



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 490 OF 2013

UKWALA SUPERMARKET (ELDORET) LIMITED.....PLAINTIFF

VERSUS

AMRITRAL SOJPAR SHAH WHOLESALERS LIMITED.....DEFENDANT

JUDGMENT

1. **Ukwala Supermarket (Eldoret) Ltd** (*hereinafter referred to as the Plaintiff*) has come to court against **Amritral Sojpar Shah Wholesalers Ltd** (*hereinafter referred to as the Defendant*) who is the registered owner of L.R No. Eldoret Municipality/ Block 7/21. The Plaintiff has been its tenant on LR No. Eldoret Municipality Block 7/21 since October 1999 where it has been operating a supermarket business. By lease agreement dated 10.6.2009, the Plaintiff and the then owners of the property Anil K. N. Shah, Ashok K. N. Shah, Paresh K. N. Shah, Mukesh K. Shah, Rohit K. Shah, formed their landlord/Tenant relation by entering into a lease agreement for a period of 5 years and 3 months with effect from the 1st day of August, 2008.

2. The Plaintiff alleges that since October, 2011, and after being notified by the said previous owners of the change of ownership of the property the Plaintiff has been paying rent to the new owner, the defendant herein. Since February 2013, the Plaintiff and the defendant have been negotiating with a view to entering into a written lease agreement. Unfortunately, they have not been able to reach an agreement as to the terms and conditions of the proposed leased.

3. On 16th September, 2013, the Defendant, through its lawyers, Nyairo & Co. Advocates, wrote to inform the Plaintiff that, it must execute a proposed Lease Agreement, whose terms it does not agree with, or vacate and deliver possession of the tenancy premises by 31st October, 2013.

4. It is the Plaintiff's case that, since there does not exist any written tenancy Agreement between itself and the Defendant, the Plaintiff enjoys a "controlled Tenancy" and that, the said "controlled Tenancy" cannot terminate or be terminated, or its terms altered to the detriment of the Plaintiff, except in accordance with the provisions of Section 4 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Chapter 301 of the laws of Kenya, hereinafter referred to as "the Act," or by mutual agreement of the parties.

5. Whereas the Plaintiff currently pays rent of Kshs.270,000.00 per month, (exclusive of VAT), the Defendant now wants the Plaintiff to execute a Lease Agreement for a term of 5 years and 3 months, in which, rent shall be Kshs.650,000.00 per month, and which rent shall increase by 10 % per annum.

6. Despite Notice of intention to sue having been issued, the Defendant has insisted that the Plaintiff must execute a Lease on the above-mentioned terms and conditions, or vacate and deliver vacant possession of

the tenancy premises by 31st October, 2013, and has through its Directors has verbally threatened to forcefully evict the Plaintiff come that date.

7. There has not been any other suit pending, and there have not been any previous proceedings in any Court between the Plaintiff and the Defendant over the issues the subject matter of this suit, and the cause of action relates to the Plaintiff named in this Plaintiff.

8. The Plaintiff's claim against the Defendant is for an Order of Permanent Injunction, to restrain the Defendant from evicting the Plaintiff from the tenancy premises on L.R No. Eldoret Municipality/Block 7/21, or in any other manner whatsoever, interfering with Plaintiff's quiet possession and enjoyment of the tenancy premises, or from increasing the current rent payable, except in accordance with the provisions of the Act.

9. The Plaintiff prays for orders that: The plaintiff further prays that the Defendant be ordered to pay the Costs of and incidental to this suit, and Interest thereon at Court rates, from the date of filing of this suit till payment in full.

10. The Defendant on his part admits that on 10.6.2009, the Plaintiff entered into a Lease Agreement for five (5) years three (3) months effective 1st August, 2008 with the previous owners. The Defendant however avers that the said Lease was due to expire on 31st October, 2013.

11. The said Lease dated 10th June, 2009 was not a controlled tenancy as defined by section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap 301 of the Laws of Kenya). Upon purchase by the Defendant of the interest of the previous owners, the said previous owners by letter dated 22nd September, 2011 notified the Plaintiff of the purchase and was to pay the rent from 1st October, 2011 to the Defendant.

12. By error, the aforesaid letter dated 22nd September, 2011 from the previous owners indicated that the said lease dated 10th September, 2009 between the said previous owners and the Plaintiff was to expire on 31st December, 2013 whilst in actual fact it was to expire on 31st October, 2013. The Defendant admits that the Plaintiff has been paying the rent for the suit premises to the Defendant since October, 2011.

13. Having taken over and assumed the interest of the previous owners to the suit premises, the Defendant continued observing the terms of the said Lease dated 10th June, 2009. However, as the term of the said lease drew to a close, the Defendant in February, 2013 asked the Plaintiff to indicate whether it wished, upon expiry of the existing Lease, to renew the same. The Plaintiff confirmed that it was desirous of having the Lease renewed whereupon the parties after negotiations agreed on the principal terms of the Lease for the period from 1st November, 2013 as follows: -

14. Monthly rent: Kshs.650,000/= plus VAT with effect from 1st November, 2013.

15. Rent increment: 10% every two and a half (2 1/2) years.

16. Lease period: Five (5) years and three (3) months.

17. In further response to the Plaintiff the Defendant states that it dispatched through its advocates the Lease capturing the main terms to the Plaintiff for execution on 22nd August, 2013 and that through its advocates the defendant wrote to the Plaintiff to execute the Lease or in default deliver possession of the suit premises upon expiry of the Lease on or before 31st October, 2013.

18. The Plaintiff failed to execute the Lease for the term beginning 1st November, 2013 and it is the Defendant's case that the Plaintiff has no valid or any Lease with the Defendant the old Lease having expired on 31st October, 2013 and the Defendant is entitled to possession of the suit premises from that date.

19. The Defendant denies that the Lease existing as at the time of filing of the suit was a “controlled tenancy” within the meaning of Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Chapter 301 of the Laws of Kenya).

20. The Defendant further states that the interest of the previous owners were assigned by transfer to the Defendant and the rights of the previous owners contained in the written Lease dated 10th June, 2009 thereafter became those of the Defendant.

21. The Defendant states that the Plaintiff’s averment that there was no written Lease as at the time of filing suit is misguided and has no basis in law in the circumstances of this matter.

22. In the counterclaim, the Defendant reiterates the contents of the defence and re-emphasizes that the rights of the previous owners contained in the said Lease dated 10th June, 2009 (but effective from 1st August, 2008) vested in the Defendant by virtue of the transfer of the interest of the previous owners to the Defendant. The said Lease dated 10th June 2009 was never at any time a controlled tenancy within the meaning of Section 4 of the Landlord and Tenancy (Shops, Hotels and Catering Establishments Act (Chapter 301 of the Laws of Kenya). The said Lease dated 10th June, 2009 still existed as at the time the Plaintiff filed suit herein on 25th October, 2013 but the same was not renewed and it therefore expired at the end of the day on 31st October, 2013. Consequently, the Defendant is entitled to and hereby claims possession of the suit premises from the Plaintiff.

23. Pending delivery of possession of the suit premises the Defendant prays for mesne profits against the Plaintiff for the period between 1st November, 2013 to the time of surrender/delivery of possession by/or from the Plaintiff to the Defendant.

24. The Defendant prays for an order that the Plaintiff delivers vacant possession to the Defendant of the premises situate on title No. Eldoret Municipality/Block 7/21. The Defendant further prays for mesne profits from 1st November, 2013 to the date of deliver of possession to the Defendant. He prays for interest and costs of the suit.

25. In response to the Defendants statement of defence and defence to the counter claim the Plaintiff states that, whereas it is true that the Plaintiff and the previous owners of the property had entered into a Lease Agreement, as stated therein, the same was not registered as required by Section 107 of the Transfer of Property Act (now repealed). Consequently, the said Lease Agreement was incapable of creating a Lease for a term of Five (5) year and Three (3) months, as had been intended by the parties thereto.

26. Further, the Plaintiff states that, the said Lease Agreement was, at best, a contract interpartes, and only valid and enforceable between the parties thereto, and the same could not be enforced by a third party, such as the Defendant herein. The Plaintiff states that, the Lease Agreement between the Plaintiff and the previous owners having not been registered, and the Defendant, upon assuming ownership of the property, having continued to accept rent from the Plaintiff, and in the absence of any written Tenancy Agreement between the Plaintiff and the Defendant, a controlled Tenancy relationship was created between them, in terms of Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act -Chapter 301 of the Laws of Kenya, herein after referred as “ the Act”. In the circumstances, the tenancy relationship between the Plaintiff and the Defendant could not terminate, or be terminated, or its terms altered to the detriment of the Plaintiff, except in accordance with the provisions of Section 4 of the Act.

27. The Plaintiff further states that, whereas the Defendant, through Nyairo & Co. Advocates, spelt out in writing, the terms on which the Defendant was willing to enter into a Lease Agreement with the Plaintiff, the Plaintiff did not accept the terms proposed and no agreement on the terms of the proposed Lease, was ever reached between the parties herein, and the Defendant is put to strict proof thereof.

28. The Plaintiff states that, it is aware of the Letter by M/s Nyairo & Company Advocates, dated 15th

June, 2013, which was endorsed with the signature of Mr. Anil K. Haria, one of the Directors of the Plaintiff. The said endorsement was done to pacify Mr. Kamal, a director of the Defendant, who had threatened forceful eviction of the Plaintiff from the suit premises if the Plaintiff did not accept the terms that Mr. Kamal was insisting on. The endorsement by Mr. Anil K. Haria was however, done on the clear understanding between Mr. Kamal and Mr. Anil K. Haria, that, the endorsement of the said letter was subject to acceptance and approval by the other three Directors of the Plaintiff Company. It is for that reason that, the names of the other three Directors of the Plaintiff were written down by Mr. Kamal on the bottom left hand side of the document, against whose names Mr. Kamal was to procure their signature their signatures. However, the other three Directors refused to accept the terms proposed by Mr. Kamal, and therefore refused to sign against their names.

29. The Defendant Company, through their lawyers, Nyairo & Co. Advocates, as a matter of fact, had previously been informed by the Plaintiff, through a letter, dated 17th May, 2013, that, Mr. Anil K. Haria, could not singly execute any Agreement on behalf of the Plaintiff. The said letter was also copied to Mr. Kamal Shah.

30. In any case, the endorsements by Mr. Kamal and Mr. Anil K. Haria, on the said letter by Nyairo & Company Advocates dated 15th June 2013, were not executed in accordance with, and the said document does not meet the mandatory requirements of Section 3(3) of the Law of Contract Act. Consequently, the said document cannot form the basis of any cause of action against the Plaintiff by the Defendant herein and that, there never existed a Lease Agreement between the Plaintiff and the Defendant, that was capable of expiring on 31st October, 2013, and the Defendant is put to strict proof thereof.

31. The Plaintiff further states that, there having not existed written Tenancy Agreement the Plaintiff and the Defendant as on 31st October, 2013, the tenancy between the Plaintiff and Defendant was, and still is a controlled Tenancy, in terms of Sections 2 (1) of the Landlord and Tenant (shops, Hotels & Catering Establishments) Act – Chapter 301 of the Laws of Kenya.

32. The Plaintiff states that, the Lease Agreement, between the previous owners of the property and the Plaintiff having not been registered, as was required by Section 107 of the Transfer of Property Act, it was incapable of creating a Lease for a term of five (5) years and Three (3) months. Therefore, there was no Lease capable of being assigned to the Defendant herein by the previous owners of the property.

33. The Plaintiff believes that, there having not existed a valid Lease, between the previous owners of the property and the Plaintiff, for a term of Five (5) years and Three (3) months, and the Defendant having failed to enter into a Written Tenancy Agreement with the Plaintiff, the relationship between the Plaintiff and the Defendant in respect of the tenancy premises is that of a Controlled Tenancy, which tenancy cannot terminate, or be terminated, or its terms altered to the detriment of the Plaintiff, except in accordance with the mandatory provisions of Section 4 of the Landlord and Tenant, (Shops, Hotels & Catering Establishments) Act.

34. Having failed to comply with the mandatory requirements of Section 4 of The Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, the Defendant is not entitled to vacant possession of the suit premises.

35. On 22.6.2016, the counsel on record for both parties agreed by consent in addition to the statement on agreed facts filed on 7.7.2014 to file a further set of agreed facts before the end of business on the said date and the case was to proceed by way of case stated. The plaintiff was to file written submission within 30 days of the consent whilst the defendant was to file submissions within 30 days of service.

36. The agreed facts in this matter are that a lease was executed dated 10th June, 2009 between the Plaintiff as a tenant and the previous Landlords (namely Anil Kumar Nemchand Shah, Ashok Kumar Nemchand Shah, Rajesh Kumar Nemchand Shah, Mukesh Kesahvji Shah, Rohit Kesahvji Shah as Trustees of Vinod Keshavji Bhagwanji Shah and Pohit Kesahvji Shah) on the basis of which the Plaintiff had possession of the suit premises. The said leases referred to in paragraph (1) above had tenure of five

(5) years three (3) months from 1st August, 2008 and was to expire on 31st October, 2013. The suit premises was sold by the previous landlords to the Defendant and the transfer was effected on 1st September, 2011. The previous landlords by letter dated 22/9/2011 notified the Plaintiff of the purchase by the Defendant of the suit premises and the notified them also to pay rent to the Defendant as from 1st October, 2011.

37. The Plaintiff complied with the instructions of the previous landlord to pay rent to the Defendant as from 1st October, 2011. The Plaintiff also complied with escalation clause on rent contained in the Lease Agreement dated 10th June, 2009. As at 31st October, 2013, the rent had escalated to Kshs.313,000/= per month.

38. No lease Agreement was reached and/or executed between the Plaintiff and the Defendant after the expiry of the Lease Agreement dated 9th June, 2009. Further the parties agreed that one of the Plaintiff's directors Anil Haria and one of the Defendant's directors Kamal A. Shah endorsed and signed the hand written notes on 8.8.2013 on the letter by Nyairo & Co. Advocates dated 15.6.2013.

39. The Plaintiff submits that the land is registered under the Registered Land Act (repealed) now the land registration Act and therefore Section 47 of the Registered Land Act repealed applied. Whose essence is that the registration of a lease for a period of more than 2 years was mandatory. The Plaintiff refers to Section 38(i) of the Registered Land Act to fortify his argument. The gravamen of the Plaintiffs argument is that the lease was required by law to be registered but was not and therefore the same created a periodic tenancy. The plaintiff further argues that an unregistered lease is not capable of conveying a legal or equitable estate in land in the circumstance where a statute requires the lease to be registered, when the land is transferred to another person, the unregistered lease does not encounter to title to land. The ownership of the land changes from one person to another completely free of the unregistered lease.

40. According to the plaintiff, lack of registration of the lease created a mere contract between previous owners of the property and the plaintiff which could be enforced between the parties thereto and not third parties. The plaintiff argues that the possession of the suit property, payment of rent and acceptance of rent created a new tenancy relationship between the new owners and Plaintiff. The plaintiff further submits that they did not enter into any written agreement to specify the length and the terms of the tenancy relationship and because that plaintiff continued in possession of the suit premises and paid rent which was accepted by the defendant, what resulted from their conduct was creation of a month to month tenancy. The defendant did not seek for an order that the plaintiff vacates the suit premises and did not seek to enter into any contract with the plaintiff.

41. The plaintiff strongly argues that since the tenancy relationship has never been reduced into writing, it becomes a controlled tenancy in terms of section 2(a) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap. 301 of the Laws of Kenya and that the same cannot be terminated except in accordance with the powers of Cap. 301 of the Laws of Kenya. On principles of Equity, he argues that equity follows the law and cannot be used to defeat clear provisions of the statute.

42. Last but not the least, the plaintiff submits that the Land Registration Act No. 3 of 2012 does not apply and that section 91 of the Registered Land Act (repealed) should be read with section 38 and 47 of the Registered Land Act repealed.

43. The defendant on his part submits that the non-registration of the lease did not make it ineffectual and neither did it convert the lease to a controlled tenancy. He argues that the new land laws do not make it mandatory to register leases and indeed recognize the validity of unregistered leases. Registration is no longer mandatory. According to the defendant, the lease created a term of 5 years, 3 months as had been contemplated by the previous owners and the plaintiff.

44. Moreover, the defendant argues that the transfer by the previous owners of the suit property to the defendant automatically assigned their rights in the lease to the defendant as the new owners and therefore, the defendant was now empowered to exercise all powers of the lessor in the lease.

45. Furthermore, the defendant argues that the plaintiff continued to observe the terms and conditions in the lease agreement by paying rent and even observed a term of escalation of rent and paid enhanced rent as and when that was required by the lease and that the plaintiff's advocate to the defendant's advocates conceded that the lease was to expire on 31.10.2013 when it would have run for five years, 3 months and therefore, the plaintiff is estopped from denying that the lease was controlled.

46. Lastly, the defendant submits that applying the equitable principles, the facts disclosed in this case would lead to the upholding of the lease dated 10.6.2009 as being valid between the plaintiff and the defendant and out-rule the ambit of Cap. 301, Laws of Kenya.

47. According to the defendant, section 3(2) of the Law of Contract Act cannot be read in isolation. Section 91 of the Registered Land Act (repealed) should be considered as the new registered owner possesses all the rights and is subject to all liabilities of the lesser exposed or implied in the lease. Thus, the defendant upon becoming the owner of the suit property through transfer acquired the reversion to the lease of which the plaintiff was the lessee and therefore, the rights in the lease are enforceable by operation of the law by the defendant notwithstanding the provisions of section 3(3) of the Law of the Contract Act. The defendant prays for vacant possession rent and mesne profits.

48. I have considered the pleadings evidence on record and do find the uncontroverted facts of this matter being that a lease was executed on 10.6.2009 between the plaintiff as a tenant and the previous owners of the suit property on the basis of which the plaintiff took possession of the suit premises. The lease had tenure of five years three months from the 1st August, 2008 and was to expire on 31.10.2013. The suit premises were sold by the previous owners to the defendant and transfer was effected on 1.9.2011. The previous owners notified the plaintiff by a letter dated 22.9.2011 and notified them to pay rent as from 1.10.2011. The plaintiff complied and paid rent as from 10.6.2009. As at 31.10.2013, the rent had risen to Kshs.313,200/= per month. No lease agreement was reached and/or executed between the plaintiff and defendant after the expiry of the lease agreement dated 9.6.2009. One of the directors of the plaintiff, Anil Haria and one of the Directors of the defendant Kamal A. Shah endorsed and signed the handwritten notes on 8.8.2013 on the letter by Nyairo & Company Advocates dated 15.6.2013.

49. One of the issues to be resolved is the effect of the failure to reduce the agreement between the plaintiff and defendant in writing, I do find that section 3(3) of the Law of Contract Act, Cap. 23, Laws of Kenya is relevant. This section provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing, signed by all the parties thereto and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party. I do find that there was no written agreement between the plaintiffs and the defendant. What existed was a contract between the defendant and previous owners and therefore, written agreement was not binding to the plaintiff. I do agree with the plaintiff that the relationship between the plaintiff and defendant was a periodic tenancy. A periodic tenancy is a tenancy that continues for successive period until the tenant gives the landlord notification that he wants to end the tenancy. The period depends on how the rent is paid. For calendar month, it becomes monthly tenancy. If rent is paid quarterly, it becomes a quarterly tenancy and if paid yearly, a yearly tenancy.

50. Section 57(2) of the Land Act 2012 provided that if the owner of land permits to exclusive occupation of the land or any part of land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.

51. It would follow that the agreement between the plaintiff and defendant being not reduced in writing is a periodic tenancy and therefore, is a controlled tenancy under the provision of section 2(1) (a) of the Landlord and Tenancy Act (Shops, Hotels and Catering Establishment Act, Cap. 301, Laws of Kenya and therefore, should be terminated in accordance with the Act thus by an order of the Tribunal.

52. There is no dispute that the agreement between the plaintiff and the previous owners was not registered and therefore, did not run with the title to the property. Had the lease been registered, then the same could have been registered as an encumbrance.

53. It is clear that the property is registered under the Registered Land Act (repealed). The lease in dispute was for 5 years 3 months and therefore, ought to have been registered under the provision of section 47 of the Registered Land Act.

54. The question to be answered is does the non-registration of a lease duly executed by parties create a periodic tenancy.

55. In ***Chon Jeuk Suk Kim and Kim Jong KYU Vs E. J. Austin and N. E. Austin***, the Court of Appeal of Kenya found that section 46(1) of the Registered Land Act (repealed) does not provide for cases where the proprietor of land permits exclusive occupation by another at rent under an agreement in writing but where no formal lessee is registered. In such a case, the Court of Appeal found that the same is periodic tenancy.

56. In ***Souza Figueiredo Vs Moorings Hotel Co. Ltd, (1960) E.A. 962***, the East African Court of Appeal held that an unregistered document operates as a contract inter-partes and can confer on, on the party in the possession of an intending lessee a right to enforce the contract specifically and obtain from the intending lessor a registerable lease and further that a covenant to pay rent in unregistered document was enforceable. The court was construing section 51 of the Uganda REGISTRATION OF TITLES Ordinance which provided that among other things that no instrument until registered shall be effectual to pass any estate or interest in land while assenting that no equitable principles can override the arm of registration of titles.

57. I have considered the authorities of ***Gosvenor Vs Rogan - Kamper (1974) EA 446, Bachelor's Bakery Ltd Vs Westlands Securities Ltd (1982) KLR 366*** and ***Walsh Vs Lonsdale (1882) 21 CMI*** and do find basis for the principle that where a statute requires registration, though not conferring any legal or equitable interest, the same is nevertheless enforceable between the parties to the agreement. I also find that the principles of equity did not apply as the law is very clear and unambiguous. I do find once again that failure to register the lease between the plaintiff and the previous owners created a periodic tenancy between the plaintiff and the previous owners and therefore, the defendant inherited a periodic tenancy between the aforesaid persons.

58. The defendant has filed a counterclaim which I do find that is defeated by the doctrine of privity of contract. The doctrine of privity of contract is a common law principle which provides that a contract cannot confer rights or impose obligations arising under it on any person or against except the thereto. The premise is that only parties to a contract should be able to sue to enforce their rights or claim damages. The defendant was not a party in the contract he seeks to enforce.

59. This court is not oblivious to the fact that the requirement of privity of contract has been relaxed under modern law to allow a 3rd party beneficiary or other forceable user to sue like a 3rd party under the law of insurance and precisely Cap. 405, Laws of Kenya. The 3rd party can only enforce rights expressly sated in the contracts.

60. In conclusion, I do find that since the agreement between the plaintiff and the defendant was not reduced into writing, and that the lease agreement between the plaintiff and previous owners was not registered, the relationship between the plaintiff and defendant was reduced to a periodic tenancy to be terminated in the manner stipulated by Cap. 301.

61. Ultimately, I do grant prayers that the Defendant, by itself, its servants, and or agents be, and is hereby permanently restrained from evicting the Plaintiff from the tenancy premises on L.R. No. Eldoret Municipality/Block 7/21, or in any other manner whatsoever interfering with Plaintiff's quiet possession and enjoyment of the tenancy premises, or from increasing the current rent payable, except in accordance with the provisions of the Land lord and Tenancy (Shops, Hotels & Catering Establishments) Act, Chapter 301 of the laws of Kenya, or by Mutual agreement of the parties. The Defendant to pay the Costs of and incidental to this suit, and Interest thereon at Court rates, from the date of filing of this suit till payment in full. The counterclaim is dismissed with costs to the plaintiff from date of filing defense and counterclaim.

DATED AND DELIVERED AT ELDORET THIS 16th DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE