

UGANDA / JUDGMENT

Williamson and Another v Walmsley (Civil Suit No. 522 of 1955.) [1955] EACA 281 (1 January 1955)

[1955] EACA 281

COURT

East African Court of Appeal

BEFORE

Forbes J

CASE / FILE NUMBER

Civil Suit No. 522 of 1955.

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ORIGINAL CIVIL

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Before FORBES, J.

TILLY WILLIAMSON AND ANOTHER, Plaintiffs

v.

EARNEST RICHARD JAMES WALMSLEY, Defendant

Civil Suit No. 522 of 1955.

Landlord and Tenant-Lease-Breach of Covenant-Forfeiture-Suit for possession—Election to determine tenancy—Service of writ—Determination
of tenancy—Transfer of lessor's interest—
Right to enforce forfeiture by transferee-Transferee's right to possession-Indian Transfer of Property Act, 1882, section 109, 111 (g).

The first plaintiff, as landlord, entered into a formal lease with the defendant with covenant for forfeiture, if the monthly rent in arrear reserved remained unpaid for 21 days. On 9th June, 1955, the first plaintiff filed a suit for recovery of possession on the ground that the rent for April, 1955, was unpaid. The summons was duly served upon the defendant. The first plaintiff, thereafter, sold the premises leased to the second plaintiff, with transfer completed on 1st September, 1955. The transferee was not substituted, as plaintiff, under Order 23, rule 9 but was merely joined. The defendant submitted that, as the first plaintiff had no longer any interest in the property, no order for possession could be made in her favour and that, as the second plaintiff had acquired ownership after the rent fell due, the company was not entitled to sue for rent in arrear before the

date of transfer and no order for possession could be made in its favour.

Held (7-9-56).-(1) The first plaintiff, having disposed of her whole interest in the property, was not entitled to an order for possession against the defendant.

- (2) The transferee, by the proviso to section 109 of the (Indian) Transfer of Property Act, 1882, was neither entitled to arrears of rent due before the transfer, nor to forfeit the lease for breach of covenant for non-payment of such rent.
- (3) The first plaintiff had a right, before transfer, to elect to forfeit the lease after breach in terms of section 111(g) of the Act and by commencing proceedings and serving the summons on the tenant she had both exercised her option and forfeited the lease which had come to an end with the service of the summons.
- (4) The first plaintiff was, before transfer, entitled to possession of the premises and her right to possession, along with her other rights in the property, passed to the transferee and the second plaintiff was, therefore, entitled to recover possession.

Cases referred to: Vishveshwar Vighneshwar Shadri v. Mahableshwar Subba Bhatta, (1919) I. L. R. 43 Bom. 28; Grimwood v. Moss, (1871-2) L. R. 7 C. P. 360; Serjeant v. Nash, Field & Co., (1903) 2 K. B. 304.

Authority referred to: Mulla, Transfer of Property Act, 1882, 2nd ed., 635.

Mann for both plaintiffs.

O'Beirne for defendant.

JUDGMENT.—This is a claim for the recovery of possession of certain premises at Kitale let to the defendant under a lease granted by the first plaintiff.

Subsequently to the commencement of the suit the first plaintiff entered into an agreement with the second plaintiffs for the sale of the premises in question to the second plaintiffs. The second plaintiffs agreed to take the premises subject to the lease to the defendant but with knowledge that ejectment proceedings had

commenced. They further agreed to join in the proceedings if required to do so. The sale was completed and ownership of the property transferred to the second plaintiffs with effect from 1st September, 1955; and the second plaintiffs were joined as plaintiffs in the suit on 21st February, 1956, in pursuance of an order of the Court of that date.

Besides possession of the premises, the plaint also claims rent and mesne profits, but it appeared that rent for the premises had, in fact, been paid up to the date of hearing.

The only question for decision accordingly is whether the plaintiffs, or either of them, are entitled to recover possession of the property. It is conceded that under section 112 of the Indian Transfer of Property Act the acceptance of the rent, which took place after the institution of the suit, is not a waiver of forfeiture.

The premises the subject of the suit were, prior to the year 1951, used by the husband of the first plaintiff, Mr. M. M. Williamson, for the purposes of his business as a dental surgeon. Mr. Williamson managed this and other property on behalf of his wife.

During the year 1950 Mr. Williamson arranged for the sale of his practice to the defendant, and part of the arrangement was that the defendant should have a ten-year lease of the premises. In pursuance of the arrangement the defendant, it appears, entered into possession of the premises on 1st January, 1951, at a rental of Sh. 250 per month, though for the first year a rental of Sh. 240 per month was accepted by the plaintiff.

A formal lease of the premises was not executed until 1st May, 1955, despite pressure by the plaintiff's advocates to have the lease completed. Under the terms of the lease as eventually signed the rent of the premises was Sh. 3,000 a year payable monthly in arrears with provision for forfeiture if the rent reserved or any part of it was unpaid for 21 days after becoming payable.

It was argued that the "rent" referred to in the forfeiture clause might be the yearly rent, and not the monthly instalments. I do not consider, however, that such a construction of the lease can be supported. It appears to me clear that the forfeiture clause was to take effect on default for 21 days in the payment of any monthly instalment of rent due under the lease.

The defendant, in fact, has from time to time throughout most of the period of the tenancy up to the commencement of this suit, been in arrears in the payment of the rent due for periods varying from three to six months. It was pleaded that subsequent to the signing of the lease there was agreement between the defendant and the first plaintiff, oral or by implication, that the rent should be paid three monthly in arrears. The defendant, however, did not give evidence in support of this, and in any case it does not appear that evidence of any such alleged oral variation would be admissible under the Indian Evidence Act.

On 9th June, 1955, the first plaintiff filed this suit for the recovery of possession of the premises on the ground that the rent for the month of April, 1955, was then unpaid. It is not disputed that such rent was in fact then unpaid. though it has since been paid.

At about this time, the first plaintiff, or Mr. Williamson on her behalf, entered into the negotiations with the second plaintiffs which resulted in the sale to the second plaintiffs of property which included the premises the subject of this suit. The agreement for the sale of the property was signed on 21st June, 1955. And, as I have already mentioned, ownership of the property was transferred to the second plaintiffs on 1st September, 1955.
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In these circumstances it is submitted for the defendant.

$\mathcal{J}_{\mathcal{C}}$

- (a) that since the first plaintiff no longer has any interest in the property it is impossible for the Court to make an order in terms of the plaint giving possession of the premises to the first plaintiff; and

- (b) that since the second plaintiffs only acquired the ownership of the property as from 1st September, 1955, and since, under the proviso to section 109 of the Transfer of Property Act, the second plaintiffs are not entitled to rent, or to sue for rent, arising before the date of the transfer of the property, the second plaintiffs cannot be entitled to sue for possession on the basis of any rent in arrears before 1st September, 1955.

I do not think it is contended that the first plaintiff is entitled to an order for possession, and clearly, since she has disposed of her whole interest in the property, she is not in a position to obtain one.

As regards the second plaintiffs it was argued that under section 109 of the Transfer of Property Act all the rights of the original lessor passed to the transferee, and that the transferee is entitled to determine the lease on a forfeiture arising for breach of a covenant even where the breach occurred prior to the transfer.

The only reported case cited to me was **Vishveshwar Vighneshwar Shastri v*. Mahableshwar Subba Bhatta*, (1919) I. L. R. 43 Bom. 28. In that case the assignee of a lessor was allowed to forfeit a lease for breach of a condition against alienation committed three years before the assignment. The decision in the case is severely criticized by the learned author in **Mulla's Transfer of Property Act**, 1882, 2nd edn. at p. 633, and I should certainly have had some hesitation in following it. In any event it would appear distinguishable from a case of forfeiture of a lease founded on default in the payment of rent. The proviso to section 109 of the Transfer of Property Act expressly provides that a lessor's transferee "is not entitled to arrears of rent due before transfer". If the transferee is not entitled to arrears of rent due before transfer, it is difficult to see how he would be entitled to forfeit a lease for non-payment of such rent, and in my opinion he would not be entitled to do so.

In this case, however, proceedings for ejectment were commenced, not by the transferee, but by the original lessor. It is clear that at the time proceedings were commenced the defendant was in default in the payment of rent, and accordingly, at that time it was open to the first plaintiff as lessor to elect whether or not she would forfeit the lease (Transfer of Property Act, section 111 (g)). By commencing proceedings she exercised her option and did forfeit the lease. In the circumstances the right or otherwise of the second plaintiffs as transferees from the original lessor to forfeit the lease does not arise. The tenancy was, in my opinion, at an end when the summons in the suit was served on the defendant. (*Grimwood v. Moss*. (1871-2) L. R. 7 C. P. 360: *Serjeant v. Nash, Field and Co.*, \$(1903)\$ 2 K. B. 304).

The first plaintiff was thereupon entitled to possession of the premises, and the right to possession in my opinion passed to the second plaintiffs upon the sale of the premises. It seems clear that the second plaintiffs, as assignees, could have been substituted as plaintiffs under Order 23, rule 9, of the Civil Procedure Rules. 1948, instead of being merely joined as plaintiffs. Subject to the question of relief against forfeiture under section 114 of the Transfer of Property Act, I hold that the second plaintiffs are entitled to recover possession of the property.

As regards relief against forfeiture, it was urged on the one hand that the tenant has been an unsatisfactory tenant, continually in arrears in his rent payments although the rent was not high; and that, although rent was now paid up to date, unless tender of the full costs of the suit were made, or security for payment given, at the hearing the defendant had lost his right to relief. On the other hand it was urged that forfeiture would cause considerable hardship to the defendant in his practice, and Mr. O'Berine stated that although he was not in a position on behalf of the defendant to tender payment of or give absolute security for costs at the hearing, security could be provided within a period of 24 hours, and that in any event the costs could not be ascertained until taxation. I have considered the facts of the case carefully and have come to the conclusion, not without some hesitation, that this is a proper case in which to grant relief against forfeiture. As regards the question of tender of the costs of this suit, this appears impracticable until the costs have been ascertained on taxation, and provision of security for payment of the costs within fifteen days after they have been so ascertained would appear reasonable compliance with the provisions of the section.

I accordingly direct that the defendant provide security within 24 hours to the satisfaction of the Court for the payment to the plaintiffs of the full costs of the suit within 15 days of the same being ascertained on taxation; and I order that, on provision of such security, the defendant be relieved against forfeiture of the lease the subject of this suit. I further order that, if default is made in the provision of security as aforesaid, the possession of the premises shall be given to the plaintiffs Turner, Barker and Hatfield Ltd. together with mesne profits to the date of possession; and that the costs of the suit be paid by the defendant.

be dismissed without any opportunity being given to the applicant to argue his case further than he has done in his application for revision. As far as the Immigration Control Ordinance and the regulations made under it are concerned, I can find nothing which requires the Immigration Control Board to do more than to consider the written applications which come before it. If it is satisfied that the applicant is eligible for the Certificate it must grant the Certificate. If it is not so satisfied it can refuse its Certificate and then there is a right of appeal to the Immigration Appeals Tribunal and the applicant has the right of appearance by advocate before the Tribunal.

In my opinion there is nothing in the plaint or in the appropriate legislation which shows that the plaintiff had a right of audience before the Board or that the Board was bound to call on the applicant to show cause why his application should not be refused if it was not satisfied on his application of his eligibility for the Certificate. In the event of an appeal, of course, the position before the Tribunal would be different in as much as there is a specific right of appearance by advocate before the Tribunal. This is in my view a sufficient answer to any allegation that the principles of natural justice have been infringed. It is not necessary in the interest of natural justice that an applicant should be given the rights now claimed at the stage of the consideration of his application by the Board. These principles are sufficiently complied with by the provision for appeal and the right of appearance on appeal. An applicant for a permit under Class G of subsection 7 of the Ordinance has no established right to a permit; he has merely a right to submit an application, a right to have such an application considered by the Board and in the

event of the refusal of a Certificate by the Board he has the right of appeal to the Immigration Appeals Tribunal and the right of appearance by advocate before that Tribunal. In my opinion, the facts pleaded do not sustain any allegation of an infringement of any of those rights by the Board and consequently in my opinion the plaint discloses no reasonable cause of action for a declaration that the decision of the Board in this case was ultra vires.

That is sufficient to dispose of the motion, but I think that I should refer to another argument that was put forward by Mr. Sherrin on behalf of the first defendant, even though I would not have granted the motion on the basis of that argument. Mr. Sherrin argued that the suit should be struck out on the ground that there was a right of appeal to the Tribunal and that the Court should not entertain the suit in view of that fact. He based his argument on that point on *Bull v. Attorney-General for New South Wales*, (1916) 2 A. C. 564, and on *Barraclough v. Brown*, (1897) A. C. 615. In my opinion neither of these cases are completely in point. Bull's case concerned a transaction that would ordinarily be held to be void, but it was held that a certain enactment made the transaction voidable not void, and further that the question as to whether or not the transaction was to be avoided or not depended upon the decision of a statutory tribunal. In those circumstances a declaration that the transaction was void was refused and it was held that the decision as to whether or not it was to be void must be made in proceedings before the statutory tribunal provided for that purpose. In **Barraclough's case** it was decided that when a statute gives a right to recover expenses in a Court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a Court of summary jurisdiction; he can only take proceedings in the latter Court.

Neither of these cases concerned an appeal from the decision of a subordinate court or tribunal and they are not in point where it is sought to declare such a decision to be a nullity. In the case of **Cooper v. Wilson**, (1937) 2 K. B. 309, a declaration was made declaring the decision of a Watch Committee to be a nullity notwithstanding the fact that there was a statutory right of appeal from the decision of the Watch Committee to the Secretary of State. It was held in *Cooper v. Wilson* that the High Court had discretion to make a declaration that the proceeding of the Watch Committee was a nullity notwithstanding the existence of a right of appeal to another authority.

In my opinion the fact that there is a right of appeal is a matter that this Court could properly take into consideration in deciding whether or not it should exercise its jurisdiction to grant the declaration that is sought, after it has heard evidence of facts sufficient to support a declaration. I consider that that is a matter which should not be decided on a motion under Order VI, rule 29, but rather it should be decided at the trial of the suit.

On the grounds stated in the earlier part of this ruling the motion will be allowed and the suit ordered to be struck out on the ground that the plaint discloses no reasonable cause of action.

The first defendant will have his costs of the motion.

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