



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CIVIL APPEAL 8 OF 1980

BETWEEN

AFRICAN UNIVERSAL MERCHANDISE LTD.....APPLICANT

AND

KULIA INVESTMENT LTD.....RESPONDENT

(Appeal from the High Court at Nairobi, Wilkinson-Guillemard J)

JUDGMENT BY POTTER JA

This is an appeal from a judgment of Wilkinson-Guillemard J given summarily under Order XXXV of the Civil Procedure Rules, in which the respondent as plaintiff landlord was awarded possession of the suit premises and other relief against the defendant tenant. The single issue before this court is whether on the facts of the case there was a “controlled tenancy” of the suit premises within the meaning of section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) (herein referred to as the (“Shops Act”). If the appellant’s tenancy was a “controlled tenancy”, then it is common ground that the High Court had no jurisdiction to make the order which it did, and that this appeal must succeed.

The suit premises are a shop on the ground floor and a number of rooms on the first floor of New Stanley House, which is erected on LR 209/4540 Nairobi. The respondent has been the registered proprietor of LR 209/ 4540, as lessee from the government for a term of 82 years and 10 months commencing on March 1, 1967, since the title to the plot was transferred to the respondent by Longreach Developments Ltd on March 23, 1977.

The facts stated in this paragraph of this judgment appear from the affidavit filed on behalf of the respondent in the High Court proceedings. These facts were not denied in the affidavit filed in reply on behalf of the appellant. The appellant originally went into occupation of the suit premises on January 1, 1971, when the appellant with the consent of Longreach Developments Ltd took a transfer of a lease expiring on July 31st; 1974 from Raymond Woollen Mills (Kenya) Ltd. In May, 1974 Longreach Developments Ltd offered the appellant a new lease for a term of 5 years and 3 months commencing on August 1, 1974 at a monthly rent of Shs 5,600. This offer was accepted by the appellant, and from August 1, 1974 the appellant occupied the suit premises under that agreement. That agreement was embodied in a lease which was executed on November 26, 1975.

It is also not in dispute that the lease was registered under the Registration of Titles Act (cap 281) on July 28, 1976. The relevant provisions of the interpretation section of the Shops Act are as follows:

“2. (1) For the purposes of this Act, except where the context otherwise requires:

.....

‘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 from the commencement thereof; or

(iii)

‘tenancy’ means a tenancy created by a lease or underlease, by an agreement for or assignment of lease or underlease, by a tenancy agreement or by operation of law, and includes a sub-tenancy

The learned judge held that on the facts the appellant’s tenancy was not a “controlled tenancy” within the meaning of section 2 of the Shops Act and accordingly entered judgment for the respondent. Unfortunately, the learned judge has not given this court all the assistance which it is entitled to expect from a judge of first instance. The submissions of Mr Ahamed, who appeared for the appellant were rejected as being “basically more spacious than sound.” The submissions of Mr Fraser, who appeared for the respondent, must be presumed to have been accepted by the learned judge, although it is nowhere so expressly stated in the judgment. Those submissions are set out in the judgment in the form of notes, an unusual and unhelpful practice. In the circumstances I propose to summarise the submissions of Mr Fraser which were made in this court on behalf of the respondent as constituting the reasoning of the lower court against which the appellant now appeals.

As I understand Mr Fraser’s submissions, there was a “tenancy” within the meaning of the Shops Act, because a tenancy for 5 years and 3 months commencing on August 1, 1974 was created by an oral agreement for lease concluded in May 1974, and the tenant was in occupation from the commencement of the term in pursuance of that agreement. There was no “controlled tenancy” as defined in that Act because when the issue arose there was a tenancy which had been reduced into writing and which was for a period exceeding 5 years. An oral agreement for lease is by reason of section 3(3) of the Law of Contract Act, (cap 23) unenforceable unless it is in writing and signed by the parties or unless there is part performance.

The agreement is not however void, see Megarry, *Law of Real Property*, 4th edition, at p 546. Mr Fraser stated that there had been part performance of the oral agreement, and I do not recollect that Mr Salter, who appeared for the appellant, contradicted him. Mr Fraser did not tell us what form the part performance took, and since the appellant tenant was already in occupation before August 1, 1974, the appellant must have done some other act in furtherance of the agreement, if indeed there was part performance. For my part I do not think that it is relevant to the questions before us whether or not there was part performance. The essence of Mr Fraser’s case is that there was a valid oral agreement for a tenancy for a period exceeding 5 years which was timeously reduced into writing, and the tenant was in continuous occupation of the suit premises from the commencement of the term of the tenancy until its termination.

The lease was registered on July 28, 1976 under the Registration of Titles Act, (cap 281). Accordingly it is not necessary in this case to consider the effect of section 2(3) of the Shops Act, which provides that evidence of a tenancy may be given for any of the purposes of the Act whether such tenancy was registered or not.

I now turn to the appellant's case. Mr Salter submitted firstly that no tenancy for a period exceeding 5 years was created because no interest in the suit premises passed to the appellant tenant until the lease was executed and registered in accordance with section 32 of the Registration of Titles Act, (cap 281). The section provides that no instrument shall be effectual to pass any interest in land until it is registered in accordance with the

Act. Alternatively, Mr Salter submitted that a lease can only operate in law to create a tenancy from the date of its execution. It is not possible to create a retrospective tenancy. For this proposition Mr

Salter relied on a line of English case law. I do not find it necessary to refer to those cases. It is sufficient in my view to cite the following passages from the judgment of Stamp LJ in *Roberts v Church Commissioners* [1972] 1 QB 278, at p 285.

“I agree. It is well settled that the *habendum* in a lease only marks the duration of the tenant's interest, and that the operation of the lease as a grant takes effect only from the time of its delivery: see *Shaw v Kay* (1847) 1 Exch 412; *Jarvis v Tomkinson* (1856) 1 H&N 195; *Cadogan (Earl) v Guinness* [1936] 1 Ch 515 and *Colton v Becollda Property Investments Ltd* [1950] 1 KB 216.

Some confusion has I think been introduced by the statement that the *habendum* only marks the duration of the tenant's interest, and, seizing upon that phrase, counsel for the tenant in this case, as was done on behalf of the unsuccessful party in *Cadogan v Guinness* [1936] 1 Ch 515, seeks to treat the words 'the duration of the term' as a reference to the length of the term. This is not a correct approach. 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. Unless there is, as a matter of law, within the meaning of section 3(1) of the Leasehold Reform Act 1967 'a tenancy granted for a term of years certain exceeding 21 years there cannot by agreement between the parties found in the tenancy agreement, be deemed to be such a tenancy for the purposes of the Act, so as to confer upon the tenant a statutory right which he would not otherwise have.

On behalf of the tenant 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 the case before us the lease was executed on November 26, 1975 and was expressed to lease the suit premise to the appellant for a term commencing on August 1, 1974 for a term of 5 years and 3 months.

The answer to these submissions of Mr Salter is that the respondent is not relying on a tenancy created by an executed and registered lease. The respondent relies on a tenancy created by an agreement for lease which is for a period exceeding 5 years and which has been reduced into writing. In the terms of the definitions of “tenancy” and “controlled tenancy” in section 2 of the Shops Act that is not a “controlled tenancy”.

As I have already observed, the lease was duly registered, and so it is not necessary in this case to consider whether section 2(3) of the Shops Act would have enabled the respondent to prove the tenancy for the purposes of the Act if the lease had not been registered.

This is not the first time that the High Court has had occasion to consider whether there was a “controlled tenancy” in circumstances similar to those in this case. In *Abdulali Jiwaji & Company v Shamji Holdings Ltd* (Civil Case 263 of 1976, Mombasa, unreported), the plaintiff landlord applied for summary judgments for possession of the leased premises. The lease was for a term exceeding 5 years, but by the

time the lease was executed the term had less than 3 years to run. The tenant submitted that prior to the execution of the lease there was a controlled tenancy, because the tenancy had not been reduced into writing; and after the execution of the lease there was a controlled tenancy, because the lease was for a period of less than 5 years. The tenant relied on the case law to which Mr Salter has referred. Sheridan J did not have the benefit of the submissions made to us by Mr Fraser. The learned judge held that the tenant had set up a serious triable issue as to whether there was a controlled tenancy, and dismissed the application for summary judgment.

In *Associated Holdings Limited v Prim and Pretty* (a firm), (Civil Case 2633 of 1977, unreported), an agreement for lease was concluded by the landlord's written offer to grant a lease for 5 years and one month and its acceptance by the tenant going into possession and paying rent. A draft lease was prepared but was never executed. After the expiration of the term the landlord applied by originating summons for a declaration of the landlord's right to have a lease signed by the tenant and for an order that the tenant do execute a lease in the form submitted. Harris J refused the application, one of the grounds being that he was not persuaded that the relief sought would be of any benefit to the landlord. The decision in *Jiwaji* was referred to by the learned judge with apparent approval.

Then in *Mary Pamos Melas and Angelike Lilly Monnas v New Carlton Hotel Limited*, (Civil Case 742 of 1976, Mombasa, unreported), the issue arose again before Sheridan J on an application by a landlord for summary judgment for possession. The tenant went into possession and paid rent under an informal agreement for a lease for a period of 10 years. When the lease was executed the term had less than 5 years to run. The learned judge accepted the landlord's argument that there was no controlled tenancy and gave summary judgment for possession.

In *The East African Power and Lighting Co Ltd v James Sidney Nesbitt*, (Civil Case 1014 of 1979, unreported) Sachdeva J reached a similar conclusion. Upon the expiration of a lease the tenant held over under an agreement for a new lease for 5 years and one month to commence immediately. When the lease was executed and registered, there was less than 5 years of the period remaining. In the course of his judgment the learned judge said:

“I respectfully adopt Mr Le Pelley's submission that sections 106 and 116 of the Transfer of Property Act are not applicable in the case. Section 106 applies only, *inter alia*, in the absence of a contract to the contrary, and, similarly, section 116 applies in the absence of an agreement to the contrary. Here there is an express contract or agreement between the parties that the new lease was to commence on 1.1.1977, and there is no reason whatever to imply a monthly tenancy.

.....

The parties in the instant case had expressly decided to enter into a lease exceeding 5 years, did so, and subsequently rectified it by registering it. In these circumstances I have no doubt that provisions of section 50 of the Registration of Land Act are applicable and the present lease commenced on 2.1.77.

In my view *Melas* and *Nesbit* were rightly decided and I respectfully agree with the reasoning of Sachdeva J in the latter case.

Accordingly I would dismiss this appeal with costs.

Law JA. I have had the advantage of reading in draft the judgment prepared by Potter JA.

The situation arising in this appeal is one which is not uncommon, and which has been the subject of conflicting decisions in the courts in Kenya. A landlord and a tenant enter into an oral agreement for the letting of property for a fixed term exceeding five years, so as to exclude the tenancy from the operation of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301), hereinafter referred to as “the Act”. In pursuance of the agreement, the tenant goes into occupation and pays rent, and

a formal lease is drawn up, agreed, executed by the parties and registered. This latter process may take some time, let us say one year. I accept Mr Salter's submission that a lease only takes effect on registration. We are however concerned in this appeal with the interpretation of section 2 of the Act, under which a tenancy for a period exceeding 5 years is excluded from the definition of a "controlled tenancy" for the purposes of the Act if the tenancy is created by an agreement which has been reduced into writing.

In my view, the subsequent execution of a lease embodying the terms of the oral agreement is a reducing into writing of that agreement, and does not have the effect of reducing the agreed term by the period taken up in agreeing, engrossing and executing the lease so as to convert the tenancy into a controlled tenancy. I agree with Potter JA that the respondent in this appeal is not relying on a tenancy created by an executed lease, but on a tenancy for a period exceeding 5 years created by an agreement which has been reduced into writing. To hold otherwise would lead to absurdity.

Businessmen who have agreed on a tenancy for a fixed period of, say, 6 years could by delaying execution of a formal lease for a year or more, claim to reduce the freely negotiated term by the time caused by the delay so as to bring the tenancy within the Act. This cannot be right. I agree with the decision to this effect of Sheridan J in *Melas and Monnas v New Carlton Hotel Ltd* (Mombasa Civil Case 742 of 1976, unreported), and I respectfully concur with the extract from the judgment of Sachdeva J in *East African Power and Lighting Co Ltd v Nesbitt* (Nairobi Civil Case 1014 of 1979, unreported) cited in the judgment prepared by Potter JA.

I would dismiss this appeal. As Miller JA also agrees, it is ordered that this appeal be dismissed with costs.

Miller JA. I have had the advantage of reading the judgment of Potter JA in this appeal in draft form. I agree with it and I have nothing useful to add in this particular case except to say, that it appears to me, that a distinction may well be drawn between agreements between parties *per se*, which agreements may or may not be caught by statutory provisions relating to the subject matter of the said agreement, as opposed to the freedom of the individual unwittingly or otherwise to contract out or within the ambit of such relevant statutory provisions which may exist.

Dated and delivered at Nairobi this 8th day of October, 1980.

K.D.POTTER

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR