unassailable and binding when they are relevantly applicable.

There is the latter decision of the Court of Appeal in *AW Rogan-Kamper v Robert Grosvenor*, CA No 33 of 1976 (unreported) which I understand has caused problems and difficulties among members of the profession. In that case, the parties agreed in writing on September 29, 1969 to enter into a lease for five years and one month at the monthly rent of Kshs 3,600, the premises to be occupied from November 1, 1969. The landlord's advocates were to draw up a draft lease incorporating the agreed terms for approval by the tenant.

The tenant entered into possession as agreed, and also continued to pay the agreed monthly rent until the end of April, 1970. On November 15, 1969, a draft lease was sent for approval by the tenant. He neither approved nor executed the draft lease. During May, 1971, the landlord gave notice to the tenant to quit the premises on the ground of non-payment of rent. The tenant refused to give up possession. In June, 1971, the landlord took possession in the event of non-payment of rent.

The learned judge of the High Court who tried the case held that it was a case of an unregistered lease and the tenant became a monthly tenant under Section 106 aforesaid. He also held that the Act applied to the suit premises, and the procedure for terminating a tenancy not having been followed by the landlord, he dismissed the landlord's claim. The landlord appealed to the Court of Appeal which allowed the appeal holding *inter alia* that as there was a contract between the parties which could have been ordered to be specifically enforced, there was an agreement to the contrary for the purpose of Section 106. The Court of Appeal remitted the suit to the same judge for decision on the basis that there was a valid contract between the parties for the leasing of the suit premises for the term certain of five years and one month. The learned judge this time gave judgment for the landlord "in obedience to the Court of Appeal decision in terms of the prayers in the plaint." It was now the tenant's turn to appeal. He appealed.

In allowing the second appeal, Mustafa JA, with whom Wambuzi P agreed, pointed out that the case was remitted to the trial judge for decision on the basis that there was a contract or agreement for a lease for five years and one month. But the trial judge proceeded to decide the case on the basis that there was a lease or as though there was a lease, for a term of five years and one month certain, and in effect, so decided the case in favour of the landlord. As the draft lease was not executed by the landlord or the tenant, it could not be an agreement or contract of a lease between the parties. Neither the contract of June 29, 1969 nor the draft lease was evidence or evidence of a valid tenancy as defined in the Act. It was therefore a controlled tenancy within the ambit of the Act, the special procedure for terminating tenancies had not been complied with and the tenancy was not legally terminated.

The third member of the court, Platt J was of the view that the tenant was a tenant at will; as the provisions of the Act were not followed, he concurred in the result arrived at by Mustafa JA. The Court of Appeal thus reached the same decision as originally made by the learned judge which was set aside on the

first appeal.

Mustafa JA also said:

> "Here the contract of September 29, 1969 created no lease or tenancy."

Of course it did not create a lease, but with respect, it did create a tenancy under a tenancy agreement the mode of creating it being recognised in the definition of the expression "tenancy" which I have already set out.

Although Mustafa JA was aware that the contract was "an agreement creating the right to obtain a lease or tenancy document" he unavoidably held it to be a controlled tenancy within the ambit of the Act for that is what it had been turned into by the acts of the parties themselves.

The learned trial judge correctly outlined the basis for his decision, i.e. the parties regarded the agreement as a contract which was for a lease binding on them; it was in writing and capable of being specifically enforced. It created a tenancy for a period exceeding five years, which was not required to be registered being a document merely creating a right to obtain another document: *Grosvenor v Rogan-Kamper* [1974] EA 446.

Rogan-Kamper v Lord Robert Grosvenor was decided on its own particular facts. Its circumstances are not likely to occur again. It is best laid to rest, and not followed. Potter JA also agreeing, the appeal is ordered to be dismissed with costs.

Potter JA. I have had the advantage of reading in draft the judgment of Law JA and I agree that the appeal should be dismissed with costs for the reasons given therein. I also would not certify for two advocates.

Dated and delivered at Nairobi this 6th day of July, 1982.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR