

24,1955

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UNIVERSITY OF LONDON
W.C.1.

No. 24 of 1954. -4 JUL 1956

In the Privy Council.

INSTITUTION FOR THE ADVANCEMENT OF
LEGAL STUDIES

43583

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL FOR
EASTERN AFRICA.

BETWEEN

ISMAIL MOHAMED CHOGLEY . . . Appellant

AND

JAGAT SINGH BAINS . . . Respondent.

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CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal from a judgment and decree of Her Majesty's Court of Appeal for Eastern Africa dated the 14th May, 1953, dismissing with costs the Appellant's appeal against a judgment and decree of Her Majesty's Supreme Court of Kenya dated the 9th June, 1952, which in turn dismissed the Appellant's appeal against a judgment and decision of the Rent Control Board at Nairobi dated the 29th January, 1951, whereby the said Board granted the Respondent an order for possession of a bakery and shop on plot No. 230/3, Race Course Road, Nairobi, Shs.16,800 mesne profits and Shs.1,600 costs.

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2. The Respondent is the owner of the said premises which in 1941 he let to one Sidi Bilal at 300/- per month. On the 1st December, 1948, he gave the said Sidi Bilal notice to quit the said premises and by their said judgment and decision of the 29th January, 1951, the said Board made an order for possession against the said Sidi Bilal. The question primarily to be determined in this appeal is whether on the true construction of the Increase of Rent (Restriction) Ordinance, 1949, the Appellant who had been let into occupation by the said Sidi Bilal was protected as a lawful sub-tenant. If this question be decided in favour of the Appellant a further question will then arise for determination, viz.,

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whether in any event the Appellant now has or can have any right to possession under the said Ordinance in view of the provisions of the Increase of Rent (Restriction) (Amendment) Ordinance, 1953, Section 2.

3. By an agreement in writing dated the 10th June, 1941, the Respondent leased the said premises (hereinafter referred to as "the premises") to Sidi Bilal for a term of five years from the 1st July, 1941, at a monthly rental of Shs.300. In October, 1941, Sidi Bilal went to live in India leaving the Appellant in occupation. So far as is known he has never returned to Kenya. He has taken no part at any stage in any of the litigation concerning the premises.

p. 55, l. 30.

p. 36, l. 4.

- p. 56, l. 8. 4. In June, 1946, the Respondent claimed possession of the premises from the Appellant on the ground that the lease had expired by effluxion of time. No notice to quit had been given. The Appellant however refused to vacate the premises and the Respondent instituted proceedings against both Sidi Bilal and the Appellant. He was successful both in the Resident Magistrate's Court and in the Supreme Court of Kenya but His Majesty's Court of Appeal for Eastern Africa set the judgment aside upon the ground that the agreement of 10th June, 1941, was void for want of registration, and ordered a retrial.
- p. 55, l. 23. 5. In the retrial the Resident Magistrate made an order that the Appellant and Sidi Bilal should give up possession of the premises. The Appellant appealed to the Supreme Court of Kenya where on the 19th November, 1938, de Lestang, J., held (A) that Sidi Bilal was a yearly tenant whose tenancy was determinable only by a six months' notice to quit; (B) that the tenancy had not been determined; and (C) that the Appellant was in possession by the leave and licence of Sidi Bilal. From the said judgment the Respondent appealed to His Majesty's Court of Appeal for Eastern Africa. 10
- p. 63, l. 12. 19th November, 1938, de Lestang, J., held (A) that Sidi Bilal was a yearly tenant whose tenancy was determinable only by a six months' notice to quit; (B) that the tenancy had not been determined; and (C) that the Appellant was in possession by the leave and licence of Sidi Bilal. From the said judgment the Respondent appealed to His Majesty's Court of Appeal for Eastern Africa.
- p. 63, l. 30. 6. On the 1st December, 1948, the Respondent's solicitors issued a notice to quit addressed to Sidi Bilal determining the tenancy as from the 1st July, 1949, or at the end of the year of tenancy which would expire next after the end of six months from the date of the service of the notice. Since Sidi Bilal could not be found the said notice to quit was affixed to the plot on the 7th December, 1948, and the Appellant was informed of this action by a letter of the same date. 20
- p. 64, l. 1. 7. On the 25th January, 1949, Sidi Bilal entered into an agreement in writing described as a sub-lease reciting (*inter alia*) that the premises had been verbally made over to the Appellant on the 15th April, 1946, and sub-letting the premises to the Appellant. By the said agreement the Appellant covenanted to pay to the Respondent the reserved rent of Shs.300 per month. 30
- p. 64, l. 21. 7. On the 25th January, 1949, Sidi Bilal entered into an agreement in writing described as a sub-lease reciting (*inter alia*) that the premises had been verbally made over to the Appellant on the 15th April, 1946, and sub-letting the premises to the Appellant. By the said agreement the Appellant covenanted to pay to the Respondent the reserved rent of Shs.300 per month.
- p. 36, l. 11. 8. On the 11th April, 1949, His Majesty's Court of Appeal for Eastern Africa affirmed the judgment of de Lestang, J., in the Supreme Court of Kenya.
- p. 1. 9. By a "Case for Landlord" lodged in the Rent Control Board at Nairobi on the 4th February, 1950, the Respondent instituted
- THE PRESENT PROCEEDINGS
- p. 2, l. 28. claiming against both Sidi Bilal and the Appellant recovery of possession of the premises, the sum of Shs.12,900 with further payment at the rate of Shs.300 per month or such higher rate as might be payable for rent or mesne profits from the end of January, 1950. 40
- p. 3, l. 25. 10. By his Defence dated the 12th April, 1950, the Appellant pleaded (*inter alia*) that he was on the 25th January, 1949, under a written Lease duly constituted a sub-tenant under Sidi Bilal from the 1st January, 1949, to the 1st July, 1949, and since the said date was protected as a sitting sub-tenant and would become a direct tenant to the landlord

with effect from such date as the Board named for the termination of Sidi Bilal's interest in the tenancy. He prayed that he be declared a lawful sub-tenant and a direct tenant from the relevant date and liable only to pay rent at Shs.300 per month. p. 5, l. 19.

No defence was filed by Sidi Bilal.

11. Oral evidence was given by and on behalf of the Respondent. The Appellant also gave evidence and admitted in cross-examination that a few days after the second trial before the Resident Magistrate he completed his own bakery on another site in Nairobi and granted a lease thereof from the 1st June, 1948. He added " I get 6,500/- goodwill for the business when I'd run for about 2 months from April-May . . . There was nothing to stop me using my new premises except the lease." pp. 7-11.
pp. 11-13.

12. By their aforesaid judgment dated the 29th January, 1951, the Board of Control held (A) that the Appellant was in possession of the premises as a licensee of Sidi Bilal; (B) that Sidi Bilal's tenancy had been determined by notice to quit operating from 1st July, 1949; (C) that they did not consider it proved that the landlord ever gave his consent to any such making over or assignment as was mentioned in the agreement of January, 1949, between Sidi Bilal and the Appellant; (D) that section 16 (1) of the 1949 Ordinance intentionally rendered invalid any kind of consent by the landlord to sub-letting between the 1st December, 1941, and the 31st December, 1949, except consent in writing; and (E) that at most the Appellant could only be an unlawful sub-tenant and they did not think he was even a sub-tenant. They therefore ordered that the Appellant must give vacant possession of the premises to the Respondent at or before the 28th February, 1951, and pay mesne profits and costs as aforesaid. They granted a stay of execution pending the filing of an appeal providing the mesne profits and costs were paid into court within 7 days. p. 16, l. 13.
p. 16, l. 18.
p. 18, l. 40.
p. 18, l. 45.

30 The Appellant appealed to the Supreme Court of Kenya. pp. 20-22.

13. The judgment of the Supreme Court was delivered by Bourke, J., who held *inter alia* that in Section 16 (1) (i) of the 1949 Ordinance there was no reason for confining the words " the tenant " so as to mean the statutory tenant. The Section covered, and was intended to cover, the case of an assignment or sub-letting before the contractual term came to an end. No qualification was to be implied but the Section only applied where consent to an assignment or sub-letting was required by the tenancy agreement. The material part of Section 16 (1) (i) was made in clear and express language retroactive in its application. Where the tenant had assigned or sub-let the whole of the premises between the dates specified without the consent in writing of the landlord there was no protection under the Ordinance. The learned judge accordingly held that the premises were not lawfully sub-let to the Appellant and that he could not rely upon Sections 16 (6) or 23 (3) for protection in possession. He was the occupier whom the landlord had never regarded or accepted as his direct tenant and the Board was entitled to make the order for recovery of possession against him. Having come to that definite conclusion the learned judge did not consider it necessary to express an opinion on the ruling regarding the alternative submission for the landlord under p. 26, l. 28.
p. 26, l. 32.
p. 27, l. 4.
p. 27, l. 25.

Section 16 (6) that the sub-letting on the 25th January, 1949, was not made "before proceedings for recovery of possession or ejectment were commenced" so as to allow the Appellant successfully to avail himself of the provisions of the subsection.

p. 29, l. 22.
p. 30, l. 6.

14. The learned judge dismissed the appeal against the order for recovery of possession and set aside the order for payment of mesne profits. He granted the Respondent the costs of the appeal.

pp. 31-34.

15. The Appellant appealed to Her Majesty's Court of Appeal for Eastern Africa where the principal judgment was delivered by Worley, Vice President, who after fully reviewing the material statutory provisions 10 and the authorities summarised his conclusions as follows:—

pp. 50-51.

"(i) The document Exhibit 6 is a sub-lease and was executed after proceedings for recovery of possession were commenced. The Appellant is not therefore a 'lawful' sub-tenant within the meaning of Sections 16 (6) and 23 (3) and cannot therefore claim any protection under these sections. Accordingly he is an 'occupier' within the meaning of the option clause, i.e., Section 16 (1) (i), even assuming that that expression excludes a 'lawful sub-tenant' as de Lestang, J., thought.

"(ii) But assuming that I am wrong in holding that the 20 sub-lease was executed after proceedings for recovery of possession were commenced, and that the correct view is that the lease was antecedent to the proceedings: then the premises were, *prima facie*, lawfully sub-let within the meaning of Sections 16 (6) and 23 (3) and I think the weight of authority is that the sub-letting did not become unlawful merely on account of absence of consent by the owner.

"(iii) But this does not avail the Appellant because in my view the expression 'occupier' in the option clause includes 'lawful' sub-tenant as well as 'lawful' assignee and for the purposes 30 of Section 16 (1) (i) a lawful sub-tenant is in no better position than the lawful assignee was held to be in the *Regional Properties* case.

"(iv) In pursuing his optional remedy against the occupier, the landlord can rely upon the ground, namely the fact of sub-letting, assigning or parting with possession, as the case may be, which would found his case against his tenant; subject always, however, to consideration of reasonableness as affecting matters personal between the landlord and the occupier."

For these reasons the learned Judge was of opinion that the judgment appealed from was right and should be confirmed. Nihill, P. and Mahon, J. 40 agreed, and the appeal was accordingly dismissed with costs as aforesaid.

16. On the 18th February, 1953 (while the appeal to the Court of Appeal was pending), the 1953 Ordinance was passed. By Section 2 of the said Ordinance it was provided that the 1949 Ordinance should cease to apply to business premises, with effect from the 25th December, 1954.

p. 53.

17. Final leave to appeal to Her Majesty in Council was granted by an order dated the 9th April, 1954.

18. On the 24th December, 1954, the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance, 1954 (which was passed on the 3rd December, 1954), came into force. The said Ordinance is to continue in force for a period of two years from the date of commencement thereof (Section 1 (2)). It applies only to premises to which the 1949 Ordinance, at the 24th December, 1954, applied (Section 1 (4)), and it provides *inter alia* that tenants of shops and hotels whose tenancies determine may be granted new tenancies on application to a court. The Respondent submits that the said Ordinance does not apply to the
10 premises the subject of this Appeal.

19. The Respondent respectfully submits that this appeal should be dismissed with costs for the following amongst other

REASONS

- 20 (1) BECAUSE between the 1st day of December, 1941, and the commencement of the Increase of Rent (Restriction) Ordinance, 1949, the tenant sub-let the whole of the demised premises and, since the Central Board considered it reasonable to make an order for possession, the Respondent was entitled to recover possession under Section 16 (1) of the said Ordinance.
- (2) BECAUSE the Appellant was at all material times an occupier within the meaning of Section 16 (1) (i) of the said Ordinance.
- (3) BECAUSE the sub-lease was executed after proceedings for recovery of possession were commenced and the Appellant was not therefore a lawful sub-tenant within the meaning of Sections 16 (6) and 23 (3) of the said Ordinance.
- 30 (4) BECAUSE the decision arrived at by the Rent Control Board which was upheld by the Supreme Court of Kenya and by Her Majesty's Court of Appeal for Eastern Africa was right and should be upheld.
- (5) BECAUSE in any event the Appellant cannot now, i.e., since the 25th December, 1954, have any right to possession of the said premises under the provisions of the Increase of Rent (Restriction) Ordinance, 1949, in view of the provisions of Section 2 of the Increase of Rent (Restriction) (Amendment) Ordinance, 1953.

DINGLE FOOT.

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