REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.283 OF 2000

SALIM MOHAMED GARWAN…….PLAINTIFF

=V E R S U S=

MOHAMED SAID ABDALLA…….FIRST DEFENDANT

AIDARUS ABDULREHMAN……..SECOND DEFENDANT

R U L I N G

O.35 r.1(1)(b) of the Civil Procedure Rules provides in pari materia that:

> ***"In all suits where a Plaintiff seeks Judgment for the recovery of land with or without a claim for rent or mesne profits by a Landlord from a tenant whose term has …… been determined by noti ce to quit …….. where the defendant has appeared, the plaintiff may apply for Judgment for …….. the recovery of the land and rent or mesne profits".***

That provision has been invoked by the Plaintiff in this suit who is the owner (Landlord) of all that commercial property known as Plot No.174 Section XVII situate in Kisauni Mombasa. That plot was rented to the two Defendants (hereinafter the Tenants) at the monthly rent of Kshs.600/- and it is common ground that the tenancy was governed by the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, Cap.301.

The Landlord states that he served Notice under S.4(2) of that Act terminating the tenancy with effect from 1.6.2000 for non-payment of rent and for unauthorised subletting. The Notice was dated 28.3.2000 and there is an Affidavit of service to show that both tenants were served on 30.3.2000. The Notice required the tenants within one month after receipt to notify the Landlord in writing whether or not they agreed to comply. No such communication was made to the Landlord. If there was such notification or there was an order of the Tribunal dispensing with it, then S.6(1) of the Act would have been invoked and the matter would have been referred to the Tribunal. But the Section was not invoked and so Section 10 of the Act became operational. It states:-

> ***10. Where a landlord has served a notice under section 4 of this Act on a tenant, and the tenant fails to notify the landlord within the appropriate time of his unwillingness to comply wi th such notice or to refer the matter to a Tribunal, then, subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions thereof or rights or service s enjoyed thereunder".***

In such event the Landlord is perfectly entitled to come to the High Court and seek vacant possession of the property and may invoke the summary procedure alluded to above for relief. That was made clear

by the Court of Appeal in C.A. 267/96 Kanabar & 2 Others Vs. Fish and Meat Ltd: That Court stated:-

> "***once a reference in accordance with section 6(1) of the Act has not been made to the Tribunal and a tenancy notice to terminate the tenancy has taken effect from the date specifie d therein in terms of section 10 of the Act, the landlord/tenant relationship comes to an end. Thereafter, one can no longer talk of the existence of a controlled tenancy in terms of section 2 of the Act without which the Tribunal under the Act has no jur isdiction."***

It is on that authority that learned counsel for the Landlord Mr. Nyongesa relies for support.

Under sub-rule 2 of Order 35 of the Civil Procedure Rules the onus shifts to the Defendant to show by Affidavit, oral evidence or otherwise that he should have leave to defend the suit. The two tenants chose to discharge that burden by way of an Affidavit sworn by one of them. They deny firstly that the Notice of Termination was served on them. Secondly, they say even if they had been served, there was no obligation to respond to the Notice because it was incurably defective. The defect was two pronged: it was not in accordance with the prescribed form which requires that the Landlord specify whether the tenancy was being altered or terminated and as far as the allegation was that rent was in arrear it has to be shown that the arrears were for two months before the notice was issued which was not the case here. That is because the tenants had by letter dated 23.3.00 paid all rent arrears from January 1999 to February 2000. The Notice in issue was however issued on 28.03.00. Finally, as the third main objection, the termination was not in good faith since there was an earlier termination Notice served on the tenants which was referred to the Tribunal but was withdrawn by the Landlord on 22.3.00 only for another one to be issued one week later.

Learned counsel for the tenants Mr. Khatib submitted that those were triable issues and therefore the application made was not tenable.

The principles upon which I have to approach the application are a daily occurrence in our courts. As a general practice courts will be slow to determine matters by way of summary procedure and will always give unconditional leave to defend where the Defendant can show even a solitary bona fide, not contrived or manufactured, triable issue. If it is clear to the court that the defence filed is a sham however, leave may be refused or conditional leave granted.

The main issue raised is that of service of the termination Notice which is denied. But there is on record the Affidavit of Service of a Court Process Server who swears that he personally found the two tenants whom he knew and he explained the purpose of his visit and handed over the Notice at different times. Both accepted the Notice but one of them refused to sign in acknowledgement of receipt while the other signed. The one who signed has not sworn any Affidavit to deny his signature on the Notice. It is alleged that the Affidavit of service is false but no effort was made to summon the Process Server for cross-examination in that regard. In my view the denial that the notice was served is hollow and I do not accept it.

The more probable scenario is that the Notice was served on the tenants but they did not feel obliged to respond to it since they felt it was defective and a nullity. Indeed their counsel so submitted. But I do not find that as a valid reason for ignoring the Notice served. The submission that it did not specify whether it was for termination or alternation is not borne out by the Notice itself. The prescribed form requires that the grounds be stated in either case when the tenancy is being terminated or altered. And the grounds stated in the Notice served, in my view, gives no room for doubt that the tenancy was being terminated. There is nothing stated in the prescribed form for "alterations proposed" which rules out alteration as the intended purpose of the Notice. At all events whether it be termination or alteration or both, it was still incumbent on the tenants to respond to the notice as required therein. They never did.

As for rent being two months in arrear before the Notice, I think learned counsel misconstrued the provisions of S.7(1)(b) of the Act. The two months need not be those immediately before the Notice. It is any "period of two months after the rent has become due" or "there has been persistent delay in rent

payment". The fact that the tenants were issuing a cheque for payment of more than one year's rent in arrear does not attest to prompt rental payments.

The notice issued herein, however, is not limited to non or delayed payment of rent. It states that the rented property has been sub-let without the Landlord's consent. Nothing has been said about that by the tenants.

I think with respect, that the proper forum for challenging the Notice served was before the Tribunal and before the Notice took effect to determine the tenancy, or thereafter with leave of the Tribunal. The tenants have themselves to blame for ignoring the Notice on the spurious pretext that they were not served.

I am satisfied that this is a clear case where summary judgment is appropriate and the defence is a sham. I grant the application as prayed with costs to the Plaintiffs/Applicants.

Dated this 14th day of March 2001.

P.N. WAKI

J U D G E