Case Number:	Civil Case 1299 of 1977
Date Delivered:	28 Feb 1980
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Mathew Guy Muli
Citation:	Syedna Mohamed Burhannudin Saheb v Mohamedally Hassanally [1980] eKLR
Advocates:	Mr Nowrojee for the Defendant Mr Le Pelley for the Plaintiff
Case Summary:	**Saheb *v* Hassanally** High Court, at Nairobi February 28, 1980 Muli J Civil Case No 1299 of 1977 ***Landlord and tenant*** *– tenancy – termination of – notice of termination – grounds for termination – reliance on alternative grounds – legality of.* ***Landlord and tenant*** *– tenancy – notice of termination of – service of notice - what constitutes proper notice.* The plaintiff (landlord) issued a notice to the defendant (tenant) under section 4(2) of the Landlord, Tenant (Shops, Hotels and Catering Establishments) Act (cap 301). The plaintiff brought the action on the basis of the notice on the grounds that the notice was invalid and that the grounds on the notice averred in the alternative were null and void. **Held:**

1. The Landlord, Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) section 7 which provides grounds on which a landlord may seek to terminate the tenancy, does not prohibit reliance upon alternative grounds, however the landlord can only enforce one ground at a time.

2. Where a landlord relies on more than one ground in the alternative, upon the tenant complying or refusing to comply with the notice the landlord will be bound by the acceptance of any one ground or by refusal of all the grounds in the notice.

3. Service of a tenancy notice can be done using two methods; either by delivering to the tenant personally or to an adult member of his family or to a servant residing with him or employed in the premises or to an employee or by sending it by prepaid registered post to his last known address.

Plaintiff's suit dismissed.

Cases

Woolf & another v Macharia [1971] EA 330

Texts

Simonds, V, *et al* (Eds) (1952-64) *Halsbury's Laws of England* London: Butterworths 3rd Edn Vol VIII p 169

Statutes

1. Landlord and Tenant (Shop, Hotels and Catering Establishments) Act (cap 301) sections 4; 4(1),(2),(4),(6); 7; 10; Form A

2. Interpretation General Clauses Act (cap 2) section 72

Advocates

Mr Nowrojee for the Defendant

Mr Le Pelley for the Plaintiff

Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Plaintiff’s suit dismissed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.1299 OF 1977

SYEDNA MOHAMED BURHANNUDIN SAHEB.....PLAINTIFF

VERSUS

MOHAMEDALLY HASSANALLY.....DEFENDANT

JUDGMENT

This suit commenced with fierce confrontation from every direction. It was formidable. However, through plodding and mediation by the court the battlefield was reduced to a manageable size. As will appear, the areas of disagreement became narrower than originally anticipated.

These proceedings were commenced by the Landlord under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301 Laws of Kenya) concerning a premises known as two shops on LR No 209/136/135 in the Bohra Musarfirkhana Kirinyaga Road of Nairobi. The Landlord caused a Notice to terminate tenancy of the defendant who had been the tenant of the premises for many years past paying therefore monthly rent of Shs 350/= per month.

While he was temporarily away in India, the Landlord, through his Attorney instructed his lawyers in Nairobi to issue the Notice to terminate the tenancy. The notice was issued under section 4(2) of the Landlord, Tenant (Shops, Hotels, and Catering Establishments) Act (cap 301 Laws of Kenya (hereinafter referred to as the Act). The relevant portion of the Notice was as follows:

“The Landlord of the above premises hereby given you notice terminating your tenancy alternatively altering its terms with effect from 31st December, 1976.

2. The(alteration I propose is an increase of the rent to Shs 3,500/= being the rent at which the premises might reasonably be expected to be let in the open market.

3. The grounds on which I seek the terminations are:

a) That you have defaulted in paying rent for a period of two months after such rent has become due, Shs 5,950/= being in arrears of the monthly rent of Shs 350/ =,

b) That I require possession of the premises for the purpose of running a clinic for the Dawood’s Bohra Community.

4. I require you within one month after receipt of this notice, to notify me in writing whether or not you agree to comply with this notice as from that date.

5. This notice is given under the provisions of s 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

Dated this 25th day of October, 1976.

Sgd HHM

Advocate and Agents for

Dr Syedna Mohamed Burhannudin Saheb.”

Basing his claim upon this Notice, plaintiff brought this action against the defendant alleging that the defendant was in default of payment of rent for a period of more than two months. That he had failed to refer the Notice to the Tribunal in accordance with the provisions of the said Act. That the tenancy was terminated by the Notice with effect from 31st December, 1976. That the plaintiff became entitled to vacant possession of the said premises and which the defendant has refused to deliver up. Plaintiff prays for vacant possession, arrears of rent of Shs 2,100/=, mesne profits at the rate of Shs 3,500/= per month from January 1, 1977 until vacant possession is delivered up, costs and interest thereon.

The defendant was duly served with the process and entered his appearance through his advocates.

In the defence filed on behalf of the defendant, he denied all the allegations of tenancy, default in payment of rent, that the purpose for which the plaintiff sought possession of the premises would entitle him to obtain such possession, and that the plaintiff had a right in law to issue the notice. Defendant averred in the alternative that the notice was null and void in law firstly because of the double-barrelled nature of the notice and secondly because the notice was served out of jurisdiction of this court, if it was ever served at all.

After protracted arguments when the case came up for hearing the issues were narrowed down and appear to be these:

1. Was the rent for July to October 1976 due and payable at the time of the issue of the Landlord’s Notice.

2. Was the Landlord’s Notice valid and dully served on the defendant"

3. If the answers to (1) and (2) are favourable to the plaintiff, what arrears of rent and mesne profits is the plaintiff entitled to"

Mr Nowrojee who appeared for the defendant did not pursue the other issues he had raised. For the purpose of this suit, the above general issues are taken as agreed, the other issues having been abandoned or agreed upon in the course of the hearing.

I think the convenient way to deal with the issue is to consider first whether the Notice was valid or not *ab initio* because it was couched in the alternative.

Mr Nowrojee argued forcibly that because the notice was couched in the alternative, the two alternative conditions or grounds upon which the plaintiff sought to terminate the tenancy could not co-exist at the same time. If I understood Mr Nowrojee correctly his complaint was that the Notice should have given the tenant only one condition of termination for him to decide whether to comply or not. That is to say either to comply with the Notice of termination or with the proposed alteration of the rent by increasing it to Shs 3,500/= with effect from December 31, 1976. That these conditions could not co-exist concurrently. The defendant could not decide on one condition because the Landlord could insist on the other condition with the result that the Landlord’s objective would be achieved in either case.

On the face of it, this argument appears to be plausible but on close scrutiny I think the contention is misconceived. Faced with the Notice the defendant had the option to elect one of three things. He could say I will vacate the premises on December 31, 1976 or that I will pay the proposed rent or that he complied or did not comply with the Notice. If he elected one of these courses then the plaintiff would be stopped from relying on other alternatives. He would not be entitled to have his cake and eat it. But the issue is whether the Notice couched in the alternative was rendered incurably defective.

Form A is the prescribed form under section 4(1) of the said Act. The form itself appears to have been couched with alternatives so that the Landlord has just to complete it appropriately. Section 4 of the said Act is also couched in the alternative by the use of “or” in it. Section 7 thereof gives several grounds on which the Landlord may give the tenant for termination of the tenancy. On reading both section 4 which provides for termination of and alternation of terms and conditions of controlled tenancy and section 7 which provides grounds which the Landlord may seek to terminate the tenancy, I see no prohibition against the Landlord relying on one or more grounds or relying upon them in the alternative. But the Landlord cannot enforce more than one ground at a time. On tenant complying or refusing to comply with the Notice the Landlord will be bound by the acceptance of any one ground or by the refusal of all the grounds in the Notice. For instance the Notice cannot have double-barrelled effect of terminating the tenancy as well as increase of the rent. It must be one or the other.

In this case it must be either termination or increase of rent but not both. If termination, then what follows would be the question of mesne profits. If the notice did not terminate the tenancy then the increase of rent becomes in issue but this again would be subject to the tenant complying with the increase or by reference to the tribunal. In any case where the Notice is couched with a ground for termination of tenancy and on the alternative ground of alteration of term or condition of the tenancy and the tenant does not notify the Landlord his willingness to comply with the Notice or to refer the matter to the Tribunal, then the Notice: “Shall have effect from the date therein specified to terminate the tenancy, or to terminate or alter the terms and conditions thereof or the rights or services enjoyed thereunder.”

Here again the effect of the Notice is in respect of termination or alteration which are subjunctive but not conjunctive. Section 10 of the Act makes this clear.

Section 72 of the Interpretation General Clauses Act (cap 2) provides:

“Save as is otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document which purports to be in such form shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead.”

I do not find any deviation in the form used from that which is prescribed by the Act. The substance is clear the effect of which is to terminate the tenancy or to alter the rent. The Notice is not misleading in any way.

I hold therefore that the Notice complied with the prescribed form under the Act. It is not void by reason of deviation or misleading. The substance is clear and remains unaffected.

Mr Nowrojee attacked the Notice further on the ground that it was received less than two months before the effective date and therefore it did not take effect on December 31, 1976 or on any other date thereafter. The Notice was issued on October 25, 1976 in duplicate. The original was sent to the defendant at his Nairobi address and the duplicate was sent to him in India. Defendant stated that he received it on November 4, 1976.

The original was received by the defendant's son in Nairobi who acknowledged receipt thereof on October 29, 1976. The defendant was temporarily away in India. Mr Le Pelley maintained that this ground was a mere technicality as the Notice was sent to the defendant's last known address and was duly received by an adult member of the family on or before October 29, 1976. He therefore maintained that the notice was duly served as required under the provisions of section 4(6) of the Act. I consider it necessary to examine the provisions of this sub-section- Section 4(6):

"A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family or to any servant residing with him or employed in the premises concerned or to his employer, or by sending it by prepaid registered post to his last known address and any such notice shall be deemed to have been given on the date on which it was so delivered or on the date of the postal receipt given by the person receiving the letter form the postal authorities as the case may be."

The modes of service of the Notice appear to me to be two-fold, namely, either by delivering to the tenant personally or to an adult member of his family, or to a servant residing with him or employed in the premises or to his employer or by sending it by prepaid registered post to his last known address. In this case service was done by prepaid registered post to the defendant's address in Nairobi. It was received and acknowledged by his son as having been received. This was on October 29, 1976. The Notice was deemed to take effect on December 31, 1976 more than two months after service as provided under section 4(4) and 10 of the Act. I hold therefore that the notice was duly served within time, and that it was capable of taking effect on December 31, 1976 being a period of more than two months from the date of service ie between October 25 and 29, 1976.

In *Woolf and Another v Macharia* [1971] EA 330, where a notice was sent by registered post to the last known address of the defendant. The notice was returned to the plaintiff by the post office after it had remained uncollected for a month. It was held that registered post is an alternative and not a residual method of effecting service. That the notice was properly served.

In this case the notice was not only sent by registered post but was also received by the defendant's adult member of his family which fact made the service of the notice even more real than service in *Woolf's*'Case. I make no finding on the effect of service outside jurisdiction as Mr Le Pelley did not rely on this.

I now turn to the most crucial issue in this case, namely whether the defendant was in arrears of rent for two months or more as at October 25, 1976. Mr Le Pelley conceded during the hearing that the total sum of the arrears of rent was Shs 2,100/=. He applied to amend the plaint so that the actual claim of arrears of rent as at December 31, 1976 to be Shs 2,100/ =.That this rent would represent rent for July to December, 1976 (6 months), rent for the earlier period having been agreed to have been paid. The notice stated one of the grounds seeking termination to be default in payment of rent for a period of two months after such rent had become due, Shs 5,950/= being in arrears of the monthly rent of Shs 350/=.

The crucial point for determination is whether the defendant was in arrears of rent for two months after the rent had become due when the notice of termination was issued on October 25, 1976.

According to the defendant, he sent the cheque to the official Receiver for Shs 700/= representing rent for July and August, 1976. This was in accordance with previous practice as advised to him by the Official Receiver. Receipt of the cheque was acknowledged by the Official Receiver who wrote as follows-

" I thank you for your letter of 30th July last together with your cheque (NG/AB 314745 for KShs 700/= in

payment of rent for the premises occupied by you herein for the months of July and August, 1976. Please note that as from 30th June, 1976 all tenants ofthe above-named corporation have been advised by me (in accordance with a Court Order) to pay their rents direct to Mr A H Heptulla, P.O. Box 18003, Nairobi I am therefore returning your above cheque, which please make payable in favour of Mr H A Heptulla and remit it direct to Mr Heptulla.

Kindly acknowledge receipt."

Pursuant to this advise the defendant altered the cheque to be payable to H A Heptulla and sent it to him on August 21, 1976 stating that it was for payment of rent for July and August, 1976. On receipt of the letter and the cheque Mr H A Heptulla replied on September 11, 1976 as follows:- "Reference is made to your letter dated 21st August, 1976 and thank you for the cheque of Shs 700.

According to the detailed accounts received from the official Receiver you owed Shs 4,550 and quote hereunder their remarks in full which appears against your name-

"A sum of Shs 4,550/= shown as outstanding as at 22.9.71 remains unpaid and outstanding. This tenant has paid rent to me for the months of June 1971 to June 1976 (both months inclusive) at Shs 350/= per month." Your cheque of Shs 700/= being rent for the months of July and August is returned as the total owed now stand to Shs 5,250/=. Please note that unless the payment of Shs 5,250/= is received within 10 days, the matter will be handed to our lawyer for the recovery in full, and holding you responsible for the consequences thereof. By copy of this letter, we are asking our lawyers that if they do not hear from us, legal proceedings be filed against you."

Pausing here the 10 days of grace period from September 11, 1976 would expire on September 21, 1976. According to the defendant, he received the letter in India on October 14, 1976 and wrote back on October 16, as follows:

"Your letters of 11-9-76 together with my cheque number No NG/AB 314745 for Shs 700/= was received by me on 14.10.76 soon after I returned from my tour, and this cheque is retained by me for proof.

As alleged in your letter under reply – para 4 that I owe a balance of Shs 5,250/= which I deny and would request you to send to me a full detailed statement of account of the above amount on my aforesaid address, and if on receipt of your statement the balance as alleged by you will be found correct, I agree myself to pay and your duty as a businessman to provide me with full particulars of the outstanding amount.

Moreover enclosed please acknowledge my fresh cheque Number NG/ AB 314746 for Shs 1,400/= on Barclays Bank for rent from July to October 1976 in respect of my shop in Musafirkhanna building which you will find in order and acknowledge its receipt by return of post."

I have reproduced the contents of the correspondence in order to highlight what appears to me to be the root of confusion and misunderstanding. According to Mr H A Heptulla, there was rent owing in the sum of Shs 4,550/= as at 22nd September, 1971 plus rent for July and August 1976. It was conceded at the hearing that rent for the period prior to July 1976 was paid. The result was that at the time of exchange of the letters (above) the unpaid rent would be for July to October, 1976. The defendant paid Shs 700/= by cheque which was returned and then by a fresh cheque of Shs 1,400/= being rent for July to October, 1976. The cheque for Shs 1,400/= was sent on October 16, 1976.

No particulars of the arrears were supplied to the defendant. Then nine days later the Plaintiff's

advocates issued the Landlord's notice on 25th October, 1976 alleging default of payment of rent in the sum of Shs 5,950/ =. This figure has now been conceded on behalf of the plaintiff to be erroneous. Plaintiff's claim is now for rent for July to December, 1976 in the sum of Shs 2,100/=.

According to my calculation and notwithstanding the payment by cheques, the defendant would have been in arrears for three months only as at the date of the notice. The sum works out at Shs 1,050/=.

Mr Nowrojee submitted that the defendant had paid by cheque for the month of July and August, 1976 but plaintiff returned the cheque on the ground that the defendant owed more money than for those two months. That the defendant requested for particulars of the arrears but he was not supplied with those. That while awaiting for the particulars he issued a fresh cheque for Shs 1,400/= being rent for July to October 1976. In effect Mr Nowrojee's contention is that the defendant was not in arrears of rent at the time of the issue of the Notice of termination. That the defendant had made a valid tender of payment of the rent on due dates.

Plaintiff on the other hand did not supply particulars of the alleged arrears of rent. The defendant was in pain in trying to get these from the plaintiff's advocates. The defendant's letters subsequent to the issue of the Notice cry loud in the name of God appealing to the plaintiff's advocates to furnish him with particulars of the arrears. These were never supplied to him to his satisfaction and naturally the defendant grew impatient day after day. I think that at least the defendant was entitled to particulars he sought. Tenseness mounted when his future cheques were also refused and returned to him. He termed the whole affair "international harassment."

To meet Mr Nowrojee's arguments Mr Le Pelley submitted that there was no valid tender for payment arguing that there could never be a valid tender unless the defendant has paid rent to the Tribunal or to court or to plaintiff's advocates. He has paid to neither. Then with so many letters requesting for particulars of the arrears and maintaining that the defendant owed no rent, it was perhaps unfair on the part of the plaintiff to insist on payment of the sum which has now turned out to have been wrongly claimed. As at the time of the Notice only three months rent might be considered as due but then the defendant had attempted, in vain, to effect payment because the plaintiff was claiming full payment including the sum which was not owed by him. The defendant had tendered payment by cheque for four months including the month in which the Notice was issued (25.10.76).

The first cheque of Shs 700/= representing rent for July and August, 1976 was first sent to the official Receiver who returned it to the defendant with advise that it should be altered to be payable to the plaintiff's representative, Mr H A Heptulla. The defendant did exactly what he was directed by the official Receiver to do. On receipt of his cheque Mr H A Heptulla returned it on September 11, 1976 stating that the total amount owed by the defendant was Shs 5,250/=. The defendant received the letter with the cheque on 14.10.76 and retained it "for proof". He then embarked on requests after requests for particulars of the claim. I observe here that apart from the rent for July and August, 1976 there was no rent owing as it turned out during the hearing. Again if H A Heptulla accepted the cheque of Shs 700/= as rent for July and August, 1976 as at September 11, 1976 when he returned the cheque, then there would have been no rent owing as at that date. However the defendant replaced the cheque with another cheque for Shs 1,400 representing rent for July to October, 1976. If this cheque was duly accepted there would have been no rent owing at the time of the issue of the Landlord's Notice on October 25, 1976. What followed is appalling. The defendant wrote on November 11, 1976 denying that he owed any rent and repeating his earlier requests for particulars. The fate of his cheque for Shs 1,400/= was not known to him then. He followed the letter with numerous reminders and pleas that he should be supplied with particulars of the alleged claim of arrears of rent. He stated that he would pay what would be correctly found to be in arrears.

Finally the defendant received a letter from the plaintiff's advocate dated May 25, 1977 which read as follows:

"We enclose a copy of a statement which shows an outstanding balance of Shs 7,000/=. You have already issued cheques totalling Shs 3,500 but these are returned herewith as they should be made in favour of Dr Syelua Mohamed Burhanuddin Saheb. We should be grateful if you would the amended cheques and also let us have a further cheque for Shs 3,500/=. We have still not heard from you as per the notice of termination of the tenancy served on you; when you will be vacating the premises at present occupied by yourself. We would be grateful if you would let us have this information as soon as possible as our clients are now getting anxious to start operating a dispensary there."

The defendant was not willing to amend the cheques without counter instruction from the official Receiver, that he should issue cheques payable in favour of the plaintiff. It is not clear whether the sum of Shs 3,500/= refused to Mr Le Pelley's letter of May 25, 1977 included the sum of Shs 1,400/=. Be that as it may, there was a serious dispute and misunderstanding on the alleged balance of rent. For the period July to December, 1976 the defendant had issued the cheque of Shs 1,400/= whose fate was not known to him until the cheques were returned on May 25, 1977. Thereafter the defendant persisted with his requests for the particulars of the alleged arrears of rent. He received nothing. This suit was then filed on June 13, 1977. It was not surprising that Mr Nowrojee was in pain trying to express the feelings of his client to the effect that he was most dissatisfied by the high-handed manner in which the plaintiff treated him. I think he was treated badly and discourteously. This is demonstrated by the fact that it now turns out that the defendant owed no rent up to and including June 30, 1976. As for the period July to December 1976 the plaintiffs advocate or his representative were holding the defendant cheque for Shs1400. Notice had already been issued on October 25, 1976 while rent for four months was in the hands of the plaintiffs advocate or representative. Was this a legal tender of payment. Let us see.

In *Halsbury's Laws of England* 3rd Edition Volume 8 at page 169 the principle of plea of tender is defined in paragraph 289 as follows:

"The principle of the plea of tender is that the promisor has always been ready to perform the contract and has in fact performed it as far as he was able, but has been prevented from completely performing it by the refusal of the promisee to accept performance"… Where, however, the promise is to pay a sum of money, the debt is not discharged by a tender of payment, but such tender, coupled with continued readiness to pay the debt is an answer to a subsequent action for non-payment if the amount of the debt is paid into court and operates as a bar to any claim for subsequent interest."

The plaintiff's representative received cheques from the defendant but refused them on the grounds that there was a clearer amount owing or that it should be made out in favour of another person with whom the defendant had no dealings previously. The cheques were for payment ofrent for July to December, 1976. There was no condition attached to the cheques. Plaintiff's representative kept these cheques for a long time until he returned them with a request that the cheques be amended to be payable to the plaintiff. This was long after the notice had been issued. The plaintiff's representative or lawyers were his duly authorised agents and this was not in dispute. In these circumstances the defendant's tender of payment in full of rent for the period July to December, 1976 was a valid tender. The plaintiff's representative or his lawyer refused and returned the defendant's cheques too late. They had received them and kept them until it was convenient to them to act. During the period they kept the cheques they had in fact received full payment. There was nothing owing from the defendant. In these circumstances the landlord's Notice was misconceived and without foundation. It cannot now be revived by reason that the plaintiff's advocate returned the cheques for amendment to make them payable to the plaintiff. By stating that they required the cheques to be so amended indicated that they had in fact

accepted the cheques in payment of the outstanding rent for the period in dispute. They cannot now be heard to say that the rent was in arrears when in fact they were to blame for presenting incorrect picture of the situation.

I hold therefore that the Notice upon which this suit was founded was without reasonable grounds and for that reason it was void and of no effect on the date stated thereon. It follows that the plaintiff's suit must be dismissed with costs. The defendant may now return the cheques duly amended and payable to the plaintiff. Plaintiff has waived his claim for interest and no order is made in this respect.

As the Notice was void and of no effect on the date thereon, it follows, therefore, that tenancy was not terminated as urged. I may add here that the massive correspondence herein reveal that the plaintiff, being the landlord treated the defendant in high-handed and harassing manner. The tenant is entitled to protection under the Act. If the landlord requires the premises on lawful grounds the Act provides procedure which must be scrupulously followed.

I am mindful that the defendant has paid rent of Shs 350/= since twenty years ago. Rent of the same premises to-day may be considerably higher in the open market. I have no data to determine this but no doubt the Act provides procedure for alteration of rent should this become necessary.

Plaintiff's suit is dismissed with costs.

Dated and Delivered in Nairobi this 28th day of February 1980.

M.G.MULI

JUDGE

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