REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO 263 OF 1976

ABDULALI JIWAJI & COMPANY.....PLAINTIFF

VERSUS

SHAMVI HOLDINGS LTD.....DEFENDANT

ORDER

July 13, 1976, **Sheridan J** delivered the following Order.

By a notice of motion filed in court on 3rd June, 1976 made under order XXXV r 1(1) (b) and (2) of the Civil Procedure Rules the plaintiff applies for summary judgment to be entered against the defendant as prayed in the plaint and for the costs of this application.

The prayers in the plaint are for:-

> "1. Possession of the Leased Premises;
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> 2. Shs 10,851/20 arrears of rent;
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> 3. Mesne profits at the rate of Shs 4,250/- per month from 1st May, 1976 until possession is delivered up;
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> 4. Damages for trespass;
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> 5. Interest on Shs 10,851/20 @ 8% per annum from the date of filing of this suit until payment;
>
> 6. Costs of and incidental to this suit."

Order XXXV r. 1(1) (b) provides:-

> "1. (1) In all suits where a plaintiff seeks judgment for-
>
> (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

> Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed and interest or for recovery of the land and rent or mesne profits."

Mr Jiwaji, for the applicant, states that at this stage he is only interested in the recovery of the leasehold premises as the claim for rent is in dispute. I am not sure if the recovery of the land can be divorced from the claim for rent or mesne profits as to do so means ignoring the word "and" in the last line of the rule. However, it is not necessary to express a final view on this.

The present claim is based on paras 4, 5 and 6 of the plaint as follows:-

> "4. By a lease made on 19th day of May, 1973 between the plaintiff of the one part and the defendant of the other part, the plaintiff demised the ground floor premises together with a portion on the first floor of the building erected on the land comprised in Mombasa/ Block XXI/parcel 154 (hereinafter referred to as "the leased premises") to the defendant for the term of seven years and four months from the 1st day of January, 1969 at the monthly rental of shs 1,700/- payable in advance on or before the 5th day of each calendar month without any deductions and subject to amongst others any increases in Municipal Rates.
>
> "5. The plaintiff is entitled to possession of the leased premises.
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> 6. The said term expired by effluxion of time on 30th day of April, 1976 yet the defendant has thereafter remained and now remains in occupation of the leased premises as a trespasser therein".

A copy of the lease is annexure I to Mr Jiwaji's supporting affidavit. In the habendum it states that the date of commencement of the lease from 1st January, 1969 for a period of seven years and four months is "now past". Para 1 (j) provides:-

> "(j) At the expiry of the term hereby created or sooner determination thereof to yield up the premises hereby leased together with all the Lessors fixtures and fittings therein in good and tenantable repair and condition in accordance with the agreement and stipulations herein before contained".

The issue is whether this term was in force from 1st January, 1969 or only from 19th May, 1973 when the lease was executed.

Mr M Satchu, for the respondent, submits that prior to 19th May, 1973 this was a controlled tenancy within the meaning of s.2(1)(a) of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act (Cap 301) hereinafter referred to as 'the Act') as it had not been reduced into writing and that the only terms to be implied are those set out in the Schedule under s.3 which do not include an undertaking to yield up the premises at the expiry of its term. From 19th May, 1973 when the lease was reduced with writing it was still a controlled tenancy as under para (b) (i) ss. (1) it was for a period not exceeding five years, in fact it was for a period of less than three years until it expired on 30th August, 1976.

At this stage all I have to decide is whether there is a real triable issue between the parties. Mr Satchu has cited three English authorities which point to the limited effect of antedating the commencement of a lease in its habendum. In *Shaw v Kay* 154 ER (Exchequer) 175 it was held that in an action for the breach of a covenant for repair in a lease, a tenant is not liable for acts done before the time of the execution of the lease, although the habendum of the lease states the premises to be held from a date prior to its execution. The habendum in a lease only marks the duration of the tenant's interests and its operation as a grant is merely prospective. In *Earl of Cadogan v Guinness & Others* [1936] 2 All ER 29 it was held that for the purpose of a statute 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 execution. Here the lease could not begin to expire from 1st January, 1969 but only from 19th May, 1973 which was for a period of less than five years under the Act. Per Clauson J at p.31

> "Now it is a very common experience that in the creation of leasehold terms the term which is expressed to be created s expressed to run as from a date anterior to the date of the document which creates a term. It is very common indeed to find a lease in the year, say, 1936, creating a term of twenty-one years as from Dec 25, 1935. And if in any such lease there is a reference to determination after the first seven years of the term, for the purpose of calculating which are the first seven years, there is no doubt that, on the true construction of the document, the seven years should be construed as beginning from Dec 25, 1935, and not from the date in March, 1936, when the document was actually executed. But it must be borne in mind that it is not possible by a deed executed in March, 1936, to create a term in such a sense as that it shall bring into existence a term prior to the date of the execution of the deed, that is impossible. Although in the instance I have given the term is looked upon as a twenty-one year's term, in fact it is twenty-one years less the period which had elapsed from Dec 25,1935, when the term nominally begins, and the date of the execution of the deed.
>
> That seems to me to be a reasonably obvious proposition. But I am supported in my opinion of its obviousness by referring to *Shaw v Kay* (2), a decision of the Court of Exchequer and a case in which the proposition which I have suggested as being a correct proposition was quite plainly accepted."

The effect of these decisions and their effect on statute is succinctly set out by Stamp LJ in *Roberts v Church Commissioners for England* [1971] 3 All ER 703 at p.707.

> "STAMP LJ. I agree. It is well settled that the habendum in a lease only marks the duration of the tenant's interest, and the operation of the lease as a grant takes effect from the time of its delivery: see *Shaw v Kay, Jervis v Tomkinson, Earl of Cadogan v Guiness,* and *Colton v Becollda Property Investments Ltd.* Some confusion has I think been introduced by the statement that the habendum only marks the duration of the tenant's interest, and seizing on that phrase, counsel for the applicant in this case, as was done on behalf of the unsuccessful party in *Earl of Cadogan v Guinness,* 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 s.3(1) of the Leasehold Reform Act 1967 'a tenancy granted for a term of years certain exceeding twenty-one years' there cannot by agreement between the parties found in the tenancy agreement, be deemed to be such a tenancy for the purpose of the Act, so as to confer on the tenant a statutory right which he would not otherwise have.
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> 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."

I think that the principles enunciated in these decisions are applicable in Kenya in relation to the Act.

I was not informed why this lease was not executed at the time it was made. If the plaintiff was in a position to antedate the lease with legal effect then the purpose of the Act (Cap 301) would be circumvented.

While I can understand the applicant's anxiety to obtain vacant possession with a prospective lease of shs 4250/- p.m as opposed to a controlled tenancy of shs 1700/- p.m I think that the respondent has set up a serious triable issue that the applicant may have chosen the wrong forum and that the matter should have been referred to the Rent Tribunal under the Act and that the respondent should have unconditional leave

to defend. The application is dismissed with costs. The draft defence and conterclaim may be admitted. Reply and defence to counterclaim, if any within 15 days.

Costs in the cause.

July 13, 1976

SHERIDAN J