

**AMRATLAL DAMODAR MALTASER AND ANOTHER T/A ZANZIBAR
SILK STORES v A. H. JARIWARA T/A ZANZIBAR HOTEL [1980] TLR 31**

AMRATLAL DAMODAR MALTASER AND ANOTHER T/A ZANZIBAR SILK STORES v. A.H.
JARIWALLA T/A ZANZIBAR HOTEL

[COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (Mustafa, Mwakasendo and Makame, JJ.A.)]

CIVIL APPEAL 5 OF 1979

Civil Practice and Procedure—Delay in the trial of a suit — Observations.

Civil Practice and Procedure — Concurrent findings of facts by two courts — What appeal court to do — Rule of practice.

Landlord and Tenant — Sub-tenant partitioning and subletting portion of premises without consent of tenant — Whether lawful sub-tenancy created.

Rent Restriction — Unlawful sub-tenancy — Whether sub-tenant protected — Rent Restriction Act, 1962.

Rent Restriction — Order for vacant possession — Whether trespasser protected — Rent Restriction Act 1962, s. 19(2).

Acquisition of Buildings — Registrar stepping into the shoes of the owner — Whether trespasser sub-tenants may be accepted as lawful tenants by Registrar.

Landlord and Tenant — Notice to quit — Rent accepted after notice — Whether amounts to waiver.

Tender — Meaning — Effect.

This case dragged for many years before its final adjudication. There was no good cause for the delay.

The appellants were sub-tenants to whom the tenant, unauthorized by the owner partitioned a restaurant and without the consent of the owner sublet a portion of it. The respondent owner of the premises filed a suit in a Resident Magistrate's Court claiming vacant possession of the ground floor and mesne profits. Judgment was given in his favour. On appeal to the High Court the appellants' appeal was dismissed. Aggrieved by the decisions of both lower courts the appellants further appealed to the Court of Appeal of Tanzania.

In the Court of Appeal of Tanzania counsel for the appellants attacked the decision of the High Court on the following main grounds. First, that the lower courts erred in their assessment and evaluation of facts. Secondly, that the appellants were lawful sub-tenants of the respondent; in the alternative that they were protected by s. 19(6) of the Rent Restriction Act, 1962. Thirdly, that the High Court judge erred in law in treating the appellants as trespassers and that the provisions of s.19(2) of the

Rent Restriction Act did not apply to avail them. Fourthly, that the High Court judge erred in law by not taking into account that the Registrar of Buildings had accepted the appellants as tenants, received rent from them, and that the respondent acquiesced to this. Fifthly, counsel for appellants argued that the first appellate judge was wrong in law in confirming the order of costs on mesne-profits since the appellants had already tendered a cheque as payment for rent due to the respondent and therefore should have been exonerated from liability to pay.

Observations: (i) a court of trial has a duty not only to follow the rules of procedure but also to exercise some firm control over the proceedings before it and, if need be, to impose and enforce a timetable for litigation;

(ii) however agreeable parties might be to adjournments, there comes a time when the court of trial is forced to say that in the interest of justice it cannot extend to the parties any more indulgences to adjourn the trial of a suit.

Held: (i) where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure;

(ii) the two appellants were not lawful sub-tenants of the respondent because both the partitioning and subsequent sub-letting of the premises were without the consent of the respondent;

(iii) a person who enters upon the premises of another without his consent, express or implied, is a trespasser;

(iv) a trespasser cannot claim the benefits flowing from the operation of the provisions of s.19(2) of the Rent Restriction Act, 1962;

(v) since there is no privity of contract between the owner of the premises and a sub-tenant, the Registrar of Buildings by stepping into the shoes of the owner does not change the relationship between the lessee and sublessee;

(vi) when a landlord has brought a tenancy to an end by means of a notice to quit, a payment of rent after that date will only operate in favour of the tenant if it can be shown that the parties intend that there should be a new tenancy;

(vii) if a debtor has made a tender and continues ready to pay, he is exonerated from liability for the non-payment, but the debt is not discharged.

Appeal dismissed.

Cases referred to:

- 1) *Allen v. Sir Alfred McAlpine and Sons Ltd.* [1968] 2 Q.B. 229.
- (2) *Towli v. Fourth River Property Co. Ltd.* (The Times Law Report, November 23, 1976).
- (3) *Michaelides v. Cormican Properties Ltd.* (The Times Law Report, November 23, 1976).
- (4) *Central Asbestos Co. Ltd. v. Dodd* [1972] 2 All E.R. 1153.
- (5) *Onorato Dolla Santa and Others v. Peera* [1970] H.C.D. No. 22.
- (6) *Gregory Mtafya v. Zainabu Lyimo* [1976] L.R.T. No. 3
- (7) *Addie v. Dumbreck* [1929] A.C. 358.
- (8) *Habib Yusufali v. Abdulasattar Riaziddin* [1972] L.R.T. n. 64.
- (9) *Clark v. Grant and Another* [1950] 1 K.B. 104.
- (10) *Carter v. Green* [1950] 2 K.B. 76.

M.A. Lakha for the appellants.

M.J. Raithatha for the respondent.

March 10, 1980. MWAKASENDO, J.A.: Manilal Mulji and Company Limited was until 1971 the owner of a three-storey building known as Zanzibar Hotel situated along Zanaki Street on Plot No. 917/24 in Dar es Salaam. On 24th February, 1964, Manilal Mulji and Company Limited let the whole of the building to A.H. Jariwalla, the present respondent and original plaintiff in the Resident Magistrate's Court. To obviate confusion I shall hereafter refer to the parties involved in this appeal either by their personal names or by the description that they bear in the Resident Magistrate's Court record. Jariwalla with the consent of Manilal Mulji and Company Limited sublet the ground floor of the demised premises,

excluding the office room and stores, to one Demello, retaining possession of the first, second and third floors for his hotel business. In terms of the underlease Exhibit P1, Demello agreed to use and occupy the front and rear parts of the ground floor as a restaurant and bar respectively. And on 21st February, 1967, Demello in turn after obtaining the permission of Jariwalla sublet the restaurant part of the ground floor to Ebrahim Yusufali Ebrahimji, the first defendant, for a term of one year expiring on 31st August, 1967, but subsequently extended to 31st August, 1968—See Exhibit P2.

On expiry of the term of the underlease Ebrahimji without the consent of the plaintiff and in breach of the covenants contained in the underlease handed the portion of the premises he was occupying to Murtaza A. Darugar, the second defendant and Mohasin Salehbhai, the third defendant. However, following upon this unlawful entry on the restaurant premises Darugar and Salehbhai pleaded with Jariwalla to regularise their tenancy. Jariwalla did so by allowing them to occupy and use the restaurant premises for a period of one year up to the end of August 1969 on condition that they would adhere to the existing covenants contained in the lease and underlease. Jariwalla's testimony about this is at p.95 of the record of proceedings. It reads:

After this notice the defendants did not vacate but the second and third defendants came to me and admitted that they had entered the premises illegally and they requested me to allow them to use the premises on regular payment of rent of Shs. 500/- per month and they would adhere to the covenants. I gave them extension of time up to August 1969. I accepted them (the second and third defendants) as my tenants up to August 1969.

This statement of what took place between Jariwalla, Darugar and Salehbhai was not impeached at the trial by either Darugar or Salehbhai. Be that as it may, in March 1969 Darugar and Salehbhai approached Jariwalla requesting to be allowed to partition and sublet a portion of the restaurant to one Alibhai A. Girnary who, as it subsequently turned out, was acting for Amratlal Damodar Maisatar and Musaffer Alibhai Girnary, the present appellants and fifth and sixth defendants at the trial respectively. Jariwalla refused his consent to the proposed partition and subletting. However, despite this refusal Darugar and Salehbhai went ahead with the proposed partition and subletting of part of the restaurant (one-third of the ground floor) to the present appellants who then proceeded to set up a shop under the name and style of 'Zanzibar Silk store'. Jariwalla knew of this unauthorised partitioning and subletting sometime before filing a suit in May 1969. In his suit Jariwalla claimed vacant possession of the whole of the ground floor and mesne profits against seven defendants, namely, in the order they appear in the plaint, Ebrahim Yusufali Ebrahimji, Murtazar A. Darugar, Mohasin salehbhai, Alibhai A. Girnary, Amratlal Damodar Maisatar, Musaffer Alibhai Girnary and The Registrar of Buildings.

Maisatar, Musaffer Alibhai Girnary and The Registrar of Buildings.

Although the plaint in this case was filed in the Resident Magistrate's Court in May 1969 I note with grave concern the dilatory nature of the interlocutory proceedings which did not come to an end until October, 1975, that is, a little over six years after the plaintiff had filed his plaint in court. I cannot see any good ground on the face of the record of proceedings to justify this deplorable state of affairs. Indeed, what the record reveals is a complete lack of any concern for dispatch on the part of the court as well as counsel for the parties. Time and again people have complained at the law's delay and to quote Lord Denning's eloquent words: "counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time. Dickens tells how it exhausts finances, patience, courage, hope." See *Allen v. Sir Alfred McAlpine and Sons Limited* [1968] 2 Q.B. 229 at p. 245. It would appear to me plain from the record of this case that the trial Resident Magistrate's Court was of the view that its role was limited to umpiring a 'game' between counsel of the various parties to the suit no matter how long it took to settle the score between them. That is clearly not what a court of law should be or do. If the law is not to be an end in itself, a court of trial has a duty not only to follow the rules of procedure but also to exercise some firm control over the proceedings before it and, if need be, to impose and enforce a time table for litigation. This course will of course not find favour with everyone but as Mr. Justice Templeman has said: "the argument against that course has always been that litigation was a game which litigants or their advisers were at liberty to play at their own pace and that the only duty of a judge was to decide a proportion of those few cases which survived to the last round and then to hand down lofty judgments which enured for the benefit of posterity until they were reversed by an appellate tribunal." That, as Mr. Justice Templeman was quick to observe, is an erroneous view of the role of a court trying a civil case. See *Towli v. Fourth River Property Co. Ltd.* and *Michaelides v. Cormican Properties Limited*, The Times Law Report November 23, 1976. The English Court of Appeal has repeatedly dealt with cases in which the suggestion that the parties can by mutual cordiality prolong the trial of actions by agreeing to adjournments in the interlocutory stage has been made but

ruled to be utterly misconceived. All in all, it seems to me, quite clear that however agreeable parties might be to adjournments, there comes a time when the court of trial is forced to say that in the interests of justice it cannot extend to the parties any more indulgences to adjourn the trial of a suit. To end my protest at the way this case has been handled in the Resident Magistrates court I should like to refer to a passage from the judgment of Lord Simon of Glaisdale in *Central Asbestors Co. Ltd. v. Dodd* [1972] 2 All E.R. at p. 1153 where he deals with the question of expedition in civil litigation thus:

Litigation is the resolution of civil contention by methods preferable to violence. But that does not mean that it is otherwise an inherently desirable activity. The rule of law is not to be equated with a reign of litigiousness. Litigation involves a call on scarce resources, and it is apt to set up emotional and social strains of its own; no one with experience of litigation would suppose that Miss Flite was a purely fanciful creation. Hence the desirability of forensic dispatch. There can be few circumstances in which contentions within a society can be prolonged unresolved without risk to the fabric of society. Moreover dilatory procedures may defeat the very purpose of the judicial process, namely to vouch-safe justice, since if litigation is prolonged, not only is there waste of time and money and moral energy, but circumstances may change in such a way that what would have been at the outset a just conclusion is in the end no longer so. Finally, delay will make it more difficult for the legal procedures themselves to vouch-safe a just conclusion—evidence may have disappeared and recollections become increasingly unreliable. Speedy rough justice will, therefore, generally be better justice than justice worn smooth and fragile with the passage of years.

Now to revert to the trial of the Plaintiff's suit before the Resident Magistrate's Court. The suit came for hearing before the Principal Resident Magistrate on 28th November, 1975, and the issues on which the learned trial Magistrate had to decide were:

- (1) Whether the fourth defendant was rightly joined in the suit;
- (2) Whether the partition of the restaurant and the setting up of the shop in a partition of it were made with the full knowledge and consent of the plaintiff;
- (3) Whether the plaintiff is entitled to vacant possession of the suit premises; and
- (4) Whether the plaintiff is entitled to mesne profits.

The learned Principal Resident Magistrate in a considered judgment entered judgment against the fifth and sixth defendants and ordered them to vacate and hand over to the plaintiff the premises of the shop known as 'Zanzibar Silk Store' and pay mesne profits to him. The appellants appealed unsuccessfully to the High Court hence this appeal before this Court. In their memorandum of appeal the appellants set out seven grounds of complaint against the decision of the two courts below. Their grounds of complaint read as follows:

1. The learned High Court judge erred in law and on the facts:
 - (a) in accepting, as he did, the evidence of the respondent as truthful and in taking the view that the evidence showed that Amratlal was not in the picture on the question of consent;
 - (b) in acting on the evidence of the second and third defendants to support the evidence of the respondent and to reject the evidence of Amratlal;
 - (c) in regarding as strange that the question of partitioning the restaurant was made subject to the consent of the second defendant and in taking the view that it had the effect of increasing the rent accruing therefrom;
 - (d) in allowing himself to be influenced considerably by his finding that the suit for possession was filed by the respondent promptly;
 - (e) in being influenced by the fact that Amratlal was not made a party to the suit initially;
 - (f) in failing to take into account the overwhelming evidence of the conduct of the appellants consistent with their entry with the consent of the respondent;
 - (g) in failing to consider the various contradictions which are apparent in the respondent's case;
 - (h) in failing to consider the contradictions in the evidence of the respondent, second and third defendants;
 - (i) in failing to consider the conduct of the respondent which evinced his honesty.
2. The learned High Court judge erred in law in holding that the refusal of the respondent to grant

consent was not unreasonable.

3. The learned High Court judge erred in law in holding, as he did, that s.19(6) of the Rent Restriction Act did not accord any protection to the appellants.
4. The learned High Court judge erred in holding, as he did, that underletting to the appellants was unlawful.
5. The learned High Court judge erred in law—
 - (a) in holding that the respondent did not waive the breach of the appellants (which is denied) by acceptance of rent only because he continued with his suit, and ought on the evidence to have held the appellants were impliedly accepted as the tenants of the respondent;
 - (b) in failing to take into account the fact that the Registrar of Buildings had accepted the appellants as tenants and received rents from them;
 - (c) in failing to consider the conduct of the respondent in his acquiescence of the Registrar of Buildings treating the appellants as lawful tenants.
6. The learned High Court judge erred in law in treating the appellants as trespassers and holding that the provisions of s.19(2) of the Rent Restriction Act had no application in the case of a trespasser.
7. The learned High Court judge erred in law in confirming the order of costs on mesne profits.

Messrs Lakha and Raithatha learned counsel appeared before us on behalf of the appellants and respondent, respectively. To take the appellants' first ground of appeal — while I found Mr. Lakha's long submissions on the various matters raised in this ground of complaint compellingly refreshing, I am afraid to say that he totally failed to persuade me that the two courts below erred as vigorously urged upon us by him. In any case, there appears to me to be no ground shown why this Court should interfere on concurrent findings of facts by the two courts below. In my respectful view, where, as in the instant case, there are concurrent findings of facts by two courts, this Court should as a wise rule of practice follow the long established rule repeatedly laid down by the Court of Appeal for East Africa, that is, that an appellate court in such circumstances should not disturb concurrent findings of facts unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principle of law or procedure. As already indicated, the appellants in this case have failed to show any ground at all to justify this Court to interfere with the concurrent findings of facts by the two courts below. In my view, this ground of appeal therefore fails.

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Grounds 2, 3, 4 and 6 are closely interrelated and it is proper that they should be considered together. Mr. Lakha throughout the progress of this case, from the Resident Magistrate's Court to this Court, has consistently maintained the stand that the two appellants were at all material times the lawful tenants of the second and third defendants and, through them, the lawful subtenants of the plaintiff. Mr. Lakha has forcefully canvassed this stand because according to his contention both the partitioning and subletting of the suit premises were with the knowledge and consent of the plaintiff. I can find no valid basis for this claim. The learned first appellate judge after an impeccably fair and thorough evaluation of evidence adduced at the trial came to the same conclusion as the learned trial Principal Resident Magistrate that the two appellants were not lawful subtenants of the plaintiff because both the partitioning and subsequent subletting of the shop premises known as 'Zanzibar Silk Store' were without the knowledge or consent of the plaintiff and therefore in breach of the covenants to which the second and third defendants had willingly agreed to adhere. I do not think on the evidence on record, properly construed, the two courts below could have reached any different conclusion in the case. But Mr. Lakha has a second limb to his main argument and this runs briefly thus: that even in the face of the two courts' irreproachable finding that the two appellants were not lawful subtenants of the plaintiff it was wrong for the appellate court and the Resident Magistrate's Court to hold that his clients were not entitled to the protection of the provisions of the Rent Restriction Act, 1962. Although Mr. Lakha has referred us to an array of authorities as supporting his main and secondary argument, I am unable to see how any of the decided cases cited to us can have any bearing on the facts as found established in this case. Indeed a number of the authorities cited to us affirm the legal position of the plaintiff. One of the authorities referred to by Mr. Lakha as supporting the stand taken by the two appellants is section 19(6) of the Rent Restriction Act, 1962, which provides:

An order against a tenant for the recovery of possession of any premises or ejectment therefrom under the provisions of this section shall not affect the right of any subtenant, to whom the premises

or any part thereof have been lawfully sublet before proceedings for recovery of possession or ejectment were commenced, to retain possession under the provisions of this section, or be in any way operative against any such subtenant but such subtenant shall subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.

The first appellate judge dealt with the question whether or not the provisions of sub-section (6) of s.19 of the Rent Restriction Act, 1962, protected the two appellants from an order for vacant possession and his answer is clearly in accordance with accepted authorities. This is what the learned first appellate judge said (p.186 of the proceedings):

It is at once apparent that the operative words of this subsection are, '.... to whom the premises or any part thereof have been lawfully sublet.... It seems that in order to seek protection under this subsection it must be shown as a condition precedent that the premises in question were lawfully sublet to the person seeking such protection.

The first appellate judge's view on this point is firmly supported by case law—see *Onorato Della Santa and Others v. Peera* [1970] H.C.D. n.22 p.23; and *Gregory Mtafya v. Zainabu Lyimo*, [1976] L.R. T.n.3. It is clear from those two cases and the English cases considered there that a person who enters upon the premises of another without that other person's consent, express or implied, is in unlawful occupation of the premises. He cannot claim the rights that are due to lawful tenants and subtenants for he is a mere trespasser. I am of course conscious of the fact that Mr. Lakha has throughout vehemently protested at the use of the word "trespassers" which has an accepted legal meaning and as defined by Viscount Dunedin in *Addie v. Dumbreck* [1929] A.C. 358 at p.371 the trespasser is "he who goes on the land of another without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to."

and whose presence is either unknown to the proprietor or, if known, is practically objected to."

In view of the evidence on record I do not think it can be seriously argued that the present appellants were anything other than trespassers. They entered upon the suit premises without the knowledge or consent of the plaintiff and when the plaintiff became aware of their unlawful presence he sued for their eviction. They may no doubt have been unaware of the niceties of the law of tenancy but that is none of the concern of this Court for as was said by Lord Shaw of Dumfermline in **Addie v. Dumbreck** [1929] A. C. 358 at p.379, of the child "who could know nothing of the law of trespass or licence, was in fact a trespasser." This disposes off grounds of appeal numbers 2, 3, and 4.

As regards ground of appeal number 6, I think a brief comment will suffice. Looking at all the decided cases including the **Onorato** and **M'tafya** cases it is clear beyond any dispute that a trespasser cannot claim the benefits flowing from the operation of the provisions of subsection (2) of s.19 of the Rent Restriction Act, 1962. The question whether it is reasonable to issue an order for vacant possession under the Rent Restriction Act, 1962, only arises where the person seeking to avail himself of the protection of the law is in lawful occupation of the premises either as a tenant or subtenant as defined under the Act. In the result I am unable to agree with Mr. Lakha that the point he has raised regarding the operation of the provisions of subsection (2) of s.19 of the Rent Restriction Act, 1962, with regard to a trespasser, has any validity whatsoever.

I now turn to consider grounds of appeal numbers 5 and 7. I will take ground of appeal number 5 first. The first question that arises is whether the Registrar of Buildings had accepted the appellants as the tenants of the respondent as contended by the appellants in paragraph (a) of the fifth ground of appeal or not. On the evidence found established in the case I cannot see how the Registrar of Buildings could have accepted the appellants as his tenants. How could the Registrar of Buildings do that since as between him (the Registrar of Buildings) and the lawful subtenants of the plaintiff, which the two appellants were not, there was no privity of contract and, therefore, in terms of the provisions of s.4(2), 11(1) and 11(2)(a) and (b) of the Acquisition of Buildings Act, 1971, Act No. 13 of 1971, the Registrar of Buildings could not step into the shoes of the owner of the acquired premises, leaving the relationship of leasee and sublessee unchanged? This question was in my respectful opinion fully dealt with and decided by the Court of Appeal for East Africa in the case of **Habib Yusufali v. Abdulasattar Riaziaddin**, [1972] L.R.T. n.64 at p.277. The submissions made by counsel in that case, who incidentally is the same counsel who has represented the two appellants in the instant case, were more or less similar to those now canvassed before us. In rejecting Mr. Lakha's submissions in the **Habib Yusufali** case, Mr. Justice Law, learned Acting Vice President, in a judgment in which the other members of the Court concurred, said at p.279:

To whom does a subtenant of part of an acquired building pay the rent reserved by the sublease? As I have already pointed out, the owner is not, so far as I am aware, usually a party to the sublease, and he was not a party to the sublease the subject of this appeal, so that the sublease in this case was not a document in relation to which the Registrar was substituted for the owner 'as a party thereto'. The rent reserved under the sublease therefore continued to be payable, in my opinion, to the tenant by the subtenant. The tenant, who by virtue of his lease entered into with the owner as a party, must pay the rent reserved by the lease to the Registrar, who has been substituted by the Act for the owner.

The learned Acting Vice-President concluded his judgment thus:

It follows that I cannot accept the submissions made by Mr. M.A. Lakha for the appellant that the Registrar becomes substituted for the owner in relation to every person in occupation of an acquired building, i.e., the tenant or subtenant or—presumably—licensee or trespasser. If the Act had intended this to be so, it could so easily have said so. Instead, the Act only substitutes the Registrar for the owner in respect of instruments to which the owner was a party.

The other point Mr. Lakha has raised in the fifth ground of appeal is whether the learned first appellate judge erred in law "in holding that the respondent did not waive the breach of the appellants (which is denied) by acceptance of rent only because he continued with his suit, and ought on the evidence to have held that the appellants were impliedly accepted as the tenants of the respondent." I do not think there is any basis for this particular complaint. The learned first appellate judge quite properly dealt with Mr. Lakha's complaint on the question of waiver at a considerable length from the last paragraph of p.187 to the end of p.189 of the record of proceedings. There is no doubt in my mind that the learned first appellate judge was right in rejecting Mr. Lakha's submissions on the question of waiver. Counsel's arguments, attractive as they are, have no foundation in law. Apart from the cases to which the learned first appellate judge has referred in his judgment, support for the first appellate judge's view may be found in two decisions of the English Court of Appeal; See *Clarke v. Grant and Another* [1950] 1 K.B. 104 pp. 105 and 106; and *Carter v. Green* [1950] 2 K.B. 76. In the former case Lord Goddard, C.J. discusses the principles to which a court must have regard in deciding whether an acceptance of rent after a notice to quit has been given by a landlord amounts to a waiver or not. He deals with this question as follows:

...if a notice to quit has been given in respect of a periodic tenancy such as a yearly tenancy the result is to bring the tenancy to an end just as effectually as if there had been a term which had expired. Therefore, when a landlord has brought a tenancy to an end by means of a notice to quit, a payment of rent after that date will only operate in favour of the tenant if it can be shown that the parties intend that there should be a new tenancy. A new tenancy must be created. That has been the law ever since it was laid down by the Court of King's Bench, presided over by Lord Mansfield, in *Doe d. Cheny v. Batten* (1775) 1 Cowp. 243. I need not read the judgments in extenso, but Lord Mansfield said (at p.245): 'the question therefore is, *quo animo* the rent was received, and what the real intention of both parties was.'

It is impossible to find that the parties here intended there should be a new tenancy. The landlord was all the time desiring to have possession of the premises: that is why he had given his notice to quit. The mistake of his agent in accepting as rent which had already accrued, rent which was in fact payable, if it was payable at all, in advance, cannot be used to establish that the landlord was agreeing to a new tenancy.

It may be that it may, there can be no doubt on the evidence on the record of this case that the plaintiff's acceptance of the refund of rent from the Registrar of Buildings was not an unequivocal act of affirmance of the two appellants as the tenants of the plaintiff. In fact, as Mr. Raithatha, counsel for the respondent has correctly stated: the money refunded to the plaintiff by the Registrar of Buildings is properly to be regarded as mesne profits which the plaintiff was entitled to claim from the two appellants. With that said, I hold that the fifth ground of complaint is without any substance and it is rejected.

Finally, the seventh ground of appeal. Mr. Lakha has submitted on this ground of appeal that the learned first appellate judge was wrong in law in confirming the order of costs on mesne profits because according to counsel the two appellants in this case tendered a cheque as payment for rent due to the plaintiff. I am unable to agree that the position in law is as urged upon us by learned Counsel. In Osborn, The Concise Law Dictionary, Fourth Edition p.329 the word 'Tender' is defined as "an offer; e.g., by a debtor to his creditor of the exact amount of the debt; the offer must be in money, which must be actually produced to the creditor, unless by words or acts he waives production. If a debtor has made a tender and continues to be ready to pay, he is exonerated from liability for the non-payment, but the debt is not discharged. Therefore if he is sued he should plead the tender and pay the money into court." In this respect see also the provisions of the Civil Procedure Code 1966 relating to Payment into Court, Order XXIV, r.1. As in this case the two appellants made no payment into Court in full satisfaction of the respondent's claim for mesne profits, the learned first appellate judge was perfectly entitled to affirm the trial Court's order of costs on mesne profits. Thus this ground of appeal also fails.

I would accordingly dismiss the appeal.

Appeal dismissed.