**THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA-AD 2019**

CORAM: DOTSE, JSC (PRESIDING)
BAFFOE-BONNIE, JSC
MARFUL-SAU, JSC
DORDZIE, JSC
AMEGATCHER, JSC

CIVIL APPEAL
SUIT NO.
J4/13/2019

20TH NOVEMBER 2019

VICTORIA ANNANG
EXECUTRIX OF THE LATE
EBENEZER QUARSHIE ANNANG ..... PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. EMOHO TRADING GH. LTD
2. RAMESH PUNJAB
3. SHAM PUNJAB
4. MAHESH JAYSINGHANI
5.FREDERICK ANIM- ADDO ..... DEFENDANTS/APPELLANT/RESPONDENTS

**J U D G M E N T**

***THE UNANIMOUS JUDGMENT OF THE COURT IS READ BY MARFUL-SAU JSC, AS FOLLOWS-:***

This appeal invites this Court to determine a fundamental issue, which is the legal effect of non- compliance of section 29 of the Conveyancing Act, 1973, NRCD 152, dealing with

re- entry and forfeiture of a lease upon breach of a covenant. The brief facts of the case are that, the father of the Plaintiff/ Respondent/Appellant, herein referred to simply as Plaintiff, the late Ebenezer Quarshie Annang, granted a fifty (50) years lease in 1968 to one Shahin Elias Shahin. This lease was registered as No. 939/ 1968, and was tendered at the trial as ''Exhibit C''. In 1970, the 1968 lease was varied with a provision that the lease will be subject to renewal for another twenty-five (25) years. The Deed of Variation was registered as No.419/1970. Then around the same year Shahin Elias Shahin assigned his interest in the leased property to one Joseph Anim- Addo through a sub- lease. The Plaintiff's case simply, is that the sub-lease between Shahin Elias Shahin and Joseph Anim- Addo offended clause 2(d) of the head- lease, which stipulated that Shahin Elias Shahin could only sublet the lease with the written consent of her father Ebenezer Quarshie Annang. On these facts the Plaintiff sued the defendants, claiming the following:-

'' a) Declaration that registered lease no. 350/1970 between Shahin and Anim- Addo was made in breach of clause 2 (d) of the lease dated 20th February, 1968 between the late E. O. Annang and the late Shahin and therefore null and void.

(b) An order cancelling registered lease number 939/ 1968 and 419/ 1970 for breach of covenant therein.

(c) An order cancelling registered lease no. 350/ 1970 as having been obtained in breach of covenant in registered lease no. 939/ 1968 and on ground of fraud.

(d) Recovery of possession.

(e) Damages for trespass.''

The trial High Court after taking evidence entered judgment for the Plaintiff and granted all the reliefs endorsed on her writ of summons. The defendants aggrieved by the decision of the High Court, appealed to the Court of Appeal which upheld the appeal in part and made the following orders, appearing at pages 325 and 326 of the record of appeal:-

''1. That the late Shahin breached the covenant when he assigned his interest in the demised premises to the late Anim-Addo without the prior written consent of the lessor, Ebenezer Quarshie Annang, the plaintiff's late father;

2. That the said breach committed by Shahin makes the lease voidable and not null and void ''ab initio".

3. That the plaintiff/lessor or sub-lessor must give the 5th defendant sub-lessee notice to re-negotiate and re-settle for ground rent to be paid by the said sub-lessee to the plaintiff sub-lessor with effect from 1st January, 2017.

4. We hereby set aside the following orders of the trial court forthwith:

a. A declaration that the Assignment between Shahin and Anim-Addo dated 1/2/1970 is null and void;

b. An order to the Lands Commission to cancel the said assignment dated 1/2/1970;

c. An order to the Lands Commission to cancel the lease 939/1968 dated 20/2/1968 and Deed of Variation No. 419/1970 dated 28/1 /1970 between Annang and Shahin.

d. An order for recovery of possession of the demised premises."

The plaintiff has appealed against the decision and orders of the Court of Appeal, urging us to set aside the orders of the Court of Appeal on the following grounds, namely:-

''a. The Court of Appeal erred in fact and in law in setting aside the findings of the trial court that the assignment by Shahin to Anim-Addo was fraudulent.

b. The Court of Appeal misdirected itself when it made a finding that issue of notice to defendant/appellants/respondents was not an issue at the trial court but held that the plaintiff's late father's right lies in giving adequate notice and time to the lessee or sub-lessee to remedy the breach or make reasonable compensation or both and not re-entry or forfeiture as ordered by the trial judge.

c. The Court of Appeal erred in setting aside the orders made by the trial High Court.

d. The judgment is against the weight of evidence.

In this appeal we note that grounds (a),(b) and (d) as formulated by the Plaintiff do not comply with the rules of this Court. The said grounds either alleged errors of law or misdirection but no such particulars were provided by the plaintiff in her Notice of Appeal, thus violating rule 6 (2) (f) of the Rules of the Supreme Court, CI 16. Indeed, regarding ground (b), beside the fact that no particulars of the alleged misdirection was provided the ground is a narrative, contrary to rule 6 (4) of CI 16. Accordingly, the said grounds which are in violation of the rules of this court will be struck out for non-compliance. Having struck out the above grounds, we are only left to address ground (d), which is that the judgment of the Court of Appeal is against the weight of evidence.

As, stated in the introduction of this judgment, the central issue to be determined in this appeal, is the legal effect of non- compliance of section 29 of the Conveyancing Act, 1973, NRCD 175. From the record of appeal, it is an undisputed fact found by both the trial court and the Court of Appeal, that the sub-lease granted by Shahin Elias Shahin to Joseph Anim- Addo was contrary to clause 2 (d) of the head lease, which required the written consent of Ebenezer Quarshie Annang, the late father of the plaintiff herein. So what is the legal effect of such a breach of covenant in a lease?

We shall now consider the relevant provisions of the Conveyancing Act, 1973, NRCD 175, relative to this appeal. The first is section 29 (1) which provides thus:-

'' 29 (1). A right of re-entry or forfeiture under a provision in a lease for a breach of a covenant, condition or an agreement in the lease is not enforceable, by action or otherwise, until:-

(a) The lessor serves on the lessee a notice:

(i) specifying the particular breach complained of;

(ii) requiring the lessee to remedy the breach, if the breach is capable of remedy,

(iii) requiring the lessee to make reasonable compensation in money for the breach; except where the breach consists of a non-payment of rent,

(b)the lessee has knowledge of the fact that such notice has been served, and

(c) the lessee fails, within a reasonable time after the service of the notice under paragraph(a), to remedy the breach, if it is capable of remedy, and except where the breach consists of a non-payment, to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

Then section 30 (1) and (2) also provides thus:-

'' (1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under a provision in a lease, or for non-payment of rent, the lessee of the property and also a sublease of the property comprised in the lease or a part of the lease may, in the lessor's action or in an action brought by that person for that purpose, apply to the court for relief.

(2) Subject to subsection (1) of section 29, where a lessee applies to the Court for relief, the Court may grant or refuse the relief having regard to the proceedings and conduct of the parties and to the other circumstances."

By the provisions of section 29, above, upon a breach of a covenant in a lease, the lessee must first be notified of the breach complained of and must have knowledge of the fact that such notice has been served. It is also a requirement that the enforceability of the re-entry be done through an action or otherwise. Now, it is also the law under section 30 (1), that where the lessor proceeds by action or otherwise to enforce his right of entry or forfeiture under any provision in a lease or for non-payment of rent, the lessee may, in the lessor's action apply to the court for relief. **See Western Hardwood Enterprises Ltd and Another v. West Africa Enterprises Ltd (1998-99) SCGLR 105.**

In this appeal, it is not in dispute, that the original lessor represented by the plaintiff took action in court, but the evidence is also clear that no notice of the breach was served on the defendants, particularly the 5th defendant, who was the executor of Joseph Anim- Addo, to remedy the breach of clause 2 (d) of the head-lease. Having

failed to provide the requisite notice as required under section 29 of the Conveyancing Act, 1973, the plaintiff's action was thus flawed, but does that inure to the benefit of the defendants?

**In Dahabieh v. S A Turqui and Brothers (2001-2002) SCGLR 498, Adzoe, JSC, speaking for this court delivered at page 511 as follows:-**

**'' It is true that section 29(1) of NRCD 175 sets a condition precedent, but whether lack of evidence of compliance with the requirement of notice ought to have constrained the Court of Appeal to dismiss the counterclaim is debatable in the circumstances of this case. Indeed, section 29 of NRCD 175 only sets out the process by which the right of re-entry or forfeiture shall become enforceable. The lessee must be given adequate notice and time to remedy the breach or make reasonable compensation or both. In our opinion, those provisions are only procedural, and whether or not they have been complied with in any given case is a question of fact rather than law to be determined on the evidence. The point must be raised at the earliest opportunity. In a suit tried before the High Court the issue of non-compliance should have been raised on the pleadings or any time at least, before the trial court. As we have already pointed out in this judgment, the appellant did not raise this issue of non-compliance before the High Court or in the Court of Appeal. He is raising it for the first time in this appeal, and the question is whether it can avail him.''**

Then relying on cases like Oman Ghana Trust Holdings Ltd v. Acquah (1984-86) 1 GLR 198 CA; Alameddine Brothers v Paterson Zochonis & Co Ltd (1971) 2 GLR 403, CA and Order 19 of the High Court (Civil Procedure) Rules, 1954 (LN 140A), whose equivalent provisions are Order 11 rules 8 (1) and (2), of the High Court (Civil Procedure) Rules, CI 47, his Lordship Adzoe, JSC, delivered at page 513 as follows:-

**''Under and by virtue of these rules, non-compliance with the requirement of notice by the Conveyancing Act, 1973 ,NRCD 175, ought to have been**

**specifically pleaded by the appellant if he had intended to rely on it; or at least he ought to have pleaded such facts as would indicate an intention to rely on it. It is wrong for the appellant now to invite argument on that issue when the respondents were not given the opportunity to meet that defence at the trial."**

His Lordship in applying the rules of court identified two exceptions to the rule namely:- (a) where the matter complained of amounts to an illegality per se and (b) where there is no element of surprise.

At this point it is important that we remind ourselves of Order 11 rules 8 (1) and (2) of the High Court (Civil Procedure) Rules, 2004, CI 47 :-

***" 8 (1). A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality:***

***(a) which the party alleges makes any claim or defence of the opposite party not maintainable, or***

***(b) which if not specifically pleaded, might take the opposite party by surprise, or***

***(c) which raises issues of fact not arising out of the pleading.***

***(2)Without prejudice to sub-rule (1), a defendant to an action for possession of immovable property shall plead specifically every ground of defence on which the defendant relies and a plea that the defendant is in possession of the immovable property in person or by a tenant shall not be sufficient."***

The record of appeal clearly showed that the defendants failed to comply with Order 11 rule 8 (1) and (2), in that, nowhere in their pleadings did they invoke section 29 (1) of the Conveyancing Act, NRCD 175 or indicate that they will rely on the said section. The defendants raised the non- compliance with section 29 (1) of the

Conveyancing Act by the Plaintiff, for the first time in the Court of Appeal. It was thus wrong for the defendants to invite arguments on the issue of non-compliance of section 29 of the Conveyancing Act, when the Plaintiff was not given the opportunity to respond to that defence at the trial. In this appeal the matter complained of, that is the non- compliance of section 29 of the Conveyancing Act, does not amount to an illegality and the defendants' failure to raise any objection to the Plaintiff's claim for recovery of possession at the trial, clearly demonstrates that they waived their right to object.

Having waived their right to object to the Plaintiff's claim for recovery of possession as a result of the breach of the covenant not to sublet without the written consent of the lessor, the trial High Court was right in granting the Plaintiff the order to recover possession of the premises the subject of the lease, since clearly there was that breach. In reviewing the evidence on record, we are of the opinion that the Court of Appeal was wrong in setting aside the order for recovery of possession granted to the Plaintiff by the High Court, after it also found at 325 of the record of appeal, that the late Shahin Elias Shahin breached the covenant when he assigned his interest in the demised premises to the late Josph Anim- Addo, without the prior written consent of the lessor, Ebenezer Quarshie Annang, the father of Plaintiff. Now, if on the law the Plaintiff is entitled to recover possession of the demised premises, then the 1970 sub-lease granted by Shahin Elias Shahin to Joseph Anim- Addo, registered as No. 350/ 1970 and tendered in the trial as ''exhibit D'' ought to be set aside as ordered by the trial High Court. We accordingly, set aside the said sub-lease, since it was in breach of the head lease and in the circumstances of this case, the Plaintiff was entitled to recover possession of the demised premises, as herein before observed.

We observed that, the head lease between Ebenezer Quarshie Annang and Shahin Elias Shahin was for a term of fifty (50) years. The term provided under the head lease was, however, varied when by the Deed of Variation, dated 28th January 1970, which is at page 256 of the record of appeal, it was provided that the term granted by the head- lease shall be renewed, at the option of the lessee for 25 years after the

fifty (50) years. The original lease under the head lease was thus not renewed for a further term of 25 years, rather a new clause was introduced to the effect that upon the expiration of the fifty (50) years, the lease shall be renewed for another 25 years. Now, as rightly pointed out by counsel for the Plaintiff in his Statement of Case, the head lease which granted the fifty (50) years lease expired in 2018 and there is no evidence that the lease had been renewed for the 25 years as provided in the Deed of Variation. As things stand now, the head lease had expired and by the breach of clause 2 (d) of the head lease, the Plaintiff is entitled to recover possession thus making the sub-lease unenforceable as explained in this judgment.

In conclusion, we are of the opinion that in view of the evidence on record and the law on the subject, the appeal ought to succeed and the decision of the Court of Appeal is hereby reversed and its orders set aside. The Plaintiff is ordered to recover possession of the demised premises situate at Osu, the subject of the head-lease registered as No. 939/1968. The appeal succeeds accordingly.

**(SGD) S. K. MARFUL-SAU**
**(JUSTICE OF THE SUPREME COURT)**

**(SGD) V. J. M. DOTSE**
**(JUSTICE OF THE SUPREME COURT)**

**(SGD) P. BAFFOE-BONNIE**
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