

## **Determination of Periodic Tenancies in Nigeria: Cobra Limited V. Omole Estates and Investment Ltd Revisited<sup>1</sup>.**

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### **1. Introduction:**

A key feature of leases<sup>2</sup>, as interest in land, is that they can be determined. This may be due to the fact that a leaseholder<sup>3</sup>, although he has right to exclusive possession<sup>4</sup> of the property is still subject to the reversionary interest<sup>5</sup> of the lessor<sup>6</sup>. However, the reversionary interest of the lessor can only resume if the lessee's interest in the property expires by effluxion of time or through issuance of appropriate notice by either the lessee<sup>7</sup> surrendering his unexpired interest in the property or the lessor determining the lease.

In this paper we shall be concerned with cases where a lessor determines a lessee's interest usually by issuing a notice to quit. Our emphasis will be on time to issue such notices and also when they efflux. The appellate courts<sup>8</sup> in Nigeria have had opportunities to pronounce on the position of the law on this issue. One of the more recent decisions on this issue is the Court of Appeal decision in the case of **Cobra Limited v. Omole Estates and Investment Limited**<sup>9</sup>. In this paper we shall revisit this Court of Appeal decision and evaluate it with the previous decisions of the other appellate court<sup>10</sup> on this issue. We shall then attempt to discover the correct position of law on this issue.

### **2.0 Cobra Limited V. Omole Estates and Investment Ltd**

#### **2.1 Facts of The Case:**

The respondent, Omole Estates and Investments Limited, as plaintiff sued the appellant, Cobra Limited, as defendant at the Lagos High Court for possession of one Duplex situate at No. 10B Lalupon Close S.W., Ikoyi, Lagos State, the sum of ₦ 125,000 being arrears of rent from 10<sup>th</sup> December 1990 to 9<sup>th</sup> December 1991, the sum of ₦ 83,332.88 for use and occupation of the demised premises for the period 10<sup>th</sup> December 1991 to 9<sup>th</sup> August 1992 and *mesne* profit at the rate of ₦ 10,416.61 per month being at the pro-rata monthly rate of

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<sup>1</sup> (2000) 5 N.W.L.R (Pt. 655) 1

<sup>2</sup> Used here to include tenancies. Indeed, tenancies are leases. The practice in Nigeria is to regard leases for a term shorter than three years as tenancies.

<sup>3</sup> Person having interest in real property in form of a lease.

<sup>4</sup> Right to keep everyone off the property including the landlord.

<sup>5</sup> The remaining interest of the lessor in the property once the interest of the leaseholder lapses.

<sup>6</sup> The person granting the lease from his interest in the land.

<sup>7</sup> Leaseholder.

<sup>8</sup> Specifically the Supreme Court and the Court of Appeal

<sup>9</sup> (2000) 5 N.W.L.R (Pt. 655) 1

<sup>10</sup> Supreme Court

the sum of ₦ 125,000.00 being the annual rent<sup>11</sup> for the premises until the possession of the premises is given up by the appellant.

In the course of the trial, it emerged that the respondent issued and served the appellant a notice to quit dated 24<sup>th</sup> June 1991 which was to lapse on 31<sup>st</sup> December 1991. It was contended for appellant the notice to quit was defective in so far as it purportedly determined the appellant's tenancy on 31<sup>st</sup> December 1991 instead of 9<sup>th</sup> December 1991<sup>12</sup>. The trial court rejected this contention.

## 2.2 Court's Decision:

On appeal, the Court of Appeal<sup>13</sup> rejected the appellant's contention as to the validity of the notice to quit issued to it and affirmed the trial court's position. Clarifying the Court's position in respect of this issue, Galadima J.C.A., who delivered the leading judgment<sup>14</sup> explained,

As it has been stated above *the appellant had contended that the notice was defective because it merely fixed the effective date on 31/12/91 which was a date other than 9/12/91 on which the actual current term of the tenancy would expire. I do not hold this view*<sup>15</sup>. All the law requires is six months notice. It does not matter that the respondent did not terminate the tenancy on 9/12/91. This will not invalidate the notice. The notice to quit is not short of the required statutory six months notice<sup>16</sup>

Having stated this, Galadima J.C.A. then went on,

The learned counsel for the appellant referred to African Petroleum Ltd v. J.K. Owodunni (1991) 8 N.W.L.R (Pt.210) 391 in aid of his submission. That case is distinguishable from the instant case. In that case Exhibit "L" the purported Notice to

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<sup>11</sup> The tenancy between the appellant and the respondent was annual tenancy.

<sup>12</sup> The appellant tenancy commenced from 10<sup>th</sup> December of one year and ended on 9<sup>th</sup> December of another year.

<sup>13</sup> Lagos Division

<sup>14</sup> Oguntade, J.C.A and Sanusi, J.C.A. concurring.

<sup>15</sup> Emphasis supplied.

<sup>16</sup> (2000) 5 N.W.L.R (Pt. 655) p.1 at p.14

Quit given by the defendant was defective in two material respects namely:

- (i) Instead of giving the tenant a six months' notice which was necessary to determine a yearly tenancy it gave him only eight days; and
- (ii) Instead of giving the tenant the notice to terminate the tenancy at the end of the current term of the tenancy, it gave him notices at the middle of the term

### 3.0 Supreme Court Position

In this segment of this discourse, we shall be concerned with some previous decisions of the Supreme Court on this issue. These Supreme Court decisions are, under the doctrine of judicial precedents<sup>17</sup>, binding on the courts below the Supreme Court<sup>18</sup>.

#### 3.1 **Awobiyi & Sons v. Igbalaye Brothers**<sup>19</sup>.

In this case, the Respondents, Igbalaye Brothers, as plaintiff and landlord, was granted possession of a premises at 19 Oke Arin Street, Lagos against the appellant, Awobiyi & Sons, as defendant by a Lagos Magistrate's court. The proceedings was brought under the then Recovery of Premises Act. The decision of the Magistrate's court was upheld by the Chief Judge of Lagos, De Lestang. The appellant further appealed to the Supreme Court. It emerged in evidence at the trial court that the appellant was a yearly tenant whose tenancy commenced on some date in January in each year. The notice to quit which was served on 30<sup>th</sup> September 1960 required the appellant to quit and deliver up possession of the premises on 31<sup>st</sup> March 1961.

One of the issues which the Supreme Court considered was whether a landlord may terminate a yearly tenancy by giving half a year's notice if such notice is to take effect

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<sup>17</sup> A key feature of the Common law system which has at its core the notion that questions before a court ought to be decided today in the same way as they were decided yesterday simply because they were decided that way yesterday (See George Whitecross Paton, *A Textbook of Jurisprudence*, (3<sup>rd</sup> Edition) (Oxford: Oxford University Press, 1964) cited in Osita Nnamani Ogbu, *Modern Nigeria Legal System* (2<sup>nd</sup> Edition) (Enugu, CIDJAP PRESS, 2009) 130.

<sup>18</sup> Osita Nnamani Ogbu, *Op Cit*, 161.

<sup>19</sup> (1965) 1 All N.L.R. 163.

on any date other than that on which a current term of the tenancy would in any event expire? In response to this issue, the Chief Justice<sup>20</sup> De Lestang, reasoned that,

At common law to be valid a notice to quit had to expire at the end of the current period of the tenancy but it is not so in our law. Section 8 and 9 of Recovery of Premises Act deal with this question. Section 8 prescribes the length of the notice to be given to determine periodic tenancies and prescribes that in the case of a yearly tenancy the period of notice is six months and section 9 which deals with the notice itself<sup>21</sup>

De Lestang C.J. then went on,

As I understand this section a notice to quit is valid if (a) it is given at any time before the end of the current term and (b) its date of expiry is not shorter than the period prescribed by section 8 for the tenancy in question. The notice to quit in the present case complies with the section and is accordingly valid in my opinion<sup>22</sup>

In reaction to the De Lestang C.J.'s position while setting aside the judgment of the Magistrate's Court, the Supreme Courts<sup>23</sup> held,

The Chief Justice attached importance to the fact that the section provides that notices may be given any time prior to the date of termination of the current term of tenancies, but in our view that means no more than that where, for example, half a year's notice is required it is not necessary to serve notice exactly half a year before the date when the tenancy is due to expire<sup>24</sup>.

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<sup>20</sup> Now known as Chief Judge

<sup>21</sup> 1965) 1 All N.L.R. 163 at 166-167

<sup>22</sup> 1965) 1 All N.L.R. 163 at 167

<sup>23</sup> Coram Brett J.S.C, Onyeama J.S.C and Ajegbo J.S.C. (Brett J.S.C. delivered the judgment of the Court)

<sup>24</sup> (1965) 1 All N.L.R. 163 at 167

The Supreme Court went further to give reason for their position,

This view is reinforced by the wording of the statutory form of notice in Form B and C in the Schedule to the Act, which calls on the tenant to quit and deliver up possession “on the...day of ...next (or at the expiration of your tenancy which shall expire next after the end of...months from the service of this notice)”. The use of the form of words in bracket is long standing in England...The form clearly presupposes that the rule of common law remains unchanged<sup>25</sup>

### 3.2 **African Petroleum Ltd. v. J.K. Owodunni**<sup>26</sup>-

The Appellant<sup>27</sup> filed an action against the Respondent<sup>28</sup> at a Lagos High Court claiming inter alia, recovery of possession of the premises known and situate at 1 Ilabere Avenue, Ikoyi Lagos State which he was put into possession by the Appellant as service tenant at the time of his employment with the plaintiff. During the trial it emerged that the Respondent had to pay rent at the “rate of ₦ 1000 per annum or 15% of salary, whichever is less<sup>29</sup>”. The sum of ₦ 1000 was later reduced to ₦ 800 and then to ₦ 400 per annum. In 1976, the Rent Tribunal fixed the appropriate rent for the premises at ₦ 13,500 per annum and allowed the Respondent two more years in the premises. The Respondent’s employment with the Appellant was determined in 1977. Despite several notices to quit and intention to go to court, the Respondent still held over the premises. In September 1983, the Respondent was issued another notice (Exhibit L) giving him about one week notice<sup>30</sup> to vacate the premises. After the hearing, the learned judge of the Lagos High court<sup>31</sup> held, on this point, that,

From the stand point of clarity in my judgment, it is clear that I did not accept or find as a fact that the tenancy between the parties is a yearly tenancy. It is my judgment in the substantive that the Defendant is a monthly tenant.

<sup>25</sup> 1965) 1 All N.L.R. 163 at 167- 168.

<sup>26</sup> (1991) 8 N.W.L.R (Pt. 210) 391.

<sup>27</sup> Plaintiff in the High Court.

<sup>28</sup> Defendant in the High Court.

<sup>29</sup> (1991) 8 N.W.L.R (Pt. 210) 391 at 406

<sup>30</sup> The notice was dated 15 September 1983 and the Respondent given up to 23 September 1983 to vacate the premises. The import of this is that assuming the notice was served on the same day, 15 September 1983, the Respondent would have had eight days to vacate the premises.

<sup>31</sup> Famakinwa J

Consequently, in order to determine his tenancy, the Defendant ought to be served with a month notice to quit....To this point, the tenancy of the Defendant<sup>32</sup> is not properly determined. He was served with 7 days notice to quit<sup>33</sup>.

Although trial judge found the tenancy of the Respondent was not properly determined, he further went on to hold that,

...the Defendant in my view is a tenant at sufferance...If I am right in this direction, then the plaintiffs would succeed for an immediate possession of the premises because the statutory notice served on the Defendant in this case are superfluous and unnecessary<sup>34</sup>

The Respondent appealed against the judgment of the trial court giving immediate possession of the premises to the Appellant. The Court of Appeal<sup>35</sup> while serving the judgment of the trial court requiring the Respondent to give immediate possession to the Appellant stated,

He<sup>36</sup> was clearly not a tenant at sufferance. Although the learned Judge found that the Appellant<sup>37</sup> was a monthly tenant, that was not the case put forth by the Respondent<sup>38</sup>...it is clear that the order of possession made by the learned Judge was improperly made and the Appellant is therefore entitled to remain in possession of the premises until the tenancy is determined according to law<sup>39</sup>

Obviously dissatisfied with this, the Appellant appealed to the Supreme Court. The Supreme Court, while dismissing the appeal, found that Exhibit L was defective on two points,

- (a) Instead of giving the tenant a six months' notice which was necessary to determine a yearly tenancy it gave him only eight days; and

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<sup>32</sup> Now Respondent.

<sup>33</sup> (1991) 8 N.W.L.R (Pt. 210) 391 at 407.

<sup>34</sup> Ibid.

<sup>35</sup> Per Awogu J.C.A, Ademola J.C.A and Babalakin J.C.A

<sup>36</sup> The Respondent, J.K. Owodunni.

<sup>37</sup> The Respondent, J.K. Owodunni.

<sup>38</sup> The Appellant, African Petroleum Limited.

<sup>39</sup> (1991) 8 N.W.L.R (Pt. 210) 391 at 408.

- (b) Instead of giving him the notice to terminate the tenancy at the end of the then current term of tenancy which was due to end on the 22<sup>nd</sup> of May, 1984, it just gave him notice at the middle of the current term of the tenancy.<sup>40</sup> Based on this background, the Supreme Court stated<sup>41</sup> that, “*It is settled that a notice to quit in order to be effective ought to determine the tenancy at end of the current term of the tenancy*”<sup>42</sup>”

#### 4.0 Correct Position of the Law

For a better understanding, it will be important to clarify from the onset what we mean by periodic tenancy. Periodic tenancy has been described as a tenancy that automatically continue for successive periods- usually month to month or year to year- unless terminated at the end of a period by notice<sup>43</sup>. Tenancy, on the other hand, has been described as the possession of land under a lease, the leasehold interest in real property<sup>44</sup>. “Lease” has been described as contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration usually rent<sup>45</sup>. “Lease” has further been described as the grant of a right to exclusive possession of land for a determinable term less than that which the grantor himself had in the land<sup>46</sup>. For a lease to be valid and enforceable it must contain the following:

- (a) the parties concerned
- (b) the property involved
- (c) the term of years,
- (d) the rent payable
- (e) the commencement date
- (f) the terms of the covenant; and
- (g) the mode of its determination<sup>47</sup>.

Tenancies are essentially leases and therefore share the features of valid lease. The implication of this is that tenancies, like leases, must have a commencement date and a determinable term. For periodic tenancies, there must be a commencement date and there must a determinable term<sup>48</sup>. In periodic tenancies the initial determinable term is for a

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<sup>40</sup> Ibid. p. 415.

<sup>41</sup> Per Nnaemeka- Agu J.S.C.

<sup>42</sup> (1991) 8 N.W.L.R (Pt. 210) 391 at 415 (Emphasis supplied)

<sup>43</sup> Bryan A. Garner (Ed), **Black’s Law Dictionary**, (9<sup>th</sup> Edition)( St. Paul, Minnesota, Thomson Reuters, 2009) p.1604.

<sup>44</sup> Ibid, p. 1603.

<sup>45</sup> Ibid, p. 970.

<sup>46</sup> V.G. Wellings & Nicholas Huskinson, Woodfall’s Law of Landlord and Tenant (28<sup>th</sup> Edition) (London,

<sup>47</sup> Nlmedim v. Uduma (1995) 6 N.W.L.R. (Pt. 402) 382 at 396.

<sup>48</sup> However, section 54 (1) of Landlord and Tenant Law (Cap. 101) Laws of Enugu State 2004, for instance, provides that where the parties fail to provide a determinable period but the rent is paid on an annual basis then the tenancy will be deemed to be a tenancy from year to year.

specific period: one week, one month, one year etc. However, after the initial determinable period and the tenant holds over and pays rent at the reserved rent under the expired tenancy, the parties are deemed by law to automatically continuing the tenancy under existing terms which most importantly include the term as to duration of the tenancy<sup>49</sup>. This continues until any of the parties specifically determines the tenancy. For a notice to quit to validly determine the tenancy, in the case of a periodic tenancy, it should stop the parties from automatically commencing a new tenancy by implication of law<sup>50</sup>. In other words, if the notice to quit fails to stop the tenancy from automatically being renewed, by implication of law, then a new tenancy is created. If a new tenancy is created, then the landlord cannot validly determine the tenancy while it is still subsisting<sup>51</sup>. He has to issue a notice to quit to coincide with last day of the current with the last day of the present period<sup>52</sup>.

Misunderstanding of this issue, for some Nigerian Courts, seems to stem from provision such as the one set out below:

Notice referred to in section 148<sup>53</sup> may be given at any time prior to the date of termination of the current terms of tenancies, *but they shall not be effective if the time between the giving of the notice and the time when the tenancy is to be determined is less than the respective period set out in section 148*<sup>54</sup>

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<sup>49</sup> See for instance section 54 (1) (c) of Landlord and Tenant Law (Cap. 101) Laws of Enugu State 2004.

<sup>50</sup> See for instance section 53 (1) of Landlord and Tenant Law (Cap. 101) Laws of Enugu State 2004 which provides that a tenancy from year to year (yearly tenancy) is a tenancy created for a term of one year with an agreement, expressed or implied, that unless it is determined by notice *at the end of that year* it will subsist for another year, and if not determined by notice *at the end of that other year*, it will subsist for another year and so on. (Emphasis supplied)

<sup>51</sup> In reality, all leases, including tenancies, are akin to “temporary sale” of the land, flat, bungalow etc for a specific period, one year, year to year, one month, month to month etc. This principle is aptly captured by the doctrine of the tenant’s “right to exclusive possession” of leased land, flat, bungalow etc. This means that the tenant, while his interest is still subsisting, can exercise exclusive dominion over property, including the use and benefit of the property (See meaning of “Exclusive Possession” in Bryan A. Garner (Ed), **Black’s Law Dictionary**, *Op Cit*, p.1282). In other words, the tenant has the right to obtain and *retain* possession against third parties including the grantor (landlord) (See Emeka Chianu, *Law of Landlord and Tenant*, Benin City, Oliz Publishers, 1994, p. 46). Any right that the landlord has in the land, flat, bungalow etc, within this period should be by agreement with the tenant and is mainly to preserve his reversionary interest in the land, flat, bungalow etc.

<sup>52</sup> See P.W.D. Redmond, *General Principles of English Law* (London, Macdonald & Evans Ltd, 1966) p.

211.

<sup>53</sup> Section 148 of Landlord and Tenants Law (Cap. 76) Laws of Anambra State 1991 which essentially prescribes the length of notices to be given to determine a tenancy where there is no express agreement between the parties (landlord and tenant).

<sup>54</sup> See section 149 of Landlord and Tenants Law (Cap. 76) Laws of Anambra State 1991 which is similar to the provision in legislations dealing with landlord and tenant laws in the various States in Nigeria. (Emphasis supplied)



Some Court, like in the case under review, has interpreted the italicized portion of this section<sup>55</sup> to mean that it is sufficient if the length of notice prescribed in legislation<sup>56</sup> is complied with irrespective of when the notice lapses<sup>57</sup>. However, as we have argued in this article this does not represent the correct position of the law.<sup>58</sup>

## 6.0 Conclusion

The Court of Appeal, in the case under review, determined that notices to quit in periodic tenancies may be issued at any time before the expiration of the present term and may lapse at any time provided such notice complied with the length provided by statutes<sup>59</sup>. However this decision was made *per incuriam* for at least two reasons. First, the decision is contrary to earlier decision of the Supreme Court in **Awobiyi & Sons v. Igbalaye Brothers**<sup>60</sup> and **African Petroleum Ltd. v. J.K. Owodunni**<sup>61</sup>. Further, the decision goes against established principles of law<sup>62</sup> on this issue. Surprisingly although the Court of Appeal referred<sup>63</sup> to Supreme Court decisions in **Awobiyi & Sons v. Igbalaye Brothers**<sup>64</sup> and **African Petroleum Ltd. v. J.K. Owodunni**, it failed to appreciate<sup>65</sup> the import of the Court's decisions in these cases. The Court of Appeal decision in this case under review is certainly not a reflection of the position of the law on the issue of the time for determining periodic tenancies in Nigeria.

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<sup>55</sup> Which is *impair materia* with the similar provisions in legislation dealing with landlord and tenant laws in the various States in Nigeria

<sup>56</sup> Such as that in Section 148 of Landlord and Tenants Law (Cap. 76) Laws of Anambra State 1991.

<sup>57</sup> *Cobra Ltd. v. Omole Estates & Investment Limited* (2000) 5 N.W.L.R (Pt. 655) 1 at 12.

<sup>58</sup> We have argued in this piece that, in the case of periodic tenants, the notices must be timed to coincide with the last day of the present term so that the parties do not automatically, by implication of law, enter into a new term. This position is reinforced in the Supreme Court decision in *Awobiyi & Sons v. Igbalaye Brothers* (1965) 1 All N.L.R. 163 at 167- 168.

<sup>59</sup> *Cobra Ltd. v. Omole Estates & Investment Limited* (2000) 5 N.W.L.R (Pt. 655) 1 at 14.

<sup>60</sup> (1965) 1 All N.L.R. 163 at 167- 168.

<sup>61</sup> (1991) 8 N.W.L.R (Pt. 210) 391 at 415.

<sup>62</sup> Including statutory provisions.

<sup>63</sup> *Cobra Ltd. v. Omole Estates & Investment Limited* (2000) 5 N.W.L.R (Pt. 655) 1 at 13. (per Galadima J.C.A who read the lead judgment)

<sup>64</sup> (1965) 1 All N.L.R. 163 at 167- 168.

<sup>65</sup> Although the Court of Appeal mentioned these decisions, it, apparently failed to consider the decisions of the Supreme Court in these cases on the issue of time to determine periodic tenancies.