

CT 10

7, 1952

No. 11 of 1950.

In the Privy Council.

ON APPEAL

31293

FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

- 1. NGARA HOTEL LIMITED
- 2. DHIRAJLAL NARANJI JESSANI
- 3. MAGANBHAI PRABHUDAS PATEL

(Defendants) *Appellants*

UNIVERSITY OF LONDON
W.C.1.
17 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

10

AND

- 1. RAJABALLY KASSAM SULEMAN and
BALADURALI KASSAM SULEMAN as repre-
sentatives of KASSAM SULEMAN DAMJI, deceased
(Plaintiff)
- 2. K. S. DAMJI & SONS (PROPERTIES)
LIMITED

Respondents.

CASE ON BEHALF OF THE APPELLANTS

RECORD.

1. This is an Appeal from a judgment of the Court of Appeal for Eastern Africa, dated the 14th March, 1949, which affirmed a judgment of the Supreme Court of Kenya at Mombasa, dated the 27th and 29th July, 1948. pp. 38, 43. p. 20.

2. The subject-matter of this Appeal are premises in Mombasa let on a monthly tenancy in accordance with the terms of a lease granted by Kassam Suleman Damji, the original Plaintiff, as the then owner of the premises, in favour of Appellants Nos. 2 and 3.

The suit giving rise to this Appeal was brought by the said Kassam Suleman Damji against the Appellants Nos. 2 and 3, and others, for possession of the premises on the ground that the Appellants Nos. 2 and 3 had broken their covenant not to assign the premises without the consent of the Landlord and that in breach of the covenant they had parted with the possession of the premises to the other Defendants. 30

It was admitted in both the Courts below, and is no longer in dispute, that there was a breach of the covenant not to assign without the consent of the Landlord.

3. The principal questions for determination are :—

(1) Whether the breach of the covenant not to assign had been waived by the landlord, so that the tenancy is still subsisting ;

18

Alternatively :

(2) Whether the condition precedent to the right to sue for possession and for ejection had not been fulfilled inasmuch as there was no act by the Landlord showing an intention to determine the lease within the meaning of Section 111 (g) of the Indian Transfer of Property Act, 1882.

Alternatively :

10

(3) Whether the leave of the Court to exercise the right of re-entry ought to have been obtained as required by the Courts (Emergency Powers) Ordinance, 1944 ; and

Alternatively :

(4) Whether it would not be reasonable to make an Order for possession in view of the Rent and Mortgage (Restrictions) Ordinance, 1940.

Both the Courts below decided the suit in favour of the Plaintiff and against the Appellants on all four questions.

4. The relevant statutory provisions are annexed hereto.

20

p. 54.

5. By a Memorandum of Agreement, dated the 24th April, 1946, the Plaintiff, as owner, agreed to let to Appellants Nos. 2 and 3, certain premises in Mombasa which had formerly been let to The Success Corporation Limited, Mombasa, carrying on the business of a Caterer under the style of Ritz Restaurant, and at the time of letting under the style of Ngara Hotel, on a monthly tenancy of Five Hundred Shillings per month.

The conditions, which were ten in number, included the following :—

No. 1.—The tenancy will commence from the 1st day of April, 1946, and will be terminated by either party on giving one calendar month's notice in writing.

30

No. 2.—The rent shall be payable in advance on the first day of each calendar month.

No. 5.—The tenants shall not assign, underlet or part with the possession of the said premises or any part thereof without the written consent of the landlord.

No. 10.—If any monthly rent shall remain in arrear and unpaid for the space of fifteen days (whether legally demanded or not) or if there shall be any breach or non-observance of any of the conditions herein contained, the tenancy shall thereupon determine, and it shall be lawful for the landlord to re-enter upon the said premises or any part thereof in the name of the whole, but without prejudice to any claim which the landlord may have against the tenants in respect of any breach of the stipulations contained herein.

40

6. On the 30th April, 1947 (Exhibit No. 2 (M)) the Agents of the Plaintiff wrote to the Agents for the Defendants as follows :— p. 67.

“ As our client is the owner of the premises in question he is entitled to know who is in occupation thereof. Please, therefore, furnish us with the names of the Proprietors of the Hotel referred to in your said letter.”

The said agents again wrote on the 3rd May, 1947 (Exhibit No. 2 (O)) as follows :—

10 “ Further to our letter of the 30th ultimo, we have been instructed by our Client to inform you that the reason he desires the names of the present proprietors of the Hotel is that he wishes to contact them with a view to settling this matter and putting it on a proper footing. In the meantime, and pending such settlement, he is willing to accept the three cheques forwarded by yourselves as mesne profits only.” p. 68

It was argued that there had been a waiver of the breach of the condition not to assign by the last-mentioned letter. The Trial Judge held that the waiver had not been proved by that letter or by the retention of the cheques, and further, that there was no evidence of waiver regarding the final transfer to the Company as the application to the Rent Control Board on the 14th July, 1947, showed. p. 23, l. 49.
p. 24, l. 4.
p. 24, l. 9.
p. 72.

7. On the 14th July, 1947, the agents of the Plaintiff wrote to the Secretary of The Rent Control Board, Mombasa, applying to the Board for its consent to the institution of legal proceedings for the ejection of the tenants and others named, as follows : (1) Narain Dass ; (2) Jugal Kishore ; (3) Gulam Rabani ; (4) Abdus Sattar. In the application, Appellants Nos. 2 and 3 were alleged to have broken the agreement, dated the 24th April, 1946, by purporting to assign the lease to the persons above-named, who apparently were assumed to be partners in the partnership known as the Ngara Hotel. The application further stated that the Appellants Nos. 2 and 3 had paid no rent since December, 1946, but the advocates of the alleged assignees, who were said to be trespassers, had tendered cheques on their behalf. p. 72.

8. On the 19th August, 1947, the agents for the Ngara Hotel, Limited and others wrote an explanatory letter, written apparently in the belief that the matter was to be heard before the Board, while on the 26th August, 1947, the Secretary of the Board wrote to the agents of the Plaintiff with a copy thereof to the agents for the Ngara Hotel, Limited, and others, to the effect that the Board, on the 20th August, 1947, had granted permission for the institution of legal proceedings. p. 74.
p. 75.

9. On the 30th September, 1947, the Plaintiff instituted

THE PRESENT SUIT

in the Supreme Court of Kenya at Mombasa, against Appellants Nos. 1, 2 and 3, and the remaining partners of the Ngara Hotel.

p. 1.

10. In the Plaint, dated the 30th September, 1947, the Plaintiff pleaded that the agreement of the 24th April, 1946, had been broken when the Defendants Nos. 2 and 3 parted with the possession of the premises on or about the 24th November, 1946, to Defendants Nos. 4 and 5 ; that on or about the 2nd March, 1947, Defendants Nos. 6, 7 and 8 joined with the latter in illegal possession ; and that the Defendant Company on or about the 23rd June, 1947, was formed and joined in illegal possession.

p. 2, l. 11.

p. 2, l. 17.

p. 2, l. 20.

p. 2, l. 27.

The Plaintiff asked for (1) possession of the premises ; (2) the sum of Shs.4,500 in respect of rent or mesne profits for nine months ended the 31st August, 1947 ; (3) rent or mesne profits at the rate of Shs.500 per month from the 1st September, 1947, until delivery of possession ; (4) Costs.

p. 3.

p. 4.

11. The Defence of the Ngara Hotel, Limited (Appellant No. 1) was filed on the 10th November, 1947. The Defence of the Appellant No. 3 was practically the same as that of Appellant No. 1. Appellant No. 2 was in India at the time.

12. The Trial Court delivered its judgment on the 27th and 29th July, 1948, granting a decree for possession and consequential reliefs.

The learned Trial Judge held :—

p. 24, l. 4.

(1) That waiver had not been proved by the letter Exhibit 2 (O) 20 or by the retention of the cheques for rent.

p. 24, ll. 13-17.

(2) That the bringing of a suit for ejection constituted an act showing the lessor's intention to determine the lease within the meaning of section 111 (g) of the Transfer of Property Act, 1882.

p. 24, ll. 38-45.

(3) That the Ordinance of 1940 only protects tenants in occupation and does not protect a mere occupier.

p. 25.

A decree in accordance with the judgment was made on the 29th October, 1948.

p. 26, l. 38.

13. There was an appeal to the Court of Appeal for Eastern Africa at Nairobi by Defendants Nos. 1, 2 and 3, the present Appellants. 30

14. The judgment of the Court of Appeal (Nihill, P., Edwards, C.J., and Bourke, J.) was delivered on the 14th March, 1949. The learned Judges held :—

p. 39, l. 40.

(A) That the only reasonable inference to be drawn from the evidence and the correspondence is that the Plaintiff when accepting cheques for rent (which he never cashed) had not full knowledge of the cause of forfeiture and that such acceptance did not therefore amount to an election by him to waive the forfeiture.

p. 40, l. 36.

(B) That, assuming that the learned Trial Judge was wrong in holding that the filing of a suit is *per se* sufficient, the Plaintiff's 40 application to the Rent Control Board for permission to institute proceedings was a sufficient act showing the Landlord's intention to determine the tenancy.

(c) That the correct interpretation to give to the words "re-entry upon any land" within Section 3 (2) of the Courts (Emergency Powers) Ordinance, 1944, is the ordinary meaning of an actual physical act and does not include an act equivalent to re-entry, and that therefore no leave of the Court was necessary. p. 41, ll. 4-19.

(d) That Section 11 (1) of the Rent Restrictions Ordinance, 1940, cannot enure to the advantage of occupiers of the premises who are occupying without any shadow of title, and that, therefore, the question as to "reasonableness" does not arise. p. 41, l. 35.

10 The appeal was accordingly dismissed with costs.

15. An Order granting Final Leave to Appeal to the Privy Council was made on the 2nd February, 1950. p. 53.

16. By a Deed of Transfer, dated the 16th May, 1949, the premises the subject of this Appeal were sold by the Plaintiff to K. S. Damji & Sons (Properties) Limited.

17. The Plaintiff, Kassam Suleman Damji, died on the 18th April, 1950.

18. By an Order of His Majesty in Council, dated the 1st November, 1951, Rajabally Kassam Suleman and Baladurali Kassam Suleman were substituted on the Record as representatives of the deceased Plaintiff and K. S. Damji & Sons (Properties) Limited was added as Second Respondent. 20

19. The Appellants humbly submit that the said judgment of the Court of Appeal for Eastern Africa, dated the 14th March, 1949, which affirmed the judgment of the Supreme Court of Kenya, dated the 27th and 29th July, 1948, is erroneous and should be reversed and this Appeal be allowed with costs throughout, for the following, among other,

REASONS

30 (1) Because the said Court of Appeal was wrong in holding that there had been no waiver by the payment of rent with no intimation of non-acceptance, or by the letter dated the 3rd May, 1947, or by the letter dated the 30th May, 1947.

Alternatively :

(1) Because the said Court of Appeal was wrong in holding that the mere filing of the suit, with consent of the Rent Control Board, was sufficient to determine the tenancy.

40 (2) Because Appellants Nos. 2 and 3 never received any notice determining the tenancy prior to the institution of the Suit.

APPENDIX

THE INDIAN TRANSFER OF PROPERTY ACT, 1882, as amended up to 1907,
and as applicable to Kenya before the Amendment of 1929.

Section 111.

A lease of immoveable property determines—(g) by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case
10 the lessor or his transferee does some act showing his intention to determine the lease.

Section 112.

A forfeiture under Section 111, clause (g) is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a
20 waiver.

THE COURTS (EMERGENCY POWERS) ORDINANCE, 1944.

Section 3 (2).

Subject to the provisions of this Ordinance, a person shall not be entitled, except with leave of the appropriate Court—

(a) to proceed to exercise any remedy which is available to him by way of—

(ii) the taking of possession of any property ;

(iv) re-entry upon any land.

THE INCREASE OF RENT AND OF MORTGAGE INTEREST (RESTRICTIONS)
ORDINANCE, 1940.

30

Section 3 (1).

The Governor shall, for the purposes of this Ordinance, by notice in the *Gazette*, establish a Rent Control Board, or a number of Rent Control Boards, with powers to act under the provisions of this Ordinance in respect of such areas in the Colony as may be specified in such notice.

Section 4.

Where any dispute arises between any landlord and his tenant relating to a tenancy to which this Ordinance applies, no proceedings arising out of such dispute shall be instituted in any Court of law except with the
40 written consent of the Board.

- (3) Because the Indian Transfer of Property Act, 1882, as amended up to 1907, and as applicable to Kenya before the amendment of 1929, was not complied with.

Alternatively :

- (1) Because the Court of Appeal for Eastern Africa was wrong in holding that the lease had been determined when no leave had been asked for, or obtained, from the appropriate Court as required by Section 3 (2) of the Courts (Emergency Powers) Ordinance, 1944, then in force. 10

Alternatively :

- (1) Because the tenancy was protected by the Increase of Rent and Mortgage (Restrictions) Ordinance, 1940.
- (2) Because the said Court of Appeal was wrong in holding that Section 11 (1) as to reasonableness did not apply in the circumstances.

S. P. KHAMBATTA.

T. B. W. RAMSAY.

T. L. WILSON & Co.,
6 Westminster Palace Gardens,
London, S.W.1,
Solicitors for the Appellants.

Section 5 (1).

It shall be the duty of the Board, in addition to any other powers specifically conferred on it by this Ordinance, to investigate any complaint relating to the tenancy of a dwelling-house or business premises made to it either by a tenant or landlord of such dwelling-house or business premises.

Section 11 (1).

No order for the recovery of possession of any dwelling-house to which this Ordinance applies, or for the ejection of a tenant therefrom, shall be made unless—

- (h) the tenant without the consent of the landlord has at any time 10
after the 1st day of December, 1941, or the prescribed date,
whichever is the later, assigned or sub-let the whole of the
dwelling-house or sub-let part of the dwelling-house, the
remainder being already sub-let ;
- (j) the dwelling-house is the property of the Kenya and Uganda
Railways and Harbours Administration (hereinafter called
“ the Administration ”) and is reasonably required for the
occupation of an employee of the Administration ;

And, in any such case as aforesaid, the Court considers it reasonable 20
to make such an order.

(4) An order against a tenant for the recovery of possession of any dwelling-house or ejection therefrom under the provisions of this section shall not affect the right of any sub-tenant, to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery of possession or ejection were commenced, to retain possession under the provisions of this section or be in any way operative against any such sub-tenant.

Section 17 (3).

Where the interest of a tenant of a dwelling-house is determined, either as the result of an order for possession or ejection, or for any 30
other reason, any sub-tenant to whom the premises or any part thereof
has 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.

Section 19.

The Governor in Council may, by Proclamation, declare that the provisions of this Ordinance shall apply to any area, district or place in the Colony in respect of premises used for business, trade or professional purposes, or for the public service, as it applies to a dwelling-house in that area, district or place, and with effect from the date of such Proclamation, or from a date specified therein, this Ordinance shall be read as 40
though references to “ dwelling-house,” “ house,” and “ dwelling ” included

references to any such premises, provided that the Ordinance in its application to such premises shall have effect subject to the following modifications :—

(a) The following paragraph shall be substituted for paragraph (d) of subsection (1) of section 11 of this Ordinance—

10 “ (d) The premises are reasonably required by the landlord for business, trade or professional purposes or for the public service, and (except as otherwise provided by this subsection) the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available.”

Section 20 (1).

This Ordinance shall continue in force during the war and one year after the end of the war.

Section 21.

The Governor in Council may, by Proclamation, add to the Schedule to this Ordinance, any area, district or place in the Colony and may, in such Proclamation, fix the prescribed date which shall be deemed to form part of the said Schedule.

20

SCHEDULE.

Name of Area, district or place	Prescribed Date	Applied with effect from
The Municipality of Nairobi	3rd September, 1939	26th April, 1940.
The Municipality of Mombasa, etc. ..	3rd September, 1939	26th April, 1940.

In the Privy Council.

ON APPEAL FROM THE COURT OF
APPEAL FOR EASTERN AFRICA

BETWEEN

NGARA HOTEL LIMITED
and OTHERS (Defendants) *Appellants*

AND

1. RAJABALLY KASSAM
SULEMAN and ANOTHER
as representatives of
KASSAM SULEMAN DAMJI
deceased (Plaintiff)
2. K. S. DAMJI & SONS
(P R O P E R T I E S)
LIMITED - *Respondents*

CASE ON BEHALF OF THE
APPELLANTS

T. L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1,
Solicitors for the Appellants.