**Grosvenor v Rogan-Kamper**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 23 October 1974

**Case Number:** 51/1974 (119/74)

**Before:** Spry Ag P, Law Ag V-P and Musoke JA

**Sourced by:** LawAfrica

**Appeal from:** High Court of Kenya – Chanan Singh, J

*[1] Landlord and tenant – Agreement – For lease of more than* 12 *months – Valid between the parties –*

*Tenant holds as if lease had been granted – Registration of Titles Act* (*Cap.* 281)*, s.* 40 (*K.*)*, Indian*

*Transfer of Property Act* 1882*, s.* 106*.*

*[2] Registration of documents – Interest in immovable property – Agreement for lease – Exempted from*

*registration as document creating right to obtain another document – Registration of Documents Act*

(*Cap.* 285)*, s.* 4(*e*) (*K.*)*.*

**JUDGMENT**

The following considered judgments were read.

**Law Ag V-P:** The appellant owns a building in Nairobi known as Penguin House. The respondent, in 1969, wished to lease the fourth floor of that building to carry on therein the business of a school. He entered into a written agreement with Tysons Ltd., the appellant’s agents, on 29 September 1969. Under its terms, the appellant agreed to grant and the respondent to take a lease of the fourth floor for a terms of 5 Years and 1 month from 1 November 1969, at a monthly rental of Shs. 3,600/-. The respondent entered into possession on 1 November 1969. A draft lease was sent to him for approval but was never approved or executed by him. The respondent paid rent at the agreed rate until the end of April 1970. Since then he has paid or tendered rent at the rate of Shs. 1,800/- a month having purportedly surrendered half the accommodation, according to him with the consent of the appellant’s agents, which consent they deny having given. On the 10 May 1971, the appellant’s advocates gave notice by registered letter that they required vacant possession of the premises on or before 31 May 1971, by reason of failure to pay rent. The respondent did not comply. On the 4 June 1971, this suit was instituted. The grounds of claim are stated in paras. 7 and 8 of the plaint as follows: “7. The defendant duly paid the agreed rent up to and including the month of April, 1970, but since that date the defendant has failed to pay the agreed rent. 8. B y virtue of the aforesaid breach of the express or implied term of the lease, the plaintiff on 10 May, 1971, gave the defendant notice forfeiting the lease with effect from 31 May, 1971, and requiring delivery up of vacant possession of the premises on or before 31 May, 1971.” The plaint went on to claim an order for vacant possession, arrears of rent, mesne profits and costs. The use of the word “lease” in para. 8 aforesaid seems to me unfortunate and confusing. There never was an executed lease, and the suit was based on an alleged breach of the agreement to grant and take a lease, dated 29 September 1969 and referred to in para. 3 of the plaint. The trial judge, unfortunately, fell into the same error, and held as follows: “In any case, this is a case of an unregistered lease.” With respect, it is not. There never was a lease in existence, capable of registration. Earlier in his judgment the judge had correctly stated that the letter of 29 September was not a lease for 5 Years and 1 month, but an agreement for such a lease. I think the judge must have intended to say, in the passage quoted above, that this was a case of an unregistered agreement for a lease. The question arises, whether such an agreement is valid and enforceable by either party although not registered. The judge relied *inter alia* on s. 4 of the Registration of Documents Act (Cap. 285) which provides for the registration of all documents conferring title or interest in or over immovable property, but, as Mr. Le Pelley for the appellant has pointed out, proviso (*e*) to that section exempts from the requirement of registration documents merely creating a right to obtain another document, which in my view must include an agreement to grant a lease. S. 40 of the Registration of Titles Act (Cap. 281) provides that no lease for any term exceeding 12 months shall be valid unless registered, but as we know there never was in existence a lease relating to the suit premises capable of registration. Must s. 40 be construed as though the word “lease” included an agreement for a lease? The respondent (who appeared in person) submitted that it should, and drew our attention to s. 41, which provides that “any lease or agreement for a lease” for a term not exceeding 12 months shall be valid without registration; by necessary implication, he argued, an agreement for a lease for a term exceeding 12 months is invalid unless registered. This submission has on the face of it considerable force, but I think the answer is this: an agreement for a term exceeding 12 months, not followed by a registered lease, gives no protection against the rights of third parties, whereas s. 41 makes it clear that a lease, or agreement for a lease, for a term not exceeding 12 months is effective for all purposes without the necessity for registration. Furthermore, the trend of judicial decision in East Africa has been for the courts to enforce unregistered leases or agreements for leases as contracts inter parts, where the contract is one capable of being specifically enforced and does not affect the rights of third parties. As was said in *Figueiredo & Co. v. Moorings Hotel*, [1960] E.A. 926: “The question is not the creation of an estate or interest in land but whether a term in a contract or a term of a tenancy at will can be enforced.” That case was cited and followed in *Clarke v. Sondhi*, [1963] E.A. 107. At p. 112 Crawshaw, J.A. quoted with approval the following extract from Mulla on the Indian Transfer of Property Act: “The transferor is not debarred from enforcing a right in respect of property which is expressly provided by the terms of the contract. So if the contract were an agreement of lease not provable because of want of registration, the lessee could not resist a demand for rent.” The judge’s view that there was no valid lease (or agreement for a lease) led him to apply s. 106 of the Transfer of Property Act, and hold that the agreement between the parties must be deemed to have resulted in a lease from month to month, and accordingly was within the competence of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301). The opening words of s. 106 read “In the absence of a contract . . . to the contrary”. In my view there was such a contract between the parties, evidenced by the agreement of 29 September 1969. Its material terms are sufficiently stated: the names of the lessor’s agents, the name of the lessee, the description of the property, the term and its commencement, and the rent agreed to be paid. This contract could have been ordered to be specifically performed at the instance of either party. As regards covenants and stipulations which are not stated, the respondent must be deemed to hold under the same terms as if a lease has been granted, and he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted: see the judgment of Jessel, M.R. in *Walsh v. Lonsdale* (1882), 21 Ch.D. 9. It follows that in my view this appeal must succeed, and I would so order, and award the appellant the costs of this appeal. I would set aside the order dismissing the suit, and the order for costs in favour of the respondent, and remit the suit to the same judge for decision on the basis that there was a valid contract between the parties for the leasing of the suit premises for the term certain of 5 years and 1 month. The final determination of the suit will necessitate a decision by the judge on those issues arising out of the pleadings and evidence on which he has made no findings, such as whether there was an effective surrender of part of the demised property; whether a stipulation should be implied into the agreement giving the landlord a right to demand vacant possession, on giving 15 days’ notice, for failure to pay rent; whether (as contended before us by the respondent) the agreement was void for illegality in that the landlord agreed to lease premises for use as a school in respect of which no licence had at the time been issued, and such other issues as the judge may consider relevant. It will be for the judge to decide whether to hear further submissions by the parties. The costs of the whole suit will be in the discretion of the judge.

**Spry Ag P:** I am in complete agreement with the judgment of Law, Ag. V.-P., and with the order he has proposed and as Musoke, J.A., also agrees, it is so ordered.

**Musoke JA:** I agree with the judgement of Law, Ag. V.-P., which I have had the advantage of reading in draft, and have nothing useful to add. *Appeal allowed.*

For the appellant:

*P Le Pelley & KA Fraser* (instructed by *Hamilton Harrison & Mathews*, Nairobi)

The respondent appeared in person.