

26, 1958

IN THE PRIVY COUNCIL

No. 10

UNIVERSITY OF LONDON  
of 1957 W.C.1.

24 JAN 1959

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

INSTITUTE OF ADVANCED  
LEGAL STUDIES

B E T W E E N :

MOHAMED HAJI ABDULLA and  
AHMED HAJI ABDULLA

Appellants

52076

- and -

(1) GHELA MANEK SHAH  
(2) PUNJA KACHRA  
(3) KASTURBHAI M. SHAH  
Trading as "Shah Ghela  
Manek"

Respondents

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CASE FOR THE APPELLANTS

Record

1. This is an Appeal from the Order of the Court of Appeal for Eastern Africa dated the 13th October 1956, whereby the said Court dismissed with costs an Appeal by the Appellants and allowed with costs a cross-appeal by the Respondents from the judgment of the Supreme Court of Kenya at Nairobi (Mr. Justice Bourke) dated the 18th February 1954, and varied as regards costs an Order dated the 7th April 1955 dismissing an application by the Respondents for the review of the said judgment. The said judgment and Order were given and made in an action (Civil Suit No.200 of 1953) wherein the Respondents were the Plaintiffs and the Appellants were the Defendants.

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2. The said action was begun by a Plaint dated the 31st January 1953, whereby the Respondents claimed in effect specific performance of an Agreement in writing dated the 6th December 1951 whereby the Appellants agreed to sell and the Respondents (by their Agent one Khetshi Ghelabhai) agreed to purchase for the sum of Shs.125,000/- certain land and buildings at River Road Nairobi in the Colony of Kenya, subject to an abatement of the purchase price by reason of an alleged breach of contract or duty on the part of the Appellants in failing to deliver vacant possession of a part of the said premises.

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Record

3. The one point of substance arising in this Appeal is whether the Respondents are or are not entitled on completion of their purchase to compensation by way of an abatement of the purchase price by reason of the fact that the Appellants, having before the time fixed for completion received a surrender of the existing tenancy of part of the premises agreed to be sold, elected without reference to the Respondents or their Agent to relet that part on the same day to another (protected) tenant at the same rent, thereby depriving the Respondents as purchasers of the additional value which would have attached to the premises if transferred with vacant possession of such part. A subsidiary point arises as to whether the Court of Appeal for Eastern Africa had any jurisdiction to vary the Order dated the 7th April 1955 as to costs.

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4. As regards the point of substance, the relevant facts appear to be the following:

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(1) By an Agreement in writing dated the 6th December 1951 (hereinafter called "the Agreement") the Appellants agreed to sell and Khetshi Ghelabhai (who acted as agent for the Respondents) agreed to purchase at the price of Shs. 125,000/- the property described in clause 3 of the Agreement as follows:

"Plot known as L.R. No.209/502 situate at River Road Nairobi, together with the building standing thereon which is rented by (1) Hiragar Motigar, (2) Velvi Ravji, Barber, (3) Deva Naran, Shoemaker. Free from encumbrances."

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A deposit of Shs. 25,000/- was paid on the signing of the Agreement, and the balance was payable "on or before the 31st of March 1952 against execution of a proper conveyance by the Vendors in favour of the purchaser his nominee or nominees" (clause 6); the conveyance to be prepared by the Purchaser (clause 7). It was further agreed by clause 10, headed "Rent and Rates" as follows:

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"The Purchaser is entitled to one fifth of the net rent from the date hereof to the date of execution of a proper conveyance ...."

(2) On 16th February 1952, and prior to the execution of any conveyance, the tenant Velji Ravji mentioned in the Agreement surrendered the tenancy of that part of the premises - that is, the centre shop - let to him and vacated the shop. On the same

day and without notice to the Respondents or their said agent, the Appellants relet the vacated part of the property to Doshi & Coy. at the same rent of Shs. 178/- a month. The new tenant went into possession and at all material times thereafter remained in possession of the said shop.

10 (3) Both the said surrendered tenancy, and the said new tenancy were protected under the local Rent Restriction legislation, and it was proved at the trial and is not now in dispute that at all material times the value of the property agreed to be sold with vacant possession of the centre shop exceeded its value subject to the said new tenancy by the sum of Shs. 18,000/-.

20 5. The trial of the action took place on 11th February 1954 before the Honourable Mr. Justice Bourke. The learned Judge delivered judgment on 18th February 1954 in favour of the Respondents, and, after hearing argument as to the form of the judgment, gave judgment for the Respondents for Shs. 18,000/- as damages with costs. In his judgment Mr. Justice Bourke stated that the agreed issues were (1) whether the Appellants were entitled in law to re-let the centre shop without the authority of the Respondents, and (2) if not, whether the Respondents had suffered damage and if so what damage. He added that the Respondents claimed damages and had abandoned the claim for specific performance.

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30 6. As regards the first of the agreed issues (which is, in effect, the principal question arising in this Appeal), Mr. Justice Bourke observed that the Respondents' argument had been founded on Section 55 (1) (e) of the Indian Transfer of Property Act 1882 (hereinafter called "the Act"), which reads as follows:

40 "55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold.

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(1) The seller is bound:-

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents".

It was said (the learned Judge added) that this section operated to put the Appellants in the position of trustees, and that upon a circumstance arising, namely, the surrender of a tenancy, increasing the value of the property, the Appellants should not have re-let except upon notice to and in pursuance of the wishes of the Respondents; whereas the Appellants, relying on Section 54 of the Act (which provides, inter alia, that a contract for sale "does not of itself create any interest in or charge on" the property, and that "The seller is entitled to the rents and profits of the property till the ownership thereof passes to the buyer"), contended that even if they became trustees, so far from failing in a duty towards the Respondents, they took the only reasonable and necessary course in promptly re-letting at the same rent. The learned Judge appears to have held in effect that Section 55 (1) (e) of the Act imposed on the Appellants as vendors duties analogous to those of a trustee or a vendor of land under English law and, after citing various passages from the judgment of Sir George Jessel M.R. in Egmont v. Smith 6 Ch.D. 469, concluded as follows:

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"Accordingly it seems evident that in law there is a duty upon a Vendor as trustee to give notice to the Purchaser of his intention to re-let where a tenancy determines, whether this event occur through surrender by the Tenant or otherwise, and to ascertain what the Purchaser wishes to be done. Despite the obligation to re-let under the general law, it seems that the Purchasers in the instant case should have been given by notice the opportunity of saying "we will forego the one-fifth share of rent to which we are entitled in respect of this central shop, and we will indemnify or settle with you as regards the balance of the rental amount to which you are entitled up to the time of completion". The failure of the Defendants

to perform this duty amounts in my opinion to a breach of trust and the Plaintiffs are entitled to damages by way of compensation."

10 7. On the 17th May 1954 the Appellants appealed to the Court of Appeal for Eastern Africa from the judgment of Mr. Justice Bourke. On the 15th December 1954 the Respondents applied by motion to the Supreme Court of Kenya at Nairobi for a review of the said judgment by substituting therefor an order for the specific performance of the Agreement with an abatement of the purchase price by the amount of the damages and taxed costs. The said application for review was dismissed with costs on the 7th April 1955. By a Decree dated the 7th June 1955 the Appellants were ordered to pay to the Respondents the sum of Shs.21,712.50/- in respect of the damages awarded by the said judgment and the taxed costs of the action. On the 10th November 1955 the Respondents gave notice of cross-appeal from the judgment of Mr. Justice Bourke and from the said Decree to the Court of Appeal for Eastern Africa pursuant to the leave of the said Court of Appeal granted by Order dated the 4th November 1955.

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30 8. The said Appeal was heard on the 2nd, 3rd and 4th October 1956, and on the 13th October 1956 the Court of Appeal for Eastern Africa (Sinclair Ag.P., Briggs J.A. and Bacon J.A.) delivered judgment dismissing the appeal and allowing the cross-appeal and varying the judgment and decree of the Court below by directing that judgment be entered and a decree passed for specific performance of the Agreement, subject to a deduction of the sum of Shs.18,000/- awarded as damages from the balance of the purchase price. The said Court of Appeal also varied the Order made by Mr. Justice Bourke on the said application for review by directing that the parties should bear their own costs of such application.

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40 9. The judgment of Mr. Justice Briggs, with which the Acting President and Mr. Justice Bacon agreed, seems to have been based on the following propositions:-

50 (1) There is no dispute that the buyers took subject to any rights of the named tenants. The question is whether they must take subject

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to the rights of any tenants whom the sellers let in on similar terms.

(2) Section 55 (1) (e) of the Act is not confined to physical preservation of the property. The seller is under a duty to ensure, so far as he reasonably can, that the buyer shall get all that he is entitled to under the contract. This may involve many matters besides the physical condition of the property.

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(3) Seller and buyer are both interested in the property in the ordinary sense of the word, and the seller is bound to have regard to the interests of both parties. The only legitimate interest of the sellers which was involved when the tenancy was surrendered was that they should not lose their four-fifths share of the net rent of the shop for the period of about six weeks expected to elapse before completion. The sellers could not have been unaware that the vacancy had greatly enhanced the capital value of the premises. Common sense suggests that they should have consulted the buyers, who would have agreed to compensate the sellers for the loss of rent.

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(4) The right of the buyers to be consulted is not merely something which may be suggested as sensible or convenient, but has a legal basis, as is shown by Egmont v. Smith 6 Ch.D. 469, 475.

(5) The sellers were bound by the provisions of Section 55 (1) (e) of the Act to consult the purchasers and to ascertain their wishes and intentions before taking any step so obviously detrimental to their interests as re-letting. Sections 55 (5) (c) and 55 (6) (a) of the Act support this view.

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10. The Appellants were given final leave to appeal from the judgment of the Court of Appeal for Eastern Africa by an Order of that Court made on 2nd April 1957.

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11. The Appellants respectfully submit that the judgment of the Court of Appeal for Eastern Africa was erroneous for the reasons hereinafter appearing.

12. As regards the point of substance arising in this Appeal, the Appellants respectfully submit as follows:-

(A) Notwithstanding the Agreement, the full ownership of the property agreed to be sold remained vested in the Appellants pending completion of the sale, and the Appellants were not in any sense trustees for the purchaser; whilst the purchaser did not, by virtue of the Agreement, acquire any beneficial or proprietary interest in the property. The relation subsisting between the Appellants and the Respondents at the time of the re-letting rested in contract only, and the rights and obligations of the parties depended entirely on the terms of the Agreement and the relevant provisions of the Act as applied to the Colony of Kenya. Accordingly, the English authorities relating to the obligations of a vendor of land between contract and completion are not in point.

(B) The Agreement was a contract for the sale of rented property, and contained no term requiring the Appellants to give vacant possession on completion of any part of the property. It was implicit in clause 10 of the Agreement that the property would continue to produce rent until completion. Moreover, the Appellants remained liable, pending completion, to pay municipal rates and ground rent and to use reasonable care in preserving the physical condition of the property. In these circumstances, the Appellants were entitled to re-let the centre shop (as they did) on terms not less favourable to the landlords than the terms of the surrendered tenancy, since the new letting did not prevent the Appellants from conveying to the Respondents what they bargained for.

(C) Section 55 (1) (e) of the Act, on its true construction, relates only to the physical preservation of the property; but, even if it is to be regarded as covering more than physical preservation, there is no reason for saying that an owner of ordinary prudence would not have re-let the surrendered shop premises; for it is not to be assumed that he was an owner about to sell or one who wanted to

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occupy the shop himself.

13. As regards the costs of the application for review, there was no appeal to the Court of Appeal for Eastern Africa from the Order of the 7th April 1955 dismissing that application with costs, and accordingly the said Court of Appeal had no jurisdiction to vary the said Order.

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14. The Appellants accordingly submit that the judgments herein of the Court of Appeal for Eastern Africa and of Mr. Justice Bourke ought to be reversed, that the Order dated the 13th October 1956 of the said Court of Appeal and the Decree dated the 7th June 1955 ought to be discharged, and that judgment should be entered for the Appellants dismissing the action with costs, and that in the alternative the said Order dated the 13th October 1956 should be varied by discharging paragraph 4 thereof, for the following (among other)

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R E A S O N S

(1) BECAUSE notwithstanding the Agreement the Appellants remained the owners of the property agreed to be sold and the Respondents acquired no estate or interest therein pending completion

(2) BECAUSE the Appellants were not trustees of the property for the Respondents and were entitled to the full benefit of the property pending completion, save only that the Respondents were entitled to one-fifth of the rent as provided by the Agreement

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(3) BECAUSE at all material times the Appellants were ready and willing to convey to the Respondents that which they contracted to buy

(4) BECAUSE on the true construction of the Agreement the Appellants were not precluded from re-letting the shop on terms not less favourable than those of the surrendered tenancy, and were not required on completion to give vacant possession of any part of the property

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(5) BECAUSE Section 55 (1) (e) of the Act is concerned only with the preservation of the property from physical deterioration

(6) BECAUSE even if Section 55 (1) (e) of the Act covers more than physical preservation



of the property an owner of ordinary prudence, placed in the position of the Appellants, would or might have deemed it reasonable and proper to re-let the vacant shop at once on the best terms that could reasonably be obtained

(7) BECAUSE (as regards the costs of the application for review) the Court of Appeal for Eastern Africa had no jurisdiction to vary the Order of the 7th April 1955

(8) BECAUSE the judgments of all the Judges in the Courts below were wrong

H.E. FRANCIS

No.10 of 1957

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CASE FOR THE APPELLANTS

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