

UGANDA / JUDGMENT

Devraj and Company v Lalji and Another (Civil Appeal No. 7 of 1946)

[1946] EACA 10 (1 January 1946)

[1946] EACA 10**COURT**

East African Court of Appeal

BEFORE

Graham Paul CJ, Sheridan CJ, Whitley CJ

CASE / FILE NUMBER

Civil Appeal No. 7 of 1946

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR JOSEPH SHERIDAN, C. J. (Kenya), SIR NORMAN WHITLEY, C. J. (Uganda), and SIR G. GRAHAM PAUL, C. J. (Tanganyika)

HIRJI DEVRAJ AND COMPANY.

Appellants (Original Respondents | Defendants)

HASSANALI RAJAN LALJI AND MEGHJI AHAMED AS EXECUTORS AND TRUSTEES OF THE WILL OF THE LATE SAUDIN MADAN.

Respondents (Original Appellants/Plaintiffs)

Civil Appeal No. 7 of 1946

(Appeal from decision of H. M. Supreme Court of Kenya)

Landlord and Tenant—The Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940—Standard rent—Retrospective effect of Board's determination.

The appellants were the tenants of certain premises situate in Nairobi which were erected in 1942. They were the first tenants of the premises and the rent was Sh. 400 per month. Under the law as it then was Sh. 400 was the standard rent as it was the rent at which the premises were first let.

In April 1943 an amending Ordinance was passed which altered the law as to the standard rent by defining it as "a rent calculated at a sum of ten per centum per annum of the ascertained market value, as defined by the Board, of the landlord's interest in the land ... on the date on which the dwelling-house was completed".

On 2-6-46 on the application of the appellants the Board fixed the standard rent at Sh. 290 per month. Meanwhile between the date of operation of the amending Ordinance (April, 1943) and 2nd June, 1944, the appellants paid Sh. 400 per month.

Following on the determination of the standard rent by the Rent Board the appellants deducted six months' excess rent paid in three monthly instalments from rents payable after June 1944. The respondents who were the landlords brought a suit to recover the sums so deducted by the appellants.

Held (1-6-46).—That the determination of the standard rent of the premises by the Rent Control Board is retrospective in effect to the date when the Ordinance fixing such standard rent came into operation.

Cases referred to: *Gover v. Field* (1944) 1 A. E. L. R. 151; *Kimm v. Cohen* (1923) 40 T. L. R. 123; *Remon v. City of London Real Property Co.* (1921) 1 K. B. 49.

Amin for the Appellants.

Parekhji for the Respondents.

SIR JOSEPH SHERIDAN, C. J.—The short point for decision in this appeal is whether or not certain words in the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, are to be construed as having a retrospective effect.

The learned magistrate who tried the case held that they should be so construed and on appeal to the Supreme Court the contrary view was taken and the appeal allowed. The matter is not free from difficulty though I am clear as to how it should be resolved.

The words which have to be construed appear in the second proviso to section 2 of the Ordinance and are—"as from the date on which any such determination is made the standard rent of the premises shall be deemed for all purposes to be of that amount". The "determination" referred to is that of the Rent Control Board and the "amount" the amount of rent determined by the Board. It is agreed that by amending legislation which came into force on the 5th April, 1943 and which, strange as it may seem, is embodied in the 1940 Consolidating Ordinance, a new method of arriving at the standard rent for premises such as those in question was laid down, and it was not until the 2nd June, 1944, that the Board did in fact determine the standard rent for the premises as being Sh. 290 per month. Prior to that date the tenant had been paying Sh. 400 per month a sum which the landlord was entitled to charge until such time as a new standard rent applied to the premises. It is not in question that a new standard rent did come into force and the question is whether it applied to the premises as from the date of the Board's determination or related back to the date of the amending legislation. Read alone the words which I have quoted might

suggest the former, but read with the rest of the relevant parts of the section in which the words appear and other sections in the Ordinance my view is that the determination by the Board relates back to the date of the amending legislation. It was on that date a new standard rent became permitted for the premises. The case of *Gover v. Field* (1944) 1 All England Reports 151, is an authority for this, I quote the following passage from the judgment of Goddard L. J. p. 157: -

"The standard rent operates in rem as has more than once been held in this Court. The effect of that is that the standard rent attaches from the moment when the house is brought under control. There was always from Sept. 1st, 1939, a standard rent applicable to the whole house and there must accordingly always have been a standard rent attaching to any room which could be ascertained, though no one knew what it was until an application was made to fix it. Indeed in *Kimm v. Cohen* (1923) 40 T. L. R. 123 it was expressly held by a Divisional Court that the apportionment operates retrospectively and in my opinion the decision is right. Therefore it seems to me that anything over that sum is made irrecoverable.

In the present case the way I view the question is as follows: $\rightarrow$

The standard rent of the premises until the enactment of the amending legislation was Sh. 400 per month but as from the date of that legislation the standard rent, in other words the rent which the landlord was permitted to charge, was as defined by the amending Ordinance and no more. As in the case of *Gover v. Field* though no one knew what that rent was until it was fixed, yet when it was fixed its determination had a retrospective effect. It is only by reading the words in question in this case as having a retrospective effect that one can give effect to other sections in the Ordinance, sections 7 and 16. I am consequently of the opinion that the learned Magistrate's judgment should be restored and I would allow this appeal with costs to the appellant in all three Courts. Before leaving this case I should like to say that I deprecate very much the action of Counsel for the appellant in telegraphing to the President of the Court additions to his argument after Counsel on both sides had been heard. This was in my view irregular and improper and I trust that it will not be regarded as a precedent by Counsel for the appellant or by any other Counsel. At the last Sessions of the Court of Appeal held at Nairobi, the Court had to draw the attention of an advocate to the impropriety of a similar happening.

I have been asked by Sir Norman Whitley to state that he agrees that the appeal must be allowed.

SIR G. GRAHAM PAUL, C. J.—The facts in this case are simple enough, and not in dispute. The premises in question situate in Nairobi were erected in 1942 and were then let for the first time at a rent of Sh. 400 per month. Under the law, as it then was in Kenya, that was the "standard rent" of the premises for the purpose of the legislation as to Increase of Rents and Mortgage Interest (Restrictions) as the premises had been erected since the "prescribed date" which was 3rd September, 1939. In April, 1943, an amending Ordinance was passed which changed the law as to the "standard rent" of such premises by defining it as "a rent calculated at a sum of 10 per centum per annum of the ascertained market value, as defined by the Board, of the landlord's interest in the land and permanent improvements thereon $\ldots$ on the date on which the dwelling-house was completed".

It would appear that neither landlord nor tenant took immediate action to have the standard rent of these premises determined by the Board under the 1943 Ordinance for it was not until 2nd June, 1944, that the Board did in fact determine the standard rent, the amount of their determination being Sh. 290 per month. Between the date of the new Ordinance coming into force (April 1943) and 2nd June, 1944, the old rent of Sh. 400 a month was paid by the tenant and accepted by the landlord.

Upon these facts the tenants who were the defendants in the suit, contended that the legal position was as follows: -

- (1) The determination of the standard rent by the Board on 2nd June, 1944, at Sh. 290 per month was retrospective in effect to the date when the amending Ordinance came into force, namely to April, 1943.
- (2) The landlord (the plaintiff) had been receiving for the period from April, 1943, to June, 1944, rent at Sh. 400 a month, i.e. Sh. 110 a month in excess of the figure determined by the Board—and that therefore by section 7 of the Consolidated Ordinance that excess was "irrecoverable" by the landlord.
- (3) This excess being specifically made "irrecoverable" by the landlord by section 7 it could be recovered by the tenant under section 16 of the Consolidated Ordinance by deducting the amount of it in three monthly instalments from future payments of rent; and
- (4) The limit of the amount of excess which the tenant could so recover was fixed by section 7 at six months—i.e. Sh. 660 which sum the tenant rightly and legally could, and in fact did, deduct in three monthly instalments from rents payable after June 1944.

The landlord brought this action in the Magistrate's Court to recover the sum of Sh. 660 so deducted by the tenant.

As regards the above legal contentions by the defendants the magistrate decided them all in favour of the defendants and dismissed the plaintiff's claim for the Sh. 660, whereas on appeal the Supreme Court decided the first of the points in favour of the plaintiffs, holding that the "Board's determination was not retrospective in effect, and that decision of course meant judgment for the defendants". The plaintiffs appealed to this Court from that judgment of the Supreme Court.

The first question this Court has to consider is whether the determination by the Board on 2nd June, 1944, was or was not retrospective in effect to the date when the 1943 Ordinance came into force—April 1943.

The general law on this point is very clearly stated at page 382 of the 6th edition of Maxwell on the Interpretation of Statutes as follows:—

"It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless such a construction appears very clearly in the terms of the act, or arises by necessary and distinct implication."

In the Ordinance in question there is no **express** provision that the determination of the Board is to have any retrospective effect. The important words are: -

"and as from the date on which any such determination is made the standard rent shall be deemed for all purposes to be of that amount".

At first glance it would appear that these words preclude any retrospective effect, but it is necessary to give full effect to the words "shall be deemed for all purposes". These are very wide words and whatever other "purposes" are covered by them it is clear that all "purposes" of the Ordinance itself must be included. If at any time after 2nd June, 1944, it becomes necessary for the purpose of section 7 of the Ordinance to know what is the standard rent, the answer must be in my view that it is deemed to be Sh. 290 a month. The contention for the plaintiff is that between the date of commencement of the 1943 Ordinance and 2nd June, 1944, there was for the purpose of section 7 no standard rent of these premises, but that contention seems to be in direct contradiction of the words quoted as to the 1944 determination being deemed to be for all purposes of the Ordinance the standard rent, and in my opinion for that reason alone the contention must be rejected.

It is to be noted moreover that in determining the standard rent of premises such as these the Board is to base its determination on the market value not as at the date of its determination (1944) but as at the date on which the erection of the premises was completed (1942). There is an element of retrospective suggestion about that provision.

Also there is a further definite suggestion of retrospective effect in the provision that a tenant can recover rent actually paid in excess of the standard rent for a period of six months. The tenant would not be likely to go on paying excess rent for six months **after** the standard rent had been determined by the Board. It is fairly clear that this provision is intended to refer to rent paid before the Board's determination and therefore it presumes the retrospective effect of such determination.

Against this contention the learned Judge in the Supreme Court was mainly influenced by the terms of section 8 which make it a criminal offence punishable by fine or imprisonment for a landlord to accept rent which exceeds the standard rent by more than the amount permitted under the Ordinance. The learned Judge in his judgment says: "How could section 8—a penal section—be applied
retrospectively; it would mean charging a man with receiving more than the standard rent when in fact there was no standard rent for the simple reason that no such standard rent had been fixed".

There is no doubt considerable force in that argument but again it would seem to be answered by the provision as to the determined rent being deemed for all purposes the standard rent. There is no exception of the purposes of section 8 from that categorical provision.

In a case where there was no **mens rea** on the part of the landlord probably no charge would be brought under section 8, and if it were, his **bona fides** would no doubt result in no punishment.

It must be borne in mind in this connexion that the Ordinance clearly contemplates due diligence on the part of the landlord in getting a standard rent determined. This is clear from section 15 which lays upon the landlord the obligation to inform the tenant on his written request as to what the standard rent is, and penalizes him for undue delay in carrying out that obligation. If a landlord chooses to delay in getting the standard rent fixed he would appear to do so at his own peril under sections 7, 8 and 15. All these considerations in my opinion destroy the weight of the argument upon which the learned Judge mainly based his decision.

Section 7 is the foundation of the plaintiff's claim. It is in the following terms (omitting words irrelevant to the circumstances of this case): -

7. Subject to the provisions of this Ordinance, where the rent of any dwelling-house, to which this Ordinance applies, has been, since the prescribed date, or is hereafter during the continuancy of this Ordinance, increased, then if the increased rent exceeds the standard rent by more than the amount permitted under this Ordinance, the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant:

Provided that, where a landlord has increased the rent of any such dwelling-house since the said date, but before the commencement of this Ordinance, he may cancel such increase and repay any amount paid by virtue thereof, and in that case the rent shall not be deemed to have been increased since that date.

Reading that section by itself, and apart from English authorities one would think that it applied only to cases where the rent had in fact been "increased" by the landlord and in this case there has admittedly never been any increase by the landlord. But it is a different matter when one considers the English decisions. To my mind the English Courts in dealing with this class of legislation have gone further than in any other branch of the law "to rescue the intentions of the legislature from the ineptitude of the draftsman". They have actually for instance gone so far as to hold that a person whose tenancy had expired and who stayed on against the active protest of the landlord was for the purpose of this legislation a "tenant" of the landlord and the relationship between them a "letting". (*Remon v. City of London Real Property Co.* 1921 1 K. B. 49). And in this matter of "increase of rent" the Court of Appeal in England has held that whenever there is a rent actually charged and paid in excess of the standard rent (plus any permitted increase) there is an "increase of rent" by the landlord although in fact the rent in question had been *decreased* and not *increased* by the landlord (*Gover v. Field* 1944 1 A. E. R. 151).

All this amazing elasticity of interpretation has been justified by the Courts in England because of the desirability in the public interest of giving effect to the manifest policy and purpose of the legislation even where the draftsman has used words which appear to be inconsistent with that policy and purpose. The policy and purpose of the Acts in England are broadly the same as the policy and purpose of the Kenya Legislation, and with some hesitation I have therefore come to the conclusion that we should follow the decision in *Gover v. Field* and hold that for the purposes of section 7 the rent (at Sh. 400 a month) has been increased though in fact it is the same as it

always has been.

Holding perforce that the rent in the eyes of the English law has been "increased" with the meaning of section 7 I find that the excess in question (i.e. Sh. 660) is by section 7 made irrecoverable by the landlord, and if in fact recovered by him it is recoverable from him by the tenant under section 16 in precisely the way in which it has been recovered, namely by deduction in three monthly instalments from rent payable by the tenant to the landlord.

Having come with some difficulty to the conclusions which I have set out I would allow the appeal, set aside the judgment of the Supreme Court including the order as to costs, and restore the judgment of the magistrate with costs to the present appellant in this Court and in the Supreme Court.

I should like to say that I concur entirely in the remarks of the learned President in regard to the telegram sent to him by Counsel for the appellant.

COURT OF APPEAL FOR EASTERN AFRICA

Before Sir Joseph Sheridan, C. J. (Kenya), Sir G. GRAHAM PAUL, C. J. (Tanganyika), and AINLEY, J. (Uganda)

G. A. DHANANI, LTD., *Appellants (Original Plaintiffs)*

THE HONOURABLE THE ATTORNEY GENERAL, Respondent

(Original Defendant)

Civil Appeal No. 12 of 1946

(Appeal from decision of H. M. High Court of Uganda)

Practice-Offences against Customs Ordinance (Uganda)-Forfeiture order by magistrate--ultra vires-Suit by owner in detinue-Improper order made-Re-trial.

In convicting some natives of assembling for the purpose of smuggling and smuggling goods into Uganda the magistrate made the following order in regard to a lorry which apparently had been used in the smuggling: "Under section 217 of the Customs Ordinance, I order that lorry No. 9379 shall be forfeited to His Majesty".

The appellants were the owners of the lorry and they instituted a suit in detinue for its recovery against the Honourable Attorney General.

The learned Judge in dismissing the suit said: "By sections 246 and 217 (j) the lorry is condemned on that conviction, *ipso facto*, and I must hold that this claim cannot be sustained against that rigorous provision".

The appellant appealed.

Held \$(1-6-46)\$.—(1) The magistrate had no jurisdiction to make the order he made.

(2) On the material before him the learned Judge could not properly make the order he made.

Re-trial ordered.

Wilkinson (Korde with him) for the Appellants.

Dreschfield, Crown Counsel (Uganda) for the Crown.

JUDGMENT (delivered by SIR JOSEPH SHERIDAN, C. J.).—In view of the order we intend to make in this appeal we propose to say very little. It was argued before us that the lorry in question in the case was forfeited by reason *inter alia* of the following order made by a Magistrate "under section 217 of the Customs Ordinance, I order that lorry No. 9379 shall be forfeited to His Majesty". This order was made in a case entitled *Rex v. (1) Alozio Bina, (2) Sowedi Nkalabo and Others*. This order was in our opinion ineffectual as the Magistrate had no jurisdiction to make it. That would appear to have been the view of the learned trial Judge also. The reason for his decision was "But this order (the order referred to) was made by the Magistrate on conviction of several persons for smuggling and on finding that the lorry had been used in the commission of that offence. By sections 246 and 217 (j) the lorry is condemned on that conviction, **ipso facto**, and I must hold that this claim cannot be sustained against that rigorous provision". On the material before the Court, the learned Judge in our view could not properly make this order. This suit was one in definite in respect of the lorry which it is common cause had been the property of the appellants and which had been seized under the Customs Ordinance. It was for the Crown to prove that they were entitled to retain the lorry. On this point the Judge decided in favour of the Crown on the authority of a conviction in a criminal case. The judgment in that case was not proved at the hearing nor was any other part of the proceedings except the order by a Magistrate to which we have already referred. In sending the case back for re-trial before another Judge while we wish to leave every question legitimately arising on the pleadings or any amended pleadings open for argument and decision we would indicate that in our view two questions in particular call for decision (1) whether the provisions of section 246 of the Ordinance can have any application to a case where, if such be proved to be the case, the offence was not committed in respect of the lorry but rather in respect of the goods conveyed by the lorry and (2) for the purposes of sections .195 et seq assuming those sections to be applicable whether the seizure of the lorry took place on 17th December, 1944, or on 23rd January, 1945, as the Crown alleges. We allow the appeal with costs to the appellant and direct a re-trial accordingly. The costs already incurred in the High Court will be costs in the cause—except those costs already provided for by particular orders in the
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