

30, 1953

No. 24 of 1952.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI. 12 NOV 1956

INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

33573

G. H. C. NORONHA (Plaintiff) *Appellant*

AND

10

1. DAMJI DEVJI
2. LALJI JETHA
3. RATTANSHI BHURA (Defendants) *Respondents.*

Case for the Respondents.

RECORD.

1. This is an appeal from the judgment and decree of the Court of Appeal for Eastern Africa dated the 22nd day of June, 1951, allowing with costs the Respondents appeal from the judgment dated the 12th day of December, 1950, of Mr. Justice Connell in the Supreme Court of Kenya, the decree giving effect to the said judgment bearing date the 31st day of July, 1952.

20 2. The principal issue in this appeal is whether the Increase of Rent (Restriction) Ordinance, 1949 (hereinafter called " the Ordinance of 1949 ") had deprived the Supreme Court of Kenya of jurisdiction to try the action.

3. By a lease under seal dated the 31st day of December, 1943, and expressed to be made between the Appellant and the first-named Respondent the land and buildings described therein (hereinafter called " the said premises ") were demised to the first-named Respondent for the term of two years from the 15th day of December, 1943, at the monthly rent of 200 shillings. pp. 57-59.

30 4. By a letter dated the 3rd day of August, 1948, and addressed to the advocates for the Appellant the Rent Control Board (Central Province) sanctioned Court action under Section 4 of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940 (hereinafter called " the Ordinance of 1940 "). On the 3rd day of November, 1948, the Appellant issued a Plaint in the Supreme Court of Kenya claiming (*inter alia*) possession of the said premises. p. 67, ll. 24-46. pp. 1-3.

5. The Plaint alleged (*inter alia*) that the first-named Respondent had become a statutory tenant of the said premises upon the expiration p. 2, ll. 20-22.

CASE FOR RESPONDENTS

p. 2, ll. 23-27.

of the said lease by effluxion of time on the 15th day of December, 1945, and that by a notice in writing addressed to the first-named Respondent and dated the 13th day of December, 1947, any contractual tenancy in respect of the said premises if then subsisting was duly determined.

p. 2, ll. 28-35.

6. The claim for possession made by the Plaintiff was based upon an allegation that in breach of the conditions of his tenancy the first-named Respondent without the necessary consent or licence of the Appellant in writing or any application for the same—

(A) had parted with possession of the said premises to the second- and third-named Respondents and was no longer residing thereon, 10
or alternatively had assigned or alternatively sub-let or purported to assign or sub-let the said premises to the second- and third-named Respondents, and

(B) had erected unauthorised structures and made unauthorised additions to or alterations in the said premises.

p. 3, l. 20, to
p. 4 l. 5.

7. By their Defence the Respondents denied that the said premises were let to the first-named Respondent alone and alleged that they were let to all three Respondents jointly. They denied having assigned, underlet or parted with possession of the said premises and the, first-named Respondent denied having given up possession of the said premises. The 20
Respondents further denied that their tenancy was statutory or that they had erected any unauthorised structure or made any unauthorised addition.

p. 4, ll. 16-33.

8. Alternatively, the Respondents alleged that if the said premises were let to the first-named Respondent alone he immediately sub-let all save one room to the other Respondents and that the Applicant had accepted rent with knowledge that it was paid by all the Respondents and that all the Respondents stayed in the premises. The Respondents further alleged that the suit should have been brought in the Resident Magistrates' Court at Nairobi which had jurisdiction to try the suit.

p. 5, l. 8, to
p. 6, l. 5.

9. On the 27th day of February, 1950, the suit came on for hearing 30
in the Supreme Court of Kenya before Mr. Acting Justice Keatinge. On behalf of the Respondent it was submitted that the Court had no jurisdiction to try the case and after argument the case was adjourned to enable the authorities on the point to be further considered.

p. 6, ll. 6-17.

10. On the resumed hearing on the 3rd day of March, 1950, the Respondents' objection to the jurisdiction was withdrawn, and Mr. Acting Justice Keatinge ordered the case to stand over for a date to be fixed for hearing. On the 28th day of November, 1950, the case came on for further hearing before Mr. Justice Connell.

p. 6, l. 30.

p. 19, ll. 10-18.

11. At the further hearing both the Appellant and Respondents 40
adduced evidence. The contentions of the Respondents were summarised by Mr. Justice Connell as being—

(1) That, with knowledge that the first-named Respondent had built an unauthorised structure on the said premises, one

Rodrigues (the attorney of the Appellant who acted on his behalf in relation to the said property) accepted rent instead of cancelling or forfeiting the lease. p. 7, l. 1, to
p. 8, l. 6.

(2) That with knowledge that the second and third-named Respondents were in possession of the said premises when the first-named Respondent vacated them the said Rodrigues accepted rent from the first-named Respondent.

10 (3) That the notice dated the 13th day of December, 1947, purporting to determine the tenancy vested in the first-named Respondent was invalid. p. 61, l. 27, to
p. 62, l. 40.

12. The learned Judge held that it was not until about November, 1947, that the said Rodrigues knew that the first-named Respondent had gone or was about to go into other premises and that it was then that the said Rodrigues had noticed the alleged unauthorised structure which was in fact unauthorised. The learned Judge further held that until then the said Rodrigues had taken no particular note as to whether the first-named Respondent was the sole occupier of the said premises. p. 19, ll. 29-37.

13. The learned Judge further held that although the said Rodrigues perhaps should have availed himself of his right of re-entry given him p. 19, l. 38, to
p. 20, l. 18.
20 by the said lease and forfeited it then and there, his failure to do so did not in the light of what transpired subsequently prevent the Appellant from succeeding in the proceedings. The learned Judge's reasons for so holding were—

(A) that the first-named Respondent had nowhere in the correspondence mentioned any new agreement or continued contractual agreement but his advocate by his letter dated the 2nd day of January, 1948, had alleged that his client was protected by the Rent Restriction Ordinance; p. 63, ll. 23-24.

30 (B) that the first-named Respondent nowhere denied the validity of the notice to quit dated the 13th day of December, 1947; p. 61, l. 28, to
p. 62, l. 40.

(C) that the first-named Respondent had complied with various demands for increases in rent based upon him being a statutory tenant, and that *Re Swanson's Agreement* [1946] 2 All E.R. 628 was authority for the proposition that the payment of standard rent by a tenant holding over operated as a complete estoppel on the part of the tenant who wished to assert that he remained as a contractual tenant;

40 (D) that on the authorities cited by the Appellant and by the Transfer of Property Act, Section 106, the said notice to quit dated the 13th day of December, 1947, was a valid notice determining the lease on the 31st day of December, 1947, and that no contractual tenancy existed thereafter. p. 16, ll. 23-29.

14. Finally the learned Judge held that the first-named Respondent admitted leaving the said premises in March, 1947, and the said Rodrigues stated that so soon as he knew that the first-named Respondent had p. 20, ll. 19-29.

p. 61, l. 20, to
p. 62, l. 40.

vacated the said premises he wrote the letter dated the 13th day of December, 1947. Thereafter the first-named Defendant was treated by the said Rodrigues as a statutory tenant and he behaved as such. By virtue of *Skinner v. Geary* [1931] 2 K.B. 546 and *Davies v. Bristow* [1920] 3 K.B. 428 the first-named Respondent was accordingly not protected and in accepting rent the Appellant would not be prejudiced.

pp. 22, 23.

p. 24.

p. 28, ll. 9-23.

p. 29, l. 7.
p. 29, l. 17, to
p. 33, l. 5.

15. The Respondents duly filed a Memorandum of Appeal dated the 29th day of December, 1950, and on the 15th day of March, 1951, the appeal came on for hearing in the Court of Appeal for Eastern Africa before Sir Barclay Nihill, P., The Hon. W. J. Lockhart-Smith, Ag. V.P., and The Hon. Ransley Thacker, Ag. C.J. After argument on the points decided by Mr. Justice Connell, the issue of jurisdiction arose. At an adjournment of the hearing on the 1st day of May, 1951, the Attorney-General was represented as *amicus curiæ* and the issue of jurisdiction was further argued. Judgment was reserved. 10

p. 34, ll. 16-39.

16. On the 22nd day of June, 1951, the Court of Appeal delivered judgment. Sir Barclay Nihill, P., referred briefly to the points material to the substantive claim under the Rent Restriction Ordinance and then, without expressing any views on these points, turned to the question of jurisdiction. He stated that the first question was whether the enactment of the Ordinance of 1949 had taken away from the Supreme Court of Kenya the power to entertain a suit of the nature of the action (which question is hereinafter called the "issue as to jurisdiction") and that if the answer to this was in the affirmative the further question would arise whether on the date upon which the suit was determined by the Supreme Court the provisions of the Ordinance applied to it or whether the jurisdiction which the Supreme Court undoubtedly possessed under the Ordinance of 1940 still attached to suits instituted but not determined before the Ordinance of 1949 came into force (which further question is hereinafter called "the issue as to retroactivity"). 20 30

p. 34, l. 40, to
p. 35, l. 24.

p. 35, l. 25, to
p. 36, l. 27.

17. After referring to the manner in which the issue as to jurisdiction had been dealt with in the Court below, the learned President referred to two decisions of the Court of Appeal for Eastern Africa under the respective titles Civil Appeal 55/1949 and Civil Appeal 64/1949 which in the submission of the Appellant herein were authority for the proposition that the Ordinance of 1949 had not impaired the jurisdiction of the Supreme Court, and said that a very careful study of the judgments of the Court of Appeal for Eastern Africa in the two cases had convinced him that the submission was wrong. In Civil Appeal 64 of 1949 in the Supreme Court of Kenya in dismissing a claim for possession Bourke, J., had decided that the Ordinance of 1949 had deprived the Supreme Court of jurisdiction in actions for possession. Although the Court of Appeal for Eastern Africa had reversed this decision, the grounds on which this had been done were not that Bourke, J., was wrong in holding that the Ordinance of 1949 had ousted his jurisdiction, but that he was wrong in holding that any tenancy to which that Ordinance could apply had been created. For this reason the Ordinance did not apply and so an order for possession could be made. 40

18. The learned President then referred to Civil Appeal 55 of 1949, where in the Supreme Court of Kenya before Thacker, J., no point on the Court's jurisdiction to make an order for possession was taken. The Court of Appeal for Eastern Africa dismissed an appeal on the ground that there was nothing unlawful or unreasonable about the Orders made by the Supreme Court. This decision would have indicated that the Court of Appeal had rejected any argument that the Supreme Court had no jurisdiction but for a passage in the judgment of the learned Chief Justice of Uganda which showed that the appellant in that appeal had attempted to raise new points which he could not require the Court of Appeal to entertain. This indicated that the issue of jurisdiction was introduced for the first time on appeal and, rightly or wrongly, struck out by the Court. Civil Appeal 55 of 1949 accordingly provided no authority for the view that the Court of Appeal for Eastern Africa had already decided that the Supreme Court had jurisdiction to issue orders for possession concurrent with Rent Control Boards.

p. 36, l. 28, to
p. 37, l. 20.

19. Having thus dealt with the question of authority on the issue as to jurisdiction, the learned President stated that he had read the judgment about to be delivered by the Acting Vice-President and fully concurred with it. For the reasons stated in that judgment, since the Ordinance of 1949 the Supreme Court of Kenya had no jurisdiction to give an order for the recovery of possession of premises controlled by the Ordinance in an area under the jurisdiction of the Central or Coast Rent Restriction Board where the proceedings arose out of a dispute between a landlord and tenant. For the same reasons section 13 (3) of the Interpretation and General Clauses Ordinance (Cap. 1 of the Laws of Kenya, 1948) did not empower the Supreme Court to make an order for possession in such cases where the suit was instituted before the Ordinance of 1949 came into force on the 6th day of September, 1949. It was accordingly unnecessary to decide the other points raised by the appeal, and the appeal would be allowed with costs. The learned President added that he had been asked by Thacker, J., to say that he (Thacker, J.) had seen both the learned President's judgment and also the judgment about to be delivered by the learned Acting Vice-President and that he (Thacker, J.) was in complete agreement.

p. 37, ll. 21-43.

p. 37, ll. 44-48.

20. In his judgment the learned Acting Vice-President first referred briefly to the course of proceedings and the two preliminary questions to be determined as being the issue as to jurisdiction and the issue as to retroactivity, and then turned to consider the two civil appeals discussed by the learned President. He examined Civil Appeal No. 64 of 1949 in somewhat greater detail and reached the same conclusion upon it as had been reached by the learned President. He then turned to Civil Appeal No. 55 of 1949, and pointed out that although the issue as to jurisdiction had not been raised in the Supreme Court of Kenya, it was specifically raised in the notice of appeal and was dealt with by counsel for the Appellant in that appeal at the outset of his argument on appeal. After referring to the absence of any reference to the issue as to jurisdiction from the judgments of the Court of Appeal, he concluded with the learned President

p. 38, ll. 1-23.

p. 38, l. 24, to
p. 39, l. 46.

p. 39, l. 47, to
p. 41, l. 12.

that there were clear indications that the Court had refused to address its mind to the issue as to jurisdiction because it was introduced for the first time on appeal.

p. 41, ll. 13-27.

21. After referring to the decision by De Lestang, J., in Civil Case No. 200 of 1949 on the issue as to retroactivity, the learned Acting Vice-President then turned to the substance of the issue as to jurisdiction. He first referred to Article 4 of the Kenya Colony Order-in-Council, 1921, which provides as follows :—

p. 41, l. 33, to
p. 42, l. 12.

“ 4. (1) There shall be a Court of Record styled His Majesty’s
“ Supreme Court of Kenya (in this Order referred to as ‘ the Supreme 10
“ ‘ Court ’) with full jurisdiction, civil and criminal, over all persons
“ and over all matters in the Colony.

“ (2) Subject to the other provisions of this Order, such civil
“ and criminal jurisdiction shall, so far as circumstances admit,
“ be exercised in conformity with the Civil Procedure and Penal
“ Codes of India and the other Indian Acts which are in force in the
“ Colony at the date of the commencement of this Order and subject
“ thereto and so far as the same shall not extend or apply shall be
“ exercised in conformity with the substance of the common law,
“ the doctrines of equity and the statutes of general application 20
“ in force in England on the twelfth day of August, 1897, and with
“ the powers vested in and according to the procedure and practice
“ observed by and before Courts of Justice and Justices of the Peace
“ in England according to their respective jurisdiction and
“ authorities at that date save in so far as the Civil Procedure and
“ Penal Codes of India and the other Indian Acts in force as aforesaid
“ and the said common law doctrines of equity and the statutes of
“ general application and the said powers, procedure and practice
“ may at any time before the commencement of this Order have
“ been or hereafter may be modified, amended or replaced by other 30
“ provision in lieu thereof by or under the authority of any order
“ of His Majesty in Council, or by any Ordinance or Ordinances
“ for the time being in force in the Colony :

“ Provided always that the said common law doctrines of
“ equity and the statutes of general application shall be in force
“ in the Colony so far as the circumstances of the Colony and its
“ inhabitants permit and subject to such qualifications as local
“ circumstances render necessary.”

He then said that counsel for the Attorney-General did not contest that the local legislature might oust that jurisdiction not only expressly but also 40
by necessary implication, although counsel for the Attorney-General did contend that on the true construction of the Ordinance of 1949 there was no such ouster, either expressly or by necessary implication.

p. 42, ll. 33-46.

22. On the other hand, counsel for the Appellant herein contended that the local legislature had no power to oust the jurisdiction of the Supreme Court but had power only to modify, amend or replace the Indian Acts, common law, doctrines of equity, statutes of general application,

powers, practice and procedure specified in paragraph (2) of Article 4, as distinct from the full jurisdiction conferred on the Supreme Court by paragraph (1) of Article 4.

23. The learned Acting Vice-President rejected the argument mentioned in the last foregoing paragraph on three main grounds. First, the decision of the Court of Appeal for Eastern Africa in *Fatuma Bachoo v. Majothi Kara Juma Bolia* (1946), 13 E.A.C.A. 50 showed that on the almost identical terms of Article 17 of the Tanganyika Territory Order in Council, 1920, the full jurisdiction conferred by paragraph (1) of the Order was to be regarded as qualified by the terms of paragraph (2). Secondly, in a number of instances local Ordinances purporting to limit the jurisdiction of the Supreme Court had not been disallowed by His Majesty under the powers reserved to him and that *Inglis v. de Barnard* (1841), 3 Moo. P.C. 425 (especially at page 432) showed that the absence of disallowance was to be taken into account in deciding whether such Ordinances were *intra vires* the local legislature. Thirdly, the plain language of Article 4 showed that the jurisdiction given by paragraph (1) was to be exercised within the framework provided by paragraph (2), and that the local legislature was competent to modify, replace or amend the framework by Ordinance, and in particular to oust or limit the jurisdiction of the Supreme Court, either by express provision or by necessary implication.

24. The learned Acting Vice-President then proceeded to consider whether the Ordinance of 1949 effected any such ouster or limitation. He first referred to Section 2 (1) of the Ordinance which (*inter alia*) provides that "In this Ordinance, unless the context otherwise requires :—

"... 'Court' means a subordinate Court of the first class . . ."

He then referred to Section 31 of the Ordinance which reads as follows :—

30 " 31. (1) The Court shall have jurisdiction to deal with any
" offence under this Ordinance or with any claim or other proceeding
" arising under this Ordinance (including suits for recovery of
" possession) as to which jurisdiction or power is not specifically
" conferred by this Ordinance on the Board, notwithstanding that
" by reason of the amount of penalty, claim or otherwise the case
" would not, but for this provision, be within the jurisdiction of
" the Court.

40 " (2) If a person takes proceedings under this Ordinance in
" the Supreme Court which he could have taken in the Court he
" shall, if successful, only be entitled to recover costs on the
" subordinate Court scale."

Finally, he said that it was common ground that Section 31 (1) ousted the jurisdiction of "the court" (i.e. of subordinate Courts of the first class) in cases such as the case before the Court because by Section 5 (1) (F) of the Ordinance the Central Board was empowered to make orders for possession in the area within which the said premises were situated.

25. He next turned to the difficulty in determining the proper construction of Section 31 (2). On behalf of both the Attorney-General

and the Appellant herein it was contended that quite apart from the Ordinance of 1949 the Supreme Court had jurisdiction to make Orders for possession, and that there was nothing in Section 31 (2) which ousted that jurisdiction expressly or by implication but that the mention of the Supreme Court in the subsection clearly indicated that that jurisdiction was to continue. On behalf of the Respondents herein it was contended that Section 31 (2) had no relation to areas (such as the area in which the said premises are situated) served by the Central Board or Coast Board. In such areas Section 5 (1) (F) empowered the Central Board or Coast Board (as the case may be) to make orders for the recovery of possession, and accordingly Section 31 (1) conferred upon "the Court" (namely, a subordinate Court of the first class) no power to make such orders. In such cases there were no proceedings which a person "could have taken in the Court" within the meaning of Section 31 (2) and therefore that subsection was inapplicable. Only in areas outside the jurisdiction of the Central Board and Coast Board could Section 31 (2) operate. Had the subsection been intended to penalise in costs those who brought proceedings in the Supreme Court which they could have brought before the Board, the words "or the Board" would have been inserted after the words "in the Court" in Section 31 (2).

p. 45, ll. 17-45.

p. 45, l. 46, to
p. 46, l. 20.p. 46, l. 20, to
p. 47, l. 3.

p. 47, ll. 3-26.

26. On behalf of the Attorney-General it was further contended that the primary object of Section 31 was to remove the pecuniary limits of jurisdiction of first class subordinate Courts in the same way that in the United Kingdom the similarly worded Section 17 (2) of the Increase of Rent and Mortgage Interest Restrictions Act, 1920, had removed the pecuniary limits of jurisdiction of County Courts, and that it was the intention of the legislature that cases under the Ordinance of 1949 should ordinarily go to the Board or first class subordinate Court, as the case might be, just as in the United Kingdom the legislature intended cases under the Act of 1920 ordinarily to go to the County Courts. The learned Acting Vice-President pointed out that there were differences in the wording of the two provisions, particularly in the introduction of the words "as to which jurisdiction or powers is not specifically conferred by this Ordinance on the Board" into Section 31 (1) of the Ordinance of 1949. Further, there were remarkable consequences in the sphere of costs if the arguments of the Appellant herein and the Attorney-General were correct. In cases arising in areas outside the jurisdiction of the Central and Coast Board, the person bringing the proceedings would be entitled to recover costs only on the subordinate Court scale. In cases arising in areas within the jurisdiction of those Boards, on the other hand, whereas under Section 5 (1) (M) of the Ordinance of 1949 the Boards have jurisdiction to direct costs to be taxed on the Supreme Court scale or on the scale applicable to a subordinate Court, if a landlord successfully brought his proceedings in the Supreme Court he would recover costs on the Supreme Court scale, and so (if the contentions of the Appellant herein and the Attorney-General were correct) all landlords would bring proceedings in the Supreme Court and leave the Boards in idleness. The legislature could not have intended such a result.

27. The learned Acting Vice-President then turned to a consideration of Section 16 of the Ordinance of 1949, subsection (1) of which sets out the

grounds upon which an order for possession may be made, and subsection (2) of which prohibits the making of such an order " unless the Central Board, " the Coast Board, or the Court, as the case may be, considers it reasonable " to make such an order." On behalf of the Attorney-General it was conceded that throughout Section 16 " Court " bore the meaning of " subordinate Court of the first class " in accordance with Section 2 (1), but on behalf of the Appellant herein it was contended that the context otherwise required and that in Section 16 " Court " ought to be construed as including the Supreme Court. The learned Acting Vice-President
 10 rejected this argument as untenable and said that the context clearly required that " Court " should mean a subordinate Court of the first class. p. 47, ll. 27-50.
 He then referred to Section 16 (1) (e) (i) and Section 16 (2) as examples of the difficulties created by holding that the Supreme Court had jurisdiction in such cases. Thus, under Section 16 (1) (e) (i) the Central Board, the Coast Board or " the Court " (i.e., a subordinate Court of the first class) was required to be satisfied as to the availability of reasonably equivalent alternative accommodation whereas the Supreme Court was not so required. Again under Section 16 (2) the Central Board, the Coast Board or a subordinate Court of the first class was required to consider it reasonable to
 20 make an order ; not so the Supreme Court.

28. The learned Acting Vice-President then dealt with two further submissions made on behalf of the Attorney-General. First, some paragraphs of Section 16 (1) do not mention " the Court ". Thus Section 16 (1) (a) states as one of the grounds for possession that " any " rent lawfully due from the tenant has not been paid, or any other " obligation of the tenancy (whether under the contract of tenancy or " under this Ordinance) so far as the same is consistent with the provisions " of this Ordinance has been broken or not performed." Even if such provisions bound the Supreme Court (assuming it to have jurisdiction)
 30 this did not obviate the difficulty created by other paragraphs which did mention " the Court ". Second, it was submitted that the difficulty could be overcome by the Supreme Court remitting proceedings to the Central Board, the Coast Board or the Court, just as in England the High Court may remit proceedings to the County Court. The Acting Vice-President pointed out that in England remissions were made for convenience and not from a lack of jurisdiction, and that they were made in pursuance of an express statutory power. p. 48, ll. 1-24.

29. The learned Acting Vice-President concluded this part of the case by saying that if the restrictions of Section 16 of the Ordinance of 1949
 40 did not apply to the Supreme Court, but the Supreme Court had jurisdiction under the Ordinance, absurd results followed. No landlord in his senses would bring proceedings for possession of controlled premises and for payment of arrears of rent before the Central or Coast Board if, by bringing the proceedings in the Supreme Court, he could put forward his claim without restrictions. All such proceedings would thus be brought in the Supreme Court, the objects of the Ordinance would be defeated and it would become entirely meaningless. On this ground alone the submission that by necessary implication the jurisdiction of the Supreme Court was ousted was fully justified. p. 48, ll. 25-37.

p. 48, l. 38, to
p. 49, l. 24.

30. A further contention on behalf of the Respondents herein was that whereas under Section 27 of the Ordinance of 1949 as originally enacted an appeal lay from the Central Board or Coast Board direct to the Court of Appeal for Eastern Africa, and from any other Rent Control Board to the Supreme Court, Ordinance No. 41 of 1949 had amended this provision (with a consequential amendment to Section 34 (3)) and had provided that appeal should lie in each case to the Supreme Court. These amendments, it was urged, showed that the Supreme Court had no longer any original jurisdiction but only an appellate jurisdiction. Even though this contention derived some support from the judgment of Bourke, J., in Civil Case No. 147 of 1949, the learned Acting Vice-President rejected it. In his view the amendments were more consistent with removing the anomaly of an appeal lying direct from a Rent Control Board to the Court of Appeal for Eastern Africa. Further, there was nothing unusual in the Supreme Court having original jurisdiction concurrent with that of subordinate tribunals and at the same time exercising appellate jurisdiction over such subordinate tribunals. 10

p. 49, ll. 25-30:

31. After taking all these factors into consideration the learned Acting Vice-President said he was of opinion that the original jurisdiction of the Supreme Court to deal with any claim or other proceedings arising under the Ordinance of 1949 had been ousted in respect of premises within the area of the Central and Coast Boards and in respect of which jurisdiction or power had been specifically conferred by the Ordinance on the Board. In saying this he observed that an action for the recovery of premises might still lie in the Supreme Court in certain circumstances. He then referred to *Joslowitz v. Burstein* [1948] 1 K.B. 408 as being a claim for possession in which no claim arising out of the Rent Restriction Acts was made and there was no defence arising under those Acts, and pointed out that in the present case it was plain from the pleadings that the said premises were "controlled premises" within the Ordinances of 1940 and 1949, so that *Joslowitz v. Burstein*, supra, had no application. In his view the present proceedings were "a claim or other proceedings arising out of" the Ordinance of 1949 and the Supreme Court had no jurisdiction unless it could be held that notwithstanding the Ordinance of 1949 the Supreme Court retained the jurisdiction which it had under the Ordinance of 1940 in respect of proceedings instituted while the latter Ordinance was in force. 20 30

p. 49, ll. 31-49.

p. 51, ll. 1-42.

32. The learned Acting Vice-President then considered the issue as to retroactivity. On behalf of the Respondents herein it was contended that the Ordinance of 1949 affected only matters of procedure and not vested rights. A landlord still retained his remedy but in cases such as the present he could exercise it only before the Central Board. The Ordinance accordingly precluded the Supreme Court from making an order for possession even in proceedings instituted before the Ordinance came into force. On behalf of the Appellant herein it was contended that despite the Ordinance of 1949 the jurisdiction of the Supreme Court under the Ordinance of 1940 remained unimpaired and in proceedings instituted under the Ordinance of 1940 the Supreme Court could still make an order for possession of controlled premises and for the payment of rent. In view of the learned Acting Vice-President, however, it was impossible to say that this was so, in the absence of any saving. 40 50

33. It was further contended for the Appellant herein that the Supreme Court had jurisdiction by virtue of Section 13 (3) of the Interpretation and General Clauses Ordinance, Cap. 1, which closely follows the terms of Section 38 of the Interpretation Act, 1889, of the United Kingdom. The said Section 13 (3) provides (inter alia) that—

p. 51, l. 43, to
p. 52, l. 34.

“ Where an Ordinance repeals any other enactment, then,
“ unless the contrary intention appears, the repeal shall not—

* * * * *

10

“ (C) affect any right, privilege, obligation or liability acquired,
“ accrued or incurred under any enactment so repealed ;
“ or

“ (D) affect any penalty, forfeiture or punishment incurred in
“ respect of any offence committed against any enactment
“ so repealed ; or

20

“ (E) affect any investigation, legal proceedings, or remedy in
“ respect of any such right, privilege, obligation, liability,
“ penalty, forfeiture or punishment as aforesaid, and
“ any such investigation, legal proceeding, or remedy
“ may be instituted, continued or enforced, and any
“ such penalty, forfeiture or punishment may be imposed,
“ as if the repealing Ordinance had not been made.”

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The learned Acting Vice-President said that this did not assist the Appellant herein because he shared the view of Bourke, J., in Civil Case No. 147 of 1949 that a contrary intention does appear in the Ordinance of 1949. By Section 35 of that Ordinance the Ordinance of 1940 was repealed but it was declared that the Ordinance of 1940 continued in full force and effect until the commencement of the Ordinance of 1949. If the legislature had intended the Supreme Court to continue to exercise its jurisdiction under the Ordinance of 1940 beyond that day this intention would surely have been expressed in Section 35. As no such intention was expressed he could not see how the Supreme Court could after the Ordinance of 1949 came into force make an order which by the provisions of that Ordinance it had been deprived of its jurisdiction to make. Accordingly the appeal would be allowed with costs. A Decree giving effect to these judgments was issued on the 30th day of May, 1952.

p. 53, ll. 1-25.

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34. The Appellant herein applied to the Court of Appeal for Eastern Africa for conditional leave to appeal to His Majesty in Council and by an Order made on the 20th day of August, 1951, such leave was granted. By a further Order of the Court of Appeal for Eastern Africa made on the 27th day of June, 1952, final leave to appeal to Her Majesty in Council was granted.

p. 55, l. 1, to
p. 56, l. 7.

p. 56, ll. 8-45.

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

REASONS

- (1) BECAUSE the Kenya legislature had power to oust the jurisdiction conferred on the Supreme Court by Article 4

of the Kenya Colony Order in Council, 1921, and by the Ordinance of 1949 the Kenya legislature had duly exercised that power in cases such as the present case.

- (2) BECAUSE where (as in the present case) the Central Board has jurisdiction to make an Order for possession the anomalies which would result from the Supreme Court also having jurisdiction to make such an Order show that the legislature intended to oust the jurisdiction of the Supreme Court.
- (3) BECAUSE on the contentions advanced by the 10 Respondents herein the operation of the Ordinance of 1949 (and particularly Section 31 thereof) is simple and effective whereas on the contentions advanced by the Appellant herein the operation of that Ordinance (and particularly Section 31 thereof) is productive of anomalies.
- (4) BECAUSE on the true construction of the Ordinance of 1949 the jurisdiction of the Supreme Court was ousted in cases such as the present case.
- (5) BECAUSE the provisions of Ordinance No. 41 of 1949 20 indicated that on matters within the Ordinance of 1949 the Supreme Court was intended to have no original jurisdiction.
- (6) BECAUSE the jurisdiction of the Supreme Court under the Ordinance of 1940 to make an order for possession of controlled premises and for payment of rent was procedural in nature and the ouster of that jurisdiction by the Ordinance of 1949 affected pending proceedings without thereby disturbing any vested rights.
- (7) BECAUSE on the true construction of the Ordinance of 30 1949 and Section 13 (3) of the Interpretation and General Clauses Ordinance, Cap. 1, the latter provision did not apply to enable pending proceedings in the Supreme Court to be continued despite the loss of jurisdiction by that Court, for the Ordinance of 1949 showed a "contrary intention" within the said Section 13 (3).
- (8) BECAUSE both the decision of the Court of Appeal and the reasons for that decision were right.

R. E. MEGARRY.

LINCOLN'S INN.
15th May 1953.

In the Privy Council.

ON APPEAL
*from the Court of Appeal for Eastern
Africa at Nairobi.*

BETWEEN
G. H. C. NORONHA (Plaintiff) *Appellant*
AND
DAMJI DEVJI LALJI
JETHA RATTANSHI
BHURA (Defendants) . *Respondents*

Case for the Respondents

*S.D. to T.L. Wilson
7/11*

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