REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 2633 OF 1977 (OS)

ASSOCIATED HOLDINGS LTD.....PLAINTIFF

VERSUS

PRIM AND PRETTY (A FIRM).....DEFENDANT

ORDER

February 15, 1978, **Harris J** delivered the following Order.

By a letter dated 12th October 1972 addressed to the plaintiff the defendant firm confirmed its wish, apparently expressed during a telephone conversation earlier that day, to become the tenant to the plaintiff of a shop in a building known as "Phoenix House" in Nairobi, and requested the plaintiff "to make the necessary arrangements." No rent or term was mentioned in the letter.

On 24th October of that year the plaintiff, in reply to that letter, confirmed in writing its readiness to let the premises to the defendant at a monthly rent of £215, the lease to be for a period of five years and one month. The letter of 24th October added that a "draft agreement," which was in the course of preparation by the plaintiff's lawyers, would be forwarded for perusal and signature and indicated certain of its terms regarding internal fixtures. The defendant went into possession on 1st December 1972 and is still in possession, and all rent accruing under the agreement has been paid.

Some time later a draft lease was forwarded by the plaintiff to the defendant and returned on 2nd December 1974 with suggested amendments by Messrs Kaplan & Stratton, the advocates then acting for the defendant. Although the date upon which this draft was sent to the defendant has not been stated it would appear to have been in 1974 since the date left blank for completion on execution of the instrument includes that year. The *habendum* in the draft is for a term of five years and one month from 1st December 1972 at the agreed monthly rent of £215 and the draft contains a number of other provisions to which I will refer later.

The negotiations concerning this draft were protracted and on 31st June 1975 Messrs Kaplan & Stratton sent to the plaintiff's advocates a letter, the terms of which have not been disclosed, but to which a reply was sent on 8th June of the following year. In this reply the plaintiff's advocates dealt specifically with no less than forty-one separate items arising from the amendments suggested by the defendant, ten of which they rejected outright.

Although much may have happened in the interval which was not found necessary to disclose to the Court, the next step of which there is evidence is the writing by the plaintiff's advocates to the defendant's present advocates of a letter dated 29th August, 1977, requesting the defendant to let them

have a copy of "the existing draft lease" duly approved. To this the defendant's present advocates replied by letter on 1st September 1977 stating that all they sought was that a lease for a reasonable term at a reasonable rent and on reasonable conditions be entered into, and adding that in their view the present position is that there is an agreement to lease premises on terms to be agreed.

The plaintiff now applies by an originating summons under order XXXVI rule 5

> "for an order that the plaintiff being interested as landlord under a written instrument by which it was agreed to lease shop No 6 Phoenix House, Nairobi, to the defendant firm for a declaration of its right to have a lease signed by the defendant firm and for an order for specific implement of its right by the signing by the defendant of the lease annexed to the affidavit filed herewith."

There was filed with the summons an affidavit by Mr Tanner, a director of Kenya Trust Company Limited, the Managing Agent of Phoenix House for the plaintiff, which exhibits what purports to be the original of the draft lease forwarded to the defendant and returned by Messrs Kaplan & Stratton with their letter of 2nd December 1974 already referred to. In his affidavit Mr Tanner states that all the amendments to the draft proposed by Messrs Kaplan & Stratton have now been made but that the defendant refuses to sign the lease.

In an affidavit filed on behalf of the defendant in reply to that of Mr.Tanner it is stated that the plaintiff has not made all the proposed amendments to the draft lease indicated by Messrs Kaplan & Stratton and that the defendant refuses to sign the proposed lease as its terms would be too onerous.

The plaintiff concedes that no lease was actually tendered to the defendant for execution but maintains that the defendant has repeatedly refused to sign such a lease, the final refusal being contained in its letter of 1st September 1977.

Mr Le Pelley, for the plaintiff, contends that the terms of the plaintiff's letter of 24th October 1972 were accepted by the defendant by its going into possession and paying rent since 1st December of that year up to the present time and that the defendant, being still in possession, is in the position of a tenant holding over after the expiration of a lease for five years and a month. In support of this contention he submits as a general proposition that where a tenant goes into possession having agreed to take a lease for a term of five years and a month the landlord retains a right to enforce the agreement by specific performance and thus to obtain and register a lease for the agreed term.

The importance of the matter in the present case lies in the plaintiff's contention that if the defendant had executed the proposed lease and as when the plaintiff says it should have done the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) (to which I will refer as the Landlord and Tenant Act) would not have applied to the tenancy so created by reason of the definition of "controlled tenancy" in section 2(1) and the defendant would not be protected under the Act. Since the plaintiff, however, has apparently only recently come fully to appreciate the legal position, and since the proposed lease, if executed prior to 31st December 1977 would have expired on that date, the present application is for equitable relief in the form of a declaration of what the position of the parties would now have been if the proposed lease had been so executed. In addition the plaintiff seeks an order that the defendant do execute such lease in the form annexed to Mr Tanner's affidavit.

Order XXXVI rule 5, under which the application is brought, provides as follows:-

> 5.Any person claiming to be interested under a deed, will or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested.

The written instrument upon which the plaintiff relies is its letter of 24th October 1972 and the question of construction raised is as to what lease should the defendant execute in order to comply with the

agreement created by or under that letter as a result of the defendant having entered into possession of the premises and paid rent therefor. The declaration sought is as to the plaintiff's right to compel the execution of such lease by the defendant.

Mr Oweggi, for the defendant, submits that the matter does not properly fall within the purview of Or. XXXVI rule 5, and I must agree that the question is not free from doubt. He rightly points out that no specific provision or term in the letter has been shown to be ambiguous or to require clarification or construction, and that what the plaintiff really seeks is relief in the form of an order which will result in what the summons refers to as a "specific implement" of whatever obligations attach to the defendant in the circumstances. This, in somewhat simpler language, would be an order for specific performance and Mr Le Pelley seeks to justify his reliance on Or. XXXVI by reason of urgency of the matter and the fact that proceedings commenced by plaint might take more than a year to come to hearing. Without expressing a concluded opinion on the question, which I consider to be one of difficulty, and without wishing to create a precedent upon a matter I must regard as doubtful, I wil nevertheless accede to Mr Le Pelley's request to entertain the application in the special circumstances of the case and allow it to proceed.

No doubt the letter of 24th October 1972 constituted an offer to grant a lease for five years and one month at a monthly rent of £215, which offer the defendant accepted upon going into possession of the premises and commencing to pay that rent. The terms of the draft lease of 1974, however, seek to impose obligations on the tenant not mentioned or suggested in the letter or to be found in the Transfer of Property Act, 1882, (of India), including the payment of taxes, assessments and charges together with a proportionate part of certain increases municipal rates, electricity charges, water and conservancy charges, security services, and the salaries of staff employed by the plaintiff in connection with Phoenix House. The terms also impose on the defendant a restriction on the right to transfer, sublet or part with possession of the premises without plaintiff's written consent, and the payment of the plaintiff's costs of the lease. From this and from the tenor of the correspondence between the parties, so far as it has been disclosed, it is clear that the agreement created by the offer contained in the letter of 24th October 1972 and its acceptance by the defendant by its taking possession of the premises and the payment of rent, has been overtaken by the subsequent negotiations. Manifestly the terms of the lease envisaged by both parties in the letters of 31st July 1975 and 8th June 1976 and of which the plaintiff now seeks the implementation *ex post facto* are more burdensome on the defendant than those stipulated in October 1972.

Furthermore, the relief now sought would, if granted be similar in effect to the granting of a decree of specific performance of the agreement of 1972 notwithstanding that that agreement, if it had been implemented, would have expired at the end of 1977. I know of no instance, nor has any been referred to, where the court has granted the equivalent of a decree of specific performance of a terminal contract already spent.

Lastly, I am not persuaded that the practical justification upon which the plaintiff seeks to rely for the granting at this late stage of the relief sought is well founded. It is not clear that a lease which is expressed to be for a term of five years and one month and to commence on 1st December 1972, but which is not executed until a later date by which time there are less than five years of the term unexpired, would necessarily give the lessor protection under the Landlord and Tenant Act on the footing that the lease falls outside the description of being "for a period not exceeding five years" within the definition of "controlled tenancy" in section 2(1).

In *Cadogan v Guinness*, [1936] Ch 515 Clauson, J, in considering the words "where a term of more than seventy years is created in land" within the meaning of section 84 of the Law of Property Act, 1925, said (at page 517):

> "It is a very common experience that in the creation of leasehold interests the term which is created is expressed to run as from a date anterior to the date of the document which creates the term. It is very common indeed to find a lease creating a term of 21 years as from December 25, 1935..... Although it is spoken of as a 21 years' term in fact is 21 years

> less the period which elapses from December 25, on which the term normally begins, to the date of the execution of the deed. That seems to me an obvious proposition ..... Applying that to the section which I have to construe I have first to discover what is the meaning of a term of more than 70 years. In my view, a term created by a deed in 1936 to begin as from December 25, 1900, for 70 years would not be a term of 70 years. It would be a term of 34 years – namely, 70 less 36 years ..... I am construing an Act of Parliament and not a document *inter partes,* and so far as the Act of Parliament is concerned it appears to me that the construction which I have indicated must be the correct one."

This decision was applied by the Court of Appeal in *Roberts v Church Commissioners for England*, [1971] 3 All E.R 703, a case under the Leasehold Reform Act, 1967, where Stamp L J said (at page 707):

> "The Expression 'the duration of the term' connotes the period during which the term is to continue, and it cannot start until it is created. Until then there is no tenancy and no interest in the tenant. Although the terms of the *habendum* are, or may be, relevant in construing the lease, here what has to be construed is an Act of Parliament.....On behalf of the applicant it was in the end of necessity conceded that although the parties may agree that as between themselves a tenancy shall be deemed to have come into existence at a date anterior to the grant of the tenancy, they cannot create a retrospective tenancy."

In Abdulahi Jiwaji & Company (Properties) Limited v Shamvi Holdings Ltd (C C 263 of 1976 Mombasa Sheridan, J, when dealing with a question similar to that which arises here, said that he thought the principles enunciated in those two decisions are applicable in Kenya in relation to the Landlord and Tenant Act.

For the purpose of the present case the material provision in the Act relates to a tenancy "which has been reduced into writing and which is for a period not exceeding five years," and it is not clear that the draft lease prepared by the plaintiff for the approval of the defendant would necessarily have fallen outside that description had it been executed during the year 1974 as the plaintiff must have intended when it submitted to the defendant a draft bearing that date.

For these several reasons I am not of the opinion that this application would succeed and the summons is dismissed with costs.

February 15, 1978

HARRIS J