IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Law, Miller & Potter JJA)

CIVIL APPEAL NO. 28 OF 1980

BETWEEN

SAHEB.....APPELLANT

AND

HASSANALLY.....RESPONDENT

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

JUDGMENT

The respondent had been tenant of two shops in Kirinyaga Road, Nairobi (herein referred to as "the premises") for about 20 years, when on October 25, 1976 his landlord the appellant issued a tenancy notice pursuant to section 4(2) of the Landlord and Tenant (Shops, Hotels, and Catering Establishment) Act, 1965 (cap 301) herein referred to as "the Act"), and then endeavoured to serve that notice on the respondent in accordance with section 4(6) of the Act.

The notice was unusual in that it sought alternative remedies, namely termination of the controlled tenancy or alternatively an increase of rent from Kshs 350 per month to Kshs 3,500 per month. The termination was sought on the grounds provided in section 7(1) (b) (default in the paying rent) and 7(1) (g) (landlord's intention to occupy the premises). The respondent did not notify the appellant landlord under section 6 of the Act that he did not wish to comply with the tenancy notice, nor did he refer the matter to a Tribunal established under the Act. The effect of such omission under section 10 of the Act is that a valid tenancy notice which has been duly served takes effect from the date specified therein in accordance with its terms.

The respondent did not give up possession of the premises and on June 13, 1977 the appellant filed a suit against the respondent in the High Court for possession of the premises, arrears of rent and mesne profits. A defence was filed in July, 1977, but the case did not come up to trial until December, 1979. In his judgment the learned judge held that by the end of the trial the triable issues had been reduced to three, namely;

1. Whether there had been such default in the payment of rent as constituted a ground for termination of the tenancy under section 7(1) (b) of the Act.

2. Whether the tenancy notice was valid and duly served.

3. What arrears of rent and mesne profits would the landlord be entitled to if successful in his claim.

The learned judge held in the appellant's favour on the second issue as to the validity of the notice, but on the first issue he found that sufficient default in the payment of rent had not been proved, and he dismissed the suit.

There is an appeal and cross-appeal before this court. The cross appeal keeps alive in this court the issues as to whether the tenancy notice was valid and duly served.

Mr Le Pelley, who appears for the appellant, does not challenge the judge's finding that there had been sufficient default in the payment of rent to constitute a ground for termination of the tenancy. But one of his grounds of appeal is that the learned judge overlooked the fact that the tenancy notice claimed possession on two grounds, and that the respondent never contested the validity of the second ground, which was that the appellant required possession of the premises for the purpose of carrying on a business.

The issues arising before this court, in the order in which it is convenient to consider them, are:

1. The validity of the tenancy notice.

2. The due service of the notice.

3. The effect of the respondent's failure to refer the notice to a Tribunal.

4. The arrears of rent and mesne profits.

<u>The validity of the Tenancy notice.</u>

Section 4 of the Act provides according to its marginal note for "Termination of, and alteration of terms and conditions in, controlled tenancy." Subsections (1) and (2) of section 4 are as follows:

"4. (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this act.

(2) A landlord who wishes to terminate a controlled tenancy, or to alter to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form."

The respondent's contention is that the word "or" first appearing in section 4(2) (ie "to terminate… or to alter") is disjunctive and not conjunctive, and that a landlord cannot in one and the same tenancy notice give notice of the termination of the tenancy and notice of alteration of the terms of the tenancy. The prescribed form referred to in section 4(2) is Form A in the regulations (L N 19/1966).

The words of paragraph 1 of Form A

"1. I …. of…. the landlord of the above-mentioned premises, hereby give you notice terminating/altering terms/altering conditions/of your tenancy with effect from….day of …19…"

The appellant's notice varied part of the paragraph to read:

"……..hereby give you notice terminating your tenancy alternatively altering its terms with effect from…."

The words of paragraph 2 of the Form A are:

"2. The alterations which I propose are:…."

The appellant's notice read:-

"The alteration I propose is an increase of the rent to Kshs 3,500 being the rent at which the premises might reasonably be expected to be let in the open market."

The words of paragraph 3 of Form A are:

"3. The grounds on which I seek the termination/ alteration are ……."

The appellant's notice read:

"3. The grounds on which I seek the termination are

(a) that you have defaulted in paying rent for a period of two months after such rent has become due, Kshs 5,950 being in arrear of the monthly rent of Kshs 350

(b) That I require possession of the premises for the purpose of running a clinic for the Dawoodi Bohra community."

The remainder of the appellant's notice followed the form exactly.

Mr Sharma, who appeared for the respondent, described this notice in the alternative as an "indefensible absurdity", whatever that may mean, and asked how could a tenant reply to such a notice, and what would be the result if the tenant did not refer the notice to a tribunal. I agree with the learned judge that such a notice creates no difficulty for the tenant.. The tenant could notify the landlord that he does not agree to comply with the notice and refer the matter to a Tribunal and then oppose both termination and alteration. Or the tenant could agree to either termination or to alteration in which case the landlord would be bound by the tenant's election. If the tenant did not refer the notice to a tribunal, and section 10 of the Act came to be applied, the result would depend in my view on the proper construction of the notice. In the case of this notice the landlord has expressed a preference for termination by the wording of paragraph 1, and would in my opinion be entitled to termination.

Mr Le Pelley has argued that there is nothing in the subsections (1) and (2) of section 4 of the Act, or in Form A, or in the purposes of the Act, to prevent a landlord from issuing a tenancy notice in the alternative. I agree with that submission. As he pointed out, the word "or" may be disjunctive or conjunctive according to the context and the purposes of the Act. The practice adopted by the landlord in this case seems to me to be in no way prejudicial to the legitimate interests of the tenant. I see no reason why a landlord, who seeks a termination of the tenancy on one or more grounds, but who also, if the tenant agrees, is prepared to accept a stated enhancement of the rent instead, should be required to take his case before a Tribunal in a piecemeal fashion, with no doubt added delay and expense.

Mr Sharma also submitted that the notice was defective in that paragraph 3(b) did not adequately set out the ground for terminating the tenancy in section 7(1) (g) of the Act, which is:

"(g)…that on the termination of the tenancy the landlord himself intends to occupy for a period of not less than one year the premises comprised in the tenancy for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

Section 4(5) of the act provides:

"(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned,…."

Mr Sharma relies on the fact that the appellant did not state in his notice his intention to occupy the premises for a period of not less than one year. I do not agree that this was necessary. In my view the notice adequately specified the statutory ground contained in section 7(1) (g).

I do not consider that there is anything else in the form of the appellant's notice to render it invalid. There is no substantial or misleading departure from the words of the form. In so far as there is any departure, the appellant may rely upon section 72 of the Interpretation and General Clauses Act (cap 2), which provides that any document which purports to be in a prescribed form shall not be void by reason of any deviation therefrom which does not affect the substance of the document, or which is not calculated to mislead.

Service of the tenancy notice.

There is nothing in this point. The notice was sent to the respondent's last known address in Kenya, and was received and acknowledged by his son, and adult member of his family, thus fully satisfying the requirements of section 4(6) of the Act.

The effect of the failure of the respondent to refer the notice to a Tribunal

What should the learned judge have done on being satisfied that a valid notice has been duly served under section 4 of the act and that no action has been taken by the tenancy under section 6 to refer the matter to a Tribunal? Section 10 of the Act provides the answer:

"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 with 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 the rights or services enjoyed thereunder".

In my opinion it is clear that under the terms of section 10 if a valid notice is not referred the landlord is entitled to possession without having to prove any of the statutory grounds relied upon in the notice. To be valid a tenancy notice must comply with the provisions of section 4, including the requirements of the use of the prescribed form, of setting out the statutory grounds for relief and of due service. The learned judge was wrong in this case to investigate the grounds relied upon in the notice, but even then he should have given judgment for the appellant on the ground that was conceded, namely that the landlord required the occupation of the premises for the purposes of his business (section 7 (1) (g)). The learned judge was in error in not awarding possession of the premises to the appellant in accordance with section 10, without making any inquiry into the validity of the grounds relied upon. It would appear from the record that Mr Le Pelley took a preliminary point in reliance on section 10, but that by consent it was not argued as a preliminary point. Mr Le Pelley referred to section 10 in his opening, and in his reply he submitted that the only issues were the validity and service of the notice and he again referred to section 10. In my view that submission was correct, except that section 10 in its terms does not relieve the landlord of the task of proving the exact quantum of the arrears of rent for the purposes of a judgment in the High Court.

Arrears of rent and mesne profits

The tenancy was terminated by the notice with effect from December 31, 1977. The appellant claimed in his amended plaint arrears amounting to Kshs 2,100 (6 months' rent) which were agreed in the course of the trial. He claimed mesne profits at Kshs 3,500 per month. The learned judge felt that there was not sufficient evidence before him to enable him to decide this claim. I agree. A claim for interest was waived.

I would allow this appeal and make an order awarding vacant possession of the premises to the appellant, with payment of Kshs 2,100 arrears of rent and mesne profits at Kshs 350 per month from January, 1977 until possession is delivered up. I would award the costs of this appeal and of the High Court proceedings to the appellant.

Law JA. I have had the advantage of reading in draft the judgment prepared by Potter J A with which I agree in every respect. In particular, I am of the opinion that when the respondent chose not to refer to the Tribunal the notice, which I agree was valid and duly served, it had effect to terminate the tenancy from

the date specified therein, the December 31, 1976, and the appellant thereafter became entitled to possession. The respondent did not give possession, and the landlord, had to come to court to enforce his rights. The learned judge should have entered judgment giving the landlord possession, especially as it was conceded at the trial by the respondent's then advocate that the premises were required by the appellant for his own purposes.

As Miller JA also agrees, the appeal is allowed, and there will be an order in the terms proposed by Potter JA.

Miller JA. I fully agree with the decisions of my brother Potter JA; but I cannot help making the following observations for what they may be worth with respect to the entire cause or matter.

I think it is useful to reflect upon few of the predominant provisions of the Landlord and tenant (shops, hotels, and catering Establishments) (Act, (cap 301) hereinafter referred to as the Act. It is now long since settled, that the title of an Act of parliament may be used not only as a guide but also as an important aid to the construction of the provisions of the Act. Here, the title is:

"An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from exploitation and for matters connected therewith and incidental thereto."

There can be no doubt that this title and the provisions of the Act arose from regard for experience and the then prevailing circumstances, thereby founding the enactment; and in particular appointing the tribunal, nigh exclusively, to deal with almost all the anticipated contentions arising between the specially contemplated persons, with respect to certain premises and the relevant commercial undertakings pursued therein.

In construing an Act as this, the ordinary rule as laid down by Esher MR in *R v Judge of Essex County Court (*1887) 18 QB 704, must applied ie…..In the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms, or remedies there prescribed, and no other must be followed until altered by subsequent legislation. And as it were for the avoidance of doubt, and incidentally taking advantage of the exempting phrase in section (3)(1) Interpretation and General Provisions Act, (cap 2) ie … "except where it is therein expressly provided," in the treating of "Termination of, and alteration of terms and conditions in controlled tenancy," section 4(1) of the Act provides:

"4(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be determined, or no term or condition in, or right or service enjoyed by the tenant shall be altered, otherwise than in accordance with the following provisions of this Act."

It was to me noteworthy that when Mr Le Pelley appearing for the Appellant, no doubt with the provisions of section 14 of the Act in mind, remarked, that it is unfortunate that the order of termination of the tenancy has to be made by the tribunal. I find it in any event appropriate to point to the provisions of the Act with a strict view on the question of jurisdiction.

Section 15 provides that any party to a reference aggrieved by any determination or order of a tribunal made therein may, within thirty days after the date of such determination or order, appeal to the High Court. The High Court in hearing such appeals has all the powers conferred on it by or under any written law; and such appeals are to be governed by the procedure in and relating to appeals from subordinate courts to the High Court; the decision of the High Court on any appeal under the Act being final and not subject to further appeal.

True it is, that there was as yet no reference before the tribunal; but the appellant landlord adopted and relied upon the provisions of the Act completely as the basis of his unaltered quest even up to this court. At the stage of the respondent's failure to comply with provisions of the Act, on receipt of the landlord's notice, the landlord then approached the High Court expressly pleading the respondent's non-compliance

therewith; overlooking the additional powers of the tribunal in relation to its area of jurisdiction under section 4(5) of the Act which itself does not exclude test of the validity of a tenancy notice. I am of the firm opinion that as in the Rent Restriction Act (cap 296), the legislature intended speedy remedies and adjustments to contentions and complaints arising from the subject matter of the Act, and with as little need as possible for protracted litigation; hence the tribunal; and I am left to wonder why the basic and unaltered gist of the contention between the parties as a constant, the contention ever reached this court, when the Act specifically envisages and prescribes, that appeals be to the High Court and no further.

Be that as it may I content myself with adopting the dictum of Lord Esher MR *supra* as my own; and with saying that having regard to what I have stated above, there appears to have been an omission somewhere; be it for the sake of clarity or exactitude; or the speedy relief of landlord or tenant invoking the provisions of the Act.

Dated and Delivered at Nairobi this 8th day of May 1981.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR