

## **TENANT ASSIGNEE AND THE ENFORCEMENT OF COVENANTS IN THE LEASE: AN APPRAISAL**

**By**

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### **Abstract**

*Assignment and Subleases are commonplace. The difference between the two is a product of common law. Without a thorough understanding of the differing rights among landlords, tenants, and transferees resulting from assignments and subleases, parties may find themselves unpleasantly surprised. This paper will give a brief overview of what a lease is, covenants in a lease, Assignment of a lease by a tenant, and the enforcement of covenants in a lease by a tenant assignee. A leasehold relationship or interest exist between two or more parties where one party gives out or lets out his property to another person to use for a period and usually, though not always, in consideration of payment of rent. It is a contract for the exclusive possession and profit of land for some definite period. In a lease, the consideration flowing from the Lessor to the Lessee is the demised premises. The consideration paid by the Lessee is the rent and the observance of any condition or covenant in the lease.*

**Keywords:** *Leasehold, Nigeria, Legal Practice, Covenant, Lease*

### **1.0 Introduction**

One of the most common legal relationships in Nigeria is a leasehold relationship. Such a relationship exists where one party (usually referred to as a Landlord) lets out his property to another person (referred to as the Tenant) to use for a period in consideration of payment of rent (as is often the case).<sup>1</sup>

The Landlord and Tenant enter into a Tenancy agreement which solidifies their relationship and forms its basis. As with every relationship, both parties enter on certain agreed terms each having individual interests and rights to protect obligations towards each other. These are usually couched as covenants. These covenants may either be Implied (by law), usual (proper and common) or expressly stated.

Common elements of a lease agreement include:

- i. Names of the parties of the agreement.
- ii. The starting date and duration of the agreement.

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<sup>1</sup>Property law practice in Nigeria (3rd Edn) Y.Y Dadem, 91.

- iii. Identifies the specific object (by street address, etc) being leased.
- iv. Provides conditions for renewal or non-renewal.
- v. Has a specific consideration (a lump sum, or periodic payments) for granting the use of this object.
- vi. Has provisions for a security deposit and terms for its return.
- vii. May have a specific list of conditions which are therein described as Default Conditions and specific Remedies.
- viii. May have other specific conditions placed upon the parties such as:
  - a. Need to provide insurance for loss.
  - b. Restrictive use.
  - c. Which party is responsible for maintenance.
- ix. Termination clause (describing what will happen if the contract is ended early or cancelled, stating the rights of parties to terminate the lease, and their obligations)

## **2.0 General Terms**

### **Lease**

A lease is a legal contract, and thus enforceable by all parties under the contract law of the applicable jurisdiction. All kinds of personal property may be leased. As a result of the lease, the owner (lessor) grants the use of the stated property to the lessee.<sup>2</sup>

### **Covenants**

Covenant is a promise under seal or deed. As between the landlord and tenant, the law implies certain covenants in order to regulate the relationship.<sup>3</sup>

### **Assignments**

Assignment means the conveyance of the whole estate or entire unexpired residue of a lease by the tenant to a third party. If there has to be an assignment, the tenant can only deal with the unexpired residue of his interests under the lease and the question of subletting for a period more than what is left of the tenant's interest in the lease cannot be met and consequently cannot arise.<sup>4</sup>

### **Creation of Leases**

For a grant of a right in land to qualify as a lease, two essential conditions must be fulfilled. They are;

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<sup>2</sup> <https://en.wikipedia.org/wiki/Lease> accessed 4th may, 2017.

<sup>3</sup> UJ Osimiri, *Modern law of Land Lord and Tenant in Nigeria*, (9<sup>th</sup> edn (pam unique publishing company ltd. P.h. 2016). 22

<sup>4</sup> *Ibid*, 317

1. The tenant must have exclusive possession of the demised premises.
2. The duration of the lease must be certain.

### **Exclusive Possession**

Exclusive possession means occupation or physical control of the land either personally or through an agent, proxy or servant. It means exclusive power of using the right given in the soil, retain same and be entitled to undisputable enjoyment of it against all persons except the person who could establish a better title. *Chiroma v. suwa* <sup>5</sup>

### **3.0 Certainty of Term or Duration**

A valid lease must be for a definite or fixed period. *Mobil Oil Ltd .v. Johnson*<sup>6</sup> and this case also applies in the circumstance *Osho .v. Foreign Finance Corp*<sup>7</sup> In other words, a lease must not be in perpetuity. To comply with this requirement, the following two basic conditions must be satisfied;

1. The date of the commencement of the lease must either be fixed or ascertainable before the lease takes off.<sup>8</sup>
2. The maximum duration of the lease must either be fixed or ascertainable before the lease takes effect.

As expressed In *National Bank Ltd. v CFAO*<sup>9</sup>, where the lease is not expressed with certainty, It must at least be referable to something which can at the time the lease takes effect, be looked as means of ascertaining what day the term is to commence. In *United Bank For Africa Ltd v Tejumola*,<sup>10</sup> Supreme Court of Nigeria held as follows: the

1. For a valid lease to exist, the parties, property, length of the term and date of its commencement must be defined.
2. It is essential to the validity of a lease that it shall appear either in express term or by reference to some writing which would make it certain or from the language used on when the term is to commence. There must be a certain beginning and a certain ending otherwise it is not a perfect lease.
3. In this case, there is no evidence to support the finding of the lower courts that a lease has been agreed upon by the parties and consequently there was neither a lease nor a binding agreement for a lease between the parties.<sup>11</sup>

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<sup>5</sup> (1986) 1 NWLR (pt19) 751

<sup>6</sup> (1961) ALL NLR (pt4)193

<sup>7</sup> (1991) 4 NWLR (pt184) 157 atn167-8

<sup>8</sup> *Ibid*

<sup>9</sup> (1948)9 NLR 4

<sup>10</sup> (1986) 4 NWLR (pt38)815; (1988) 2NWLR (pt.79)662 at 664-667

<sup>11</sup> U.J Osimiri, Modern law of Land Lord and Tenant in Nigeria, (9<sup>th</sup> edn ipam unique publishing company ltd. P.h, 2016.)67

#### **4.0 Formation of a Lease Contract**

There are two methods whereby a lease contract can be formed.

They are:-

1. Express grant
2. Agreement for a lease

The agreement for a lease presupposes that the landlord shall grant and the tenant shall take the lease in future. A lease is then created when the agreement is carried out by the parties. The creation of a lease is subject to ordinary rules of the law of contract, which are; offer, acceptance, consideration, intention to create legal relation etc. Oral agreement may suffice but written or formal contract is advantageous in order to reduce areas of friction and disputes.

#### **5.0 Formalities**

Express grant of a lease must comply with all the formalities required by the law for the creation or conveyance of a legal estate because a lease is a form of conveyance of legal estate. A lease must be created in the proper way in compliance with the formalities and it is not for the court to relax the rules of law governing the execution of document under seal. At common law, there is no formality as it may be created orally but it may not qualify as a legal estate unless it is made by deed. Some statute permit a lease to be created orally or in writing under hand or by deed.

#### **6.0 Registration of Leases**

The registration of leases is not strictly mandatory for all categories of lease. However, A lease for a term of more than 3 years must be registered in accordance with the law. A lease is a registrable instrument as it confers, transfers, limits, S charges or extinguishes interest in land from the landlord/grantor to the tenant/grantee. These provisions are preserved by the LAND USE ACT.<sup>12</sup>

#### **7.0 Types of Leases**

Leases or tenancies may be classified under the following headings:-

PERIODIC TENANCIES, TENANCY AT WILL, TENANCY AT SUFFERANCE, TENANCY BY ESTOPPEL, TENANCY FOR A FIXED TERM, STATUTORY TENANCY, LEASES OF REVERSION.

##### **7.1 Covenants in a Lease**

As soon as a valid lease has been created, both the landlord and the tenant will enjoy certain rights and obligations there from. These are in form of covenants spelling out the terms of the lease. Covenants in leases are contractual stipulations

or promises made under seal or contained in a deed enforceable according to ordinary rules of contract. In this way, the covenantor undertakes to restrict the use of the land for the benefit of the covenantee.

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<sup>12</sup> S 48 Land Use act, 1978.

Some of these covenants are agreed specifically by the parties. These expressly agreed covenants are called express covenants. Others even though not specifically agreed upon are nevertheless implied by the general law and are often implied as usual covenants.

### **7.2 Express and Implied Covenants**

During the existence of the leasehold relationship, the tenant is entitled to the quiet and peaceable enjoyment of the premises. These include the right to:

Privacy;

Freedom from unreasonable disturbance;

Exclusive possession of the premises, subject to the Landlord's restricted right of Inspection; and

The use of common areas for reasonable and lawful purpose.<sup>13</sup>

A tenant is to perform certain obligations such as:

- a. Pay the rents at the times and in the manner stated; pay all existing and future rates and charges not payable by the landlord by law;
- b. Keep the premises in good and tenantable repair, reasonable wear and tear excepted; permit the landlord and his agents during the tenancy at all reasonable hours in the daytime after previous written notice, to view the condition of the premises and to effect repairs in necessary parts of the building;
- c. Not to make any alterations or additions to the premises without the written consent of the landlord; • Not to assign or sublet any part of the premises without the written consent of the landlord; and Notify the landlord where structural or substantial or substantial damage has occurred to any part of the premises as soon as practicable,<sup>14</sup>

In return and unless otherwise stipulated by the tenancy agreement, the landlord shall comply with the following:

- i. Not to disturb the tenant's quiet and peaceable enjoyment of the premises.
- ii. Pay all rates and charges as stipulated by law.
- iii. Keep the premises insured against loss or damage.
- iv. Not terminate or restrict the use of a common facility or service for the use of the premises.

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<sup>13</sup> Tenancy law of Lagos state 2011, s 6

<sup>14</sup> *Ibid*, s 7.

- v. Not seize any item or property of the tenant or interfere with the tenant's access to his personal property.
- vi. Effect repairs and maintain the external and common parts of the premises.

There are certain specific clauses/covenants that may be considered desirable to be included in a tenancy agreement as they serve to protect either of the parties. For the purpose of our discuss, I shall be considering the understated clause/covenant.

### **8.0 Covenant Against Assignment and Sub-Letting**

This covenant must be expressly stated in the tenancy agreement to take effect. It basically prevents the tenant from leasing the property in the duration of the initial leasehold relationship.

The covenant in its ideal standard form must reflect that the prior written consent of the landlord must have been obtained (landlord's protection) but that such consent should not be unreasonably withheld in the case of a respectable and responsible person. *Alakija v John Holt Ltd* <sup>15</sup> (Tenant's Protection).

### **8.1 Assignment of a Lease**

The Assignment of a Lease is a title document (also referring to the process itself) whereby all rights that a lessee or tenant possesses over a property are transferred to another party. It is the transfer of an entire leasehold interest from a tenant to a third party.

### **8.2 Assignment of Lease by Tenant**

Absent an express restriction in the lease, a tenant may freely transfer his leasehold interest. An assignment occurs when the assignor assigns his entire interest under the lease to another. The assignee stands in the shoes of the original tenant in a direct relationship with the landlord. The LL and T2 are in privity of estate, and each is liable to the other on all lease covenants that run with the land. But, LL and T1 remain in privity of contract, thus T1 remains liable for all unpaid rent.

If the original tenant assigns his interest in the lease, his privity of estate terminates, but his privity of contract remains intact. In other words, assignment of the lease ends his right to possession, but, absent an express release under the terms of the lease, his liability under the lease continues. When the assignee takes possession of the premises, the assignee obtains privity of estate. Privity of estate binds the landlord and assignee to the terms of any covenants running with the land, but only so long as the privity of estate continues. As a result, the assignee becomes liable to the landlord for the payment of rent and the breach of any other lease covenants running with the land. Likewise, the landlord becomes liable to the assignee for the covenant of quiet enjoyment.

If the assignee assumes the obligations of the tenant under the lease through agreement with the assignor, both the tenant and the assignee have privity of contract, while only the assignee has privity

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<sup>15</sup> (1973) 7 CCHC) p.31

of estate. The landlord can enforce the lease against the assignee as a third party beneficiary, regardless of whether the landlord was a party to the assignment.

Where the tenancy Agreement is silent on the right of the tenant to sublet, Assign or otherwise part with the possession of the demised premises, the sublessee/assignee would not be a trespasser but deemed a tenant of the head- landlord.<sup>16</sup> However, there is a distinction between pre-assignment and post assignment breaches. In respect of PRE-ASSIGNMENT breaches, the assignee is not liable for breaches of covenant which occurred while the original tenant retained the lease. The assignee is only liable in respect of breaches committed while the lease was vested in him and not prior to this time.

### **9.0 Enforcement of the Covenants in the Lease by the Tenant Assignee**

Can the assignee of the term of the lease sue the landlord or be able to enforce the covenants against the landlord? The answer is in the affirmative, but only in respect of post-assignment breaches. In respect of the pre-assignment breaches, the original tenant retains the right to sue the landlord based on the doctrine of privity of contract, irrespective of the assignment.

The assignee may therefore not be able to enforce the pre-assignment breaches against the landlord, unless it can be argued that by virtue of the assignment such right had passed to him. The assignee can enforce post-assignment breaches, as the benefits of the covenant runs with the land enabling him to sue the landlord or the reversioner provided such covenant touch and concern land and there is further privity of estate between them.

It is worthy of note that the assignee can be sued by the landlord in respect of post- assignment breaches.<sup>17</sup>

### **10.0 Conclusion**

It is safe to conclude that the original tenant in an assignment may not exonerate himself entirely from breaches whether pre or post assignment. More so, as he shall continue to be liable to pay rent under the lease notwithstanding that the lease has been assigned, and the privity of estate no longer exists between him and the landlord. The landlord can recover either from the tenant or assignee or partly from both, but the tenant may claim indemnity from the assignee. The tenant Assignee can also enforce the covenants in the post-assignment lease against the Landlord.

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<sup>16</sup> Rent Control Edict 1984, s 13

<sup>17</sup> U.J Osimiri, *Modern law of Land Lord and Tenant in Nigeria*, (9<sup>th</sup> edn; Pam Unique Publishing Company Ltd. P.h, 2016.)380-381