IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)
HOLDEN AT WUSE ZONE 2
HIS LORDSHIP HON. JUSTICE A. S. ADEPOJU
AND
HIS LORDSHIP HON. JUSTICE Y. HALILU
ON THE 30TH DAY OF OCTOBER, 2018
APPEAL NO: CVA/283/17

BETWEEN:

MISS AMADE MARY IYOMA ---------- APPELLANT

AND

1. **JIDE TAIWO**
   (TRADING UNDER THE NAME & STYLE OF IDE TAIWO & CO) ---------- **RESPONDENTS**
2. **MACBAS & SONS LTD**

JUDGEMENT

This is an appeal against the decision of the Senior District Judge sitting at Life Camp Abuja Presided over by His Worship L. O. Abolaji granting possession, mesne profits and arrears of rent to the respondents.

The facts that led to the institution of this case as could be gleaned from the plaint is that the 2nd respondent is the owner of a two bedroom flat situate at No. 14, Ahmed Musa Crescent, Jabi occupied by the appellant as a tenant for one year certain beginning from the 7th of March, 2013 at a rent of **₦1,700,000 (One Million Seven Hundred Thousand Naira)**.

The 1st respondent is a firm of estate surveyors and valuers appointed by the 2nd respondent as her agent to manage and oversee the property. The parties had a written agreement in respect of the tenancy. And upon the expiration of the tenancy in 2014, the tenancy renewed by the appellant.

Also in 2015, the tenancy was again renewed, however the appellant paid the sum of **₦1,500,000 (One Million Five Hundred Thousand Naira)** leaving a balance of **₦200,000 (Two Hundred Thousand Naira)**. The tenancy expired on the 6th of March 2016, the appellant was said to have written a letter dated 7th of March 2016 to the 1st respondent stating her intention not to renew her tenancy. The 1st respondent in a letter dated 30th March 2016, granted the

appellant 3 months grace within which to vacate the property. The appellant acknowledged the 1st respondent's gesture with a letter of appreciation dated the 14th April 2016. When the three (3) months expired on 6th June 2016, the appellant did not vacate the premises but rather paid an instalmental sum of **₦500,000 (Five Hundred Thousand Naira)** as part payment for the tenancy period of 7th March 2016 to the 7th March 2017, leaving an outstanding sum of **₦1,200,000 (One Million Two Hundred Thousand Naira)**. At the expiration of the tenancy the respondents served statutory notices on the appellant.

At the commencement of trial, the respondents called one Mr. Yinka Aderemi, a surveyor in the 1st respondent's firm as their witness. He testified serving the statutory notices on the appellant by pasting on the door of the house. He swore to an affidavit to that effect. The tenancy agreement with other documents such as the statutory notices were admitted in evidence as exhibits. The tenancy agreement was admitted as Exhibit P2. The 7 days notice to quit and the affidavit in support were admitted as Exhibits P9A and P9B respectively, while the notice of owner's intention to recover possession and the affidavit of service were admitted as Exhibits P10A and P10B. The court was urged to grant the claim of the respondents. The witness was cross-examined by the appellant's counsel.

Similarly, the appellant testified for herself. She admitted being in tenancy relationship with the 2nd respondent; that the tenancy agreement (Exhibit P2) covered only 2013/2014 tenancy years and lapsed on the 6th of March 2014. And that after the expiration of Exhibit P2, there was no other written agreement between them, but the 1st respondent asked her orally if she would continue. She agreed and paid the sum of **₦1,500,000 (One Million Five Hundred Thousand Naira)** for 2014/2015 tenancy year. She denied seeing the statutory notices claiming that she was seeing them in court for the first time. There was cross-examination of the witness and the appellant closed her case. Parties filed and exchanged written submissions.

The appellant's notice of appeal dated and filed on 18th of August, 2017 contain four (4) grounds with the particulars of error. In support is the appellant's brief of argument dated 13th November, 2017, filed out of time and was deemed on 21st day of March 2018. The respondents' brief of argument

was dated and filed 4th of April 2018. The parties adopted their briefs of argument on the 25th of June 2018.

We have carefully considered the notice of appeal filed by the appellant and the argument of parties as contained in their respective briefs. And out of the four (4) grounds of appeal, the appellant distilled four (4) issues for determination namely;

1. Whether the 2nd respondent who is an artificial entity that did not establish its juristic personality at the trial can lawfully initiate an action, authorize the 1st respondent to act for her and entitled to be granted any relief whatsoever in a court of law as granted by the court below? This issue is harvested from ground 3.
2. Whether Section 28 of the Recovery of Premises Act LFN 1990 allows the respondents without any previous attempts being shown to have been made by them to serve Exhibits P9A P10A on the appellant to proceed to serve same by pasting same on the door of the property sought to be recovered? This issue is harvested from ground 2 of the notice of appeal.
3. Whether a seven day notice to quit is known to a tenancy for a fixed term certain for one year and the same tenancy can metamorphose to a tenancy at will? This issue is harvested from ground 4 of the notice of appeal.
4. Whether the tenancy relationship between the respondents and the appellant is for a year certain and not yearly or three months? This issue is distilled from ground 1 of the notice of appeal.

We will consider the argument of parties in respect of the issues formulated seriatim.

ISSUE 1:

The appellant referred to the plaint where the 2nd respondent was referred to as **Macbus & Sons** and argued that apart from the 2nd respondent been so described, the juristic status of the 2nd respondent as it is customary in any pleading was not stated. That the 2nd respondent was merely described as the owner/landlord of the property known as two bedrooms bungalow situate at 14 Ahmed Musa Crescent Jabi, Abuja and no more. That no certificate of incorporation was frontloaded by the respondent like other documents so

frontloaded. The appellant relied on the case of **REPTICO S. A. GENERA V AFRIBANK (NIG) PLC (2013) 14 NWLR (1373) PG 172 PP 209-210 PARAS C-A.**

The counsel to the appellant further argued that the court below agreed with their contention but proceeded to hold that appellant admitted the juristic standing of the 2nd respondent under cross-examination and evidence in chief when she said thus ***"Yes I know the 2nd plaintiff in this case, Macbus & Sons Limited. I have been in a tenancy relationship with the 2nd plaintiff since 2011."*** He argued that this piece of evidence does not constitute an admission that the 2nd respondent is a juristic person.

The appellant also relied on the case of **ABACHA V EKE SPIFF (2009) 7 NWLR (PT. 1139) PG 97 @ PP 126 PARAS A-B**. He urged the court to hold that the 2nd respondent have not proved its juristic standing and therefore set aside the decision of the court below on this ground.

In reply the respondent submitted that the issue of legal personality is a matter of fact that should have been raised and issue joined thereto either during cross-examination of the PW1 since the lower court was court of summary jurisdiction or at least it should have been raised during the evidence in chief of the appellant.

The respondent relied on the case of **GENERA V AFRIBANK (NIG) PLC Supra.**

RESOLUTION OF ISSUE 1:

Let me say straightaway and unequivocally too that the issue before the lower court was not whether the 2nd plaintiff now respondent before this court was a limited liability company or not. The status of the 2nd respondent was never made an issue before the lower court. It was at the address stage that the appellant raised the issue of the juristic status of the 2nd respondent. No doubt, whether the 2nd respondent is a juristic personality or not is a matter of law and fact. The fact of raising it at the address stage is tantamount to laying ambush for the respondent because there would be no opportunity to produce the Certificate of Incorporation at this stage to proof its juristic status.

The appellant throughout the entire gamut of her evidence never denied the status of the 2nd respondent as owner/landlord of the premises she occupied. We agree with the submission of the learned counsel to the respondents that

it would be illegal and unjust for the appellant to deny the status of the 2nd respondent having taken advantage of the tenancy agreement between them and also appreciated the 2nd respondent's magnanimity for giving her 3 months extension for free. The respondents relied on the decision of the court **FASEL SERVICES LTD V NIGERIAN PORTS AUTHORITY (2003) 41 WRN 129** which we also agree with that;

"Even if the contract is illegal, which formed the circumstance of this case it is not, it is trite that a party to an illegal contract who has benefited from the said contract would not be allowed at a later stage to raise the defence of illegality to the disadvantage of the other party."

Also commended to the court is the case of **JOSEPH V KWARA STATE POLY (2014) AFWLR (PT. 750) 1215 @ 1236 PAR A** where the Court of Appeal held thus;

"A party who execute agreement with others with his eyes wide open, and after taking advantage of its benefit with full knowledge of its contents cannot belatedly go to court to castigate its genuineness. Even a court of equity cannot come to the aid of such a party."

We do not see any reason to disturb the finding of the lower court in respect of the juristic personality of the 2nd respondent. Issue is therefore resolved in favour of the respondents.

ISSUE 2:

The appellant referred to the provision of Section 28 of the Recovery of Premises Act and Exhibit P9A and P10A, affidavit of service of notice to quit and notice of owner's intention to recover possession deposed to by the PW1. Section 28 deals with service of processes relating to Recovery of Premises and it provides thus;

"Service of a notice of determination of a tenancy or of a notice to quit or any summons warrant or other processes shall be effected in accordance with the provisions of the law for the time being in force relating to the service of civil process of magistrate courts and if the defendant cannot be found and his delivering is either not known or admission thereto cannot be obtained for service of the process, a copy of the process shall be posted on some

conspicuous part of the premises sought to be recovered and the posting shall be deemed good service on the defendant."

The appellant's counsel referred to the testimony of the defendant (appellant) that she was not served and just saw the notices for the first time in court. The counsel argued that this testimony was not impugned by the respondent during cross-examination. That the only evidence that the respondents had to ground their contention was the evidence of Yinka Aderemi and the Exhibits P9A P10A, P9B and P10B, the affidavits of the witness who stated in the main at paragraph 3 of both affidavits that;

"The notice was pasted to quit Ms Amade Mary I, due to the fact that she was absent to receive and acknowledge the notice to quit." - Par of Exhibit P9B.

"On the 20th of March 2017 that the notice was pasted to recover possession on the premises from Ms Amade Mary I due to the fact that she was absent to receive or acknowledge the notice to recover possession." – Para 3 and 4 of Exhibit P10B.

The appellant contended that the witness for the respondents (PW1) did not give evidence of the number of times, dates and occasions service of Exhibits P9A and P10A were attempted on the appellant's known place of abode as strictly required by Section 28 of the Recovery of Premises Act before the posting deposed to in Exhibit P9B on the 9/3/2017 and Exhibit P10B on the 20/3/17.

The appellant further contended that statement by the PW1 is that he visited the property on only one occasion and not finding her to acknowledge the notice personally without stating that he visited her several times before the pasting of the said notices is defective and fatal to the case of the respondents. The appellant referred to the case of **ADUBIARAN V EHI (1962) LLR 104.**

And finally the appellant contended that in paragraph 1 at P123 of the record, the court below did not evaluate the evidence of the appellant alleging that she was not served in accordance with Section 28 of the Recovery of Premises Act.

In reaction to the appellant's contention, the respondents admitted that the notices required under the Act are to be served personally on the tenant who is the occupier of the premises sought to be recovered. That from the provision of Section 28 of the Recovery of Premises Act, affidavit of service is not required but the respondent in the instant case deposed to the affidavit in order to dispense with any doubt that might arise as a result of denial by the defendant/appellant that she was not served. That Section 28 of the Recovery of Premises Act did not stipulate the number of attempts that should be made before notices are pasted at the conspicuous part of the premises to be recovered. The respondent referred to the testimony of the PW1 under cross-examination by the appellant that he never met the appellant at home on all the occasions he ever visited or came to the premises to see her. The respondent referred to the answer of PW1 as contained in page 83 of the record where he said; ***"I have never met her to discuss it with her as she is always not available."*** The respondent also referred to the hearing notice that was served on the appellant which was received by one Onate O. Bridget as evidence that the appellant was not always at home. The respondent relied on the case of **SPLINTERS (NIG) LTD V OASIS FINANCE LTD (2013) 18 NWLR (PT. 1385) 188 @ 220-222 PARA C** wherein it was held thus;

"Learned Counsel for the appellant had rightly submitted that service of the notices must be personal on the tenant or the occupier of the premises or where not possible or by posting."

RESOLUTION OF ISSUE 2:

It is not in doubt that the provision of Section 28 of the Recovery of Premises Act have obviated the need to apply for an order of substituted service of notices, summons and warrants provided the following conditions exist; (a) It must be shown that the defendant cannot be found. (b) Or that the place of dwelling either not be known or admission thereto cannot be obtained for serving any such process. In this instance copies of the process shall be posted on some conspicuous part of the premises sought to be recovered and such posting shall be deemed good service on the defendant.

The burden is on the server of the process to establish by credible and convincing evidence that conditions (a) and (b) exist before he pasted the

process on the conspicuous part of the premises, which the landlord seeks to recover. It must be shown that there were efforts at personal service which failed before pasting the process as enjoined by the provision of Section 28 of the Recovery of Premises Act. See the case of **CHIWETE V AMISSAH (1957) LLR Per Hubbard J.** where the court held;

"The server inquired about the tenant from a man he met on the premises, the man said the tenant was not in and he did not know where he was. He then pasted the notice on the door. The person seeking to serve a notice can knock at a door for the purpose of serving the notice even though someone has told him that the person to be served is not there. His informant may obviously not be telling the truth. It is doubtful whether it was the intention of the legislature that an application to the court should be necessary for substituted service either of a notice to quit or of a notice of intention to proceed to recover possession. I have certainly never heard of one being made and I suggest that substituted service of such notices should be deemed to be governed by the second limb of Section 28."

On whether there is need for an affidavit of service, an affidavit of service may be dispensed with if the witness is the server of the process for the recovery of premises. However where there is an affidavit of service, the deponent must aver to how, where, when and the circumstances that led to the pasting of the process if there was no personal service. In other words the affidavit must evince attempts made at personal service. See the case of **BALOGUN V N. B. N (1992) 2 NWLR 207**, where the court held thus;

"That an affidavit of service is only a prima facie proof of service in relation to how and where service is effected. Thus an affidavit of service or an endorsement of service of any court process is not a conclusive proof of the service of such process. Service therefore can be challenged and when it is challenged, the burden of proving that the service has been effected in accordance with the law is on the person asserting such service."

The testimony of the PW1 at the lower court was that;

"On 9th March 2017, a seven (7) days was served on her but she was absent to receive or acknowledge. It was later pasted on her entrance door. And on 20th March 2017 seven (7) days notice of owner's intention to recover possession

was served on the defendant but due to her absential to receive or acknowledge the notice, it was eventually pasted on her entrance door.

I swore to an affidavit to that effect on the two notices pasted."

The testimony of the respondent's witness (PW1) that he has never met the appellant to discuss with her as she was always not available is at large; it is presumptuous and does not fit into any of the conditions stated in the second limb of the Section 28 of the Recovery of Premises Act. Has the witness gone to serve the appellant with notices before and never met her? If yes when and what time of the day? Was it weekend, during the week days etc? The affidavit of service Exhibit P9A and P10A are devoid of all these material facts.

I am therefore not convinced that service of the notices for determination of the appellant's tenancy was in accordance with the provision of Section 28 of the Recovery of Premises Act. I therefore resolve issue No. 2 in favour of the appellant.

ISSUES 3 AND 4

Issues No. 3 and 4 are related and can be resolved together. The starting points of the tenancy agreement (Exhibit P2), paragraph 1(a) states thus;

"(a) In consideration of the rent hereinafter reserved and covenants and conditions on the part of the tenant to be paid, performed and observed, the landlord hereby demises unto the tenant all that 2 bedroom bungalow at No. 14, Ahmed Musa Crescent, Jabi, Abuja (hereinafter referred to as 'the demised premises) for a term of one (1) year certain commencing from the 7th of March 2013 to 6th day of March 2014, paying and yielding yearly rent of ₦1,700,000 (One Million Seven Hundred Naira) (sic) per annum payable in advance net exclusive of all township, tenement, usual tenant's rates during the said tenancy, the sum of ₦1,700,000 (One Million Seven Hundred Naira) (sic) representing rent for the term hereby granted having been paid for by the tenant before the execution of this agreement (the receipt whereof the landlord hereby acknowledges).

(b) There shall be renewal on yearly basis and renew on 2 yearly basis."

The appellant is a yearly tenant from the above paragraph of the tenancy agreement. The premises was demised for a year certain commencing from 7th March 2013 to 6th March 2014 with an option of renewal n yearly basis or 2 yearly basis. It is in evidence that after the expiration of the initial term of tenancy on the 6th of March 2014, the appellant renewed her tenancy for another year. Although there was no renewal of the tenancy agreement, it is however implied that parties are deemed to have contracted new tenancy on the same terms and conditions as earlier contained in the initial tenancy agreement. The appellant further renewed her tenancy for 2015-2016 period but paid the sum of **₦1,500,000 (One Million Five Hundred thousand Naira)** leaving a balance of **₦200,000 (Two Hundred Thousand Naira).**

From the foregoing, the initial term certain had been converted to periodic tenancy with the appellant paying rent yearly. However trouble started in 2016 when the appellant could not afford to renew her rent, she wrote Exhibit P4, a notice of non-renewal and sought for six (6) months to enable her source for money and find an alternative accommodation. She was granted three (3) months grace by the 1st respondent which expired on the 6th of June, 2016.

Exhibit P7 dated 14th June, 2016, showed that the appellant paid **₦300,000 (Three Hundred Thousand Naira)** in Exhibit P8 dated 18-10-2016, showed additional payment of **₦200,000 (Two Hundred Thousand Naira)** totalling **₦500,000 (Five Hundred Thousand Naira)** for the tenancy period of 2016-2017 and according to PW1, leaving a balance of **₦1,200,000 (One Million Two Hundred Thousand Naira)**. Obviously the appellant was in breach of the rent clause which states that rent is payable in advance. Where a tenant is in areas of rent for a specific period provided by the statute a notice to quit becomes irrelevant. This is applicable in respect of periodic tenancy. Once a yearly tenant does not pay his/her rent as at when due for payment, the tenancy is automatically converted to a tenancy at will, which requires only the service of a seven (7) days notice of owner's intention to recover possession. See the case of **BOCAS NIGERIA LTD V WEMABOD ESTATES (2016) LPELR 40193 CA**, See also **ODUTOLA V PAPERSACK (NIG) LTD (2006) NWLR (PT. 1012) 470** The Supreme Court held;

"From the moment a year's rent became due and payable by the respondent but remain 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."

Essentially where a tenant holds over at the end of his contractual tenancy by virtue of an agreement between the tenant and the landlord under common law, he becomes either a tenant at will or tenant at sufferance. The appellant became a tenant at will by virtue of Exhibit P4, the notice of non-renewal on 7th March 2016. She held over at the will of the respondents who granted a grace of three (3) months to enable the appellant source for an alternative accommodation. Furthermore, as at the time the appellant made a part-payment of the six (6) months rent as stated in Exhibit P7, she still remained a tenant at will of the landlord, her initial tenancy having expired on 6th March 2016. The six (6) months rent paid was to expire in December, 2016.

The fact that the respondents granted the appellant three (3) months to look for an alternative accommodation or received six (6) months rent from her does not create a three (3) months or six (6) months tenancy relationship, and thus entitle her to one (1) month notice as argued by the appellant's counsel in his brief. As rightly pointed out by the appellant tenancy relationship is contractual, parties have to be ad-idem as to the terms of the relationship. The endorsement on Exhibit P7, that the six (6) months rent was part-payment of the reviewed rate of **₦750,000 (Seven Hundred and Fifty Thousand Naira)** I observe was by the appellant. There was no proof that the parties intended a six (6) monthly relationship. Having said so, I hold that the appellant being a tenant at will is only entitled to 7 days notice of owner's intention to recover possession. The 7 days notice to quit served on her was a surplusage because her tenancy had already expired. There was therefore nothing left to be determined. See the case of **IHEANACHO V UZOCHUKWU (1997) 2 NWLR (PT. 487) 257 @ 267-270 H-A** where the Supreme Court held;

"The landlord desiring to recover the premises let to a tenant shall firstly when the tenancy has already expired, determine the tenancy by service on the defendant of an appropriate notice to quit on the determination of the tenancy, he shall serve the defendant with the statutory 7 days notice of owners intention to apply to court to recover possession of the premises."

See **SPLINTERS (NIG) LTD V OASIS FINANCE LTD (2013) 18 NWLR 194,** where the Court of Appeal held;

"It is only when a tenancy has not expired that there will be need to determine the tenancy by a notice to quit, it is obvious that if at the time a landlord seeks to recover his premises, the tenancy had already expired, it is reasonable to assume that there will be no need for a notice to quite… … … … …"

In consonance with the above reasoning, issues 3 and 4 formulated by the appellant are resolved in favour of the respondents.

The respondents have posed whether they have proved their case to be entitled to balance of rent for 2015/2016, 2016/2017 and mesne profit. We have already expressed my dissatisfaction with the proof of service of the notices on the appellant, the consequence of this is that the award of mesne profit and possession by the lower court cannot stand and are hereby set aside. This however cannot be said of the arrears of rent. We have no reason to disturb the finding and conclusion of the lower court with respect to the payment of the arrears of rent by the appellant. Consequently the arrears of rent should be paid with immediate effect and we so hold.

HON JUSTICE A. S. ADEPOJU	**HON JUSTICE Y. HALILU**
Presiding Judge	**Hon. Judge**
30/10/2018	**30/10/2018**