Case Number:	civ case 1331 of 95
Date Delivered:	10 Jul 2001
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	-
Judge:	Philip John Ransley
Citation:	KIM HOLDINGS LIMITED vs THE ATTORNEY GENERAL[2001] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1331 OF 1995.

KIM HOLDINGS LIMITED……..PLAITNIFF

VERSUS

THE ATTORNEY GENERAL……DEFENDANT

J U D G M E N T

The Plaintiff's claim against the Defendant is in respect of rent due and an unpaid, water bill in respect of two properties which were let to the Defendants by the plaintiff or their predecessors.

The first property L.R. No. 209/1802 comprising of maisonettes was the premises let to the Defendant by a lease which expired on the 10.5.92 (see Exhibit B) as stated in a letter from the Plaintiff to the Defendant dated the 31.3.1992 giving the Defendant three months notice to vacate the premises on the 1st June 1992. On the 25.3.92 the Defendant wrote to the Plaintiff proposing a lease for three years at the same rent and terms as were contained in the then current lease. In a postscript to the letter of the 31.3.92 the Plaintiff stated it did not want to enter into another lease. The Defendant thereafter continued as a tenant paying a rent of Shs.10,000 per month until the Plaintiff by its letter of the 15.2.94 claimed that the Plaintiff had been forced to pay a sum of Shs.202,466 to the Nairobi City Council to obtain a clearance certificate. The letter also demanded a sum of Shs.169,987,80 from the Defendant in respect of outstanding water charges consumed by the various occupiers of the flats in the premises. The letter also on the 1st June 1994 gave three months notice of termination of the lease which was to run from 1 March to 31 May, 1994.

On the 17 March 1994 the Defendant offered to pay a rent of Shs18,000/- per month per maisonette comprised in the premises for a period for three years. By is letter of the 18.3.94 this offer was rejected but the Plaintiff proposed a rent of 25,000/- per month per maisonete. The letter also stated that if 25,000/- was not agreed then the Defendant should hand over possession on the 30 April, 1994.

The Defendant did not accept the rent of Sh.25,000 per mainsonette per month and continued in possession of the premises until the 31 March, 1995 when it vacated.

In the case of L.R. No. 209/367/7 these premises were let to the Defendant by the predecessor in title to the Plaintiff namely one Arjan Ghai Shivji Jessa under a lease dated the 27.11.2001. This lease expired on the 30.4.94 the rent being at the rate of shs.80,000 per month or 10,000/- for each maisonnete comprised in the premises. Correspondence ensued over rent for the premises at the expiry of the lease the Plaintiff asking for 25,000/- per maisonette and the Defendant offering 18,000/-. On the 18.3.94 the Plaintiff wrote to the Defendant Exhibit 7 stating that if the Defendant wanted the maisonette it should take them at 25,000/- per month but if not it should arrange to hand over the maisonettes to the Plaintiff by the 3.4.1995. As no agreement was reached on the expiry of the tenancy the Defendant became a trespasser in the premises without any lawful right to stay there. The position however changed in that by a Notice dated the 26.8.94 the Plaintiff through its advocates served a notice on the

Defendant demanding rent and water charges in respect of both properties as set out therein for the months of May to September 1994 and seeking vacant possession arrears of rent and water charges mesne profits and costs of an intended suit. The Defendant vacated both premises on the 31 March, 1995.

The Plaintiff has claimed for the relief it claims in the plaint on the basis that by two letter s after the expiry of the leases on the 30.5.94 and 30.4.94 respectively the 16 maisonnettes comprised in the suit premises would be rented at 25,000/- per month for each of the sixteen maisonettes comprised in the suit premises and that any renewal would be based on this condition. See paragraph 6 & 7 of the Plaint.

The Plaintiff's case is therefore based on a rent of shs.25,000/- per month per maisonette. The Defendant after it vacated the premises paid to the plaintiff a sum of money equal to 10,000/- per maisonette per month from the time it had occupied the premises after the expiry of the leases. This sum of money is credited against the sums claimed in the Plaint which so far as rent is concerned is a claim for rent being the difference between the sum of Shs.10,000/- per maisonette paid and the sum of 25,000/- per maisonette asked for by the Plaintiff. It is clear there was no agreement by the Defendant to pay the rent of Shs.25,000/- per maisonette as demanded and thus I find that no rent was due at the rate of Shs.25,000/- per month. The Defendant was on the expiry of the lease a trespasser and could have been sued for vacant possession and mesne profits. This however the Plaintiff has not done. The Notice Exhibit 11 served on the Defendant does not assist the Plaintiff to create a tenancy at 25,000/- per month per maisonnete. Although it demands rent at that rate for the months of May to September 1994 in the absence of express agreement to pay rent at 25,000/- per month there can not be an implied tenancy by conduct by remaining in the premises. In deed the Defendant expressly stated it would not agree to pay 25,000 per month as demanded and offered in the case of L.R. No. 209/356/7 18,000/- per month. It cannot be implied that there was a tenancy at this rate after the lease expired. There being no agreement on rent in either of the suit premises and the Plaintiff having brought its claim on a contract which does not exist, nor is it alleged, cannot succeed to recover rent from the Defendant. Counsel for the Plaintiff has brought to my attention a passage in Chitty on Contract 25th Edition paragraph 82 in which there is reference to a case in which it was held that an offer had been accepted by silence contrary to the general rule. For such a case to exist it must be based on estoppel. I can find nothing in the Defendant's conduct which to my mind amounted to an estoppel. Here there was not silence but an offer to rent the premises at a lower rent than was offered. The Plaintiff does not rely in its plaint on silence creating an estoppel which should be pleaded. Again Learned Counsel relies on two cases namely Drane Vs. Evangelou (1978) ALL E.R. page 437 and Heptulla Bros. Vs. Thakore (1957) E.A. Page 358 for the proposition that the Defendant can be treated as trespassers and in the absence of pleadings evidence can be adduced and the court can award mesne profits in lieu of rent where it has not been pleaded.

In the first case the act of trespass was aggravated by what was called reprehensible conduct on the part of the Landlord who had committed the trespass. In dealing with the point that trespass had not been pleaded Lord Denning M.R... at page 440 quoted what the Learned trial Judge said as follows;-

"Counsel for the Landlord submitted that that claim was for breach of a covenant for quiet enjoyment. He cited a passage from Woodfall: ' Since the claim is in contract punitive or exemplary damages cannot be in trespass". Counsel for the landlord urged that trespass was not Pleaded. The judge then said; 'The facts are alleged sufficiently so it does not matter what label you put on it.' The judge was right. The tenant in the particulars of claim Gave details saying that three men broke the door, removed The tenant's belon gings, bolted the door from the inside; And so forth. Those facts were clearly sufficient to warrant A claim for trespass. As we said in Re Vandervells Trusts".

I think they were wholly different circumstances and as the Plaintiff has made its case out on an agreement for rent, I do not see that I can translate it into a claim for mesne profits, in trespass although as I have said the Defendant was a trespasser.

The Heptulia case only comes into play if mesne profits are to be awarded which is not the case here.

With regard to the water charges claimed in respect of L.R. No. 209/356/7 there was no agreement produced to me whereby the Defendant undertook this liability. I asked for the expired lease to be produced but it was not forthcoming. Had that expired lease contained an agreement by the Defendant to pay water charges it would have been a continuing obligation after the expiry of the lease. However in its absence I am unable to award judgment against the Defendant for the water charges. In the result, the Plaintiff has failed to prove its case and I dismiss the Plaint with costs to the Defendant.

Dated and delivered at Nairobi this 10th day of July, 2001.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.