

UGANDA / JUDGMENT

Mootasamy v Ahmed (Civil Appeal No. 7 of 147) [1947] EACA 84 (1 January 1947)

[1947] EACA 84

COURT

East African Court of Appeal

BEFORE

Bourke J

CASE / FILE NUMBER

Civil Appeal No. 7 of 147

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APPELLATE CIVIL

Before BOURKE, J.

MOTIRAM AND MISS MOOTASAMY, Appellants (Original Plaintiffs) v.**MOHAMED HAROON AHMED, Respondent (Original Second Defendant) Civil Appeal No. 7 of 1947**

Increase of Rent Ordinance, 1940—Right of tenant to sub-let.

The appellants were owners of premises, subject to the Increase of Rent Ordinance, which they let to the first defendant. In June, 1945, the appellants informed the first defendant that he must not sub-let. There was no restriction on sub-letting in the original agreement and in July, 1945, the first defendant sub-let the premises to the respondent. The appellants then gave the first defendant notice to quit as from 1st September, 1945. In an action for possession the appellants succeeded against the first defendant but were refused possession as against the respondent and appealed.

Held (15-12-47).—That as the first defendant had an implied right to sub-let and exercised it during the course of the contractual tenancy such sub-letting was lawful and possession. could not be obtained from such sub-tenant.

Cases referred to: Dick v. Jacques 36 T. L. R. 773; Chapman v. Hughes 129 L. T. R. 223; Haskins v. Lewis (1931) 2 K. B. 1; Skinner v. Geary (1931) 2 K. B. 546; Tara Singh v. Harnam Singh 11 E. A. C. A. 24; Ward v. Larkins (1923) WN (1946) 1 A. E. R. 74.

E. Figgis (Mandavia with him) for the Appellants.

A. R. Kapila for the Respondent.

JUDGMENT.—This is an appeal from the Court of the Resident Magistrate, Nairobi. The facts may be briefly stated. In October, 1944, the plaintiffs became the owners and landlords of the premises in dispute to which the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, applied (hereinafter referred to as "The Ordinance"). Mohamed Bashir, the first defendant in the action, was then in lawful occupation of the premises and he was accepted by the plaintiffs as their tenant from month to month. The terms of the monthly contractual tenancy included no restriction as to sub-letting by the tenant. In June, 1945, the appellants learned that their tenant proposed to sub-let and they informed him that they objected to such course. Early in July, however, the tenant did sub-let the whole premises to the respondent, the second defendant to the action, who went into possession. On the 20th July, 1945, and subsequently to the creation of the said sub-letting and occupation by the sub-tenant, the plaintiffs gave notice terminating the contractual tenancy as from 1st September, 1945, and complained of the action of their tenant in sub-letting the dwellinghouse without their consent and in disregard of their expressed objection; they informed that permission was being sought from the Rent Control Board to institute ejectment proceedings against the tenant and sub-tenant on the ground that the premises had been unlawfully sub-let. I need not go into the facts as to acceptance of rent for nothing now turns upon that aspect of the matter. In due course the requisite authority was obtained and the action for eviction brought against Mohamed Bashir and the present respondent. An order for possession was made against Mohamed Bashir since he had sub-let the whole of the premises without the consent of his landlords and so lost the protection of the Ordinance in view of the provisions of section 11 (1) (h) thereof, which reads as follows: "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

the tenant without the consent of the landlord has at any time after the 1st day of December, 1941, or the prescribed date, whichever is the later, assigned or sub-let the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let"; an order for possession against the respondent was refused that the premises were lawfully sub-let to him, and he was accordingly protected in occupation under section 17 (3) of the Ordinance—"17. (3) Where the interest of a tenant of a dwelling-house is determined, either as the result of an order for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Ordinance, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued".

It is important to bear in mind that there was no covenant of the contractual tenancy restricting in any way a sub-letting by the tenant, and that the subtenancy was created while the contractual tenancy was in force, and before the notice to quit was given.

The grounds of appeal rest upon the argument that the sub-letting was unlawful, and that section 11 (1) \$(h)\$ of the Ordinance had the effect of restricting a tenant's Common Law right of sub-letting unless there was consent on the part of the landlord; as Mr. Figgis put it, the section

introduced what might be called a "statutory covenant" into a contract of tenancy that did not include such a restrictive covenant agreed upon between the parties. Consequently, it is argued, the sub-letting being a breach of section 11 (1) \$(h)\$ was not lawful and the position of the respondent is no better than that of a trespasser; he is not protected by section 17 (3) and the order for possession should also be made against him. The third ground of appeal has been expressly abandoned. Learned counsel for the appellants covered a great deal of ground in his long and interesting review of cases decided under the Rent Restriction Acts in England, most of which are concerned with determining difficult questions as to the rights of a statutory tenant under the Acts. On the simple facts of this case, however, I am convinced that the matter falls within very narrow compass indeed. The position put forward I find surprising, and so far as my knowledge brings me, or the authorities brought to my notice disclose, it is quite novel.

Now where there is an express contractual prohibition against sub-letting premises without the landlord's consent, and in breach of such covenant in the tenancy agreement the tenant does sub-let the whole premises, then, as no one would contest, the landlord would normally be entitled to recover possession against both the tenant and sub-tenant. The contractual tenancy being terminated by notice to quit the tenant would have lost his protection under the Ordinance having regard to the provisions of section 11 (1) \$(h)\$ and indeed under section 11 (1) (a) had section 11 (1) (h) not been included; the sub-tenant could not rely upon section 17 (3) for protection because the sub-letting would not be lawfully made (see *Dick and another v. Jacques* and another 36 T. L. R. 773; *Chapman v. Hughes* 129 L. T. R. 223). But where there is no such prohibitory covenant in existence between the parties to the contract of tenancy what is the position, apart from statute, of the tenant? It is simply this; he has an estate and a Common Law right to assign or sub-let his interest in whole or in part as he pleases, and any under-letting by him would accordingly be lawful. I am unable to see that anything in section 106 or any other section of the Transfer of Property Act, 1882, renders that principle inapplicable on the facts of the present case. That brings me to the question arising on this appeal as to the effect of the Ordinance. The tenant would lose his right to protection under section 11 (1) \$(h)\$ where he has sub-let the whole of the dwelling-house and an order for possession could properly be made against him, which would amount to a determination of the tenancy. It has been suggested that circumstances justifying such an order against the tenant must also entail the making of a similar order against the sub-tenant;

but that is not necessarily so. As was said by Scrutton, L. J., in *Haskins v. Lewis* (1931) 2 K. B.1 at p. 15: "I think an order for recovery of possession of the whole premises can be made in favour of the landlord against the tenant which will result in determining the tenant's interest in the whole of the dwelling-house. and that any suggestion that the order for possession will entitle the bailiff to turn the sub-tenants out of the part of the premises they occupy is met by the provision that as they are tenants of the landlord under the Act, and not tenants of the original tenant, by reason of section 15, sub-section 3 (section 17 (3) of the Ordinance), the bailiff will not be able to have such power"; and per Romer L. J. in the same case at p. 19: "On the other hand it is to be observed that the Act in terms contemplates that notwithstanding the existence of sub-tenancies and the possession of sub-tenants, an order may be made against a tenant, the original tenant, for

possession". In that case there had been sub-lettings of the whole of the premises forming the "dwelling-house" to which the Act applied—"the original tenant is not occupying any part of the original tenancy, the original dwelling-house, so as to make him a tenant under the Act.... he is therefore not in personal occupation of any dwelling-house. That being so, he appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by sub-letting it" (per Scrutton L. J. at p. 14). That fundamental principle as re-stated in *Skinner v. Geary* (1931) 2 K. B. 546, has been accepted by the Court of Appeal for Eastern Africa as underlying section 11 of the local Ordinance and it provides the real key to the problem raised in the instant case, *Tara Singh v. Harnam Singh* 11 E. A. C. A. 24. It is germane to the present inquiry to ascertain the purpose and effect of section 11 (1) (h) of the Ordinance. It will be remembered that the contention is that section 11 (1) (h) has the effect of introducing a covenant in terms into a contract of tenancy to which the Ordinance applies and in which there is no such restrictive covenant agreed between the parties. The argument proceeds that breach of such "statutory covenant" renders the sub-letting bad and unlawful from its inception so that the landlord is entitled to recover possession both as against his tenant and the sub-tenant in occupation of the whole premises. As I have said, that proposition is at least novel, and no authority, I venture to say, will be found directly in support, certainly no such authority has been brought to my notice in the course of an exhaustive argument. The cases of *Haskins v. Lewis* and *Skinner v. Geary*, though there was no sub-letting in that case, throw light upon the subject. In **Haskins v. Lewis** the equivalent section in the English Act was considered and it was said by Romer L. J. (supra p. 18): "Where, therefore, when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Act which enables him to resist the claim of his landlord to possession, whether he has gone out without sub-letting the premises or whether he has sub-let the premises as a whole. Where he has sub-let the premises as a whole I think that he has ceased thereby to be entitled to the protection otherwise afforded him by the Act, and I think this was so even before the introduction by the Act of 1923 of paragraph (h) to sub-section 1 of section 5 of the earlier Act, a paragraph which I think was introduced by the Act of 1923 really for the purpose of quieting any doubts that may previously have existed on the subject". After the earlier quotation which I have given from the judgment of Romer L. J. in the same case the learned Judge went on to say: "That is contemplated by section 5 sub-section (5), by section 15 sub-section (3) (equivalent to section 17 (3) of the Ordinance) and indeed by section 5 sub-section (1) paragraph (h) (equivalent to section 11 (1) (h) of the Ordinance and now re-enacted in Sch. 1 to the Act of 1933). I refer also to *Ward v. Larkins* (1923) W. N. 189, where it was held that if a landlord is able to obtain possession as against a tenant on the ground of breach of covenant, even though he does so by means of forfeiture during the term of the contractual tenancy, the sub-tenants to whom the house was lawfully sub-let before the proceedings against the tenant commenced, may retain possession.

In the present case the contractual tenancy came to an end through service of the notice to quit and at most the tenant, Mohamed Bashir, could only be said to be in the position of a statutory tenant under the Ordinance. He was no longer in physical possession of any part of the premises

and since the principal object of the Ordinance is to protect a person residing in a dwelling from being turned out of his home the tenant was in no position under *Skinner v. Geary* to resist the claim of his landlord to possession even apart from section 11 (1) (h), which was apparently introduced "for the purpose of quieting doubts". But section 11 (1) (h) makes it quite evident that he could look for no protection under the Ordinance. The argument advanced for the appellants would, however, seek to carry the effect of section 11 (1) (h) very much further, namely, to the extent of restricting a Common Law right by providing a covenant breach-of which by the tenant would render the sub-letting unlawful and so prevent section 17 (3) operating to protect the sub-tenant in possession of the whole premises. In my opinion section 11 (1) \$(h)\$ can have no such effect and was never intended to have any such effect. The rights of a statutory tenant to sub-let and the position of his sub-tenant are really beside the present discussion and only serve to confuse the issue. The point is that the tenant sub-let the whole premises when he was perfectly entitled at law in the absence of a restrictive covenant as to sub-letting. Subsequently the contractual tenancy came to an end and he could look for no protection under section 11 of the Ordinance. So an order for possession rightly, in my opinion, was made against him; but since the sub-letting was lawful in its inception the sub-tenant may properly rely for protection in possession upon section 17 (3). Finally I refer to *Norman v. Simpson* 1 A. E. R. (1946) 74, in which it was held that the question of whether a sub-letting was unlawful or not, within section 15 (3) of the 1920 Act (section 17 (3) of the Ordinance), depend on the original landlord's right of re-entry. In that case the tenant had covenanted not to sub-let without the consent of the landlord. In breach of that covenant he did sub-let. If no other circumstance intervened the sub-tenancy could not survive the termination of the head-tenancy for the house would be "unlawfully sub-let". But it was held that the sub-tenant was protected by section 15 (3) of the English Act because the owner accepted rent from the head-tenant with full knowledge of the sub-letting and thereafter the right to re-enter was gone. The time for ascertaining whether the head landlord had a subsisting right of re-entry was held to be immediately before the head-lease came to an end, ignoring the earlier history of the sub-tenancy. Applying that test to the instant case it is plain that the sub-letting was lawful. There was no covenant against sub-letting to breach-I have already rejected the argument that section 11 (1) \$(h)\$ provides for a new covenant between freely contracting parties—and the head landlords had no right of re-entry before they took steps to terminate the contractual tenancy. When they did take such steps they were entitled to the order against their tenant who was no longer in occupation and had lost his protection under the Ordinance; but since the sub-letting was lawful they could get no further towards obtaining possession from the sub-tenant protected under section 17 \$(3)\$ of the Ordinance.

In my judgment, on the facts of this case, and they are not now in dispute, the learned Magistrate came to a correct conclusion in law. The appeal is dismissed with costs.

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Prepared on 14 October 2026 · Esheria