2.1950

No. 37 of 1948.

In the Privy Council.

ON APPEAL

FROM HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

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

AND

GILBERT SCOTT MORLEY (Plaintiff) — *Respondent.*

CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal from the judgment, dated the 20th August 1947, and the decree, dated the 21st April 1948, of the Court of Appeal for Eastern Africa dismissing with costs the Appellants' appeal from the judgment of Mr. Acting Justice de Lestang in the Supreme Court of Kenya, dated the 1st April 1947.

2. The principal issues in this appeal are :—

(A) Whether after the 1st February 1946 the Respondent remained in actual possession and occupation of the premises in suit and was therefore protected by the Increase of Rent and Mortgage Interest (Restriction) Ordinance (No. 12 of 1940) of the Colony and Protectorate of Kenya as amended by the Increase of Rent and of Mortgage Interest (Restrictions) (Amendment) Ordinance 1943 (No. 12 of 1943) and the Increase of Rent and of Mortgage Interest (Restrictions) (Amendment No. 2) Ordinance 1943 (No. 26 of 1943).

(B) Whether the damages awarded to the Respondent by the Trial Judge were excessive and whether the Court of Appeal should have interfered with the said award.

3. The Appellants are the owners of certain premises situate in Fairview Road, Nairobi, Kenya, which at some date prior to November 1943 they leased to one Mrs. de Silva. In November 1943 Mrs. de Silva leased to the Respondent a portion of the said premises comprising two living rooms, one kitchen, a closed verandah and a share of the W.C. and bathroom. In January 1945 the Appellants terminated

p. 13, l. 20.
p. 6, l. 35.
p. 13, l. 25.

Mrs. de Silva's tenancy and in November 1945 obtained possession of the portion of the premises occupied by her. From the 25th October 1945
p. 40, l. 30. Respondent became the direct tenant of the Appellants at a monthly rental of Sh. 60 which rent was paid up to and including February 1946.

4. On the 1st February 1946 the Respondent took up an appointment
p. 13, l. 35. as a clerk at Dondora, about sixteen miles from Nairobi. Such employment was on monthly terms either party to the contract being entitled to terminate the same at a month's notice. On the 9th February the Respondent fetched his wife and children from Nairobi to Dondora, leaving some of his belongings in his portion of the said premises at Nairobi (hereinafter referred to as " the flat ").

p. 41, l. 26. 5. By a letter dated the 15th February 1946 the Respondent requested
p. 13, l. 42. permission from the Appellants to sub-let the flat to one Rodrigues. Such
p. 42, l. 11. permission was refused. On the 20th February 1946 the Respondent's advocate, R. C. Gautama, addressed a letter to the Secretary, Rent Control Board, Central Province, Town Hall, Nairobi, applying for the Board's consent under section 6 (1) (*b*) of Ordinance XXVI of 1943 to sub-let the flat during the Respondent's temporary absence from Nairobi on a job at Dondora Estate.

p. 42, l. 31. 6. On the 20th February 1946 the Appellants' advocate, D. N. Khanna, addressed a letter to the said Gautama alleging (*inter alia*) that the Respondent had gone away for good and not temporarily with a view to returning; that his clients had a large family, required the flat for themselves and would not consent to any sub-letting; and that since the Respondent had ceased to reside in the flat he was not entitled to any protection under existing legislation. He accordingly gave the Respondent notice to quit and deliver up vacant possession of the flat on the 1st April 1946 or at the end of his complete month of tenancy for March 1946.

7. On a date before the expiry of the notice to quit, which the learned
p. 14, l. 4. Trial Judge found to be at about the end of February, the Appellants
p. 45, l. 28. put their own padlock on the entrance to the flat. On the 6th March 1946, the Respondent addressed a letter to the said Gautama enclosing 20s. rent and stating that he did not intend to give up the place, that his family would certainly occupy the flat within three months and that he was only letting the flat for that time so as not to be out of pocket. He further stated that he had come into Nairobi on two week-ends but could not get into the house as the landlord (*sic*) had put a lock on his door without his
pp. 46–7. authority. A copy of the said letter was transmitted by the said Gautama to the Rent Control Board and by them to the said Khanna.

p. 49, l. 30. 8. On the 11th April 1946, the said Gautama addressed a letter to the
p. 50, l. 11. Rent Control Board stating (*inter alia*) that the Respondent no longer wished to sub-let the flat. On the 15th April 1946 the said Gautama addressed a letter to the said Khanna stating that the Respondent had now withdrawn his application for sub-letting as he needed the flat for his own use. The letter further stated that the placing of the extra lock on the door by the landlord was illegal and gave final notice that, unless the lock were removed by 12 noon on the following day, the Respondent would break the lock in the presence of two independent witnesses.

9. On the 25th April 1946, the Appellants entered and took possession of the flat. On the same day the said Khanna addressed a letter to the Secretary of the Rent Control Board, and sent a copy thereof to the said Gautama, informing them of the Appellants' action. The letter further stated that an inventory of things found was made in the presence of three witnesses and that the Respondent should arrange at an early date to take charge of the things. p. 52, l. 30.

10. On the 23rd November 1946 the Respondent filed pp. 1–3.

THE PRESENT SUIT

alleging (*inter alia*) that the Appellants had (A) put their locks on his locks and thus prevented him from getting lawful access to the flat; (B) wrongfully and unlawfully broken his (the Respondent's) locks and entered upon the flat and taken unlawful possession thereof; (C) unlawfully retained the same; (D) wrongfully and unlawfully taken possession of the Respondent's goods which were in the flat, out of which goods various articles were found missing, damaged and/or lost. The Respondent claimed Shs. 1,495 special damage, general damages for personal inconvenience, hardship and loss of use of the flat, an order for ejectment of the Appellants therefrom and for restoration of possession to the Respondent, and costs of the suit.

11. By their Defence, dated the 13th December 1946, the Appellants pleaded (*inter alia*) that :— pp. 4–6.

(A) By reason of the sharing with other tenants of the use in common of the W.C. and bathroom the tenancy was not a protected tenancy. p. 4, l. 37.

(B) The implied contract of tenancy (if any) arising from the payment and acceptance of rent was duly determined with effect from the 1st April 1946 by a notice to quit given on the 20th February 1946. p. 4, l. 41.

(C) The Respondent held over after the 1st April and was therefore a trespasser and the Appellants were entitled to re-enter and take possession as they did on the 25th April 1946. p. 5, l. 1.

(D) On the 9th February 1946 the Respondent gave up residence in the premises, having gone to reside at the Dondora Estate where he had resided ever since and was so residing at the date of the Defence. p. 5, l. 22.

(E) By reason of the Respondent having ceased to reside in the premises on and after the 9th February 1946 no statutory tenancy came into being after the 1st April 1946. p. 5, l. 26.

(F) The Appellants were entitled to and did put their own padlock on the Respondent's padlock and re-enter and resume possession of the premises and remove the Respondent's belongings therefrom. p. 5, l. 37.

(G) The Appellants made an inventory of the articles found on the premises and such articles were still intact and complete as found. The Respondent, despite requests, failed to take charge of the same after their removal from the premises as aforesaid. p. 5, l. 46.

12. The Respondent gave evidence (*inter alia*) as follows :—

p. 7, l. 10. (A) He had no contract or definite terms at Dondora Estate. He was taken on trial for six months.

p. 7, l. 15. (B) When he left for Dondora his wife was expecting a baby. There was no hospital at Dondora and for medical attention it was necessary to come to Nairobi. He wanted to keep the house in Nairobi because he wanted his family to stay in Nairobi.

p. 7, l. 32. (C) He was greatly inconvenienced by the Appellants taking possession of his flat because he had no place to stay in Nairobi and the day after his child was operated on it had to be taken back to Dondora after the operation.

p. 7, l. 44. (D) He had not completely left the flat in February when he went to Dondora. He went to a new job at Dondora and resided at Dondora. He wanted to keep the flat in Nairobi because his wife was not going to stay permanently at Dondora. He could leave his job at any time within six months. He could not afford two houses and that was why he wanted to sub-let to a friend with whom he had arrangements.

p. 8, l. 38 The aforesaid evidence was not challenged in cross-examination, the Respondent being cross-examined only as to the inventory of his p. 8, l. 47. possessions which, he stated, was incorrect. In re-examination he stated that, had he not been dispossessed, he would have come back to Nairobi.

p. 9, l. 1. 13. Cuthbert Wigham, Manager of the Dondora Estate, deposed that the Respondent was taken on temporarily for three or four months as a clerk on the Estate and was now on a monthly basis. In cross-examination this witness stated that he employed the Respondent on monthly terms stating that he would be on three or four months' trial. No term was stated if the Respondent proved suitable. Had the Respondent been unsatisfactory he (the witness) would have got someone else in his place.

p. 9, l. 26. 14. Agnes Mirida Morley, wife of the Respondent, deposed (*inter alia*) that when she went to Dondora to join her husband she took with her only most essential things. She was expecting a baby at the time. She intended to return to the house in Nairobi. In cross-examination p. 10, l. 16. this witness stated that at Dondora they occupied two rooms, kitchen, etc., about the same size as Nairobi premises. She had many cups and saucers and took to Dondora only what she needed. She had enough to share between two houses.

p. 11, l. 2. 15. Appellant No. 1 deposed that when Mrs. De Silva left the p. 11, l. 13. Respondent became his direct tenant. The padlock was placed on the flat because the Respondent had locked the place and gone away. He knew the Respondent wanted to sub-let the flat. Rodrigues inspected the flat twice and a gentleman from Modern Provision Store also came to visit.

p. 14, l. 32. 16. The Trial Judge held that the rooms shared were a bathroom and a lavatory. Applying the test in *Cole* v. *Harris* [1945] K.B. 474, he considered that there was a separate letting in this case and that the rooms came within the Rent Restriction Ordinance.

The learned Judge next considered whether the tenancy had ceased p. 14, l. 37.
to be protected by reason of the fact that the Respondent had given up physical possession of the flat. He considered the principles laid down in *Skinner* v. *Geary* [1931] 2 K.B. 546, and continued :—

" Applying those principles to the facts of this case I find that p. 15, l. 22.
the plaintiff had not given up actual possession or personal occupation of the premises. The facts show quite clearly in my view that from the very beginning he had no intention of giving up the premises because he was not sure of his job which was on a monthly
10 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.

" The plaintiff being a protected tenant the respondents were
20 not entitled to take possession of his premises forcibly as they did and they must give up possession of the premises to the plaintiff as prayed."

As regards the claim for special damage, the learned Judge held that p. 16, l. 22.
the defence had failed to rebut the Plaintiff's case and found it proved on the evidence that goods to the value of Sh. 1,495 disappeared from the premises as claimed. He further held that the loss of these articles was the direct result of the Appellants' wrongful act in trespassing on the premises of the Respondent and meddling with his belongings and that the Appellants were responsible therefor.

30 As regards general damages the learned Judge held that the Respondent p. 16, l. 31.
had been greatly inconvenienced by being deprived of the use of his rooms. Up to the time of the judgment, namely for over a year after the wrongful occupation of the premises, he had not been allowed to have them back. He must have been put to a great deal of trouble when his wife and children requiring medical attention had nowhere to stay in Nairobi. The learned Judge assessed the general damages at Sh. 2,000.

The learned Judge therefore gave judgment for the Respondent in p. 16, l. 38.
the sum of Sh. 3,945 damages and made an order for the possession of the flat, with costs. A decree was passed accordingly. p. 17.

40 17. The Appellants appealed from the said judgment to the East p. 18.
African Court of Appeal. The judgment of Nihill, P., included the following passages :—

" In their Memorandum of Appeal the Appellants took the p. 10, l. 12.
point that the learned Judge of the Court below erred in finding that there was a separate letting so as to bring the premises within the scope of the Rent Restrictions Ordinance, but this point was abandoned by Mr. Khanna, Counsel for the Appellants, at the outset of the hearing and I think rightly so. There is abundant authority for the view adopted by the learned Judge that where the

living rooms are not shared in common there is a separate letting so as to bring the portion of the house let within the definition of a ' dwelling-house ' as defined in the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940 (*Cole* v. *Harris* [1945] 2 A.E.R. 146)."

* * * * * *

p. 41, l. 42. " Was Mr. Morley on the 25th April, 1946, in possession of a portion of the Appellants' premises of which he was formerly a contractual tenant or not ? If he was, then in spite of the expiration of the notice to quit, he had become what is loosely called ' a statutory tenant ' by reason of the provisions of section 17 of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940. If this was Mr. Morley's status the Appellants had no business to exercise self help for without a court order for possession they could do nothing. On the contrary if Mr. Morley had ceased in law to retain possession of the flat then this appeal must succeed. The learned Judge in the Court below addressed his mind to this issue and after reviewing the leading cases came to the conclusion that the facts proved established beyond doubt that although Mr. Morley temporarily left his premises his home was still in them as he intended to return to them. Now, that is a conclusion that this Court will, I think, hesitate to upset unless convinced that the learned Judge has drawn incorrect inferences from the established facts."

* * * * * *

p. 32, l. 32. " Whatever may be the position to-day I consider all the evidence points to the fact that Mr. Morley between February and the end of April, 1946, had not formed the intention of permanently transferring his home to Dondora. There were many urgent reasons why he should not do so. After a careful consideration of all these factors I have come to the conclusion that I cannot say that the learned Judge was wrong in the conclusion he arrived at and that the answer to the question I have put myself must be that Mr. Morley had not relinquished possession of his flat on 25th April, 1946. In fact, I think, the true position by April, 1946, was that the Appellants were anxious to force their tenant out of possession whilst he on his part was just as anxious to retain it."

p. 35, l. 14. Graham Paul, C.J., expressed his agreement with the aforesaid judgment. His own judgment included the following passage :—

p. 36, l. 24. " In my view the real position in this case is that while the Respondent was a contractual tenant in possession but temporarily absent the Appellants wrongfully and illegally interfered with the tenant's rights by locking him out."

The judgment of Edwards, C.J., included the following passages :—

p. 37, l. 33. " I respectfully agree with the judgments delivered on the main point that the learned Trial Judge was on the evidence entitled to find that the plaintiff at the material time had not ceased to be in ' actual possession ' of the flat in question."

" In the instant case it must be remembered that the learned Trial Judge 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 '." p. 37, l. 47.

As regards damages all three judges declined to interfere with the assessment of the Trial Judge.

18. The Appellants applied to the East African Court of Appeal for leave to appeal to His Majesty in Council. On the 5th November 1947, the application was dismissed.

19. By an Order-in-Council, dated the 27th day of April, 1948, special leave to appeal to His Majesty in Council was granted.

20. The Respondent respectfully submits that this appeal should be dismissed with costs and the Judgment and Decree of the Court of Appeal for Eastern Africa upheld for the following amongst other

REASONS

(1) Because the Trial Judge found as a fact that the Respondent did not give up actual possession or personal occupation of the flat and the Court of Appeal have held that there was evidence on which he could properly so find.

(2) Because both Courts have rightly held that the Respondent was at the material time a statutory tenant and was protected by the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940 as amended by the Increase of Rent and of Mortgage Interest (Restrictions) (Amendment) Ordinance 1943 (No. 12 of 1943), and the Increase of Rent and of Mortgage Interest (Restrictions) (Amendment No. 2) Ordinance 1943 (No. 26 of 1943).

(3) Because the Court of Appeal was right in refusing to interfere with the assessment of damages by the Trial Judge.

(4) Because the judgment of the High Court was right.

DINGLE FOOT.

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AND

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CASE FOR THE RESPONDENT.

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