

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Appeal 84 of 2002

HASSAN AWADHI SALIM T/A. SUEZ PROVISION STORES APPELLANT

- V E R S U S -

1. ABDALLA SAID BARAKA

2. BARAKAT SAID BARAKA RESPONDENTS

JUDGMENT IN APPEAL

In this appeal the Memorandum of Appeal sets out 4 grounds of appeal which I summarize thus:-

The notice was issued by a person not a landlord or a party to the suit, that the Hon. Chairman grounded his decision on matters which post-dated the issuance of notice, that the judgment was against the weight of evidence and that judgment should not have been entered against the appellants at all.

This appeal relates to a Business Premises which fall under the provisions of Landlord and Tenant (shops, Hotels and Catering Establishments) Act Cap. 301. The statutory notice was given by PW1 on behalf of himself and his brother now deceased on the ground that the Tenant had parted with the possession of the premises to another person Abdallah Awadh Salim since October 1995. Evidence given was that the tenant had left the country for Saudi Arabia. For the tenant one Swaleh Awadh Salim gave evidence and exhibited a Power of Attorney donated by the Tenant who is his brother which enables him to run his brothers business while his brother is out of the country. It is this witness who pay rents which is always accepted by the landlord.

I have examined the authority of *Kreitman –vs- Vidofsky Times law Reports March 25 1927*. Which clearly indicates that where the premises are occupied by a person who is protected by the act namely mother brother and father it cannot be said the possession has been handed to another. There is also the case of *Stening –vs- Abrahams 1931 All E.A. R. Rep. 437* where it was held that a lessee cannot be said to part with the possession of any part of the premises unless his agreement with other party wholly ousts him from the legal possession of that part. Concurrent user does not amount to parting with possession. In the present case the tenant gave a Power of Attorney to his brother to represent his business interest in Kenya while he was trading between Kenya and Saudi Arabia. The holder of Power of Attorney was overseeing the activities in the shop but his other brother was running the day to day activities of the shop. There is no evidence that the tenant was receiving any rent from his brother, so as to constitute him a sub-tenant. However, the landlord's rent was paid regularly. I have perused the Act and the definition given of the tenant in relation to tenancy' means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding and includes a sub tenant".

In the circumstances I find the appeal with no merit and the same is dismissed with costs.

Dated this 30th day of July, 2004.

J. KHAMINWA

JUDGE

J. Khaminwa – Judge

Court clerk – Chege

Mr. Adoch holding brief for Y.A.Ali