



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Nyarangi Ag JA)

CIVIL APPEAL NO. 22 OF 1982

BETWEEN

PANAFRICA BUILDERS AND CONTRACTORS LIMITED.....APPELLANT

AND

JAGDISH SINGH.....RESPONDENT

(Appeal from the High Court at Nairobi, Brar Ag J)

JUDGMENT

This is an appeal from a ruling of the late Mr Justice Brar of November 26, 1981 in which he gave judgment for Jagdish Singh against Pan Africa Builders & Contractors Limited (Pan Africa) and Kantibhai Maganbhai Patel (Patel) for:

1. Possession of a house, outhouse and grounds on plot LR 205/49, Riverside Drive, Nairobi and their ejection from those premises;
2. Kshs 75,000 arrears of rent;
3. Mesne profits at the rate of Kshs 5,000 a month from July 1, 1981 until delivery up of possession;
4. Interest at court rates on Jagdish Singh's claim for arrears of rent and on the mesne profits from the date he filed his plaint, which was July 24, 1981, until payment; and
5. Costs with interest until payment.

He gave them until the end of November 1982 (four days) to hand over vacant possession.

The ruling was given in response to a motion on notice filed by Jagdish Singh on August 29, 1981 expressed to be brought under order XXXV rules 1 and 2 of the Civil Procedure Rules in which he asked for judgment to be entered for him against Pan Africa for Kshs 75,000 arrears of rent and against both Pan Africa and Patel for mesne profits at the rate of Kshs 7,000 a month from July 1, 1981 until delivery of possession of the premises, possession of them and ejection together with the costs of the application and of the suit.

The claim for mesne profits was at the rate of Kshs 7,000 in Jagdish's plaint filed on July 26, 1981, amended plaint filed a month later and motion on notice. Jagdish Singh did not make it clear in either plaint if his prayer was for such an order to be made against Pan Africa or Patel or both but in the motion on notice it is against both. Mr Justice Brar gave judgment for Jagdish Singh for mesne profits at the rate of Kshs 5,000 against both Pan Africa and Patel.

They now ask this court for orders that:

- (a) their appeals be allowed;
- (b) the application for summary judgment be dismissed with costs against Patel;
- (c) Jagdish Singh's suit against Patel be dismissed with costs and interest;
- (d) Patel to have the costs of his appeal;
- (e) the application for summary judgment against Pan African be dismissed with costs with interest to be paid forthwith;
- (f) alternatively, Pan Africa be given unconditional leave to defend, and to have the costs of the application for summary judgment with interest; and
- (g) Pan Africa to have the costs of the appeal.

Jagdish Singh, in turn, asks this court to dismiss the appeals of Pan Africa and Patel and uphold the ruling of Mr Justice Brar and all the orders he made save for that burdening him with the payment of arrears of rent because this was not asked for in the motion on notice. One curious point should be noted. Jagdish Singh doubted the *bona fides* of Pan Africa and Patel (especially Patel) in their dealings over these premises but his advocates did not ask the learned judge or this court to make an order giving either of them conditional leave to defend.

The memorandum of appeal has twenty-eight grounds on it which were reduced to twelve matters. Mr Gautama for Jagdish Singh appeared to find this a cause for complaining but, in my view, this was a merciful release for which Mr Khanna for Pan African and Patel should be thanked. The background of the appeal is this. Jagdish Singh is a Nyeri sanitary engineer and builder, Pan Africa a Nairobi builder and Patel the managing director of Pan Africa. Jagdish Singh let the premises to Pan Africa at the rate of Kshs 2,500 a month under an oral agreement the terms of which, so far, have not been clearly spelt out by either side and far less agreed. Patel lived in the place but Jagdish Singh did not plead by what arrangement he did so and Patel did not help him by specifying it.

Jagdish Singh purported to terminate Pan Africa's tenancy by serving on it on June 13, 1981 a notice dated June 12, 1981 to quit the premises at the end of that month. He did the same to Patel just in case Patel claimed he too had a tenancy of the premises. Patel and Pan Africa did not quit. So Jagdish Singh filed his plaint on July 21 that year and Pan Africa and Patel on August 17 1981 entered appearance and filed their one written statement of defence which Jagdish Singh suggested was sinister but it seems a perfectly proper and wise step for a tenant to take if his landlord is trying to evict him.

Pan Africa and Patel raised these issues among their defences (but not in this order) –

1. Jagdish Singh has not entitled to claim mesne profits from either of them.
2. They were not in arrears with the rent.
3. The tenancy was not effectively determined because –
 - (i) It was addressed to Pan Africa and Patel in the alternative.

- (ii) It did not require them to quit and deliver up vacant possession.
- (iii) It did not state which one's tenancy would expire on June 30, 1981.
- (iv) It did not state Jagdish Singh was their Landlord
- (v) The duration of the tenancy was not mentioned

4. The premises were subjected to the provision of the Rent Restriction Act.

5. The tenancy was a yearly tenancy which could only be determined by 12 calendar months notice and not a monthly one.

Despite this, Jagdish Singh filed his application for summary judgment 12 days later with an affidavit in support dealing with each paragraph of the written statement of defence and swearing that there was not valid answer to his claim and Pan Africa and Patel were entering lists merely to gain time. He pointed out the notice to quit exhibited to his affidavit was not addressed to Pan Africa and Patel in the alternative but to both of them. It certainly did require delivery of vacant possession when the notice expired. It made clear that Pan Africa was the only tenant. Jagdish Singh was mentioned in it as the landlord. It described the tenancy as a monthly one and because they were residential premises and the tenancy a periodical one from month to month it was determinable by a notice to quit at the end of the month by giving 15 days notice to do so. Section 106 of the Transfer of Property Act. The tenancy was not, therefore, a yearly one.

He went on to deny the Rent Restriction Act applied since the rent for the premises was over Kshs 800 a month and the tenancy was determined at the end of June 1981 after which Pan Africa and Patel were trespassers in the place. They had never paid any rent, he continued, and a bare denial that the arrears were Kshs 75,000 would not suffice.

Patel replied for Pan Africa and himself in an affidavit filed on October 9, 1981 in which he "repeated and confirmed" the facts alleged in their one amended written statement of defence. He annexed to it three of Jagdish Singh's statements of account, four letters from the plaintiff, two from Pan Africa and one statement and four invoices from it. Out of these annexures, as so often happens in such case, Jagdish Singh was said to owe Pan Africa Kshs 93,184.35 whereas Pan Africa and Patel owed Jagdish nothing which Jagdish Singh indignantly denied. There was no set-off or counterclaim by Pan Africa or Patel. This was emphasized by Mr Sehmi for Jagdish Singh when the hearing of the application began before Mr Justice Brar on October 13, 1981. He also pointed out that Pan Africa and Patel raised four invoices on April 30, 1981 debiting large sums for the cost of maintaining and extending the premises which Jagdish Singh denied authorizing them to do and, also, denied they had, in fact, done. They had shown by their very own documents that part of their defence was a sham or unfounded in fact. He also referred to section 106 of the Transfer of Property Act in support of Jagdish Singh's claim that the tenancy of the suit premises was a month to month one. They were not subject to the Rent Restriction Act because the Rent Restriction (Amendment) Act 1981 (No 5 of 1981) did not come into operation until July 3, 1981 and by that time that tenancy was terminated on June 30, 1981 so Pan Africa and Patel were not tenants but trespassers. Mr Joshi for Pan African and Patel harped on the failure of Jagdish Singh to plead or set out in the notice when the tenancy began and if it were a monthly one from what date to what date of each month it ran or that they were required to hand over vacant possession at the end of the month and at the end of which one.

Consequently they were protected tenants from July 3, 1981 by virtue of the provisions of section 3, of the Rent Restriction Act because from July 1981 their rent was Kshs 2,500 or less which was within the range for the standard rent under the Rent Restriction (Amendment) Act. He agreed that, in any event, the tenancy was a yearly one and it continued from year to year unless determined by 12 calendar months notice. He supported this submission by reference to section 41 of the Registration of Titles Act (cap 281), section 99 of the Government Lands Act, Chesire on *Real Property* 12th edition 399, 400 and Gour on *The Law of Transfer*, 7th edition, para 2625. These were triable issues, according to Mr Joshi, and he submitted the application should be dismissed with costs. Mr Sehmi's reply was that they were not well

founded arguments. The form of notice was not relevant and all that was required was that it should be clear which this one was. Tenancies that were effectively determined before July 1, 1981 were not caught by the amendments to the Rent Restriction Act.

Mr Justice Brar in his ruling of November 26, 1981 held the plaintiff disclosed a clear cause of action. The premises were immovable property, the tenancy was not made by a registered instrument and it was not a yearly one; section 107 of the Transfer of Property Act; so it was deemed to be a lease from month to month; section 106 (*ibid*) How was it terminable? By fifteen days notice from either the lessor or lessee expiring with the end of a month of the tenancy. It had to be in writing signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence or (if such tender or delivery is not practical) affixed to a conspicuous part of the property. Section 106 (*ibid*) The rent was calculated on a yearly basis but only because it was over 2 years in arrears but it was always demanded on a monthly basis. There was no payment of rent annually or agreement that this should be so. The purpose of the tenancy was not agricultural or manufacturing so the presumption is that it was from month to month. Mulla's *Transfer of Property Act*, 4th edition, 1956, page 615. The notice to quit so far as these tenants Pan Africa or Patel were concerned who were presumably conversant with all the facts and circumstances of it, were, when construed not with a desire to find fault with it but in accordance with the maxim '*utres magis valeat quam pereat*' (that an act may be valid rather than perish), perfectly valid. Gour on the *Law of Transfer*, 7th edition 1948 Vol II page 1566. Pan Africa and Patel held over after June 31, 1981 without Jagdish Singh's consent so they became trespassers and had no grounds for claiming the protection of the Rent Restriction Act Mulla (*ibid*) 759; *Cow v Casey* [1949] 1 KB 474, 478, 479, Lord Green MR. The allegation that Jagdish Singh owed Pan Africa Kshs 93, 148.35 was spurious. There were no *bona fide* or *prima facie* triable issues. The mesne profits would be Kshs 5,000 a month because Kshs 7,000 was arbitrary and not mentioned in the notice to quit. Now on the pleadings, the issues were whether or not –

1. Jagdish Singh had cause of action?
2. his notice to quit was valid?
3. Pan Africa's tenancy was from month to month?
4. Pan Africa's tenancy was a controlled one?
5. Pan Africa owed Jagdish Singh any arrears of rent?
6. Pan Africa should pay Jagdish Singh mesne profits?

Mr Justice Brar took as his guide line in deciding if he should or should not allow the application the principle enunciated by Madan JA in *Continental Butchery Ltd v Samson Musila Nthiva* Civil Appeal 35 of 1977 which is that the respondent must show a *bona fide* triable issue which would entitle him to defend.

He exercised his discretion and gave judgment. He did not dismiss it for some defect in the application itself eg, there was no verification of the cause of action or amount claimed. Order XXXV rule 1(2). He found Pan Africa and Patel did not satisfy him that either (a) there was an issue or question in dispute which ought to be tried or (b) there ought for some other reason be a trial.

On appeal, an interlocutory one, which is in practice in some respects a rehearing (see *European Asian Bank AG v Punjab and Sind Bank*, [1983] 2 All ER 508, 515h) this court will not hesitate, in an appropriate case, to decide questions of law under order XXXV, even if they are of some complexity and take a little longer to understand (*Cow v Casey* [1949] 1 KB 474, 481 (CA)) or else the case may go for trial and the argument will be repeated all over again with the possibility of yet another appeal (see *Verral v Great Yarmouth BC*, [1981] 1 GB 202, 215, 218 Lord Denning MR and Roskill LJ) which would defeat the purpose of order XXXV.

The learned judge did not err in law, in my respectful view, when he made certain orders in favour of Jagdish Singh against Patel. When the application was urged before him Jagdish Singh had claimed Patel was not his tenant but *ex abundanti cautela* still filed suit against him as a tenant but the written statement of defence of both Pan Africa and Patel never made clear Pan Africa and not Patel was Jagdish Singh's tenant so there was justification for entering judgment against Patel in favour of Jagdish Singh if leave to defend was unwarranted. Clearer pleading by Patel's advocate would have avoided this.

He made no error of law, in my view, when he held that Pan Africa and Patel could not claim the protection of the Rent Restriction Act if the tenancy was effectively determined on June 30 1981 because thereafter they became trespassers. The Rent Restriction (Amendment) Act 1981 (No 5 of 1981) received the President's assent on June 29 1981, one day before the expiry of the notice to quit, but the Act commenced on July 3, 1981. Any premises the rent of which was Kshs 800 or less a month was a 'controlled' one before July 3, 1981 but on and after that day the limit was Kshs 2,500 or less a month.

Mr Khanna for Pan Africa (and Patel) in this appeal submitted that the Amendment Act was retrospective and or the relevant law to be applied by the High Court was that which obtained at the date of the hearing of the application and by the Court of Appeal at the date of the hearing of the appeal. It would be in each event the amending Act and the tenancy would be protected one, so the High Court had no jurisdiction to deal with the application.

The Divisional Court (Sankey and Talbot JJ) in *Landrigan v Simons*, [1924] 1 KB 509, 513 held that the judgment of the county court judge was perfectly correct when it was delivered in an action to recover rent paid in excess but wrong when the appeal was heard and appeal judgment delivered because the Rent Restriction Act 1920 was amended two days after the judgment in the lower court. That amendment, however was clearly retrospective because it provided that a notice of intention to increase the rent, 'whether served before or after that passing of the amending Act would have effect and would be deemed always to have had effect'. The amendment in the matter before Mr Justice Brar and this court is not in the same form and is not on that score retrospective.

The House of Lords in *Attorney-General v Vernazza*, [1960] AC 965 held it had jurisdiction to vary an order of the High Court if the terms of an amending Act were retrospective, procedural and providing a new remedy, but not if it altered substantive rights because the High Court could itself have made the same variation had it been applied for. The circumstances in that case were that on April 9, 1959 the High Court made an order prohibiting Vernazza from instituting proceeding in the High Court or in any other court without leave. On May 14, 1959 an act amending the 1925 Act dealing with vexatious litigants gave the High Court the power to prohibit such a litigant from continuing with his legal proceeding instituted before the making of such an order. Although this was probably not a retrospective amendment it did provide a new remedy and, in all, did not affect substantive right. The amendment Act in this appeal before us, however, was not retrospective nor of a procedural nature and certainly affected the substantive rights of the landlord and tenant. Rudd J in *Dhupa v Birdi* [1967] ER 568, 569 was unable to distinguish *Remon v City of London Real property Co Ltd*, [1921] 1 KB 49 and held that if a tenant whose tenancy has been determined holds over and remains in possession until such time, as, by an amendment to the current Rent Restriction Act, the premises becomes controlled, he becomes entitled to the protection of the Act. This is some support for Mr Khanna's submission.

It was not, however, cited to the former Court of Appeal for East Africa in *Jivraj v Devraj*, [1968] EA 263 which held that the Rent Restriction (Amendment) Act, 1966 did not have retrospective effect so as to prevent Jivraj in pending proceedings from obtaining possession from Devraj who had ceased to be a tenant before the amending Act became effective. Here, Jagdish Singh filed his suit on July 21 1981 which is after the amending Act came into force so it might be argued *Jivraj v Devraj* did not apply. The question still is, however, whether the terms of the amending Act apply to persons who had ceased to be tenants before the commencement of that amending Act?

Sir Charles Newbold P in *Jivraj v Devraj* proceeded to deal with the question in that appeal in this way. Where a person has ceased to be a tenant at a date prior to the date on which an amending Act comes into force normally that person could not be regarded as a tenant at the date of the amending Act. It would be

incorrect to call someone a tenant who had no right to be in possession of the premises at the date when those premises came into the ambit of the amending legislation because his tenancy had been duly determined but who nevertheless had wrongly continued in possession. The amending act would apply naturally to all tenants lawfully still in possession, of course no matter even if the tenancy originated prior to the beginning of the amending Act.

Jagdish Singh gave Pan Africa and Patel a notice to quit which was, for the purpose of this issue, effective for June 30, 1981. After that date Jagdish Singh was entitled at common law to bring an action for the recovery of the premises and the ejection of Pan Africa and Patel from them. When the amending Act came into operation bringing premises of the class of which they had been the tenants within the purview of the principal act the question which then arose was whether they (who were wrongfully in possession of them) could be regarded as being ‘tenants’ within the meaning of the principal Act?

I must now set out the relevant sections. Section 14(1) provides that

“14(1) No order for the recovery of possession of any premises or for the ejection of a tenant there from shall be made unless.....”

certain conditions are fulfilled.

And section 3(1) of it defines “tenant”, except when the context otherwise requires, thus-

“tenant” includes a sub-tenant and any person from time to time deriving title under the original tenant, and the widow of a tenant who was residing with him at the time of his death, or where a tenant leaves no widow or is a woman, such member of the tenant’s family so residing as may be determined by the court notwithstanding that the rights under the tenancy may have passed, on the tenant’s death, to some other person.

Section 24(1) states that –

A tenant who under the provisions of this Act retains possession of any premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy.

Relying on the last section, to some extent, the English Court of Appeal held in *Remon v City of London Property Co Ltd* [1921] 1 KB 49, *Hutchinson v Jauncey* [1950] 1 KB 574 and *Jones v Rosenberg* [1950] 2 KB 52 (followed by Rudd J of the then Supreme Court of Kenya in *Durga Dass v Gurdip Singh* HCCC 1327 of 1966 and *Dhupa v Viridi* [1967] EA 568, 569 (K) and Chanan Singh J if the same court in *Jivraj v Devraj* that he could be because the relevant amending Act operated retrospectively so as to prevent the landlord from obtaining an order for possession. It was admitted that this strained the meaning of the word “tenant but the object of the legislation was to protect certain tenants and it would be defeated unless the courts gave the word this unnatural meaning. So, in effect, the normal law to be applied in the rent restriction cases was that obtaining at the date of judgment and not that at the date when the legal proceedings were initiated.

But this, Sir Charles Newbold pointed out, is contrary to the common law and to section 23(3) of the Interpretation and General provisions Act (cap 2) which provides *inter alia*:

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not –

(a)

(b)

(c) affect a right, privilege, obligation or liability, acquired, accrued or incurred under a written law so

repealed;

(d)

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealed written law had not been made”

It is also not right, without there being express or a necessary implication in the amending Act to override such rights in order to protect a very small class of persons, that is persons who if their tenancy continued, said Sir Charles Newbold, would have come within the protection of the amending act and the act but whose tenancy had been lawfully determined prior to the operation of the amending act and the wrongly continued in possession until the amending act came into being. And just because it is legislation to protect tenants that intention cannot mean the amending act had retrospective effect or else all legislation designed to protect a section of the community, or indeed, the community as whole would have retrospective effect.

A summary of the principles to be culled from these and other authorities cited by Mr Khanna is this. The general rule is that a statute should not, in the absence of express provision, be construed so that it deprives people of their accrued rights. *Zainal bin Hashim v Malaysia Government*, [1980] 2 WLR 136, 140 (PC); section 23 (3) *Interpretation and General Provisions Act* (cap 2) *Craies on Statute Law*, 7th edition (1971), p 389. And to take a rent restriction case out of the ambit of that principle the question of whether there is or is not a letting within the properly applied legislation must be decided on the facts existing at the time of the date when the writ is issued (in England; *Dobson v Richards*, [1919] WN 166 KBD) Lord Reading CJ: *Prout v Hunter*, [1924] Leslie & Co Cumming, [1926] 2 KB 417; *Turner v Baker*, [1949] 1 KB 605: or the date of the judgment. *Remon v City of London property Co Ltd*, [1921] 1 KB 49 (CA).

So the amending Act applies, and those whose tenancies had been lawfully determine prior to the operation of the amending act and who had wrongly continued until the act came into operation were protected providing there were no pending legal proceedings when the amending act began. *Remon v City of London Property Co Ltd* (*ibid*)

This was not so, however, if there were legal proceedings for ejection and so forth before the amending Act began; *Noranha v Devja*, [1954] AC 49; unless on the construction of certain sections of the amending Act it is clear that there was a necessary intention that the amending Act should have retrospective effect; *In re Joseph Suche & Co Ltd* (1875), L Ch D 48, 50. Jessel MR *Hutchinson v Jauncey*, [1950] 1 KB 574 (CA): Maxwell on *Interpretation of Statutes*, 10th ed, p 221.

And decision of the English Courts (especially the Court of Appeal) in all this are not lightly to be disregarded because the legislation in Kenya has the same object and is similar in some respects. *Jivraj v Devraj*. The *Remon* decision was wrong, nevertheless, because the reasoning behind it was false, as Sir Charles Newbold P indicated, but it had probably been acted upon for years and it is clearly wrong, and gives rise to injustice. Sir Charles Newbold P and Spry JA in *Jivraj v Devraj* both disapproved of *Remon* and, with respect, I agree with them. Besides, *Jivraj v Devraj* has now stood for 16 years and also been acted on, or so I think.

Coming back to Jagdish Singh, Pan Africa and Patel, the facts are that at the time of the filing of the plaint under the relevant amending and principal Acts there was no letting. The premises are not subject to control until July 3, 1981. The tenancy of Pan Africa and or Patel had been (if it were a month to month tenancy) properly determined by a notice to quit (with two days to spare) and when the plaint was filed they were not tenants at all. They were trespassers and, in truth, thereafter they were trespassers continuing to trespass.

I can find nothing in the amending Act, even remotely, indicating any retrospective intent. It simply

protected those who were lawfully in possession of the premises (statutory tenants) on and after July 3, 1981. It follows, in my view, that there was no breach of the Rent Restriction Act so the ruling of the learned judge on this was not a nullity. Of *Smith v Poulter*, [1947] KB 339, Denning *J Peachey Property Corporation Ltd v Robinson*, [1967] 2 KB 543 (CA).

The next issue on the pleading was whether or not the learned judge was right in holding the notice to quit was effective or in another word, valid? Jagdish Singh's advocates Mandla and Sehmi, wrote on June 12 1981 to both Pan Africa and Patel and said that on instructions

“.....we hereby determine the monthly tenancy in respect of the above premises in which Mr K M Patel is now residing on June 30, 1981 or at the end of the month of the tenancy which will expire next after the end of the month of the tenancy which will expire next after the end of fifteen days from the date of the service of the notice.”

It was served on Pan Africa the next day. There is disagreement between the parties on whether it was a yearly tenancy or a limited period one (of a month) and whether it was determined by proper notice to quit. Now, if the premises are protected the notice must be in writing and where the period is not elsewhere specified in the Act it shall not be less than one month's notice ending at the end of a tenancy month and the tribunal must construe notices to quit liberally and without undue regard to technicalities. Section 15 Rent Restriction Act. But if it is not protected the technicalities abound. See Halsbury's *Laws of England*, 3rd edition volume 23, pages 516 – 531 inclusive. So, there was another triable issue entitling Pan African and Patel to defend.

Further issues were what was the agreed rent and whether or not Pan Africa and Patel were in arrears and I agree with Nyarangi Ag JA that these were also triable issues thrown up by the pleadings and the affidavits. Jagdish Singh did not ask Patel for payment of arrears of rent in his application to the judge overlooked this and erred in law when he made an order against Patel that he should pay them.

Mesne profits was another matter on which leave to defend should have been given because in the notice to quit they were forecasted as a sum “well above Kshs 5,000 a month”, the plaintiff upped them to Kshs 7,000 a month which was not admitted as the correct figure to claim for them and the judge chose Kshs 5,000 a month because no notice had been given that the claim would be Kshs 7,000 a month and he considered it an arbitrary one. It was submitted that they were often double the amount of the agreed rent. There was, however, no report by an expert on the rental value of these premises and comparable ones nearby after June 30, 1981 to support either sum another triable issue, in my view.

Was this an application that the judge should have dismissed with cost to be paid forth with? Order XXXV rule 8(2): *Trikam Maganlal Gohil & Anr v John Waweru Wamai*, Civil Appeal 42 of 1982. I agree with Hancox J A that it was not, and for the reasons he set out in his judgment to follow. The issues of whether the premises were controlled or not if they were let on a month to month tenancy apart, the appeal was not a complex one so it does not warrant an award of costs for two advocates. The upshot is, that, in my judgment, the appeals of Pan Africa and Patel should be allowed and that, instead, both should be given unconditional leave to defend. Hancox JA and Nyarangi Ag JA agree so those will be the orders of the court.

Hancox JA. I have had the advantage of reading in draft the judgment of Kneller J A and I agree with it. I agree that there were at least three triable issues before the judge and for that reason, leave to defend the suit should have been given. This was not a straight-forward lease or tenancy agreement, but one the terms of which had to be inferred from the correspondence and statements of account contained in the bundle of documents exhibited to the second appellants' affidavit, filed in response to the application for summary judgment in the High Court. There is not even an assertion or averment of how and when the tenancy commenced in the pleadings or in the affidavits.

Nevertheless this is not like, for example, a running down action, or similar action in tort, when there can exist a genuine dilemma as whom to sue (See Harman LJ in *Salisbury v Woodland* [1969] 3 AER, 869, at P 881). The respondent in this case must have known with whom he contracted to let the premises in

Riverside Drive, Nairobi. In my opinion Mr Gautama can not now be heard to argue on behalf of the respondent that this was a case within order I rule 7 of the Civil Procedure Rules, justifying the action against both, so that his client could obtain the necessary eviction order against a person not the legal tenant. It seems to me that the situation is amply, I might almost say expressly, covered by our rule 31 of order XXI of those rules.

As Kneller JA has pointed out, there was no prayer against both appellants jointly and severally in the plaint and there was no claim in the notice of motion against the second appellant for Kshs 75,000 alleged arrears of rent, and the judge should not have entered judgment against both the appellants as he did. For this reason the second appellant's appeal would necessarily succeed were it not merged in the success of the appeal generally.

I turn to Mr Khanna's argument, on behalf of the appellants, that the Rent Restriction (Amendment) Act, 1981, which did not come into force until July 3, 1981 (three days after the purported termination of the tenancy by the letter of June 12, 1981) operated retrospectively, so as to bring the premises (assuming the correct rent to have been Kshs 2,500 per month or less) within the Principal Act (cap 296). I am in agreement with that which has fallen from Kneller JA on this issue, that the amending act did not operate retrospectively, and in particular that, in my judgment, the decision in *Jivraj v Devraj*, [1968] EA 263, was with respect, perfectly correct and that we should follow it in the instant case.

Mr Khanna's last point was that this was a case where it should have been obvious to the respondent that the appellants' contentions were such as to entitle them to unconditional leave to defend. Accordingly this was one of those limited class of cases where, as was made clear in *Trikam Maganlal Gohil and another v John Waweru Wamai*, Civil Appeal 42 of 1982, the application for summary judgment should have been dismissed with costs to be paid forthwith by the respondent, under rule 8(2) of order XXXV. The sub-rule is obviously intended to discourage unjustified application for summary judgment.

It may be that the respondent made haste to file his application for summary judgment, the amended plaint being filed August 27, 1981, and the notice of motion only two days later. Nevertheless, in my view though the judge erred in granting summary judgment, any express finding that the respondent knew that the appellant would be entitled to leave to defend would have been obviously inconsistent with his decision. I am not prepared to say that the judge necessarily would, on the material before him, have reached such an express finding (see Law JA in *Gohil's* case supra) had he taken a different course. I would therefore reject this head of Mr Khanna's argument, which does not seem specifically to be covered by his rather voluminous memorandum of appeal. The foregoing is without prejudice to the general question of costs which Mr Gautama asked should be left over until after our decision on the appeal. In the result, I agree that this appeal should be allowed and that leave to defend should be given to both appellants as indicated by Kneller JA and with the orders proposed by him.

Nyarangi Ag JA. I agree with judgment of Kneller JA which I have read in draft. There were several triable issues disclosed before the trial judge. There was no conclusive evidence as to what the rent was at the time of letting. That was compounded by the lack of independent valuation of the rental value of the premises at any time. That was a triable issue and the trial judge erred in not granting leave to defend.

The oral tenancy agreement had much to do with the parties' mutual account, which account was credited and debited according to their agreement, towards rent. It was not open to the trial judge to criticize the mode of payment to the disadvantage of the appellants; See *Re Footman Bower & Co Ltd* (1961) 2 All ER 161. On the affidavit evidence before the trial judge a triable issue was disclosed as to whether or not there were arrears of rent.

The amended plaint touched on the second appellant unusually lightly. Paragraph 5 which is the sole reference to the second appellant reads.

"The said notice to quit was subsequently served also on the second appellant himself personally on the said June 13, 1981, determining any tenancy in the said premises which might be claimed by him."

That is not a positive or assertive claim against the second appellant. In the joint defence, the second appellant stated that there was not averment that either he or the other appellant was a tenant. The plaintiff stated in his affidavit that the second defendant.

“is not and never has been a tenant at all....”

There is substance in Mr Gautama’s contention that the second defendant made common cause with the first appellant and that he plunged into the arena. But the second defendant’s defence was clear from the outset. The second defendant was not joined so as to avoid the filing of another action. See *Overseas Touring Co v African Produce Agency* (1962) EA 190, but in the hope that the plaintiff would get a meaningful judgment. However, a perfectly meaningful judgment against the first appellant would have been available to the plaintiff by virtue of rule 31 of order XXI. There was not valid basis for impleading the second defendant and no judgment should have been entered against him.

The date of commencement of The Rent Restriction (Amendment) Act, 1981, No 5 of 1981 (the Act) is the July 3, 1981. Mr Khanna argued that the Act operated retrospectively so that notwithstanding the letter of June 12, 1981 seeking to terminate the tenancy, the premises would be brought within the Act provided the rent was Kshs 2,500 per month. An Act can operate retrospectively, I think, only when there is such express provision in the Act. There is nothing in the Act on which retrospective operation can be based or implied. I agree that act No 5 of 1981 did not operate retrospectively and concur with Kneller JA that the decision in *Jivraj v Devraj* (1968) EA 263 is correct.

I agree that this appeal be allowed to the extent set out by Kneller JA.

Dated and Delivered at Nairobi this 3rd day of May 1984.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

AG. J.O.NYARANGI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR