IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Sir James Wicks CJ, Wambuzi & Law JJ A)

CIVIL APPEAL NO 18 OF 1978

Between

EAST AFRICAN POWER

AND LIGHTING CO LTD ....APPELLANT

AND

ATTORNEY GENERAL...............................RESPONDENT

JUDGMENT

Law JA The appellants are the owners of a building in Nairobi known as Electricity House. Various Government ministries and departments were interested in occupying as offices the fifth, sixth, seventh, eighth, twelfth and thirteenth floors of this building, and from 1970 to 1972 negotiations took place between the appellants, through their agents and their advocates, and the Ministry of Works, on behalf of the Government for six years' leases of these floors at an agreed rental of Shs 18 per square foot per annum. In due course, leases were drawn up, executed and registered in respect of the fifth, sixth, seventh, eighth, and thirteenth floors. The fifth floor was occupied by the National Hospital Insurance Fund, the sixth, seventh and eight floors by the Ministry of Power and Communications, and the thirteenth floor by the Department of Community Development.

The lessees in each case were the ministries concerned. In the case of occupiers who were departments, or funds established by statute, the lessees were the ministry responsible for the department or for the administration and control of the fund.

This appeal concerns only the twelfth floor, in respect of which no lease was ever executed. The occupiers of that floor were the National Social Security Fund (the "NSSF") established by the National Social Security Fund Act. The NSSF is not a legal entity. It has no capacity to enter into contracts, or to sue or to be sued. By section 3 of the Act, it is stated to be a fund under the control and management of the Minister, and it is common ground that, if the negotiations for a lease of the twelfth floor had been completed and the draft lease approved by the Ministry of Works, the lease would have been executed by the Ministry of Health, although the rent would have been paid by the NSSF. The NSSF entered into possession in April 1971. On 22nd January 1971, the Ministry of Works had written to the appellants' agents to the effect that:

> The NSSF are anxious to occupy the accommodation as soon as possible. This is to confirm that we shall take the twelfth floor at the already agreed rental of Shs 18 per square foot per annum.

At the trial of the suit, the subject of this appeal, Mr Kageche, the Permanent Secretary of the Ministry of Works, deposed that the word "we" in the last sentence of the above extract, meant that the Ministry of Works would "take the lease", which I understand to mean that the Ministry was the intended lessee of the premises to be occupied by the NSSF. In the event, the NSSF ceased to occupy the premises in April 1973. They gave no notice of their intention to do so. They paid the rent until the end of April. They handed some of the keys to a Mr Ogot, a watchman employed by the appellants, in April; and the rest of the keys on 29th June 1973, again to Mr Ogot, who on this occasion gave a receipt for all the keys. The appellants' agents wrote to the NSSF on 10th April 1973 asking if the premises had been vacated. The NSSF replied on 26th April , saying "It is true we vacated the said floor on 3rd April 1973 and Ministry of Works should have advised you accordingly". Clearly the NSSF were of the view that the Ministry of Works were tenants. The appellants' agents then wrote to the Permanent Secretary of the Ministry of Works on 3rd May 1973 in these terms:

> We have just been advised by the NSSF that they have vacated the above accommodation ... As you are aware we have had no notification of this, and accordingly we can only assume that you are intending to use the accommodation for another Government Ministry. Your information on this however will be of assistance.

Again, the Ministry of Works was being treated as the tenant. If they were not, one would have expected them to say so. This letter and further letters remained unanswered; but on 10th September 1973 a significant communication came from the NSSF who said, in reply to a demand for rent "... We vacated the said floor on 3rd April 1973 and thereafter the Ministry were responsible.

Here is another assertion that, whatever the nature of the tenancy, it did not terminate when the NSSF vacated the premises in April 1973. It is not until 21st November 1973 that the Ministry of Works wrote to the appellants' agents saying:

> The above-mentioned accommodation was vacated by the NSSF and keys for it were handed to your representative on 3rd April 1973. Your representative signed for the keys and documentary evidence can be produced to support this. Consequently rent can be paid up to 30th April 1973 only.

The impression I get from this letter is that the Ministry was saying that the NSSF were the tenants, and that the tenancy was surrendered by them in April 1973, and that the surrender was accepted by the appellants' representative.

On the 6th August 1974, the appellants' advocates wrote to the Ministry of Works, saying:

> In our opinion there is a binding agreement between the Government and our client to take a lease of the above premises. We can find no document agreeing to a surrender of this lease. Our client will not accept a surrender until such time as a new tenant is found ... In the meantime our client holds the Government responsible for all rent for these premises.

This letter was passed on to the Attorney-General, who on 28th August 1974 replied to the advocates' letter denying all liability, on the grounds that there never was a final and completed bargaining between the parties so as to bind the Government to take a lease of the floor. The advocates replied on 10th September 1974 saying:

> Even if there was no binding agreement, which is not accepted by us, NSSF entered into occupation and there was at least a monthly tenancy which has not yet been lawfully terminated and the Ministry is therefore still liable for rent.

To this letter the Attorney-General replied on 2nd October 1974, saying:

> The mere fact of NSSF having gone into occupation during negotiations for the lease and thereby making some payments for use thereof does not by itself give rise to a monthly tenancy. In our

> opinion no such tenancy was ever entered into and the facts establish a tenancy at will where no notice to quite was necessary.

At last, the issue between the parties was defined. The appellants contended that the occupation of the premises and the payment and receipt of agreed rent resulted in a monthly tenancy being created, which was never determined by notice; and the Government, through the Attorney General, contended that a tenancy at will was created, which required no notice to determine it.

The appellants filed suit on 29th December 1975, claiming arrears of rent of Shs 124,465/50 and smaller sums in respect of service charges, excess rates and redecoration charges, on the basis of a concluded agreement between themselves and the Government acting through the Ministry of Works for a lease of the twelfth floor; alternatively, on the basis of a monthly tenancy which had not been terminated by notice. The defence, filed on 27th January 1976, was to the effect that there never was a concluded agreement; that occupation of the premises pending negotiations "constituted the NSSF a tenant at will"; that the Government never became a monthly tenant of the premises; that, if the NSSF became a monthly tenant, that tenancy was terminated by the appellants and that the NSSF thereafter held over as tenants at will; and there was an allegation that, if there was a monthly tenancy, it was terminated in March 1973 by payment of one month's rent paid in advance in lieu of notice. This last matter needs no further consideration as in fact no such payment in advance was ever made.

At the trial of the suit, the issues were agreed and narrowed down as follows-

> Being agreed between the parties that the Government of the Republic of Kenya did take occupation of the twelfth floor of Electricity House ... for and on behalf of the NSSF on or about April or May 1971 in circumstances which do not amount to trespass,
>
> 1. What relationship existed between the [appellants] and the Government in relation to the twelfth floor Electricity House?
>
> 2. Was the Government of Kenya entitled to terminate that relationship?
>
> 3. If 'yes', was the Government required to give notice in writing to terminate that relationship?
>
> 4. If 'yes', was any valid notice of termination of that relationship given to the [appellants]?
>
> 5. If the answer to question 3 is the negative, then was there a valid termination?
>
> 6. If there was a tenancy, was there any valid surrender of that tenancy?
>
> 7. What sum, if any, is due to the [appellants] from the [Government]?

In the course of a long and carefully considered judgment, Muli J answered these issues as follows. He held that the relationship between the parties was that of a tenancy at will by implication of law, that the Government could terminate that tenancy without being required to give notice in writing, and that as it was a tenancy at will it was validly terminated.

Accordingly, the issue of surrender did not arise, but in the judge's view there was a valid surrender arising out of the handing over of the keys to the watchman because 'the watchman held himself out as the person with authority to receive the keys". With respect, that was a misdirection. A person cannot hold himself out to be an agent of another person, and thereby bind that other person. To incur liability for the acts of another, it must be the principal who holds the other person out as having his authority, express or ostensible. That was not the position here. Mr Ogot was a watchman and a cleaner, and there is no evidence that he was ever held out by the appellants as having authority to accept the surrender of a tenancy on their behalf, or to do any act which could bind the appellants in their capacity as landlords in relation to a tenancy. For instance, Mr Ogot could not have bound the appellants by purporting to grant a tenancy on their behalf. A watchman employed by a landlord does not have that ostensible authority, any

more than he has to accept a surrender.

On the basis of the relationship between the Government and the appellants being a tenancy at will, the judge gave judgment for the appellants for redecoration charges of Shs 2516 and excess rates of Shs 627/05, making a total of Shs 3143/05, with costs on that amount and interest. He rejected the appellants' main claim which was for rent, service charges and excess rates incurred after the alleged surrender.

The substantial issue on this appeal is whether the judge was right in holding that the relationship between the parties was a tenancy at will, or whether he should have held that it was a monthly tenancy by virtue of the provisions of section 106 of the Transfer of Property Act? Mr Fraser, for the appellants, contends for the latter proposition, Mr Shields, for the Attorney-General, supports the finding of the judge.

The position here is that, in the course of negotiations for a formal lease of the twelfth floor for a term of six years between the appellants and the Ministry of Works for the Government, the Government allowed the NSSF to occupy the premises, which the NSSF did, and thereafter rent was paid and accepted. What then was the relationship between the appellants and the Government? Muli J found that, by implication of law, there was a tenancy at will. He appears to have relied on *Birsingh v Ketra* [1967] EA 741 and on the judgment of Platt J in *Rogan-Kamper v Lord Grosvenor* (No 2) [1977] Kenya LR 123. *Birsingh's* case related to premises which had been sold. The seller remained in possession with the consent of the buyers and paid an agreed rent. Counsel on both sides agreed that, in the circumstances, a periodic tenancy from month to month had been created.

Notwithstanding this consensus, the judge found that the tenancy was a tenancy at will. In effect, he was in a minority in coming to this finding.

In *Rogan-Kamper's* case, there was an agreement for a lease, but no formal lease was in the event executed. The tenant was given possession and went into occupation. He paid rent which was accepted. The majority of the Court (Mustafa JA and Wambuzi P) had no doubt that, in the circumstances, a monthly tenancy was created, under section 106 of the Transfer of Property Act. Platt J was alone in holding that the resulting tenancy was a tenancy at will. The facts in the *Rogan-Kamper* case were similar to the facts in the instant case. The parties had agreed to enter into a lease for five years and one month at an agreed monthly rent and to occupy the premises from an agreed date. The landlords were to draw up a lease incorporating the agreed terms. The tenant entered into occupation and paid the agreed rent for some months. He refused to execute the formal lease drawn up by the landlords. Mustafa JA summed up the position as follows, [1977] Kenya LR at page 129:

> Here the tenant had entered into possession of the premises with the permission of the landlord. There was consensus and a tenancy was created by the payment and receipt of rent; see *Jagat Singh Bains v Ishmael Mohamed Chogley* (1949) 16 EACA 27. What sort of tenancy was created? ... In terms of section 106 of the Transfer of Property Act, 'in the absence of a contract to the contrary' this would be a lease from month to month, terminable by fifteen days' notice expiring with the end of a month of tenancy.

Wambuzi P came to the same conclusion. He held, [1977] Kenya LR at page 133, that:

> The rights of the parties are governed by the relationship which was created between them by possession of the suit premises and payment and acceptance of rent, which is a monthly tenancy.

The trial judge in the instant case refused to apply the "deeming" provisions of section 106 of the Transfer of Property Act because, in his words, [1977] Kenya LR at page 218, "The section pre-supposes a concluded lease". With respect, this was a fundamental misdirection. Section 106 is deemed to apply in the absence of a contract or local law or usage to the contrary, with the consequence that "a lease of immoveable property shall be deemed to be a lease from month to month ..."

The word "lease" in that context does not mean a concluded or formal lease. It means a letting. Section 106 has no application where there is a valid document of lease, because no question of "deeming" then

arises.

In the instant case, the correspondence clearly establishes an agreement for a lease for six years by the Government of ascertained premises at an agreed rent. The agreed terms covered all the essentials of a lease. A formal lease to this effect was contemplated and engrossed, but not executed. In accordance with the agreement, however, the Government took possession of the premises through its nominee or licensee, the NSSF; and the agreed rent was thereafter paid and accepted. In the absence of a contract to the contrary, the letting was for an uncertain duration, so that the deeming provision of section 106 applied and a monthly tenancy was created, terminable by fifteen days' written notice. This is in my view the inescapable conclusion, based on a long line of East African and Indian authorities. The Indian cases are fully authoritative here, as the Transfer of Property Act is an applied Indian Act. I need only refer to *AA Bepari v JLR Chaudri* [1939] 2 Cal 254 as an example, and *Singh v Singh* [1961] 1 R Patna 350.

Mr Shields for the Attorney General supported the judge's holding that the tenancy in this case was a tenancy at will. He submitted that there was no full agreement for a lease in this case, that occupation by the NSSF was purely permissive, and that what was paid was not rent but reasonable compensation for use and occupation. Mr Shields submitted that the NSSF were the tenants and not the Government; but that is not in accordance with the agreed issues, which clearly postulate that, whatever the relationship, it existed between the appellants and the Government.

Furthermore, as has already been pointed out, the NSSF is a statutory fund, administered by a Minister, and is not a legal entity capable of entering into a contract. Mr Shields also submitted that the judge was right in not applying section 106 because its application is "subject to any ... local law to the contrary". A tenancy at will can arise by implication of law under the common law of England, and that common law forms part of the local law of Kenya by section 3 of the Judicature Act. That is an ingenious argument, but I think that it must fail.

Firstly, I do not agree that, in the circumstances of this case, there ever was a tenancy at will. Such a tenancy is usually expressly created; as is stated in *Woodfall on Landlord and Tenant,* (26th Edn) page 307, Courts of law have always leaned as much as possible against construing demises to be tenancies at will, but have rather held them to be tenancies from year to year. There must be a clear intention to create a tenancy at will.

No such intention is apparent in this case. How then can the creation of such a tenancy be implied? Certainly not under any provision contained in the Transfers of Property Act, which in Chapter V codifies the law of Kenya relating to the letting of immoveable property. By section 106, a letting of immoveable property for purposes other than agricultural or manufacturing is deemed to be a lease from month to month, and by section 116 the same applies in the case of holding over. Nothing in the Act allows for the implication or the deeming of a tenancy at will. My own view is that a tenancy at will can only exist in Kenya when it results from an express agreement to create such a tenancy, and there is no room for the implication of a tenancy at will in the land law of Kenya. Possession by a tenant with the consent of the landlord followed by payment and acceptance of rent results, in the absence of a contract or local law or usage to the contrary, in a letting governed by the provisions of section 106 of the Transfer of Property Act. Such a letting can only be terminated by the giving of requisite written notice, and it is common ground that no such notice was given in this case.

I am accordingly of the view that this appeal succeeds and should be allowed, with costs. I would alter the judgment and decree appealed from by increasing the amount awarded to the appellants from Shs 3,143/05 to Shs 133,870/25, with costs on the higher scale and interest at court rates.

Wambuzi JA. I have had the advantage of reading in draft the judgment prepared by Law JA. I agree with it and have nothing useful to add. I concur in the orders he proposes.

Sir James Wicks CJ. I have read the judgment prepared by Law JA in which I concur.

There will be an order in the terms proposed by Law JA.

Appeal allowed with costs.

Dated and delivered at Nairobi this 22nd day of November 1978.

SIR JAMES WICKS

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CHIEF JUSTICE

S.W.W WAMBUZI

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JUDGE OF APPEAL

E.J.E LAW

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR