

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 2140 OF 1980

1. MADAN AGGARWAL

2. SADRUDIN SIDI.....APPLICANTS

VERSUS

SURJIT SINGH.....RESPONDENTS

JUDGMENT

This is an application for summary judgment under Order XXXV rules 1 and 2. Two suits have been consolidated. The plaintiffs in each are the same persons. They are landlords of a block of flats. The defendants are tenants, each occupying one of these flats. The landlords seek in each case possession, mesne profits, costs and interest. They say that by an oral agreement with each of the defendants they let the flats to them at a rent of Kshs 1,500 per month which tenancies they terminated by notices to quit duly served on the defendants.

The plaintiffs purchased the property in September, 1977, for Kshs 600,000. The rents of all the flats were then controlled, the defendants each paying Kshs 500 per month. The plaintiffs applied to the Rent Restriction Tribunal for decontrol. The Tribunal considered that the purchase price was not excessive (see Section 4 (27(a)) of the Rent Restriction Act Cap 296) and assessed the rent of the defendants' flats at Kshs 1,070 per month. If the Tribunal had taken into account the fact that the rents were controlled it is unlikely that they would have found the purchase price not to be excessive. It was not until some months later however that I held in *Kalyan v Rasi Properties Ltd* (CA 127 of 1979) that in valuing a property the Tribunal must take into account controlled rents among other encumbrance at the time of purchase. There has been no appeal however against the Tribunal's decision in the present case. The assessment of the rent at Kshs 1,070 per month I think may properly be considered as an incidental part of the Tribunal's ruling that the flats ceased to be subject to the Rent Restriction Act. Thereafter they proceeded to record an agreement between the landlords and the tenants that the tenants pay a monthly rent of Kshs 1,500 per month that the tenants to be at liberty to vacate earlier by giving one month's notice to the landlords.

This is the oral agreement on which the plaintiffs rely. The agreement is preceded by the contraction "OBC" which presumably means "Order by Consent." Mr RN Khanna appearing for the defendants / respondents contended that this consent order was ultra vires the Tribunal and a nullity. Both defendants however have paid the rent of Kshs 1,500 per month without protest until the end of the period of 12 months ie until February 29, 1980.

The plaintiffs served notices to quit dated January 30, 1980 to take effect from February 29, 1980. The only reaction of the defendants was to beg for further time to find alternative accommodation. The "OBC" record by the Tribunal must, I think, in the circumstances be regarded merely as a record made by the Tribunal of an oral agreement reached in their presence by the plaintiffs and the defendants, both of whom were represented by advocates. It is not an order made by the Tribunal. Mr Khanna further submitted that the notices to quit were not properly served. Service he said was by registered post for which no provision is made in Section 106 of the Transfer of Property Act.

There is no doubt that service on the defendants was effected. Both notices to quit are marked "Hand delivery." Mr Khanna relies on the fact that these words have been struck out on the photocopy of one of these notices and the words "By Reg Post" substituted in manuscript. There is no evidence to show how they were served. The receipt of both notices to quit is acknowledged in letters to the plaintiffs' advocates

by advocates to whom the notices were referred by the defendants and no objection is made to the method of service or validity of the notice. The point is a technicality of no substance which is in any event raised neither in the defences filed nor in affidavits.

Mr Khanna further submitted that the notices to quit were invalid in the absence of any material to show when the original monthly tenancies ended. He referred to *Valji v Byramjee & Sons* [1952] XXV KLR 8. The defendants however entered into the fresh agreements with the landlords in the presence of the Tribunal under which the monthly tenancies ended on the last day of each month. I see no reason to hold that the notices to quit were invalid.

Mr Khanna also submitted that the affidavits filed by the plaintiffs were defective in that they failed to swear to the facts verifying the cause of action and failed to state that in the deponents' belief there was no defence to the action. There is no substance in this submission. In affidavits sworn jointly by the plaintiffs they not only confirm the correctness of the plaint but exhibit documentary evidence in support of the facts stated in the plaint. They do not add that in their belief there is no defence to the action, these words are not specifically required by Order XXXV rule 1 and although they appear in For No 3A of Appendix A they are not strictly necessary where a defence has already been filed. Their omission in such cases is a mere technicality since it is for the court to determine whether or not the defence filed raises a triable issue.

In my opinion the defendants/respondents have failed to show any triable issues and there will be judgment for plaintiffs against the defendant in each case for possession of the premises occupied by him such possession to be delivered up on or before the 30th day of June, 1981. The plaintiffs are entitled to mesne profits and interest thereon from March 1, 1980 until the date on which possession is recovered such mesne profits to be assessed by the court filing agreement. The defendants will pay the plaintiffs' costs and interest thereon.

Dated and Delivered at Nairobi this 30th day of April 1981.

A.H.SIMPSON

JUDGE