

Mesne Profit under the Nigerian Legal System: A Critical Appraisal of the Case of Abeke v Odunsi & Anor

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Abstract

The concept of Mesne profit is indispensable in the relationship between landlord and tenant. This is because there are instances where holding over may arise. The concept of Mesne profit although not new in property law and the law of landlord and tenant developed on a snail speed as a result of several controversies regarding what amounts to Mesne profit. However, with increasing awareness on the importance of the concept, modern tenancy agreements will be adjudged incomplete without the Mesne profit or holding over clause. It is against this backdrop that the paper seeks to analyse this concept in line with the landmark decision in Abeke v Odunsi & Anor with the intention of laying to rest the controversy on what constitutes Mesne profit and when an action for Mesne profit will lie under the Nigerian Legal system.

1. Introduction

With the incessant increase in population, there is need for more houses to accommodate the rising population, as a result, there has always been the need for people to build and lease or rent houses to satisfy this need and meet the demand of tenants. These houses could either be for residential or commercial purposes. This brought the need to regulate the relationship between landlord and tenant in Nigeria so as to avoid issues like arbitrary increase in rent and illegal holding over of premises by tenants

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which is the objective of this research¹ and one of the ratio in the decided case of *Abeke v Odunsi & Anor*.²

The paper has been divided into five segments, part one being the introduction. Part two will examine the meaning and calculation of *Mesne* profit under Nigerian legal system; while part three shall analyse the case of *Abeke v Odunsi & Anor* mentioned above. Part four will examine *Mesne* Profit in other jurisdictions with the aim of drawing a comparative study between these jurisdiction and Nigeria. Part five shall conclude this study with relevant recommendations.

2. Mesne Profit under Nigerian Legal System.

Before examining the term *Mesne* Profit it is pertinent to examine the meaning of the terms, landlord and tenant as the topic revolves around them. Section 2 of the Recovery of Premises Act states that:³

‘A Landlord is a person entitled to immediate reversion of the premises and includes the Attorney or Agent of any such Landlord or any person receiving whether in his own right or as an Attorney or Agent, any rent from

1 Musa-BakwunyeHalima “*Mesne* Profit and Compensation for Use and Occupation: A Myth or a Reality,” available at: <http://Mubaklegalconsult.blogspot.com>, last accessed on 18, July 2013.

2 (2013) LPELR -20640 (SC). See Ijeoma Okoronkwo, Recovery of Premises: An Assessment of Landlord/Tenant Law in Nigeria, Lawyers Chronicles; available at www.thelawyerschronicle.com accessed 18 July. 2016.

3 Recovery of Premises Act Cap 544 Laws of Federal Capital Territory, 1990. The recovery of Premises Act is both a model law and a federal Law but applicable in the Federal Capital Territory. This is because tenancy matters are one of the items on the concurrent legislative list in the Constitution of Federal Republic of Nigeria, 1999. Therefore it is within the powers of every state to legislate upon it. See Part 2 of the Second Schedule of the Constitution of Federal Republic of Nigeria 1999.

any person for the occupation of any accommodation in respect of which he claims a right to receive same’.

The Rent Control and Recovery of Residential Premise Law⁴ defined a tenant to include a sub-tenant or any person occupying any premises whether on payment of rent or otherwise but does not include a person occupying premises under a *bonafide* claim to be the owner of the premises.⁵ A tenant includes; “any person occupying any accommodation on payment of rent and includes a sub-tenant.”⁶

The Rent Control and Recovery of Premises Law of Lagos State and the new Lagos State Tenancy Law,⁷ also included a sub-tenant and a service tenant in the definition of tenant.⁸

Having examined the meaning of landlord and tenant, it is pertinent to examine *Mesne* profit, which is the objective of this research. The term “*Mesne*” literally means intermediate profits.⁹ The concept is feudal in origin, and common in countries with similar legal system with the English legal system (including former British colonies of which Nigeria is one). Thus, *mesne* profit refers to the intermediate pecuniary value of the premises between the time when the rent expires and the tenancy terminates and the time the tenant yields up possession.

⁴ See section 40(i) of the Rent Control and Recovery of Residential Premises Law vol. 7, Laws of Lagos State, 2003.

⁵ See, section 2 of the Recovery of Premises Act, above note 2. See also section 47 of the Lagos State Tenancy Law, 2011, *Abeke v Odunsi & Anor*, above note 1, *Oduye v Nig Airways Ltd* (1987) NWLR (Pt. 55), (1987) 4 S.C 202, see *Ibiyemi Odunje v Nigerian Airways Ltd* (1987)NWLR (pt. 55) 26, (1987) 4 SC at 202,(1987) ALL NLR PG 398, (1987) LPELR –SC 135.

⁶ *Eloichim Nig Ltd v Mbadiwe* (1986) 1 NWLR (Pt.14), (1986) 1 S.C 99, *Martha Udusegbe v Julius Tugba*, (2010) LPELR-CA/B/80/1998, *Mrs Veronica Olojede & Anor v Mr Olaleye & Anor* (2012) LPELR -9845.

⁷ Lagos State Tenancy Law, 2011.

⁸ Vol.7 Laws of Lagos State of Nigeria 2003, see also S.47 of Lagos State Tenancy Law, 2011.

⁹ The concept of *Mesne* profits came from medieval origins, the Feudal system where all land belonged to the king. See, *above* note 1.

It is noteworthy that at the subsistence of a tenancy, the tenant is contractually obliged to pay the agreed rent and at the end of the tenancy, the tenant is obliged to yield up possession. Failure to abide by these provisions of the law makes the tenant a trespasser and as a trespasser, he is liable to pay damages for trespass but instead of calling it damages it is called “*Mesne Profits*” under the law, which is referred to as the profits of an estate received by a landlord from a tenant in wrongful possession.¹⁰ The term *mesne* profit has been defined as:¹¹

Intermediate profits - That is profits accruing between two points of time, that is between the date when the defendant ceased to hold the premises as a tenant and the date he gives up possession.

The value or compensation or damages for wrongful use and occupation of another’s land which would have been rightly in the owner’s possession and which is sometimes measured in damages for trespass in a relationship that could have been that of the landlord and tenant save that there is either no agreement for a tenancy or that the formerly existing agreement had expired.¹² It is also defined as:¹³

“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

¹⁰ Above note 1.

¹¹ *Abeke v Odunsi & Anor*, above note 1. See also *Odutola & Anor v Paper Sack Nig Ltd* (2007) MJSC 129 at 149 para A-B (SC), *African Petroleum Ltd v Owodunni*, *Debs v Cenico Nigeria Ltd* (1986) 3 NWLR (Pt. 32) p. 846, *Osawuru v Ezeiruka* (1978) 5-7 SC, 91, *Mrs Veronica Olojede & Anor v Mr Adeola A.B Olaleye & Anor*, above note 6.

¹² Mesne Profit Defined, available at: <<http://www.businessdayonline.com/NG/index.php/law/bar-report/482>> accessed on 16, July 2013.

¹³ Above note 12.

true owner as compensation for which he has committed”.

Accordingly, section 47 of Lagos State Tenancy Law 2011 further defined *mesne* profit as “the rents and profits which a tenant holds over during his occupation of the premises and which he is liable to pay as compensation to the person entitled to possession”.

From the definitions above one cannot but conclude that the definitions captured the true meaning and the nature of the term *mesne* profit as these definitions especially the definition proffered in *Abeke v Odunsi & Anor* marshalled out the ingredients of *mesne* profit i.e

- (1) profits accruing between two points of time,
- (2) that is between the date when the defendant ceased to hold the premises as a tenant and
- (3) the date he gives up possession.

2. 1 Difference between *Mesne Profit* and *Rent*

Having examined the meaning of *mesne* profit as it exists under our laws, there is need to examine the meaning of rent to enable us appreciate the dichotomy between the word “rent” and the phrase “*mesne* profit.” The term rent is defined under section 47 of Lagos Tenancy Law¹⁴ to include:

Any consideration or money paid or agreed to be paid or value or a right given or agreed to be given or part of any crop rendered or any equivalent given in kind or in labour, in consideration of which a landlord has permitted any person to use and occupy any land, premises, or other corporeal hereditament, and the use of common areas but does not include any charge for

¹⁴ Lagos Tenancy Law 2011, See section 47.

services or facilities provided in addition for the occupation of the premises”.

Rent is also a retribution or compensation for the land demised. It is defined to be certain profit issuing yearly out of land and tenements corporeal: and may be regarded as of two folds nature: first as something issuing out of the land, as a compensation for possession during the term; and, secondly, as an acknowledgement made by the tenant to the landlord during the tenure.¹⁵ The primary liability to pay rent arises from privity of estate and not from covenant because the liability issues out of land. At common law, the profit may be a sum money, chattel or services which are profits in the eye of the law or partly in one way and partly in another.¹⁶ The different types of rent include¹⁷ Ceiling Rent, Double Rent, Economic Rent, Rack Rent, Dry Rent, Ground Rent, Guild Rent and Net Rent.

Rent is different from *mesne* profits, in the sense that while rent is liquidated, *mesne* profits are not. In addition, rent is operative during the subsistence of the tenancy, while *mesne* profits starts to run when the tenancy expires and the tenant holds over.¹⁸

3. *Mesne* Profit under Nigerian Legal System: A Critical Appraisal of the Case of *Abeke v Odunsi & Anor*¹⁹

The facts of this case are as follows: The appellant (Abeke) had purchased the property known and described as No. 4 Oyewunmi close, Surulere, Lagos, hereinafter referred to as the property, from the estate of Michael Abiodun Joseph for the sum of N1,100,000.00 (One million, one hundred thousand naira only).

¹⁵ Above note 1.

¹⁶ Above note 1.

¹⁷ Bryan A. Garner (ed.), Black's Law Dictionary 9th edition. Pg.1410.

¹⁸ See *Abeke's case*, above note 2 and *Mrs Veronica Olojede & Anor v Mr Olaleye & Anor*, above note 6.

¹⁹ Above note 1.

Consequent upon the purchase, the respondents (Odunsi and Ors) herein who were tenants in the property challenged the appellant's authority and ownership of the property on the ground that the estate of Michael Abiodun Joseph ought to have given them the first option to purchase the property. By the judgment of Adeyinka J. (as he then was) in suit No. LD/3626/93, between the appellant and the respondents, the high court declared that the appellant was the beneficial owner of the property and was entitled to recover possession of same from the defendants on service of the relevant statutory notice.

Pursuant to the judgment of Adeyinka, J. (as he then was), the appellant filed another suit, the subject of appeal to Supreme Court. In their statement of defence, the respondents admitted that they had not paid any rent to the appellant since 1992 because there was a dispute as to the ownership of the property. In the trial, both parties called evidence. The 1st respondent in his evidence in chief testified that he was not a tenant in the property in dispute but the owner of the said property, notwithstanding the judgment of Adeyinka, J. (as he then was) which had declared the appellant the rightful owner of the property. The 1st respondent however admitted that he had no title documents to the said property. Based on the denial of the appellant's title to or ownership of the said property, the trial Judge ordered as follows: "(i) Possession of No. 4 Oyewunmi Close Surulere, Lagos is hereby granted to the plaintiff. (ii) The defendants shall pay to the plaintiff *mesne* profit at the rate of N50,000 per annum from 1 April 94 – 1 April 96 and thereafter at the rate prorata up to and after this day until vacant possession is granted to the plaintiff.

The judgment of the trial court was later set aside upon appeal to the Court of Appeal by the respondents and the appellant's claims were dismissed. That decision led to an appeal to the Supreme Court and the appeal was predicated on five grounds of appeal. Upon the receipt of records of appeal, pursuant

to the Rules of court, parties filed and exchanged their briefs of argument. From the five grounds of appeal, the appellant formulated three issues for determination at the hearing of appeal and they include:

1. Whether the respondents denied the title of the appellant as the landlord of the property situate at No. 4 Oyewunmi Close, Surulere, Lagos and thereby incurred the penalty of forfeiture of their tenancy.
2. Whether the respondents are entitled to be served statutory notices in spite of their denial of the appellant's title to the property.
3. Whether from the facts of this case, the appellant in this case is entitled to *mesne* profit.

We shall examine the issues stated above but concentrate on the last issue which is the objective of this work.

Issue 1

Whether the respondents denied the title of the appellant as the landlord of the property situate at No. 4 Oyewunmi Close, Surulere, Lagos and thereby incurred the penalty of forfeiture of their tenancy:

It is worthy to note that the Supreme Court per Ariwoola JSC relied on the judgement of Adeyinka J (trial Court) to resolve this issue in favour of the appellant, thereby setting aside the decision of the Court of Appeal. The reason include the fact that the respondent were given the first option of purchase as was in their tenancy agreement and they failed to buy within the stipulated time before the appellant bought the property in dispute and since the respondents were neither tenants of the appellant and neither had the title documents of the property in dispute they were

not landlords but tenants at sufferance²⁰ whose tenancy maybe determined or terminated at any time.

Issue 2

Whether the respondents are entitled to be served statutory notices in spite of their denial of the appellant's title to the property:

The Supreme Court *per* Ariwoola JSC also relied on the judgement of Adeyinka J to resolve this issue in favour of the appellant setting aside the decision of Court of Appeal. The reason include, the fact that the respondents were neither tenants of the appellant nor owners of the property in dispute, and as such were not entitled to statutory notices from the appellant whose landlordship they denied in clear terms.

Issue 3

Whether the appellant is entitled to *Mesne* profit, from the respondent:

The trial court awarded *mesne* profit but the Court of Appeal set it aside on the ground that there was no tenancy relationship between the parties and if there was no tenancy relationship between the parties, there cannot be claims for *mesne* profit rather claim for damages, use and occupation of the property.

The supreme Court *per* Ariwoola JSC considered the meaning of *mesne* profit as intermediate profits - that is, profits accruing between two points of time, which is between the date when the defendant ceased to hold the premises as a tenant and the date he gives up possession. As a result, the action for *mesne*

²⁰ A tenant at sufferance arises where a tenant of a fixed term refuses at the expiration of his tenancy to vacate possession and wrongfully, that is without the consent of the landlord continues in possession, see *Briggs v C.L.O.R.S.N.* (2005) SC, Megarry & Thompson, *A Manual of the Law of Real Property* 319, sixth edition 1993 cited in *Abeke v Odunsi & Ors.* See also the conclusion of this paper for my humble opinion on the term tenant at sufferance.

profits, ordinarily does not lie unless either the landlord has recovered possession or the tenant's interest in the land has come to an end or the landlord's claim is joined with a claim for possession.²¹ Based on this interpretation, and the decision of the apex court in issue 1 above on the fact that there was no tenancy relationship between the parties, the Supreme Court affirmed the decision of the Court of Appeal on the appellant not being entitled to *mesne* profit. This decision therefore forms the basis of this research paper.

3.1 Analysis of *Abeke's case*

The decision in *Abeke's case* on *mesne* profit will be analysed based on the three issues for determination mentioned above²² which informed the decision of the Supreme Court on this matter. Before proceeding, it is necessary to raise some questions from the three issues which will form the basis of this analysis.

- i. Who is a tenant and were the respondent tenants?
- ii. When does an action on *mesne* profit lie and how is *mesne* profit calculated under Nigerian Legal system?
- iii. Since the Landlord and Tenancy Law seek to protect both the landlord and the tenant, does the law recognize tenant at sufferance? If it does, is the provision on this matter adequate? Is a trespasser and tenant at sufferance mandated to pay *mesne* profit? And, if not, in event of holding over, what will be the landlord's entitlement?

3.1.1 Who is a tenant and were the respondent tenants?

The term has been examined in detail in part two of this work. The Rent Control and Recovery of Residential Premise Law²³ defines a tenant to include a sub-tenant or any person occupying any

²¹ Above note 20.

²² See, issues 1 to 3 above .

²³ See section 40 (i) of the Rent Control and Recovery of Residential Premises Law of Lagos State, 2003

premises whether on payment of rent or otherwise but does not include a person occupying premises under a *bonafide* claim to be the owner of the premises.²⁴ A tenant includes; “any person occupying any accommodation on payment of rent and includes a sub-tenant.”²⁵

The Rent Control and Recovery of Premises Law of Lagos State and the new Lagos State Tenancy Law,²⁶ also included a subtenant and a service tenant in the definition of tenant.²⁷

The decision of the supreme Court in issue number two of the issues for determination in *Abeke's Case* revealed that the respondents were not “tenants” but mere trespassers although the Supreme court termed them ‘tenants at sufferance’ which I humbly disagree. This is because of the non-existence of that term in our laws²⁸ and also because in common law jurisdictions where this term originated from the term is used interchangeably with “trespass.” In other words, a tenant at sufferance is viewed as a trespasser under the law and the landlord has to go through proper eviction process to eject the tenant.²⁹ Therefore, it is my humble

²⁴ See, see section 2 of the Recovery of Premises Act (above note 1), see also section 47 of the Lagos State Tenancy Law, *Oduye v Nig Airways Ltd* (1987) NWLR (Pt. 55), (1987) 4 S.C 202, *Ibiyemi Odunje v Nigerian Airways Ltd* (1987) NWLR (Pt. 55) PG 26, (1987) 4 SC pg 202, (1987) All NLR 398, (1987) LPELR –SC 135.

²⁵ *Eloichim Nig Ltd v Mbadiwe* (1986) 1 NWLR (Pt.14), (1986) 1 S.C 99, *Martha Udusegbe v Julius Tugba*, (2010) LPELR-CA/B/80/1998, see also *Mrs Veronica Olojede & Anor v Mr Olaleye & Anor* (2012) LPELR -9845 (CA)

²⁶ Lagos State Tenancy Law, 2011.

²⁷ Vol.7 Laws of Lagos State of Nigeria 2003, see also S.47 of Lagos State Tenancy Law, 2011.

²⁸ Lagos State Tenancy Law, 2011, Rent Control and Recovery of Residential Premises Law of Lagos State, 2003.

²⁹ Ira Meislik “Why so Much Confusion about holdover tenants? www.retaireaestatelaw.com accessed 21st November, 2016, see also Ijeoma Okoronkwo, Recovery of Premises : An Assessment of Landlord/ Tenant Law in Nigeria, available at: Lawyers Chronicles www.thelawyerschronicle.com accessed 18/07/2016, see also What is Tenancy at Sufferance, available at: www.propertydo.com accessed 21 /11/ 2016.

view that the respondents were “trespassers” who were liable to pay the appellant damages for illegal use and occupation of the property in dispute for the duration the appellant acquired possession of the property in dispute.

3.1.2 When does an action on *mesne* profit lie and how is *mesne* profit calculated under Nigerian Legal system?

In *Abeke’s* case, the Supreme Court *per* Ariwoola JSC stated that an action for *mesne* profit cannot lie unless the landlord has recovered possession or the tenant’s interest in the land has come to an end or the landlords claim is joined with the claim for possession.³⁰ That means that the landlord must show proof that the tenancy has expired and the tenant is holding over for the action to succeed. In attempting to answer the question posed above, it is pertinent at this juncture to examine how *mesne* profit is calculated under Nigerian legal system and how the Landlord can make a claim for *mesne* profit.

According to the provision of section 31 of the Lagos state Tenancy Law 2011, the Landlord may claim for *Mesne* Profits where the rent has expired and the tenant is holding over. The section provides thus:

Where *mesne* profits or sum for use and occupation of the premises are claimed, the claim shall show the rate at which such sum is claimed and where it is proved, judgment shall be entered for the amount proved.

There have been diverse views as to when a landlord is entitled to *mesne* profit, those views shall however be analyzed in

³⁰ Above note 2. see also *Debs v Cenico* above note 11, *MC Agbamor v Ofili* (2004), All FWLR, (Pt. 197) 1060.

this paper. One of such views is expressed in the decision of the court in *Abeke's case*,³¹ *per* Ariwoola, J.S. C

Generally, a claim for *mesne* profits is based on trespass by the defendant in occupation and it is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...

However section 18(2) of the Rent Control Law 1976 (Lagos) suggests that the two items of claim may be different. It provides as follows:

If *mesne* profits are claimed and the writ of summons or plaint shows that the rate at which such *mesne* profits are claimed is the same as the standard rent of the premises, judgment shall be entered for the ascertained amount as liquidated claim and if the *mesne* profits are claimed at the rate of the said rent up to the time of obtaining possession the judgment shall be extended to include such claim and shall be a second alternative in Form J.

Thus, the provisions of the rent control statutes are to the contrary³² for example Section 20, of the Lagos Rent Control Law of 1976 provides:

The Landlord may claim to recover rent or *mesne* profits, or both accruing in respect of such premises since the ending or determination of the tenancy down to the day appointed for the hearing, or to any proceeding day named in the plaint.

³¹ (1964)ANLR 482, (1964) All NLR 69, see also *Nweke v Ibe* (1974) 4 ECSR (Pt. 87) 225, *Omosho v Oloriegbe* (1988) 4 NWLR (Pt. 87) 225, *Ayinde v Lawal*.

³² Emeka Chianu, *Law of Landlord and Tenant* (2nd ed.), (Panaf Press 2010) 326.

The above law clearly states that the landlord is entitled to *mesne* profits, from the determination of the tenancy or any day appointed for hearing or any day named in the plaint in other words it must not be from the date judgment was entered.

Calculation of *mesne* profit is often regulated by necessary statutes, thus under Nigerian legal system, if a tenant is still in possession and the court awards *mesne* profits to the landlord, the *mesne* profit will be calculated up to the date he gives up possession. If the person has already given up possession and the award of *mesne* profit is upheld, the *mesne* profits will be calculated up to the date he gave up possession.³³

There are conflicting views as to what should be the measure of *mesne* profit payable by the tenant after termination of his contractual tenancy, if it is the value of the property or on the rent payable. In *Wemabod Estates Ltd v Peters*³⁴ the rent paid by the tenant was N25.00k whereas the actual value of the premises was N40.00k *per* month due to the fact that the tenant was the plaintiff's employee and it was part of his conditions of service. In determining the *mesne* profits the court held that it should be based on the real value of the premises and not on the rent paid. This view was also upheld in *Debs v Cenico (Nig.) Ltd*³⁵ and *Osawaru v Ezeiruka*.³⁶

Another method of calculating *mesne* profit is by the use of expert evidence to show what the current rental value is. Thus, where the defendant fails to state otherwise in the evidence before the court on the rental value of the property, the court is bound to award the *Mesne* Profits in accord with the expert's testimony and where the tenant fails to controvert the Landlord's pleadings the

³³ Above note 21.

³⁴ (1974) ICCHJ 87 High Court (Lagos).

³⁵ (1986) 3 NWLR (Pt. 32) 846.

³⁶ (1978) 6 SC 135 P. 924, paras. E - H.

court should grant the Landlord's claim.³⁷ Under Section 31 of Lagos State Tenancy 2011, the *Mesne* Profits is measured based on the Landlord's claim, the Landlord is free to show the rate at which such sum is claimed and must prove same. However it is expected that to assist the court to arrive at a fair decision, either party must bring its own estate value as an expert witness in order to ascertain the current rental value of the property.³⁸

Furthermore, in calculating the *mesne* profit it is necessary to examine when rent is due and when it is in arrears as the *mesne* profit starts to run at the expiration of the rent where proper notice has been given. Thus, the position of the Law with regards to rent and when it is due and the tenant is in arrears is clearly provided for under section 13 of the Lagos State Tenancy Law, 2011, and it states as follows:

In the case of a monthly tenancy, where the tenant is in arrears of rent for six months, the tenancy shall lapse and the court shall make an order for possession and arrears of rent upon proof of the landlord.

In case of a quarterly or half- yearly tenancy, where the tenant is in arrears of one (1) year rent, the tenancy shall lapse and the court shall make an order for possession and arrears of rent upon proof by the landlord.

Notice for tenants under Subsection (1),(c), (d) and (e) of section 13³⁹ need not terminate at the anniversary of the tenancy but may terminate on or after the date of expiration of the tenancy.

³⁷ *Ajanaku v Egbede* (1979), 40 SHC(pt11) 146, 167, *Clifton v Huntley*(1948) 2All ER 283.

³⁸ Above note 29.

³⁹ S. 13(1)(c),(d),and (e) makes provision for three months' notice for a quarterly tenant, three months' notice for a half –yearly tenant; and six months' notice for a yearly tenant.

3.1.3 Since the Landlord and Tenancy Law seek to protect both the landlord and the tenant, does the law recognize tenant at sufferance? If it does, is the provision on this matter adequate? Is a trespasser and tenant at sufferance mandated to pay *mesne* profit? And, if not, in event of holding over, what will be the landlord's entitlement?

An examination of the Rent Control and Recovery of Residential Premises Law of Lagos State 2003 and the Lagos Tenancy Law of 2011 shows that the term “tenant at sufferance” is missing from these laws. This is so despite the fact that our laws are of common law origin and the concept of tenancy at sufferance is a common law principle thus:

“A tenant at sufferance arises where a tenant of a fixed term refuses at the expiration of his tenancy to vacate possession and wrongfully, that is without the consent of the landlord, continues in possession, the tenant differs from a trespasser because his original entry was lawful.”

From the decision of the apex court in issue number 2 of *Abeke's* case, this paper is of the view that the respondents were trespassers and should have been treated as trespassers⁴⁰ who should pay the appellant damages for the unlawful use and occupation of the property for the duration they were in occupation after he acquired the property. It is noteworthy that the law on trespass is clear and adequate and this paper aligns with the decision of the Learned Justices of Supreme Court that damages not *mesne* profit should apply in this instant case.⁴¹

4. *Mesne* Profit in Other Jurisdictions

4.1 Kenya

⁴⁰ Above, note 30.

⁴¹ *Abeke v Odunsi & ors*, above note 2.

Kenya is examined because Kenyan Landlord and Tenancy Act makes provision for *mesne* profit and also Kenya is a former British colony. Controlled tenancy in Kenya covers two kinds of property uses, residential and commercial. There are two different statutes for these different uses.⁴²The Rent Restriction Act applies to dwelling houses with monthly rents of Two Thousand Five Hundred Kenya Shillings. The statute restricts increase of rent, right to possession, execution of premiums and provides for fixing of standard rents. The Kenyan Landlord and Tenant Act⁴³ covers commercial leases; however, some of its provisions are sometimes used for residential dwellings.

Other applicable statutes include; the Registered Land Act which requires landlords to keep premises fit for habitation, the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 2012, the Distress for Rent Act (Cap 293) which allows landlords to auction the possessions of the tenants for compensation.⁴⁴The government of Kenya through the Ministry of Housing prepared a bill that sought to revise and consolidate the aforementioned statutes that control the residential and commercial tenancies. The bill had been drafted in the year 2007 and is called The Landlord and Tenant Bill, 2007 despite being looked at to ensure that it is in consonance with the Constitution of Kenya, 2010,⁴⁵ it has not been passed in to Law, this is one of the major gap in Kenya's legal system.

On the issue of *mesne* profit in Kenya, the claim can only be ordered to be paid to the landlord by the tribunal when the

⁴² The Rent Restriction Act Cap 296 Laws of Kenya, for residential users and The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) Laws of Kenya 2010 (revised 2012).

⁴³ Above note 31.

⁴⁴ Landlords Rights Are Strong In Kenya, available at <<http://www.globalpropertyguide.com/Africa/Kenya/Landlord-and-Tenant>> last accessed on 16 July 2013.

⁴⁵ Landlord and Tenant Bill, 2007- Kenya Law reports, available at: <http://www.Kenyalaw.org/lk>, accessed on 16 July 2013.

landlord has issued the tenant termination notice as prescribed by the enabling statute and on receipt of the notice, if the tenant does not wish to vacate, he/she must submit the matter to the tribunal within the prescribed time in accordance with the provisions of Landlord and Tenant (Shops, Hotels and Catering Establishments Act). Hence, the tenancy will not terminate until after the decision of the tribunal. The landlord is enjoined by the Act mentioned above not to terminate the tenancy and at the same time alter the terms and conditions of the tenancy for example, the Landlord should not increase rent, as it will be perceived to be a new tenancy thus, the landlord will not be awarded *mesne* profit.⁴⁶ Furthermore, where the landlord permits the tenant to continue holding over after termination of the original protected tenancy and continue to accept rent, the tenancy between the landlord and tenant will resume as a protected⁴⁷ or a new tenancy, the landlord therefore, cannot be awarded damages for use and occupation or *mesne* profit.⁴⁸

4. 2 United Kingdom (UK)

The Law regulating landlords and tenants relationship in UK is the Landlord and Tenant Act of 1954. The term *mesne* Profit also called occupation payment or charge⁴⁹ simply means damages for trespass by unlawful occupation of land where the trespasser used to be a tenant. Under common law, the principle behind *mesne* profits is that a trespasser is not allowed to use another person's land without compensating the landowner. The landowner does

⁴⁶ See S. 9 (3) of Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 2012.

⁴⁷ Controlled Tenancy under the Kenyan Law available at: http://kenyanlawyer.blogspot.com/2012/02/controlled-tenancies-under-kenyan-law_13.html, accessed on 17 July 2013.

⁴⁸ Section 12(1)(e) of Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 2010 revised in 2012.

⁴⁹ Mesne Profit –What is it? See: <http://www.landlordlawblog.co.uk/2010/09/25/mesne-profits-what-is-it/>, accessed on 17/07/2013.

not need to have suffered any loss. The fact that the person used to be a tenant is of vital importance and distinguishes the trespasser who enters land or premises without permission, e.g. a burglar or a ‘squatter’. In *Ministry of Defence v Thompson*,⁵⁰ the court held that whereas the burglar hopes to be a short-term trespasser, a squatter hopes to be a long-term occupant. In both cases the freeholder is entitled to damages, either for the loss he has suffered, or the value of the benefit the occupier has received. Thus under common law, once the landlord or his agents has elected to forfeit the lease and start proceedings for possession, usually by the service of a notice to quit, any further receipt of rent (as opposed to damages for unlawful occupation) may result in the inference that a new tenancy has been created. It is therefore vital that any such payments be accepted as *mesne* profits (damages for unlawful occupation) so that no presumption of a new tenancy being created can arise.⁵¹

The question of whether or not there was a new tenancy arose in the landmark case of *Sterling v Leadenhall Residential*.⁵² The facts of that case were that the defendant, an assured tenant, was in arrears of rent. The landlord obtained an order for possession in June 1996. Defendant was due to give up possession on 19 July 1996. Shortly before that date he offered to pay off the arrears at £100 *per* month. The landlord agreed to accept payment of the arrears, together with the current rent. When the tenant failed to fully comply with the agreement the landlord sought possession. The tenant however argued that there was a new tenancy in March 1998, following an increase in rent and therefore possession proceedings had to be re-commenced, both the District Judge and, on appeal, the Circuit Judge held that no new tenancy had been created. The tenant appealed to the Court of

⁵⁰ [1993] EG 148; (1993) HLR 552.

⁵¹ Above note 36.

⁵² 2 L Ltd, Court of Appeal 29 June 2001.

Appeal. It was held, following *Street v Mountford*⁵³ that a person who was allowed to remain in another's property with exclusive possession and paying for the occupation, was a tenant and not a licensee.

The question then arose as to whether there was an intention to create something other than a tenancy. Because of the exchange of letters in July 1996, no new or different terms had been arrived at between landlord and tenant after the date of the possession order in June 1996.⁵⁴ When the tenant was allowed to remain in possession after 19 July 1996, he was a trespasser, liable to pay the landlord *mesne* profits for his occupation of the property, and also liable to pay the arrears. The landlord could have executed the order by obtaining and enforcing a warrant for possession at any time within six years. But, although the relevant events and the exchange of letters leading to the agreement in 1996, was not intended and did not affect the legal relations between the parties in terms of the possession order, the position changed when the landlord sought and obtained an increase in the monthly payment for the use and occupation of the premises. The increased payment could not be justified by reference to the possession order. That created a new tenancy.

The effect of this case is that an agreement not to enforce the order for possession will not create a new tenancy, provided instalments for the payment of the arrears rent and *mesne* profits as damages for the unlawful occupation follow the court order for possession. Any variation as to the core terms of the former tenancy agreement, especially in relation to an increase in the 'rent,' will be treated as a new tenancy.⁵⁵

Also in *Bankway Properties Ltd v Dunsford*⁵⁶ where the Landlord granted an assured tenancy on a flat to recipients of

⁵³ [1985] 2 All ER 289.

⁵⁴ Above note 53.

⁵⁵ Above note 36.

⁵⁶ [2001] EGCS 53.

Housing Benefit for a term of one year at a rent of £4,680, with a rent review after the second anniversary of the tenancy to £25,000 *per annum*. Neither tenant read the agreement before signing, but the landlord's agent had invited the tenants to read it and sent a letter to them before they moved in drawing their specific attention to the rent review and inviting the tenants to seek legal advice before signing. The agreement was not, however, enclosed. In January 1997, the landlord wrote to the tenants offering to defer the review date indefinitely, with the proviso that it could be re-instated upon five weeks' written notice. The tenants would be entitled to 14 days' notice in writing terminating the tenancy. The tenants accepted this offer.

In March 2000, the landlord gave notice of re-instatement of the rent review date. Proceedings were later brought for possession and rent arrears of over £12,000, based on the rental of £25,000 *per annum*. That is the maximum annual rental for an assured tenancy under Statutory Instrument 434 of 1990. The trial judge held the review clause enforceable notwithstanding it was a device to allow the landlord to obtain possession under the Housing Act 1988. As the agreement was entered into before 1 July, 1995, when the Unfair Contract Terms in Consumer Regulations 1994 (now 1999) came into effect, the Act could not apply. As the tenants had been invited to read the agreement and signed it, it could not be held to be an onerous or unusual condition not drawn to the tenants' notice. Possession was therefore granted. On appeal by the tenant, it was held that the landlord never expected the tenant to pay the rental of £25,000 *per annum* and the clause was merely inserted as a means of recovering possession. The tenants could never hope to pay the increased rental and the clause was inserted as a device to contract out of the security of the Housing Act. It was therefore repugnant and unenforceable as not representing the true intent of the parties.⁵⁷

⁵⁷ Above note 36. See also *Antoniades v Villiers* [1990] 1 AC 417, HL.

Thus, it is a known fact that under common law, the liability to pay *mesne* profits arises when a former tenant holds over after termination or expiry of his tenancy and stops when he gives up possession.⁵⁸ This rule is not without exception, hence the notable exception is the assured and short hold tenancies where rent can safely continue to be accepted as rent until a possession order is granted by the court (since a statutory tenancy⁵⁹ is deemed to exist until the tenancy is brought to an end by the court.⁶⁰

4.3 Comparative Analysis of Kenya, United Kingdom and Nigeria with Regards to the Issue of Mesne Profit Under Their Various Tenancy Laws.

From above it can be said that there exist a lot of similarities between Nigeria and other jurisdiction with regards to the term *mesne* profit. This is particularly true of Nigeria and Kenya since both were past British colonies. Some of the similarities include the meaning of *mesne* profit and when a claim of *mesne* profit can be made.⁶¹

Despite these similarities there is also a disparity between these two countries (UK and Kenya) and Nigeria, which is the existence of a central legislation regulating the landlord and tenant relationship in both countries, as against Nigeria where the

⁵⁸ Practical Law, available at: <http://uk.practicallaw.com/1-517-5027>, accessed on 16 July 2013.

⁵⁹ Statutory tenant means a tenant whose tenancy has expired under the ordinary rules of law but who has rights by statute to pay rent and continue in occupation under rent control or other emergency legislation. See, available at: www.merriam-webster.com/dictionary, accessed on 6 /08/ 2013, see also, <http://oxforddictionaries.com>, accessed on 16 July 2013.

⁶⁰ *Mesne* Profit, Residential Letting and Management of Property in UK available at: <http://www.letlink.co.uk/articles/trespass/mesne-profits.html>, accessed on 16 July 2013 see also the section 5 (2) of the Housing Act of 1988.

⁶¹ That is at the determination of a tenancy and the tenant is holding over. See above note 11.

responsibility has been shifted to the various States that make up the nation.⁶²

With respect to the tenancy laws of United Kingdom, some of the centralized legislation include; the Landlord and Tenant Act of 1954, the Housing Act of 1988 and the Unfair Contract Terms in Consumer Regulations 1999. While that of Kenya includes; The Rent Restriction Act for residential users and The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, 2010 reviewed in 2012, even though there is a bill proposing to merge these two statutes.⁶³

While we align our view with the decision of the Learned Justices of Supreme Court on the following:

- a) when an action for *mesne* profit will lie,
- b) On how *mesne* profit should be calculated,
- c) That damages not *mesne* profit should apply in the case under review.

It is appropriate to mention that lack of a central legislation could pose as a threat to the landlord and tenant relationship in Nigeria because of the huge disparity in the amount charged as rent and *mesne* profit in different states and FCT which may in future bring about inconsistency in judicial decisions on the subject in discourse.

5. Recommendations and Conclusion

5.1 Recommendations

The following are recommended:

- a. A landlord should not abuse the right to request for *mesne* profit by inflating prices;

⁶² See the Recovery of premises Act Cap 544 in the Laws of Federal Capital Territory, 2007. This is also because the issue of recovery of premises is in the concurrent legislative list under the 1999 constitution of Federal Republic of Nigeria as amended.

⁶³ See Kenya Landlord and Tenant Bill, 2007.

- b. Tenants are also enjoined not to trespass⁶⁴ as section 31 of Lagos State Tenancy Law,⁶⁵ clearly allows a landlord to seek for *mesne* profit, when the tenancy has determined and the tenant is holding over or trespassing.
- c. The need for an efficient and workable central legislation in Nigeria, which will serve as a guideline for States in Nigeria, as seen in other jurisdiction examined in this paper.

5.2 Conclusion

The term *mesne* profit has been examined and clarified using the recent case of *Abeke v Odunsi and Anor*⁶⁶ in this paper. Therefore before a judge can grant a claim of *mesne* profits, he must look carefully into the following circumstances:

- a. if there was a tenancy relationship between the parties, and where there is a relationship,
- b. if the tenancy has determined,
- c. The *mesne* profit must be the current rental value of the property.

These three things which form the ratio of the case under review and which forms the basis of any claim of *mesne* profit in Nigeria must be present before any action for *mesne* profit will succeed.

Judging from what is obtainable in other jurisdiction on *mesne* profit the case under review was rightly decided but this paper takes exception on the use of the term tenancy at sufferance since the term is unknown to the laws on which the case under review was decided.

⁶⁴ Above note 2.

⁶⁵ Lagos State Tenancy Law 2011.

⁶⁶ Above note 1.