



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GITHINJI, MAKHANDIA & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 265 OF 2010**

**BETWEEN**

**1. CHON JEUK SUK KIM**

**2. KIM JONG KYU.....APPELLANTS**

**AND**

**1. E. J. AUSTIN**

**2. N. E. AUSTIN**

**3. AUSTIN & PARNERS LIMITED .....RESPONDENTS**

***(Appeal from the judgment of the High Court of Kenya at Mombasa (Khaminwa, J.) dated 19<sup>th</sup> October, 2006***

**in**

**H.C.C.A. No. 335 of 2001)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal from the judgment and decree of the High Court (*J. Khaminwa, J.*) whereby judgment was entered for the respondents against the appellants for Kshs.7,200,466/40 less Kshs.480,000/= plus interest and costs. The judgment sum comprised of Kshs.952,500/= being rent arrears and Kshs.6,247,958/40 being the costs of repairs and renovation of allegedly demised premises.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents are husband and a wife. They are the registered proprietors of land parcel No. **Mombasa/Block XXI/Parcel/216** as joint proprietor along Moi Avenue Mombasa City on which a building has been erected. The land is registered under the Registered Land Act now repealed. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a suit in the High Court against the 1<sup>st</sup> and 2<sup>nd</sup> respondents who are also husband and wife for specific performance of an agreement for lease; and for recovery of Kshs.952,508/= as arrears of rent as at June 2001. and further rents and also claimed Kshs.8,000,000/= as damages in the

form of cost of repairs and renovations. The plaint was subsequently amended with leave and the 3<sup>rd</sup> respondent was joined as a co-plaintiff.

By the amended plaint, the respondents averred among other things that by an agreement made between the parties in April 1999 and signed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents by the 3<sup>rd</sup> respondent as their agent the 1<sup>st</sup> and 2<sup>nd</sup> respondents agreed to let and the appellants agreed to take on lease one half of the building standing on the plot for a term of ten years from 1<sup>st</sup> May, 1999 to 30<sup>th</sup> April, 2009 at a rent and terms and conditions contained in the agreement.

The undated agreement was produced as exhibit at the trial. The document is from the appellants and is addressed to Managing Director Austin & Partners Ltd. It begins with the following words

*“We agree to enter into a lease/agreement with yourselves with regard to the above mentioned premises on the following terms and conditions.”*

It then sets out the terms and conditions. Under that document the term is 10 years from May 1999 with a grace period of three months to carry out internal repairs and renovations. The monthly rent is indicated as Kshs.60,000/= in the 1<sup>st</sup> year, Kshs.65,000/= in the 2<sup>nd</sup> year, Kshs.70,000/= in the 3<sup>rd</sup> year and so on escalating to Kshs.130,000/= in the 10<sup>th</sup> year.

Clause 3(b) thereof states

*“We shall carry out internal, external, roof and renovations as described by us with approved principal plans and consent in writing from the Landlord, which shall form part and parcel of the Landlords property.”*

Further Clause 6 of the document provides:

*“LEASE:- A formal lease containing other terms and conditions as may be decided by yourselves and drawn by your advocates shall be executed by us. We shall pay for the costs of drawing, preparing engrossing and registering the lease and all disbursements to be incurred therein. This offer of our (sic) shall form part and parcel of the lease document.”*

The document gives the names of the appellants as the directors and indicates that a company is being registered.

The document is signed by the two appellants and below their signatures is an acceptance by Austin & Partners Ltd thus:

*“The above terms and conditions are acceptable to us and will form part and parcel of the lease document.”*

The respondent further averred in the plaint that in terms of the agreement the defendants were to carry out at least cost with reasonable dispatch and within a reasonable time interval and external repairs to the roofs and other renovations and that the appellants failed to complete the agreed alterations and additions to the buildings. The respondents pleaded further that the appellants had left the premises in unfinished and delapidable condition which the respondents were bound to repair and renovate at a cost Kshs.8,000,000/=.

The appellants in their defence denied ever entering into a lease agreement with the 1<sup>st</sup> and 2<sup>nd</sup> respondents and averred *inter alia* that no lease has ever subsisted; that they never received any keys to the premises and never entered into the premises and thus cannot be described as tenants and that the respondents had no power to enter into any lease agreement having earlier mortgaged the property to the bank; that no consent of the bank was sought nor obtained and that the respondents concealed this

material information.

In the alternative the appellants averred that the appellants desired to incorporate a company that hoped to enter into a valid lease with the 3<sup>rd</sup> respondent and that although various discussions were held and correspondence exchanged no consensus was ever reached; that as discussed agents agreed to make part of the premises tenantable and entered into an agreement with Ketu Construction to reconstruct the premises for Kshs.1,980,900/=; that the 3<sup>rd</sup> respondent subsequently agreed to supervise the construction and was paid Kshs.2,500,000/= by the appellants and that the respondent frustrated the contractor and chased the contractor from the site; that as a result the construction was not completed and thus the premises remained untenable.

The appellants in their reply to the defence averred that appellants did not disclose they were agents of a company yet to be incorporated; that the appellants took possession and entered into a contract with Ketu construction for repair and renovation; that 1<sup>st</sup> respondent agreed to supervise the construction as agent of the appellants during the appellants absence from Kenya; that 1<sup>st</sup> appellant paid Kshs.1,500,000/= to 1<sup>st</sup> respondent and account of the money was given and that the 3<sup>rd</sup> respondent did not frustrate or chase away the contractor. The 1<sup>st</sup> respondent gave evidence at the trial and called two witnesses while the 2<sup>nd</sup> respondent who was the 1<sup>st</sup> defendant also gave evidence and called two witnesses.

The trial Judge considered the evidence and made finding *inter alia* in essence that there was a contract as an agreement to lease was as good as a lease; that the mortgage registered against the title did not affect the validity of the contract as that was a contract between the respondents and the charge also because the lease was not executed; that the respondents performed their part of the contract and lastly that the appellants were given exclusive possession and the fact that the 1<sup>st</sup> respondent was an agent for appellants in the constructions does not mean that he had retained possession of the premises.

The first finding is the subject matter of ground 6 of the grounds of appeal which avers that the learned Judge erred in law in finding that an agreement to lease is as good as a lease in the specific circumstances of this case and the conditions which had to be met.

**Mr. Gikandi**, learned counsel for the appellants submitted that in view of the provisions of the registered Land Act requiring that a lease for a period over two years has to be in the prescribed form and has to be registered the agreement for lease was illegal and the doctrine of ***Walsha v Lonsdale [1882]21 ch.1) 9*** applied by the trial Judge was not applicable as the doctrine cannot erode mandatory provisions of law.

The title of the 1<sup>st</sup> and 2<sup>nd</sup> respondents land was registered under the Registered Land Act (RLA) now repealed which is the applicable law.

By **section 47** of RLA, a lease for a period exceeding two years has to be in the prescribed form and is completed by registration by proviso to **section 45**.

If only part is leased the lease should be accompanied by a plan or other description adequate to identify the part leased.

By **section 46(1)(b)**

*“Where the proprietor of land permits the exclusive occupation of land or any part thereof by any other person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.”*

Further by **section 46(1)(c)** the period of periodic tenancy is the period by reference to which rent is payable and is terminable by notice. **Section 46(2)** provides that a periodic tenancy is not capable of registration.

It is apparent that **section 46(1)** 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 lease is registered. In such a case is a periodic tenancy as the learned Judge held.

There is relevant local case law which counsel cited.

In ***Souza Figueiredo v Moorings Hotel Co. Ltd* [1960] EA 926**, the predecessor of this Court held that unregistered document operates as a contract inter-partes and can confer on, on the party in the position of intending lessee a right to enforce the contract specifically and obtain from the intending lessor a registrable lease and further that a covenant to pay rent in unregistered document was enforceable in that case 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 accenting that no equitable principles can override the arm of the Registration of Titles Ordinance. Sir Kenneth O'Connor P said at p. 931 letter F-G said:

*“but there is no question here of an equity overriding the terms of an Ordinance. As already stated the Ordinance avoids the creation of an estate or interest in land by unregistered instruments but there is nothing in the Ordinance which renders such instruments ineffectual as contracts between the parties to them there is nothing in the Ordinance to say that an unregistered document purporting to be a lease of , or an agreement to lease, land which is the subject to the operation of the Ordinance for more than three years is void”*

The President explained further at page 931 letter if -

*“in England sued equity treats as done that which ought to be done, the intending lessee would be a lessee in equity and would have an equitable estate in land:*

*Walsh v Lonsdale (1882) 21 ch. D9. In Uganda he cannot derive any estate (whether legal or equitable) from unregistered instrument because section 51 so says.”*

The decision in ***Souza Figueiredo & Co. Ltd*** was followed in ***Clarke v Sodhoni* [1963] EA 107** where the Court further held that the proviso of **section 40** for the Kenya Registration of Titles Ordinance that no lease for a period exceeding one year shall be valid unless registered does not exclude the use of unregistered lease to show the terms of the contract between the parties.

The case of ***Gos Venor v Rogan – Kamper* [1974] – 446** concerned the enforcement of an agreement for a lease contrary to **section 40** of Kenya Registration of Titles Act and it was held that such a lease is valid between the parties although it gives no protection to the rights of third parties and the respondent held under the same terms as if a lease had been granted. In ***Bachelor's Bakery Ltd v Westlands Securities Ltd* [1982] KLR 366** which concerned the enforcement of unregistered lease agreement it was held that such an agreement valid between the parties even in the absence of registration.

Those decisions show that an agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate is nevertheless enforceable as contract between the parties for the period stated in the document and the non-registration does not preclude the use of the document to show the terms of contract between the parties. Although those decisions relate to the construction of the provisions of the Registration of Titles Ordinance Act they apply with equal force to the legal effect of an agreement for a lease of unregistered lease of a period of over two years under the Registered Land Act as **section 47** thereof is similar to the provision under consideration in those decisions.

However, the learned Judge erred in law applying herein equity of ***Walsh v Lonsdale* (supra)** and in treating an agreement for a lease is as good as a lease. As the President said in ***Souza Gigueiredo* (supra)** an unregistered to lease where there is statutory requirement for registration is not capable of conferring

legal or equitable estate in the land – see also *Said Ben Sultan Bin Mohamed v Jokha Binti Sultan Bin Sahim EL Muisking (1955) I EACA 273* In *Rogan-Kamper v Lord Grosvenor (No. 2)(1976-80) I KLR 558*, the the court declined to apply the equitable principle holding in essence that the operation of equitable principle was excluded by the statutory requirement for registration. However it is worth repeating that covenants and stipulations in such document are enforceable inter parties.

The legal character of the document under consideration in this appeal is from its form and contents an agreement for a lease. It is common ground that the formal lease was not executed. From the authorities although the document does not conform legal or equitable estate to the appellants the covenants therein would be enforceable as between the parties if it is ultimately found to be an enforceable contract. The non-registration does not result in a periodic tenancy under RLA as the learned Judge erroneously held.

The contract has however been construed in relation to the pleading and the evidence under the principles of law of contract to find out whether It was an enforceable contract of a lease. The appellants plead in essence that the contract was not enforceable on several grounds namely that it was not executed by the respondents who are the registered proprietors of the property; that the respondents concealed that the property was mortgaged to the bank; that the appellant never took possession not even a day and were not given exclusive possession and that although the appellants agreed to make the premises tenantable by undertaking construction the respondents frustrated the construction by chasing the contractor out of the site. It was also submitted by the appellants counsel in the High Court that there was no lease agreement until the renovation was completed and that no lease had commenced at the time of filing the suit. It was submitted by the appellants counsel in this appeal that the effect of the award of Kshs.6,247,958/40 was to order the appellants to building a hotel for the respondents for free.

On the issue of the execution of the lease agreement, there is no dispute that it was executed by the appellants on one part and Austin & Partners. There is a rubber stamp of Austin & Partners Ltd and one signature. The plaint was amended to indicate that Austin & Partners Ltd acted as an agent of the respondents. The law of course allows an agent to execute a binding contract for the principal. However the 1<sup>st</sup> respondent other than saying that he is a Managing Director of Austin & Partners Ltd and that the 2<sup>nd</sup> respondent was his wife did not give evidence relating to the agency. He did not even refer to the document or identify the person who signed it. Further he did not disclose directors of the company or the person or persons authorized to sign documents on behalf of the company. No certificate of incorporation was produced in the absence of any concrete evidence agency and due execution by agent was not proved on balance of probabilities.

The learned Judge did not consider this issue which arose from the pleadings in the absence of evidence for valid execution of the document and prove of agency the document is not enforceable as a contract either by the respondents or by the company.

Regarding the concealment of the fact that the property was mortgaged to the bank the 2<sup>nd</sup> appellant testified at the trial that it was in September, 2000 that 1<sup>st</sup> respondent told him that the property was mortgaged to the bank for a loan of Kshs.10 million and stated if he had known that the property was mortgaged he would not have agreed to enter into the transaction. The respondents pleaded that they disclosed the mortgage to the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent testified so in his evidence.

The mortgage is not mentioned in the agreement of lease. However there is no dispute that a charge dated 30<sup>th</sup> December, 1996 to secure a loan of Kshs.10 million was in the subsistence at the material time. The only mention of a mortgage in writing is through the letter dated 15<sup>th</sup> February, 2001 from the respondents to the 2<sup>nd</sup> appellant. That is about ten months after the execution of the lease agreement. It is improbable that the respondents would have agreed to enter into such a long lease and undertake extensive reconstruction of premises if there were aware that the property was charged to the bank for a large loan. Although this fact would not absolve the appellants from paying rent if there was an enforceable contract, it is relevant in ascertaining the intention of parties in connection with the date of commencement of the tenancy. It is expedient to consider the contentious issues of condition to carry out

repairs and renovations and the issue of exclusive possession together.

The agreement of lease stipulates that the appellants intended to carry out first class restaurant business in the premises. Under the agreement the appellants would have three months grace period to carry out internal repairs and renovations of the premises to suit their purpose. The respondents case was that tenancy took place immediately but there was a grace period of three months and rent was payable from the month of August 1999. The appellants seem to say that they agreed to make the premises tenable but tenancy was to start after completion of the renovations which the respondents frustrated. To discover the intention of the parties the substance of the agreement and the conduct of the parties must be considered.

It is not evident that the parties had agreed on the exact size of the premises to be leased and the nature of construction to be undertaken. The agreement refers to the portion to be leased as “*west half section of the plot*”.

The 1<sup>st</sup> respondent in his evidence said that the appellants were to lease half of the property but added

*“They said to use the whole plot not half. They wanted to break down the barrier.*

*I had no objection because they were to improve the property.”*

On his part the 2<sup>nd</sup> respondent stated in his evidence

*“I was looking for restaurant premises. I was introduced to him in early 1999. They showed me a place behind the building. I wanted to rent. We wanted to extend the building and toilet and other areas. Plot not half of the building agreed we extend and build a first floor ...”*

The letter of offer dated 6<sup>th</sup> July, 1999 from Ketu Construction to respondents shows the nature of the construction to be undertaken at the cost of Kshs.1,980,900/= and which would be completed in 96 days.

It is common ground that as the 2<sup>nd</sup> respondent was not available in the country most of the time he gave the 1<sup>st</sup> respondent under a Power of Attorney dated 28<sup>th</sup> July, 1999 to carry out the repairs for him to be financed by the respondents. The Power of Attorney however did not state the period within which the construction would be completed. The construction started under the supervision of the 1<sup>st</sup> respondent but stopped in December 1999 according to a letter dated 20<sup>th</sup> April, 2001 from Ketu Construction to the 2<sup>nd</sup> respondent. The contractor gave several reasons for stoppage of the works including failure by 1<sup>st</sup> respondent to supply building material, closing of site by the 1<sup>st</sup> respondent and failure by 1<sup>st</sup> respondent to provide enough finance.

**Mr. Mohamed Iternani**, a quantity surveyor called by the respondents as a witness stated that Kshs.1,980,900/= quoted by Ketu Construction would not have finished the works and the correct estimate in 1999 should have been Kshs.4,418,960/=. Mr. Itarunami also prepared an estimate of restaurant development at estimated cost of Kshs.6,247,958/40 as at 1<sup>st</sup> October, 2002 and of the work done plus value of materials at site at Kshs.684,850/= as at 4<sup>th</sup> June 2000.

By a letter dated 15<sup>th</sup> February, 2001 from 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent shows that they held a meeting on 13<sup>th</sup> February, 2001 at which the 2<sup>nd</sup> respondent apparently asked for reduction of rent. The 1<sup>st</sup> respondent stated in that letter among others that they had not agreed to reduce rent or not to charge rent during the progress. The 1<sup>st</sup> respondent explained why he rejected the building plans prepared by the contractor and asked to be informed when the construction would be completed adding

*“We also agreed that you finish the ground floor stage and at a later date the first floor taking into consideration to present economic condition.”*

The 1<sup>st</sup> respondent also gave condition upon which he would complete the project if the 2<sup>nd</sup> appellant so desired.

From the foregoing it is clear that the precise size of the plot building to be leased or that was leased is not identifiable. There was no plan or sufficient description given at the trial. This renders the contract unenforceable for uncertainty.

Further it is apparent that no project specification and architectural drawing had been prepared to guide the parties as to how long the project would take and the estimated costs before entering into the contract. That left the implementation of the covenant to carry out renovations uncertain. Drawings were made subsequently but the 1<sup>st</sup> respondent rejected them and fresh drawings had to be made which were ultimately approved according to his own specifications. As it turned out the project involved major and expensive reconstruction of the building and apparently of the empty space behind the building which the 2<sup>nd</sup> respondent would not ultimately complete. The construction was to be financed by the 2<sup>nd</sup> appellant and undertaken by the 1<sup>st</sup> respondent under a Power of Attorney. In an ordinary tenancy it is the duty of the Landlord to make the premises tenantable – that make the premises reasonably fit for occupation. It seems from the 1<sup>st</sup> respondent's letter dated 15<sup>th</sup> February, 2001 that the 2<sup>nd</sup> appellant was disputing that rent was payable. That letter shows that even long after expiry of the three months grace period the 1<sup>st</sup> respondent was still insisting on completion of the construction.

The written offer was made by the appellants in person. There was no evidence of who drew the document. The respondents aver in paragraph 5 of the plaint that the appellants were to carry out the renovations with reasonable dispatch and within a reasonable time. This implies that there was no agreed period.

From the foregoing it is clear that the condition for carrying out internal, external, roof and renovation in the contract documents was very ambiguous. It was fundamental condition as the operation of the restaurant which was the fundamental purpose of the tenancy depended on it. The respondent's letter dated 15<sup>th</sup> February, 2001 indicates that much later after the meeting of 13<sup>th</sup> February, 2001 the parties agreed that the construction would be completed in bits, ground floor first and later first floor.

In the absence of an agreement on the specifications of the construction, architectural drawings, costs of the construction and time for completion of all the contract is again unenforceable for uncertain from inception. Moreover even the condition for repair and renovations was enforceable which is not the case, the contract should be construed in a commercial sense. From the evidence the conduct of the parties and totality of the circumstances, the inference which can be reasonably drawn is that the tenancy would commence upon the completion of the construction to make the premises tenantable for high class restaurant either within three months or within a reasonable time thereafter and further that no rent would be payable before the completion.

The appellants were not given either exclusive defacto or legal possession of the premises. The 1<sup>st</sup> respondent the one who was undertaking the construction on behalf of the appellants under a Power of Attorney was acquiring and storing building materials; supervising and paying the contractor. It was admitted that the 2<sup>nd</sup> appellant was abroad during the construction. There was no evidence that he was present in Kenya at any time during the construction. The 2<sup>nd</sup> appellant claims that he did not pay any rent during the period other than the Kshs.495,870/= he paid on account on six months rent as damage deposit and municipal rates. The receipt dated 30<sup>th</sup> April, 1999 for payment of that money was produced.

Although the 1<sup>st</sup> respondent claimed that the appellants paid rent, he did not produce any receipt. He however admitted that he appropriated some of the money received from 1<sup>st</sup> appellant for construction. The construction was not completed and the appellant did not use the premises. In the

premises the finding by the trial Judge that appellants were given exclusive possession is an abstraction. This is a case where the appellant paid a large sum of money – (1<sup>st</sup> respondent disputed receiving Kshs2,502,220/= but admits receiving Kshs.1,500,000/=) but, they got no financial benefit for it – Indeed there was no consideration. As regards the award of Kshs.6247,958/40 as damages caused when works were abandoned, the report of Mr. M. Itarunani of Adams Consultants show that the Kshs.6,247,958/40 was the current estimated cost of development of the restaurant as at 1<sup>st</sup> October, 2002. Indeed the respondents claimed in paragraph 11 of the plaint Kshs.8,000,000/= as the cost of making good and completing the works. The award does not represent a reasonable estimate of restoring the building to the condition in which it was before the aborted construction commenced. That award would unjustly enrich the respondents. It has no justification.

The facts of this case distinguish it from some of the local cases referred to herein before where there was a tenancy – the tenant had taken the full benefit of the tenancy but failed to comply with the conditions or stipulations in the tenancy.

From the foregoing we have come to the conclusion that there was no enforceable contract of tenancy that would have entitled the respondents to rent and damages and that the award of Kshs.6,247,958/40 was in any case unjustified.

In the result the appeal is allowed, the judgment and decree of the High Court together with respective awards of Kshs.952,908/= as arrears of rent and Kshs.6,247,958/40.

The respondent to pay the cost of the appeal and cost of the suit to the appellants.

***Dated and delivered at Malindi this 7th .day of October 2013***

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**A.K.MURGOR**

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**JUDGE OF APPEAL**

***I certify that this is a  
true copy of the original.***

**REGISTRAR**

