

2,1950

No. 37 of 1948.

In the Privy Council.

<p>ON APPEAL</p> <p><i>FROM HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.</i></p>	<p>UNIVERSITY OF LONDON W.C.1.</p> <p>12 NOV 1956</p> <p>INSTITUTE OF ADVANCED LEGAL STUDIES</p>
--	--

CASE FOR THE APPELLANTS

BETWEEN

DEVJI HAMIR and NARSHI HAMIR together trading
under the style or firm of THE AFRICAN BOOT
COMPANY (Defendants)

Appellants

31116

10

AND

GILBERT SCOTT MORLEY (Plaintiff)

Respondent.

Case for the Appellants.

RECORD.

1. This is an appeal for which leave to appeal as of right has been granted from a judgment of His Majesty's Court of Appeal for Eastern Africa (Nihill P., Graham Paul and Edwards C.JJ.) dated 20th August 1947, affirming a judgment of Mr. Acting Justice M. C. N. de Lestang in the Supreme Court of Kenya dated 1st April 1947.

p. 29, l. 41—
p. 38, l. 9.
p. 13, l. 15—
p. 16, l. 41.

20 2. The action was brought by the Respondent as Plaintiff on 23rd November 1946 in the Supreme Court of Kenya at Nairobi against the Appellants as Defendants to obtain an order for the ejectment of the Appellants from premises consisting of two living rooms, a kitchen and a closed verandah with the common use of a W.C. and bathroom with other tenants of the Appellants situate in a building on Plot No. 1635/1 (erroneously stated in the proceedings to be Plot No. 1635/2) at Fairview Road Nairobi in the Colony and Protectorate of Kenya and an Order for the restoration of possession of the said premises to the Respondent together with a sum of 1,495 shillings for special damages in respect of damage to or loss of goods of the Respondent upon the said premises and general damages in respect of personal inconvenience hardship and loss of use of the said premises from some date unspecified between 15th February 30 1946 and 16th April 1946. The Appellants delivered a Defence on 13th December 1946.

p. 1, l. 12—
p. 4, l. 30.

p. 4, l. 31—
p. 6, l. 19.

3. The said action was based on a claim by the Respondent that at all material times the Respondent was the lawful statutory tenant of the Appellants under the Increase of Rent and of Mortgage Interest

p. 1, l. 23—
p. 2, l. 31.

(Restrictions) Ordinance (No. 12 of 1940 of the Colony and Protectorate of Kenya) as amended, and that the Appellants had nevertheless wrongfully excluded the Respondent from the said premises from and after some date unspecified between 15th February 1946 and 16th April 1946 and on or about 16th April 1946 had unlawfully broken and entered into the said premises and taken unlawful possession thereof, and that thereafter the damage to or loss of goods of the Respondent had been discovered.

4. Section 11 (1) of the Consolidated Edition of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance (No. 12 of 1940) and all Ordinances amending the same (Nos. 9 and 37 of 1941, No. 16 of 1942, No. 12 of 1943) provides that "No order for the recovery of possession of any dwellinghouse to which this Ordinance applies, or for the ejectment of a tenant therefrom, shall be made unless—" and after setting out ten specific grounds for possession (none of which was in issue in this case) continues "and, in any such case as aforesaid, the Court considers it reasonable to make such an order."

5. The marginal note and text of sub-sections (1) and (3) of Section 17 of the said Consolidated Edition are as follows :—

Conditions of
statutory
tenancy

17. (1) A tenant who, under the provisions of this Ordinance, retains possession of any dwelling-house shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Ordinance, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, then notwithstanding the provisions to the contrary of any law in force in the Colony, on giving not less than three months notice :

Provided that, notwithstanding anything in the contract of tenancy, a landlord who obtains an order for the recovery of possession of the dwelling-house or for the ejectment of a tenant retaining possession as aforesaid shall not be required to give any notice to quit to the tenant.

* * * * *

(3) Where the interest of a tenant of a dwelling-house 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.

6. The principal point in the appeal is whether at the expiration of the Respondent's contractual tenancy of the said premises the Respondent sufficiently occupied the said premises as his home to bring into being and thereafter to retain a statutory tenancy of the said premises.

7. At some time in 1943 the Appellants became the owners of the house of which the said premises form part and let the said house to one Mrs. De Silva. In November 1943 the Respondent took a sub-tenancy of the said premises from Mrs. De Silva at a rent of 60 shillings a month. In October or November 1945 Mrs. De Silva determined her tenancy of the said house and thereafter the Respondent held the said premises as a tenant of the Appellants.

p. 1, ll. 19-21.
p. 10, l. 43—
p. 11, l. 3.
p. 6, ll. 34-38.
p. 6, l. 37,
p. 40, l. 29—
p. 41, l. 24.

10 8. On 1st February 1946 the Respondent left the said premises in order to work as a Clerk on the Dondora (or Dandora) Estate about 15 miles from Nairobi. The Respondent's wife remained in occupation of the said premises but on 9th February 1946 she left the said premises and went to reside with the Respondent on the Dondora Estate.

p. 8, l. 11.
p. 9, l. 28.

9. On and after 9th February 1946 the only property of the Respondent which the Appellants admitted remained on the said premises consisted of—

p. 11, ll. 16-18,
31-36,
p. 12, ll. 5-11.

20 1 Curtain stand
 1 Bed
 1 Window curtain
 1 Cloth bag containing sundry papers
 1 Table
 1 Old Trunk
 1 Primus
 1 Small Stand
 1 Old umbrella.

p. 58.

In addition the Respondent claimed that he had left certain clothing cooking utensils crockery and personal effects to the value of 1,495 shillings on the said premises. The Respondent gave evidence that "when my wife and I left on 9th February 1946 there was nobody in my rooms. We locked the rooms and put nobody in possession."

p. 2, ll. 24-29,
p. 3, ll. 10-42.
p. 8, ll. 11, 12.

30 10. Evidence was given by Cuthbert Wigham, Manager of Dondora Estate, that he employed the Respondent in February 1946 as a Clerk on the Estate on monthly terms on three or four months' trial and that this employment still continued at the date of this trial (27th March 1947). The Respondent gave evidence that "On 9th February 1946 I was residing at Dondora Estate . . . I resided at Dondora."

p. 9, ll. 1-11.

p. 7, ll. 46-49.

40 11. On 15th February 1946 Mr. R. C. Gautama on behalf of the Respondent wrote a letter to the Appellants seeking their consent to a sub-letting of the said premises to one Mr. Rodrigues. The Respondent in his evidence at the trial stated that Mr. Rodrigues had promised to leave the said premises if the Respondent required them and that he (the Respondent) intended to sub-let the said premises for a year "with certain arrangements about my wife staying there when she required." Mr. D. N. Khanna on behalf of the Appellants wrote a letter in reply to Mr. R. C. Gautama stating that the Appellants would not consent to the sub-letting and giving to the Respondent notice to quit and deliver up vacant possession of the said premises on the 1st April 1946 "or at the end of his complete month of tenancy for March, 1946."

p. 41, l. 25.
p. 42, l. 10.
p. 8, ll. 6, 7.

p. 7, l. 38.
p. 43, ll. 1-19.

p. 42, ll. 11-30.

12. On 20th February 1946 Mr. R. C. Gautama on behalf of the Respondent wrote a letter to the Rent Control Board seeking the Board's consent under section 6 (1) (b) of Ordinance 26 of 1943 to the Respondent sub-letting the said premises. On 11th April 1946 Mr. R. C. Gautama on behalf of the Respondent wrote a letter to the Rent Control Board stating that the Respondent no longer wished to sub-let the said premises.

p. 30, ll. 6, 7.

p. 2, ll. 3, 4.

p. 5, ll. 37-41.

p. 11, ll. 12-14.

p. 14, ll. 4-6.

13. At some uncertain date towards the end of February 1946 the Appellants with the object of preventing any unauthorised sub-tenant from taking possession of the said premises put a padlock on the entrance to the said premises in addition to the Respondent's padlock. 10

p. 50, ll. 12-32.

14. On 15th April 1946 Mr. R. C. Gautama on behalf of the Respondent wrote a letter to Mr. D. N. Khanna stating that unless the lock attached by the Appellants was removed by 12 noon on 16th April 1946 the Respondent would break the lock in the presence of 2 independent witnesses and take possession of the premises. On 25th April 1946 the Appellants broke into the said premises in the presence of three witnesses and made an inventory of the goods found upon the said premises. On the same day Mr. D. N. Khanna on behalf of the Appellants wrote a letter to the Rent Control Board and to Mr. R. C. Gautama informing them that the Appellants had taken possession of the said premises and had made an inventory of the things found therein and stating that the Respondent should arrange at an early date to take charge of these things. On 13th September 1946 and 26th September 1946 Mr. D. N. Khanna sent further letters to Mr. R. C. Gautama requesting the Respondent to remove these things. On 5th October 1946 the Respondent's wife inspected these things but did not remove them. On 22nd October 1946 Mr. R. C. Gautama on behalf of the Respondent first put forward the Respondent's claim that certain articles were missing. 20

p. 5, ll. 42-45.

p. 58.

p. 52, l. 28.

p. 53, l. 9.

p. 53, l. 30-

p. 54, l. 9.

p. 55, ll. 1-18.

p. 10, ll. 26-33.

p. 56, ll. 1-18.

p. 56, l. 20.

p. 57, l. 13.

p. 13, l. 15.

p. 16, l. 40.

15. On 1st April 1947 Mr. Acting Justice M. C. N. de Lestang gave judgment for the Respondent for 1,495 shillings special damages and 2,000 shillings general damages and made an order for possession of the said premises in favour of the Respondent with costs. 30

p. 14, l. 37-

p. 15, l. 21.

p. 15, ll. 22-33.

16. Mr. Acting Justice de Lestang gave the following among other reasons for his judgment. He said that it was settled law that a tenant, to be entitled to the protection of the Rent Restriction Ordinance "must be in personal occupation or actual possession of the premises in respect of which he seeks that protection." In his view on the facts of this case the Respondent had not given up actual possession or personal occupation of the premises. The Respondent had no intention of giving up the premises "because he was not sure of his job which was on a monthly basis and in which he was on trial for three months, his wife was expecting a baby and his children enjoyed bad health and he wanted a roof in Nairobi as there were no medical facilities at Dondora and in consequence he left some of his belongings in the premises. For these reasons he sought to sub-let the premises to a friend in order to cut down his expenses. I think that the facts proved establish beyond doubt that although he temporarily left the premises his home was still in them and he intended to return to them." He found that the articles to the value of 1,495 shillings had disappeared from the articles which the Respondent had left behind on the said premises, that the Appellants 40 50

p. 15, l. 37.

p. 16, l. 30.

had not rebutted this evidence, and that the loss of these articles was the direct result of the Appellants' wrongful act in trespassing on the Respondent's premises and unlawfully meddling with his belongings. He further assessed 2,000 shillings general damages in respect of the Respondent being deprived of the use of his rooms. p. 16, ll. 31-37.

17. The Appellants appealed to His Majesty's Court of Appeal for Eastern Africa (Nihill P., Graham Paul and Edwards C.JJ.). The appeal was heard on 5th and 6th August 1947 and on 20th August 1947 the Court of Appeal delivered judgments unanimously dismissing the appeal. pp. 18-29.
p. 29, l. 41.
p. 38, l. 9.
- 10 Nihill P. stated that the crucial issue in the case was whether or not the Respondent on 25th April 1946 was in possession of a portion of the Appellants' premises of which he was formerly a contractual tenant. He stated that if the Respondent was not in possession the appeal must succeed but that the learned judge in the Court below after addressing his mind to the issue and after reviewing the leading cases came to the conclusion that the facts proved established beyond doubt that although the Respondent temporarily left the said premises his home was still in them as he intended to return to them, and that this was a conclusion that the Court of Appeal would hesitate to upset unless convinced that the learned judge had drawn incorrect inferences from the established facts. p. 31, ll. 41-44.
p. 31, l. 49.
p. 32, l. 6.
- 20 Nihill P. agreed with the general proposition that the basic reason for the Rent Restriction Ordinance was the shortage of housing accommodation and that if people could obtain protection for a pied-a-terre in addition to the premises in which they actually resided the whole intention of the legislature would be defeated. He regarded the present case as a border line case which needed very little to swing the scale either way and said that at the date of the hearing below the Respondent had been 14 months working and living on the estate at Dondora and that "there is no evidence that he contemplates giving up his employment there." Nihill P. p. 32, ll. 8-13.
p. 32, ll. 19-22.
- 30 however said that no one could say that the Respondent might not have terminated his employment at Dondora and returned to Nairobi, and he considered that whatever might be the position at the date of the hearing, all the evidence pointed to the fact that the Respondent had not formed the intention of permanently transferring his home to Dondora. p. 32, ll. 25-27.
p. 32, ll. 32-35.

18. Graham Paul C.J. agreed with the judgment of Nihill P. He regarded the judgments of Scrutton and Slesser L.J. in *Skinner v. Geary* 1931 2 K.B. 546 as being authorities against the Appellants and not in favour of them and held that there was nothing to prevent the Rent Restriction legislation protecting a tenant who occupied more than one dwelling-house. p. 35, ll. 14-17.
p. 35, ll. 33-49.
p. 6, ll. 1-23.
- 40

19. Edwards C.J. agreed with the judgments delivered on the main point that the learned judge below was on the evidence entitled to find that the Respondent at the material time "had not ceased to be in "actual possession" of the flat in question," and like Nihill P. thought the case a border line case. He said that he might not be prepared to hold that a tenant who on a transfer from Nairobi to Naivasha took his wife and family with him and left only a few sticks of furniture behind him should in the absence of special circumstances showing a definite intention to retain possession of a house rented by him in Nairobi be regarded as still in actual possession of that house, but that in the present case the p. 37, ll. 33-37.
p. 37, ll. 41-49.
- 50

learned trial judge had held that the facts established beyond doubt that although the Plaintiff temporarily left the premises, his home was still in them and he intended to return to them.

20. On 15th March 1948 the Appellants petitioned the King's Most Excellent Majesty in Council for special leave to appeal from the judgments of the Court of Appeal dated 20th August 1947 or alternatively to declare that they had an appeal as of right and on 27th April 1948 His Majesty in Council was graciously pleased to approve the report of the Lords of the Committee humbly reporting as their opinion that leave ought to be granted to the Appellants to enter and prosecute their appeal and to order 10 that the same should be carried into execution.

21. The Appellants submit that the judgments of the Supreme Court of Kenya and of His Majesty's Court of Appeal for Eastern Africa are wrong and ought to be reversed and the present appeal allowed for the following and other

REASONS.

- (1) BECAUSE there was no evidence on which the learned judge could in law find that on the date when the contractual tenancy came to an end the Respondent retained possession of the premises as a dwelling-house. 20
- (2) BECAUSE the learned judge misdirected himself in holding that on the evidence before him the Respondent at the material dates sufficiently occupied the said premises to hold a statutory tenancy thereof.
- (3) BECAUSE the learned judge and the Court of Appeal were wrong in holding that the Respondent could in law be a statutory tenant of the said premises after he had removed to the Dondora Estate.
- (4) BECAUSE the learned judge and the Court of Appeal were wrong in law in treating as evidence that the 30 Respondent retained possession of the premises as a dwelling-house evidence that he intended to sub-let the premises on terms that his wife might occasionally stay there as the guest of the sub-tenant.
- (5) BECAUSE a mere intention to return to the said premises in certain circumstances coupled with leaving a small quantity of furniture therein was insufficient in law to create or preserve a statutory tenancy of the said premises for the Respondent.
- (6) BECAUSE under the Rent Restriction Ordinances no 40 person who is living in one home can in law claim a statutory tenancy of other premises.
- (7) BECAUSE the awards of damages were based on the Respondent having a statutory tenancy of the said premises and in fact he had no such tenancy.

GERALD GARDINER.

R. E. MEGGARY.

In the Privy Council.

ON APPEAL

*from His Majesty's Court of Appeal for
Eastern Africa.*

BETWEEN

HAMIR and Another (Defendants)

Appellants

AND

MORLEY (Plaintiff)

- *Respondent.*

Case for the Appellants.

HILDER, THOMPSON & DUNN,

39 Jermyn Street,

London, S.W.1,

Solicitors for the Appellants.