

UGANDA / JUDGMENT

Main v Ferguson (Civil Case No. 14 of 1941) [1942] EACA 3 (1 January 1942)

[1942] EACA 3

COURT

East African Court of Appeal

BEFORE

Thacker J

CASE / FILE NUMBER

Civil Case No. 14 of 1941

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ORIGINAL CIVIL

BEFORE THACKER, J.

NORMAN MAIN. Plaintiff

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ADAM FERGUSON. Defendant

Civil Case No. 14 of 1941

Action to recover possession of dwelling house and furniture let on monthly tenancy to defendant—Termination of tenancy by notice—Refusal by defendant to give up possession—The Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940—Alternative accommodation—Discovery by Court that Ordinance not applied to Mombasa—Requisition of house under Defence Regulations 1939—Costs of action.

The plaintiff sued the defendant to recover possession of his dwelling house and furniture which the defendant held under a monthly tenancy from the plaintiff. The agreement was terminable by a month's notice. The plaintiff gave notice to determine the tenancy but the defendant refused to give up possession. The defendant contended that suitable alternative accommodation as required under the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, had not been provided and alternatively that the house had been duly requisitioned under the Defence Regulations, 1939. The action was contested throughout by both parties on the footing that the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, applied and it was not discovered by the Court until late in the proceedings after the evidence and addresses had been concluded and judgment had been reserved that the Ordinance had not been applied to

Mombasa.

Held (13-2-42).—(1) The Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, had not been applied to Mombasa and the defendant was not entitled to avail himself of its provisions as a defence.

- (2) Since the Ordinance had not been applied, its provisions as to alternative accommodation were not relevant to the issues.
- (3) Rent for the period during which the house was requisitioned by the Governor was not payable by the defendant but may be the subject of a claim made to the Compensation Board.
- (4) In the exercise of its discretion, since both plaintiff and defendant had proceeded upon the mistaken assumption that the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, had been applied to Mombasa each party was ordered to pay his own costs.

Christie for plaintiff.

Atkinson for defendant.

JUDGMENT.—Mr. Christie for the plaintiff has set this most troublesome and somewhat extraordinary case down for further argument following upon my observations made on the 7th February and has asked for judgment with costs.

Both Mr. Christie and Mr. Atkinson have stated their entire agreement with my observations of the 7th February, namely that the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940 has not been applied to Mombasa. When I made my remarks on the 7th February I had no doubt about it, though I was guarded in my language lest by some chance it could be shown that a notice had in fact been published in the Gazette. However, it has not been and we are now given to understand by Mr. Atkinson that the Attorney General also agrees with my observations and that he is taking steps to have the matter put right and to have the necessary notice published in the Gazette. This, I understand, will be done in next Tuesday's Gazette; and that the notice will be retrospective as from April, 1940, that is a date long before this action was commenced. The defendant therefore, if this information is correct, would have been entitled to raise the defence of no alternative accommodation. The question is, however, ought this Court to delay making its judgment, seeing that Mr. Christie for the plaintiff has asked for judgment, until after this notice has been published next Tuesday? It is conceded by Mr. Atkinson for the defendant that no defence is available to him under the Ordinance (except that dealing with the requisition matter) until the matter is put right. In other words, that he cannot now take the point that no alternative accommodation has been provided equivalent in all respects to the house belonging to Mr. Main which he was occupying.

After this judgment was written yesterday, I was handed at 3.52 p.m. yesterday an affidavit sworn by Mr. Atkinson attaching a telegram which is as follows:— "Browne agrees absence of Gazette notice affects position, Notice being published immediately appointing 26th April, 1940, Signed Figgis".

I am afraid, in the circumstances this cannot help the defendant. Seeing that the plaintiff insists on his judgment and will not wait, even on the assumption that the person called "Browne" in the telegram is the Solicitor General, and even if what is said in the telegram is true, and I do not doubt but that it is, the Solicitor General cannot in any way bind the Governor beforehand. The Governor might conceivably not sign the order, or might not make it retrospective. I cannot, in other words, anticipate an amendment of the law or anticipate the application of the Ordinance to Mombasa. I must apply the law as it stands today and not as it may be tomorrow or the day after. In these circumstances, it does not seem to me, since application for judgment has been made, that the matter ought justly. as regards the plaintiff to stand over until the notice is published.

The plaintiff desires to have his judgment—he is in law entitled to have it, but it will be nevertheless a fact, if the notice is published next Tuesday and made retrospective to April, 1940, that this combined with what, to put it no higher, is a most unfortunate omission to implement the Ordinance, that the defendant has been very effectively deprived of any chance of successfully defending this action. The defence of the Ordinance is not now available to him at this stage. It is to be hoped that the defendant will be able to find some redress for the unfortunate circumstances in which, through no fault of his own, except that of not discovering that the Ordinance did not apply to Mombasa, he now finds himself.

I have gone to some length in pointing out to Mr. Christie the possibilities of an appeal against any judgment which he may secure, which appeal if lodged presumably would be grounded on the fact that between my judgment and the hearing of the appeal, the law has been altered, and that his success may of necessity be therefore short lived. However, I cannot do more than that. If he insists on his judgment, and he does so, it seems to me that this Court has no option but to decide the case on the law, as it stands now, and to give him the judgment he asks for. Throughout the hearing of the case, the defendant admitted that he owed a certain sum for rent and no dispute centered around this matter. Mr. Atkinson said his client would hold himself responsible for rent for the period during which the house was requisitioned by the Supply Board.

Mr. Atkinson now has withdrawn from so much of his undertaking as applies to this period since the Ordinance is not in operation here and says the defendant must look to the Compensation Board for the rental for that period. It may be mentioned that there was a tender of rental but that was refused by the plaintiff (see Exhibit A). No payment into Court was made. No order for ejectment is asked for seeing that the defendant vacated the premises on the 30th September. The principal issue before me at any time has been the issue of costs.

There will therefore be judgment for the plaintiff for rental at the rate of Sh. 170 per month for the following periods: \$-\$

From 1st June to 13th June, upon which latter date the house was requisitioned. For the period 14th June to 12th August, upon which latter date the requisition was cancelled the plaintiff should look to the Compensation Board.

From 13th August to 30th September rental is due at the above rate from the defendant to the plaintiff. Interest at the Court rate for the same periods will be awarded.

The question of costs remains to be considered. Costs normally follow the event, that is, the party who succeeds is entitled to have his costs paid by the party who loses. The Court, however, has a discretion in the matter of costs. That discretion must be exercised judicially on fixed legal principles, in accordance with the rules of reason and justice, not according to private opinion, or benevolence or even sympathy. When there are no materials before the Court on which it can exercise its discretion, it is not justified in depriving a successful party of his costs.

In this case both parties have entirely overlooked throughout the fact that the Ordinance had not been applied to Mombasa and it is astonishing that neither side took the trouble to verify whether the Ordinance applied to Mombasa or not. The case was fought entirely from the beginning up to the reservation of judgment on the understanding that the Ordinance did apply.

The Plaintiff himself in his statement of claim (see paragraph 7) was the first one to put forward the allegation that alternative accommodation was available that is, in the pleadings. The defendant also embraced the defence that it was not reasonably equivalent and neither side has abandoned their individual claims and points until today, and then only after the Court itself had discovered the fact that the Ordinance did not apply. It is for the advocate to verify this, not the Court. If a careful study of Section 18 (2) and a search into the Gazette had been made it would have disclosed what the Court was obliged to find out and then only at a very late stage of the proceedings.

Moreover, in the correspondence both parties (using identical words) stated that "the matter seems to be governed by Section 8 (1) (d) of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940" (see Exhibit 3 from the defendant and Exhibit 4 by the plaintiff's wife to the defendant). If the discovery which the Court made had been made at the beginning of these proceedings, then possibly, (I do not say certainly), these proceedings might never have been commenced. What is certain, however, is that if the plaintiff had pleaded that the Ordinance did not apply to Mombasa, the question would very quickly have been decided and there would have been no need for any witnesses to be called for either party. The matter would then have been one only for legal argument, with the same result as has happened today. As it was, however, the point was never discovered nor made, with the result that we have had a protracted hearing, witnesses were heard, arguments on law were heard, as to the suitability of the alternative premises, visits to the plaintiff's own house and the alternative house and so on. None of these things would have been necessary if the plaintiff had pleaded that the Ordinance did not apply. Can it be said therefore, in these circumstances, when in short the plaintiff wins not by his own efforts, or those of his

Counsel (and I say that quite respectfully) or by the evidence of his witnesses, or by the arguments of his Counsel but by a discovery made at the eleventh hour by the Court itself—can it be said that notwithstanding this omission his costs throughout these proceedings or any considerable part of them ought to be paid by the defendant? I cannot but think that there is only one answer to that question. It would be manifestly unjust and inequitable if the Court were to make such an order. Such an order would put this plaintiff who has succeeded, it is true, but who has failed to ascertain an easily ascertainable fact, on the same footing as a successful plaintiff who succeeds by the force and strength of his own pleadings, of the evidence of his own witnesses and of his own legal arguments.

It does not detract from the plaintiff's mistake that the defendant made the same mistake. The defendant has also fallen into the same error and he is, in this way, no better off than the plaintiff. He cannot, it need hardly be said, look to the plaintiff for payment of any part of his costs. Both sides are equally in the wrong.

In a case such as this where the plaintiff, one might almost say, succeeds in spite of himself, in circumstances of prolonged litigation which ends in his favour for a reason never pleaded, never argued nor even contemplated by him, it would be most unjust and inequitable if he were to obtain an order that in spite of all this his costs should be paid for by the defendant.

There is support for my ruling as to costs to be found in the words of Slessor, L. J. in *Diamantidi v. Grosvenor Securities* reported in 1937, Vol. I, A. E. R. at page 707 in which the learned Lord Justice said, "For these reasons, seeing that so much time and expense have been incurred on a submission made by the appellants which we think cannot properly be maintained as a matter of law, we have come to the conclusion that this appeal ought to be allowed, and judgment entered for the defendants, but that there should be no costs, either in this Court or in the court below, on either side".

There will be therefore judgment for the Plaintiff in the sum of Sh. 348 and each side will pay his own costs.

With regard to the costs to be paid by each party to his own advocate, I have confidence that the fullest allowance will be made therein by each advocate for the mistake which has been made.

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