



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**MISCELLANEOUS CIVIL CASE NO 176 OF 1991**

**ABDULATIF HAJI ESMAIL & 7 OTHERS ..... PLAINTIFF**

**VERSUS**

**ALI ASHUR & ANOTHER.....DEFENDANT**

**JUDGMENT**

The plaintiff is the registered proprietor of the premises known as Mombasa/Block /XVIII/202 and 203 situate along Jomo Kenyatta Avenue Mombasa. The said premises were originally the property of one Kassam Ismail Khamisa Kumbhar who is 1st defendant's half – brother. Prior to the acquisition of the premises by the plaintiff the defendants were in occupation of the premises on a family arrangement by virtue of which the previous owner of the premises ie the said Kassam, is said to have occupied some other family premises belonging to the family of the 1st defendant. By reasons of that arrangement the 1st defendant who appears to be the spokesman of the rest of the defendants contends that the arrangements existing between his family and the said Kassam makes him and the other defendants, tenants in the premises, but this contention is hotly contested by the plaintiff who claims that the defendants were mere licencees who have no right to remain on the premises against the will of the current owner.

These proceedings were initially commenced in the Resident Magistrate's Court but subsequently an appeal was lodged to this Court by the defendants after being dissatisfied by a ruling by the Resident Magistrate. Further before the appeal was heard by this Court a consent order was entered on 1.7.93 transferring the case from the Resident Magistrate's Court to this Court for disposal and at the same time terminating the defendant's appeal. Accordingly the proceedings before me were in effect a trial of the suit filed in the Resident Magistrate's Court.

The evidence for the plaintiff generally confirmed the contents of his pleadings. It was that he purchased the suit premises in 1988 from the said Kassam. According to the sale agreement the premises were sold in vacant possession as shown in exhibit 3. Although at the time of the purchase of the property the defendants were in occupation of the premises, the plaintiff was assured by Kassam that the occupiers of the property would move because they were relatives of his. But from the time of purchasing the property in 1988 to the time of hearing this case the defendants have not only refused to vacate the premises but the plaintiff has also not received any rent from them.

In his evidence the 1st defendant said that the premises were family property which formerly belonged to his uncle. Upon the death of the uncle the property devolved to his brother Kassam Ismail Kamis Kumbhar, the person who sold them to the present plaintiff.

At one stage of his evidence the 1st defendant said that at the time of sale of the property to the plaintiff,

the 1st defendant were staying in the house at a rental of Shs 500/- which was being paid to the said Kassam while on his part Kassam was staying in another house belonging to 1st defendants and paying Shs 670/- rent to the 1st defendant's family for it. It was not however clear from the evidence whether the rentals were monthly or annual. However later in his evidence the 1st defendant stated that no rent was in fact being paid either by the said Kassam or the 1st defendant and his family for the occupation of the two family houses. The 1st defendant in fact conceded that after he became aware of the purchase of the house by the plaintiff, he moved out of the premises with his family but was later persuaded by his brothers to return to the premises to look after the interest of the family.

And finally in his cross-examination by Mrs Ali for the plaintiff, the 1st defendant further conceded that in an affidavit sworn by him on 5.3.1990 he had stated that since 1957 he had been staying in the premises without paying any rent.

The above was briefly the evidence adduced by the two principal contending parties.

Given the nature of the pleadings and the evidence adduced by both sides I think the only issue I have to decide in this matter is whether or not the defendants are tenants or licensees of the premises. If they are tenants they are entitled to remain in the premises until a proper notice is served upon them under the Rent Restriction Act ie if the plaintiff intends to take over the premises. On the other hand, if they are licensees, then they have no right to remain in the premises against the wishes of the owner of the premises.

A tenant means a person to whom a lease is granted (see *Woodfall on Landlord and Tenant* 26th Ed p 2 ) while a licence is an authority to do something which would otherwise be inoperative, wrongful or illegal eg to enter on land which would otherwise be a trespass. A licence passes no interest, and a mere licence is always revocable see (*Osborn A Concise Law Dictionary* 5th edition p 193)

In my view, the evidence in this case clearly shows that the defendants were not tenants at all but were licensees. The 1st defendant who gave evidence on the behalf of the other defendants though at pains to show some landlord and tenant relationship miserably failed to adduce any tangible evidence to that effect. His evidence established that the premises were originally owned by his uncle, upon whose death they became the property of his brother, Kassam. The 1st defendant and his family continued to occupy the premises not as tenants of Kassam but on the basis of a family arrangement. They paid no rent to the said Kassam nor did they pay any to the plaintiff. After the purchase of the property by the plaintiff, the 1st defendant and his family vacated the premises no doubt after receiving the notice to quit served upon them by the plaintiff's former advocates M/s Pandya & Talati, thereby acknowledging the plaintiff's right to evict him from the premises; the fact that he changed his mind and returned to the premises did not alter that position.

In *Woodfall on Landlord and Tenant (supra)* at page 9 the learned author gives two examples of licensees which I think clearly show that the defendants herein were licensees. He states:-

“Where a husband living apart from his wife lets her live in his house for some consideration by way of rent, a tenancy is not necessarily to be inferred, and it is a question of fact whether the relationship of landlord and tenant is established. The contention that a licensee shall live in premises rent-free for the duration does not create a tenancy. A tenancy may be changed into a license by an agreement that the tenant is to live rent-free in the future”.

In the instant case there is no evidence to suggest that any tenancy was at all created. The defendants were living in a family house rent-free which the owner decided to sell to the plaintiff. They have no right to remain thereon against the wish of the plaintiff.

For the above reasons, the plaintiff is entitled to the orders he seeks in the plaint. Accordingly there will be judgment for the plaintiff against defendants as prayed in the plaint. The defendants will pay the plaintiff's costs and these by the third party, whom I agree was brought to these proceedings quite unnecessarily.

Dated and delivered at Mombasa this 26<sup>th</sup> day of November, 1993

**T. MBALUTO**

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**JUDGE**