

*Privy Council Appeal No. 10 of 1957*

**Mohamed Haji Abdulla and another** - - - - - *Appellants*

v.

**Ghela Manek Shah and others** - - - - - *Respondents*

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 1ST DECEMBER, 1958

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*Present at the Hearing :*

LORD REID

LORD COHEN

LORD SOMERVELL OF HARROW

[*Delivered by* LORD SOMERVELL OF HARROW]

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This is an appeal from the order of the Court of Appeal for Eastern Africa dismissing an appeal by the appellants and allowing a cross appeal by the respondents from a judgment of the Supreme Court of Kenya.

The plaintiffs, the present respondents, claimed specific performance of an agreement in writing dated the 6th December, 1951. The agreement was for the sale by the defendants, the present appellants, to the plaintiffs of certain land and buildings at River Road, Nairobi. The plaintiffs' claim for specific performance was made subject to an abatement of the purchase price by reason of an alleged breach of duty or contract by the defendants.

The only question in the appeal is whether the respondents, hereinafter called the purchasers, are entitled on completion to compensation by way of an abatement of the sum to be paid to the appellants, hereinafter called the vendors to complete the purchase.

The material provisions of the agreement are as follows:—

“MEMORANDUM OF AGREEMENT OF SALE OF THE UNDER-MENTIONED PROPERTY BETWEEN THE PARTIES HERE-UNDER MENTIONED UPON TERMS SPECIFIED BELOW

1. *Name of the Vendors* :—

MOHAMED HAJI ABDULLA and (2) AHMED HAJI ABDULLA.

2. *Name of the Purchaser* :—

KHETSHI GHELABHAL.

3. *Description of Property* :—

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) Velji Ravji, Barber (3) Deva Naran, Shoemaker, Free from encumbrances.

4. *Purchase Price* :—

Shgs.125,000/- (Shillings One hundred and twenty five thousand only).

5. *Deposit against Purchase Price made on the signing hereof :—*

Shs.25,000/- (Shillings Twenty five thousand only).

6. *Balance of Purchase Price :—*

Shs.100,000/- (Shillings One hundred thousand only) to be paid 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.

7. *Conveyance :—*

To be prepared by an Advocate named by the Purchaser, their Nominee or Nominees. Cost of such Advocate, Stamping and registering the Conveyance to be borne by the Purchaser.

10. *Rent and Rates :—*

The Purchaser is entitled to one fifth of the net rent from the date hereof to the date of execution of a proper Conveyance. The Vendors are liable to pay Municipal Rates and Ground Rent only up to the date of execution of proper Conveyance.

Dated at Mombasa this 6th day of December, 1951."

On 16th February, 1952, prior to the execution of any conveyance one of the tenants Velji Ravji surrendered his tenancy of the part of the building let to him. On the same day without consultation with the purchasers the vendors relet the vacated part of the building to a new tenant at the same rent. Under the Rent Restriction legislation in force at the time the rent under the new lease was the maximum rent. Owing to the shortage of accommodation the premises with Velji Ravji's part vacant were worth Shs.18,000/- more than with that part let. The purchasers claimed that this sum should be deducted from the purchase price or awarded as damages.

Before the learned Judge the purchasers succeeded. Owing to a misunderstanding as to an agreement between counsel judgment was entered for Shs.18,000/- as damages and not for specific performance with an abatement of the purchase price. This led to a Notice of Motion for a review of the judgment. This was dismissed and the purchasers by a cross appeal asked for a variation of the Judge's order by substitution of an order for specific performance on payment of the agreement price less the deposit, less the Shs.18,000/- and less taxed costs.

The vendors' appeal was dismissed and the cross appeal in substance allowed.

The purchasers submit that the vendors committed a breach of duty owed to the purchasers by reletting without consulting them. The purchasers admit that the vendors were interested in four-fifths of the rent until completion and that the purchasers would be bound to indemnify them for this loss arising from the premises being kept vacant. It was accepted in the Courts below that if the purchasers had been consulted they would have wished the premises to remain vacant and would have been willing to pay the loss of rent or allow it to be deducted from their one-fifth share. It would not have amounted to more than £10 or £15.

The case depends on the duty owed by a vendor to a purchaser after contract but before completion.

By Article 11 (b) of the East Africa Order in Council, 1897, the provisions of the Indian Transfer of Property Act, 1882, as amended, prior to the 27th November, 1907, were made part of the law of Kenya. It is provided by section 54 that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. This negatives the English principle under which a contract for sale confers an equitable title on the purchaser. That principle being negated the vendor's obligations, if any, must be sought elsewhere. They are dealt with in section 55 of the Act. The first argument arises on section 55 (1) (e).

“ 55. In the absence of a contract to the contrary, the buyer and the seller, of immovable 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:—

(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.”

The vendors submit that the words “ take . . . care of ” should be limited to protecting the property from physical deterioration ; that they remained owners and were entitled to relet ; that the subject matter of the contract was a property fully let and that the vendors have always been ready and willing to convey the property fully let ; that if the purchaser had desired some right of control or consultation if the whole or part of the premises became vacant then he should have so stipulated in the contract ; that therefore no duty of consultation in the circumstances arose under section 55 (1) (e) nor can any such duty be implied.

The purchasers submitted in the first place that the words “ take . . . care of the property ” should be given a wide meaning.

Their Lordships reject the submission that the words “ care of the property ” are restricted to the preservation of the property from physical deterioration. They include care in its management having regard to the interests of the purchaser. On this view the obligations imposed by section 55 (1) (e) are substantially those imposed on a vendor under English law.

The Court of Appeal cited with approval the opinion of Mulla and Gour in their text books on the Indian Act that the vendor’s duties to a purchaser under paragraph (e), although he is not a Trustee, are the same as they would be if section 15 of the Indian Trusts Act, 1882, were applicable. That section reads as follows:—

“ 15. A trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own ; and in the absence of a contract to the contrary a trustee so dealing is not responsible for the loss, destruction, or deterioration of the trust property.”

This is substantially the position of a trustee in relation to property under English law. Their Lordships therefore agree with the Courts below that English principles and authorities are relevant and of assistance.

On this basis it seems plain that the vendors had no right without consultation with the purchaser to diminish the value of the property as it was after the surrender by reletting.

Reliance was placed by the Court of Appeal on a passage in *Egmont v. Smith*, 6 Ch. D. 469. In that case Sir George Jessel, M.R., considered the position if after contract and before completion a tenancy came to an end. The land was agricultural land. The Master of the Rolls (p. 476) said this:—

“ I have no doubt whatever that, on the general law, the duty of a trustee is to let the farms from year to year in order to obtain sufficient rent, and to keep the farms in a good state of cultivation. That, I have no doubt, is the general law. Whether the vacancy happen in the ordinary course of determining the tenancy either by the landlord or the tenant, or whether the vacancy happen because the landlord gave the notice at the request of the purchaser, appears to me as regards the subsequent liability wholly immaterial.

I think it is the proper course that the vendor should give notice of the impending vacancy to the purchaser, and ask him what he wishes to be done ; because if the purchaser says I am willing to run

the risk of the farms being unlet, and I will guarantee you against any loss that will arise to you in case the purchase goes off, it might be a proper thing to allow them to remain unlet.”

In the circumstances that prevailed in Nairobi the reletting had the same effect in relation to value as the leaving vacant of agricultural land. Their Lordships are therefore of opinion that the decision of the Court of Appeal was right.

The vendors sought to rely on other provisions in section 55. In their Lordships' opinion these do not assist or affect the conclusion to which they have come as to the construction and application of section 55 (1) (e).

The purchasers sought alternatively to support the decision of the Court of Appeal on the terms of the contract and on a general proposition that a purchaser ought always to be consulted with regard to a new letting. It is unnecessary to consider circumstances other than the present, which are in their Lordships' opinion covered by section 55 (1) (e).

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the Order of the Court of Appeal confirmed. The appellants must pay the costs of the appeal.



In the Privy Council

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MOHAMED HAJI ABDULLA AND  
ANOTHER

v.

GHELA MANEK SHAH AND OTHERS

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DELIVERED BY LORD SOMERVELL OF  
HARROW

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,  
DRURY LANE, W.C.2.  
1958