

UGANDA / JUDGMENT

Bone v Duncan (Civil Case No. 134 of 1942) [1943] EACA 42 (1 January 1943)

[1943] EACA 42

COURT

East African Court of Appeal

BEFORE

Sheridan CJ

CASE / FILE NUMBER

Civil Case No. 134 of 1942

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ORIGINAL CIVIL

BEFORE SIR JOSEPH SHERIDAN, C. J.

EVELYN BONE. Plaintiff

 $\mathbf{v}$

DOUGLAS DUNCAN, Defendant

Civil Case No. 134 of 1942

Landlord and Tenant—Suit for possession by landlord of premises previously occupied by landlord—Reasonableness of order for possession—Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, section 8.

The plaintiff was the owner of a dwelling-house in Nairobi which she had occupied as a residence from 1931 to 1937. In June, 1937, she leased the dwellinghouse to a Mr. Pollard, which tenancy was terminated at the end of June, 1939, The defendant, who is a Flight-Lieutenant, leased the dwelling-house from the 1st August, 1939, on a verbal monthly tenancy. There was evidence which the Court accepted, preferring the defence evidence to that of the plaintiff, that during the period in which the dwelling-house was vacant the plaintiff was trying to re-let it. On the 29th August, 1942, the plaintiff gave the defendant a month's notice to quit as from the 1st September, 1942, on the ground that she required the house for occupation herself.

The evidence of the plaintiff testified to the following circumstances affecting. her position: — During the defendant's tenancy she had lived part of the time with her married daughter who had a house near the dwelling-house in question, part of the time with friends, part of the time on the coast and she had paid a visit to South Africa. Between July, 1941, and September, 1941, her

daughter's husband died and this resulted in the daughter, owing to reduced circumstances, having to let portion of her house and consequently in a room being no longer available in the house for the plaintiff.

The dwelling-house, the subject-matter of the suit, contains four bedrooms, and the plaintiff averred that she wanted the house for herself and a friend who was getting married and that the husband and wife and another girl were going to live with her. This arrangement would leave one vacant bedroom which the plaintiff wished to keep to return hospitality.

The circumstances affecting the defendant's position are fully set out in the judgment.

\$Held\$ (14-12-42).—(1) That there was no good reason for thinking that the plaintiff, the owner of the dwelling-house which she previously occupied from 1931 to 1937, does not reasonably require the house within the meaning of section 8 (1) (2) of the Rent Restrictions Ordinance, 1940.

(2) That weighing the circumstances affecting the plaintiff on the one hand and those affecting the defendant on the other hand to grant an order in favour of the plaintiff would cause the greater hardship.

Slade for plaintiff.

Figgis, K. C., for defendant.

JUDGMENT.—The first point for consideration is whether the plaintiff landlord quite apart from the interests of the defendant tenant comes within the provisions of section 8 (1) (i) of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940. This provision was the result of an amendment introduced by an amending Ordinance 1941 (No. 37 of 1941). Reading the principal Ordinance and the amendment together the relevant part of the section reads: —

"No order for the recovery of possession of any dwelling-house to which this Ordinance applies, or for the ejectment of a tenant therefrom, shall be made unless—

(i) the landlord is the owner of a dwelling-house which he has previously occupied as a residence for himself and reasonably requires such house for occupation as a residence for himself, and has complied with the terms relating to the giving of notice contained in any lease into which he has entered with the tenant in respect of such house, or, in the absence of any such lease, has given the tenant one month's notice to quit."

It is agreed that the Ordinance applies to the dwelling-house in question.

An argument has been put forward that the plaintiff's evidence with regard to her alleged intention to occupy the house for herself on the termination of Mr. Pollard's tenancy in June, 1939, should be rejected as being in contradiction of the evidence given by Mrs. Brandon and Mrs. Pollard and, as I understand the argument, that its rejection should be taken as indicating that the plaintiff was not genuine in making the present application for the recovery of the house. While I accept the evidence of both Mrs. Brandon and Mrs. Pollard in preference to that of the plaintiff, I agree with Mr. Slade that it does not affect the question of the plaintiff's intention to

recover the house from the present tenant. I can perceive no good reason for thinking that the plaintiff as the owner of the dwelling-house which she previously occupied from 1931 to 1937 does not reasonably require the house within the meaning of section 8 (1) (i) and accordingly I decide the first point in her favour. The decision of the case turns on the second point, the issue of greater hardship, that is whether greater hardship would be caused by granting the order than by refusing it. In our local law there is a general provision to the effect that even though the landlord were to satisfy the Court that he came within one or all of the conditions enumerated as (a) to (i) in section 8 the Court must consider whether it is reasonable to make the order. In considering this provision I would refer to the English Act of 1933 by way of analogy as indicating what a Court should take into consideration. Section 3 of the Act provides, inter alia, "No order or judgment for the recovery of any dwellinghouse to which the Principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the Court considers it reasonable to make such an order or give such a judgment, and the Court has power so to do under the provisions set out in the First Schedule to this Act." ... Here follows the First Schedule which in so far as it is material provides: "A Court shall for the purposes of section 3 of this Act have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the Court considers it reasonable so to do) if—.... (h) the dwelling-house is reasonably required by the landlord..... for occupation as a residence for (inter alios) himself. Provided that an order or judgment shall not be made or given on any ground specified in paragraph (h) of the foregoing provisions of this Schedule if the Court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing it."

. And so I proceed to consider the issue of greater hardship on the facts of the case. The defendant, Flight-Lieutenant Duncan, is the tenant of the dwellinghouse which he occupies with his invalid mother and his married sister. The rent is £15-10-0 per month, the payment of which they share. At the time of the letting of the house as from the 1st August, 1939, it was known to the landlord that all three would occupy the house. As to the state of Mrs. Duncan's health then the plaintiff said: "When Mr. Duncan took the house first she had a stroke or something and fell downstairs and had a native ayah to look after her". Mrs. Duncan fortunately has to some extent recovered, but admittedly is still an invalid. Her condition was described fairly and frankly by her son and daughter. But Mr. Slade has contended that in considering the second point in the case Mrs. Duncan's health is irrelevant for the reason that the house was not let to her and in any event that her health would not suffer by living in an hotel. As to her condition being irrelevant he referred to the Irish case of *Cooley v. Walsh and Cooley* (1926) I. R. 230. From the reference to that case in the *English & Empire Digest Supplement* 1941 p. 105. I agree with Mr. Figgis that the facts are different from those in the present case if only for the reason that the dwelling-house was not occupied by the tenant but by his sister and her husband. I certainly think that the fact that Mrs. Duncan has from the inception of the tenancy occupied the house of which her son is the tenant and has occupied it with the knowledge and consent of the landlord is a circumstance

to be considered in arriving at my decision. as I also consider it proper to consider the fact that she is an invalid. The defendant and his sister have given evidence which I accept that they have tried to find other accommodation and have not succeeded. Their enquiries were not extended to hotels.

ϵ Should I in all the circumstances of the case grant an order in favour of the plaintiff? My answer to that is that to do so, weighing the circumstances affecting the plaintiff on the one hand and those affecting the defendant on the other, would cause the greater hardship. Judgment will therefore be entered for the defendant with costs as agreed on the Lower Court scale.

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