**MR. WILLIAM JOHN GILBERT GODWIN AND OTHERS**

**V.**

**TUNDE DURO-EMMANUEL AND OTHERS**

COURT OF APPEAL (LAGOS DIVISION)

CA/L/684M/2013

29TH DAY OF APRIL 2016

**LEX (2016) - CA/L/684M/2013**

OTHER CITATIONS

2PLR/2017/144 (CA)

**BEFORE THEIR LORDSHIP**

AMINU ADAMU AUGIE, JCA (Presided)

Y. BYENCHIT NIMPAR, JCA

J. YAMMANA TUKUR JCA (Read the Lead Judgment)

**BETWEEN**

1. MR. WILLIAM JOHN GILBERT GODWIN

2. MRS. MARGARET GILLIAN GODWIN

AND

1. TUNDE DURO-EMMANUEL

2. MRS. EBUN-OLUWA DURO EMMANUEL

3. MRS. CHRISTIANA MODUPE FADIYA

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE (O. Atinuke Ipaye, J., Presiding)

**REPRESENTATION/LAWYERS**

O. IDEMUDIA with V. EGBOH and E. OSIPITAN - for the Appellants.

KEHINDE OSIBONA with ADENIYI KOMOLAFE - for the 1st and 2nd Respondents.

OLORUNFEMI DANIEL - for the 3rd Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

COMMERCIAL LAW - CONTRACTS - CONTRACT DOCUMENT MADE BETWEEN PARTIES - Interpretation thereof - Attitude of court thereto.

REAL ESTATE AND PROPERTY LAW - LANDLORD AND TENANT - LEASE AGREEMENT:- Meaning of - Option to renew clause contained therein - Whether an obligation on a landlord.

REAL ESTATE AND PROPERTY LAW - LANDLORD AND TENANT - LEASE AGREEMENT:- Option to renew clause contained therein - Implication thereof.

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - DOCUMENTS - WORDS USED IN A DOCUMENT - Construction of - Need to give simple and ordinary meaning thereto.

EVIDENCE - ADMITTED AND UNDISPUTED FACT - Attitude of courts thereto.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellants as plaintiffs instituted an action at the High Court of Lagos State challenging the refusal of the respondents to renew a lease entered into for a period of fifty years, which later expired. The said lease contained an option to renew for another 49 years; to which the respondents refused to consent.

The appellants claimed right of renewal of the lease agreement, validity of the right of renewal, entitlement to the leased property for the renewal of the lease for the agreed sum of E300, (N600) six hundred naira per annum. The court refused their claims.

Dissatisfied, the appellants appealed on grounds that the lease agreement made it mandatory that the lease at its expiration be renewed for another term of 49 years.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment in favour of the respondents. The appellants had claimed that by the deed of lease, they were entitled to a renewal for another 49 years. Dissatisfied, the Appellant appealed to the Court of Appeal.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

1. Whether the tenor of clause 4 of the lease agreement between the parties, dated 2 December 1957 envisaged that, should the claimants (appellants) express a desire to renew the lease, at its expiration (particularly with regards to the consideration) contained in the clause 4.

2. Whether the claimants (appellants) having expressed its desire to renew the lease of 2 December 1957 and communicated same to the respondents vide its notice to that effect, the respondents are obliged to renew same and/or the claimants (appellants) are entitled to treat same as renewed, as provided for in clause 4 of the lease of the 2 December 1957.

*BY 1ST AND 2ND RESPONDENTS:*

Whether clause 4 of the lease agreement dated 2 December 1957 (exhibit 18) makes it mandatory on the respondents to renew the lease at its expiration for a further term of 49 years on the receipt of appellants’ notice of intention to renew the lease.

*AS ADOPTED BY COURT*

[The Court adopted the sole issue formulated by the 1st and 2nd Respondents].

**MAIN JUDGGMENT**

TUKUR JCA (DELIVERING THE LEAD JUDGMENT:

This is an appeal against the judgment of the High Court of Lagos State in suit No. M/169/2007, delivered on 20 February 2013 by Honourable Justice O. Atinuke Ipaye in favour of the respondents. The circumstances that led to this appeal are that the appellants entered into a lease agreement with respondents wherein the respondents agreed to lease out the property identified as No. 27, Boyle Street, Lagos to the appellants for a period of 50 (fifty years) with the option to renew for another period of 49 (forty nine) years. Dispute however ensued when the appellants sought to exercise their right of renewal of the lease as the respondent declined to consent to it. Thus, the appellants as claimants at the trial court filed an originating summons dated 2 April 2007, an affidavit in support and written submission (seen at pages 1 and 2, 19 to 22 of the record of appeal). They sought the following reliefs:

1. “A declaration that the claimants are entitled to a right of renewal of the lease agreement dated 2 December 1957 and registered as No. L03050 in the register of a title kept at the Lands Registry, Alausa, Ikeja.

2. A declaration that the exercise of the claimants’ right of renewal of the lease agreement of 2 December 1957 via their letter of 20 February 2004 is valid and binding on the defendant.

3. A declaration that the claimants are entitled to possession/lease of the premises situate at No. 27 Boyle Street, Lagos for a further term of 49 years from 1 December 2007 on payment of the agreed rent of £300 (N600) per annum.

4. A declaration that the claimants’ pursuant to their right of renewal and in accordance with clauses 3(4) and 4 of the lease agreement dated 2 December 1957, are only obliged to pay, as consideration for the renewal the sum of £300 (three hundred pounds) or its Naira equivalent.

5. And for such further order or orders as the honourable court may deem fit to make in the circumstances.”

The appellants hinged their reliefs on the determination of the following questions:

1. Whether the claimants validly exercised their right of renewal of the lease agreement dated 2 December 1957 and whether the exercise of the right of renewal is binding on the defendants.

2. Whether the claimants are bound to pay more than the bare value of the land (less the building and appurtenances thereof) as consideration for the renewal of the lease.”

In response, the respondents filed a motion on notice dated 15 February 2007, seeking that the trial court should order pleadings for the matter to be resolved at trial. The respondents equally filed a counter-affidavit to the originating summons dated 22 February 2008. Upon court order, the appellants filed a statement of claim dated 18 March 2010 accompanied with a statement on oath of the 1st appellant and list of documents to be relied on at trial, all dated 18 March 2010. The defendants thereafter filed a statement of defence, witness statements on oath and index documents to be relied upon by the defendants, all dated 16 April 2010. (Seen at pages 139-163 of the record). At the end of trial, the trial court found that the claimants did not prove their entitlement to the claims enumerated above.

Dissatisfied with the judgment, the appellants filed a notice of appeal dated 13 March 2013 with two grounds of appeal. The appellants’ brief settled by Osahon Idemudia of Libra Law Office is dated 2 October 2015 and filed on 7 October 2015.

No reply brief was filed. The appellants formulated two issues to wit:

1. Whether the tenor of clause 4 of the lease agreement between the parties, dated 2 December 1957 envisaged that, should the claimants (appellants) express a desire to renew the lease, at its expiration (particularly with regards to the consideration) contained in the clause 4.

2. Whether the claimants (appellants) having expressed its desire to renew the lease of 2 December 1957 and communicated same to the respondents vide its notice to that effect, the respondents are obliged to renew same and/or the claimants (appellants) are entitled to treat same as renewed, as provided for in clause 4 of the lease of the 2 December 1957.

On the other hand, the 1st and 2nd respondents’ brief dated and filed on 17 November 2015 was settled by Kehinde Osibona Esq., of Kehinde Osibona & Co. The respondents formulated a sole issue for determination as follows:

1. Whether clause 4 of the lease agreement dated 2 December 1957 (exhibit 18) makes it mandatory on the respondents to renew the lease at its expiration for a further term of 49 years on the receipt of appellants’ notice of intention to renew the lease.

I shall adopt the sole issue raised by the 1st and 2nd respondents in the determination of this appeal. This is because, it covers the crux of the appeal.

Sole Issue:

1. Whether clause 4 of the lease agreement dated 2 December 1957 (exhibit 18) makes it mandatory on the respondents to renew the lease at its expiration for a further term of 49 years on the receipt of appellants’ notice of intention to renew the lease.

Arguments of counsel:

The appellants in opening their argument made reference to exhibit 15 which is the lease agreement dated 2 December 1957 between the parties in this suit and submitted that they are entitled to renewal or extension of the lease for a further term of 49 years. Quoting copiously from clauses 4 and 1 of the said lease agreement, counsel for the appellants contended that the appellants’ right of renewal or extension of the lease was at their option and automatic on their giving to the respondents, notice of intention to renew. That the respondents were bound by the agreement to renew the term of their lease to 49 years upon being given notice of intention to renew. Counsel referred this court to exhibits 5A and 5B to argue that notice of renewal was duly given to the respondents in exercise of their contractual right.

Appellants’ counsel further submitted that their liability in the renewed lease would be £14,700 (fourteen thousand, seven hundred pounds) which amounted to N29,400 (twenty-nine thousand, four hundred naira) Nigerian currency as at the time the submission was made. Citing page 14 of the judgment of the trial court at page 319 of the records of appeal, counsel submitted that the court’s interpretation of “Will” as contained in the lease agreement does not reflect the intention of the parties as captured in clause 4 of the lease agreement. Counsel contended that the interpretation had the effect of rewriting the contract for the parties. Relying on the cases of Moat v. Martins & Anor. (1949) 2 All NLR 646; Rayfield v. Hands & Ors. (1958) 2 All NLR 194, counsel further submitted that the word “Will” connotes a positive compulsion to carry out what was agreed in the lease agreement. That the trial court misled itself when it singled out the word without looking at the intendment of the agreement. He submitted on a final note that courts are bound to give effect to the wishes of the parties by having recourse to the interpretation that reflects their wishes. He therefore urged this court to set aside the decision of the trial court and uphold the claims of the appellants.

On the other hand, counsel for the 1st and 2nd respondents in his opening submission also referred to clause 4 of the lease agreement. He stated that courts of law are duty-bound to interpret the intention of the parties as contained in their agreement. Counsel submitted that once contracts are voluntarily entered into, parties to it are bound by the terms and conditions. He cited Idufueko v. Pfizer Products Ltd (2014) All FWLR (Pt. 745) 269, (2014) 5/6 SC Pt. 3 at 33; Ibama v. Shell Petroleum Development Company of Nigeria Limited (2005) All FWLR (Pt. 287) 832, (2005) 10 SC 74; Koiki v. Maagnusson (1999) 5 SC (Pt. 3) 30 at page 111, (2001) All FWLR (Pt. 63) 167 ; Baba v. N.C.A.T.C. Zaria (1991) 7 SC (Pt. 1) 58. (1991) 5 NWLR (Pt. 192) 388, (1991) 7 SCNJ 1.

Learned counsel submitted that parties were bound by the terms and conditions of the lease agreement dated 2 December 1957. On the use of the word “Will” in clause 4 of the lease agreement, 1st and 2nd respondents’ counsel contended that interpretation of a document is a matter of law and not fact. That where a document is clear, the operative words should be given their simple and ordinary grammatical meaning. And that the courts are not permitted to make or rewrite contracts for the parties, he cited Odogwu v. Oki (1990) NWLR (Pt. 153) 721 at page 736; Oyenuga v. Provisional Council, University of Ife (1965) NMLR 9; Solicitor-General, Western Nigeria v. Adebanjo (1971) 1 All NLR 181. It is also the submission of counsel that the word “Will” could either be imperative or directory depending on the context it is used. He referred to the Blacks’ Law Dictionary, 7th Edition; Amadi v. N.N.P.C. (2000) 6 SC (Pt. 1) at 66, (2000) All FWLR (Pt. 9) 1527; Liverpool Borough Bank v. Turner (1861) 30 LJCH 379 at 657, to submit that in this case, the use of the word in the lease agreement cannot be regarded as mandatory.

It is the contention of counsel that the appellants have not paid their rents from 1957 up to 1986 but that a loan which was granted to one of the Administrators of the Estate of Thomas Jaiye Da Silva was controverted as part of the rent for the period of 1986 to 1991. That the non-employment of the rent amounted to breach of an implied term in the lease agreement. That a lessee who intends to take advantage of an option to renew a lease must comply with the terms of the lease. Counsel submitted that it could not have been the intention of the drafters of the lease agreement that as long as the lessees indicated intention to renew notwithstanding the lessees’ non-compliance with a term of the lease agreement, the leasors have a duty to renew.

Counsel for the 1st and 2nd respondents submitted that the word “Will” is synonymous with the word “Shall” or “Must”. That the courts will however not always construe “Will”, “Shall” or “Must” as mandatory but will look at the context in which they are used. He contended that it is not the intent and purposeof clause 4 of the lease agreement to place a mandatory obligation on the respondents to renew once the appellant gave notice of intention to do so. Counsel argued that the cases cited by the appellants do not support their contention as they represent a contrary position. He cited the case of Woodhouse v. Consignia Plc (2002) 2 All ER 738 at 747, paragraph J to buttress his submissions that “Will” will be construed in the context that is used in a document. In all, 1st and 2nd respondents’ counsel urged this court to uphold the decision of the trial court and dismiss the appellants’ appeal for lacking in merit and award substantial cost to them.

Resolution of sole issue:

I have carefully looked at the facts of this case and examined the submissions of parties as well as the evidence adduced and, I am convinced that this is a simple matter of construction of document, in this case, the lease agreement dated 2 December 1957.

As a preliminary point, I wish to state that from the record it is not a subject of dispute that the property in question is situate at No. 27, Boyle Street, Onikan, Lagos, and neither is it a subject of contention that the lease agreement was executed on the 2 December 1957 at pages 9 and 224 of the record of appeal that the property in question was originally leased out by one Thomas Jaiye Da Silva (who is now deceased) to the appellants. The defendants as heirs were substituted for the deceased leasor. All these facts have not been controverted by parties and the trial court equally reflected same in its judgment.

I also rely on them. The law is trite that facts admitted and undisputed can be relied on by the courts. See Hon Gabriel Yunisa Olofu & Ors. v. Mr. Micheal Itodo & Ors. (2010) 18 NWLR (Pt. 1225) 545 (SC), (2011) All FWLR (Pt. 572) 1637; Okorie v. Ejiofor (1992) 3 NWLR (Pt. 343) 90 at 104; Elizabeth Mabamije v. Hans Wolfang Otto (2016) LPLER - 26058 (SC).

The area of dispute in this matter is whether the appellants are automatically entitled to right of renewal of their lease with the respondents once a notice of intention to renew has been given in accordance with clause 4 of the lease agreement dated 2 December 1957. For ease of reference, clause 4 is reproduced thus:

“It is mutually agreed between the parties hereto that if the lessee shall be desirous of continuing the tenancy hereby created for a further term of forty nine (49) years at the expiration of the term hereby granted and shall not less than six months before the expiration of the said term give the lessor or leave at or post at her usual or last known address a notice in writing of such their desire then the lessor will let the said premises to the lessees for the further term of forty nine (49) years from the 1st day of December 2007 at the increased rent of three hundred pounds (£300) payable annually in advance and subject in all other respects to the same stipulations, terms and conditions as are herein contained this clause of renewal.”

Now, it is the contention of the appellants that the respondents are obligated by the tenor of the above clause to renew their lease for yet another period of 49 years.

The respondents on the other hand argued that the word “Will” in a document may be interpreted as directory or imperative depending on the context of usage.

Now the Black’s Law dictionary, 8th Edition at page 1208, defines the noun equivalent of “Will” as a “Wish”, desire, choice, similarly, the Oxford Advanced English dictionary 8th Edition in page 1702, defines the verb version of the word “Will” as to use the power of your mind to do something or to make something happen; to intend or want something to happen.”

I agree entirely with the learned trial judge that the use of the word “Will” in clause 4 of the lease agreement do not convey a mandatory connotation. For emphasis, I deem it necessary to reproduce a portion of the judgment of the lower court at page 14 and seen at page 319 of the record of appeal thus:

“With all due respect, I am persuaded that the contentions of the learned counsel for the claimants are misconceived. My reasons are as follows: First, a careful reading of clause 4 above is not couched in mandatory terms. Clause 4 merely states that “then the lessor “Will” let the said premises to the lessee for the further term” and I so hold. Unlike the word “shall” which is a word of command and usually mandatory in nature, the word “Will” as defined by Blacks’ Law Dictionary, 7th Edition “means wish, desire, choice”. The Merriam Webster Dictionary further defines “Will as a verbal auxiliary used to express “desire, choice, willingness, consent” I am persuaded thus persuaded that the option to renew in the manner expressed in clause 4 of exhibit 18 is not mandatory in nature. Secondly, it cannot by any stretch of imagination, be considered that the lessee was in any way compelled to exercise a reserved privilege to seek a renewal of the lease or that the lessor was in any way compelled to accept his notice of intention to renew. An “option to renew’’ as in this instant case remains an “option” and give it any other meaning would not only run counter to the intendment of the parties, it would run counter to usual commercial practice...”

Now, the law is indeed trite that in the interpretation of contractual documents or instruments voluntarily made by two or more parties, the court in its endeavour to discover the intention, aspiration and contemplation of the parties must confine itself to the words used in the document by the parties. We as judges are not permitted to incorporate any extraneous ideas that cannot be traceable to the written document. See Nika Fishing Co. Ltd v. Lavina Corporation (2008) LPELR - 2035 (SC), (2008) All FWLR (Pt. 437) 1; Amadi v. Thomas Aplin & Co. Ltd (1972) 7 NSCC 262, (1972) 4 SC 228; Matthew Mbogu v. Adviser Shadrack (2007) LPELR – 8368 (CA).

Niki Tobi JSC in the case of Nika Fishing Co. Ltd v. Lavina Corporation puts it thus:

“When construing documents in dispute between two parties, the proper course is to discover the intention or contemplation of the parties and not to import into the contract ideas not potent on the face of the document”.

It is against this background that I resolve the lone issue in favour of the respondents and the end result of all these discourse is that the appeal lacks merit and it is hereby dismissed.

The judgment of the lower court in suit No. M/169/2007 is hereby affirmed. Parties to bear their costs.

**AUGIE JCA:**

I have read in draft, the lead judgment delivered by my learned brother, Tukur JCA and I agree with his reasoning and conclusion. It is settled that in construction of documents, the words must first be given their simple and ordinary meaning and that under no circumstances may new or additional words be imported into the text unless it would be by the absence of that, which is imported, impossible to understand - see Solicitor-General, Western Nigeria v. Adebanjo (1971) 1 All NLR 181, where the Supreme Court, per Coker JSC, added:

“The cardinal presumption is that the parties have intended what they have in fact said that their words must first be construed as they stand. In Smith v. Lucas (1881) Ch.D. 531 at 542, Jessel M.R. on this point observed that:

“One must consider the meaning of the words used, not what one may guess to be the intention of the parties.”

In this case, it is clear from the said clause 4 that parties used the word “Shall” in respect of the lessees’ intention to continue with the tenacy, and notice to be given by the lessees.

But they did not use the word “shall” for the lessor; they merely agreed that upon receipt of notice, “the lessor will let the said premises to the lessees for the further term of 49 years.” The use of the word “will” rather than “shall” in that regard is weighty and significant. I also agree with the lower court that the said “clause 4 is not couched in mandatory terms”. It is for this and other reasons in the lead judgment that I also dismiss the appeal, and I abide by the consequential orders in the lead judgment, including on costs.

**NIMPAR JCA:**

I had the privilege of reading in advance, the draft of the judgment just delivered by my brother, Jamilu Yammama Tukur JCA. I agree with the reasoning and conclusion arrived at. Let me just say that the option to renew is exactly what it is: an option. It is not a lease granted in perpetuity. It does not also impose an obligation on the landlord to renew an expired lease where the landlord does not wish to do so. As we held in the case of Ezenwa v. Oko (2008) 3 NWLR (Pt. 1075) 610 at 629, even where there is a provision that the lessor shall not unreasonably withhold consent to renew the lease, the option to renew clause still leaves the lessor with the discretion either to renew or not to renew the lease. In other words, a landlord can refuse to renew a tenancy despite the existence of an option to renew clause. More so, the word “will” in the option to renew clause is directory not mandatory as expatiated by my learned brother in the lead judgment.

Consequently, I too dismiss the appeal and affirm the judgment of the lower court delivered by Hon. Justice O. Atinuke Ipaye delivered on 20 February 2013.

Appeal dismissed