



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Law V-P & Mustafa JA)

CIVIL APPEAL NO 34 OF 1975

DOLAT KARIM WALJEE TRADING AS IBRAHIM & SONS.....APPELLANT

VERSUS

S ROSE..... RESPONDENT

JUDGMENT

Wambuzi P delivered the following This appeal is against an order of the High Court of Kenya requiring the appellant to vacate and deliver up to the respondent vacant possession of

the premises known as office No 4, Balfour House, Kimathi Street, Nairobi. The respondent is the lessee of the premises and one Mohamed Ibrahim Dar was a sub-lessee, and carried on a tailoring business in the premises under the name "Ibrahim & Sons" prior to his death in 1971. Upon Dar's death the respondent claimed to have sub-let the premises to Dar's sons on a month-to-month basis for the purpose of winding up their late father's business. He appears to have been surprised in April 1972 to receive a cheque for rent emanating from the appellant who apparently was occupying the premises and purported to be his sub-tenant. The respondent sued *inter alia* for possession. On the other hand, the appellant claimed that Dar's business, together with the tenancy, had been transferred to her by Dar before his death. She claimed she could not be evicted otherwise than in accordance with the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The judge found as a fact that there was no transfer of the tenancy and the appellant did not enjoy the protection she claimed under the Act. He made the order which is the subject matter of this appeal.

The appellant contends the decision in the lower court is erroneous in fact and in law and raises in her memorandum of appeal no less than 15 points on which it is claimed that the judge came to wrong conclusions. Mr Wilkinson for the appellant argued in effect that the respondent as a reversioner had no right of action against the appellant in trespass. In his submission Dar's tenancy was a controlled tenancy within the meaning of section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. This tenancy could not be terminated except in accordance with the provisions of the Act. Alternatively, the respondent had created a month-to-month tenancy in favour of Dar's sons which was also a controlled tenancy and it too could not be terminated otherwise than in accordance with the provisions of the Act. It had not been shown that either tenancy had been lawfully terminated. If Dar's tenancy subsisted, the respondent not having possession could sue the appellant in trespass for damages only upon proof of actual damage to the reversion. If Dar's tenancy was terminated, then the tenancy of Dar's sons subsisted and the appellant was not a trespasser but a licensee of the sons of Dar. For the respondent, Mr Deverell supported the decision of the lower court. He argued in effect that after Dar's

death the estate took no interest in the tenancy and no rent was paid by the estate. On the contrary, the sons of Dar who apparently were dealing with the estate matters assisted the appellant in an attempt to show that Dar's tenancy had been transferred to the appellant. Dar's tenancy therefore was abandoned or surrendered. Counsel argued further that the respondent could not have created a tenancy in favour of the sons of Dar as claimed because, after Dar's death, Dar's tenancy was still subsisting in the estate. In his address Mr Wilkinson indicated an objection to the argument on the question of abandonment or surrender of Dar's tenancy but the matter was not pursued and I take it that the point was abandoned.

Be that as it may, no issues were framed at the beginning of the hearing in the lower court. It would appear, however, from the opening address of Mr Deverell who appeared for the respondent in that Court on 24th October 1973 that in his view the only issue was whether or not Dar had transferred his tenancy of the premises to the appellant. The judge appears to have accepted this as the only issue. He said in his judgment: Put in the simplest terms the [respondent] is saying that by several strokes of alleged truthful occurrences parallel to recognisable legal steps and rights, Mr Karim Waljee has by plan or system of conduct sought to dispossess him of the suit premises. On the other hand, Mr Waljee is saying to [the respondent] 'You are a liar, you agreed to the sub-tenancy on behalf of my wife and it is surprising that you are so bold to have brought this suit'.

In his judgment the judge dealt with the background of the case and came to the conclusion:

This Court finds as a fact, that commencing with the exceedingly questionable unilateral memorandum of purchase of some of Dar's equipment on 2nd August 1971 there evolved a scheme operated by Saeed, Waljee and Waheed to foist [the appellant] upon [the respondent] as assignee of Dar's tenancy either by ultimate exasperation or estoppel under the umbrella of the business name Ibrahim & Sons. The Court finds that Dar until his death never transferred or assigned his tenancy to [the appellant] neither did his sons validly do so, and there is no tenancy by agreement, estoppel or otherwise as between [the respondent] and [the appellant].

Having come to this conclusion the judge said of the protection of the tenancy which had been claimed by the appellant: The nature of the undertakings conducted within room no 4 by the late Dar and that by [the appellant] fall within the definition 'shop'. It has been argued for [the appellant] that in order to secure possession [the respondent] must follow the laid down procedure in the Act cap 301 and that this has not been done. Upon the Court's findings of fact the sub-tenancy claimed by [the appellant] does not exist either by agreement, assignment or by operation of law; and [the appellant] does not fall within the above definition of 'tenant'. Indeed it was this badge 'tenant' which [the appellant] sought to inflict upon [respondent] and which ostensible position the Court has found is held by [the appellant] as a matter of fact by deceit. I may be wrong but I am of opinion that the mere established nature of [the appellant's] occupation of the suit premises should not bring [the appellant] within 'the protection of tenants of such premises' and the intentment of the Act.

On the evidence the decision of the lower court that the appellant was a trespasser, and therefore not protected under the Act, may have been correct. The question raised before us, however, which apparently was raised by Mr Khanna but was not dealt with in the lower court's judgment is whether the respondent had a right to sue the appellant for possession even though it is accepted that the appellant was a trespasser. This is a question of law which should have been dealt with by the judge. In my view it was necessary in order to determine the respondent's rights; to show what had happened to Dar's tenancy. Was it still subsisting or did it somehow terminate? Allied to this was: what was the effect of the alleged tenancy expressly pleaded by the respondent as having been granted to the sons of Dar? Paragraph 4 of the plaint reads:

Subsequent to Mohamed Ibrahim Dar's death [the respondent] verbally agreed with the said Mohamed Ibrahim's sons, Waheed and Saeed Dar, that they could sub-let the premises from him at the same rent on a month-to-month basis until they had wound up the business of Ibrahim & Sons.

Returning to the first question, it would appear to be common ground, and indeed the trial judge appears to have found, that Dar's tenancy was a controlled tenancy within the meaning of section 2 of the

Landlord and Tenant (shops, Hotels and Catering Establishments) Act and would come within section 4 of the Act. That section provides in sub-section (1): Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of any such, tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

It was argued for the appellant, and I think Mr Deverell for the respondent conceded, that Dar's tenancy did not automatically terminate on his death. It is to be noted that there is nothing in the Act to suggest that death of the tenant would terminate a controlled tenancy and under common law: A tenancy does not determine by the death of the lessee, but will vest in his legal personal representatives who are entitled to give or receive the proper notice to quit See *Woodfall: Landlord and Tenant* (27th Edn) page 964.

As was pointed out by Mr Deverell for the respondent, the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act appears to have been designed for the protection of a category of tenancies against termination by the landlord. Indeed the long title to the Act is:

“An Act... to make provisions with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation....”

The Act sets out the procedure to be followed by the landlord who wishes to terminate such a tenancy and the grounds therefore. The Act is, however, silent as to what procedure a tenant who wishes to terminate such a tenancy may adopt or indeed the grounds for such termination. In these circumstances it is rather difficult to construe the expression: “no such tenancy shall terminate or be terminated” in section 4 of the Act. It may well be that this means terminate in accordance with or be terminated under any written law or term or condition of the tenancy. In my view, however, the expression is so wide that it may well refer to termination by the landlord or the tenant. If this is so, then there may well be a gap in the law which makes no provision for the procedure for termination of a controlled tenancy by the tenant. It may be said that the tenant has been so protected that he may not be able to take himself out of the protection without being in breach of some condition of the tenancy agreement. In this connection Mr Deverell argued that Courts will construe a statute to avoid an absurd situation. That may be so, but where the words of a statute are clear, it is not for the Courts to rewrite the statute. It may be said on the other hand that, in the absence of any statutory provision governing the procedure for such termination, the ordinary law would apply. In this case the question would be whether it would be for the tribunal under the Act or the ordinary Courts to determine the issue. I note, however, that the question in the case before us is not that a tenant wishes to terminate his tenancy but rather that a landlord seeks to say that a tenant is not his tenant and must vacate his premises.

The argument before us is that Dar's tenancy was abandoned or surrendered. According to Mr Deverell for the respondent, the nonactivation of the tenancy by Dar's estate amounted to an abandonment or surrender of the tenancy. The evidence on this issue is contradictory and inconsistent. The respondent claims to have allowed the sons of Dar, at their request, to wind up their father's business and accepted rent from them for some time. On the other hand, there is evidence that the business together with the tenancy was transferred to the appellant before Dar's death. If the latter is true, then it is strange that the sons of Dar should have requested the respondent and not the appellant to give them time to wind up their father's business. On this issue, the trial judge said in effect that this request was part and parcel of a plan to plant the appellant as a tenant of the respondent. I am unable to see how in these circumstances the possibility can be excluded that the appellant's moves to acquire the sub-tenancy were subsequent to an arrangement between the respondent and the sons of Dar for the latter to remain in the premises for the purpose of winding up their father's business. There was evidence of Dar's business property being in the premises at the time of his death. Can it be said in these circumstances that the estate did nothing to activate the tenancy after Dar's death? Is it relevant whether Dar's personal representative or someone else paid the rent?

Be that as it may, paragraphs (a) and (e) of section 12(1) of the Act read: A tribunal shall in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall

have power-

(a) to determine whether or not any tenancy is a controlled tenancy; ...

(e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises in a controlled tenancy;....

From these provisions it would appear that a tribunal under the Act has jurisdiction to say whether or not a tenancy is a controlled tenancy. Further, a tribunal has jurisdiction to deal with people who somehow occupy premises comprised in a controlled tenancy as appears to be the position in this case.

It would appear that, on the facts of this case, Dar's tenancy could have been terminated on the grounds stated in paragraphs (b) and (c) of section 7(1) of the Act for default in the payment of rent; this was Mr Deverell's argument that the estate, as such, did nothing to activate the tenancy or that the estate committed substantial breaches by using the premises as a classroom instead of a tailoring business as was alleged in the evidence. It may well be that a protected tenancy may be abandoned or surrendered, but in either case it means termination of the tenancy. Against the reading of section 4 of the Landlord and Tenant (Shops, Hotels and Catering

Establishments) Act that no controlled tenancy shall terminate or be terminated, it is my considered view that a controlled tenancy cannot be terminated otherwise than in accordance with the provisions of the Act. The position as I see it in this case is that there is no evidence that Dar's tenancy terminated or was terminated at any time. Even assuming that Dar's tenancy somehow terminated, there is the possibility (as pleaded in paragraph 4 of the plaint) of another controlled tenancy of the same property having been created in favour of Dar's sons. It has not been shown that that tenancy was ever terminated. In either case, it is my view that it is for the tribunal under the Act to terminate the tenancy.

The appellant who apparently is in occupation of the premises could be a licensee or a trespasser, in which case I think it is common ground that the respondent who is the lessor cannot maintain an action against the appellant in trespass without proof of actual damage to the reversion. No such damage was pleaded or argued and in any case such an action would be for damages and not for possession, as in this case. Notwithstanding the rather unhappy background to the case as found by the judge, I am constrained to allow the appeal and to set aside the order for vacation of the premises and payment of mesne profits made by the High Court.

Mustafa JA read the following Judgment.

I have read the judgment prepared by the President and I agree that the appeal must be allowed. The respondent was the tenant of certain premises and had sub-let some of them to Mohamed Ibrahim Dar who died in September 1971. The sub-tenancy to Dar was under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (hereafter called "the Act").

It is common ground that a tenancy does not determine automatically on the death of a tenant. The sub-tenancy of Dar vested in his estate; Dar appeared to have died intestate and no grant of letters of administration was applied for or made. It also appeared that two of Dar's sons meddled with his estate, at least to the extent of winding up his business. Accepting the evidence adduced by the respondent in full, the situation would appear to have been this: when Dar died, Dar's sons approached the respondent who allowed the sons to continue as his sub-tenants on monthly terms for the purpose of winding up Dar's business. The respondent received regular monthly rents from Dar's sons. The respondent became aware in December 1971 that Dar's business had been wound up, but he nevertheless continued to receive monthly rents from Dar's sons until April 1972, when he discovered that the appellant was in fact in occupation and was paying rent through Dar's sons. Then he took action in Court to evict the appellant on the ground that she had wrongfully entered and occupied the suit premises without his consent, and the trial judge found that the appellant was a trespasser and made an order for her to deliver possession of the suit premises.

The suit premises were controlled premises within the meaning of the Act, and, in terms of section 4, no controlled tenancy shall terminate or be terminated otherwise than in accordance with the Act. The respondent had not terminated the tenancy with Dar or Dar's estate. After the death of Dar, the sons of Dar had at some stage handed over possession of the suit premises to the appellant. If at the time of such handing over the subtenancy was still vested in the estate, then, the sons of Dar must have acted in their capacity as executors *de son tort* of Dar's estate. The appellant could not in that case have been a trespasser vis-à-vis the respondent. Even if, as submitted by Mr Deverell, that the sub-tenancy had been surrendered by Dar's estate some time after Dar's death, the respondent had subsequently granted a monthly sub-tenancy of the suit premises to Dar's sons. The respondent had not terminated the tenancy with Dr's sons. Since the appellant obtained possession of the suit premises from Dar's she could not have been a trespasser either. Even if the tenancy to Dar's sons was not a controlled tenancy within the provisions of the Act, the situation would be the same, as the respondent had not served notice to quit on Dar's sons. In each of the situations mentioned above the respondent's position was that of a reversioner as there was an intermediate sub-tenant standing between the respondent and the appellant which precluded the respondent from claiming that the appellant was a trespasser as against him. In my view therefore the respondent could not maintain an action for ejectment on the ground of trespass against the appellant in the circumstances.

Law V- P read the following Judgment.

I have had the advantage of reading in draft the judgment prepared by the President, and I agree with his conclusion. I do so with regret, because the appellant's case as pleaded in her defence was based almost entirely on the contention that she had acquired the sub-tenancy by transfer from Dar in the latter's life-time; a contention which was false and untrue, and supported by bogus and predated documents concocted by the appellant's husband with the collaboration of one or more of Dar's sons. Only in the last few words of paragraph 13 of the defence was it suggested that the sub-tenancy might have been transferred by Dar's sons and heirs. That is what I think happened. Dar's interest in the sub-tenancy, which survived in his estate after his death, may have been transferred to the appellant by his sons, in their capacity as legal representatives, or if they themselves became sub-tenants under an agreement entered into with the respondent as pleaded in paragraph 4 of the plaint, then in that capacity. Whatever the true position, the premises are controlled premises within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. By section 4 of that Act, no controlled tenancy shall terminate or be terminated otherwise than in accordance with the provisions of the Act.

The first of those provisions is the giving of notice in the prescribed form. No such notice has ever been given to Dar, to his estate, or to his sons (if they ever became sub-tenants). Only the tribunal set up under the Act can terminate a controlled tenancy, where the notice if given is opposed.

As regards Mr Deverell's submission that the tenancy which vested in Dar's estate was surrendered or abandoned, I do not see how there can be an abandonment without an assumption of, or entering into, possession by the landlord. If the tenancy was not surrendered or abandoned, it still subsists, and the appellant was let into possession while it subsisted.

Whether the appellant is a trespasser, or a licensee, the landlord not having had possession has no cause of action for ejectment. If she has somehow acquired the status of sub-tenant, only the tribunal can determine the subtenancy.

For these reasons I agree, albeit reluctantly, that this appeal must be allowed.

Appeal allowed with costs.

Dated at Nairobi this 12th day of January 1976.

S.W.W. WAMBUZI

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PRESIDENT