IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Madan, Potter JJA & Kneller Ag JA)

CIVIL APPEAL NO. 5 OF 1982

BETWEEN

SHAH.....APPELLANT

AND

PADAMSHI.....RESPONDENTS

(Appeal from the High Court at Nairobi, Cockar J)

JUDGMENT

Madan JA This litigation began with the respondents' application made to the Nairobi Rent Tribunal established under the Rent Restrictions Act (cap 296), for assessment of the standard rent of residential premises situated in Nairobi which the appellant occupied as the respondents' tenant at Kshs 800 per month. On July 21, 1980 the tribunal assessed the standard rent of the premises at Kshs 1,010 p m.

By notice in writing dated August 1, 1980 the respondents terminated the appellant's monthly tenancy and required him to vacate the premises on August 31, 1980. The notice was sent to the appellant by ordinary post without a certificate of posting at his postal box address number 72914, Nairobi. The appellant having failed to vacate the respondents filed a suit in the High Court for his ejectment from the premises. The appellant filed his defence containing averments, *inter alia* that his tenancy had never been terminated, the Act applied to the premises and the suit was improperly filed in court as he was a protected tenant at the standard rent of Kshs 800 per month, and the assessment of rent by the Tribunal was a nullity inasmuch as he was not served with notice of hearing for assessment of the standard rent by the Tribunal. The respondents lodged an application under the summary procedure for an order *inter alia* for the appellant to vacate the premises. Two of the sworn statements in the affidavits of the second respondent in support of the application for summary judgment were that when the appellant was informed the Tribunal had assessed the monthly rent at Kshs 1,010 he offered to pay the rent of Kshs 2,000 per month: secondly, when the second respondent called at the appellant's shop on August 11, to collect the outstanding rent the appellant showed him the original of the notice to quit and asked why the respondents wished him to vacate the premises when he was prepared to pay an increased rent.

Mr Pall was the advocate acting for the respondents. His assistant Mr Okach also swore an affidavit deponing that he personally served the respondents' application for assessment of the standard rent together with the Tribunal's hearing notice which informed the appellant the assessment would be made by the Tribunal on July 21, 1981 by delivering these two documents to the appellant who was known to

him having been previously pointed out to him by the second respondent. The appellant accepted service of the two documents and acknowledged receipt thereof by signing on the reverse of the carbon copy of the hearing notice which Mr Okach returned to the Tribunal with a formal return of service. Mr Okach attached a photocopy of the hearing notice allegedly bearing the appellant's signature on the reverse of it. The appellant filed an affidavit in reply. He reiterated on oath that the assessment of the standard rent by the Tribunal was a nullity; he also did not receive the alleged notice dated August 1, purporting to terminate his tenancy, and he never showed it to or had any conversation about it with the second respondent.

On the affidavit evidence before him the learned trial judge held that the appellant's credibility as well as his *bona fides* were heavily damaged by his claim in his replying affidavit that he was neither served with the respondent's application for assessment of the standard rent nor was he informed of its hearing date; the hearing notice was served on the appellant and he signed on the reverse side of it. One did not need to be a handwriting expert to notice that the signature of the person receiving the notice (comparing it with the appellant's signature on his replying affidavit) was that of the appellant. The appellant was not a truthful person. The judge went on to say that the notice terminating the tenancy was duly posted to the appellant, he "in fact received it" and his tenancy "was in fact terminated at the expiry" thereof on August, 31 1980. No triable issue had been raised by the defence and the appellant did not have a *bona fide* defence. The judge made an order for possession of the premises.

The appellant has appealed. The main ground of appeal is that the appellant never received the notice terminating his tenancy, and due receipt of the notice to quit being in issue it should have gone to trial as a presumption as to delivery in due course of post is confined to registered letters only. This was a triable issue.

The first error that took place in the court below was that the judge compared the appellant's two signatures. It is normally wrong for a court to compare handwriting without the assistance of an expert, Duffus VP in *Shah v Aguto* [1970] EA 263 at p 268. This error led to a second error, ie to condemn the appellant as unworthy of credit in relation to the notice terminating the tenancy – an instance of correlative condemnation – because the judge thought he had lied about the non-receipt of the hearing notice. While on the subject of *bona fides* the judge failed to note that while the hearing notice was served personally upon the appellant, and while the second respondent made it convenient to call at the appellant's place of business personally to collect the rent, an important document like a notice terminating the tenancy was dispatched by ordinary post. It is the easiest of things for a person to deny the receipt of a letter, the respondents advocate said. It was also the easiest of things to send the communication by registered post or at least obtain a certificate of posting. I do not accept the submission that there is a presumption that a letter sent by ordinary post would reach the addressee in due course. Such a presumption arises only in the case of a letter sent by registered post as stated in section 3(5) of the Interpretation and General Provisions Act, (cap 2). Nor do I accept the submission that section 119 of the Evidence Act saves the situation for the respondents. That section cannot create a presumption in the case of a letter sent by ordinary post, it being excluded by section 3(5) (supra).

Section 106 of the Transfer of Property Act provides that a monthly tenancy shall be terminable, on the part of either lessor or lessee, by fifteen days notice expiring with the end of a month of tenancy. Every notice under this section must 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 practicable), affixed to a conspicuous part of the property. I am of the opinion that if none of the other methods stated above is followed notice terminating tenancy may be served through the post. If it is sent by ordinary post, and without a certificate of posting, the person giving it takes the risk of facing a situation such as in this case.

While the appellant was not in a position to challenge the posting of the notice at his postal address, he was however entitled to plead, as he did, that he did not receive the notice. The nature and content of the alleged conversation regarding the notice narrated in the second respondent's affidavit, in particular the alleged offer to pay increased rent when it was being contested all the time, required that both his and the respondents' evidence be subjected to cross-examination to test it so that the court may assess the

demeanour and veracity of the witnesses. That could only be done by holding a trial with the advantage of cross-examination. A party who contends that he did not receive a particular letter by post can do no more than to deny the receipt of it, and bare though the denial appears by itself, it is capable of raising a triable issue. As the situation stood, with respect, the judge failed to note that a triable issue existed. He was also in no position to hold that the appellant "*in fact*" received the notice. If he meant to say the appellant *must* have received the notice, he should have said so, and said what he meant with the reasons for his opinion. Except in the clearest of cases, which this one was not it is inadvisable for the court to prefer one affidavit to another in order to enter summary judgment. Summary judgment is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the defendant will not succeed at the trial. This appeal must be allowed with costs. The decree of the High Court is set aside, and the appellant given unconditional leave to defend before another judge. The costs of the application for summary judgment to be in the cause.

Potter JA. I have had the advantage of reading in draft the judgment of Madan JA. I agree with it and with the order proposed and have nothing to add.

Kneller Ag JA. I agree with the judgment of Madan JA and the orders proposed in it.

Dated and Delivered at Nairobi this 24th day of September 1982.

C.B.MADAN

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

A.A.KNELLER

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AG.JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR