IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Mustafa JA & Platt J)

CIVIL APPEAL NO. 33 OF 1976

BETWEEN

A.W.ROGAN KAMPER.....APPELLANT

AND

ROBERT GROSVENOR.....RESPONDENT

(Appeal against the Judgment of Chanan Singh J n the High Court dated 31st July 1975 in Civil Case No 786 of 1971)

JUDGMENT

The appellant (hereinafter called "the tenant") wanted to lease certain premises belonging to the respondent (hereinafter called "The landlord") and entered into a written agreement with the landlord's agents, Tysons Ltd, on 29th September 1969. The agreement was in the form of a letter containing certain terms sent by Tysons Ltd to the tenant and which the tenant agreed to by signing the letter at the bottom. The material terms to that agreement were: (1) the parties agreed to enter into a lease of five years and one month, the monthly rent being Shs 3600; (2) the tenant agreed to occupy the premises from 1st November 1969; and (3) the landlord's advocates were to draw up a draft lease incorporating the agreed terms for the tenant's perusal and approval.

The tenant entered into possession on 1st November 1969 and paid the agreed monthly rent at Shs 3600, and continued doing so until the end of April 1970. On 30th April 1970, the tenant wrote to Tysons Ltd stating that he, with immediate effect, would surrender half the premises, and retain the other half, for reasons stated in the letter. Tysons Ltd replied by letter of 5th May 1970 to the effect that, without its client's instructions, it could not accept such surrender, although it would endeavour to secure a tenant for the portion of premises that the tenant wished to give up. Since May 1970 the tenant paid or tendered rent at Shs 1600 per month while the landlord maintained that the tenant was liable for rent at Shs 3600 per month.

On 15th November 1969 a draft lease in terms of the agreement of 29th September 1969 was sent to the tenant by Tysons Ltd for approval and return. Subsequently, a number of reminders were sent to the tenant concerning the draft, the last one being dated 16th October 1970. The tenant, however, neither approved nor executed the draft lease. During May 1971, the landlord gave notice to the tenant to quit the premises he occupied on 31st May 1971, on the ground of non-payment of rent. The tenant refused to give up possession, and the landlord in June 1971 instituted an action for ejectment, for payment of

arrears of rent and for mesne profits. The landlord's amended plaint averred that: (a) there was an agreement in writing dated 29th September 1976 by which the landlord agreed to grant the tenant a lease for five years and one month; (b) that after entering into possession, the tenant despite being tendered a draft lease, failed to approve or execute it; (c) that it was an express term of the draft lease that the landlord was at liberty to terminate the tenancy and reenter into possession if rent or any part thereof was in arrears for fourteen days; and (d) that since April 1970 the tenant had failed to pay the agreed rent and that "by virtue of the aforesaid breach of the express or implied term of the lease" the landlord gave notice to quit.

It seems that the landlord was claiming possession and arrears of rent on the basis of the draft lease which neither party had executed.

This action was tried before the High Court (Chanan Singh J). In the course of his judgment he referred to the Transfer of Property Act and the Registration of Titles Act, and of course to the agreement of 29th September 1969 and to the draft lease. Then came this passage:

In any case, this is a case of an unregistered lease. The consequences of such a state of affairs are now well recognised as a result of the Privy Council case of *Ariff v Jadunath* (1930) 58 Cal 1235...

He then went on to say that, on the facts of the case and applying section 106 of the Transfer of Property Act, "I hold that the lease being compulsorily registrable but being unregistered, the defendant became a monthly tenant of the plaintiff." He also held that the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act applied to the suit premises, and that as the procedure for terminating tenancies had not been followed by the respondent, he dismissed the landlord's claim with costs. He did not deal with the other issues of fact raised by the parties.

The landlord then appealed to the Court of Appeal for East Africa. The leading judgment of this Court was delivered by Law V-P on 23rd October 1974, the other two members formally concurring. Law V-P stated (at page 447) *inter alia*:

The use of the word 'lease' [in the plaint] … seems to me unfortunate and confusing. There never was an executed lease, and the suit was based on an alleged breach of the agreement to grant and take a lease, dated 29th September 1969 … The trial judge, unfortunately, fell into the same error, and held as follows: 'in any case, this is a case of an unregistered lease'. With respect, it is not. There never was a lease in existence, capable of registration … The question arises, whether such an agreement is valid and enforceable by either party although not registered … This contract could have been ordered to be specifically performed at the instance of either party. As regards covenants and stipulations which are not stated, the [tenant] must be deemed to hold under the same terms as if a lease had been granted, and he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted: see the judgment of Jessel MR in *Walsh v Londsdale* (1882) 21 Ch D 9.

It follows that in my view the appeal must succeed … and remit the suit to the same judge for decision on the basis that there was a valid contract between the parties for the leasing of the suit premises for the terms certain of five years and one month. The final determination of the suit will necessitate a decision … whether there was an effective surrender of part of the demised property; whether a stipulation should be implied into the agreement giving the landlord a right to demand vacant possession, on giving fifteen days' notice, for failure to pay rent; whether … the agreement was void for illegality …

The case was accordingly remitted to Chanan Singh J who heard further submissions from the parties and gave judgment on 31st July 1975 in favour of the landlord "in terms of the prayers in the plaint". It is from this judgment that the tenant now appeals to this Court.

Chanan Singh J in the judgment under appeal stated, *inter alia*:

The Court of Appeal for East Africa allowed the [landlord's] appeal against my judgment of the 27th May 1974, and remitted the case to me and directed that I decide it 'on the basis that there was a valid contract

between the parties for the leasing of the premises for the term certain of five years and one month.' … I am bound by the decision of the Court of Appeal and will, of course, now decide the case on the basis that there was a lease for five years and one month, or as though there was such a lease.

He then examined and analysed the evidence, found that there was no acceptance by Tysons Ltd of the purported surrender by the tenant, nor was the agreement void for illegality. He apparently did not make any finding on the third issue remitted to him, ie whether the landlord could recover vacant possession of fifteen days' notice or for non-payment of rent. He ended his judgment thus: "… I now give the [landlord] in obedience to the Court of Appeal decision, judgment in terms of the prayers in the plaint".

The appeal was argued on the following main grounds. Mr Nazareth for the tenant submitted that the trial judge misconstrued, misinterpreted and misapplied the judgment of the Court of Appeal remitting the case to him for decision. The case was remitted to him:

On the basis that there was a valid contract between the parties for the leasing of the suit premises for the term certain of five years and one month.

The trial judge, however, decided the case "on the basis that there was a lease for five years and one month or as though there was such a lease". The trial judge also stated "… I now give the [landlord], in obedience to the Court of Appeal decision, judgment in terms of the prayers in the plaint". Mr Nazareth submitted that the Court of Appeal nowhere in its judgment directed such judgment to be given. The whole basis of approach by Chanan Singh J to the case was wrong and he therefore arrived at a wrong conclusion. Mr Nazareth submitted that if the trial judge had followed the proper approach in accordance with the direction of the Court of Appeal, he would have come to the conclusion that a month-to-month tenancy was created between the parties by or implied from payment and acceptance of rent; that no valid notice of termination had been given; and that no case for determination of the tenancy or for payment of arrears of rent had been made out. Mr Nazareth also disputed the trial judge's findings that there was no acceptance of surrender of part of the leased premises by the landlord, and that the agreement dated 29th September 1969 was not bad or void for illegality. He also attacked the judgment given in that it did not take into account money paid into Court or to thelandlord by the tenant and also did not differentiate between claims for arrears of rent and mesne profits.

In the judgment under appeal, Chanan Singh J, after referring to the remission to him by the Court of Appeal to decide the case on the basis that there was a valid contract for the leasing of the premises, went on to say:

With respect, that is what in my own way I have tried to do when I held that Exhibit I 'is not a lease for five years and one month. It is an agreement for such a lease' … that such an agreement can be the basis for a suit for specific performance but cannot itself be regarded as a lease.

I must, with respect, agree with this statement of the law by Chanan Singh J; indeed, that is what I think Law V-P said in effect in his judgment, and the case was remitted to the trial judge for decision on the basis that there was a contract or agreement for a lease for five years and one month. But, unfortunately, the trial judge then proceeded to decide the case on the basis that there was a lease, or as though there was a lease, for a term of five years and one month certain, and in effect so decided the case in favour of the landlord. That is the main ground of complaint by Mr Nazareth in the appeal before us. Mr Nazareth submitted that the trial judge was not asked to decide the case on the basis that there was a lease, but only on the basis that there was a contract for a lease. A contract for a lease is different from a lease and each has different legal incidents attaching to it, and one cannot be substituted for the other. However, as the trial judge said, he himself had in effect so held in his earlier judgment; but he nevertheless went on to decide the case on the basis, in his words, "this is a case of an unregistered lease". It is this proposition that Law VP on appeal found was wrong. Law V-P in his judgment also referred to *Walsh v Lonsdale* (1882) 21 Ch D 9. It would seem that Chanan Singh J thought that the Court of Appeal held that the doctrine enunciated in the *Lonsdale* case was applicable to Kenya, for the judge in the case under appeal, after stating that he was bound by the Court of Appeal decision, decided the case on the basis that there was a lease for five years and one month, or as though there was such a lease.

Mr Le Pelley for the landlord submitted that the Court of Appeal did decide that the *Lonsdale* case was to be followed. He submitted that Chanan Singh J in his first judgment had held that the agreement was only a contract for a lease and not a lease for five years and one month, and referred to section 40 of the Registration of Titles Act (which provides that no lease for any term exceeding twelve months is valid unless registered). The judge also referred to section 107 of the Transfer of Property Act (India) which provides that a lease of immoveable property for any term exceeding one year can only be made by a registered instrument. There was no registered instrument in this case. It was in those circumstances that the judge held that there was an unregistered lease on a month-tomonth basis in terms of section 106 of the Transfer of Property Act (India). Mr Le Pelley's submission was that since the Court of Appeal set aside the order of Chanan Singh J dismissing the suit and remitted the suit to the judge for decision, it must have done so on the basis that the agreementwas to be treated as a lease or as though it was a lease in accordance with the *Lonsdale* case.

I must confess that I find the question, whether or not the Court of Appeal was following the decision in the *Lonsdale* case, a very difficult one to resolve. Law V-P made a clear distinction between a contract for a lease and a lease. If, however, Law V-P had intended to follow the *Lonsdale* case, he could easily have said so, and treated the contract as if it was a lease for five years and one month. He did not do so. But the fact remains that he referred to the *Lonsdale* case. However, he referred to it in the following terms ([1974] EA at 448):

In my view there was such a contract between the parties … its material terms are sufficiently stated; the names … the description of the property, the term and its commencement, and the rent agreed to be paid. This contract could have been ordered to be specifically performed at the instance of either party. As regards covenants and stipulations which are not stated, the [tenant] must be deemed to hold under the same terms as if a lease had been granted, and he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted: see the judgment of Jessel MR in *Walsh v Lonsdale* (1812) 21 Ch D 9.

It seems to me that he was perhaps referring to the missing covenants and stipulations in the contract, and held that such covenants and stipulations could be the same as implied in a lease, in an action for specific performance of the contract for a lease, rather than saying that *Lonsdale* case was to be followed.

There is another factor which would seem to favour Mr Le Pelley's submission. If the *Lonsdale* case was not to be followed, then there was no lease for five years and one month created and only a tenancy or lease for less than one year could have come into existence, and Chanan Singh J's finding to this effect should not have been set aside, if he had arrived at the right conclusion for wrong reasons.

I confess that it is not clear whether the Court of Appeal in its judgment was following the *Lonsdale* case or not; its position seems ambivalent. I think that I will have to consider certain matters before I can decide this particular point. I have already referred to section 207 of the Transfer of Property Act, as well as to section 40 of the Registration of Titles Act to which the suit premises are subject. In terms of these sections a valid lease of the subject premises for over one year can only be made by a registered instrument. The effect of section 107 of the Transfer of Property Act (India) was considered by the Privy Council in the Indian case of *Ariff v Jadunath Majumdar* (1930) 58 Cal 1235, and their Lordships stated, *inter alia:*

Their Lordships themselves are in agreement with the High Court in the view that *Walsh v Lonsdale* has no application to this case, owing to the fact that the respondent's right to enforce the contract had been barred long before the commencement of the present suit. The respondent was not in a position to obtain specific performance of the agreement for a lease from the same Court and at the same time as the relief claimed in this section. Had he been so entitled the position would be very different, for then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could have duly registered, the appellant's ejectment action being stayed in the meantime. In these circumstances the respondent would obtain complete protection, but consistent with and not in violation of the provisions of the Indian statute.

The *Ariff* case has been quoted with approval and followed in a number of decisions by this Court; I will just cite two, *Souza Figuerido & Co Ltd v Moorings Hotel Co Ltd* [1960] EA 926, 931, and *Abdul Rehman v RH Gudka* [1957] EA 4, 10. Mr Le Pelley's contention, that since the contract can operate *inter partes*, then equity would require that it should be treated as if a lease has been granted in pursuance of it, cannot be right as it runs counter to the decision in the *Ariff* case and the previous decisions of this Court, as well as to the statutory enactments in Kenya. The only right flowing from the contract was the right by either party to obtain specific performance of the contract for a lease. Indeed, that is what Law V-P said in his judgment. "The contract could have been ordered to be specifically performed by either party".

Keeping all these factors in mind I will now attempt to decide whether the Court of Appeal in its judgment applied the doctrine enunciated in *Walsh v Lonsdale* to the case. If it did, then of course Chanan Singh J was right to have proceeded on the basis that he did, and this main ground of appeal fails. However, I do not think that Law V-P was applying the *Lonsdale* doctrine. If the Court of Appeal was departing or dissenting from or was reversing its previous decisions on *Walsh v Lonsdale* I have no doubt that it would have done so in clear terms, giving its reasons therefore, and not in such an oblique way, as it were, by strained inference. As I have indicated earlier this Court's decision is somewhat Delphic, and is susceptible of two interpretations. Taking into consideration all the circumstances, I would adopt the interpretation which seems to me to be in consonance with this court's previous decisions and with statutory provisions, and I am of the view that the Court of Appeal decision did not apply the doctrine enunciated in *Walsh v Lonsdale*; it follows that Chanan Singh J was wrong to have approached and decided the case on the basis that there was a lease or as if there was a lease. I understand the dilemma the trial judge was in when the case was remitted to him for decision, especially in view of his previous finding on the matter; but he should have carried out this court's instructions in the terms in which they were couched, irrespective of what conclusions he might have reached in the process.

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? Clearly, as already indicated, it could not be a tenancy for more than a year. 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. Was there any "contract" in this case? Law V-P in his judgment would seem to hold that the agreement of 29th September 1969 was such a contract. That statement apparently was made *obiter*, as it was not necessary for the decision of the appeal before him. I think the words "in the absence of a contract" refer to the term between the parties regulating the giving of notice prior to the determination of the lease, see *Gour on the Transfer of Property* (7th edn), volume 2, page 1528, paragraph 2634. The contract of 29th September 1969 refers to an agreement for a lease of over five years and in any event contains no term regulating the giving of notice, and so there was no contact to the contrary. The tenancy created by the payment and receipt of rent was a monthly one terminable on fifteen days' notice in terms of section 106. The Court of Appeal did not seems to have considered specifically the issue of a monthly tenancy arising from the payment and receipt of rent. It is common ground that the premises are a 'shop" within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act (hereinafter called "the Shops Act").

The question to be considered now is whether the premises are subject to the provisions of the Shops Act. Mr Le Pelley referred to section 2(3) of the Shops Act which reads:

Notwithstanding anything contained in any other written law requiring the registration of tenancies, evidence of a tenancy may, for any of the purposes of this Act, be given in any proceedings whether such tenancy is registered or not.

He contended that the contract of 29th September 1969, though not registered, was admissible evidence, and since it referred to a contract for a term of over five years it was not a controlled "tenancy". I do not read section 2(3) in that way. A "tenancy" in the Shops Act is defined as follows:

a tenancy created by a lease or under lease, by an agreement for or assignment of a lease or under-lease,

and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee as such.

Here the contract of 29th September 1969 created no lease or tenancy; it was only an agreement creating the right to obtain a lease or tenancy document. Indeed the landlord in his plaint relied on the draft lease he forwarded to the tenant as a basis for the tenancy he alleged was created; see paragraph 6 of the amended plaint which reads:

It was an agreed term of the draft lease that the [landlord] should be at liberty to immediately terminate the tenancy and re-enter into possession on the premises if the rent or any part thereof was in arrears for a space of fourteen days from the due date of payment.

It was by virtue of such express or implied breach that the landlord gave notice purporting to forfeit the lease and claimed vacant possession and other reliefs.

The draft lease was not executed by the landlord or the tenant, and cannot be an agreement or contract of a lease between the parties. So neither the contract of 29th September 1969 nor the draft lease was evidence or a document of a valid tenancy as defined in the Shops Act and I do not think, therefore, the provisions of section 2(3) are of any assistance. In any event the provisions of section 2(3) and procedural and permit evidence of a tenancy created and evidenced by a lease which, though compulsorily registrable, is not registered, admissible in proceedings under the Shops Act. In my view this procedural rule does not alter the nature of such a document, nor the status of the parties involved, nor does it create an interest in land where none exists nor validate a lease declared void for want of registration by statutory enactments.

I am therefore of the view that this was a controlled tenancy within the ambit of the Shops Act and I find that the special procedure for terminating tenancies had not been complied with in this case. The tenancy was not legally terminated.

Having arrived at this decision, it is not necessary for me to deal with the other grounds of appeal. But for the sake of completeness, I find that Chanan Singh J was right in holding that there was no legal surrender of part of the premises by the tenant, nor was the agreement of 29th September 1969 bad or void for illegality. I have duly considered the rather painstaking arguments urged by Mr Nazareth on these two points, but I am not at all persuaded by them. His complaint about the nature of the judgment passed has merit, but no useful purpose will be served by my dealing with it in the circumstances.

This has been an exceptional appeal, and I have attempted to decide it on grounds which are individual to it. I admit that I do not find this decision altogether satisfactory, but I feel that this is perhaps the best that can be done in the circumstances, as other decisions may be even more unsatisfactory.

I would allow this appeal, set aside the judgment and decree of the High Court and substitute therefore an order dismissing the landlord's claim. I would allow costs to the tenant both here and below. As regards the costs of the appeal, I would certify for two advocates.

Wambuzi delivered the following Judgment. I do not find this appeal easy to decide but I think much depends on the construction placed on the judgment of this Court delivered by Law V-P on 8th October 1974, remitting the case to Chanan Singh J. In summarising the dispute between the parties Law V-P in his judgment quoted paragraphs 7 and 8 of the plaint. The relevant part of paragraph 8 reads:

By virtue of the afore-said breach of the express or implied term of the lease, the [landlord] … gave the tenant notice forfeiting the lease …

Law V-P then said, at [1974] EA 446, 447:

The use of the word 'lease' in paragraph 8 aforesaid seems to me unfortunate and confusing. There never was an executed lease, and the suit was based on an alleged agreement to grant and take a lease … The

trial judge, unfortunately, fell into the same error, and held as follows: 'In any case, this is a case of an unregistered lease'. With respect, it is not.

It would appear to me, therefore, that the [landlord] had referred to a breach of the terms express or implied of a lease as if there was an executed lease. On this point I cannot read any more in Law V-P's judgment than that he held that Chanan Singh J erred in referring to this as a case of an unregistered lease. Law V-P thought that Chanan Singh J must have intended to say that "this was a case of an unregistered agreement for a lease" and considered section 4 of the Registration of Documents Act and sections 40 and 41 of the Registration of Titles Act, and concluded:

"… an agreement for a term exceeding twelve months, not followed by a registered lease, gives no protection against the rights of third parties … The trend of judicial decision in East Africa has been for the Courts to enforce unregistered leases or agreements for leases as contracts *inter partes* where the contract is one capable of being specifically enforced and does not affect the rights of third parties.

Law V-P referred to S*ouza Figuerido and Co Ltd v Moorings Hotel Co Ltd* [1960] EA 926 and *Clarke v Sondhi Ltd* [1963] EA 107 both of which are illustrations of the enforceability of a term of a contract. Law V-P went on, at [1974] EA 446, 448:

The judge's view that there was no valid lease (or agreement for a lease) led him to apply section 106 of the Transfers of Property Act, and hold that the agreement between the parties must be deemed to have resulted in a lease from month to month …

He concluded that there was a contract between the parties which could have been ordered to be specifically performed at the instance of either party. Law V-P then remitted the case to Chanan Singh J for a decision:

on the basis that there was a valid contract between the parties for the leasing of the suit premises for the term certain of five years and one month.

One of the questions for decision by the lower court pointed out by Law V-P was:

whether a stipulation should be implied into the agreement giving the landlord a right to demand vacant possession on giving fifteen days' notice for failure to pay rent.

In other words, the court below had to decide to what extent this valid contract for a lease was enforceable as regards its terms, express or implied. I do not think that it was necessary for the decision to remit the case to the lower court with this direction to refer to *Walsh v Lonsdale* (1882) 21 Ch D 9. In any case, this authority was referred to in connection with covenants and stipulations not stated in the agreement. It was still a matter for the lower court to decide the terms of the contract and their enforceability in the light of the law of Kenya and the previous decisions of this Court. As I understand his judgment, Law V-P was of the view that Chanan Singh J in the court below proceeded on the premises that there was no valid contract for a lease and therefore did not consider what terms of the agreement, express or implied, were enforceable.

It was argued before us, in effect, that unless the judgment of Law V-P is construed as saying that *Walsh v Lonsdale* applies to this case, Chanan Singh J was bound to come to the same conclusion as before; which it would appear was wrong. That may be so, but I do not subscribed to that view. If that were the case, I think that his Court would have expressly directed the lower court to proceed with the case on the basis that there was a lease for five years and one month on the authority of *Walsh v Lonsdale* and not merely on the basis that there was a valid agreement for a lease for that term. Further, I do not find anywhere on the record any request that this Court was to affirm the decision of the lower court in the first appeal on some other grounds. If the basis of the decision of the High Court was wrong in the opinion of this Court, then I find no alternative to this Court but to remit the case to the lower court for a decision on the correct basis as was done. In these circumstances, I am of the opinion that it is irrelevant that the lower court would have come to the same conclusion as before if it had followed correctly the

direction of this Court.

I note that Chanan Singh J observed in his judgment that he himself had in his earlier judgment held that the letter which is the contract is not a lease for five years and one month but an agreement for such a lease; but the judge in the same judgment said that this was a case of an unregistered lease, which it is not. In my view, this was the point which resulted in the remission of this case to the lower court.

I agree with the reasons given by Mustafa JA that as no lease was executed in accordance with the contract of 29th September 1969, no lease for five years and one month was created and no stipulations as to termination could be implied. 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. As the parties agree that the premises are a "shop" within the meaning of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, the procedure prescribed by that Act for terminating the tenancy had to be complied with. I am in complete agreement that the case of surrender or illegality has not been made out, and I agree that this appeal must be allowed; and as Platt J agrees with the orders proposed by Musafa JA, there will be an order in the terms proposed by him.

Platt J delivered the following judgment. As a result of an appeal to this Court, the initial judgment of the High Court was set aside and the matter was remitted to the High Court for retrial. The direction of the Court of Appeal was that the suit should be remitted to the same judge, Chanan Singh J, for decision on the basis that (see [1974] EA 446, 448):

There was a valid contract between the parties for the leasing of the suit premises for the term certain of five years and one month. The final determination of the suit will necessitate a decision by the judge on those issues arising out of the pleadings and evidence on which he has made no findings, such as whether there was an effective surrender of part of the demised property; whether a stipulation should be implied into the agreement giving the landlord a right to demand vacant possession, on giving fifteen days' notice, for failure to pay rent; whether (as contended before us by the [landlord] the agreement was void for illegality in that the landlord agreed to lease premises for use as a school in respect of which no licence had at the time been issued, and such other issues as the judge may consider relevant.

The judge then followed these directions, and understood from certain of the reasons given for setting aside his initial judgment that the doctrine of *Walsh v Lonsdale* (1882) 21 Ch D 9 had been brought in and that therefore he must consider the contract for leasing as a lease, or as if it were a lease. He then considered the claim that the contract was illegal and rejected it. He also refuted the allegation that part of the suit premises had been surrendered. Thereafter he gave judgment in accordance with the prayers in the plaint which in effect were that vacant possession was to be given to the landlord by the tenant; that the tenant was to pay Shs 37,800 being arrears of rent, and pay mesne profits.

The main grounds of appeal are expressed in grounds 1,2 and 3, and as they summarise quite accurately what Mr Nazareth contended for the tenant I shall set them out:

(1)The judge erred in misconstruing the judgment dated 8th October 1974, which had remitted the suit to the judge 'for decision on the basis that there was a valid contract between the parties for the leasing of the suit premises for a term certain of five years and one month,' and which had not decided or held that there was a lease between the parties for a term of five years and one month whereas the judge erroneously decided the suit as if this Court had held (contrary to the statute and contrary to its own previous decisions and to decisions of the Privy Council) that there was a lease between the parties for a term of five years and one month.

(2)The judge erred in failing to hold that in accordance with the decision of this Court in *Jagat Singh Bains v Ishmael Mohamed Chogley* (1949) 16 EACA 27 there was a valid lease between the parties from month to month created by or implied from payment and acceptance of rent.

(3)The judge erred in failing to hold that the lease from month to month had not been validly determined, the same being protected under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act

and no notice thereunder having been served on the [tenant] determining the lease.

Accordingly, it was contended that no order for possession, or mesne profits could have been made. Moreover the rent outstanding had been paid and ought to have been dealt with. In effect, Chanan Singh J having set out, this time, on the right path must have returned to the same position he had reached in his initial judgment. Alternatively, or further perhaps, the contract was illegal, and if not illegal, there had been a surrender of half of the premises.

On the first of those alternatives, it was clearly not a case of illegality *ab initio*. It was asserted that the tenancy became illegal after the tenancy had started. However, no-one seemed to know or be prepared to say when the illegality began or whether the landlord's agents knew of this. Therefore the landlord had not participated in the illegal performance of the contract (*Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd* [1973] 2 All ER 856 is distinguishable).

On the second alternative, the evidence pointed from the beginning to lack of acceptance of the surrender.

There is no doubt that Chanan Singh J was right in his conclusions on these matters.

The main question then is whether he was right to consider that he must treat the contract for leasing as a lease, or as if there was a lease. As the other members of the Court have explained Chanan Singh J's predicament, there is no need for me to reiterate the possible interpretations of the judgment directing a retrial, except to say that the better view of the judgment is that the contract was not to be considered as if it were a lease, but simply whether the missing stipulation regarding forfeiture on notice could be implied (as it seems, from the draft lease) into the contract of leasing. It was here that the decision in *Walsh v Lonsdale* (1882) 21 Ch D 9 was referred to. However, as the decision in the appeal was reported (see *Grosvenor v Rogan-Kamper* [1974] EA 446), and as the headnote suggests that this agreement for a lease permitted the tenant to hold under the same terms as if a lease had been granted, it is as well to correct any misapprehensions that may arise. The headnote is misleading.

Chanan Singh J correctly stated the law that section 107 of the Transfer of Property Act does not permit the operation of the equity in *Walsh v Lonsdale*. No equitable rule can override the express provisions of the Act (*Ariff v Jadunath* (1930) 58 Cal 1235, 91; *Souza Figuerido & Co Ltd v Moorings Hotels Co Ltd* [1960] EA 926). Thus a lease of immoveable property, from year to year, or for any term exceeding one year, or reserving a yearly rent, can only be made by a registered instrument; all other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. The problem then arises regarding the effect of an agreement for a lease. It is necessary to distinguish those agreements which operate as a present demise from those that are executory. If the agreement operates as a present demise for more than a year and remains unregistered, it may operate as a lawful lease for one year; and then by holding over, to operate as a monthly tenancy determinable on fifteen days' notice, in the case of premises like those in this case, as provided in sections 116 and 106 of the transfer of Property Act. If it is an executory agreement for a lease, and the "tenant" merely goes into possession on payment of rent without any further agreement, there arises a tenancy at will by implication of law. The executory agreement for a lease passes no interest in the land. A tenancy at will involves no definite interest in the land, but merely a personal relation for which, however, a rent may be reserved. No formal notice is required to determine this type of tenancy (see *Mulla: Transfer of Property Act* (5th edn), page 664 dealing with section 106 of the Act).

The agreement, though executory as far as the intended lease is concerned, may be used in proper circumstances to support a suit for specific performance; and according to *Souza Figuerido's* case the covenant to pay rent contained in the agreement may be looked at as a contractual stipulation. But it seems to me that other terms of the agreement relating to the future lease can only be relied upon in connection with specific performance. That is the extent of the contract operating *inter partes*.

The difficulty which arose in this case stems originally from the terms of the plaint. Having referred to the agreement dated 29th September 1969 (summarised by Mustafa JA), the draft lease, which was unexecuted, was then pleaded. It seems that the breach of the covenant for payment of rent was

considered to be a breach of "the lease", where upon the landlord gave the tenant notice forfeiting "the lease". I am left in some doubt whether these "slips" do not reveal an inner conflict, namely that the agreement was intended to create a present demise. Neither party would accept that this was intended by the agreement of 29th September 1969, and it may be that, from the other terms of the pleadings, and of the directions to Chanan Singh J by the Court of Appeal, this aspect is not open now. However, having in mind the old rule that "agrees to let and agrees to take" may be words of present demise, the position on 1st November 1969 might have been so intended; that is, after the one condition relating to references being satisfactory had been satisfied. The intended lease was to be on "the agreed terms" and no other terms were specifically left over for consideration.

These agreed terms covered all the essentials of a lease. In these circumstances the formal lease to be drawn up later could have been merely a further assurance. (One may compare the authorities collected by Page J in *Ramjoo Mohamed v Haridass Mullock* (1925) 52 ILR Cal 701.) It follows that I would be prepared to assume, on the basis of the case as presented, rather than decide, that the agreement of 29th September 1969 was an executory agreement for a lease.

It follows then that the tenant was a tenant at will, and as such the next inquiry concerns the application of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. It has been assumed throughout that the school which the defendant was to operate, when he got permission, would fall within the definition of a "shop". That assumption was maintained by the parties in this appeal. A controlled tenancy of "a shop" is a tenancy – (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 [the rest is immaterial]

The actual tenancy created by possession and payment of rent is an unwritten tenancy, and is therefore controlled, because the definition of tenancy includes "tenancy agreements" and tenancies created by "operation of law". Therefore, there is no need in this case to tackle the meaning or operation of section 2(3) of the Act in relation to that part of the definition of tenancy apparently describing a tenancy created by an agreement for a lease.

If this tenancy was controlled then in accordance with section 4(1):

Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered otherwise than in accordance with the following provisions of this Act.

The provisions of the Act were not followed. Accordingly, there was no lawful termination on 31st May 1971, and no mesne profits could be ordered. On the findings of Chanan Singh J there were arrears of rent, but they had been paid and accepted before the retrial. In the result I agree with the orders proposed by Mustafa JA.

Dated and Delivered at Nairobi this 7th day of July 1977.

S.W.W.WAMBUZI

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PRESIDENT

A.MUSTAFA

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR