REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 742 OF 1976

1. MARY PANOS MELAS

2. ANGELLINE LILLY MONNAS.....PLAINTIFFS

VERSUS

NEW CARLTON HOTEL LTD.....RESPONDENT

JUDGMENT

By notice of motion filed on 14th December 1976 under the Civil Procedure Rules, order XXXV, rule 1(b) the plaintiffs apply for summary judgment for possession of the suit premises and for mesne profits to be assessed and costs to be taxed. The supporting affidavit of Mr JEL Bryson, a partner in the plaintiff's firm of advocates, avers:

3.That by an instrument of lease dated 30th May 1972, the plaintiffs let to the defendant three plots of land known as plots 143, 144 and 152 of Section XX, Mombasa (hereinafter referred to as the said premises), for the term of ten years from 1st December 1966. I annex hereto a true copy of the said lease and mark the same JELB 1.

4.That the said lease also comprised a building situated on plot 144 Section XX Mombasa, which said building was let furnished as a hotel.

5.That the said term of ten years expired on 30th November 1976 but the defendant wrongfully retains possession of the said premises despite requests to hand over vacant possession of the same to the plaintiffs.

6.That the plaintiffs were at the commencement of this action justly and truly entitled to possession of the said premises (together with the said building and the landlords furniture therein) and the defendant is and was at the commencement of this action justly and truly liable to the plaintiffs for mesne profits.

7.That I verily believe that there is no defence to this action except as to the amount of the said mesne profits.

The copy of lease is headed. "Kenya – The Registered Land Act 1963". Although it was executed on 1st November 1972 it is expressed to be for a term of ten years from 1st December 1966 (now past). In particular clause 3(f) provides:

That if the lessee shall desire to determine the term hereby created at the expiration of the first five years

thereof and shall on or before 31st July 1971 serve on the lessors notice of such its desire and shall up to the time of such determination pay the rent and perform and observe the lessee's conditions then immediately on the expiration of such five years this lease and everything herein contained shall cease and be void, but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of covenant.

In his affidavit in reply filed on 10th February 1977 Mr Satchu, for the defendant avers as follows:

3.The defendant denies that the plaintiffs are entitled to immediate vacant possession. The defendant claims the protection available to it under the Landlord and Tenant ((Shops, Hotels and Catering Establishments) Act. The rent in respect of the premises occupied by the defendant has been paid regularly by the defendant to the plaintiffs.

4.I believe that the effect of the lease referred to in paragraph 3 of the plaint, and dated 30th May 1972 is not as set out in that paragraph.

5.The plaintiffs are not entitled to pursue their remedy for vacant possession and mesne profits before this Court. The lease for such a period is expressly protected by the Act and the plaintiffs must proceed with their remedy for possession and mesne profits before the tribunal set up under the Act.

It immediately becomes apparent that the only possible triable issue is a point of law, namely whether or not the lease gave rise to a controlled tenancy within the definition in section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (hereinafter referred to as "the Act") in that, under paragraph (b) of the section 2(1), it is a tenancy 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 from the commencement thereof.

On the face of it the lease is for a period of ten years commencing on 1st December 1966, with a break clause at the expiration of the first five years and terminating on 30th November 1976. The defendant lessee did not exercise its option to determine the lease at the expiration of the first five years. It ran its full length of ten years and, normally, one would have expected the defendant to vacate on 30th November 1976.

When the proceedings commenced Mr Inamdar, for the plaintiffs, was at pains to show that the expression "within five years" was not co-terminous with the expression "at the expiration of five years". In *Rex Hotels Ltd v Jubilee Insurance Co Ltd* [1972] EA 211 a similar option to terminate had been specifically deleted when the deed of variation extended the original lease from ten to fifteen years, and so it did not become necessary to decide its effect; but there is nothing in the judgments of the Court of Appeal to suggest that otherwise it would have been caught by paragraph (b)(ii) of the definition of "controlled tenancy". I agree with Mr Inamdar on this point.

Mr Satchu submitted that, as a matter of law, the term of a lease can only run from the date of its execution, which in this case was 30th May 1972. Although the lease was expressed to be for ten years commencing on 1st December 1966, it could only operate in law to lease the premises for a term from 30th May 1972 to 30th November 1976, which would be for a period of four and a half years; and so it was a "controlled tenancy within paragraph (b)(i) of the definition as being for a period not exceeding five years. He relied on *Earl of Cadogan v Guiness* [1936] 2 All ER 29, where it was held that, for the purpose section 84(12) of the Law of Property Act 1925, the lease commenced on the date of execution and was for a term calculated from that date and that the lease could not begin to expire until after that date. Here the operative date would be 30th May 1972, according to Mr Satchu's argument. The headnote and editorial note read:

By a lease executed on 31st January 1888, a term of ninety-nine years was created commencing on 25th

March 1874, subject to certain restrictive covenants. On 14th October 1935, an application was made under the Law of Property Act 1925, section 84(12) for the discharge or modification of one of the restrictive covenants:

Held: the term was created fourteen years after it was stated to commence and was, therefore, a term for substantially eighty-five years. The period expired must be calculated from the execution of the lease and was, therefore, forty-seven years. The lease was therefore one for a term of more than seventy years, but as fifty years had not expired at the date of the application, it was not a lease in respect of which there was jurisdiction to make an order under the Law of Property Act 1925, 84(12), for the discharge or modification of a restrictive covenant contained in it.

Editorial Note: The point here is a very restricted one. In the first place the case is only concerned with the construction of a statute. The leases in question were dated and executed long after possession had been taken under them, and the terms were to be calculated from the date of possession. For the purposes of the statute the leases 'commenced' on the date of execution and were for a term calculated from that date, and the lease could not begin to 'expire' until after execution. In order to satisfy the words 'after the expiration of fifty years of the term' a period of fifty years after the date of the lease must have expired.

A similar decision was reached in *Roberts v Church Commissioners for England* [1971] 3 All ER 703 where the Court of Appeal was concerned with construing the definition of "long tenancy" in section 3(1) of the Leasehold Reform Act 1967. In *Abdulahi Jiwaji & Co v Shamui Holdings Ltd*, unreported, I held that the principles enunciated in these decisions were applicable in construing the definition of "controlled tenancy" in the Act.

Mr Inamdar has invited me to reconsider that decision. He had no quarrel with the reasoning underlying the two English cases but he argued that they were based wholly on the particular words of the statutes with which the Courts were concerned. In the *Cadogan* case Clauson J was careful to preface his judgment with the words ([1936] 2 All ER at pages 30, 31):

I cannot agree that the words of the statute must be read into the lease. I have to construe the statute. Nor am I concerned with what the parties say. I have to see what the Legislature says.

Later on he says, at page 32:

I am construing an Act of Parliament and not a document; as far as the Act of Parliament is concerned I think that the opinion I have formed is the correct one.

Stamp LJ said in *Roberts* case [1971] 3 All ER 730, 707:

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.

In both cases the word "term" which is created or granted, is incorporated in the statute. Mr Inamdar contrasts section 2 of the Act which makes no reference to a term being created or granted. It only refers to a period of years. It is a different statute with different terminology. How the period is to be measured is to be found in subsections (1) and (2) of section 50 of the Registration of Land Act, subject to which the lease was prepared. Section 50 provides:

(1)Where the period of a lease is expressed as commencing on a particular day, that day is excluded in computing that period.

(2)Where no date of commencement is named, the period commences on the date of the first execution of the lease, and that day is excluded in computing that period.

Here the date is named as from 1st December 1966 and you cannot fall back on the date on which the lease was first executed for the purposes of computing the date of commencement. The position is made

quite clear in 23 *Halsbury's Laws of England* (3rd Edn), page 531, paragraph 1186:

Tenancy for years. A tenancy for a term of years arises by express contract or by statute, and it is essential to the contract that the commencement and duration of the term should be so defined as either to be certain in the first instance, or to be capable of being afterwards ascertained with certainty.

The term may commence either immediately, or from a past or future date; and although it is expressed to commence from a past day, yet the actual interest of the lessee commences only on the execution of the deed, and his liability is limited accordingly; thus he is not liable for matters arising before the date of execution under the covenant to repair, or under a covenant not to erect buildings of less than a specified value. Under a proviso for determining the lease at the end of seven or fourteen years, these periods are reckoned from the commencement of the term.

In *Bird v Bakers* (1858) 28 LJQB 7 the headnote reads:

By indenture, dated and executed 19th July 1851, the plaintiff demised to the defendant premises then in his occupation 'to hold from 25th December 1849 for the term of fourteen years thence next ensuing' with a proviso, 'that it shall be lawful for either party to determine this demise at the expiration of the first seven years thereof by six months' notice'. Held that the seven years ran from 25th December 1849.

That is precisely the case here as was acknowledged by Clauson J in *Cadogan's* case. If Mr Satchu is correct, clause 3(f) of the lease would have no effect as the defendants would be required to give notice on 31st July 1971, which would be before the date of the execution of the lease on 30th May 1972. It is clear that the defendant had gone into possession and paid rent before the lease, which reduced an informal agreement into writing, was executed.

Although I am now convinced that the point of law must be decided in the plaintiffs' favour, Mr Satchu warns me of the danger of converting the present application into a full hearing on the merits. However, having decided that there is no triable issues in law I do not see why the plaintiffs, who have already been kept out of rightful possession of their property for three and a half months, should further indefinitely be kept out while the sterile exercise of arguing this point all over again is gone through. In *Cow v Casey* [1949] 1 KB 474, 481, Lord Greene MR stated that however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable it will give final judgment. This case is reproduced in the *Annual Practice* 1970, Vol 1, page 129, under the heading "Leave to Defend - Unconditional Leave". For the purpose of this application, RSC order 14 (England) is in *pari materia* to our order XXXV. For the above reasons there will be judgment for the plaintiffs as prayed.

Dated and Delivered at Mombasa this 18th day of March 1977.

D.J.SHERIDAN

JUDGE