

3,1959

IN THE PRIVY COUNCIL

No. 23 of 1957

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA.

B E T W E E N :

FAZAL ILAHI

Appellant

- and -

GATHUTHI HOTEL

Respondents

CASE FOR THE APPELLANT

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- 10 1. This is an appeal from an order, dated the 26th April, 1957, of the Court of Appeal for Eastern Africa (Worley, P., Briggs and Bacon, JJ.A.), allowing an appeal from a decree, dated the 19th September, 1956, of the Supreme Court of Kenya (Corrie, J.) and ordering specific performance of an alleged agreement to grant a lease of the business premises at 232/1/1, Race Course Road, Nairobi, known as Gathuthi Hotel. p.59
p.32
- 20 2. The Appellant's Complaint was issued in the Supreme Court of Kenya on the 22nd November, 1955. By it he alleged that he was the owner and landlord of the said business premises, and the Respondents (a firm) were in possession of them and carrying on the business of an eating house there. The Appellant had let the premises to the Respondents on a monthly tenancy from the 1st January, 1955, at a rent of Shs. 750 per month. By a Notice to Quit served on 30 the 24th June, 1955 the tenancy had been terminated on the 31st July, 1955. The Respondents had failed to vacate the premises and continued in possession. The Appellant therefore claimed possession of the premises and certain sums as mesne profits. pp.1-3
3. The Respondents' Defence and Counterclaim was dated the 28th January, 1956. They alleged pp.9-13

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that on or about the 30th June, 1953 the Appellant had verbally represented to them that he would grant them a permanent lease of the premises if the Respondents purchased the business of an eating house from him for the sum of Shs. 20,000, including certain effects. Relying upon this representation, as they alleged, they had purchased the said business and effects for Shs. 20,000. They denied the effect of the Notice to Quit served on the 24th June, 1955, and alleged that it contravened the Appellant's said representation. By way of counterclaim, the Respondents alleged that they were entitled to a permanent lease of the premises, which the Appellant had failed to grant. They claimed specific performance of the alleged agreement for a permanent lease, or alternatively damages.

pp.14-16 4. The Appellant's Reply to Defence and Defence to Counterclaim was dated the 9th February, 1956. He stated that the question of whether the Respondents' tenancy was a monthly tenancy commencing from the 1st January, 1955, at Shs. 750 per month rent, had been directly and substantially in issue in two former suits between the same parties, viz., Resident Magistrate's Nairobi Civil Case No. 3761 of 1955 and Resident Magistrate's Nairobi Landlord and Tenant Case No. 333 of 1955, and was therefore "res judicata". The alleged oral agreement was unenforceable, because it was too vague, was not in writing and was not registered. The terms of sale of the eating house business were contained in a written agreement between the parties dated the 30th June, 1953. The Appellant denied that he had made any representation to grant a permanent lease such as the Respondents alleged. The Respondents' tenancy had been merely a monthly tenancy.

pp.97-98 5. Resident Magistrate's Nairobi Civil Case No. 3761 of 1955 was an action instituted by the Appellant against the Respondents on the 27th June, 1955, claiming arrears of rent of the said business premises for April and May, 1955 at Shs. 750 per month, amounting to

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- Shs. 1500. In that case the Appellant said in evidence that he had let the premises to the Respondents in 1953, had terminated that tenancy by notice to quit at the end of 1954, and in January, 1955 had let the premises to the Respondents again at a new rent of Shs. 750 per month. The Respondents denied that they had ever agreed to pay Shs. 750 per month, and claimed that the original rent of Shs. 300 per month remained payable. The Resident Magistrate accepted the Appellant's evidence, and gave judgment for him for Shs. 1500 on the 9th August, 1955.
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- p.99,1.30-
p.100,1.14
- p.102,11.
18-23,
p.103,11.
32-40.
pp.64-67.
6. Resident Magistrate's Nairobi Landlord and Tenant Case No. 333 of 1955 arose out of an application made by the Respondents on the 19th July, 1955 under the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance for a new tenancy of the said business premises. In this application, the Respondents alleged that the expiring tenancy had begun on the 30th June, 1953 and been terminated on the 24th June, 1955 by notice to quit. By his Answer, the Appellant contended that the tenancy to which the application referred, viz. that beginning on the 30th June, 1953, had expired at the end of December, 1954, so that the application had been made out of time. The Resident Magistrate accepted this contention and dismissed the application on the 7th October, 1955.
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- pp.67-68
- pp.106-107
- pp.69-72
7. The written agreement of the 30th June, 1953 between the Appellant and the Respondents provided, by its first clause, that the Appellant agreed to sell and the Respondents to purchase the eating house business conducted on the said business premises for Shs. 20,000, this price being apportioned as to Shs. 8,000 to the goodwill and as to Shs. 12,000 to certain fittings. The second clause provided that the purchase price should include the goodwill, the fittings, the benefit of a trade licence and (clause 2(d))
- 40
- pp.62-63

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'the benefit of the tenancy in respect of the said business which shall be transferred by the Vendor in favour of the Purchasers'.

p.17 8. The action was tried by Corrie, J. on the 21st and 22nd May, 1956. For the Appellant, the clerk of the Resident Magistrate's Court at Nairobi produced the files of the proceedings described in paragraphs 5 and 6 above. The Appellant himself gave evidence that he had let the said business premises to the Respondents on a monthly tenancy in 1953, after he had sold the business to them. This tenancy had been terminated by notice to quit on the 31st December, 1954, and a fresh agreement had been made for a monthly tenancy, at Shs. 750 per month rent, from the 1st January, 1955. This tenancy had been terminated by a Notice to Quit served on the 24th June, 1955, which had expired on the 31st July, 1955. In June, 1953 he had been joint owner of the building with his brother, but in February, 1954 he had purchased his brother's half share for Shs. 67,500. He had not decided at the time of sale when the Respondents' tenancy should be terminated, but had said that they might remain so long as they paid the rent and kept the hotel clean. The goods included in the purchase price were worth Shs. 12,000. He denied that it had been agreed that the rent of Shs. 300 per month should be increased when the Rent Restriction Ordinance came to an end. The Respondents had not paid Shs.20,000 to secure fixity of tenure.

p.18,11. 10
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p.18,11. 20
12-16.
p.18,1.17
p.18,1,35-
p.19,1.3.
p.19,11. 30
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p.19.11. 24-26.
p.19,11. 32-35.
p.19,11. 42-44.

9. The following evidence was given for the Respondents: 40

pp.21-22 (a) Danson Kiombani Gachara, one of the partners in the firm of Gathuthi Hotel, said the Respondents had paid the Appellant Shs. 20,000: Shs. 1,000 for tiles on the wall and a refrigerator, Shs. 1,000 for utensils, Shs. 10,000 'to allow us to stay until we wanted to leave', and Shs. 8,000 for goodwill. There had been a written

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10 agreement, which the witness had signed. The rent had originally been Shs. 300 per month. Later the Appellant had asked for Shs. 750. The Respondents had not agreed, but had paid the higher rent for three months and then had asked for a reduction. The Appellant had refused to grant this, and had sued them successfully. Subsequently the Respondents had applied to the Court to fix the rent, under the Landlord and Tenant Ordinance.

20 (b) Wachira S/O Gikonyo, another partner in the firm, stated that it had been agreed in June, 1953 that the Respondents were to pay the Appellant the sum of Shs. 20,000 and a monthly rent of Shs. 300. They were to have the premises for ever. The Appellant had told them that he would increase the rent when the control ended. The Shs.20,000 included Shs. 2,000 for movable and immovable effects, Shs.10,000 as 'a deposit ... for the years we were to remain in the premises', and Shs. 8,000 for the goodwill of the business. The rent had been increased to Shs. 750 per month in January, 1955.

30 10. Corrie, J. delivered his judgment on the 31st July, 1956. Having set out the facts and the contentions of the parties, he referred to the agreement of the 30th June, 1953. He observed that there was a contradiction between clauses 1 and 2. In clause 1 the price was apportioned between the goodwill and certain fixtures, while in clause 2 it was said also to include the benefit of a trade licence and the tenancy. The Respondents said they had paid Shs. 10,000 as a premium for the grant of a permanent lease, but they had to accept the wording of the agreement as it stood. It was difficult to read clause 2(d) of that agreement, which stated that the tenancy in respect of the said business "shall be transferred by the Vendor in favour of the Purchasers", as meaning that a permanent tenancy was to be granted by the vendor

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p.29,11. 1-9.	to the purchasers. In Resident Magistrate's Nairobi Civil Case No. 3761 of 1955 the Magistrate had found as a fact that the Respondents had agreed to pay Shs. 750 a month rent from the 1st January, 1955, although it was admitted that originally they had paid only Shs. 300 a month. In that case, however, the question of the duration of the tenancy had not been in issue. Dealing with Resident Magistrate's Nairobi Landlord and Tenant Case No. 333 of 1955, the learned Judge held that the terms of the Respondents' application were entirely inconsistent with their claim to be entitled to a permanent tenancy of the premises. They were therefore estopped from claiming that they were entitled to a permanent tenancy. The learned Judge gave judgment for the Appellant for possession and mesne profits, and dismissed the counterclaim.	10
p.21,1.10- p.30,1.15.		
p.30,11.19- 39.		20
pp.33-35.	11. The Respondents appealed to the Court of Appeal for Eastern Africa. In their Memorandum of Appeal, dated the 15th October, 1956, they submitted that the learned Judge had been wrong in holding that they were estopped from claiming specific performance of the Appellant's undertaking to grant a permanent lease. They also submitted that their application to the Landlord and Tenant Court had been inconsistent, and had been drafted by them themselves, without real comprehension of the Landlord and Tenant Ordinance.	30
pp.35-52.	12. The Appeal was heard on the 1st April, 1957 and the judgments of the Court of Appeal (Worley, P., Briggs and Bacon, JJ.A.) were delivered on the 10th April, 1957.	40
pp.52-59.		
pp.52-53.	Briggs, J.A. referred to the agreement of the 30th June, 1953, and said the Appellant's title was believed to be a lease under the Crown Lands Ordinance for 99 years from the 1st January, 1906.	
p.54,11.5- 20.	Resident Magistrate's Nairobi Civil Case No. 3761 of 1955 had been brought by the Appellant for the recovery of rent and nothing more. The application by the Respondents to the Landlord and Tenant Court in Case No. 333 of 1955 was, on its	

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face, an application for a new tenancy, but it was probable that the Respondents had really intended to ask for the rent to be fixed. That application had not been heard on its merits, but had been dismissed as made out of time. The learned Judge then referred to the judgment of Corrie, J., and held that there were no circumstances giving rise to an estoppel. The question was one of construction of the agreement in the light of the surrounding circumstances. The evidence indicated, in the learned Judge's view, that the chattels used in the business were not worth more than Shs. 2,000, and he considered it unlikely that the Respondents would have paid a large sum for the goodwill of the business, unless they were going to have some security of tenure. The Appellant had admitted in evidence that, if the Respondents duly paid the rent and "kept the place clean", he would continue the tenancy. These factors, said Briggs, J.A., all indicated that a mere monthly tenancy was unlikely. The words in the agreement, 'the benefit of the tenancy in respect of the said business', were unexpected, because the Appellant was not in a colloquial sense a tenant. The learned Judge interpreted these words as meaning that the Appellant agreed to grant a lease for one day less than the unexpired term of his Crown lease. He then mentioned a number of covenants which, in his (Briggs, J.A.'s) view, ought to be included in the lease. It had been argued that the agreement was too vague and uncertain to be enforceable. The learned Judge held that the considerations affecting an executory agreement were different from those affecting a lease, and it was enough if from an executory agreement the Court could fairly discover the intention of the parties as to all essential terms of the proposed lease. The agreement should, if necessary, be construed 'contra proferentem'. Although somewhat obscure, it was not too uncertain to be enforced. Briggs, J.A. accordingly thought that the appeal should be allowed, the Appellant's claim dismissed, and an order made on the counterclaim for specific performance of the agreement to grant a lease or, should the Governor's consent to the lease, required by the Crown Lands Ordinance, not be given, an inquiry as to damages.

13. Worley, P. and Bacon, J.A. agreed with the judgment of Briggs, J.A.,

p.54, 1.44
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p.55, 1.31.
p.55, 1.31
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p.56, 1.2

p.56, 1.11-
p.57, 1.5.

p.57, 1.6-
p.58, 1.10.

p.58, 1.11-
27.

pp.58-59.

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14. The Appellant respectfully submits that clause 2(d) of the agreement of the 30th June, 1953 did not constitute an agreement to grant a permanent lease or such a lease as has been ordered by the Court of Appeal, and Briggs, J.A. was mistaken in his view of what he called 'the surrounding circumstances', on which he based his interpretation of the agreement of the 30th June, 1953. The learned Judge thought the furniture, fittings, etc. sold were probably worth Shs. 2,000 rather than Shs. 12,000. Since the parties had agreed on the figure of Shs. 12,000 in the document of the 30th June, 1953, it was, in the Appellant's respectful submission, pointless to speculate about the correctness or incorrectness of that valuation. There would have been no purpose in introducing a concealed premium in this way, since in Briggs, J.A.'s view it would not have been illegal for the Appellant to charge a premium. The learned Judge also attached weight to the Appellant's evidence that he had said he would continue the tenancy if the Respondents paid the rent and kept the place clean. The Appellant submits that this statement may quite well have referred to the continuation of a monthly tenancy, and the conditional character of the undertaking indicates that the parties were not contemplating a permanent tenancy. This undertaking, furthermore, may well explain the Respondents' readiness to pay for goodwill, which Briggs, J.A. regarded as another indication of the existence of something more than a monthly tenancy. Finally, the learned Judge overlooked the fact that the decision in Resident Magistrate's Nairobi Landlord and Tenant Case No. 333 of 1955 did make 'res judicata' the fact that the Respondents' first tenancy of the premises terminated on the 31st December, 1954, since it was by reason of this fact that the Resident Magistrate declined jurisdiction; and this fact was inconsistent with the grant of anything but a monthly tenancy in June, 1953.

15. The Appellant respectfully submits that clause 2(d) of the agreement of the 30th June, 1953 is too vague to be enforceable. It does not specify what tenancy is to be 'transferred' to the Respondents. The Appellant could only 'transfer' a tenancy which he held himself;

- but his title (even supposing it to be rightly described as a tenancy) was a title to the whole building, and it was never suggested that the Respondents were to have more than a lease of the ground floor, on which the eating house business was conducted. Clause 2(d), furthermore, does not specify what term the Respondents are to have, what rent they are to pay, or what is to happen if they cease carrying on the business. If some sort of long term was intended, clause 2(d) also fails to specify whether either party was to have the right to break it. On all these matters the intention of the parties cannot be gathered from the document, but can only be a matter of speculation; so clause 2(d), in the Appellant's submission, is unenforceable.
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- 20 16. Whatever may have been provided by the agreement of the 30th June, 1953, after the making of that agreement the Respondent accepted two successive monthly tenancies of the premises. They failed to pay rent due under the second of those tenancies, and the Appellant was obliged to sue them in order to recover it. The Appellant respectfully submits that these were circumstances which should have affected the exercise of the
- 30 discretion to order specific performance, and the learned Judges of the Court of Appeal erred in not taking them into consideration.
17. The Appellant respectfully submits that the Respondents held the premises under a monthly tenancy. This emerges not only from the terms agreed between the parties, but also from the provisions of the Indian Transfer of Property Act, 1882, s.106, that
- 40 'In the absence of a contract or local law or usage to the contrary a lease of immovable property for any other purpose (i.e. other than an agricultural or manufacturing purpose) shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.'

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This tenancy was duly terminated on the 31st July, 1955 by the notice to quit of the 24th June, 1955, and the Appellant is entitled to possession of the property, and to mesne profits as assessed by Corrie, J..

18. The Appellant respectfully submits that this appeal ought to be allowed, the order of the Court of Appeal for Eastern Africa set aside and the decree of the Supreme Court of Kenya restored, for the following (amongst other) 10

R E A S O N S

1. BECAUSE the Respondents occupied the premises on a monthly tenancy, which has been duly determined:
2. BECAUSE clause 2(d) of the agreement of the 30th June, 1953 did not constitute an agreement to grant anything more than a monthly tenancy: 20
3. BECAUSE clause 2(d) of the agreement of the 30th June, 1953 was too vague to be enforceable:
4. BECAUSE in awarding the discretionary remedy of specific performance the learned Judges of the Court of Appeal for Eastern Africa failed to consider all the relevant circumstances:
5. BECAUSE in the circumstances no order of specific performance ought to have been made: 30
6. BECAUSE of the other reasons given by Corrie, J..

J.G. Le QUESNE

No. 23 of 1957

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FAZAL ILAHI

- v -

GATHUTHI HOTEL

C A S E

- for the -

A P P E L L A N T

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