

GIT. Q. 2.

1,1954

No. 11 of 1953.

# In the Privy Council.

## ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

37754

UNIVERSITY OF LONDON  
W.C.1.  
24 FEB 1955  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

MEGHJI LAKHAMSHI AND BROTHERS . . . Appellants

AND

FURNITURE WORKSHOP . . . Respondents.

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## Case for the Respondents.

RECORD.

1. This is an appeal from an Order dated the 18th March, 1952, of the Court of Appeal for Eastern Africa (Nihill, P., Worley, V.-P., and de Lestang, J.) in proceedings whereby the Appellants seek to recover possession from the Respondents of part of certain premises previously let to the Respondents and now protected by the provisions of the Increase of Rent (Restriction) Ordinance, 1949 (hereinafter called "the 1949 Ordinance") which are comparable in general scope but differ considerably in detail from the provisions of the English Rent Restriction Acts. p. 18.

20 2. The Appellants' application for possession came in the first instance before the Central Rent Control Board and was dismissed with costs by the said Board on the ground that the Board had no power under the provisions of the 1949 Ordinance to make an order for possession in respect of part of the premises let to the Respondents. The said Order was reversed on appeal by the Supreme Court of Kenya (Campbell, Ag. J.). On appeal by the Respondents to the Court of Appeal for Eastern Africa the said Court of Appeal restored the Order of the said Board but for different reasons. They agreed with Campbell, Ag. J., that the Board had power to make an Order for possession of part of the premises let but held the Appellants had failed to prove their case such case being that pursuant to the provisions of Section 16 (1) (k) of the 1949 Ordinance the Appellants required possession of the premises to enable the reconstruction or rebuilding thereof to be carried out. The Respondents will contend upon the present appeal both that the Central Rent Control Board was right in holding that it had no jurisdiction to make an Order for possession of part of the premises and that the Court of Appeal for Eastern Africa was right in holding that the Appellants had failed to prove the grounds for recovering p. 4.  
p. 8.  
p. 18.  
pp. 14-15.  
p. 16, ll. 25-27.

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possession which they alleged. The Respondents will further contend by way of preliminary objection that the value of the matter in dispute on this appeal is and was at all material times less than £500 and that therefore the said appeal is not competent.

3. The facts giving rise to the said appeal so far as material to be herein stated are as follows.

p. 22, Ex. A.

4. Pursuant to an Agreement in writing dated the 2nd May, 1941, the Respondents became tenant of the Appellants of Plot No. 45/46 Thika Township (which is situate in the Central Province of the Colony) for a period of twelve months from the 1st May, 1941, to the 30th April, 1942, at a monthly rent of Shs. 180. The said Plot comprised a building or buildings containing two shops and five living rooms and an open space measuring approximately 20 feet by 40 feet (hereinafter called "the open space") which open space is the subject matter of the present proceedings. Upon the expiration of the said tenancy the Respondents continued in possession of the said plot as statutory tenants protected from eviction by the provisions of the 1949 Ordinance or other similar provisions for the time being in force. 10

p. 12, l. 42-p. 13, l. 2.

pp. 1, 2.

5. By an Application in writing dated the 2nd May, 1950, and made pursuant to the 1949 Ordinance the Appellants applied to the said Central Rent Control Board for an Order under Section 16 (1) (k) thereof evicting the Respondents from the open space. 20

6. The provisions of the 1949 Ordinance most material to this appeal are as follows :—

(A) Section 1 (2) thereof provides that : " This Ordinance shall apply to all premises, whether dwelling-houses or business premises, situate in any area in the Colony in which a Rent Control Board has been established . . . " subject to certain exceptions not material to this appeal.

(B) Section 2 (1) thereof provides that " unless the context otherwise requires— 30

" ' business premises ' means a building or part of a building let for business, trade or professional purposes or for the public service and includes land within the curtilage of such building or part of a building and comprised in the letting ;

" ' dwelling-house ' includes any house or part of a house or room let as a separate dwelling (whether or not such house, part of a house or room is occupied by one or more tenants) where such letting does not include any land other than the site of the dwelling-house and garden or other premises within the curtilage of the dwelling-house, but does not include any living-room which is shared by the landlord with one or more tenants ; 40

" ' premises ' means premises to which this Ordinance is applied by subsection (2) of Section 1 thereof."

(C) Sections 3 and 4 thereof make provision for the establishment of a Rent Control Board for the Central Province of the Colony therein and hereinafter called "the Central Board."

(D) Section 5 thereof confers certain powers on the Central Board in its area including (*inter alia*) power under subsection (1) thereof—

"(f) to make orders for the recovery of possession of  
"premises . . ."

and

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"(g) for the purpose of enabling additional buildings to be  
"erected, to make orders permitting landlords to excise  
"vacant land out of premises of which, but for the  
"provisions of this Ordinance, the landlord could have  
"recovered possession, where such a course is, in the  
"opinion of the Central Board . . . desirable in the  
"public interest . . ."

(E) Section 16 (1) thereof provides that :—

"No order for the recovery of possession of any premises  
"to which this Ordinance applies, or for the ejection of a  
"tenant therefrom, shall be made unless—

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\* \* \* \* \*

"(k) the landlord requires possession of the premises to  
"enable the reconstruction or rebuilding thereof to be  
"carried out, in which case the Central Board . . .  
"may include in any ejection order for such purpose  
"an order requiring the landlord to grant to the tenant  
"a new tenancy of the reconstructed or rebuilt premises  
"or part thereof on such terms as may be reasonably  
"equivalent to the old tenancy, and fixing a date for  
"the completion of the new building and for its  
"occupation by the tenant and imposing such reasonable  
"conditions as the Board may think necessary . . ."

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7. On the 17th August, 1950, the Central Board after hearing evidence on behalf of the Appellants but without calling on the Respondents, dismissed the said application of the Appellants with costs on the ground that the Central Board had no power under Section 16 (1) (*k*) to order an ejection from part only of premises comprised in a letting. The Central Board observed that the Appellants could have taken steps under Section 5 of the 1949 Ordinance to excise but had not done so. pp. 3, 4. p. 4, ll. 16-18.

40 8. By a Memorandum of Appeal dated the 15th September, 1950, the Appellants appealed from the decision of the Central Board to the Supreme Court of Kenya. The appeal was heard on the 18th July, 1951, and on the 25th July, 1951, Campbell, Ag. J., delivered judgment allowing the appeal with costs and remitting the case to the Central Board for further hearing. The most material passage in the judgment is as follows : p. 5. p. 6. p. 7. p. 7, ll. 13-23.  
"I can see no reason why the Board should have no power to order  
"ejection from part only of premises in possession of a tenant. The  
"Board has power to order ejection from 'premises' and there is

“ nothing to say that ‘ premises ’ must mean all the premises leased.  
 “ There is no rule of law that a plaintiff for example must sue for all the  
 “ money a defendant owes him or must sue for specific performance of all  
 “ the services which he claims that a defendant has undertaken to do.

“ If it should be a greater hardship for a tenant to be ejected from  
 “ part of his premises rather than the whole, this is a matter which can  
 “ be argued before the Board at the hearing. A Board must be presumed  
 “ to go into all the aspects of each case as it arises.”

pp. 9, 10.

9. By a Memorandum of Appeal dated the 9th August, 1951, the Respondents appealed from the judgment of Campbell, Ag. J., to the 10  
 Court of Appeal for Eastern Africa. The appeal was heard on the  
 18th March, 1952, and the Court of Appeal (Nihill, P., Worley, V.-P., and  
 de Lestang, J.) delivered reserved judgments the same day allowing the  
 appeal with costs.

pp. 11, 12.

pp. 12-17.

pp. 12-17.

p. 14 l. 7-p. 15 l. 44.

10. The leading judgment was delivered by Worley, V.-P. He agreed with Campbell, Ag. J., that the Central Board had power to order  
 ejection from part only of the premises. He based this part of his  
 judgment largely upon the decision of the English Court of Appeal in  
*Salter v. Lask* [1924] 1 K.B. 754, where it was held that upon the expiration  
 of a tenancy the landlord was entitled in a proper case to recover possession 20  
 of part of the premises let from his late tenant. The learned Vice-President  
 was however of opinion that the Appellants had in any event failed to  
 prove a case under Section 16 (1) (k) of the 1949 Ordinance. “ The real  
 “ point in this matter is,” he said, “ that the landlords’ application did  
 “ not come within the ambit of Section 16 (1) (k) at all; they were not  
 “ asking for possession for the purpose of reconstructing or rebuilding.  
 “ They were asking for excision of a portion of the premises in order to  
 “ erect new buildings and, in my view, as I have already indicated, the  
 “ Board was acting within its powers in refusing to consider the application  
 “ under Section 16 (1) (k). Their decision is not invalidated merely because 30  
 “ one of the reasons they gave in arriving at it is open to criticism.” The  
 learned Vice-President was further of opinion that the Central Board  
 reasonably exercised its discretion in not permitting the Appellants to  
 treat the application as having been made pursuant to Section 5 (1) (g)  
 of the 1949 Ordinance.

p. 16, ll. 25-32.

p. 16, ll. 1-13.

p. 17.

11. Nihill, P., and de Lestang, J., delivered short formal judgments  
 agreeing with the judgment of the learned Vice-President.

p. 21.

12. On the 19th January, 1953, the Court of Appeal for Eastern  
 Africa granted final leave to the Appellants to appeal to Her Majesty in  
 Council. 40

13. By Article 3 (a) of the Eastern African (Appeal to Privy Council)  
 Order in Council, 1951, an appeal lies as of right from any final judgment  
 of the Court of Appeal—

“ where the matter in dispute on the appeal amounts to or is  
 “ of the value of £500 sterling or upwards, or where the appeal  
 “ involves directly or indirectly some claim or question to or  
 “ respecting property or some civil right amounting to or of the  
 “ said value or upwards.”

14. In support of such application the Appellants filed evidence to the effect that the value of the whole of the premises comprised in the said Agreement dated the 2nd May, 1941, mentioned in paragraph 4 hereof was 135,000s. (£67,500) and that the value of the open space was 16,000s. (£800). No evidence was filed as to the effect on such value of the occupation of the Respondents pursuant to a statutory tenancy under the 1949 Ordinance. The Respondents contend that the Court of Appeal for Eastern Africa must have proceeded upon the basis that because the capital value of the open space with vacant possession was more than £500 therefore  
 10 the Appellants were entitled to appeal as of right and that such basis is wrong in law.

15. The correct test to be applied under Article 3 (a) of the said Order in Council is to ascertain how much it is worth to the Appellants to succeed on the appeal disregarding questions of costs. Where the Appellants are owners of land subject to a statutory tenancy and are seeking possession thereof it is necessary therefore to deduct from the value of the land with vacant possession the value of the land subject to the statutory tenancy which the Appellants will retain even if they lose. That this is the true construction of the said Article appears from the decisions  
 20 of the Court of Appeal for Eastern Africa in *Popatlal Padamshi v. Shah Meghji Hirji* (Civil Appeal No. 32 of 1951) and in *Chogley v. Bains* (Civil Appeal No. 57 of 1952) and also from the advice of the Judicial Committee of the Privy Council in *Arieh Zvi Lipshitz v. Haim Aron Valero* [1948] A.C. 1, which dealt with the identically worded Article 3 (a) of the Palestine (Appeal to Privy Council) Order in Council 1924.

16. The onus is upon the Appellants to show that this test has been satisfied. But their own evidence points to a contrary conclusion. According to such evidence the value of the open space subject to the Respondents' statutory tenancy cannot have been less than £300.  
 30  $\frac{180 \times 12 \times 16,000}{135,000}$  or £12 16s. This represents a return of over  $4\frac{1}{4}$  per cent. on £300 while the property is still subject to statutory occupation with the prospect of very great appreciation in value so soon as such occupation ceases. But if the value of the open space with vacant possession is £800 and its value subject to the Respondents' tenancy is more than £300 then the value to the Appellants of the matter in dispute must be less than £500.

17. The Respondents respectfully submit that this appeal should in  
 40 the premises be dismissed with costs for the following amongst other

### REASONS.

- (1) BECAUSE for the reasons stated in paragraphs 13 to 16 inclusive hereof the present appeal is not competent.
- (2) BECAUSE the Court of Appeal for Eastern Africa rightly held that the Appellants had failed to prove that they required the open space for the purpose of

reconstruction or rebuilding thereof as provided by paragraph 16 (1) (k) of the 1949 Ordinance. It is not possible to reconstruct or rebuild premises let as an open space.

- (3) BECAUSE the Central Board was right in holding that it had no power under Section 16 (1) (k) of the 1949 Ordinance to make an order for possession of part only of the premises let to the Respondents. By virtue of the provisions of sub-sections 1 (2) and 2 (1) of the 1949 Ordinance the word "premises" in Section 16 (1) thereof must unless the context otherwise requires refer to the whole premises comprised in a letting. This construction is supported in paragraph (k) of Section 16 (1) by the reference therein to "the old tenancy." It is further supported by reference to other paragraphs of Section 16 (1) such as paragraphs (d) and (i), where the context shows that the term "premises" is used to denote premises comprised in a letting considered as a whole and does not mean any particular part of such premises which the landlord may seek to recover. 10 20
- (4) BECAUSE the words "or any part thereof" cannot be implied after the words "the premises" in the first line of paragraph (k) aforesaid since where the draftsman so intends he expressly uses this expression as in the phrase "rebuilt premises or part thereof" later in the same paragraph.
- (5) BECAUSE if it were possible for a landlord to recover possession of part of the premises from a statutory tenant it would then become necessary to apportion the rent in respect of the remainder thereof and no power is conferred by the 1949 Ordinance on the Central Board to make such apportionment although by paragraph 5 (1) (e) of the 1949 Ordinance power to apportion rents in other circumstances is expressly conferred. 30
- (6) BECAUSE if it is possible under Section 16 (1) of the Ordinance to make orders for possession of part of the premises let then the provisions of paragraph 5 (1) (g) of the Ordinance are otiose. Such paragraph provides for the excision of vacant land for the purpose of enabling additional buildings to be erected where in the opinion of the Central Board it is desirable in the public interest. But under paragraph 16 (1) (f) of the Ordinance possession of premises whether vacant land or not and for whatever purpose may be obtained provided that it is in the opinion of the Central Board in the public interest. It is submitted that the proper reconciliation of these apparently inconsistent provisions is that the exceptional remedy of excising part only of the premises is only granted when the further conditions specified in paragraph 5 (1) (g) are fulfilled. 40 50

- 10 (7) BECAUSE the Court of Appeal for Eastern Africa were wrong in holding that the decision of the English Court of Appeal in *Salter v. Lask* [1924] 1 K.B. 754 was applicable to the facts of the present case. That case merely decided that as a matter of general law a landlord upon the expiry of a tenancy may obtain possession of part only of the premises. It expressly reserved the position under the Rent Restriction Act as appears from the judgment of Bankes, L.J., at page 759 (cited by Worley, V.-P., in the present case) where the learned Lord Justice says that a landlord might find himself in difficulties if he should employ the device of suing for part of the premises only in order to invoke in his own favour the provisions of the Rent Restriction Act. The present appeal turns in the submission of the Respondents upon the true construction of paragraph 16 (1) (*k*) of the 1949 Ordinance which is not paralleled in the English Rent Restriction Acts and as to which no English authority can therefore directly assist.
- 20 (8) BECAUSE if (which the Respondents do not admit) the Appellants might have established a claim to possession pursuant to the provisions of paragraph 5 (1) (*g*) of the 1949 Ordinance nevertheless the Central Board reasonably exercised its discretion in refusing to allow the Appellants to raise a fresh case under the provisions of that paragraph. The Appellants in their application expressly asked for an order pursuant to paragraph 16 (1) (*k*) thereof and this was the case which the Respondents were by their evidence prepared to meet. Different issues of fact, such as the question of public interest, requiring the preparation of different evidence would have arisen under paragraph 5 (1) (*g*) thereof.
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MICHAEL ALBERY.

In the Privy Council.

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ON APPEAL  
*from the Court of Appeal for Eastern Africa  
at Nairobi.*

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BETWEEN  
MEGHJI LAKHAMSHI  
AND BROTHERS . *Appellants*  
AND  
FURNITURE WORKSHOP *Respondents.*

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**Case for the Respondents**

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HERBERT OPPENHEIMER,  
NATHAN & VANDYK,  
20 Copthall Avenue,  
London, E.C.2,  
*Solicitors for the Respondents.*