

24, 1955

~~G.F. 1.6.2~~

UNIVERSITY OF LONDON
W.C.1.

No. 24 of 1954. -4 JUL 1956

In the Privy Council.

INSTITUTE OF ADVANCE
LEGAL STUDIES

ON APPEAL

43582

FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

ISMAIL MOHAMED CHOGLEY *Appellant*

AND

JAGAT SINGH BAINS *Respondent.*

Case for the Appellant

RECORD.

10 1. This is an appeal by leave from a judgment dated the 14th May 1953 of the Court of Appeal for Eastern Africa (Nihill P., Worley, V.-P. and Mahon J.) dismissing an appeal from a judgment dated the 19th June 1952 of the Supreme Court of Kenya (Bourke J.) dismissing an appeal from a judgment dated the 29th January 1951 of the Rent Control Board at Nairobi (hereinafter called "the Board") whereby the Appellant was ordered to give vacant possession to the Respondent of premises consisting of a bakery and shop on plot No. 230/3 Race Course Road Nairobi (hereinafter called "the premises").

20 2. The appeal involves the Appellant's right to retain possession of the premises pursuant to the provisions of the Increase of Rent (Restriction) Ordinance 1949 (hereinafter called "the Ordinance") on the ground that the premises were lawfully sub-let to him before the proceedings for recovery of possession were commenced and the principal questions raised thereby are questions of construction of the Ordinance.

3. The facts giving rise to this appeal so far as material to be herein stated are as follows.

30 4. The Respondent is and has been at all material times the owner of the premises. By an Agreement in writing dated the 10th June 1941 he purported to let the premises to one Sidi Bilal for a period of five years from the 1st July 1941 at a monthly rent of Shs.300. The said Agreement contained no restriction against sub-letting. Sidi Balal went into possession and carried on the business of a baker on the premises until he went to India in September or October 1942 leaving the Appellant in charge of the business and in occupation of the premises. In December 1946 the Respondent instituted proceedings for possession against Sidi Balal

pp. 34-52.

pp. 22-30.

pp. 15-19.

p. 9, ll. 30, 31.

p. 9, l. 34; p. 10,

ll. 1, 2, 4, 5, 35;

p. 55, ll. 30-33.

p. 27, ll. 12, 13.

p. 10, l. 3; p. 11,

l. 32;

p. 55, ll. 33-36.

p. 10, l. 6.

pp. 54, 55.

and the Appellant in the Resident Magistrate's Court at Nairobi on the ground that the term granted by the said Agreement had expired by effluxion of time. The Resident Magistrate gave judgment for the Respondent and this judgment was upheld on appeal by the Supreme Court of Kenya but was reversed by the Court of Appeal for Eastern Africa on the ground that the said Agreement was void for want of registration pursuant to Section 107 of the Indian Transfer of Property Act 1882. The Court of Appeal accordingly ordered a retrial before the Resident Magistrate.

p. 10, l. 11.
p. 57, ll. 10-13.

5. At the retrial the Resident Magistrate again made an order for 10 possession holding that Sidi Balal was a tenant at will whose tenancy had been determined and that the Appellant was a mere licensee of Sidi Bilal and neither the sub-tenant of Sidi Bilal nor the direct tenant of the Respondent. On the 19th November 1948 this order was set aside by the Supreme Court of Kenya on the ground that Sidi Bilal held a yearly tenancy or at the least a monthly tenancy which had not been determined and that the Appellant was his licensee. The Court of Appeal on the 11th April 1949 dismissed the appeal of the Respondent from this judgment.

pp. 55-63.

p. 60, ll. 15-27.

p. 36, ll. 9-12.

p. 63, Ex. 1.

6. By letter dated the 1st December 1948 the Respondent by his 20 agents gave notice to Sidi Bilal to determine the yearly tenancy held by him on the 1st July 1949.

pp. 64, 65, Ex. 6.

7. By a Sub-lease dated the 25th January 1949 and made between Sidi Bilal of the one part and the Appellant of the other part Sidi Bilal sub-let the premises to the Appellant from the 1st January 1949 up to and including the 1st July 1949 determinable thereafter as the law should permit at the monthly rent of Shs.300 to be paid in the name of Sidi Bilal to the Respondent.

8. The Ordinance (which adopts the general scheme and much of the phraseology of the English Rent Restriction Acts but contains many 30 variations therefrom) came into operation on the 6th September 1949. The provisions of the Ordinance as subsequently amended in force at the date of the said judgment of the Board and chiefly material to this appeal are as follows :—

“ 16.—(1) No order for the recovery of possession of any premises to which this Ordinance applies, or for the ejection of a tenant therefrom, shall be made unless—

- (i) the tenant has, without the consent in writing of the landlord, at any time between the 1st day of December 1941 or the prescribed date, whichever is the later and the 40 commencement of this Ordinance, assigned or sub-let the whole of the premises or sub-let part of the premises the remainder being already sub-let; or, at any time after the commencement of this Ordinance, has, without the consent in writing of the landlord, assigned, sub-let or parted with the possession of the premises or any part thereof.

A Landlord who wishes to obtain an ejectment order on this ground may have the option of obtaining a similar order against the occupier or having the occupier as his direct tenant.

* * * * *

(2) In any case arising under sub-section (1) of this section no order for the recovery of possession shall be made unless the Central Board, the Coast Board, or the court, as the case may be, considers it reasonable to make such an order.

* * * * *

10

(6) 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 sub-tenant, to whom the premises or any part thereof have been lawfully sub-let 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 sub-tenant.

* * * * *

20

23.—(3) Where the interest of a tenant of any premises is determined, either as the result of an order for possession or ejectment or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Ordinance, 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.

* * * * *

28. Notwithstanding the absence of any covenant against the assigning or sub-letting of any premises no tenant shall have the right to assign, sub-let or part with the possession of such premises or any part thereof without the written consent of the landlord or, where such consent shall be unreasonably withheld, without the consent of the Board :

30

Provided that this section shall not apply to a tenant holding a tenancy commencing after the commencement of this Ordinance for a term exceeding one year or holding any tenancy the unexpired residue whereof at the commencement of this Ordinance exceeds one year.

29.—(1) Notwithstanding anything contained in this Ordinance, the tenant of any dwellinghouse may—

40

(a) with the consent in writing of the landlord (which consent shall not be unreasonably withheld) and with the consent of the Board ; or

(b) in any case where, in the opinion of the Board the consent of the landlord has been unreasonably withheld, with the consent of the Board alone, sub-let for a period of not

more than six months (which period may with the consent of the Board be extended for a further period of three months) any dwellinghouse of which the tenant is in personal occupation; and upon the expiration of the period for which such dwellinghouse has been sub-let, the tenant shall be entitled to resume personal occupation of the dwellinghouse."

p. 16, l. 39.

The "prescribed date" mentioned in paragraph (i) of sub-section 16 (1) of the Ordinance was the 31st December 1940.

pp. 1, 2.

9. By an Application in writing dated the 4th February 1950 and made pursuant to the Ordinance the Respondent applied to the Board for an order against Sidi Bilal and the Appellant for recovery of possession of the premises and for an order for payment of arrears of rent and mesne profits. Sidi Bilal did not defend the said proceedings. 10

pp. 6-15.

pp. 15-19.

10. The Board heard the said application on the 8th and 22nd November and the 28th December 1950 and on the 29th January 1951 delivered a reserved judgment making an order for the recovery of possession of the premises against Sidi Bilal and the Appellant and for payment of mesne profits by the Appellant subject to a stay of execution as to delivery of possession pending an appeal. 20

p. 16, ll. 27-30.

11. The Board held that section 16 (1) (i) of the Ordinance applied because the sub-lease to the Appellant was made without the consent in writing of the Respondent and that the Appellant (even if he were a sub-lessee and not a mere licensee) could not rely on section 16 (6) as a sub-tenant to whom the premises had been lawfully sub-let before proceedings were commenced (A) because the Sub-lease being contrary to the provisions of section 16 (1) (i) was not lawful and (B) because the Sub-lease was granted during the currency of the earlier proceedings for possession which had ended in the Appellant's favour and also after service of a valid notice to quit and therefore was not granted "before proceedings . . . were commenced." 30

pp. 20, 21.

p. iii.

pp. 22-30.

12. By a Memorandum of Appeal dated the 5th February 1951, the Appellant appealed from the decision of the Board to the Supreme Court of Kenya. The Appeal was heard on the 8th, 9th, 26th, 27th, 28th and 29th May 1952, and on the 9th June 1952, Bourke J. delivered a reserved judgment setting aside the Order of the Board for payment of mesne profits by the Appellant but affirming the order for recovery of possession subject to a stay of execution pending an appeal. The learned Judge found that the Appellant was a sub-lessee and based his decision on the ground that he was not protected as such because the sub-lease was unlawful since made without the consent of the Respondent. He expressed no opinion as to the correctness of the alternative ground relied upon by the Board that the sub-letting was not made before proceedings for recovery of possession or ejection were commenced. 40

p. 27, ll. 9-28.

p. 27, ll. 29-42.

pp. 31-34.

13. By a Memorandum of Appeal dated the 12th June 1952, the Appellant appealed from the judgment of Bourke J. to the Court of Appeal

for Eastern Africa. The appeal was heard on the 2nd, 3rd and 4th May 1953, and the Court of Appeal (Nihill P., Worley, V.-P., and Mahon J.) delivered judgment on the 14th May 1953 dismissing the appeal.

14. The leading judgment was delivered by Worley, V.-P. After a general review of the facts and the course of the litigation before the Board and the Supreme Court, the learned Vice-President turned to the questions raised on the appeal which he found to be seven in number and summarised as follows :—

10 (1) What is the effect of the document Ex. 6 ? Is it a sub-lease or an assignment ?

(2) If it is a sub-lease, was it made before or after “ proceedings for recovery of possession or ejection were commenced ” ?

(3) If a sub-lease and made before the commencement of such proceedings, then were the suit premises thereby “ lawfully sub-let ” in the absence of consent of the Landlord ?

(4) Does section 16 (1) (i) apply to a contractual tenancy or to a statutory tenancy or to both these descriptions of tenancy ?

(5) Does section 16 (1) (i), or to be more precise, the first limb of the first paragraph, have retrospective effect ?

20 (6) Does the term “ occupier ” in the option clause include a person to whom the premises were lawfully sub-let within the meaning of section 16 (6) ?

(7) If a landlord opts to obtain an order under this paragraph against the “ occupier,” can he obtain such an order on the same grounds as he has, or might have, relied upon to secure an order against the tenant or must he make out a case, separate and distinct, against the occupier (subject however in either case to the consideration of reasonableness under section 16 (2)) ?

15. The first question considered by the learned Vice-President was important because if the Sub-lease was, as contended by the Respondent, in reality an assignment, then the Appellant would be precluded from relying upon the provisions of section 16 (6) of the Ordinance which relates to sub-lessees but not assignees. The Respondent contended that the document called a Sub-lease in reality was an assignment because it was granted for the whole of the unexpired residue of the term vested in Sidi Bilal and at the same rent. The learned Vice-President rejected the Respondent’s contention on this point on the ground that whether or not the document might have been an assignment under English law, under the law of Kenya, by virtue of the provisions of sections 105 and 108 (j) of the Indian Transfer of Property Act 1882, an Underlease for the entire residue of the underlessor’s term operates in the absence of a contract to the contrary as an Underlease and not as an assignment. Section 108 (j) of the said Act provides as follows :—

“ The lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property . . . ”

p. 41, l. 27-p. 42,
l. 42.

16. Upon the question whether the Sub-lease was made before or after "proceedings for recovery of possession or ejection were commenced" the learned Vice-President did not accept the view of the Board that proceedings were commenced by a notice to quit but was of opinion that proceedings under the Ordinance are commenced when an application is made to the Board for possession. He found it more difficult to come to a conclusion on the question whether the only relevant proceedings were the current proceedings then before the Court or whether the date of commencement of the previous proceedings between the parties was relevant. The learned Vice-President came ultimately and "not without 10 some hesitation" to the conclusion that if the original proceedings commenced in 1946 were still *sub judice* at the date when the sub-lease was granted the sub-lease was not granted before the commencement of proceedings within the meaning of section 16 (6) of the Ordinance. The Appellant contends that this conclusion was wrong in law. "Proceedings" in section 16 (6) must mean the proceedings in respect of which an order is sought under paragraph 16 (1) of the Ordinance. It cannot reasonably refer to proceedings finished and concluded before the date of the sub-lease. In respect of proceedings still current at the date of the sub-lease the sub-lessee is precluded from relying upon section 16 (6). 20 But if those proceedings do not result in the termination of the sub-lease, then there is no logical reason why the sub-lease should be the less valid in respect of any future proceedings. The sub-lessee may well have known that the current proceedings were entirely misconceived and bound to fail.

p. 42, l. 43-p. 44,
l. 40.

17. Upon the third question as to whether the Sub-lease was a lawful sub-letting the learned Vice-President disagreed with the view of both the Board and of Bourke J., and held after a review of the authorities that where the head lease does not preclude sub-letting without consent a sub-letting which is otherwise lawful could not become unlawful 30 merely by reason of the absence of consent actual or implied of the landlord. The Appellant contends that this conclusion was correct both because it accords with the weight of authority upon the comparable provisions of the English Rent Restriction Acts and also because under the Ordinance it is made reasonably plain by the provisions of sections 28 and 29 (1) (b) that it is possible under such Ordinance for there to be a lawful sub-letting without the consent of the landlord.

p. 44, l. 41-p. 45,
l. 15.

p. 45, ll. 16-38.

18. Upon the fourth and fifth questions the learned Vice-President held respectively that section 16 (1) (i) applied to contractual tenancies as well as to statutory tenancies and that the first part of the first paragraph 40 thereof is retrospective in effect. The Appellant accepts these conclusions and does not seek on the present appeal to challenge the same.

p. 45, l. 38-p. 50,
l. 12.

19. The sixth question considered by the learned Vice-President concerned the construction of a paragraph not paralleled by any provision in the English Rent Restriction Acts and described by him as "the option clause" to the following effect: "A Landlord who wishes to obtain an ejection order on this ground may have the option of obtaining a similar order against the occupier or having the occupier as his direct tenant." The learned Vice-President came to the conclusion that this paragraph

applied to a lawful sub-tenant notwithstanding the apparently contradictory provisions of section 16 (6) of the Ordinance and the contrary decision thereon of de Lestang J., in *Premchand Nathoo and Co. Ltd. v. Haji Kassam Haji Issak* Kenya Supreme Court Civil Case No. 151 of 1950. The learned Vice-President further was of opinion upon the last question posed by him that "the option clause" permitted a landlord to obtain an order against a lawful sub-tenant merely because the landlord was entitled to an order against his head tenant and without showing that the provisions of section 16 (1) of the Ordinance showed any separate ground for recovery of possession as against the sub-tenant, but subject nevertheless to the question whether it was reasonable to make an order against the sub-tenant pursuant to the provisions of section 16 (2) of the Ordinance.

p. 50, ll. 13-40.

20. On these two last questions the Appellant respectfully contends that the learned Vice-President was misled by the authority of decisions on the English Rent Restriction Acts into placing upon the language of provisions peculiar to the 1949 Ordinance a construction which they will not properly bear. The learned Vice-President frankly admitted that the construction adopted by him led to great difficulty in reconciling the provisions of section 16 (1) (i) and sections 28 and 29 of the Ordinance. He failed in the end to find any satisfactory solution of this difficulty but contented himself with saying: "However that may be I do not think that any difficulty that may occur in reconciling these sections would justify the Court in not giving effect to the plain meaning of section 16 (1) (i) as applied to the facts of the present case."

p. 50, ll. 2-5.

21. The Appellant contends that the provisions of section 16 of the Ordinance as applied to a lawful sub-tenant are by no means plain on the face thereof. There is a *prima facie* conflict between the provisions of "the option clause" and those of section 16 (6). The Appellant contends that the correct reconciliation of these provisions is to treat section 16 (6) as creating an exception in favour of the special class of sub-tenant therein specified from the provisions of "the option clause" applicable to occupiers generally. The right "to retain possession under the provisions of this section" so conferred involves that in order to recover possession the landlord must show as against the sub-tenant a case both under subsection (1) and under subsection (2) of section 16 of the Ordinance. The language of the "option clause" is not apt to deprive a lawful sub-tenant of the rights expressly saved for him under section 16 (6). The loss of such rights cannot depend upon the mere wish of the landlord nor can it follow upon the actual making of an order against the tenant in view of the express provision in section 16 (6) that such order shall not "be in any way operative against any such sub-tenant." Any difficulty in choosing between the alternative constructions is conclusively resolved by reference to sections 28 and 29 (1) of the Ordinance. Upon the construction adopted by the learned Vice-President a sub-tenant who had obtained a sub-lease with the consent of the Board pursuant to section 28 or section 29 (1) (b) of the Ordinance after the landlord had unreasonably withheld his consent would *ipso facto* be liable to be evicted by the landlord under the provisions of section 16 (1) (i). Even if it be right that the sub-tenant could raise the defence of lack of reasonableness this is an extravagant and unattractive

construction. But it is difficult to see how upon the language of the section the sub-tenant can be deprived of his defence under subsection (1) without also being deprived of his defence under subsection (2).

p. 51, ll. 30-40.

22. Nihill P., and Mahon J., delivered brief formal judgments concurring with the order proposed by the learned Vice-President.

23. By an order of the Court of Appeal for Eastern Africa dated the 9th April 1954 the Appellant was granted final leave to appeal to Her Majesty in Council from the said judgment of the Court of Appeal.

24. By a Petition and Supplementary Petition lodged respectively on the 14th June and 13th July 1954 the Respondent petitioned Her Majesty in Council to revoke the said order granting final leave to appeal but by order of Her Majesty in Council dated the 27th July 1954 both the said Petitions were dismissed with costs. 10

25. The Appellant therefore humbly submits that this appeal should be allowed and that the order of the Court of Appeal in East Africa should be reversed and an order made in the Appellant's favour dismissing the Respondent's application for possession of the premises for the following amongst other

REASONS

- (1) BECAUSE the Sub-lease dated the 25th January 1949 took effect as such and did not operate as an assignment. 20
- (2) BECAUSE the said Sub-lease was made "before proceedings for recovery of possession or ejection were commenced" within the meaning of section 16 (6) of the Ordinance.
- (3) BECAUSE notwithstanding the absence of consent on the part of the Respondent as landlord the premises were lawfully sub-let to the Appellant by the said Sub-lease.
- (4) BECAUSE by virtue of section 16 (6) of the Ordinance the Appellant was entitled to retain possession of the premises "under the provisions of this section" and the Respondent has failed to show as against the Appellant that he is entitled under section 16 (1) of the Ordinance to recover possession of the premises. 30
- (5) BECAUSE for the reasons stated in paragraphs 20 and 21 of this case the second paragraph of section 16 (1) (i) of the Ordinance (described as "the option clause") does not assist the Respondent in this respect.

MICHAEL ALBERY. 40

In the Privy Council.

ON APPEAL

from the Court of Appeal for Eastern Africa.

BETWEEN

ISMAIL MOHAMED

CHOGLEY *Appellant*

AND

JAGAT SINGH BAINS . . *Respondent*

Case for the Appellant

HERBERT OPPENHEIMER, NATHAN & VANDYK,
20 Copthall Avenue,
London Wall, E.C.2,
Solicitors for the Appellant.