IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, J. MOHAMMED & KANTAI JJ.A.

CIVIL APPEAL NO. 171 OF 2008

BETWEEN

KENYA KNITTING & WEAVING MILLS LIMITED …… APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED …..…… RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Warsame, J) delivered on 30th day of November, 2007

in

HCCC NO. 2191 OF 2000)

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JUDGMENT OF THE COURT

1. The matter before this Court is an appeal from the judgment of Warsame, J *[as he then was]* in **HCCC 2191 of 2000** delivered on 30th November, 2007.

The appellant, ***KENYA KNITTING & WEAVING MILLS LIMITED***, sought as damages KShs.31,656,373/= plus costs and interest from the respondent, ***KENYA POWER & LIGHTING COMPANY LIMITED*** for breach of contract.

Background

2. The appellant vide a letter of offer dated 30th October, 1997 and the respondent's letter of acceptance dated 13th November, 1997, agreed to lease to the respondent parcels of land situated in Nairobi on Mombasa Road known as LR Nos. 37/689, 37/690 and 37/691 for a period of 5 years and 3 months from 1st December 1997 at a total rent of KShs.745,000/- per month as well as another property, L.R. No. 37/692, also leased to the respondent, at a rent of KShs.247,500/= per month (collectively referred to as the suit properties). Both parties admitted that they had agreed with the terms enumerated in the letter of offer which was to be followed by a formal lease to be prepared by the respondent's advocates. While waiting for the documents to be availed to facilitate the preparation of the formal lease, the respondent took occupation of the suit properties.

3. Through a series of correspondence, the respondent urged the appellant to deliver to them copies of the title documents to enable their advocates prepare a formal lease in respect of the suit premises. In a letter dated 2nd June 1998 the appellant revealed that they could not avail the title documents in respect of the suit properties as the suit properties had been charged in favour of Kenya Commercial Finance Company Limited. The respondent continued to occupy the suit properties until 1999 when it indicated its desire to vacate and hand over the suit properties to the appellant. The respondent gave a 3-month notice of its intention to terminate the tenancy agreement and paid rent for the notice period.

4. On expiry of the notice period, the respondent vacated the suit properties and invited the appellant for a joint inspection of the suit properties. It is the appellant's contention that the respondent, wrongfully and unilaterally vacated the suit properties by terminating the lease agreement which was for a term of 5 years and 3 months. The respondent was therefore in breach of the lease agreement for its premature termination. The appellant claimed recovery of damages for loss of rent for the suit properties for the remaining period of the lease; damages of KShs. 39,596,271/= with interest at the rate of 12% p.a from the date of filing suit until payment in full; KShs.284,610/= in respect of Site Value Tax, Ground Rent in respect of the suit properties and costs of the suit.

5. The learned Judge determined that there was no lease agreement in existence between the parties and that there was no provision that allowed the appellant to rely on the letters of offer and acceptance for letting the suit properties for a fixed period of 5 years and 3 months. The learned Judge found that since there was no proper lease agreement in place, the lease agreement could be terminated by either party giving reasonable notice and that the preparation of a valid lease was a condition precedent for the appellant to derive benefits from its relationship with the respondent concerning the suit properties. The learned Judge failed to find the respondent liable for any alleged damages claimed by the appellant and dismissed the suit with no order as to costs.

6. Dissatisfied with that decision, the appellant brings this appeal based on fifteen (15) grounds of appeal, *inter alia*, as follows: the judgment is against the weight of evidence; that the learned Judge did not appreciate that the respondent had adduced no evidence; that the learned Judge did not appreciate that the appellant had discharged the burden of proof requirements; that the learned Judge failed to appreciate that there were 2 binding contracts/agreements of letting between the parties for a fixed term of 5 years and 3 months for all the suit properties and that all the material terms were agreed upon and the formal lease was a mere formality; that the learned Judge erred in finding that the delay in supplying the documents needed for preparation of the lease despite his own finding that the preparation of the lease was a mere formality; that the learned Judge erred in finding that since no formal lease was entered into, occupation of the premises was substantially and fundamentally frustrated by the appellant; and that the learned Judge erred in not making a finding as regards damages suffered by the appellant upon premature vacation of the suit premises.

Submissions by learned Counsel

7. The firm of Mogire & Co. Advocates, on behalf of the appellant, filed written submissions dated 30th September 2015. Mr Muindi, learned counsel for the appellant submitted that despite no evidence being tendered by the respondent, the learned Judge failed to make a finding on the two lease agreements which the appellant tendered; that the two lease agreements were binding upon the respondent who was to complete the tenancy term as agreed and that the respondent should not have terminated the lease prematurely and without giving any reasons.

8. It was further submitted that the respondent was informed that the properties had been charged to Kenya Commercial Finance Company Limited, who held the certificates of title; that the respondent was satisfied with the explanation and through a letter dated 22nd June 1998, its advocates prepared a draft lease. This preparation of the draft lease, it was argued, showed that the respondent had waived the request of titles and physical plans and that the learned Judge therefore erred in not considering this evidence; that the learned Judge misdirected himself by stating that the appellant frustrated the lease despite the respondent's failure to supply reasons for terminating the lease; that the evidence adduced before the Court showed that it was the respondent who refused or failed to return the draft lease for

execution by the appellant.

9. Counsel submitted that the gist of authorities on the matter, was that where there was an unexecuted lease, parties are bound by their agreement even where the lease is not registered or executed. Counsel urged this Court to re-examine the evidence on record and allow the appeal.

10. The appeal was opposed. The firm of Mwaura & Mwaura Waihiga Advocates filed written submissions on behalf of the respondent. Ms Odongo learned counsel for the respondent, submitted that the learned Judge was correct in dismissing the appellant's claim for damages; that the claim was based on a letter of offer which contained conditions to be fulfilled to enable the preparation of a formal lease. Counsel submitted that the respondent discharged its burden of proof as required by ***S. 107 of the Evidence Act***; that the appellant's failure to supply the documents for preparation of the lease was unreasonable; that the letter of offer which the appellant relied on as the agreement between the parties, could not operate as a binding contract since conditions of the offer had not been fulfilled and was therefore not capable of being specifically performed; that occupation of the suit premises was fundamentally frustrated by the appellant by their delay in fulfilling their part of the agreement; that the delay assumed a character that went to the root of the relationship between the parties and that the respondent as the aggrieved party, was therefore entitled to rescind the lease agreement. Counsel conceded that the judgment of the learned Judge was sound and urged us to dismiss the appeal.

Determination

11. We have considered the submissions, the authorities and the law. In coming to a decision, this Court's duty is set out in the case of ***SELLE AND ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LTD AND OTHERS, [1968] 1 EA 123 (CAZ)*****:**

> "***An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (****Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270****)***."

12. The appellant and the respondent agreed to enter into a lease in respect of the suit properties. The appellant's case is that the two letters of offer constitute lease agreements binding upon both parties for the duration of 5 years and 3 months. The respondent was therefore in breach of the agreement by purporting to terminate the lease 2½ years into the tenancy. The respondent argued that the agreements were conditional upon the release of documents of title and physical plans of the properties which would facilitate the preparation of a formal lease, failing which, they were entitled to terminate the agreement by notice.

13. In the case of ***SHEIKH ABDALLA OMAR BASHIRAHIL V SAMUEL OBILA ALLELA, CA NO. 7 OF 1993*** the Court had to consider: *whether in the absence of a specific provision for termination of the agreement the tenancy could be terminated by either party upon giving reasonable notice to the other party; and whether the notice given was a valid one.*

14. The Court stated that the normal practice for termination of a lease before it was due was to give a three-month notice, which would have been adequate. The court read into the agreement a provision for termination since it had not been covered by the parties. The Court stated as follows:

> "***... an agreement such as this one under consideration is valid*** *inter partes* ***even in the absence of registration although it gives no protection against third parties. As far as the***

> ***parties were concerned this was the final contract intended to govern their relationship...***" (Emphasis added).

15. To determine the binding effect of the agreement, the intention of the parties is a paramount consideration. The appellant and respondent intended there to be a formal lease governing their relationship as landlord and tenant.

The physical plans and title documents were required to enable the respondent to draft the lease as a condition precedent to the formal lease agreement. This fact was adduced in evidence and was not controverted.

16. In the case of ***EAST AFRICAN POWER AND LIGHTING CO LTD V THE HONOURABLE ATTORNEY GENERAL, [1978] KLR*** the facts were similar to those in the current appeal. The Court held that:

> ***"where a prospective tenant is permitted to occupy premises in anticipation of the execution of a formal lease (but all essential elements of the lease have not been agreed) and rent is paid and accepted, in the absence of a contract or local law or usage to the contrary the letting is therefore governed by*** *Section 106 of the ITPA (Indian Transfer of Property Act* ***and is a monthly tenancy which can only be terminated by giving the requisite notice."***

17. In the appeal before us, the record indicates that the respondent prepared a draft lease on the agreed terms in anticipation of receipt of the requisite documents from the appellant to facilitate the preparation and execution of the formal lease. In the absence of a formal lease, a monthly tenancy had been created. The respondent indicated their intention to terminate the monthly tenancy by giving a three-month notice. Supported by the principles enunciated in the cases above quoted, we find that this was adequate notice. The respondent was not bound to lease the premises for the full term of 5 years and 3 months and were not liable to pay the damages claimed.

18. We come to the conclusion that the learned Judge properly directed his mind to the pleadings and evidence and arrived at the correct decision. None of the grounds challenging that decision can succeed and are dismissed. The appeal accordingly fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 19th day of May, 2016.

G. B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR