REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 135 of 2000

1. KANTABEN SHAH

2. DINESH SHAH ……APPELLANTS

VERSUS

1. DR. APOLLO ORODHO

2. RINAH ORODHO ……..……RESPONDENTS

J U D G M E N T

The Appellant herein, Kantaben N. Shah and Dinesh N. shah put forward four (4) grounds of appeal to challenge the decision of Emily Ominde, Chairman Rent Restriction Tribunal in Tribunal case No. 330 of 1996 delivered on 1st December, 2000. In that decision, the learned Chairman gave Apollo Bwonyo Orodho, the Respondents herein judgment as prayed in the plaint.

The background of this appeal can be traced from the proceedings contained in the record of appeal. By a plaint dated 12th September 1996, the appellants sought for an order of vacant possession against the Respondents over certain residential premises the appellants occupied comprised in Mombasa/Block XVII/ Parcel 837A. The Respondents also claimed for mesne profits from 1st July 1996 until the date of vacation. The basis of the plaint was that Mrs. Kantaben N. Shah, the 1st appellant herein had either sub-let or parted with possession of the residential premises to Dinesh Shah, the 2nd appellant. The appellants filed a defence denying the Respondents' claim. Two witnesses testified on behalf of the Respondents in support of the plaint and the 2nd appellant testified in support of the defence before the tribunal.

When the appeal came up for hearing the appellants argued all the grounds of appeal together. The main ground argued on appeal is to the effect that the learned Chairman erred when she concluded that the first appellant had parted with the possession of the suit premises when there was no evidence to support such a conclusion. It was also argued that the learned Chairman should have appreciated the fact that a new tenancy was created by the conduct of the parties.

Let me start with the first ground of appeal argued before this court. It is the submission of the appellants that there was no evidence to establish that the 1st appellant had parted with possession. I have already stated that the Respondents' case was supported by the evidence of two witnesses. The 1st Respondent, Apollo Bwonya Orodho (P.W.1) told the learned tribunal chairman that the 1st appellant who was their tenant in part of the residential premises situate in Mombasa/Block XVII/Parcel 837A had parted with possession of the premises to her son, Dinesh Shah, the 2nd appellant herein without their permission. He told the tribunal that he visited the premises on several occasions but did not see the 1st

appellant. He said he made inquiries from a neighbour, to the 1st appellant, David Mbugua (P.W.2) as to the whereabouts of the 1st appellant . He said he was told by P.W.2 that he only saw the 1st appellant once despite the fact that P.W.2 is a neighbour to the 1st appellant. On cross-examination P.W.1 said that he knew the 1st appellant lived with the 2nd appellant who is the 1st appellant's son in the suit premises. P.W.1 also told the tribunal that he bought the premises while the appellants were occupying the same as tenants in 1976. On further cross-examination he said that he knew the 1st appellant had gone abroad and that he has been receiving the monthly rent through the advocate. P.W.2 told the trial court that when he occupied the premises neighbouring that occupied by the appellants in 1992, he found the 1st appellant and the 2nd appellant living together with two children. He said he has not seen the 1st appellant since 1993. P.W.2 then changed his story by saying that he saw her sometimes in 1995. On cross-examination P.W.2 confirmed that he last saw the 1st appellant in 1998. On his part Dinesh Shah (D.W.1), the 2nd appellant denied that the 1st appellant parted possession of the demised premises to him. He told the learned tribunal Chairman that the 1st appellant had traveled to England and India for Medical attention. He said the 1st appellant has not been to the demised premises since 1998 due to her bad health. He said the 1st appellant intends to come back to Kenya as soon as her health improves. He produced medical records to show that the 1st appellant is seriously ill. He told the learned tribunal chairman that he resides in the demised premises with his family. He admitted that he is the one who paid the rent on behalf of his mother.

What is clear and uncontested from the evidence is that the appellants were sitting tenants when the Respondents purchased the property in 1976. The appellants were mother and son who resided together in the demised premises. It is also not denied that the last time the 1st appellant was at the demised premises was in 1998. This is confirmed by the evidence of David Mbugua (P.W.2) and Dinesh Shah (D.W.1). The plaint filed before the tribunal is dated 12th September 1996. The plaint does not state when the appellants sub-let or parted possession of the demised premises. It is important to consider paragraphs 5 and 6 of the aforesaid, which reads as follows:

"5 The first defendant has sub-let and

parted with possession of the said

house without the consent and or

authority of the plaintiffs to the 2nd

defendant who occupies the same.

6 By notice in writing dated 25th May 1996

the plaintiffs terminated the 1st

defendants' tenancy on 31.6.1996 and

notified both the defendants of their

intention to file an action if vacant

possession of the house was not

handed over on that day, the grounds

being sub-letting and parting with

possession."

It is clear from the evidence of P.W2 and D.W.1 that the 1st appellant was still in occupation of the demised premises before she was seriously taken ill in 1998. The learned Chairman appears to have ruled in favour of the Respondents on the basis of a question raised by appellant's advocate which she gladly reproduced as follows:

"Is it strange to you that Asians live together and pass all their tenancies from generation to generation? It could have been a slip of the tongue on the part of the lawyer but it gives the actual position that is prevailing in these circumstances."

The learned Tribunal Chairman treated the question as an admission on the part of the appellants. That was a great misdirection on her part. It was the chairman's duty to decide the matter on the basis of the evidence tendered i.e. the answer to the question and not the question itself. It was incumbent upon the Plaintiffs (Respondents) to prove their case. I have reassessed and re-evaluated the evidence tendered before the Tribunal. I find that the evidence tendered by the Respondents did not prove that the 1st appellant parted with possession. The evidence tendered shows that by the time the suit was filed, the 1st appellant was still in occupation of the demised premises and she only left for abroad for medical treatment when she was seriously taken ill. The fact that the 2nd appellant paid the house rent did not mean that the 1st appellant parted possession of the premises. It is a matter of common notoriety that in such kindred relationships, the Children usually assist the parents to settle rent and other daily outgoings particularly if they are living together like in this appeal. Had the learned tribunal chairman seriously considered the 1st appellant's defence should have come to a different conclusion. The learned chairman seemed to have overlooked the fact that there was evidence in form of medical reports and correspondences produced by the 2nd appellant to show that the 1st appellant had gone outside the country for medical attention and did not merely leave Kenya to live in India permanently. The Respondent did not tender cogent evidence to controvert the 2nd appellant's medical evidence. In the end I agree with the appellant's submissions that there was no sufficient evidence tendered by the Respondents before the tribunal to establish that the 1st appellant had parted with possession.

The second ground argued on appeal is to the effect that the learned tribunal chairman should have found that there was a new tenancy between the 2nd appellant and the Respondents in the light of the evidence presented before her. To be fair to the learned tribunal chairman, no such submissions were put to her attention for determination. In any case there was no pleading to declare such. I will not try to do so at this stage. Perhaps I should mention by passing that if such a submission had been made or pleaded that there is ample evidence that a month to month tenancy may be established between the landlord and the 2nd appellant and his company.

For the above reasons, the appeal is allowed with the result that the judgment of the tribunal of 1st December 2000 is set aside and substituted with an order dismissing the plaint. Costs of the appeal and that of the case before the tribunal are awarded to the appellants.

Dated and delivered at Mombasa this 2nd day of June 2006.

J.K. SERGON

J U D G E

In open court in the absence of the parties.