

UGANDA / JUDGMENT

Rakha v Ahmed (Civil Suit No. 1074 of 1955) [1956] EACA 3 (1 January 1956)

[1956] EACA 3

COURT

East African Court of Appeal

BEFORE

Rudd J

CASE / FILE NUMBER

Civil Suit No. 1074 of 1955

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ORIGINAL CIVIL

BEFORE RUDD. J.

ALLA RAKHA, Plaintiff

v.

MOHAMED AHMED. Defendant

Civil Suit No. 1074 of 1955

Landlord and Tenant—Increase of Rent (Restriction) Ordinance, 1949—Premises let as dwelling-house—Effect of use of one room as private office—By-laws prohibiting change of user except with permission—Presumption from protracted use.

The defendant was the tenant of buildings on a plot in Nairobi which originally comprised premises built as shops, living quarters and stores. One room, originally built as a shop, was used by the defendant as an office or study. The rest of the premises were used by the appellant as his dwelling and for purposes ancillary thereto. All the premises were let to the defendant as dwelling accommodation. The defendant had two business premises in another part of Nairobi. The plaintiff sued for those parts of the premises which had originally been built as shops and as stores on the ground that they were business premises and/or that their user as dwellings was unlawful.

**Held* \$(2-5-56)\$.—(1) The premises were used by the defendant as part of his dwelling-house and had been let to him as such.*

- (2) The fact that a tenant of a dwelling-house sets apart one room in it as a private office or study, in which he deals with business matters in his home, does not make that room business premises within the meaning of the Ordinance.
- (3) That if, under Municipal By-laws, the permission of the Town Clerk was required before the rooms built as shops or stores could be used as habitable rooms. protracted user, as habitable rooms, could raise a presumption that such permission had been obtained in the absence of proof to the contrary.

Morgan for plaintiff.

Akram for defendant.

Reported by: \$-I\$. R. Thompson, Esq., Resident Magistrate, Nairobi.

JUDGMENT.—This is a suit claiming possession of three shops and two stores on Plot 138/87 Canal Road. The defence is that the premises are not shops or stores and are part of the defendant's dwelling-house and rented as such by defendant from plaintiff.

The premises in question comprise only part of the buildings on the plot. The buildings on the plot were erected by D. W. 2 in 1929. They comprise four blocks of buildings round the perimeter of the plot and there is a yard in the middle. The four blocks of buildings are connected to each other by a wall or parapet which with the buildings completely encloses the plot.

The frontal block fronts on to Canal Road and consists of two rooms separated by a door and a passage giving access from Canal Road to the yard. The room on the right is larger than the room on the left and is divided by an arch. These two rooms comprise the three alleged shops claimed by plaintiff. The building plans which were approved by the Municipality in 1929 described these two rooms as shops.

As one enters the yard through the door and passage from Canal Road one finds a block of two rooms on the right of the yard and an exactly similar block of two rooms on the left of the yard. The plaintiff describes the two rooms on the right as living rooms and the two rooms on the left as stores. The two rooms on the left are the rooms of which plaintiff claims possession as stores. The remaining buildings on the plot comprise a range of smaller buildings at the back of the plot and they were designed to be ancillary to the living accommodation. They consist of sanitary accommodation, a fuel store, a provision store, a pantry and a kitchen according to the plan. The plot and buildings were sold to plaintiff in 1943 when the defendant was the sitting tenant of them. The defendant is a hide and skin merchant, an Arab who now has two wives who both live with him on the plot. He became the tenant of premises on the plot in 1930 or 1931. At first he occupied the two rooms shown on the plan as living rooms and lived in them and used the smaller of the two front rooms shown as shops on the plan as an office. Later after one of his marriages he asked his landlord for further accommodation. He became tenant of all the buildings on the plot. He denies that he used any of them as a hide and skin store and I believe him on that. He says he used the two rooms on the left, shown on the plan as stores, as living rooms and that seems very likely to my mind. These rooms appear to be exactly similar to the two

rooms opposite which are designated as living rooms on the, plan. When the defendant had two wives living on the premises I consider it most probable that one of them would be given the buildings on the left as her quarters; the other having the building on the right. Though the evidence does not go as far as that. I find as a fact that the rooms on the left designated on the plan as stores were let to defendant as dwelling accommodation and used by him as' such and not as stores consequently they are not business premises and are protected by the Rent Restriction Ordinance unless it is shown that the user of them as part of the dwelling-house accommodation on the plot is unlawful. As regards the rooms fronting on Canal Street the position is slightly different. The one on the left was used by the defendant as his office in his house. He had another office at his godown in Shauri Moyo until 1951 when he moved his business premises to the Industrial Area where he has an office. I have no doubt but that he did do business in the room on the left on the plot in question but I do not consider that that necessarily makes it "business premises" within the meaning of the Ordinance. He became tenant and occupier of the room at the same time as he became tenant of the rooms which are designated on the plan as living rooms. It appears to have been one l)ingle tenancy. he had other business premises including an office at Shauri Moyo. The fact that a business man sets apart one room in his dwelling-house as an office or study in which he d'eals with business matters in his home does not in my opinion necessarily make that room business premises within the meaning of the Ordinance. I find as a fact that defendant used and occupied this room as part of his dwelling-house. As -regards the other front -room, the larger one on the right, the defendant became the tenant of this room consequent upon one of his marriages when he asked for further accommodation. He used it partly as a waiting room and partly as sleeping accommodation for visitors and employees. This room or part of it would be used to entertain male guests. I think it is important to remember that the defendant is an Arab living in a city. His womenfolk would not mix freely wi-th strange men even though they were visitors and guests of the master of the house. They would ordinarily observe *purdah* to some extent at least. No doubt business friends and acquaintances were met and entertained in the large room but so also I think would male friends\ and acquaintances who were not close members of defendant's family and who had not come on business. I find that this room was not let for business trade or professional purposes and is not business premises within the meaning

of the Increase of Rent Restriction Ordinance, 1949. It was let with the two rooms on the left side of the plot to the defendant who had asked for more accommodation consequent on his marriage. In my opinion it was let and occupied as part of the defendant's dwelling-house. The plaintiff claims these two front rooms as shops but it has been proved that the defendant only took out a trading licence for six months in respect of the plot in question. That was in 1952, long after the premises were first let to him and the user of any room on the premises as a shop ceased long before action brought.

In my opinion on the facts the premises in question in the suit were let to the defendant and used by him except for six months at most in 1952 as part of his dwelling and not as business premises.

Mr. Morgan for the plaintiff argued that it was unlawful to use the two rooms on the left of the plot otherwise than as stores or the two rooms in front otherwise than as shops in view of the designation of these rooms as stores and shops respectively in the plan approved by the Municipality in 1929. He relied on by-law 352 of the Nairobi Municipality (Building) By-laws, 1948, which provides-

- (a) Where any building has been erected a person shall not, except with the permission of the Council under the hand of the Town Clerk and upon such terms as the Council may prescribe, use, or being the owner thereof allow such building to be used, otherwise than for the purpose or purposes specified or indicated in the approved plans and particulars and the application in respect thereof or for which the building was constructed.
- (b) Purpose or purposes in this by-law shall mean the particular purpose for $\frac{1}{2}$ which a building or part thereof has been erected or to which it has lawfully been altered and not solely its general purpose as a domestic building, a public building or a building of the warehouse class. In domestic building only that portion thereof which has been erected as a dwelling may be used as such. In a dwelling any inhabitable room therein which complies with these by-laws may be used as such notwithstanding its designation on the approved plans, but any apartment (such as a larder, pantry, kitchen, closet, store, cellar, etc.), not designated or designed as a habitable room shall not be used as a habitable room.

The rest of the by-law is not material to the case.

This by-law was so far as I am aware first enacted long after the tenancy was created. There may have been a by-law to similar effect in force at the time the tenancies were created but in my opinion this fact is not conclusive. There is a presumption of legality under which it must be presumed that the user of the premises was lawful and not unlawful until the contrary is shown. The contrary has not been shown here. Certain alterations as regards sanitation have actually been sanctioned, the purpose of these is not indicated in evidence but apart from that and assuming the present by-law or a similar one to have applied when the lettings to defendant were created there is nothing to show that the consent of the Town Clerk was not obtained. In my opinion it was for the plaintiff to prove that no such consent was obtained. The exemption is in the by-law itself and not contained in a proviso and it was as much in the interest of the original owner as of the defendant that the exemption should have been obtained if it were necessary. I apply the presumption with all the greater assurance in as much as there appears to me to be no reason why the permission of the Council if applied for should not have been given. The "stores" on the left appear to be constructed to the same specification as the living quarters on the right. The "shop" on the left therefore must have been approved as a habitable room and could in my opinion be used as an office, similarly the "shop" on the right was approved as a habitable room and appears to comply with the provisions of the by-laws. In an application to the Rent Control Board in 1953, the respondent described the premises on the plot occupied by defendant as dwelling quarters and receipts were issued on his behalf describing the rent as for "the house".

I have perused the Nairobi Corporation's By-laws, 1929, later as amended called the Nairobi Municipality By-laws, 1944. The suggestion that they might be important came from me at the end of the case and counsel were not in a position to cite them though they brought them to my Chambers later, I have not found it particularly easy to find my way about them. The nearest approach to the present by-law 352 appears to have been by-law 99 which was repealed in 1947 when quite different by-law was substituted. I am not satisfied that by-law 99 or any other by-law was infringed. I apply a presumption of legality. I find as a fact that all the premises on the plot were let as dwelling accommodation and that except for six months in 1952 they were used as a dwelling-house and not as business premises.

I dismiss the suit with costs.

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