In The Supreme Court of Nigeria

On Friday, the 15th day of December 2006

S.C. 280/2003

Before Their Lordships

Sylvester Umaru Onu	......	Justice, Supreme Court
Niki Tobi	......	Justice, Supreme Court
Dahiru Musdapher	......	Justice, Supreme Court
Aloma Mariam Mukhtar	......	Justice, Supreme Court
Walter Samuel Nkanu Onnoghen	......	Justice, Supreme Court

Between

Alhaji J. A. Odutola	....	Appellants
J. A. Odutola Property Dev. Ind. Co Ltd	....	

And

Papersack Nigeria Limited	....	Respondent

Judgement of the Court
Delivered by
Niki Tobi. JSC

The *res* in this litigation is 44, Eric Moore Road, Iganmu Industrial Estate in Lagos State. The 1st plaintiff, now the 1st appellant, is the original owner of the property. He is the founder and principal shareholder of the 2nd plaintiff, now the 2nd appellant. The 2nd appellant is the assignee of the unexpired term and interest in the property with effect from 13th December, 1991. The 1st appellant is the Managing Director of the 2nd appellant. The case of the appellants is that Thoresen and Co. (Nig.) Ltd. rented the property and not Papersack Nigeria Limited. Although the tenancy expired in 1980, respondent still occupied the property. They paid rent to the 1st appellant, though not regularly. The 1st appellant issued receipts for payments made to the respondent.

Following the failure on the part of the respondent to pay the rent, the appellants filed the action. They claimed possession, outstanding rent and *mesne profit*. The respondent made a counter-claim. The learned trial Judge gave judgment for the appellants as follows:

"1. The defendant shall give up possession of the warehouse and office premises situate at No 44, Eric Moore Road, Iganmu Industrial Estate, Lagos forthwith and shall pay *mesne profit* at the rate of ₦808,861.64 *(Eight hundred and eight thousand, eight hundred and sixty-one naira, sixty-four kobo)* from the 1st day of June, 1994 until possession is given up.

2. For the sum of ₦2,975,143.23 *(Two million, nine hundred and seventy-five thousand, one hundred and forty-three naira, twenty-three kobo)* with interest at the rate of 21 % per annum from the 1st day of June 1989 to the 31st day of May, 1994 being the amount owed by the defendant for the use and occupation of the plaintiffs warehouse and office premises at No 44 Eric Moore Road, Iganmu Industrial Estate, Lagos State.

On appeal to the Court of Appeal, the court allowed the appeal. The judgment of the High Court was set aside. The court made the following orders:

"1. The arrears of rent of ₦68,419.95 for the period of 1977- 1982 is set aside.

2. The appellant shall pay rent of ₦200,000.00 for the period of 1st June 1984 to 31st May, 1985.

3. The rent from 1989 to 1994 shall be at the rate of ₦20,000.00 per annum as there was no proper increase of rent proved by the respondent.

4. The total arrears of rent due as at 31st May, 1994 is the sum of ₦1,000,000.00 *(One million naira only)*.

5. The order for payment of *mesne profit* is set aside."

Dissatisfied, the appellants have come to the Supreme Court. Briefs were filed and duly exchanged. The appellants formulated four issues for determination as follows:

"1. Whether the learned Justices of the lower court were not wrong when they held that a yearly tenancy agreement existed between the appellants and the respondent.

2. Whether the learned Justices of the lower court were not wrong when they held that the notices given to the respondent to give up possession of the premises were not valid.

3. Whether the learned Justices of the lower court were not wrong when they held that evidence of issuance of receipt in the name of the 2nd appellant to the respondent in lieu of the deed of assignment could not by any means amount to proof of assignment of the property to the 2nd appellant.

4. Whether the learned Justices of the lower court were not wrong in holding that the appellants were not entitled to *mesne profit* on the ground that no valid notice to quit was issued when there was a continuous use and occupation of the premises by the respondent without the payment of rents."

The respondent also formulated four issues for determination. I will not reproduce them here as they are substantially the same as those of the appellants.

At the hearing of the appeal, Professor S. A. Adesanya, learned Senior Advocate of Nigeria, for the appellants, withdrew issue No 3 and it was accordingly struck out. That, in my view, is good judgment.

Taking issue No 1, learned Senior Advocate submitted that the evidence before the trial court established that the tenancy relationship between the parties was a tenancy at will. He relied on the evidence of the 1st appellant. He submitted on the evidence of the respondent that the respondent which originally came into occupation as an intruder or trespasser became a tenant at will of the 1st appellant after expiration of the extension of the term to 31/12/82 as contained in exhibit P2.

Relying on the case of *Pan Asian African Co. Ltd. v. National Insurance Corporation (Nig.) Ltd. (1982) All NLR (Reprint) 229*, Learned Senior Advocate submitted that holding over with the consent of the landlord made the respondent a tenant at will. He referred to *Law of Real Property by Megary and Wade (4th edition) at page 638* and the cases of *Howard v. Shaw (1841) 8M and M and W118*, and *Wheeler v. Mercer (1957) AC 416 at 425*. On the strength of exhibit D9, learned Senior Advocate argued that there was no agreement that could convert the tenancy at will relationship between the parties to a yearly tenancy. He disagreed with the position taken by the Court of Appeal that

> "a new yearly tenancy was entered into with the anniversary year commencing from 1st June, 1982 to 31st May of the following year and each year, at an increased rent of ₦200,000.00 per annum in respect of the demised premises."

Citing *Okechukwu v. Onuorah (2001) FWLR 208; (2000) 15 NWLR (Pt.691) 597*; and *Osho v. Foreign Finance Corporation (1991) 4 NWLR (Pt.184) 157*, learned Senior Advocate enumerated the requirements of a valid lease.

Learned Senior Advocate submitted on issue No 2 that the notices given to the respondent to give up possession of the premises were valid and duly terminated the respondent's tenancy. He contended that although the respondent was given six months' notice, it was entitled to notice of one week as a tenant at will. Counsel cited *Bosah v. Oji (2002) FWLR (Pt.99) 1185; (2002) 6 NWLR (Pt.762) 137; Harvey v. Pratt (1965) 2 All ER 786 at 787; Marshall v. Berridge (1881- 85) All ER Rep. 908 at 912; Nlewedim v. Uduma (1995) 6 NWLR (Pt.402) 383 at 396*; and *Lakasi v. Dabian (1957) NRNLR 12* on the essentials of a valid lease. He urged the court to hold that the notices issued are valid, though surplus in relation to period to vacate.

On issue No 4, learned Senior Advocate submitted that as the respondent's tenancy was validly determined, the appellants are entitled to *mesne profit* and arrears of rent. He submitted that the claim of the appellant for the period of 1989 - 1992 is for the amount owed by the respondent as consideration for the use and occupation of the appellants' property for the period. To learned Senior Advocate, a claim for the rent as made by the appellants is for the consideration and the use and occupation which is different from *mesne profit*. What the appellants are claiming is a liquidated rent and is operative during the subsistence of the tenancy. He cited *Howard v. Shaw (1841) 8 M* and *W U8; Omotosho v. Oloriegbe (1988) 4 NWLR (Pt.87) 225; Osawaru v. Ezeiruka (1978) 6 and 7 SC 135; N.C.H.C. Ltd. v. Owoyele (1988) 4 NWLR (Pt.90) 588; and Ayinke v. Lawal (1994) 7 NWLR (Pt.356) 263.*

Dealing with the issue of *mesne profit*, learned Senior Advocate submitted that the appellants are not bound to use the rent payable during the tenancy as a yardstick in the determination of amount payable as *mesne profit*, but on what is the actual value of the premises at the time when the tenancy expires. He cited once again *Ayinke v. Lawal (supra)* and urged the court to allow the appeal.

Learned Senior Advocate for the respondent, Mr. T. E. Williams, submitted on issue No 1 that the evidence on record clearly justify the conclusion of the Court of Appeal that it was a yearly tenancy. He relied on the evidence of 1st appellant, exhibit P3 and exhibit P6. He also called in aid the evidence of DW1. Assuming without conceding that the respondent was a tenant at will at some point in time, the parties converted it to a yearly tenancy in the course of time. This is because from 1st June, 1982, the 1st appellant had demanded rent in advance from the respondent who paid same annually. Counsel cited *Pan Asia African Co. Ltd. v. National Insurance Corporation Nig. Ltd. (1982) All NLR (Reprint) 229*. Counsel claimed that

exhibit D9 clearly showed that the parties had at least agreed orally to a yearly tenancy in 1985 at the annual rent of ₦200,000.00. He also relied on the notice of six months as another reason for a case of yearly tenancy.

On Issue No 2, learned Senior Advocate contended that notice to quit to be valid and effective to terminate a tenancy must expire on the anniversary of the tenancy and any notice to quit which purports to terminate the tenancy before the expiration of the current term or in the middle of a current term is invalid. He cited *African Petroleum Limited v. Owodunni (1991) 8 NWLR (Pt.210) 391 at 415*.

On Issue No 4, Learned Senior Advocate submitted that a claim for *mesne profit* cannot be sustained as the tenancy had not been determined and still subsists. As there was no termination of the tenancy, there was no holding over, to justify a claim of *mesne profits*. He cited *Ayinka v. Lawal (1994) 7 NWLR (Pt.356) 265*. He urged the court to dismiss the appeal.

A tenancy at will, which is held by a tenant at will, generally conveys a mutual wish or intention on the part of the tenant and the landlord in the occupation of the estate. There is general understanding that the estate may be legally terminated at any time. A tenancy at will is built into the mutual understanding that both the tenant and the landlord can terminate the tenancy when any of them likes or at any time convenient to any of them. In a tenancy at will, the lessee (the tenant) is the tenant at will because the lessor (the landlord) can send him packing at any time the lessor pleases. In other words, the tenant occupies the estate at the pleasure or happiness of the landlord. This is however subject to proper notice emanating from the landlord. Littleton succinctly describes who is a tenant at will in a medieval language as follows:

> "Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain or sure estate, for the lessor may put him out at what time it pleaseth him." See *Litt. s. 68*.

In the case of *Wheeler v. Mercer (1956) 3 All ER 631*, Lord Simonds said at page 634:

> "A tenancy at will though called a tenancy is unlike any other tenancy except a tenancy at sufferance to which it is next of kin. It has been properly described as a personal relation between the landlord and his tenant; it is determined by the death of either of them or by one of a variety of acts, even by an involuntary alienation, which would not affect the subsistence of any other tenancy."

It is clear from *Wheeler v. Mercer (supra)* that although the lease may be made to be determinable at the will of the landlord only, it is also determinable at the instance of the tenant. This is a fair position in the law of property. After all, a landlord cannot foist on a tenant a tenancy which is insensitive, inimical or hostile to the tenantry needs or interests of the tenant. In *Pan Asian African Co. Ltd. v. National Insurance Corporation (Nig.) Ltd. (1982) All NLR 229*, this court said at page 243:

> "A tenancy at will arises whenever a tenant with the consent of owner occupies land as tenant (and not merely as servant or agent) on terms that either party may determine the tenancy at any time. This kind of tenancy may be created expressly [e.g. *Mansfield and Sons Ltd. v. Botchin (1970) 2 QB 612*] or by implication, common examples are where a tenant whose lease has expired holds over with landlord's permission without having yet paid rent on a period basis (see e.g. *Meye v. Electric Transmission Ltd. (1942) Ch 290*)."

It is the case of the appellants that it was a tenancy at will. It is the case of the respondent that it was a yearly tenancy. While the learned trial Judge agreed with the appellants as plaintiffs, the Court of Appeal agreed with the respondent as defendant. Who is correct or who is right?

The learned trial Judge took time to examine the issue. I will quote him *in extenso* at pages 251-252 of the record:

> "The defendant then continued in occupation of the warehouse as a trespasser and as per 1st plaintiff's tabulation exhibit P3, the defendant paid rent to the 1st plaintiff. The acceptance of rent from the defendant was not *per se* evidence of any new tenancy. The court will have to determine whether in the circumstances of this case, a new tenancy was created between the parties. See *Udih v. Izedonmwen (1990) 2 NWLR, (Pt.132) 357*, Ratio 8.
>
> The 1st plaintiff solicitors forwarded a lease agreement to the defendant which if it had been approved or executed by the defendant would have created a new tenancy between the parties, rather the defendant by its letter of 18/9/85 exhibit D9 raised a six-point comment on the lease agreement and requested the 1st plaintiff's solicitor to amend the draft lease accordingly. It follows that no new written yearly tenancy was created between the parties. An oral yearly tenancy agreement could not have been created by the parties in May 1982 as testified by the 1st DW in view of the late Chief Aboderin's letter dated 24/4/82 pleading for an extension of time till 31/12/82 to move out of the warehouse. The defendant thereafter remained a Tenant-at-will paying rent. I find as a fact and I so hold that no new yearly tenancy was entered into by the parties from 1st June, 1982 to 31st May, 1983 and from year to year but a tenancy at will from 1/6/80 when Thoresen & Co. Ltd. ceased to be a tenant of the warehouse."

The Court of Appeal did not agree with the above conclusion of the learned trial Judge. Relying on the evidence of 1st appellant and the six months' notice to quit, the Court of Appeal said at page 449 of the record:

"This admission supported the case of the appellant that it was a yearly tenant and it is reinforced by the fact that the respondent gave the appellant six months' notice to quit. There was no doubt that the relationship between the appellant and 1st respondent as understood by both parties was a yearly tenancy. I therefore agree with the appellant that the trial court was wrong in holding that the appellant was a tenant at will."

And so the two courts took diametrically opposite views. What is the evidence before the court? I think I can start with exhibit P1 from Thoresen and Co. (Nig.) Ltd. to Messrs Olugbajo Sonoiki and Associate, the Estate Agent of the appellants at the material time. It reads:

"Dear Sirs

Alhaji J. A. Odutola: Plot 44, Iganmu Industrial Estate

We thank you for your letter dated 18th November, 1976. We should inform you that we have already been granted a lease for five years terminating during 1980. So far, we have paid the rent for the first two years and to the best of our knowledge the rent for the remaining three years is payable annually in advance.

Yours faithfully,

for: Thoresen & Co. (Nig) Limited

(SGD)???

L.O. Lawal
Controller, Finance/Admin."

Exhibit P1 is the hub of the transaction as it affects the content of yearly tenancy. It is the alpha and omega in the sense that it begins and ends the content of yearly tenancy in the transaction. It says it all. The lease was for a fixed period of five years. It was to terminate "during 1980". Rent was paid for the first two years. Rent for the remaining three years was payable annually in advance. That is the language of exhibit P1. Nobody can quarrel with the position in exhibit P1 because it is clear, very clear indeed. But what happened thereafter is the cause of the furore in this matter.

The appellants touched exhibit P1 in their brief. This is what they said at page 3 of the brief:

"Evidence led at the trial revealed that the original tenancy was between 1st appellant and Thoresen and Co. (Nig.) Ltd. By letter dated 6/12/76 written by Thoresen and Co. (Nig.) Ltd to the 1st appellant and admitted as exhibit P1, the tenancy of Thoresen and Co. (Nig.) Ltd. would terminate in 1980."

The above is all that the brief made out of or from the exhibit. I expected the brief to build on the exhibit because it dealt very clearly with the origin of the transaction. And origins of transactions are, in most cases, important as they tell their history. And history supplements the present and the future. And so, I go to the origin of the transaction. I think our law of procedure allows me to do so. Yes, it does. After all, I can make use of any exhibit in the trial court. I am not moving out of the evidence since exhibit P1 is evidence before the court. Let me still mention one thing and it is that the respondent did not mention the exhibit, not even in a line. It skipped it. Although it is also an admission which clearly qualifies as one against interest, the respondent understandably did not mention it, but took other evidence apparently in similar boat of admission against interest. The evidence of the 1st appellant is one. Exhibit 3 and 6 are others. I will return to them in this judgment.

What happened after exhibit P1? Putting it in another language of question: What happened after 31st May, 1980 to be precise? The appellants mentioned what happened at page 3 of their brief and it is that the respondent, without the knowledge and consent of the 1st appellant, moved into possession of the premises. That is the evidence before the court. The respondent did not deny it. And why should that be the situation? The respondent did its own thing in its own way. The respondent helped itself outside the law. That is not an issue before the court. I will therefore not say one word on it.

The Learned trial Judge captured the trend lucidly when he narrated at page 250 of the record:

"The plaintiffs case was that after the expiration of the fixed term of Thoresen and Co. (Nig.) Ltd. in 1980, i.e. 31/5/80, the defendant took possession of the warehouse without 1st plaintiff's consent but upon the late Chief Aboderin's letter of 24/4/82 asking for time to pack out, the 1st appellant agreed that the defendant remain in the premises till 31/12/82. The respondent did not move out of the warehouse on 31/12/82 and remained there until 1985 when there were moves by the 1st plaintiff and the defendant to create a new tenancy which did not materialise."

The letter of 24th April, 1982 (exhibit P2) written by late Chief Aboderin, which the learned trial Judge mentioned above, is a very comprehensive letter touching on a number of things, some important and others not important. Of importance to this appeal are paragraph 1 and part of paragraph 4. The paragraphs read:

"1. No doubt your solicitors would have contacted you in respect of the notice given to us to vacate your premises. We have already informed them to appeal to you to let us stay till December, 1981 when we hope to move out of the premises.

…………………………………..

4. We have started moving the old machinery from the jute bag factory and as soon as this is completed, we will start renovation, hence we are appealing to you to let us stay here for the next six months and we will definitely vacate there on or about December, 1982."

Such was the pathetic letter of appeal for understanding and leniency. I should mention in passing that exhibit P2 was written in the name of Paper and Allied Producing Company Limited, the new name replacing Thoresen and Co. (Nig.) Limited.

Came the promised December 1982 in exhibit P2, the premises was still occupied; this time by the respondent by way of a unilateral act. It remained in the premises until 1985, in the words of the learned trial Judge,

"when there were moves by the 1st plaintiff and the defendant to create a new tenancy which did not materialise."

I think this is a proper place to take the evidence of oral agreement by DW1. He said in evidence in-chief at page 186 of the record.

"In 1982, we entered into an oral agreement with the landlord to let the premises yearly from 1st June to 31st May at an annual rent of ₦200,000.00."

Can this evidence pass for its content of oral agreement of a yearly tenancy to vitiate the termination of the lease in 1980? Can the bare *ipse dixit* of a witness of the existence of oral evidence turn around in his favour in the face of clear documentary evidence to the contrary? I have a few more questions to ask but I can stop here.

I expected DW1 to go a bit deeper in the evidence of oral agreement if the respondent really had such evidence. In this regard, evidence of where and when the oral agreement was made ought to have been led. Similarly, there ought to have been evidence of who said what and a clear statement that the oral agreement vitiated or updated the lease.

While oral agreement has the legal capacity to re-order or change the contents of an earlier written agreement, to satisfy the basic requirements of an agreement, the party alleging such agreement must prove it. See sections 135, 136 and 139 of the *Evidence Act*. See also *Broadline Ent. Ltd. v. Monterey Maritime Corp. (1995) 9 NWLR (Pt.417) 1; Chime v. Chime (1995) 6 NWLR (Pt.404) 734; Usman v. Ram (2001) 8 NWLR (Pt.715) 449; Attorney-General of Lagos State v. Purification Tech. (Nig.) Ltd. (2003) 16 NWLR (Pt.845) 1; Archibong v. Ita (2004) 2 NWLR (Pt.858) 590*.

It is the generally accepted practice that tenancy agreement is made in writing. In order to play safe, I do not want to say that it is invariably made in writing; but I can say that it is mostly made in writing. Accordingly, where a party alleges the existence of an oral agreement, which is a unique method and procedure, he must give credible evidence as to the modalities of such agreement. In other words, a party alleging an oral agreement is duty bound to prove such an agreement to the hilt.

And what is more, a lease is an exact legal transaction affecting an estate and the law requires some basic requirements. They are (1) The words of demise. (2) The agreement must be complete. (3) The lessor and the lessee must be clearly identified. (4) The premises and dimensions of the property to be leased must be stated clearly. (5) The commencement and duration of the term of the lease must also be clearly stated. See *Osho v. Foreign Finance Corporation (1991) 4 NWLR (Pt.184) 157*. In *Nlewedim v. Uduma (1995) 6 NWLR (Pt.402) 383*, this court held that a lease to be valid and enforceable, must contain the following (1) The parties concerned. (2) The property involved. (3) The term of years. (4) The rent payable. (5) The commencement date. (6) The term as to covenants and (7) The mode of its determination.

Did the so-called oral agreement comply with or satisfy the above requirements or ingredients of a valid lease? In the absence of any evidence to that effect, this court cannot speculate or conjecture as to the contents of the so-called oral agreement. The learned trial Judge was never moved by the evidence of oral agreement. I am not moved either. The Court of Appeal was silent on that aspect.

Mr. Williams submitted that exhibit D9 "showed that the parties had at least agreed orally to a yearly tenancy in 1985." With the greatest respect, there is no such thing in exhibit D9. Exhibit D9 merely commented on the Draft Lease Agreement sent to the respondent by the film of Ayoola and Company, Solicitors.

As it is, the respondent has waved to this court, with all confidence, a supposed oral agreement which the appellants have denied. Unfortunately, this court cannot identify such an agreement, not even the shadow of it. I am tempted to come to the conclusion that the story of the oral agreement is a fabrication. How can the reactions of the respondent to exhibit D9, the lease, metamorphose to an oral agreement, reactions which the respondent asked to be incorporated into the agreement? In sum, the respondent did not prove the so-called oral agreement. And in view of the fact that it so alleged, the burden of proof was on it.

Let me take the issue of new tenancy here. An act of a new tenancy is conscious and specific one which must be a subject of bilateral conduct on the part of the landlord and tenant. As a matter of law, the parties must clearly and unequivocally express their willingness to enter into the new tenancy at the termination of the old one. As a specific act emanating from the landlord and the tenant, it cannot be a subject of guess or speculation. An agreement or contract is a bilateral affair which needs the *ad idem* of the parties. Therefore where parties are not *ad idem*, the court will find as a matter of law that an agreement or contract was not duly made between the parties. In the case of *Chief Olowofoyeku v. The Attorney-General of Oyo State (1990) 2 NWLR (Pt.132) 369*, cited by learned Senior Advocate for the appellants, the Court of Appeal correctly held that where an agreement is intended to be made by several persons jointly, if any of those persons failed to enter into the agreement, there is no contract, and liability is incurred by such of them as have entered into the agreement.

And that takes me to the issue of admission by the appellants. The Court of Appeal zeroed in on that. Let me reproduce the *ipsissima verba* of the evidence of the 1st appellant which the Court of Appeal relied upon. In answer to cross-examination, 1st appellant said:

> "As far as Blocks B and C are concerned, Papersack succeeded Thoresen as tenant. The defendants are one year tenant. The ₦200,000.00 per annum is not the current rent. I did not negotiate revision of rent."

Relying on the above evidence, the Court of Appeal concluded at page 449 of the record and I quote it the second time at the expense of prolixity:

> "The admission supported the case of the appellant that it was a yearly tenant and it is reinforced by the fact that the respondent gave the appellant six months' notice. There was no doubt that the relationship between the appellant and 1st respondent as understood by both parties was a yearly tenancy. I therefore agree with the appellant that the trial court was wrong in holding that the appellant was a tenant at will."

The most important and poignant word for my purpose is "understood". Parties to an agreement may mutually but wrongly come to an understanding as to the legal content of it. That notwithstanding, a court of law can only interpret the agreement strictly in its legal content and arrive at a conclusion on the law and the law alone in respect of it. A court of law cannot construe the agreement to convey the meaning "as understood" by the parties, if it is different from the real legal meaning of the agreement. While there are instances where the principles of equity may assist a party wronged by a strict application of the construction of the agreement, in the application of the doctrine of *estoppel*, this is not one of such cases.

I realise that the so-called admissions in exhibit P3, P6 and the evidence of 1st appellant under cross-examination did not reflect the true legal position of the matter in respect of the status of the tenancy. There was a clear mistaken belief on the part of the parties as to the true legal position and this court cannot deviate from the position of the law merely because there are admissions: admissions which are not borne out in law. After all, this is a court of law and must therefore uphold the law as its clientele.

An admission against interest, in order to be valid in favour of the adverse party, must not only vindicate or reflect the material evidence before the court; it must also vindicate and reflect the legal position. Where an admission against interest does not vindicate or reflect the legal position, it will be regarded for all intents and purposes as superfluous. And a court of law is entitled not to assign any probative value to it.

Exhibit P1 which I reproduced earlier is the mother of all the exhibits. It started the events and told a story of the termination of the yearly tenancy in 1980. This was in the letter sent by Thoresen and Co. (Nig.) Ltd. Although things changed when the respondent came into the tenancy, they did not change in favour of the respondent to the extent of a continuing yearly tenancy.

Mr. Williams submitted, without conceding, that at some point in time the respondent could have been tenant at will but in the course of time the parties convened it to a yearly tenancy. This is because from 1st June, 1982, the appellants had demanded rent in advance from the respondent who had paid same annually. With respect, I am not with him, the evidence show that the parties started with a yearly tenancy which finally became a tenancy at will by operation of law. While I agree that a tenancy at will can be convened to a yearly tenancy and vice-versa, the position in this case is that it is the yearly tenancy that was converted to a tenancy at will. And here, I hold that when the yearly tenancy ended in 1980, the tenancy at will commenced and the "holding over" started immediately thereafter. In *Pan Asian African Co. Ltd. v. National Insurance Corporation (Nig.) Ltd. (1982) All NLR 229*, this court held that holding over with consent of the landlord makes the tenant, a tenant at will.

Let me take the issue of notice. The Court of Appeal, in coming to the conclusion that it was a yearly tenancy, held that the notice to quit given to the appellant which did not end on the 31st of May in the year was invalid. As I have come to the conclusion that the tenancy was at will, there is really no need to take this aspect further. But I think I can make the point clearer by taking section 15 (1)(a) of the Rent Control and Recovery of Residential Premises Law, Cap. 167, Laws of Lagos Stare. The subsection provides:

> "Where there is no express stipulation as to the notice to be given by either party to determine the tenancy the following periods of time shall be given:

(a) in the case of a tenancy at will or a weekly tenancy, a week's notice."

In exhibit P6, the solicitors of the 1st appellant gave the respondent seven days' notice to quit. The notice was given on 1st February 1993. The last paragraph of the exhibit reads:

"We shall on the 10th day of February, 1993, apply to the court for a summons to eject any person therefrom."

I do not think I should take the issue further. The notice, exhibit P6, is valid.

I think this is a convenient place to take the issue of six months for whatever it is worth. As indicated above, the Court of Appeal saw the six months' notice as an admission on the part of the appellants of the existence of a yearly tenancy. With respect, I do not agree with the court because it is not consistent with logic.

I do not think I have made myself clear. Let me do so by resorting to a market place example. If A is owing B ₦10.00 but at the time of payment, mistakenly pays ₦12.00, can it be said with any seriousness that A owed B ₦12.00 instead of ₦10.00 that the agreement clearly provides? The court will regard the extra ₦2.00 as a "gift" on the premise of *gratis* and not part of the bargain. I think B should smile home with his N2.00 "gift" like a winner of lottery and not make a contractual matter out of it. I think I have made myself clear.

And that takes me to the last issue on *mesne profit* and arrears of rent. The expression "*mesne profits*" is used to describe the sum due to a landlord from the time his tenant ceases to hold the premises as tenant to the time such tenant gives up possession. See *Debs v. Cenico Nigeria Ltd. (1986) 3 NWLR (Pt.32) 846*. *Mesne profits* are the rents and profits which a trespasser has, or might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. See *African Petroleum Ltd. v. Owodunni (1991) 8 NWLR (Pt.210) 391*. *Mesne profits* mean intermediate profits, *id est* profits, accruing between two points of time, that is between the date when the tenant ceases to hold the premises as a tenant and the date when he gives up possession. See *Alhaji Ayinke v. Alhaji Lawal (1994) 7 NWLR (Pt.356) 253*.

The learned trial Judge ordered the payment of *mesne profits* at the rate of ₦808,861.64 from the 1st day of June, 1994 until possession is given up. The Court of Appeal set aside the award of *mesne profits* on the ground that the tenancy of the respondent was not properly determined.

In paragraph 22(c) of the further amended statement of claim, the appellant claimed as follows:

"*Mesne profit* at the rate of ₦808,861.64 per annum until possession is given up."

In his evidence-in-chief, 1st appellant said at page 130 of the record:

"The last term on exhibit P3 is the rent due up to 1991 which is ₦994,416.75. The rent due for 1992 is ₦808,861.64 1992/93 the same amount."

In his judgment at page 271, the learned trial Judge made the following order:

"1. The defendant shall give up possession of the warehouse and office premises situate at No 44, Eric Moore Road, Iganmu Industrial Estate, Lagos State forthwith and shall pay *mesne profit* at the rate of ₦808,861.64 from the 1st day of June, 1994 until possession is given up."

The Court of Appeal set aside the award of *mesne profits* on the only ground that the notice to quit was not valid and therefore did not properly determine the tenancy of the respondent. Contrary to that, I have held that the notice to quit was valid and therefore properly determined the tenancy of the respondent. In the light of this and from the totality of the claim and the evidence before the court, I set aside the order of the Court of Appeal in respect of the *mesne profit* and restore that of the trial court.

In sum, the appeal is allowed and the judgment of the Court of Appeal is set aside. I affirm the judgment of the trial Judge. I award ₦10,000.00 against the respondent in favour of the appellants.

Judgement delivered by
Sylvester Umaru Onu. JSC

This is an appeal against the judgment of the Court of Appeal, holden in Lagos in Appeal No CA/L/144/2001 delivered on the 1st day of July, 2003. That court had allowed the appeal against the judgment of the Lagos State High Court delivered by Adeyinka, J. in suit No LD/2209/93 on 22nd day of May, 1998.

The appellants as plaintiffs had at the High Court, claimed the following reliefs in paragraph 22 of the further amended statement of claim:

"22. Whereof, the plaintiffs claim against the defendant as follows:

(a) Possession of the warehouse and office premises situate at Eric Moore Road, Iganmu Industrial Estate, Lagos State.

(b) The sum of ₦3,005,140.95 *(three million, five thousand, one hundred and forty naira, ninety five kobo)* being outstanding money owed by the defendant for the use and occupation of the plaintiffs' property plus interest at 21 % per annum until the debt is liquidated.

(c) *Mesne profit* at the rate of ₦808,861.64 per annum until possession is given up."

The facts of the case have been exhaustively set out in the leading judgment of my learned brother, Tobi, J.S.C. and I do not deem it necessary to repeat them except where the need arises, to emphasize the point made.

Evidence led showed that the original tenant of the 1st appellant was Thoresen & Co. (Nig.) Ltd whose tenancy was to terminate on 31/5/80 by virtue of letter dated 6/12/76 admitted in evidence as exhibit P1. However, by another letter dated 24th April, 1982, from Chief Aboderin who is stated to be the owner of both Thoresen & Co. (Nig.) Ltd and the respondent, the said Chief Aboderin pleaded with the 1st appellant that time for the said Thoresen & Co. (Nig.) Ltd to vacate the property be extended to 31/12/82 and the said request was acceded to. The letter in question was received in evidence as exhibit P2.

It then transpired that at the expiration of the original term of Thoresen & Co. (Nig.) Ltd in 1980, the respondent without the knowledge, consent or agreement of the 1st appellant took possession of the premises which was a warehouse on 31/12/82 being the terminal date of the extended period of tenancy. In 1985, an attempt by the 1st appellant and the respondent to create a tenancy failed. In the meantime, the respondent was initially paying rent for the use and occupation of the property.

It was appellant's contention that the respondent having moved into the property without an agreement and by that token became a tenant at will of the 1st appellant particularly, after the expiration of the extended term to 31/12/82. Such a tenancy in law is determined by seven days' notice of intention to recover possession.

While the High Court held the view that the appellants were right, the court below (Court of Appeal) held otherwise since the respondent was now paying rent on yearly basis. Hence, it became a yearly tenancy determinable at six months' notice of intention to recover possession, thereby rendering seven days' notice improper.

I hold the view that from the expiration of Thoresen & Co. (Nig) Ltd's extended tenancy, the respondent became a trespasser on the property.

However, from the time the respondent started to pay rent which was on yearly basis and in advance, a yearly tenancy by conduct of the parties may have been created and continued in existence until when the respondent stopped paying the rent as and when due or failed to secure a tenancy agreement in respect of the property. At page 130 of the record appear the following facts, which have neither been contested nor disputed by the respondent:

"2nd PW The last item on exhibit P3 is the rent due up to 1991 which is ₦994,418.75. The rent due for 1992 is ₦808,861.64, 1992/93 the same 1994/95 and 1995/96 ₦1,982,365.26 and 1996 to May, 1997 ₦1,802,356.26. All these rents have not been paid by the defendant."

I am of the firm view that from the moment a year's rent became due and payable by the respondent but remained unpaid, the yearly tenancy, if any created by the conduct of the parties thereto came to an end by effluxion of time and the respondent thereupon became a tenant at will to the 1st appellant by continuing or remaining in possession of the property. In other words, the respondent at that stage is said to be holding over the property and in that capacity, became a tenant at will. See the case of *Howard v. Shaw (1841) 8M & M W118*; and *Wheeler v. Mercer (1957) AC 416 at 425* which elucidate on the principles of holding over, how a tenancy at will arises as well as the requisite period of notice to quit *vis-a-vis* the provisions of section 15(1) of the Rent Control and Recovery of Premises Law, Cap. 167, Laws of Lagos State, by whose provisions the respondent was entitled to no more than a week's notice.

It is for these and the fuller reasons articulated and proffered by my learned brother, Tobi, J.S.C that I too allow the appeal. I abide by all the consequential orders awarded inclusive of those as to costs.

Judgement delivered by
Dahiru Musdapher. JSC

I have had the opportunity to read before now, the judgment of my Lord, Tobi, J.S.C with which I entirely agree. For the same reasons canvassed in the aforesaid judgment, which I respectfully adopt as mine, I too, allow the appeal and set aside the judgment of the court below. I restore the decision of the trial court. The appellants are entitled to costs which I assess at ₦10,000.00.

Judgement delivered by
Aloma Mariam Mukhtar. JSC

I have read in advance the lead judgment delivered by learned brother Niki Tobi, J.S.C. The reliefs sought by the appellants in the High Court of Lagos, as per their further amended statement of claim are as follows:

(a) Possession of the warehouse and office premises situate at Eric Moore Road, Iganmu Industrial Estate, Lagos State.

(b) The sum of ₦3,005,140.95 *(three million, five thousand, one hundred and forty naira, ninety five kobo)* being outstanding money owed by the defendant for the use and occupation of the plaintiffs' property plus interest at 21 % per annum until the debt is liquidated.

(c) *Mesne profit* at the rate of ₦808,861.64 per annum until possession is given up."

The respondent/defendant in its statement of defence counterclaimed against the appellants/plaintiffs as follows:

> "Whereupon the defendant counter-claims against the plaintiffs in the sum of ₦1,360,370.00 and N5 million as special and general damages respectively in respect of the defendant's raw materials, industrial machines and components destroyed as a result of the wrongful activities of the plaintiffs."

The learned trial Judge after evaluating the evidence before him and giving the addresses of learned counsel the consideration they deserved dismissed the respondent's counter claim and gave judgment in favour of the plaintiffs as follows:

"1. The defendant shall give possession of the warehouse and office premises situate at No. 44, Eric Moore Road, Iganmu Industrial Estate, Lagos State Forthwith and shall pay *mesne profit* at the rate of ₦808,861.64 *(Eight hundred and eight thousand, eight hundred and sixty-one Naira, sixty-four kobo)* from the 1st day of June, 1994 until possession is given up.

2. For the sum of ₦2,975,143.23 *(Two million nine hundred and seventy-five thousand, one hundred and forty three Naira, twenty-three kobo)* with interest at the rate of 21% per annum from the 1st day of June, 1989 to the 31st day of May, 1994 being the amount owed by the defendant for the use and occupation of the plaintiff's warehouse and office premises at No. 44, Eric Moore Road, Iganmu Industrial Estate, Lagos State."

The defendant appealed against the judgment to the Court of Appeal, and the Appeal Court set aside the said judgment as it relates to the termination of the tenancy, but varied the award for arrears of rent made by the trial court. Dissatisfied by the decision of the Court of Appeal, the plaintiff appealed to this court on four grounds of appeal. Briefs of argument were exchanged by learned counsel for the parties, and these were adopted at the hearing of the appeal. Four issues for determination were raised in the appellants' brief of argument, but the third issue in the brief was struck out at the instance of the learned Senior Advocate of Nigeria in the course of his submissions in court.

Four issues for determination were raised in the respondents' brief of argument. On the nature of the tenancy between the parties, it is clear from the copious evidence adduced that the tenancy in respect of the property in dispute was originally between plaintiffs/appellants and Thoresen & Co. (Nig.) Ltd. From the printed record of proceedings one can see that the tenancy between the parties to this case became a tenancy at will. These facts are reflected in the following averments in the appellants' amended statement of Claim.

3. The plaintiffs aver that the defendant is the present occupier of the warehouse and office premises let to Thoresen & Co. (Nig.) Limited by the plaintiffs. The tenancy of Thoresen and Company Nigeria Limited was determined by effluxion of time in 1980.

4. The plaintiffs aver that the rent payable for the demised premises for the year 1977 - 1982 was ₦185,450.00 year.

7. The plaintiffs aver that the defendant paid the sum of ₦159,643.72 per year between 1979 - 1982 leaving the balance of ₦22,806.25 unpaid for each year.

8. By mutual agreement the defendant's tenancy (if any) was determined and the defendant was expected to vacate the property on 31st December, 1982.

10. The defendant did not vacate the premises in December, 1982 and on the personal undertaking of Chief Aboderin, the Chairman of the defendant's company, it was agreed that the defendant shall continue to pay for the use and occupation of the premises at the prevailing rate in the area until the defendant secures alternative accommodation.

The averments were supported by credible evidence which the learned trial court accepted and found on. The definition of tenancy at will as set out in the *Law of Real Property by R.E. Megarry and H.W.R. Wade 4th Edition page 638* is copiously reproduced and dealt with in the case of *Pan Asian African Co. Ltd. v. National Insurance Corporation Nig. Ltd. (1982) All NLR 229*. My learned brother has in the lead judgment applied the knowledge impacted by the authors of the *Law of Real Property* and the decision in the *Pan Asian African* case to the present appeal. The evidence adduced does not disclose a valid lease between the present parties and this thus further strengthens the appellants' case that the arrangement between them was that of a tenancy at will, and the notice to quit given to the respondent was a valid one. See *Harvey v. Pratt (1965) 2 All NLR 786*; and *Marshall v. Beridge (1981-85) All ER 908*. I hold that the tenancy is a tenancy at will.

I am in complete agreement with the reasoning and conclusion reached in the lead judgment, and also allow the appeal. I abide by the consequential orders made in the lead judgment.

Judgement delivered by
Walter Samuel Nkanu Onnoghen. JSC

This is an appeal against the judgment of the Court of Appeal, Holden in Lagos in appeal No CA/L/144/2001 delivered on the 1st day of July, 2003 in which it allowed the appeal against the judgment of the Lagos State High Court delivered by Adeyinka, J. on the 22nd day of May, 1998 in suit No LD/2209/93.

The appellants, who were the plaintiffs at the High Court, claimed the following reliefs in paragraph 22 of the further amended statement of claim:

> "22. Whereof, the plaintiffs claim against the defendant as follows:
>
> (a) Possession of the warehouse and office premises situate at Eric Moore Road, Iganmu Industrial Estate, Lagos State.
>
> (b) The sum of ₦3,005,140.95 *(three million, five thousand, one hundred and forty naira, ninety five kobo)* being outstanding money owed by the defendant for the use and occupation of the plaintiffs' property plus interest at 21 % per annum until the debt is liquidated.
>
> (c) *Mesne profit* at the rate of ₦808,861.64 per annum until possession is given up."

The facts of the case have been fully stated in the lead judgment of my learned brother Tobi, J.S.C. and as such I do not intend to repeat them here except as may be needed to emphasis the point being made.

There is evidence that the original tenant of the 1st appellant was Thoresen & Co. (Nig.) Ltd whose tenancy was to terminate on 31/5/80 by virtue of a letter dated 6/12/76 admitted in evidence in exhibit P1. However by another letter dated 24/4/82 from Chief Aboderin who is said to be the owner of both Thoresen & Co. (Nig.) Ltd and the respondent the said Chief pleaded with the 1st appellant for extension of time to 31/12/82 for the said Thoresen & Co. (Nig.) Ltd to vacate the property which request was accepted by the said 1st appellant. The letter in question was received in evidence as exhibit P2.

However at the expiration of the original term of Thoresen & Co. (Nig.) Ltd in 1980, the respondent without the knowledge, consent or agreement of the 1st appellant took possession of the premises which was a warehouse. The respondent did not move out of the warehouse on 31/12/82 being the terminal date of the extended period of tenancy. In 1985 there was an abortive move by the 1st appellant and the respondent to create a tenancy. Meanwhile the respondent was initially paying rent for the use and occupation of the property.

It is the case of the appellants that the respondent having moved into the property without an agreement was a tenant at will of the 1st appellant particularly after the expiration of the extended term on 31/12/82, and that such a tenancy is determinable by seven days' notice of intention to recover possession. The High Court agreed with the appellants but the Court of Appeal did not. The Court of Appeal held that since the respondent was paying rent on yearly basis, there was an implied yearly tenancy which was determinable by six months' notice of intention to recover possession terminable at the end of the tenancy and such seven days' notice was not proper.

I hold the view that from the expiration of the extended tenancy of Thoresen & Co. (Nig.) Ltd, the original tenant of the 1st appellant, the respondent was a trespasser on the property. However from the time the respondent started to pay rent which was on yearly basis and in advance, a yearly tenancy by conduct of the parties may have been created and continued in existence until when the respondent stopped paying the rent as and when due and or failed to secure a tenancy agreement for the property. At page 130 of the record appear the following facts, which have not been disputed by the respondent:

> "2nd PW The last item on exhibit P3 is the rent due up to 1991 which is ₦994,418.75. The rent due for 1992 is ₦808,861.64, 1992/93 the same 1994/95 and 1995/96 ₦1,982,365.26 and 1996 to May, 1997 ₦1,802,356.26. All these rents have not been paid by the defendant."

I hold the considered view that from the moment a year's rent became due and payable by the respondent but remained unpaid, the yearly tenancy, if any, created by the conduct of the parties thereto came to an end by effluxion of time and the respondent thereby became a tenant at will of the 1st appellant by continuing in possession of the property. In law we describe the respondent at that stage as holding over the property and in that capacity it became a tenant at will. The situation of failure to pay rent continued from 1991 to 1997 yet learned counsel and the Court of Appeal contend that there was a yearly tenancy.

In the case of *Pan Asian African Co. Ltd. v. National Insurance Corporation (Nig.) Ltd. (1982) All NLR 229 at 243*, this court has this to say:

> "Holding over with the consent of the landlord made the respondent tenants at will. This is well settled law. See the *Law of Real Property by R.E. Megary and H.W.R. Wade, 4th edition page 638* where the learned authors deal with creation of tenancies at will.
>
> A tenancy at will arises whenever a tenant with the consent of the owner occupies land as tenant (and not merely as servant or agent) on terms that either party may determine the tenancy at any time. This kind of tenancy may be created expressly (e.g. *Manfield & Sons Ltd. v. Botchin (1970) 2 QB 612*) or by implication, common examples are where a tenant whose lease has expired holds over with landlord's permission without having yet paid rent on a period basis. (See *Meye v. Electric Transmission Ltd. (1942) Ch. 290*), where a tenant takes possession under a void lease or person is allowed to occupy a house rent free and for indefinite period and (usually) where a purchaser has been let into possession pending completion. *Howard v. Shaw (1841) 8M & M W118, Wheeler v. Mercer (1957) AC 416 at 25*. Unless the parties agree that the tenancy shall be rent free or the tenant has some other right to rent-free occupation the landlord is entitled to compensation for the 'use and occupation' of the land."

It is not disputed that a tenancy at will is determinable by seven days' notice of intention of the landlord to recover possession which was duly complied with in this case. Even if six months' notice was given, it does not, per se, change the nature and legal character of the tenancy in issue.

I therefore agree with the learned trial Judge at pages 251 - 252 of the record thus:

> "The defendant then continued in occupation of the warehouse as a trespasser and as per 1st plaintiff's Tabulation exhibits P3, the defendant paid rent to the 1st plaintiff. The acceptance of rent from the defendant was not *per se* evidence of a new tenancy. The court will have to determine whether in the circumstances of this case, a new tenancy was created between the parties see *Udih v. Izedunmwem (1990) 2 NWLR (Pt.132) 357*. The 1st plaintiff solicitors forwarded a lease agreement to the defendant which if it had been approved or executed by the defendant would have created a new tenancy between the parties, rather the defendant by its letter of 18/9/85 exhibit D9 raised a six points comments on the lease agreement and requested the 1st plaintiff solicitors to amend the draft lease accordingly. It follows that no new written yearly tenancy was created between the parties. An oral yearly tenancy agreement could not have been created by the parties in May 1982 as testified by the 1st DW in view of the late Chief Aboderin's letter dated 24/4/82 pleading for an extension of time till 31/12/82 to move out of the warehouse. The defendant thereafter remained a Tenant at-will paying rent."

On the issue of the requisite period of notice to quit, it is very clear that by the provisions of section 15(1) of the Rent Control and Recovery of Premises Law, Cap. 167, Laws of Lagos State, Cap. 167, the respondent was entitled to nothing more than a week's notice.

In conclusion, I agree with the conclusion reached by my learned brother Tobi, J.S.C. in the lead judgment that the appeal has merit and should be allowed. I accordingly allow same and abide by the consequential orders contained in the said lead judgment including the order as to costs.

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