SYLLA & CO. BAKERY, by & thru its Attorney-In-Fact, SHEIK KAFUMBA KONNEH, Plaintiff/ Appellant, *v.* **ROYAL PHARMACY**, by & thru JOSEPH DIXON, Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: January 5, 2005. Decided: February 28, 2005.

1. Where an agreement expires by its terms and, without renewal, the parties continue to perform as before, an implication arises that they mutually assented to a new contract containing the same provision as the old, and ordinarily, the existence of such a contract is determined by the objective test, that is, whether a reasonable man would think the parties intended such a binding contract.
2. As a general rule, a tenant who remains in possession of leased premises after the expiration of the lease term does not thereby become a tenant from year to year; however, consent to remain on the premises may be actual or constructive, implied or expressed, or maybe by words or some acts recognizing or treating him as tenant, often evidenced by payment and unconditional acceptance of rent.
3. If after the expiration of a lease, the tenant pays rent and landlord accepts the payment, the lease is extended.
4. The acceptance of rent by the landlord, where the tenancy has expired, raises the presumption that the tenant has been accepted for an additional period.
5. The proof of acceptance of rent by the landlord is evidence of his consent to a renewal of an expired lease.
6. Absent evidence to show a contrary intent on the part of the landlord, a landlord who accepts rent from his hold-over tenants will be held to have consented to a renewal or extension of the lease.
7. A promissory note which makes no mention of an existing sublease agreement or the property conveyed, and which is not signed by the two parties to an existing sublease agreement, is not a renewal of the sublease agreement or an addendum thereto.
8. The renewal or addendum to an existing written contract cannot be an oral arrangement.
9. A sub-lessor alleging breach of an alleged oral sublease agreement under which part payment had allegedly been made must file an action of debt, and not action of summary proceedings to recover real property.
10. An addendum to any agreement is a contract and must meet the basic requisite of a valid contract.
11. Among the requisite to the formation of a valid contract is that there must have been the mutual consent of all parties competent to contract, founded on a sufficient

consideration to perform some legal act or omit to do something, the performance of which is not enjoined by law.

12. A lease, like a contract for the conveyance of land, requires the participation of at least two parties, the lessor and the lessee.

13. A promissory note which contains only the signature of the sub-lessee, promising to pay rent for a certain period, but does not indicate the demised premises for which the sub-lessee is paying and does not include the signature of the sub-lessor consenting to accept the rent for the period indicated, and a covenant to convey to the sub-lessee the specifically demised premises, does not meet the requirement contemplated by Liberian statute and common law for a valid contract for the conveyance of real property.

The appellant, Sylla & Co. Bakery, sued the appellee, Royal Pharmacy, in an action of summary proceedings to recover real property. In the complaint, the plaintiff/appellant prayed the court to have the appellee evicted from the property and to have the appellee pay the appellant an amount of US$4,250.00 which the appellant claimed was due it by the appellee based on a promissory note issued by the appellee.

The records revealed that the appellant and the appellee had entered into a sublease agreement for the lease of the appellant's premises by the appellee for a period of one year, in consideration for which the appellee was to pay an annual rental of LD4,250.00, payable in advance. The sublease agreement stipulated that at the end of the certain period, the appellee would have the option to renew the sub-lease for another two years on conditions negotiated by the parties. No such negotiations were ever held even though the appellee continued to occupy the premises and to pay annually the rental stated in the sublease agreement. This rental was accepted by he appellant.

After several years the appellant, through its attorney-in-fact, wrote to the appellee stating that the rental for the premises for the ensuing year would be US$4,250.00. The appellee thereupon executed a promissory note in favour of the appellant promising to pay US$4,250.00 as annual rental for the premises. Upon the appellee's refusal to pay the amount because no agreement had been reached for payment in United States Dollars, the appellant sued out in summary proceedings to recover possession of real property.

The trial court ruled that the continued adherence to the terms of the sub-lease agreement was tantamount to a renewal of the agreement on the same terms for additional one-year periods; that the appellee should pay the appellee the year's rental of LD4,250.00 and vacate the premises at the expiration of the current one-year period; and that there was no agreement for payment of the rental in United States Dollars. From this judgment both parties appealed to the Supreme Court. However, only the appellant perfected its appeal.

The Supreme Court affirmed the ruling of the trial judge. The Court held that the once the sublessee was allowed to remain on the premises and to tender payment for the new period, and the payment had been accepted by the sub-lessor, those acts constituted

performance under the agreement. Hence, it said, the sub-lease agreement was deemed to have been renewed or extended by implication for another year under the same terms and conditions as the original sublease.

The Court held further that the promissory note which the appellant relied on as evidence of a new leasehold was not legally an addendum or a new lease or an extension of the old lease. The Court noted that the promissory note was signed only by the sub-lessee, that the promissory note did not state the property to which it referred, and that it could not there-fore be the basis upon which the written sub-lease agreement could be amended. Moreover, the Court stated, if the promissory note could be considered as a new lease, then the appellant should have sued in an action of debt for the amount due and not in an action of summary proceedings to recover real property.

Momodu T. B. Jawandoh appeared for the plaintiff/ appellant. No counsel appeared for the defendant/appellee.

MADAM JUSTICE COLEMAN delivered the opinion of the Court.

This appeal is before us from a ruling of His Honour Francis N. Topor, Assigned Circuit Judge, Sixth Judicial Circuit, Montserrado County, in a summary proceeding to recover possession of real property filed by the plaintiff, now appellant, Sylla & Co. Bakery, against the defendant/appellee, Royal Pharmacy.

The complaint, filed by Sheik Kafumba F. Konneh as attorney-in-fact for the appellant, Sylla & Co. Bakery, alleged that on July 15, 1987 Sylla and Co. Bakery, acting through its president, Mohammed Sylla, executed a sublease agreement with the appellee, Royal Pharmacy, for one year certain.

The appellant in its complaint also stated that upon the expiration of the sublease agreement, the appellant and the appellee orally agreed that the appellee would remain in possession of the premises and pay rent in United States Dollars at a rate of US$4,250.00 (Four Thousand Two Hundred Fifty United States Dollars) per annum for the period July 15, 1991 to July 14, 1992, as per a promissory note signed by the appellee's representative.

The complaint also alleged that the appellee paid US$1,000.00 (One Thousand United States Dollars) but refused to pay the balance US$3,250.00 (Three Thousand Two Hundred Fifty United States Dollars) and failed to vacate the premises. The appellant therefore prayed the trial court to oust, evict and eject the appellee from the property and to award appellant special damages of US$3,250.00 (Three Thousand Two Fifty United States Dollars) and general damages for the appellee's wrongful withholding of the premises.

A writ of summons was issued and served on the appellee. The appellee filed a seven (7) count answer, alleging that the appellant had no legal capacity to institute the action since the power of attorney was prepared in Guinea and not notarized and probated in Guinea, but

bore stamps of the Republic of Liberia. The appellee also denied that it ever paid US$1,000.00 (One Thousand United States Dollars), but admitted that it paid LD$7,000.00 (Seven Thousand Liberian Dollars), which the appellant converted to US Dollars at a rate of L$7.00 to US$1.00, and issued a receipt for US$1,000.00 (One Thousand United States Dollars) without the consent and authorization of the appellee. The appellee alleged that it rejected the receipt in a letter addressed to Kafumba Konneh, attorney-in-fact for the appellant.

Finally, the appellee alleged that the promissory note referred to by the appellant was secured by fraud and deception; that the sublease agreement did not call for payment of rent in United States Dollars; and that the alleged oral agreement to pay rent in United States Dollars was not in harmony with the law which required that transactions in relation to realty be reduced to writing.

The appellant filed a ten (10) count reply denying the aver-ments of the answer, confirming the complaint, and insisting that the appellee had paid US$1,000.00 (One Thousand United States Dollars) and not LD$7,000.00 (Seven Thousand Liberian Dollars).

A motion to dismiss the complaint was filed, heard and denied. The law issues were subsequently disposed of and the case ruled to trial.

A regular trial was held, during which the appellant produced five witnesses and had admitted into evidence the following instruments: a power of attorney signed by Mohammed Sylla, President of Sylla and Co. Bakery; a sub-lease agreement entered into by plaintiff and defendant; a promissory note signed by the defendant; a letter demanding payment of US$3,250.00 (Three Thousand Two Hundred Fifty United States Dollars); and a second letter addressed to the defendant demanding payment of US$3,250.00 (Three Thousand Two Hundred Fifty United States Dollars) on or before July 8, 1992.

The defendant, for its part, produced three (3) witnesses to testify on its behalf and offered into evidence six species of documentary evidence, including: a receipt from Abraham Kamara to Mr. Joseph Dixon; a letter from the attorney-in-fact of the plaintiff, Kafumba Konneh, to Abraham Dixon; two letters to Kafumba Konneh requesting the return of the LD$7,000.00 (Seven Thousand Liberian Dollars); a sub-lease agreement between plaintiff and defendant; and a receipt from Sheik Kafumba Konneh to Joseph Dixon, for the amount of US$1,000.00 (One Thousand United States Dollars).

Final arguments were heard and His Honour Francis N. Topor, Assigned Circuit Judge for the December, A. D. 1993 Term, rendered final judgment on January 28, 1994.

The judge, in his final judgment, ruled as follows:

> "Plaintiff and defendant entered into a sublease agreement on July 15, 1987, for the period of one (1) calendar year, beginning July 15, 1987 and ending the 14th day of July, A. D. 1988, at an annual rental of LD4,250.00 payable yearly in advance. Though there was no express agreement between the plaintiff and the defendant after the expiration of the sublease agreement, defendant continued to occupy the premises from July 15,

1988 up to July 14, 1992. Hence, by these conduct, the sublease agreement between plaintiff and defendant was deemed renewed.

"Plaintiff, in its complaint, referred to a promissory note allegedly issued by defendant on the 11th day of November, A. D. 1991. In the 1st paragraph of the said promissory note, defendant correctly acknowledged his indebtedness to Sylla and Co. Bakery. The second paragraph recites and states that defendant will pay or cause to be paid to Sheikh Konneh the sum of US$4,250.00 (Four Thousand Two Hundred Fifty United States Dollars). The 2nd paragraph is out of context for there is no contractual basis for the promise to pay US$4,250.00 (United States Dollars Four Thousand Two Hundred Fifty). The expired sub-lease agreement stated the currency in which rental should and must be paid. There is no agreement between Sylla and Co. Bakery and defendant for the payment in US$ currency. The power of attorney did not sufficiently confer any right to the grantee to make a novation respecting realty.

".....where an agent is authorized to make a contract for his principal in writing, it must, in general, be personally signed by him; but in the name of the principal and not merely in the attorney's name, though the latter be described as attorney in the instrument." [*Miller v. McClain*] 12 LLR 3, 6 (1954); 3 BOUVIER LAW DICTIONARY 2691, (Rawle's 3d rev. 1914).

"After alleging fraud, the party alleging it must produce the evidence tending to establish the allegation at the trial. In the absence of evidence in support thereof, the allegation of fraud may not be sustained. With respect to the averments of fraud, the Civil Procedure Law, Rev. Code 1.9.5(2) requires that they be stated with particularity and not in a broad sweep as was done by the defendant in his answer. Where fraud is alleged, every species of evidence tending to establish the allegation should be adduced at the trial; otherwise the party asserting fraud will not be allowed to succeed. *Henrichsen v. Moore*, 5 LLR 60 (1936). Allegations are not proof; rather they must be sustained by evidence. *Hill v. Hill,* 13 LLR 257 (1958); *Jogensen v. Knowland*, 1 LLR 266 (1895).

"In view of what has been stated hereinabove, the court is of the opinion that the attorney-in-fact, not being authorized by the power of attorney made profert of with the complaint to demand for payment in US$ currency, is hereby overruled. For power of attorney, with respect to realty, must state with particularity what the attorney is required to do. This not having been done, the attorney, Konneh, has no right to demand payment in currency not contemplated by the parties at the time of making or entering into said contract.

"Accordingly, defendant is liable to plaintiff in the amount of LD4,250.00 (Four Thousand Two Hundred Fifty Liberian Dollars), being the rent in arrears.

"Plaintiff is entitled to the possession of its premises. Defendant is to be ousted, evicted and ejected from the premises. The clerk of this court is hereby ordered to issue a writ of possession and place same in the hands of the sheriff for service on defendant.

And it is hereby so ordered. Costs are ruled against defendant."

To this ruling/final judgment, the appellee excepted and announced an appeal to the Honourable Supreme Court of Liberia. The appeal was granted but the judge further ordered that the defendant be ousted since in summary proceedings to recover possession of real property an appeal does not serve as a stay. The defendant excepted to this further ruling and gave notice that it will take advantage of the statute. Similarly, the appellant also excepted to the trial judge's ruling and appealed only to that portion of the said ruling awarding plaintiff LD4,250.00 (Four Thousand Two Hundred Fifty Liberian Dollars) instead of United States Dollars.

The appellant's appeal was granted and perfected. The appellee did not perfect its appeal and is therefore not before this Court.

Even though the plaintiff excepted only to that portion of the judge's final judgment awarding LD4,250.00 (Four Thousand Two Hundred Fifty Liberian Dollars) instead of US Dollars, it filed a four (4) count bill of exceptions raising other errors allegedly committed by the judge in his final judgment.

In the appellant's bill of exceptions, it alleged that the judge erred in ruling that the sublease agreement of July 15, 1987 was still in force; that the judge erred when he ruled that Sheik Kafumba Konneh, attorney-in-fact for Sylla & Co. Bakery, did not have authority to demand payment of rent from appellee Royal Pharmacy in United States Dollars; that the judge erred when although he ruled that the appellee did not prove fraud in the execution of the promissory note, he failed, refused and neglected to award appellant the amount of US$3,250.00 (Three Thousand Two Hundred Fifty United States Dollars), same being the balance rent due under the promissory note; and that the judge erred when he revoked his order to the clerk for the issuance of the writ of possession and instead ordered that the appellee remained on the subject premisses up to and including the 15th day of February 1994.

This Court will restrict itself only to that portion of the judge's final judgment excepted to and appealed from by the appellant.

The issues to determine this matter are:

1. Whether or not the judge erred in ruling that the sub-lease agreement entered into between the appellant and the appellee was deemed renewed by their conduct and therefore the appellant was entitled to rent in Liberian Dollars as stated in the sublease agreement of 1987?
2. Whether or not the promissory note signed by the sub-lessee was an addendum, extension or renewal of the sub-lease agreement of 1987, and thus had a binding effect on the sub-lessee?

From the records before us, a sublease agreement was entered into on the 15th day of July, 1987 by and between Sylla & Co. Bakery, as sublessor, and Royal Pharmacy, as sublessee. The sublease agreement was for one year (July 15, 1987 to July 14, 1988), with an

annual rental of LD4,250.00 payable yearly in advance. The sublease agreement contained a provision for an option to renew the agreement for an additional two (2) years on renegotiated terms and conditions.

The sublessee occupied the premises from 1987 up to 1991, and even though the certain period of the sublease agreement was for only one year, with an option to renew for an additional two (2) years, there is no evidence that at the end of the one year certain period the parties renegotiated the additional two (2) years optional period. However, the sub-lessee remained on the premises and paid the amount of LD4,250.00 (Four Thousand Two Hundred Fifty Liberian Dollars), the rent stated in the sublease agreement, until 1991 when Kafumba F. Konneh informed the sublessee that he had a power of attorney from the sublessor and that the rent covering the period July 15, 1991 to July 14, 1992 should be US$4,250.00. A promissory note was prepared and signed by the sublessee alone to pay the amount of US$4,250.00 as rent, covering the period July 15, 1991 to July 14, 1992. The promissory note stated that any failure to comply, the sub-lessee was to peacefully yield up the premises.

The trial judge, in his final judgment, stated that since the parties had performed under the sublease agreement when it expired in 1998, the agreement was renewed by the conduct of the parties; that is, by the sublessee remaining on the premises and paying the rent as stipulated in the sublease agreement and the sublessor accepting the rent.

The question is, did the trial judge err in ruling that by the conduct of the parties the sublease agreement of 1987 was renewed and therefore the sublessor was entitled to rent under the sublease agreement? There is no disagreement between the parties that the sublease was for only one year, with an option for an additional two (2) years on terms and conditions to be renegotiated. There is also no disagreement that when the sublease agreement expired on July 14, 1988, the parties did not renegotiate the additional two (2) years optional period, but that the sublessee remained on the premises and paid the rent as stated in the sublease agreement of 1987 up to 1991. We therefore hold that the judge was acting within the scope of the law when he ruled that based on the conduct of the parties (i.e. the sublessee remaining on the premises after the one year period and paying the rent and the sublessor accepting the rent), that the sublease agreement was renewed. The issue or question that arises is not just whether the original sublease agreement had expired in 1988, but whether at the expiration there was an extension or renewal of the sublease agreement by implication.

The sublease agreement provided that the sublease was for only one year and could be renewed for another two years on terms and condition to be negotiated. However, when the sublease expired in 1988, there was no negotiation for the additional two years optional period and there was no act by the parties to indicate that the sublease agreement expired or terminated in 1988. Instead, there are clear indications that the sublease agreement was renewed on its terms by implication. That is, the sublessee retaining the premises and paying

the same rent as stated in the sublease agreement.

The Supreme Court held in the case *Francis v. Liberian French Timber Corp.*, 22 LLR 173 (1973), that "the doctrine has been advanced that where an agreement expires by its terms and without renewal the parties continue to perform as before, an implication arises that they mutually assented to a new contract containing *the same provision as the old*, and ordinarily, the existence of such a contract is determined by the objective test, that is, whether a reasonable man would think the parties intended such a binding contract." (Emphasis provided).

In 49 AM JUR. 2d, *Landlord and Tenant*, at section 1143, it is stated that "it seems to be uniformly accepted as a rule of law that a tenant who remains in possession of a leased premises after the expiration of the lease term does not thereby become a tenant from year to year. Such consent may be actual or constructive, implied or expressed, or may be by words or some acts recognizing or treating him as tenant and is often evidenced by payment and unconditional acceptance of rent".

The cases generally hold that if after the expiration of a lease, the tenant pays rent and landlord accepts the payment, the lease is extended. So, the view has been taken that the acceptance of rent by the landlord raises the presumption that the tenant has been accepted for another year. Similarly, the proof of acceptance of rent by the landlord is evidence of his consent to a renewal. Indeed, it is the rule that absent evidence to show a contrary intent on the part of the landlord, a landlord who accepts rent from his hold-over tenants will be held to have consented to a renewal or extension of the lease. 49 AM JUR 2d, *Landlord and Tenant*, § 1144, page 1097.

The Court is therefore in agreement with the trial judge that the conduct of the parties was an implied consent between the appellant and the appellee, and that the sublease agreement was renewed on the same terms and condition as the sublease agreement of 1987.

The second issue this Court deems necessary to determine this matter is whether or not the promissory note obtained from the sublessee was an addendum, extension or renewal of the sublease agreement of 1987, and hence, has a binding effect on the parties?

The records reveal that after the sublessee had been in possession of the premises from 1987 to 1991, an attorney-in-fact was appointed by the sublessor to represent its interest. A promissory note was obtained from the sublessee promising to pay or cause to be paid the full sum of US$4,250.00 (Four Thousand, Two Hundred Fifty United States Dollars) to Sheik Kafumba Konneh on the 30th day of November 1991. This amount represented rent covering the period July 15, 1991 to July 14th, 1992.

The appellant, in its Brief and argument before this Court, contended that the sublease agreement under which the appellee claimed to have paid rent had in fact expired on July 14, A. D. 1988, and that the parties had met and agreed orally to a renewal of the tenancy of the appellee, not as a sublessee but rather as a tenant from year to year, paying its rentals in United States Dollars annually. It was under the alleged renewed arrangement that the

appellee executed the promis-sory note to pay the appellant the sum of US$4,250.00 (Four Thou-sand Two Hundred Fifty United States Dollars) in advance for the period from July 15, 1991 to July 14, 1992. The appellant therefore contended that there was no justification for the appellee to pay the agreed rent in Liberian Dollars instead of United States Dollars, as undertaken in the note.

The appellant further contended that the intent of the parties being clear and not in dispute, as seen from the promissory note, there is no further reason to refuse to enforce same. Therefore, the appellee must honor its own note or be compelled to make payment as stipulated therein.

The appellee, in its Brief, contended that the alleged promissory note, which is not consistent in terms of the currency, and which made no reference to the sublease agreement between the parties, cannot be interpreted as an amendment to clause two (2) of the sublease agreement.

The defendant further contended that when an agreement expires by its terms and without a renewal and the parties continue to perform as they had, a new contract containing the same provisions arises by implication. It relied on *Francis v. Liberian French Timber Corp.*, 22 LLR 168, syl. 2, text at page. 175.

The appellee also argued that among the requisites to the formation of a valid contract is that there must have been the mutual consent of all parties competent to contract, founded on a sufficient consideration to perform some legal act or omit to do something, the performance of which is not enjoined by law. It relied on 24 LLR 126 (1975), syls. 3 & 4, and text at pages 139-140.

In his ruling on this latter issue the trial judge held that since the sublease agreement between the parties was deemed renewed, there was no contractual basis for the promise to pay US$4,250.00 (Four Thousand Two Hundred Fifty United States Dollars), as the sublease agreement stated Liberian Dollars as the currency in which the rental should and must be paid. He further held that "[t]here is no agreement between Sylla & Co. Bakery and defendant for the payment in United States Dollars currency."

We concur with the trial judge.

If we accept the argument of the appellant that the promissory note was a contract; that the parties orally agreed to the renewal of the tenancy; and that it was the alleged renewed arrangement that led to the issuance of the promissory note, then the follow-up questions are: Was the alleged renewed arrangement that prompted the issuance of the promissory note a renewal of the sublease agreement? Or was it an addendum thereto? Or was it a totally new lease agreement? We think the promissory note conforms to none of the above. It is not a renewal of the sublease agreement or an addendum thereto because the promissory note made no mention of the sublease agreement or the property conveyed, and it was not signed by the two parties. Moreover, a renewal or addendum to an existing written contract cannot be an oral arrangement as the appellant in this case would have us believe.

On the other hand, were we to take it that the promissory note was issued under a new lease agreement, meaning that the parties had set aside the sublease entered into on July 15, 1987; that what now existed between them was a new oral lease agreement under which the alleged part payment in United States Dollars was made, then the appellant should have sued in an action of debt and not summary proceedings to recover possession of real property. This is because under such circumstance the alleged new oral lease agreement would be in force and effect and the only contention of the appellant would be that the appellee had not fully paid his rent. And since it would be that part payment had been made to the appellant, appellant's contention would be for payment of the remaining rent balance, which remedy would lie in an action of debt and not summary proceedings to recover possession of real property which is now before us on appeal.

Given what we have said above, the only logical conclusion is that the sublease agreement was, by the actions of the parties, renewed on the same terms and conditions, including the payment of rent in Liberian Dollars.

An addendum to any agreement is a contract and must meet the basic requisite of a valid contract. The Supreme Court of Liberia held in the case *Bestman v. Acolatse*, 24 LLR 126 (1975), text at 139-140, that "[a]mong the requisite to the formation of a valid contract is that there must have been the mutual consent of all parties competent to contract, founded on a sufficient consideration to perform some legal act or omit to do something, the performance of which is not enjoined by law."

A lease, like a contract for the conveyance of land, requires the participation of at least two parties, the lessor and the lessee. 49 AM JUR 2nd, *Landlord and Tenant*, § 60.

The promissory note which the appellant claimed was a valid contract did not met the requisite requirement contem-plated by our statute and common law for a valid contract for the conveyance of real property. The promissory note contained only the signature of the sublessee and the promise to pay rent for a certain period; it did not indicate the demised premises for which the sublessee was paying rent and it did not include the signature of the sublessor consenting to accept the rent for the period indicated and a covenant to convey to the sublessee the specifically demised premises.

We are therefore of the opinion that the promissory note did not meet the requirement of a lease agreement or an addendum to a lease agreement for the reasons stated above.

In view of the foregoing, we hold that the judgment of the lower court requiring appellee to pay to the appellant the sum of LD4, 250.00 (Four Thousand, Two Hundred Fifty Liberian Dollars), the agreed amount stated in the sublease agreement, is hereby affirmed. The Clerk of this Court is hereby ordered to send a mandate to the lower court ordering the judge presiding therein to resume jurisdiction over the case and enforce its judgment. And it is hereby so ordered.

Judgment affirmed.