

Privy Council Appeal No. 23 of 1957

Fazal Ilahi - - - - - *Appellant*

v.

Gathuthi Hotel - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL,
DELIVERED THE 22ND JANUARY, 1959**

Present at the Hearing:

LORD COHEN

LORD SOMERVELL OF HARROW

LORD DENNING

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal from a judgment of the Court of Appeal for Eastern Africa allowing the respondents' appeal from a judgment of the Supreme Court of Kenya. The claim was one by the appellant as landlord for possession of the ground floor of certain premises and mesne profits. The premises are on Plot No. 232/1/1 Racecourse Road, Nairobi. The Supreme Court ordered possession with mesne profits at the rate of Shs.750/- per month with interest. The Court of Appeal set aside their judgment and made a decree for specific performance ordering the appellant to grant a lease on terms which will be considered later.

The appellant landlord appeals, submitting that the respondents were in occupation of the premises on a monthly tenancy which has been duly determined.

In June, 1953, the appellant and his brother were lessees under a long lease of premises the ground floor of which is the subject of the present proceedings. Apparently a 99 years' lease had been granted in 1906 and a sub-lease for 90 years in 1907.

In and before June, 1953, the appellant ran an eating house business on the ground floor. In June, 1953, a written agreement was entered into by the appellant as vendor for the sale of the business to the respondents as purchasers.

MEMORANDUM OF AGREEMENT

MEMORANDUM OF AGREEMENT made the 30th day of June One thousand nine hundred and fifty three BETWEEN FAZAL ILAHI S/O FAZAL DIN of Nairobi in the Colony of Kenya Merchant (hereinafter called "the Vendor") of the one part and WACHIRA S/O GIKONYO, WAMATHAI S/O MUME and KIUMBANI S/O GACHARA all of Nairobi aforesaid African traders (hereinafter called "the Purchasers") of the other part WHEREAS the Vendor has been for some time past carrying on the business of an eating house on Plot No. 209/232/1/1, Race Course Road, Nairobi aforesaid under the

firm name or style of "AKBARI HOTEL" (hereinafter referred to as "the said business") AND WHEREAS the Vendor has agreed with the Purchasers for the sale to them of the said business including its goodwill, furniture, fittings, refrigerator etc., for the price of Shillings Twenty thousand (Shs.20,000/-) NOW THIS AGREEMENT WITNESSETH as follows:—

1. The Vendor hereby agrees to sell and the Purchasers to purchase the said business for the price or sum of Shillings Twenty Thousand (Shd.20,000/-) which shall be apportioned in the manner following that is to say the sum of Shillings Eight Thousand (Shd.8,000/-) as to the goodwill of the said business and the balance of Shillings Twelve thousand (Shd.12,000/-) being the agreed value of the furniture, fittings, cooking utensils and refrigerator etc., all passing by manual delivery.

2. The said purchase price shall include:—

- (a) the goodwill of the said business,
- (b) the furniture, fittings, cooking utensils and refrigerator etc., lying in the business premises,
- (c) the benefit of trade licence in respect of the said business which shall be transferred in favour of the Purchasers,
- (d) the benefit of the tenancy in respect of the said business which shall be transferred by the Vendor in favour of the Purchasers.

3. The said purchase price shall be paid by the Purchasers to the Vendor upon the signing of this Agreement (receipt whereof the Vendor hereby acknowledges).

4. The Vendor shall hand over the possession of the said business to the Purchasers on the first day of July One thousand nine hundred and fifty-three which shall be the date of sale of this business.

5. All profits and receipts of the said business and all losses and outgoing in respect thereof up to the Thirtieth day of June One thousand nine hundred and fifty-three shall belong to and be paid and discharged by the Vendor and as from the First day of July One thousand nine hundred and fifty-three all profits and receipts of the said business and all losses and outgoing in respect thereof shall belong to and be paid and discharged by the Purchasers PROVIDED HOWEVER, that the Vendor shall indemnify the Purchasers if they may be held responsible for payment of any debts incurred by the Vendor up to the Thirtieth day of June One thousand nine hundred and fifty-three.

6. All necessary notices required to be published under the Fraudulent Transfer of Business Ordinance, 1930 shall be signed by the Vendor and the Purchasers and be published as required under the said Ordinance.

7. All costs of and in connection with this Agreement shall be borne and paid by the Purchasers.

8. The Purchasers shall be entitled to trade under the said firm name or style of "AKBARI HOTEL" and all proprietary rights therein shall belong to the Purchasers and the Vendor shall have no interest or right therein and shall have no authority to withdraw the same.

IN WITNESS WHEREOF the parties hereto have hereunto subscribed their names the day and year first hereinabove written.

SIGNED by the said Vendor in (Sd.) Fazal Ilahi s/o Fazal Din.
the presence of:—

G. Sarwar,
Advocate's Assistant,
Nairobi.

SIGNED by the said PUR-
CHASERS in the presence
of:—

WACHIRA.
WAMATHAI.
KIUMBANI.

J. R. Thairo,
Advocate's Clerk.

G. Sarwar,
Advocate's Assistant,
Nairobi.

It is common ground that rent was then agreed at Shs.300/- per month, this being the controlled rent.

On 10th February, 1954, the appellant bought his brother's share in the long sub-lease. There was no evidence as to the brother's interest, if any, in the eating house business.

In November, 1954, the appellant served a Notice to Quit in these terms:

29th November, 1954.

1. Wachira s/o Gikonyo,
 2. Wamathi s/o Muma,
 3. Kiumbani s/o Gachara.
- All trading as Gathuthi Hotel,
Race Course Road,
Nairobi.

Dear Sirs,

Plot LR. 209/232/1/1
Race Course Road—Nairobi.

I have been instructed by your landlord, Mr. Fazal Ilahi to give you this notice to quit, which I hereby do, that you must vacate the premises you occupy on the above plot, and deliver their possession to my client Fazal Ilahi on 31st December, 1954, that is to say, at the end of your month of tenancy commencing on 1st December, 1954.

Yours faithfully,

(Sgd.) D. V. KAPILA.

Rent Restriction of these premises ended on 31st December and the rent was by agreement increased to Shs.750/- per month, the respondents remaining in possession.

Rent was not paid for April or May, 1955.

Proceedings were taken for the recovery of the unpaid rent. A further Notice to Quit was served on 24th June, 1955.

D. V. KAPILA
ADVOCATE.

24th June, 1955.

Messrs. Gathuthi Hotel,
Race Course Road,
Nairobi.

Dear Sirs,

Hotel Premises on Plot No. 232/1/1
Race Course Road, Nairobi.

I am instructed by my client Mr. Fazal Ilahi of Nairobi to give you this notice which I hereby do, that you must quit and deliver vacant possession to him on the 31st July 1955 of the above premises situated

on the above plot which you occupy as my client's tenants on a monthly tenancy from the first to the last day of each calendar month.

On your failure to quit as requested above, proceedings will be filed against you for your ejection from the premises.

Yours faithfully,

(Sgd.) D. V. Kapila.

In July, 1955, the respondents started proceedings under the Landlord and Tenant Shops & Hotels Temporary Provisions Order for a new tenancy at the rent of Shs.300/-. In their application form they stated that their original tenancy was for a limited period. This application was dismissed on the ground that it was made out of time.

The plaint in the present proceedings was issued on 22nd November, 1955.

In their defence and counterclaim the respondents allege a verbal representation made by the appellant on or about 30th June that the appellant would grant a permanent lease if the respondents purchased the business, as they did by the agreement of that date. The respondents counterclaimed for a permanent lease on such terms as the Court should think just or alternatively for damages.

In the Supreme Court the plaintiff gave evidence that he was owner and landlord and that he had let the premises to the respondents in 1953. The Judge's note continues: "Defendants were to pay rents monthly, they were monthly tenants." In cross-examination he said that he told the respondents that if they went on paying the rent monthly and kept the place clean he would continue the tenancy. The respondents produced and relied on the written agreement. This had been read over to them in Swahili. Mr. Gachara said that they were to be allowed to stay until they wanted to go.

In his judgment the learned Judge said that the respondents mainly relied on the wording of the written agreement. The learned Judge held that the respondents were estopped by the statement in their application to the Landlord and Tenant Court that their tenancy had been determined. The learned Judge proceeded to award mesne profits at the rate of Shs.750/- per month and not at a higher rate which had been claimed.

The respondents appealed. It would appear that the fact that the appellant's interest, originally with his brother, was under a long lease and was not a freehold was stated by counsel in reference to the claim for a permanent lease. Counsel's statement was not challenged and the lease was not called for.

The judgment of the Court of Appeal was delivered by Briggs, J.A. The Court of Appeal held that there was no estoppel as held by the learned Judge. This point was not argued at the hearing before the Board. The Court also held that the question was purely one of construction of the agreement in the light of the surrounding circumstances. The Court referred to the unlikelihood of the respondents buying the business unless they had some security of tenure and construed the words of clause 2 (d) as an agreement to transfer the remainder of the appellant's interest in the long lease. The Court proceeded to consider terms. The tenant was not to be entitled to sub-let or assign but should be allowed to surrender on a year's notice. The term was to be one day less than the residue of the long lease.

Counsel for the respondents felt unable to support the provision as to surrender. He submitted that the clause in the agreement should be construed as an agreement to grant a lease; that the rent had been agreed collaterally; that the other terms should be taken from the head lease in so far as they were applicable to the business premises. Alternatively he submitted that the terms of the head lease beneficial to the

respondents should be incorporated and that the respondents' covenants should be those to be implied under the Transfer of Property Act section 108 (B) "in the absence of a contract or local usage to the contrary".

The respondents are plainly in a difficulty in asking the Court to take terms from the long lease which has never been called for and which is not before the Court. If it was a building lease as it may have been many of its terms would be wholly inapplicable to the letting 47 years later one floor of the premises for an eating house. In their Lordships' opinion the words "tenancy in respect of the said business" cannot be construed as referring to the long lease. The words admittedly suggest an existing tenancy of the ground floor. There was no such tenancy.

The written agreement is an agreement for the sale of the business. That agreement involved the creation of a tenancy under which the respondents could enter into possession on the following day. As the clause does not in their Lordships' opinion refer to the head lease the written agreement clearly does not express the terms of a tenancy nor does it enable the Court to imply them. It is referring in inapt terms to a tenancy to be agreed contemporaneously. Everything that happened later supports the appellant's evidence that the terms agreed were for a monthly tenancy. The respondents might well have insisted on a longer term to be embodied in a written lease but they did not do so. The appellant may have given the assurance to which he deposed and the respondents may have been content with this. It would in their Lordships' opinion have been too uncertain to be legally enforceable. If however it had been made more precise so as to be enforceable the respondents could not rely on it as they failed to pay the rent as later agreed and forced the appellant to sue for it. Owing to the law's delays it may be that the respondents will by now have had in effect a reasonable period of occupation at an agreed rent, but on the issues the appellant succeeds.

The appeal therefore will be allowed and their Lordships will humbly advise Her Majesty that the Order of the Court of Appeal for Eastern Africa dated the 26th April 1957, be set aside and the decree of the Supreme Court of Kenya dated the 19th September, 1956, restored with the exception of paragraphs (3) and (6) thereof for which the following paragraphs shall be substituted:—

(3) That the defendants do pay to the plaintiff mesne profits at the rate of Shs.750/- per month from the 1st November, 1955, until possession is given, allowance being made for any mesne profits already paid by the defendants.

(6) That the defendants do pay interest on the decretal amount of Shs.750/- at the rate of 6 per cent. per annum from the 1st August, 1956, until payment.

The respondents must pay the appellant's costs of this appeal and of the appeal to the Court of Appeal for Eastern Africa.

In the Privy Council

FAZAL ILAHI

v.

GATHUTHI HOTEL

**DELIVERED BY
LORD SOMERVELL OF HARROW**

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