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7, 1952

No. 11 of 1950.

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

1. NGARA HOTEL LIMITED
2. DHIRAJLAL NARANJI JESSANI
3. MAGANBHAI PRABHUDAS PATEL (Defendants) - *Appellants*

AND

KASSAM SULEMAN DAMJI (Plaintiff) - - - - *Respondent*

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
W.C.1.
17 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

T. L. WILSON & CO.,
6 WESTMINSTER PALACE GARDENS,
LONDON, S.W.1,
Solicitors for the Appellants.

A. L. BRYDEN & WILLIAMS,
53 VICTORIA STREET,
LONDON, S.W.1,
Solicitors for the Respondent.

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

- BETWEEN
1. NGARA HOTEL LIMITED
 2. DHIRAJLAL NARANJI JESSANI
 3. MAGANBHAJ PRABHUDAS PATEL (Defendants)

UNIVERSITY OF LONDON
 W.C. 1.
 17 JUL 1953
 INSTITUTE OF ADVANCED
 LEGAL STUDIES
Appellants

AND

KASSAM SULEMAN DAMJI (Plaintiff) *Respondent.*

RECORD OF PROCEEDINGS

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In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

1. NGARA HOTEL LIMITED
 2. DHIRAJLAL NARANJI JESSANI
 3. MAGANBHAI PRABHUDAS PATEL
- (Defendants) *Appellants*

10

AND

KASSAM SULEMAN DAMJI (Plaintiff) *Respondent.*

RECORD OF PROCEEDINGS

PART I

No. 1.

PLAINT.

*In the
Supreme
Court of
Kenya.*

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA.

Civil Case No. 123 of 1947.

KASSAM SULEMAN DAMJI

Plaintiff

No. 1.
Plaint, 30th
September
1947.

versus

20

1. NAGARA HOTEL LIMITED
 2. DHIRAJLAL NARANJI JESSANI
 3. MAGANBHAI PRABHUDAS PATEL
 4. NARAIN DASS MULJI GHAI
 5. JUGAL KISHORE
 6. GULAM RABANI
 7. ABDUS SATAR
 8. REHEMAT ULLAH
- Defendants.

PLAINT.

30 1. The Plaintiff is a British Indian Merchant and landowner trading and residing in Mombasa and he is the owner of the premises at Salim Road, Mombasa, known as the Nagara Hotel, his address for service is the Chambers of Messrs. Christie & Bryson, Advocates, Mombasa.

*In the
Supreme
Court of
Kenya.*

No. 1.
Plaint, 30th
September
1947,
continued.

2. The Nagara Hotel Limited, is a limited liability company incorporated in Kenya and having its Registered Office at the Nagara Hotel, Salim Road, Mombasa. The other Defendants are Indian Hotel Keepers. Their address for service is the Nagara Hotel, Mombasa.

3. By an agreement in writing dated the 24th day of April 1946, the Second and Third Defendants contracted with the Plaintiff for the monthly tenancy of the said Nagara Hotel at the monthly rent of Shs.500/00 subject *inter alia* to the condition that the Defendants should not assign, sublet or part with the possession of the said premises or any part thereof without the written consent of the Plaintiff. 10

4. On or about the 24th day of November, 1946, the First and Second Defendants in breach of the said condition or covenant on the part of the tenants parted with the possession of the said premises to the Defendants Numbers Four and Five without the consent in writing and knowledge of the Plaintiff and *ipso facto* the tenancy was determined as provided in the said Agreement.

5. On or about the 2nd day of March, 1947, the Sixth, Seventh and Eighth Defendants joined with the Fourth and Fifth Defendants in illegal possession of the said premises.

6. On or about the 23rd day of June, 1947, the Defendant Company 20 was formed and joined in the illegal possession of the said premises and carries on its business therein.

7. The Plaintiff has called upon the Defendants to vacate the said premises but they refuse to do so and this action has become necessary.

8. On the 20th day of August, 1947, the consent of the Rent Control Board was obtained to institute these proceedings.

WHEREFORE the Plaintiff prays for judgment for :

- (1) Possession of the said premises ;
- (2) The sum of Shs.4,500/00 in respect of rent or mesne profits for nine months ended 31st August, 1947. 30
- (3) Rent or mesne profits at the rate of Shs.500/00 per month from 1st day of September, 1947, until possession is delivered to the Plaintiff ;
- (4) Costs ; and,
- (5) Such further and other relief as this Honourable Court may deem fit.

(Sgd.) CHRISTIE & BRYSON,

Advocates for the Plaintiff.

Dated at Mombasa this 30th day of September, 1947.

Filed by :—

40

Messrs. Christie & Bryson,
Advocates,
Mombasa.

No. 2.

DEFENCE of Defendant No. 1, Nagara Hotel Limited.

In the
Supreme
Court of
Kenya.

The Defendant NAGARA HOTEL LTD. states as follows :—

1. Paragraph 1 of the plaint is admitted.
2. Paragraph 2 of the plaint so far as it relates to this Defendant is admitted.
3. Paragraph 3 of the plaint is denied. This Defendant admits that by an agreement in writing dated the 24th April, 1946, the premises in question were let to the Nagara Hotel at the monthly rental of Shs. 500/- subject *inter alia* to the condition that it should not be sublet or assigned to anyone without the written consent of the Plaintiff. This Defendant further states that at the time of the letting of the premises to Nagara Hotel the Plaintiff was informed and well knew it that the Defendants Nos. 2 to 5 aforesaid were equal partners in the said business carried on under the name and style of the Nagara Hotel. As the Defendants Nos. 4 and 5 were not present in Mombasa at the time of the aforesaid agreement it was agreed between the parties that Defendants Nos. 2 and 3 should execute the agreement for and on behalf of the Nagara Hotel. The Plaintiff has always been receiving rents from the Nagara Hotel.
- 20 4. Paragraph 4 of the plaint is denied. This Defendant admits that on or about the 24th November, 1946, Defendants Nos. 2 and 3 left the partnership leaving the other two partners Defendants Nos. 4 and 5 carrying on the business of the Nagara Hotel. All the alleged breach of the tenancy agreement or its determination as stated or otherwise is denied.
5. Paragraph 5 of the plaint is denied. This Defendant admits that Defendants Nos. 6, 7 and 8 joined in the partnership business of the Nagara Hotel.
- 30 6. Paragraph 6 of the plaint is denied. This Defendant admits that the said partnership business of Nagara Hotel was formed into a limited liability company on or about the 23rd June, 1947. The Defendants Nos. 2 to 6 inclusive and others are the shareholders of the said company known as Nagara Hotel Limited.
7. As to paragraph 7 this Defendant states that the Plaintiff has no legal right whatsoever to claim vacant possession of the said premises.
8. The Plaintiff has no cause of action against this Defendant and submits that the premises were let to the Nagara Hotel whose partners are now shareholders in the Nagara Hotel Limited.
9. This Defendant submits that all the rents due up to date have been tendered and received by the Plaintiff and no rent whatsoever is at present
40 due and owing to the Plaintiff.
10. This Defendant further submits that the possession by all or any of the partners during the partnership period was lawful and the present possession by this Defendant is also lawful and protected by the Increase of Rent and Mortgage Interest Restriction Ordinance. The Plaintiff is not entitled in law to any relief as claimed or any other whatsoever.

No. 2.
Defence of
Defendant
No. 1,
Nagara
Hotel
Limited,
10th
November
1947.

*In the
Supreme
Court of
Kenya.*

WHEREFORE this Defendant prays that this suit be dismissed with costs as against him.

Dated at Mombasa this 10th day of November, 1947.

No. 2.
Defence of
Defendant
No. 1,
Nagara
Hotel
Limited,
10th
November
1947,
continued.

(Sgd.) A. C. SATCHU,

Advocate for the Defendant No. 1.

Filed by :—

Satchu & Satchu,
Advocates for the Defendant No. 1,
Mombasa.

No. 3.
Defence of
Defendant
No. 3,
Maganbhai
Prabhudas
Patel, 8th
April 1948.

No. 3.

10

DEFENCE of Defendant No. 3.

The Defendant MAGANBHAI PRABHUDAS PATEL states as follows :—

1. Paragraph 1 of the plaint is admitted.
2. Save and except that this Defendant's address is Nagara Hotel Mombasa paragraph 2 of the plaint is admitted. His address for purposes hereof is c/o the Chambers of Satchu & Satchu, Advocates, Mombasa.
3. Paragraph 3 of the plaint is denied. This Defendant admits that by an agreement in writing dated the 24th April 1946 the premises in question were let to the Nagara Hotel at the monthly rental of Shgs. 500/- subject *inter alia* to the condition that it should not be sublet or assigned to anyone without the written consent of the Plaintiff. This Defendant further states that at the time of the letting of the premises to Nagara Hotel the Plaintiff was informed and well knew that the Defendants Nos. 2, 3, 4 and 5 aforesaid were equal partners in the said business carried on under the name and style of the Nagara Hotel. As the Defendants Nos. 4 and 5 were not present in Mombasa at the time of the aforesaid agreement it was agreed between the parties that Defendants Nos. 2 and 3 should execute the agreement for and on behalf of the Nagara Hotel. The Plaintiff has always been receiving rents from the Nagara Hotel.
4. Paragraph 4 of the plaint is denied. This Defendant admits that on or about the 24th November 1946 Defendants Nos. 2 and 3 left the partnership leaving the other two partners Defendants Nos. 4 and 5 carrying on the business of the Nagara Hotel. All the alleged breach of the tenancy agreement or its determination as stated or otherwise is denied.
5. Paragraph 5 of the plaint is denied. This Defendant admits that Defendants Nos. 6, 7 and 8 joined in the partnership business of the Nagara Hotel.

20

30

6. Paragraph 6 of the plaint is denied. This Defendant admits that the said partnership business of Nagara Hotel was formed into a limited liability company on or about the 23rd June 1947. The Defendants Nos. 2 to 6 inclusive and others are the shareholders of the said company known as Nagara Hotel Limited.

7. As to paragraph 7 this Defendant states that the Plaintiff has no legal right whatsoever to claim vacant possession of the said premises.

8. The Plaintiff has no cause of action against this Defendant and submits that the premises were let to the Nagara Hotel whose partners
10 are now shareholders in the Nagara Hotel Limited.

9. This Defendant submits that all the rents due up to date have been tendered and received by the Plaintiff and no rent whatsoever is at present due and owing to the Plaintiff. The Plaintiff accepted the rents well knowing that the Nagara Hotel was formed into a limited liability company as stated in paragraph 6 hereof.

10. This Defendant further submits that the possession by all or any of the partners during the partnership period was lawful and the present possession by this Defendant is also lawful and protected by the Increase of Rent and Mortgage Interest Restrictions Ordinance. The Plaintiff is
20 not entitled in law to any relief as claimed or any other whatsoever.

Wherefore this Defendant prays that this suit be dismissed with costs as against him.

Dated at Mombasa this 8th day of April 1948.

(Sgd.) A. C. SATCHU,
Advocate for the Defendant No. 3.

Filed by :—

Satchu & Satchu,
Advocates for the Defendant No. 3,
Mombasa.

*In the
Supreme
Court of
Kenya.*

No. 3.
Defence of
Defendant
No. 3,
Maganbhai
Prabhudas
Patel, 8th
April 1948,
continued.

*In the
Supreme
Court of
Kenya.*

PLAINTIFF'S EVIDENCE.

No. 4.

KASSAM SULEMAN DAMJI.

No. 4.
Kassam
Suleman
Damji,
Examina-
tion-in-
chief,
23rd April
1948.

H.M. SUPREME COURT OF KENYA AT MOMBASA.

Civil Case No. 123 of 1947.

Kassam Suleman Damji (Plaintiff)

v.

1. Nagara Hotel Ltd. & 7 Others.

23.4.48.

Bryson for Plaintiff.

10

Satchu for Defendants 1, 3, 4, 5 and 6.

D. D. Doshi for Defendant 8.

Defendants 2 and 7 absent (not entered appearance).

Bryson : For hearing to-day to take evidence of Plaintiff who is leaving for India.

P.W.1. KASSAM SULEMAN DAMJI, sworn.

I am Plaintiff in this suit. I am a landowner in Mombasa and Nairobi. I am registered proprietor of plots 125, 126 of Section XXVII Mombasa. Prior to April, 1946, the premises on those plots were let to Success Corporation Ltd. The directors of that Company were Fatehali Dhalla and others. The Success Corporation Ltd. used the premises as a Cafe and called it the Ritz Restaurant. They were monthly tenants. 20

Sometime in April 1946 Mr. Fatehali Dhalla approached me with regard to selling his business to some other people in Nairobi. He mentioned N. D. Jessani and Maganbhai Patel as the purchasers. I agreed to his transferring the business with the tenancy to those people whom I was prepared to accept as my tenants. Fatehali Dhalla is the head of my Community. At this interview he did not mention any other names. He did not mention the names of Defendants 4, 5, 6, 7 or 8.

Following interview with Fatehali Dhalla I signed this agreement of 30 tenancy (Ex. 1) in Mr. Satchu's office.

In December 1946 I heard something and as a result I consulted my advocates.

(Correspondence put in and marked (Exh. 2).)

I gave instructions to my lawyers as contained in Exh. 2 (A). Replies were received and I gave instructions for other letter to be written from time to time.

Eventually I applied to the Rent Control Board and on 22.8.47 I obtained written permission to institute legal proceedings against the Defendants.

This is it (Exhibit 3).

I filed this suit.

I want vacant possession of the premises because I have received a notice from the Municipality that the tenants were not keeping the premises clean. I produce the two notices from the Municipality (Ex. 4).

10 Since granting the lease I have not given any consent for any sub-letting or assignment. I have not given consent to any assignment to a Company Ngara Hotel Ltd.

*In the
Supreme
Court of
Kenya.*

No. 4.
Kassam
Suleman
Damji,
Examina-
tion-in-
chief,
23rd April
1948,
continued.

Cross-examination by Mr. Satchu.

I do not want premises back in order to obtain good premium. I do not know if people pay premiums to obtain premises. I have heard about premiums being paid but I do not know the amounts thereof. I did not know Defendants 2 and 3 at the time I leased the premises to them. I do not know if they were at that time trading in the premises as Ngara Hotel. Before signing the lease I had not seen Defendants 2 and 3. It is not true that I met them and that they informed me that Defendants 4
20 and 5 were partners with them in Ngara Hotel. It is not true that at the time of signing the agreement Defendant 2 and 3 told me that they were signing on behalf of the business. Before execution of lease (Ex. 1) the premises were not known as Ngara Hotel. At the time of the lease I was told that the new business would be carried on in the name of Ngara Hotel. I came to hear of breach of the lease by the end of December 1946.

Cross-
examina-
tion.

I sent notice to quit (2 (A)) on 21/1/47. The matter was then in the hands of my lawyers and the delay is theirs. I kept on enquiring from them.

30 After notice Ex. 2 (A) Defendants 4 and 5 did not approach me in Nairobi. I did not ask for a premium from them. (Ex. 2 (O) read to witness). I do not know why this letter was written and why the enquiry regarding the names of the people in the business. I would not have granted lease to Ngara Hotel had I been approached by them. I would not have agreed to a transfer for many reasons, e.g., unauthorised partition had been made, premises kept unclean, parts of the premises had been sublet, etc., a cess pit had been filled up. I do not know who did these things. I cannot say if any notices were sent to the tenants previous to January 1947. I must consult my manager for that. I was responsible for cleaning the cess pit before Ex. 1. This was not an arduous task then but afterwards
40 the cess pit was continually full. The premises were previously used as a tea room known as China Tea Room. I knew they were selling tea and coffee. I do not know what the Ngara Hotel Ltd. are doing. They sell Betel-nuts, sweetmeats, etc. I am not prepared to agree to transfer of lease to the Defendants. I want the original tenants and nobody else. I want my premises back. I am not afraid that I will not get my rent. I have brought my account books but I know nothing about them; my son and my clerk keep them.

(Bryson undertakes to produce the books if and when called upon.)

*In the
Supreme
Court of
Kenya.*

I have seen the account of Ngara Hotel in my books. I do not know if it is in the name of "Ngara Hotel."

Cross-examination by Mr. Doshi.

No. 4.
Kassam
Suleman
Damji,
Cross-
examina-
tion,
23rd April
1948,
continued.

The premises are still known as Ngara Hotel. Defendant 1 is a limited Company to my knowledge Defendant 2-8 are shareholders in Defendant 1 Company. I know that some of them are the directors of the Company. I do not remember a firm called "Ngara Hotel" without the "Limited." When I signed Ex. 1 I knew that the business would be called Ngara Hotel but the proprietors were to be Defendants 2 and 3. I do not know if Defendant 8 was taken as a partner in the Ngara Hotel. I have not named Defendant 8 as a trespasser. I do not know him personally not even his name. I do not know if Defendant 8 was in occupation of the premises. I do not know if Defendant 8 ceased to be a partner before I took action. 10

Re-
examina-
tion.

Re-examination by Mr. Bryson.

The delay in instituting proceedings was due to time taken in finding out who were in possession of the premises. My son and my clerk look after my affairs in Mombasa. It was very largely my son who instructed my advocates.

If premises were vacated I would open a new business for my son. 20
I do not trust the present occupiers. They (the occupiers) had made application for liquor licence contrary to clause 6 of the lease.

R. O. D. W.

M. C. NAGEON DE LESTANG.

S.O. 24th and 25th June 1948.

M. C. NAGEON DE LESTANG.

24/6/48 Bryson for Plaintiff.

Schermbrucker with Satchu for Defendants Nos. 1 and 3.

Satchu who had appeared for Nos. 4, 5 and 6 asks leave to withdraw as he has no instructions from Defendants 4, 5 and 6. 30

Leave granted.

D. D. Doshi for No. 8.

Defendants 2, 4, 5, 6 and 7 absent.

No. 5.
Rajabali
Kassam
Suleman
Damji,
Examina-
tion-in-
chief,
24th June
1948.

No. 5.

RAJABALI KASSAM SULEMAN DAMJI.

Bryson calls :—

RAJABALI KASSAM SULEMAN DAMJI, sworn, states :—

Son of Plaintiff. I represent him in business in Mombasa. I see this lease Ex. 1. Since that lease granted I have given no consent to any sub-letting or assignment to anyone on behalf of my father. I have my 40
father's books here if required.

Since my father gave evidence I have received another notice from the Municipality about the cess pits of the premises. This is it (Ex. 5).

Cross-examination by Mr. Satchu.

I hold General Power of Attorney from my father. I would not have consented to an assignment of the premises had I been approached. Re Clause 5 of Ex. 1 I would not have agreed to an assignment as we wanted shop for our own use. If we had known that a hotel was going to be carried on on premises we would not have leased the premises at all and the Municipality might object to its use as a hotel. Those the principal reasons. Also we would refuse to lease to anyone in whom we could not repose trust.

- 10 When lease granted I knew that premises to be used as restaurant as mentioned in lease. In hotel as distinct from restaurant board and lodging supplied. Don't know if premises being used as hotel or restaurant. Know nothing about it. Know premises once used as Ritz Restaurant. I have never been in hotel. I still have objection if premises only used as restaurant. My objection is that we want the premises for our own use. First wanted premises when I left school. I left school in December '44. It was two years ago that I wanted the premises. At that time lease in existence. Knew I could not get house. If Defendants Nos. 2 and 3 guaranteed rent I would not agree to the assignment to the other
- 20 Defendants. The original tenants vouched for by Mr. Fatehali Dhalla. Since Defendants 2 and 3 left premises we have had nothing but complaints from the municipality and there has been damage to building due to the cesspits. Don't want to let original tenants assign in spite of agreement.

- Re Ex. 2 (O). Don't remember giving instructions for that letter to be written. I usually give instructions to our advocate. That letter written with a view to finding out who were the partners in the Ngara Hotel. Not written with view to settling matter with new tenants. I didn't approach manager of the Ngara Hotel in the matter. Don't even know him. Never approached any partner in Hotel and don't know any
- 30 of them. Never suggested I wanted premium for the transfer of tenancy. I have heard that such premiums are asked for. My father owns quite a few houses. Never served any notice on Defendants 2 and 3 terminating their lease. Don't know if my advocates have done so. I have not re-entered on the premises for the breach. From April 1946 to December 1946 receipts for rent issued in name "Ngara Hotel (Ritz Restaurant)." My book-keeper prepared receipts so I cannot say this with certainty. These are three of the receipts (Ex. A).

Cross-examination by Mr. Doshi.

- 40 I don't know No. 8 Defendant even by sight. Don't know whether he had anything to do with the Hotel when suit filed.

Re-examination by Mr. Bryson.

In our books account in connection with rent for these premises reads :—

(Consults books) "Ngara Hotel (Ritz Restaurant) (M. P. Patel and N. A. Jessani)." Previous tenants were Success Corporation Ltd. who ran

*In the
Supreme
Court of
Kenya.*

No. 5.
Rajabali
Kassam
Suleman
Damji,
24th June
1948,
continued.
Cross-
examina-
tion.

Re-
examina-
tion.

*In the
Supreme
Court of
Kenya.*

No. 5.
Rajabali
Kassam
Suleman
Damji,
Re-
examina-
tion,
24th June
1948,
continued.

a restaurant called "Ritz Restaurant." They carried on up to end of March 1946. Their account is headed "Account of Success Corporation Ltd. (Ritz Restaurant) 1946."

Re letter Ex. 2 (O). I see letter dated 30/4/47 (Ex. 2 (M)). I don't remember instructing my advocate to write that letter but I entrusted everything to my advocate. In January 1947 I learned that people other than Defendants 2 and 3 were running the hotel but didn't find out until later who they were.

Defendants 2 and 3 never told me that they were in partnership with 4 and 5 when lease granted. They never told me that they had left the partnership and left Defendants 4 and 5 in the partnership or that later Defendants 6 and 7 joined in the partnership or that Limited Liability Company formed.

Plaintiff's case closed.

T. D. M. BARTLEY.

DEFENDANTS' EVIDENCE.

No. 6.
Maganbhai
Prabhudas
Patel,
Examina-
tion-in-
chief,
24th June
1948.

No. 6.

MAGANBHAI PRABHUDAS PATEL.

MAGANBHAI PRABHUDAS PATEL, sworn, states :—

I'm 3rd Defendant. I signed Ex. 1. On hearing that Ritz Restaurant was to be sold I and Defendant No. 2 came to Mombasa. We had a talk with Defendants Nos. 4 and 5 and had agreed that when business bought we would all be partners in it. Defendant No. 2 and I bought the business and then we entered into this lease. We formed our partnership after the lease was entered into. No written agreement.

(By consent certified copies from Registrar of Business Names put in and marked Ex. B.)

Defendant No. 2 and I signed the lease on behalf of the four partners of the Ngara Hotel. Defendants 3 and 4 contributed to the purchase of the business. After signing lease we started the business in name of Ngara Hotel. We carried it on as a Restaurant as it is to-day. People don't sleep there. Only used as a Restaurant. It was run as partnership affair from beginning. We were later registering as we had intended forming a limited Company and then found this took time.

Partnership had another concern in Nairobi also called Ngara Hotel.

We had difficulty about forming Limited Company as other partners wanted to allot shares to their relatives and friends. In November 1946 Defendant No. 2 and I retired from partnership as we couldn't come to agreement as to allotment of shares and also business here not in good condition due to staff difficulties so we agreed to divide the business.

No. 2 Defendant and I took our Nairobi business and Defendants 4 and 5 the Mombasa business. Since then the Mombasa business has been converted into Limited Company and I'm a shareholder and No. 2 Defendant also has shares. We gave no notice to the Landlord when Limited Company formed, as we were under the impression this not necessary.

*In the
Supreme
Court of
Kenya.*

We put up no fixed partition since taking over the business. Had no complaints from landlord that premises not clean. No portions of premises sub-let. During our time no matter of cesspits raised at all. Never
10 received notice from landlord that I had broken lease and that he was re-entering. Landlord never approached me to put present position re lease on proper footing. I am prepared as a guarantor to continue my personal covenants under the lease.

No. 6.
Maganbhai
Prabhudas
Patel,
Examina-
tion-in-
chief,
24th June
1948,
continued.

Cross-examination.

Defendants 4 and 5 names not put in Ex. 1 because only Defendant No. 2 and I in Mombasa and as name Ngara Hotel appeared on lease we thought that as soon as firm registered partners would come in under lease. We got advocate Mr. Satchu to draw Ex. 1. We told him that the tenants were to be Ngara Hotel of which partners were Nos. 2, 3,
20 4 and 5 Defendants. We informed Mr. Satchu that there were two other men in Nairobi who were partners in the Ngara Hotel. We didn't inform Mr. Satchu that we intended forming a limited Company as we hadn't time to go into details. We never told Mr. Satchu Defendant No. 2 and I signed Ex. 1 on our own behalf and on behalf of the other partners. When lease Ex. 1 signed we were advised that partnership should be registered within 30 days. Mr. Satchu dealt with the lease only. Our advocate in Nairobi Mr. Gautama was dealing with everything else. We didn't advertise the change of business under the Fraudulent Transfer of Business Names Ordinance. Not true that reason for not registering
30 until October was because Defendants 4 and 5 not our partners when lease signed.

Cross-
examina-
tion.

I know of no written assignment of the partnership to the limited Company. The Company does not own the Nairobi business.

No written agreement of retirement of No. 2 Defendant and I from partnership.

At date of lease (Ex. 1) registered partners in Nairobi business were No. 2 Defendant and I.

The Nairobi business is still a partnership. When we bought the Success Corporation business I don't remember if I signed any document
40 covering the purchase. I may have. Defendants Nos. 4 and 5 signed no document as they were not here. Defendants 2, 3, 4, 5, put up Shgs. 25,000/- in equal shares to buy the business. Paid by cheque drawn by No. 2 Defendant. Between April '46 and October '46 I consider all four of us liable for debts of partnership. I don't know that Defendants 4 and 5 would not have been liable as partnership not registered. Don't agree that unnecessary for 2nd Defendant and I to make new registration for Mombasa business as already registered for Nairobi business. Not true that Defendants 4 and 5 only approached us in September or October to become partners. Not true that we registered in October because we
50 had arranged to hand over the business then to Nos. 4 and 5 and that we wanted it to appear to the landlord that they had always been partners.

*In the
Supreme
Court of
Kenya.*

No. 6.
Maganbhai
Prabhudas
Patel,
Cross-
examina-
tion,
24th June
1948,
continued.
Re-
examina-
tion.

Witness
evasive.
T.D.M.B.

Not
impressed
by this
witness.
T.D.M.B.

Lahori Ram was not manager when I was in the business. He was only manager from time 4 and 5 Defendants took over the business. (*Shown Ex. 2 (N).*) I can't explain that. Lahori Ram not employed until after dissolution of partnership.

I am shareholder of Ngara Hotel Ltd. I own one share. I don't know that in November '47 a liquor licence was applied for the hotel by the Company.

Cross-examination by Mr. Doshi :

I know No. 8 Defendant. I don't know if he is a shareholder.

Re-examination.

Before we retired from the business and Nos. 4 and 5 took over the business we had no discussion with the landlord as we thought no necessity as Nos. 4 and 5 the continuing partners. Business carried on by them same as by us. After 2nd Defendant and I returned Nairobi we saw Mr. Gautama a month later re registering partnership and partnership agreement.

To Court : After signing lease here I remained for a month and then went Nairobi for a day or two and there I saw Gautama and instructed him to prepare draft partnership agreement and also as regards registration of the business and then I returned here. Jessani had returned Nairobi immediately after lease signed. I carried on the business here and Jessani the Nairobi business. I don't know when the 3rd and 4th Defendant came to Mombasa. They came within a month of buying the business on a visit but they didn't help run the business.

T. D. M. BARTLEY.

No. 7.
Pannalal
Chadha,
Examina-
tion-in-
chief,
24th June
1948.

No. 7.

PANNALAL CHADHA.

PANNALAL CHADHA, sworn, states :—

Secretary of Ngara Hotel Ltd. Shareholders of Company are Defendants 2 to 6 and myself and 3 others brothers of mine.

Company formed in June 1947 to carry on Restaurant known as Ngara Hotel and before that as Ritz Restaurant. Company carrying on the Restaurant business now. There was a restaurant in those premises 7 or 8 years ago to my knowledge. Since Company formed I took part in discussions with landlord as to lease. I joined the Company in January. I took part in the discussions just as a relative of my friends who had the premises. I met the Plaintiff at Nairobi railway station and I started the discussions. There was a case pending against my brother by the Municipality as to cess pits. I asked Plaintiff why he was getting my brother into trouble and he replied that my brothers might be good business men but didn't know how to talk.

Plaintiff said that my brother had committed a breach of agreement. I explained whole position to Plaintiff and he told me to come and see him

and he would settle the matter. No reference was made to the present occupants.

I didn't go to see the Plaintiff.

That happened in end of July 1947. No partitions put in since I have known premises. No portions sublet. Apart from cess pit trouble no other complaints.

No. 2 Defendant has gone to India. No. 4 Defendant also gone to India.

Cross-examination.

10 Mr. Gautama is in Nairobi.

My brother was one of the Directors of the Company—Satyapal Chadha. At that conversation in July 1947 I told Plaintiff that a limited Company was now running the hotel.

(Re Ex. 2W) Mr. Rhemtullah had nothing to do with our Company on 8/7/47.

I see this G.N. in the Official Gazette for 6th October 1947. G.N.1718 in which it cites Defendant No. 8 as applying for liquor licence for the Ngara Hotel Mombasa.

20 I was not secretary in September 1947 nor was I a shareholder. I didn't become a member until January 1948. No reference in minute book of Directors meetings of Company for July 1947 as to application for liquor licence. Cannot explain how No. 8 Defendant applied for liquor licence. There is a stall in the hotel where things are sold to public—beetle leaves sold. Two cupboards used as a stall. It is part of the restaurant.

As we often had trouble with the landlord we asked Defendants 2 and 3 to join the Company. Yes to make Company legal. They hold one share each.

To Court :

They became shareholders on 23rd June 1947.

30 Company formed on 23 6/47.

No. 8 Defendant never a shareholder of the Company and had nothing to do with the Company and had nothing to do with Ngara Hotel after Company took control.

Re-examination.

Defendants 2 and 3 shareholders from time the Company was formed. Usual for customers to demand beetle leaves after having tea.

Case against my brother re cess pits was dismissed. The landlord got the cess pits cleaned after the case.

*In the
Supreme
Court of
Kenya.*

—
No. 7.
Pannalal
Chadha,
Examina-
tion-in-
chief,
24th June
1948,
continued.

Cross-
examina-
tion.

Re-
examina-
tion.

T. D. M. BARTLEY.

*In the
Supreme
Court of
Kenya.*

No. 8.

LAHORI RAM.

LAHORI RAM, sworn, states :—

No. 8.
Lahori
Ram,
Examina-
tion-in-
chief.
24th June
1948.

I was Manager of Ngara Hotel from 24th November 1946 to 28th February 1947. During that time I had no dealings with landlord or his son. His son came often to hotel for repairs. About 5 or 6th March after I had handed over charge I had a talk with the Plaintiff's son. Defendant No. 8 and I were sitting in hotel when son came to us and said he wanted to have a talk. We went upstairs and he said he had heard that hotel again sold. I replied that I couldn't say anything about it—one of the partners had come and asked me to hand over charge to people, i.e., the 7th Defendant and 8th Defendant. I handed over charge to 7th and 8th Defendants. Plaintiff's son said the hotel changes hands so often what does the landlord get out of it. I replied that the partner (4th Defendant) had returned Nairobi and Plaintiff's son asked me to write a letter to him and ask him to settle with the landlord. 10

Cross-
examina-
tion.

Cross-examination.

I referred to hotel being sold. Defendants 7 and 8 bought the hotel. Defendant No. 4 came here on 27th February and on 28th he asked me to hand over charge to Defendants 7 and 8. I handed over stocks, furniture, food and everything to Defendants 7 and 8. The cash I handed to Defendant No. 4. That was on evening of 28th February. The 4th Defendant told me hotel had been sold and ordered me to hand over. After hotel sold I don't know who ran hotel here. I didn't pay the March 1947 rent to Messrs. U. K. Doshi. I went to Nairobi on 22nd March. 20

(Bryson reads letters 2 (H) (K) and (L)).

In March 1947 No. 8 Defendant in Mombasa. I didn't pay the March rent to Mr. Doshi's office.

(Reads letter 2N).

I paid rent for November and December 1946. I sent January rent about third week in January and landlord refused to accept it. I wired No. 4 Defendant and was instructed to remit rent through a lawyer. I gave Mr. Doshi Ex. 1 and asked him to send the rent. I knew nothing about the 2nd and 3rd Defendants having ceased to be interested in hotel. I told Mr Doshi that I believed there were 4 partners. I told Mr. Doshi that in January. I wasn't here in May. Defendant No. 8 present during conversation with landlord's son. He joined in conversation but can't remember what he said. The owner of the hotel believed hotel sold so he wanted to extract something from the seller not from the buyer. 30

Doshi : Nil.

40

Re-
examina-
tion.

Re-examination.

All I knew was that I was told to hand over charge as the business had changed hands. I wasn't feeling happy so I didn't enquire.

To Court :

The landlord's son said he had heard that the hotel had been sold for 30,000 to 35,000 and that the landlord should get something out of it.

Defendants Nos. 4 and 5 engaged me as manager. No. 4 Defendant is my nephew and as I had not been well in Nairobi he got me to come down to Mombasa for a change and run the hotel here which was not well run. No. 5 Defendant came down and installed me here.

When Plaintiff's son said hotel had been sold for 30—35 thousand don't remember if No. 8 Defendant said anything.

T. D. M. BARTLEY.

25.6.48. As before.

Defence case closed for 1st and 3rd Defendants. *Doshi* for No. 8.

*In the
Supreme
Court of
Kenya.*

No. 8.
Lahori
Ram,
Re-
examina-
tion,
24th June
1948,
continued.

10

No. 9.

PURSHOTTAM NATHALAL MEHTA.

PURSHOTTAM NATHALAL MEHTA sworn states :—

Chief Clerk in Advocate Doshi's office. Application made by our office to Liquor Licensing Court in name of Defendant No. 8. Application was made on 27th May 1947. Heard in November 1947 which was first sitting of Court after May. Court sits twice year in May and November

20 Later client retired from partnership in Ngara Hotel and he instructed us if licence granted it should be transferred to remaining partners in Ngara Hotel. Application was not granted. The application was subject to consent of landlord.

Cross-examination.

Bryson : Don't know who other partners were in May 1947. Don't know if No. 8 consulted his other partners as to application. I pointed out to No. 8 that he must get landlord's consent. Liquor licences not issued to firms only to individuals. He gave instructions in May and came in October to say that he had retired and that getting consent of landlords would now lie on remaining partners. He didn't mention limited company.

Schermbrucker : No. 8 came with other persons—2 or 3 but I didn't enquire who they were.

T. D. M. BARTLEY.

30

No. 9.
Purshottam
Nathalal
Mehta,
Examina-
tion-in-
chief,
25th June
1948.

Cross-
examina-
tion.

*In the
Supreme
Court of
Kenya.*

No. 10.
REHEMAT ULLAH.

REHEMAT ULLAH sworn states :—

No. 10.
Rehemat
Ullah,
Examina-
tion-in-
chief,
25th June
1948.

No. 8 Defendant and Retired railway servant. Retired in 1946. I know Nos. 6 and 7 Defendants. In 1947 they bought a business and I got a share in it after business purchased. Business was Ngara Hotel. I joined business 20 days after they bought it. I paid Shgs. 6000/- for my share. I remained partner for 3 months when they sold the business while they were in Nairobi. I was called up to Nairobi to sign the papers and I was repaid about Shgs. 5500/-. I don't know if I was a registered partner as I left everything to them. Apart from paying the money I knew nothing about the business. I made application for liquor licence for the hotel. I did so in order to expand the business. It was in my name, No. 7 Defendant being here in Mombasa, No. 6 in Nairobi and No. 7 knew no one here he being quite a new man. When I ceased being partner other partners told me that if they got licence they would consult the landlord get his consent and start the business. 10

Cross-
examina-
tion.

Cross-examination.

Bryson : I don't know when I ceased to be a partner. When I left partnership business sold to Kundanlal and Pannalal two Chaddas in Nairobi. Defendants 6 and 7 told me so. I signed some papers at this time but I'm illiterate so don't know if I signed an assignment of lease. Document signed before an advocate but don't know his name. No partnership agreement in writing between me and Nos. 6 and 7 Defendants. Kundanlal Chadda and I agreed to my applying for liquor licence. The business already bought by the 2 Chaddas when I applied for the liquor licence. I applied as had it been granted I wanted to become a shareholder in the business. 20

I didn't know that there was a covenant in the Ngara Hotel lease that the lessee would not carry on a liquor selling business. Don't know that the 2 bars near the Ngara Hotel belong to the Plaintiff. 30

If liquor licence obtained I would have taken shares in the Company if I could.

I never told Plaintiff I was going to apply for an off licence. (Refers Ex. 2 (U) and (W).) I cannot explain that as I am an illiterate man and I used to deliver letters for No. 7 Defendant to the other parties. I don't remember whether or not I was in the business on 8th July.

While I was in the business my partners were Nos. 6 and 7 Defendants. There was another man whose name may be Kishore.

To Court : I only knew Defendants 6 and 7 as my partners. 40

They were in business when I joined it and paid my money to Defendant No. 7.

Satchu : Lahori Ram was working for Hotel in my time. Landlord's son came to Ngara Hotel when I was there with Lahori Ram—that was on 6th or 7th March. Landlord's son enquired from Lahori Ram if business sold and Lahori Ram said yes for Shgs. 30 to 35,000. Landlord's son said if so what have we got out of that. That was all.

To Court : At that time I was a partner in the business. We had kept Lahori Ram in to help us for a few days. Plaintiff's son knew I was a partner in the business. He asked Lahori Ram as he didn't know me well. 50

T. D. M. BARTLEY

Defendant No. 8's case closed.

No. 11.
JUDGE'S NOTES.

*In the
Supreme
Court of
Kenya.*

No. 11.
Judge's
Notes,
25th June
to 19th
July 1948.

Schermbucker :

Lease to Nos. 2 and 3 d. April 1946.
Evidence that 4 partners from beginning.
Delay in registering due to possible Company being floated.
Plaintiff's case breach on 24/11/46.

Submits Change in partnership an assignment.

Breach an unwilling breach.

10 In January 47 Landlord heard of breach. What he did. Right in law was to declare agreement void. He has to do something to show tenant he was exercising right Letter 2 (A).

Even if no partnership and a direct handing over from Nos. 2 and 3 to 4 and 5 that could be done with consent. What was done wrong is that they failed to get consent. Cheques sent all through in payment of rents. Cheques held—not returned—another indication that Plaintiff waiting for satisfactory footing.

Letter 2 (m) why want to find out. Why not write to Defendants 1 and 2 and declare lease void.

20 Letter 2 (O) what landlord's attitude then ? Waiver of breach ?
Admits a breach before suit brought but an unwilling breach.

Reasonableness :

Rent Restriction Ordinance applies to owner and occupier. Not necessarily landlord and tenant. S.20 (2)—Ord. applied to premises not to landlord and tenant.

Tara Singh v. Harnam Singh 1944 XI E.A.C.A. 24 " apply to premises."

Habib Khan Sidi Khan v. Meraj Din Ahmed Bux (1945) XII E.A.C.A. 18.

Upjohn v. Macfarlane 1922 2 Ch. 266 at p. 261 & 262, 264 line 17.

30 *Shrimpton v. Rabbits* (1924) 131 L.T. 478 Col. 2.

Cumming v. Danson (1942) 2 A.E.R.653 at 655 E ; 657.

Smith v. Poulter (1947) 1 A.E.R. 216 at 217B.

Re reasonableness. Whole attitude of landlord was to reach a stage where agreement could be come to.

Landlord's reasons. Premises for son. Cess pits.

Plaintiff's son's attitude. No assignment under any circumstances.

Section 11 (3).

Doshi :

40 For No. 8 : No cause of action against No. 8. He should not have been joined. Re mesne profits rent tendered. Only suit which lies against my client would be for damages and not for mesne profits.

*In the
Supreme
Court of
Kenya.*

No. 11.
Judge's
Notes,
25th June
to 19th
July 1948,
continued.

2 p.m. As before.

Bryson :

Onus of proof of lawful possession on defendant. Lease speaks of itself. Agreement between Plaintiff and Defendants 2 and 3 rest descriptive. Agreement drawn by skilled advocate. Attestation clause. Tenants recommended by head of community. Although receipts in name of Hotel this usual—firm 2 partners. Delay in registration. Gautama not produced. Reason why partnership registered in October was that by then the 2 partners were to sell. Registration a similar attempt to continue chain of ownership as was done when Limited Company formed. 10

Change in composition of firm an assignment.

Varley v. Coppard 26 L.T.R. 882.

Corporation of Bristol v. Westcott (1879) 12 Ch. 461.

Langton v. Henson (1905) 92 L.T.R. 805.

Each change in composition of partnership constituted breach of covenant not to assign.

Reasonableness

Refers to definition of dwelling-house—must be a letting.

Present occupiers trespassers, and no provision of rent restriction Ordinance applies to them. 20

S.11 (1) (a) and (h)

17(1) and (3) “lawfully.”

Dick and another v. Jacques 36 T.L.R. 773.

Chapman v. Hughes 39 T.L.R. 260.

Re *Upjohn v. Macfarlene* this an action of landlord against his tenant.

Submits .

No question of reasonableness applies. If Court has to consider reasonableness submits perfectly clear Defendants did best to keep landlord in dark as to what has happened.

Re Ex.2 (O) suggested that this a waiver. 30

Refers 2 (a) and (b) word partners in 2 (b) implies that Defendants 2 and 3 still partners with Defendants 4 and 5.

Ex.2G to Defendant No. 6. No reply.

Ex.2 (k) & 2 (L) 2 (N). On 2/5/47 we informed that 2 & 3 Defendants the proprietors.

Re 2 (O) Had it turned out that Defendants 2 and 3 were still partners with 4 & 5 then possibly no assignment and we would have had no case.

Conduct of Defendants such that unreasonable to condemn the landlord to have such tenants.

Liquor licence flagrant attempt at breach. 40

Re rent on mesne profits.

Court :

What order do you crave against different Defendants ?

Submits :

No. 8 jointly with others for period March to June 47. No. 1 from 23rd June onward.

Schermbrucker :

Re Chapman v. Hughes.

Tenancies in this case of Defendants 2 and 3 never terminated.

1945 Blendel Rent Restrictions Guide p.48 para. 2.

29.6.48. Clerk to M/S. Christie & Bryson, Advocates.

Mr. Satchu, Advocate.

Mr. Doshi D.D. Advocate.

By consent—Fixed for address in Court at 10.00 a.m. on Friday, 2/7/48.

Joyce Rugg Gunn.

Dist. Registrar.

10

2/7/48 Satchu.

Bryson.

Doshi.

Satchu : S.111 (G).

Courts strongly against forfeitures :—

David v. Salvadora and another (1926) A.I.R. Madras 1202.

Nritendra v. Jogendra (1933) Calcutta 890.

Acts determining lease.

Motilal v. Chandra 1920 Calcutta 866.

20

Naurang v. Jananden 1918 Calcutta 971.

S. 112 Transfer of Property Act.

Sarafali v. Subraya (1896) 20 Bombay 439.

Rent tendered and not returned.

The King v. Paulson (1920) A.I.R. Privy Council 191.

Bengal Nagpur Railway Co. v. Firm Balmukunda A.I.R. (1923) Calcutta 664.

XX. *Crett v. Firm Gamgaraj* 1937 Calcutta 139.

Rajah Sri Amar v. Sheikh Mazir (1939) Oudh 257.

Davenport v. The Queen (1877) 3 A.C. 131.

30

1st breach alleged 24/11/46. Plaintiff knew of breach in December. December rent accepted in December. Another breach in March 1947 and again on 3rd June when Limited Company came in.

Suit instituted September. Rent tendered monthly during that period and received. No return of rent. Cannot accept cheques even under protest.

Intention to treat lease as subsisting Ex.O.

Doshi :

English principles apply.

Bryson :

40

Waiver not pleaded. At no time rent accepted. Tender by cheque not a proper tender and correspondence declares that rent not accepted.

English law applicable.

*In the
Supreme
Court of
Kenya.*

No. 11.
Judge's
Notes,
25th June
to 19th
July 1948,
continued.

*In the
Supreme
Court of
Kenya.*

No. 11.
Judge's
Notes,
25th June
to 19th
July 1948,
continued.

Jones v. Carter 153 E.R. 1040.

Goodright v. Cator 99 E.R. 304.

X. *Elliot v. Paynton* (1924) 1 Ch. 236 and at p. 246.

XX. *Commissioners of Works v. Hull* 1922 K.B.205.

Notice to 1st assignees was an unequivocal overt act by landlord to show forfeiture.

Sergeant v. Nash Field & Co. (1903) 2 K.B. 304.

19/7/48 Judgment in Court on 26/7/48. Originally fixed for 22/7. Now taken out of list as Judge busy in Court of Appeal for E.A.

Joyce Rugg Gunn. 10
Dist. Registrar.

Bryson : Defendants 4 to 8 trespassers.

Brown v. Draper (1944) 1 A.E.R. 246.

If Defendants 4 to 8 wrongly joined then No. 8 entitled to costs and Nos. 4, 5 and 6 to costs up to the filing of defence as they did not appear.

Satchu : for No. 8 : I am entitled to costs.

T. D. M. BARTLEY.

No. 12.
Judgment,
27th and
29th July
1948.

No. 12.

JUDGMENT.

20

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT
MOMBASA DISTRICT REGISTRY.

Civil Case No. 123 of 1947.

KASSAM SULEMAN DAMJI - Plaintiff

versus

1. NGARA HOTEL LTD.,
2. DHIRAJLAL NARANJI JESSANI
3. MAGANBHAI PRABHUDAS PATEL
4. NARAIN DASS MULJI GHAI
5. JUGAL KISHORE
6. GULAM RABANI
7. ABDUS SATAR and
8. REHEMAT ULLAH - - - Defendants

30

27.7.48. As before.

JUDGMENT.

The cause of action in this case is set out in the Plaintiff in the following paragraphs :—

“ By an agreement in writing dated the 24th day of April 1946, the Second and Third Defendants contracted with the Plaintiff for the monthly tenancy of the said Ngara Hotel at the monthly 40

rent of Shs. 500/- subject *inter alia* to the condition that the Defendants should not assign, sub-let or part with the possession of the said premises or any part thereof without the written consent of the Plaintiff.

*In the
Supreme
Court of
Kenya.*

10 On or about the 24th day of November, 1946, the First and Second Defendants in breach of the said condition or covenant on the part of the tenants parted with the possession of the said premises to the Defendants Numbers Four and Five without the consent in writing and knowledge of the Plaintiff and *ipso facto* the tenancy was determined as provided in the said Agreement.

No. 12.
Judgment,
27th and
29th July
1948,
continued.

On or about the 2nd day of March 1947 the Sixth, Seventh and Eighth Defendants joined with the Fourth and Fifth Defendants in illegal possession of the said premises.

On or about the 23rd day of June, 1947, the Defendant Company was formed and joined in the illegal possession of the said premises and carries on its business therein.

The Plaintiff has called upon the Defendants to vacate the said premises but they refuse to do so and this action has become necessary.

20 On the 20th day of August, 1947, the consent of the Rent Control Board was obtained to institute these proceedings."

30 Defendants Nos. 1, 3, 4, 5 and 6 filed exactly similar written statements in which it was alleged (1) that the premises were originally let to the Ngara Hotel and that the Plaintiff knew at the time that Defendants 2 to 5 inclusive were partners in the Hotel, (2) that on or about the 24th November 1946 Defendants Nos. 2 and 3 left the partnership leaving Nos. 4 and 5 to carry on the business, (3) that Nos. 6, 7 and 8 Defendants joined in the partnership, (4) that the partnership of Ngara Hotel was formed into a limited liability company on or about the 23rd June 1947 and that Defendants Nos. 2 to 6 inclusive and others are the shareholders of the company known as Ngara Hotel Ltd. (the first Defendant). The defence denied any right to vacant possession, alleged tender of all rents due to date and submitted lawful possession and also protection under the Increase of Rent and Mortgage Interest Restrictions Ordinance.

40 No. 8 Defendant in his pleading stated that he became a partner in the Ngara Hotel in March 1947 and remained a partner until the limited company was formed in June 1947. At the hearing only Defendants Nos. 1, 3 and 8 were represented. Defendants Nos. 2 and 7 never entered appearances and the advocate who had appeared for Defendants 4, 5 and 6 in preliminary matters asked leave to withdraw as he had no instruction. None of those Defendants appeared.

It will now be convenient to set out the relevant terms of the agreement referred to in the pleadings :—

50 "MEMORANDUM OF AGREEMENT made the 24th day of April One thousand nine hundred and forty-six BETWEEN KASSAN SULEMAN DAMJI, British Indian Landlord of Mombasa in the Protectorate of Kenya (hereinafter referred to as the Landlord) of the one part AND DHIRAJLAL NARANJI JASSANI and MAGANBHAI PRABHUDAS PATEL British Indian Merchants trading under the name and style of Ngara Hotel of Mombasa aforesaid (hereinafter

*In the
Supreme
Court of
Kenya.*

No. 12.
Judgment,
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referred to as the Tenants) of the other part WHEREAS the Landlord is the owner of the premises No. J.276 standing on Plots Nos. 125 and 126 of Section XXVII situate on Salim Road North, Mombasa AND WHEREAS the Landlord has agreed to let and the tenants have agreed to take the ground-floor of the said premises, wherein the The Success Corporation Limited Mombasa had been carrying on business of caterer under the style of Ritz Restaurant (now known as Ngara Hotel) on monthly tenancy at Shs. 500/- (Shillings five hundred) per month subject to the following conditions :—

The tenancy will commence from the 1st day of April 1946 10 and will be terminated by either party on giving one calendar month's notice in writing.

The tenants shall not assign under-let or part with the possession of the said premises or any part thereof without the written consent of the Landlord.

If any monthly rent shall remain in arrear and unpaid for the space of fifteen days (whether legally demanded or not) or if there shall be any breach or non-observance of any of the conditions herein contained the tenancy shall thereupon determine and it shall be lawful for the landlord to re-enter upon the said premises 20 or upon any part thereof in the name of the whole, but without prejudice to any claim which the Landlord may have against the tenants in respect of any breach of the stipulations contained herein.

In Witness whereof the parties have hereunto set their hands and seals the day and year first above written.

Signed Sealed and Delivered by the } (Sgd.) KASSAM SULEMAN
Landlord in the Presence of : } DAMJI.

(Sgd.) A. C. SATCHU,
Advocate,
Msa.

30

Signed Sealed and Delivered by the } (Sgd.) MAGANBHAI
said Tenants in the presence of : } P. PATEL
(Sgd.) A. C. SATCHU, } (Sgd.) DHIRAJLAL
Advocate, } N. JESSANI
Msa." }

The Plaintiff's evidence establishes that Mr. Fatehali Dhalla, the head of the Plaintiff's community and a director of the Success Corporation Limited, approached him with regard to the sale of the Ritz Restaurant to Defendants Nos. 2 and 3 and that he agreed to the transfer of tenancy to Defendants Nos. 2 and 3.

40

No evidence was brought by the defence to try and establish that the Plaintiff knew there were four partners in the Ngara Hotel.

The Plaintiff stated that in December 1946 he heard something and as a result consulted his advocates and Exh. 2 (A) dated the 21st January 1947 was sent to Defendants Nos. 4 and 5 notifying them that they were trespassers and ordering them to vacate. To this letter a reply was received from a Nairobi advocate dated the 27th January stating that Defendants 4 and 5 were partners in the Ngara Hotel and as such were not prepared to vacate.

According to the pleading and the evidence of the 3rd Defendant the position at this date was that the 2nd and 3rd Defendants had retired from the partnership on the 24th March 1946 leaving the 4th and 5th Defendants as continuing partners.

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On the 22nd March 1947 Exhibit 2 (G) was sent to Defendant No. 6 ; this letter is in similar terms to that sent to Defendants 4 and 5. The position at this date according to the pleadings and the exhibits was that Defendants Nos. 6, 7 and 8 had joined Defendants 4 and 5 as partners in the Ngara Hotel Mombasa on the 2nd March 1947. No information as to
10 any of these alleged changes in partnership were given to the landlord.

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Notwithstanding the evidence contained in Exhibit B (1) as to Defendants 6, 7 and 8 joining the firm as partners with Defendants 4 and 5 on the 2nd March it is quite certain from the evidence of Lahori Ram that what had happened was that Defendants 4 and 5 had sold the Ngara Hotel as a going concern to Defendants 6, 7 and 8 as from the 2nd March 1947 and the Plaintiff's advocate submits that the evidence justifies the conclusion that a similar sale as a going concern was made by Defendants 2 and 3 to Defendants 4 and 5 on the 24th November 1946 and on the evidence before me I think this more than likely. The 2nd and 3rd Defendants were
20 the sole partners in the Ngara Hotel Nairobi when they bought the going concern in Mombasa and obtained the lease from the Plaintiff. That lease was clearly a lease to the 2nd and 3rd Defendants and an advocate would have drawn it differently had he been informed as to the alleged position at that time. It was not until the 7th October 1946 that the Ngara Hotel Mombasa was registered under the Registration of Business Names Ordinance and Defendants 2, 3, 4 and 5 shown as partners. This very delayed registration the explanation for which was unsatisfactory was followed on the 24th November by the alleged retirement of Defendants Nos. 2 and 3 from the partnership. This alleged retirement was made the
30 occasion for a change of manager of the hotel the 4th Defendant's nephew being appointed manager. Another change of manager took place on the sale of the hotel as a going concern to the 6th, 7th and 8th Defendants. Again after the lease of the hotel to Defendants 2 and 3 Defendant No. 2 ran the Ngara Hotel Nairobi and Defendant No. 3 the Mombasa Hotel. The other two alleged partners had no hand in running the hotel. In June 1947 when the Ngara Hotel Limited was formed the 2nd and 3rd Defendants were granted one share each and Mr. Bryson submits that this was on a par with the Defendants' action all through to try and establish a chain of ownership. Mr. Schermbrucker for the 1st and 3rd Defendants
40 admitted that there had been a breach of the condition not to assign and the evidence justifies the admission.

Indeed in my view there were three purported assignments of the lease viz. on the 24th November, 1946, when the original tenants sold the hotel as a going concern to the 4th and 5th Defendants, the second on the 2nd March, 1947, when these two Defendants sold to the 5th, 7th and 8th Defendants and finally on the 23rd June, 1947, when it is common ground that the Ngara Hotel Limited was formed and took over the hotel as a going concern. The consent of the landlord was in none of these cases asked for or obtained. It has been argued that there has been
50 a waiver of the breach of the condition in the lease not to assign by

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Exhibit 2 (O). This waiver was not pleaded and a perusal of the correspondence disclose that this letter was obviously written by the landlord's advocate in an attempt to obtain the names of the occupiers of the premises which information was being deliberately withheld from him. I do not consider that waiver has been proved by that letter or by the retention of the cheques for rent. During the whole period under review the landlord was unaware of the true position as I have now found it to be. He was deliberately misinformed as to what had happened and his reactions to the misrepresentations cannot be relied upon as a waiver. There is no evidence of waiver regarding the final transfer to the Company indeed 10 it seems clear from the application to the Rent Control Board Exhibit 2 (Y) that the landlord did not know of this final purported assignment until after he had made that application for leave to institute proceedings.

The landlord at no time before institution of the suit gave any notice or do any act showing his intention to his original tenants to determine the lease and it has been argued that the suit was premature by reason of Section 111 (g) of the Transfer of Property Act, 1882. The relevant portions of Section 111 of that Act reads :—

“ 111. A lease of immovable property determines—(g) by forfeiture, that is to say (1) in case the lessee breaks an express 20 condition which provides that on breach thereof, the lessor may re-enter . . . and . . . the lessor . . . does some act showing his intention to determine the lease.”

Different High Courts in India have come to contradictory conclusions as to the effect of that section vide page 649 of Mulla's Transfer of Property Act, 2nd Edition. After reading the cases cited in Mulla and the cases cited by counsel I have no hesitation in respectfully agreeing with the decision in *Isabali Tayabali v. Mahadu Ekoba* (1918) 42 Bombay 193, that the bringing of a suit for ejection constituted an act showing the lessors' intention to determine the lease within the meaning of the Act. In 30 *Elliott v. Boynton* [1924] 1 Ch. D. 236, Pollock, M.R., in his judgment stated : “ In a long series of cases it has been determined . . . that the lessor must do some act evincing his intention to enter for the forfeiture and to determine the lease . . . ”

“ It was necessary therefore for the Plaintiff in this case to take such a step in order to render his cause of action complete and the issue of the writ is such a step ; *Jones v. Carter.*”

It has also been argued by Mr. Schermbrucker who appeared for the 1st and 3rd Defendants that the Defendants were entitled to the protection of the Increase of Rent and Mortgage Interest Restrictions 40 Ordinance on the ground that this Ordinance applied to owner and occupier and not necessarily to landlord and tenant. In my view from numerous decisions in England it is clear that the Ordinance only protects tenants in occupation. That it does not protect a mere occupier is clear from the decision in *Tara Singh v. Harnam Singh* [1944] XI E.A.C.A. 24.

I give judgment for possession as prayed.

Judgment is also given against the 2nd and 3rd Defendants for rent at Shgs.500/- p.m. from 1st January to the 30th September, 1947, the date of the filing of the suit on which date the tenancy determined and for mesne profits from that date at Shgs.500/- per month until possession 50 given.

I reserve the question as to what judgments should be entered in this respect as to the other Defendants and as to costs for consideration after hearing counsel.

(Sgd.) T. D. M. BARTLEY.

27-7-48.

29-7-48. *Judgment continued.*

10 In my opinion Defendants Nos. 4 to 8 were wrongly joined in this action. They were, it is true, in possession of the property but had vacated before the action was filed and the lease terminated and the Plaintiff has proceeded against Defendants 2 and 3 for rent. I accordingly dismiss the suit as against Defendants Nos. 4, 5, 6, 7 and 8 with costs and the costs of Nos. 4 to 7 are of course only awarded up to their disappearance from the action. There will be costs as prayed against Defendants 1, 2 and 3.

(Sgd.) T. D. M. BARTLEY.

29-7-48.

Order by consent for stay of execution for 14 days pending formal application.

(Sgd.) T. D. M. BARTLEY.

29-7-48.

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No. 13.
DECREE.

No. 13.
Decree,
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IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA.

Civil Case No. 123 of 1947.

KASSAM SULEMAN DAMJI

Plaintiff

versus

1. NAGARA HOTEL LIMITED
2. DHIRAJLAL NARANJI JESSANI
3. MAGANBHAI PRABHUDAS PATEL
4. NARAIN DASS MULJI GHAI
30 5. JUGAL KISHORE
6. GULAM RABANI
7. ABDUS SATAR
8. REHEMAT ULLAH

- Defendants.

DECREE.

CLAIM for vacant possession of premises, rent or mesne profits, costs and such further and other relief as the Honourable Court deem fit.

THIS SUIT coming on the 29th day of July, 1948, for final disposal before His Honour Mr. Justice T. D. M. Bartley in the presence of Counsel

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Decree,
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for the Plaintiff and of Counsels for the Defendants Nos. 1, 3 and 8 and in the absence of Defendants Nos. 2, 4, 5, 6 and 7 IT WAS ORDERED as follows :—

1. Judgment for possession as prayed ;
2. Judgment against the 2nd and 3rd Defendants for rent at Shs. 500/- per month from 1st January, 1947, to the 30th September, 1947, and for mesne profits from 1st October, 1947, at Shs. 500/- per month until possession is given ;
3. Suit against Defendants Nos. 4, 5, 6, 7 and 8 dismissed with costs ;
4. Judgment for costs as prayed against Defendants Nos. 1, 2 and 3.

10

Given under my hand and the Seal of the Court at Mombasa this 29th day of October, 1948.

(Sgd.) T. D. M. BARTLEY,
Judge,

H.M. Supreme Court of Kenya.

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1948.

No. 14.

MEMORANDUM OF APPEAL.

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA 20
AT NAIROBI.

Civil Appeal No. 23 of 1948.

(Being an appeal from judgment in Civil Case No. 123 of 1947 of H.M.'s Supreme Court of Kenya at Mombasa.)

1. NGARA HOTEL LIMITED
2. DHIRAJLAL NARANJI JESSANI
3. MAGANBHAJ PRABHUDAS PATEL (Original
Defendants Nos. 1, 2 and 3) Appellants

versus

KASSAM SULEMAN DAMJI (Original Plaintiff) - - Respondent. 30

GROUND OF APPEAL.

Ngara Hotel Limited, Dhirajlal Naranji Jessani and Maganbhai Prabhudas Patel (1st, 2nd and 3rd Defendants in the Court below), the above-named Appellants appeal from the judgment of His Majesty's Supreme Court of Kenya dated the 27th and 29th July, 1948 (a certified copy whereof is attached hereto) and set forth the following principal grounds of appeal :—

1. The learned Judge erred in holding that the tenancy of Appellants Nos. 2 and 3 (D. N. Jessani and M. P. Patel) had determined before the filing of this suit as :—

40

(1) The re-entry relied upon by the learned Judge as determining the tenancy was not valid in law as the leave of the Court

to exercise such right had not been obtained as required by the Courts (Emergency Powers) Ordinance, 1944, which was then in force.

(2) The filing of the suit which was relied upon by the learned Judge as determining the tenancy of Appellants Nos. 2 and 3 (D. N. Jessani and M. P. Patel) did not operate as :

(a) such suit was not in view of the prayers in the Plaint a clear act showing an intention to determine the tenancy ;

10 (b) the act showing an intention to determine the tenancy should have taken place before the filing of the suit.

2. The learned Judge erred in holding that any breaches of covenants of the tenancy by assignment or otherwise had not been waived by the Respondent.

3. The learned Judge erred in declining to consider whether it was reasonable to make an order for possession.

4. The learned Judge erred in giving judgment for the payment of rent and mesne profits as the rent had been duly tendered before the suit by cheques which had not been returned or non-acceptance of which had not been signified.

20 The above-named Appellants, therefore, pray that this appeal be allowed that the said Judgment of the Supreme Court be set aside and that the Respondent's (Plaintiff's) suit be dismissed with costs here and in the Court below.

Dated at Nairobi this 23rd day of October, 1948.

(Sgd.) R. C. GAUTAMA,
for Trivedi, Nazareth & Gautama,
Advocates for the Appellants.

Filed by :—

30 Messrs. Trivedi, Nazareth & Gautama,
Advocates,
Government Road,
P.O. Box 1048,
Nairobi.

To :—

Messrs. Christie & Bryson,
Advocates,
Mombasa.

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(A) Before Plaintiff can succeed he must show that tenancy was determined before suit filed ;

(B) That Rent Ordinance does not preclude the making of an order.

Ex. 2.T. Clear rent accepted up to that date. Clear a monthly tenancy. Can only be terminated by Sec. 111.

There was a question of waiver. No obligation for Defendants to plead waiver because no determination pleaded. We did show acceptance of rent after alleged breach.

Adjourned to 9.30 to-morrow.

10

(Sgd.) J. H. B. NIHILL P.

18.2.49.

10.30 a.m. Hearing Resumed.

Nazareth : The facts in law do not show a determination of tenancy therefore I was not bound to plead waiver unless re-entry had been pleaded.

Reads judgment dated 27.7.48.

Re-entry clause was not pleaded.

NOTE.—Ex. 2 (A). Was this a waiver to action not to sub-let or assign.

20 Judge's order on 29/7. Dismissed action with costs in favour of Defendant 8.

1st question : Was tenancy determined under Sec. 111 Indian Transfer of Property Act. Sec. 111 (g) the words " or the lease became void " still in the Act for the purposes of this Colony. If there is a clause, giving right to determine a lease on breach of covenant landlord must do something to show he means to exercise his right of re-entry.

10 *Edition of Hill & Raymond* 420 : " actual entry not necessary to constitute re-entry. Bringing an action constitutes re-entry." At p. 422.

30 In India some act is necessary before action filed landlord must write and say he is taking advantage of the condition in the lease.

In England it is a mere matter of election by landlord.

Gour 5th Edition 847 Sec. 87 Penal Code. No emergency legislation required to restrain forcible entry. No physical re-entry necessary. Emergency Powers Ordinance Sec. 3 (2). Brought into force on 6.2.45. Repealed on 30.8.48. Sec. 3 (2) IV. " *re-entry on land.*"

Submits that under this a landlord could not *make a constructive re-entry without leave of the Court.* " Re-entry on land " means the determination of the estate by re-entry.

40 Repealed by Ordinance 65/1948. No proclamation made under Section 1 (2). Ordinance 65 of 1948 a one clause repealing Ordinance.

One of the objects of Emergency Powers Ordinance was to interfere with right to embark on any step. Sec. 4.

In this case it was held that lease was only determined by re-entry under Sec. 111 therefore as there was no leave re-entry was invalid. Bringing of the action was invalid.

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Judge held that "bringing the action" was the act of re-entry. Definition of re-entry is "that act by which the tenant's estate is determined"; or does it only mean taking possession physically.

Mulla 649, para. 3.

Essence of re-entry—lawyer's notice to determine. You can take peaceable possession. You only assert your own right to your own property.

Sec. 114 (a) not in 1882 Act.

[1942] 2 A.I.R. 572 at 576. Sec. 112 waiver acceptance of rent. Distinguishes between exercising a "right of property" not a remedy. 10

If leave not obtained act of writing the letter did not lawfully determine the.

Adjourned 2.15 p.m.

J. H. B. NIHILL, P.

Hearing resumed.

2.15 *Nazareth continues* :—

Bowmaker, Ltd. v. Tabor [1941] 2 A.E.R. 72.

Smart v. Ross [1942] 1 A.E.R. ; 2 A.E.R. 82.

You can't dodge act by agreement.

Abandons ground 2 (A). 20

Re ground 2 (B). I concede that in English law filing action would forsee an act showing intention to determine tenancy. Election is in the landlord.

Here we are dealing with a statute not an election. Sec. 111 I. T. Property Act.

Indian cases contradictory.

33 Calcutta 339 (1906) "held there must be an act prior to filing of the suit."

Mulla 649.

(b) 1908 31 *Madras* 403 (no reason). 30

1913 35 *Allahabad* 145.

"Cause of action" must be complete at institution of the suit.

1917 45 *Calcutta* 469 at 472.

Sec. 111 (g) as unamended see p. 763 Mulla.

Conceded.

By Court: No letter addressed to 2nd and 3rd Defendants before action (Bryson agrees).

Case on which Judge relied 1918 42 *Bombay* 195. This decision did not have before it the 1917 *Calcutta* case.

Bombay case followed by 1924 47 *Allahabad* 348. 40

refers to 1917 *Calcutta* and 1913 *Allahabad*.

Did not refer to *Bombay* case.

1931 58 *Calcutta* at 1359 (this after 1929 amending Act).

Followed *Bombay* but expresses views *obita*. Not a case under Act or all see at 1663.

Submit weight of authority in India strongly in favour of some prior act.

Also your plaint must show complete cause of action. As there was no prior act tenancy was not determined. This quite distinct from Emergency Powers Ordinance. If I succeed on latter point I succeed on all.

Re ground 2 :

Now concede breach pleaded in para. 4 of the Plaint.

10 *Corporation of Bristol v. Westcott* (1879) 12 Chancery 461. Joint possession no breach of the covenant. Other people joining possession is no breach. Mulla 644.

Waiver depends on Sec. 112.

Acceptance of rent. In Nov., 1947, 2nd and 3rd Defendants parted with possession to 4th and 5th.

On 30 May, 1948—See Exh. 2 (T).

[1878] 3 A.C. 102.

Cheques that we sent were never returned. As long as they remained in hands of Plaintiff evidence of payment.

10th Chalmers 265, 266, 267 and 269.

20 A cheque a conditional payment until dishonoured.

Pearce v. Davis (1834) 174 E.R. 125.

Hargrave v. Manchester (1873) L.R. 8 C.P., at p. 685.

By Court : Was it not necessary to plead waiver ?

Nazareth : Yes.

Note : Defence of No. 3 not filed. There was material in the defences pleaded from which the Court could infer defence of waiver.

20 Hailsham at 334 para. 401.

Skinner v. Geary—mere parting with possession.

30 *By Court* : To apply test of reasonableness must there not be a statutory tenant in possession ?

Nazareth : I will answer that after the adjournment.

Hearing adjourned until 9.30 a.m. Wednesday 2nd March.

(Sgd.) J. H. B. NIHILL P.

10 a.m.

2-3-49. *Coram* as before.

Nazareth.

Bryson.

Nazareth : Concede there had been a parting with possession (waived by acceptance of rent) Exhs. Q, O, S & T.

40 Joining of possession no breach of covenant.

At time suit was filed there was a favour and subsequent changes in possession not a breach if he found other breaches other than the breached which was waived he acted outside the business.

Plaintiff could not forfeit lease at time suit was filed.

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Norman v. Simpson [1946] 1 A.E.L.R. 74.

Hope v. Chapman [1947] 2 A.E.L.R. 1.

Skinner v. Geary.

Personal occupation not necessary in case of a business premises.

Reidy v. Walker [1933] 2 K.B. at 266.

Hiller v. United Dairies [1934] 1 K.B. 57.

Principle of *Skinner v. Geary* should not be extended further than necessary. No personal occupation needed as regards business premises.

Carter v. S.U. Carburettor Co. Ltd. [1942] 2 A.E.L.R. at 228.

Brown v. Draper [1944] 1 A.E.L.R. 246.

10

Reasonableness has to be considered.

Shrimpton v. Rabbits (1924) 121 L.T.R. 478.

XII E.A.C.A. 18.

Hart v. Crampton [1947] 2 A.E.L.R. at 604.

Relatives of tenant can be considered.

My first position.

If no valid act of re-entry contractual tenancy still existing.

Main position: *Has the contractual tenancy come to an end.* If it has not Rent Restriction Ordinance cannot apply at all but only ordinary law and L & T.

20

Further point: You couldn't have an act of re-entry without leave of Court. Even a *constructive* act of re-entry.

Butcher v. Mayor of Poole [1942] 2 A.E.L.R. 572.

Point re E.P. Act not taken in Court below.

Thus is this case.

Tenancy not determined because landlord did not obtain leave. But a Court of Appeal will always entertain a new point of law—if no fresh evidence required to maintain it.

Emergency Court's Ordinance overlooked therefore Court of Appeal must take cognizance of a statute.

30

If either of above points succeed there is still an outstanding tenancy and I must succeed.

Final point: If all earlier points fail—still judge did not consider question of reasonableness and there must be a reference back.

Rent for April and May 1947 was paid.

Defendant 1 alleged payments of rent up 10th Nov. 1947.

“ 3 “ “ “ “ “ to date.

No evidence showing return of cheques. Suit filed on 30th September 1947.

Bryson: Not one of the matters now raised in appeal were raised in lower Court. Emergency Powers Ordinance neither pleaded nor argued. Waiver not pleaded and argued on a different point. Reasonableness not pleaded.

40

Don't argue that Nazareth not entitled to argue these points but it must affect the quantum of costs.

Compare correspondence with findings by Judge.

Lease to 2-3/4 & 5.

Plaintiff not only kept in ignorance but deliberately misled. Judge has found in fact that there were three unlawful assignments

24-11-46

2- 3-47

23- 6-47

In the Court of Appeal for Eastern Africa.

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XX at p. 4 of Judgment.

Up to 24-11 Defendants 2 and 3 were partners in business, and were the only original lessees.

From 24-11 to 2-3-47 4 and 5 Defendants sole partners and assignees without consent.

From 2-3-47 to 23-6, 6, 7 and 8 were unlawful sub-assignees. After 23-6-47 legal persons in possession *Ngara Hotel Coy. Ltd.*

Exh. 2 (A)

„ 2 (B) (but Judge found that it was a new partnership after sale).

„ 2 (C)

„ 2 (G) 22nd March to Defendant 6. No reply.

20

„ (K)

„ (L)

Cf. see Record of Evidence. Exh. (L) must contain a misstatement of fact.

Exh. 2 (M). Exh. 2 (O). Exh. 2 (P), (Q), (S).

Exh. 2 (U) 7th June.

Admitted in lower court that by 8th July Hotel sold to D.8.

Exh. 2 (Y) to Rent Control Board.

„ 2 (AA) of Ngara Hotel Ltd.

Basic on question of waiver that landlord was not only not informed but misinformed. Landlord never told of any assignment by Defendants 2 and 3.

Re Ground of Appeal—this (Emergency Powers) Ordinance 1944. Object of Ordinance :—

(A) to protect certain people who have been affected by the War, so that they could not meet their obligations.

(B) it protects such people in the possession of their property.

Sec. 3 (2).

Sec. 3 (4). Only persons to benefit, persons who had suffered by the War. Clear Ordinance only applies to failure to keep affirmative obligations of a lease. How can it apply to negative.

“ I say before I have to go to appropriate Court ” I have to show that tenant has failed to perform an affirmative obligation.

1940 Proclamations G.N. 1155 of 1940 at p. 897 at p. 902.

Rules under Sec. 9 (1).

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I agree.
Sgd.
J.H.B.N.

Submits Ordinance does not apply.

By Court: (Nihill): But does not the obligations to apply to the appropriate Court—apply in every case before re-entry of land.

Adjourned to 2.15 p.m.

(Sgd.) J. H. B. NIHILL, P.

2.20 p.m. Hearing resumed.

Bryson (cont.):—

22nd Woodfall L. & T. 386. *Harman v. Ainslie* [1904] 1 K.B. 698.

Re 2nd point which emerges from Ordinance “ person to be protected is the person in possession.” 10

“ If lease assigned for a re-entry (which I do not concede) it certainly cannot apply to a constructive re-entry.”

By Court (Bourke, J.): If Sec. 3 (2) (iv) was meant to include an act equivalent to re-entry it should have said so.

Re *Butcher v. Mayor of Poole*, at p. 575 at 579.

Ordinance cannot extend to anything but actual physical retaining of possession or re-entry.

S. & A. Services, Ltd. v. Dixon [1940] 3 A.E.R. 98 (hire purchase agreement).

This case decided on Sec. 1 of Ch. 67 1939 Statutes.

If legislature had intended that a landlord could not terminate a lease without leave of Court it would have said so. 20

This followed without consent.

Whitstable Urban C. v. Tritton [1941] 3 A.E.L.R. 405.

Re 2nd ground: “ that act of landlord showing his intention to determine lease must take place before filing of suit.”

Submission in lower Court that there were such prior acts. Sec. 111 (g) I.T.P. Act nothing in section as unamended before 1929 to show that landlord must communicate his intention.

Commissioner of Works v. Hull [1922] 1 K.B. 205. 30

Submit Indian Law the same before 1929 Act.

Landlord's intention clear from the correspondence.

See Exh. 2 (A) also Exh. 2 (G).

Application to Rent Control Board (Exh. 2 (Y)).

This was communicated to original tenants.

Infer from Exh. 2 (AA) that Defendants 2 and 3 informed.

Re Appellants' submission that filing of action itself not sufficient.

Rely on 2 cases: ([1918] 42 Bombay 195 at 197; 58 Calcutta 1259).

Indian section merely codified English common law. 4th Edn. Gour on Indian Transfer of Property Act. Vol. III, para. 2698. 40

Adjourn to 9.30 a.m. to-morrow.

(Sgd.) J. H. B. NIHILL, P.

3.3.49.

9.30 a.m. Hearing resumed.

Bryson (continues)—

re waiver: Before a landlord can waive a breach he must have knowledge. Sec. 112 Indian Transfer of Property Act. In this case we had not full knowledge. See Exh. 2 (B). 34 did not disclose an assignment in November 1947. All through the correspondence there was deception. Trying to assume a lawful link with original partners Defendant 2 and Defendant 3. Judge found 3 clean sales.

10 See also "Y" in judgment.

Even if letter 2 (T) is a waiver there was no waiver of assignment to the limited liability company as no evidence that landlord knew of that at all. This not a dwelling-house—a hotel—difficult for a landlord to find out who was in possession.

Exh. A (2) by this stage as found by judge there had been two assignments.

Privity of contract to pay rent ceases on assignment.

All cheques since December were never cashed—even those referred to in 2 "T."

20 *re question of reasonableness*:

Can *Skinner v. Geary* be extended to "business premises." If it does and I say it must. Principle "if a business tenant ceases to carry on business in the leased premises goes elsewhere he must cease to have the protection of the Ordinance."

Ordinance does not apply because 2 and 3 out of possession for 18 months. Even if Court below should have this Court can deal with reasonableness.

Summary:—

- 30 (A) That Emergency Courts Ordinance does not apply ;
 (B) anyhow that re-entry means a physical re-entry ;
 (C) re forfeiture, there was a prior act ;
 (D) re reasonableness.

re Cross Appeal 34/1948.

I submit in circumstances Defendant No. 8 not improperly joined but even if he was, judge should have exercised discretion in my favour.

Not complaining against costs awarded to 4, 5, 6 and 7.

40 Judge's reasoning wrong because it was necessary for proper trial of suit to join these defendants. If we had sued only 2 and 3 and the Limited Company the Court would have had no knowledge of all the links in the chain.

By Court: In an unlawful assignment you must join unlawful occupier.

Even if wrongly joined see Order 1 Rule iv (2). Defendants 4, 5, 6 and 7 filed defences but went no further. Defendant 8 could have asked leave to be struck out. I abandon mesne profits against No. 8.

If Respondent succeeds I still should not be mulcted in costs as none of his issues pleaded.

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Mr Nazareth : re Costs :

Plaintiff failed himself to plead right of re-entry, on which my new points hung. Bullen and Leake's Precedents. Plaintiff should have pleaded his cause giving right of re-entry.

Para. 4 of Plaintiff is wrong. "Lease was not *ipso facto* terminated." This now conceded to be wrong. Waiver hung on this—also Emergency Powers Ordinance. If the Plaintiff had been clear our attention would have been withdrawn.

[1946] 2 A.E.R. at 329. *Lemon v. Lardeur.*

No told cases cited. Determination of lease by a forfeiture in Kenya— 10
fairly uncommon. In general all Defendants denied determination of the lease. No obligation on me to plead reasonableness. So far as pleadings Plaintiff was to blame more than me.

As regards assignments nothing in pleadings. Judge found "purported" assignments. Judge was only addressing his mind to "parting of possession."

There was no evidence of "assignment" at all.

Replying to Bryson re-application of Emergency Powers Ord.

Re "negative covenants."

[1904] 1 K.B. at 698 at p. 700. *Harman v. Ainslie.*

20

You can have non-performance of a negative covenant. See Sec. 6 (3) of Ordinance. Ordinance does not only protect persons actually in possession.

Re submission that "re-entry" only meant physical re-entry. No justification for any distinction between actual and constructive re-entry.

In modern law it is the determination of estates that is the essence of re-entry.

20 Hailsham at 252 para. 285.

Entry is going on land or doing something "equivalent." Impossible to maintain this in the light of *Butcher v. Poole*. Does it include a mere 30
act such as filing a letter.

Re S. & A. Services case—This concerned "moveables" only. Constructive re-entry is also self help.

15 Williams on Personal Property at p. 52. Self help is "filing of the suit."

Plaintiff could have given me a valid notice to quit—thus re-entered without leave of appropriate Court.

Notice to Rent Control Board not sufficient as not a notice to contractual tenants themselves and was not proved as having been brought to their notice. 40

Acceptance of rent after filing of suit not a waiver—This was the case in *Commissioner of Works v. Hull*.

Mulla 651 at top of page—any acceptance of rent operates as a waiver. See p. 2 of record.

45 Calcutta. A proper pleading should have shown an act showing intention to determine lease.

14th Gour's T.P. Act p. 1809.

"some act or other before the determination of the suit."

Waiver—landlord's knowledge. Exh. 2 (A) of 21.1.47 shows that he knew position and was acting on it.

also

After knowing all this he accepts rent in 2 (T).

Defendants 2 and 3 never ceased to be liable for rent. Sec. 108 (j) Mulla p. 596. Mere fact that cheques not cashed immaterial.

re reasonableness—had to be considered.

10 *Brown v. Draper.*

Appeal should be allowed for reasons given.

This case arises purely *on forfeiture.*

re Cross Appeal :

Submit fact here is that lease not determined before 30 Sept., 1947. Judge gave rent up to that date and thereafter mesne profits. Findings not challenged. Therefore privity of contract between 2 and 3 up to 30.9.47. In order to make other persons liable for rent there must have been new contract not alleged or privity of estate. Can only be shown by complete assignment to No. 8. See Mulla 614 at p. 615. Possession alone without assignment does not render one liable to rent.

1913 *Calcutta at p. 148 at 155.*

Utmost judge found was a purported assignment.

Sec. 54 of Transfer of Property Act. An assignment of a lease must be in writing and registered.

14 Allahbad p. 176.

5th Edn. Shepherd Transfer of Property Act 391.

Gour " " " " 6th Ed.

Vol. III at 1942.

Bryson concedes no assignment in writing produced.

30 31 *Bombay* 159.

There was no justification for filing suit against No. 8 so I should get my costs.

No. 8 not in possession on 30.6.48.

A claim for mesne profits is really a claim for damages.

1942 1 *A.E.L.R.* 136.

No. 8 was never properly joined. Judge was right. No. 8 had to defend because a claim made against him for rent.

Bryson :

No reply on cross appeal.

40 Judgment reserved.

(Sgd.) J. H. B. NIHILL P.

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14.3.49 Coram as before.
Judgments delivered.
Appeal dismissed with costs.
Cross Appeal dismissed with costs.

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Nazareth asks for stay pending an application for leave to appeal to Privy Council which I enter at Kampala.

Value of premises 500/- per month rental.

Probably appeal as of right.

Hamilton : Has no instructions.

Order : Stay of execution of the Order of possession will be granted for one month from to-day.

10

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IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI.

Civil Appeal No. 23 of 1948.

NGARA HOTEL LIMITED and two Others

20

versus

KASSAM SULEMAN DAMJI.

JUDGMENT (Nihill, P.) :

This is an appeal against a judgment of the Supreme Court of Kenya which allowed an order of possession to the Respondent who is the landlord of certain premises in Mombasa known as the Ngara Hotel. The Appellants were the second and third Defendants in the Court below and were the tenants of the premises on a monthly tenancy from the 1st April 1946 under an agreement in writing bearing date 24th April 1946. Five other Defendants were joined in the suit as well as a limited liability company now known as Ngara Hotel Ltd. which was cited as the first Defendant. The second and seventh Defendants never entered appearance and the fourth, fifth and sixth Defendants after filing exactly similar defences withdrew. There is a cross appeal also before us (Civil Appeal No. 34 of 1948) from an order made by the learned Judge in which he held that Defendants four to eight had been wrongly joined and that the suit against them must be dismissed with costs.

In this appeal the Respondent is the Appellant and the Respondent is the eighth Defendant. After listening to the evidence the learned

Judge in the Court below came to the following finding of fact which I see no reason to disturb, namely that there had been three purported assignments of the lease (1) on 24th November 1946 when the second and third Defendants sold the hotel as a going concern to the fourth and fifth Defendants (2) on the 2nd March 1947 when these two Defendants sold to the sixth, seventh and eighth Defendants and (3) on 23rd June 1947 when the Ngara Hotel Ltd. was formed and took over the hotel as a going concern. It is common ground that in none of these changes in the ownership of the business and the changes in possession which they
 10 involved was the consent of the landlord, Respondent, asked for or obtained. They therefore constituted breaches of the covenant contained in clause 5 of the Lease of 24th April 1946 which is as follows :—

“ 5. The tenants shall not assign, underlet or part with possession of the said premises or any part thereof without the written consent of the landlord.”

It has been clearly established that on 30th September 1947 when the suit was filed the original tenants, the second and third Defendants, were no longer in actual occupation of the premises and in view of this the learned judge on the decision of this Court in *Tara Singh and Another v. Harnam Singh* (XI E.A.C.A. 24), which followed the English case of *Skinner v. Geary* ([1931] 2 K.B. 546), held that the tenancy was not one protected by the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940. In both the above cited cases the contractual tenant had abandoned the possession of a dwelling-house and Mr. Nazareth has argued that the principle laid down in *Skinner v. Geary* should not be extended to business premises as in the case of business premises personal occupation is not of the essence. In view, however, of the wording of Section 19 of the Ordinance I am of the opinion that the words in Section 17 “ so long as he retains possession ” must apply to business premises. I can envisage
 20 interesting questions arising as to whether there had been abandonment of possession arising in cases where, for example, the owner of a business had moved the headquarters of his business to other premises leaving only a branch manager behind, but in a case like the present where the contractual tenants have sold the business and departed no such question can arise and I think the learned judge was right in applying the principle in *Skinner v. Geary*.
 30

This, however, is by no means Mr. Nazareth’s only or indeed his chief iron in the fire. His main contention is that there has never been a lawful determination of the tenancy and that the breaches of the covenant have
 40 been waived by acceptance of rent. On the issue of waiver I think that the learned judge came to the right conclusion—leaving out of account the fact that waiver was not specifically pleaded I consider that the only reasonable inference to be drawn from the evidence and the correspondence is that the Appellant when accepting cheques for rent (which he never cashed) had not full knowledge of the cause of forfeiture and that such acceptance did not therefore amount to an election by him to waive the forfeiture. All the correspondence at the material times shows that although he suspected that there had been a breach he was quite in the dark as to its precise character and extent. He was in fact seeking for
 50 information as to the true position which the other side showed quite a singular dexterity in withholding. In addition to this there was a further

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breach of the covenant by the purported assignment of the 23rd June 1947 to the limited liability company about which it is certain that the Appellant had no knowledge, at least until after he had applied to the Rent Control Board for leave to institute proceedings (14th July 1947).

I now come to the main issue in this appeal. Was there at any time a lawful determination of the tenancy? By the English law of landlord and tenant there can be no doubt that before the enactment of the Law of Property Act 1925 the institution of an action for ejection was equivalent to re-entry which determined the lease. The law in Kenya on this matter is, however, governed by the provisions of the Indian Transfer of Property Act 1882, as amended up to 1907. The relevant section of that Act, before the amending Act of 1929 which has never been applied to Kenya, is as follows:—

Section 111 (g):

“ A lease of immovable property determines—

(g) by forfeiture; that is to say (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease.”

It is contended on behalf of the Appellant that after the lease became void by reason of breach of covenant there was no act by the landlord showing his intention to determine the lease so that his cause of action was not complete when he filed his suit. On this point the learned Judge in the Court below relied on the decision in *Isabali Tayabli v. Mahadu Ekoba* (1918), 42 Bombay 195, for holding the view that there mere bringing of the suit was a sufficient intention on the part of the landlord to show that he had elected to determine the tenancy. Other Indian High Courts, however, have taken a contrary view and have held that some prior act of intention to determine the lease is a condition precedent to the right of suit for ejection (Mulla, 6th ed., p. 649). I am not sure that Mr. Nazareth is not right in his submission that the weight of authority in India prior to the passing of the 1929 amending Act is against the view that the filing of a suit is *per se* sufficient. But assuming that the learned judge was wrong, I have no hesitation in finding that the Respondent's application to the Mombasa Rent Control Board for permission to institute proceedings was a sufficient act showing his intention. This application was dated 14th July 1947 (Ex. 2 (Y)) and the letter Ex. 2 (AA) shows clearly that summonses to attend the hearing of the application were served at the Ngara Hotel on the tenants, the second and third Defendants, service on their behalf being accepted by the secretary of the hotel. That they may not have had personal notice of the application because one was in India and the other somewhere else seems to me to matter not a bit. The Respondent had done his best to show his intention.

I now come to what may perhaps be regarded as the Appellants' trump card. If all else fails it is contended that the re-entry relied upon by the learned judge as determining the tenancy was not valid in law as the leave of the appropriate court to exercise that right was not obtained as required by the provisions of Section 3 (2) of the Courts (Emergency

Powers) Ordinance 1944. This typical piece of wartime legislation survived on the Kenya Statute Book until 30th August 1948, but it was in force on the material date in this case when the Respondent filed suit (September 1947). The argument is that the Respondent was not entitled to do an act equivalent to re-entry without leave of the Court which it is conceded he did not obtain. Therefore this re-entry was unlawful and there has been no lawful determination of the tenancy. The argument is an ingenious one, but I think it must fail. I for one am not prepared to say that Section 3 (2) (a) (iv) of this Ordinance was meant to include an act equivalent to re-entry. If the legislature meant this they should have said so. An examination of the other remedies set out in sub-paragraph (a) of sub-section (2) of the Section show that they belong to the species which may be termed "self help." In my view therefore, the correct interpretation to give to the words "re-entry upon any land" is the ordinary meaning of an actual physical act. If I am wrong then the extraordinary position is reached that the Respondent before he could take any effective action in face of his tenants breach of covenant had not only to obtain the leave of the Rent Control Board, but of the appropriate Court as well.

20 I would add that this point was never pleaded or argued in the Court below, and if I thought that there was substance in it, it would be a matter not without difficulty to determine whether as an appellate court we should look at it at all. As it is, the view I take of the construction to be placed on the relevant section of the Ordinance relieves me of the necessity of deciding the point and I will therefore content myself in saying this. Whilst it may have been the practice of this Court not to hold the parties too strictly to their pleadings and arguments in Courts of first instance this Court has a discretion in the matter and will not lightly allow the introduction of new matter, even when it is claimed that the point advanced

30 is one purely of law and needs no fresh evidence to support it. The litigant therefore, who by design or inadvertence leaves something out in the Court of first instance which if argued might have resulted in a decision in his favour cannot necessarily expect either the indulgence or sympathy of this Court.

I now come lastly to the third ground of appeal that the learned judge failed to consider the question of reasonableness and therefore offended against the requirements of Section 11 (1) of the Ordinance. On this question I take my stand on the principle set out in *Skinner v. Geary* especially as enunciated by Lord Justice Scrutton and I quote a passage from his judgment (at p. 561) when considering Section 4 of the Act of 1923 which for all material purposes is the same as Section 11 of our Ordinance :—

40 " The argument of Mr. Safford may be called the twin brother of that just quoted, put the other way, for he says that Section 4 of the Act of 1923 provides that an order for possession shall not be made except in certain specified circumstances, and where he asks ; are there any words in that Section dealing with a tenant who is not in possession of the premises, but is living somewhere else ? Parliament, says Mr. Safford, has not dealt with that case. In my opinion it has not done so because it never contemplated the possibility of the tenant living somewhere else. A non-occupying tenant was in my opinion never within the precincts

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of the Acts, which were dealing only with an occupying tenant who had a right to stay in and not to be turned out. This case is to be decided on the principle that the Acts do not apply to a person who is not personally occupying the house and who has no intention of returning to it."

Again earlier at p. 559 :—

"That being so, he appears to me to come within the fundamental principle of the Act that it is to protect a person who is resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by 10
sub-letting it."

I have already given my view that by virtue of Section 19 of the Ordinance the principle in *Skinner v. Geary* is capable of being applied to business premises and must be so applied. The purpose behind the section and exercise by the Governor-in-Council of the power given to extend the application of the Ordinance to business premises must have been to protect the business man who if turned out of the premises he was occupying would have no other place to go to from which to conduct his business. I would therefore paraphrase the second passage from the judgment of Lord Justice Scrutton which I have just quoted and say that it would not 20
be consistent with the fundamental principle of the Ordinance to hold that it protected an ex contractual tenant of business premises who had ceased himself to carry on business therein but for his own purposes was making money by sub-letting them to others. It is true that the second and third defendants have retained one share each in the business now known as the Ngara Hotel Ltd. This limited liability company which is the first defendant can be said to have been in possession on the material date but its possession flows only from an unlawful assignment. The fact that the contractual tenants have retained an interest in the business cannot be said to show that they are tenants in occupation. If Mr. Nazareth holds 30
shares in Kenya Breweries, which he may well do, I am sure that he would not argue that thereby he was in either occupation or possession of a brewery. The learned judge therefore having found (and it could not be disputed) that the second and third defendants were not in actual occupation of these premises he was right in my opinion in holding that they had not retained possession within the meaning of the Rent Restrictions Ordinance. This being so Section 11 (1) cannot enure to the advantage of occupiers of the premises who are occupying without any shadow of title. To hold the opposite would be to turn these occupiers into statutory tenants which they can never be. The question as to 40
"reasonableness" does not therefore arise. As regards the submission made in the fourth ground of appeal, this matter was only dealt with very briefly in Mr. Nazareth's argument but it seems apparent from the correspondence that the rent tendered was not tendered on behalf of the second and third defendants but by the persons who were at the time unlawfully in possession. The learned judge could therefore make no other order than he did.

On the cross appeal to which the eighth defendant appears as Respondent I see no reason to find that the learned judge exercised his discretion wrongly in the matter of costs which he awarded to the fourth 50

to eighth defendants. This was a matter in the discretion of the trial judge and I cannot see that he acted on any wrong principle.

The Appellants fail on every ground and the appeal of the first, second and third defendants must be dismissed with costs.

The cross appeal will also be dismissed with costs.

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EDWARDS, C.J.

10 I agree with the Judgment just delivered by the learned President and have nothing to add.

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(Sgd.) D. EDWARDS.

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No. 18.

JUDGMENT of Bourke, J.

20 The Plaintiff in the proceedings out of which this appeal arises sued eight defendants, to whom it will be convenient to refer, as was done in argument and throughout the judgment of the lower Court, by the numbers as given upon the plaint. The action was for rent, mesne profits, and for the recovery of possession of certain premises in Mombasa let by the Plaintiff as a monthly tenancy to defendants 2 and 3 under a written agreement of the 24th April 1946. The Plaintiff in the exercise of a right of re-entry relied upon a forfeiture arising through the breach and non-observance of a covenant not to assign, underlet or part with the possession of the premises or any part thereof without the written consent of the landlord. Breach of the covenant as alleged was found as a fact and no dispute now arises as to that. The plaintiff obtained the relief he prayed against defendants 1, 2 and 3 who are the present Appellants.

30 The appeal has been fought on behalf of the Appellants upon four grounds, the first of which was never put forward at any stage of the trial before the lower Court, and lacks nothing in both novelty and ingenuity. The argument is based upon certain provisions of the Courts (Emergency Powers) Ordinance, 1944, which was repealed about a month subsequent

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to the date of pronouncement of judgment in the action. The relevant portions of section 3 (2) of the Ordinance read as follows :—

(2) Subject to the provisions of this Ordinance, a person shall not be entitled, except with leave of the appropriate Court—

(a) to proceed to exercise any remedy which is available to him by way of

(ii) the taking of possession of any property ;

(iv) re-entry upon any land.

The plaintiff did not move to obtain such leave and it is now said that as a consequence of the absence of leave there never was any 10 determination of the tenancy despite the breach of covenant and the forfeiture clause and proviso for re-entry in the tenancy agreement ; in other words the statutory provisions quoted affect the contract of lease and unless leave of the Court is obtained to proceed to exercise a remedy available by way of re-entry upon land the forfeiture does not operate, so that in the circumstances defendants 2 and 3 are still entitled to a good and valid interest as contractual tenants whose estate has never been determined. The proposition I find somewhat startling and I confess to the impression entertained hitherto that the only statutory obligation of this 20 kind resting upon a landlord seeking to bring proceedings of this nature is provided for by section 4 of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, which was complied with by the Plaintiff when he sought and obtained the written consent of the Rent Control Board to the bringing of the action. Whether the Appellants should properly be heard at all upon this new line of defence has given me much concern. It is of course a point of law and if it had been raised in the Court of first instance it seems quite evident that the Plaintiff whose interest it was to dispute it would not or could not have called evidence which would affect the result.

But the question is raised, apparently as an afterthought upon 30 legislation devised to meet conditions of emergency springing from the effects of war. To obviate hardship and in recognition of the difficulties likely to affect persons in abnormal times the Courts were given special powers to control the pursuit of certain remedial measures in relation to and effecting a change in the possession of property. No doubt it is beside the point, though I think it deserving of comment, that at no stage of these proceedings has it been suggested for a moment that the Appellants have to any degree, so far as the premises the subject-matter of the suit are concerned, been the victims of such conditions as impelled the passing of the legislation under consideration. The generally accepted principle, 40 however, seems to be clear that where it is desired to take a new point of law, which was not taken in the Court of first instance, the Court of Appeal has a discretion, and in seeking to do justice is likely to permit any new point of law to be raised which can effectively be taken without seeking to adduce fresh evidence and which is not inconsistent with the conduct of the case before the Court of trial (*Banbury v. Bank of Montreal* [1918] A.C. 626 ; *The Tasmania* [1890] 15 App. Cas. 679). But it is by no means uncommon to find points of law being taken in this Court for the first time and litigants and their advisers would do well to take heed of the words used by Lord Birkenhead, L.C., in *North Staffordshire Railway* 50 *Company v. Edge* [1920] App. Cas. 254, 263 :—

10 “ An attempt indeed was made to present the argument to the Court of Appeal, but that tribunal refused, and in my opinion rightly refused, to be influenced by an attempt so belated. I share their view for many reasons, to some of which I attempted to give expression in *Wilson v. United Counties Bank* [1920] A.C. 102 ; 88 L.J. (K.B.) 1033. An attempt was made in the argument to distinguish the doctrines there laid down from those which it was said ought to govern the present case, on the grounds that the issue here was a simple point of law of such a kind that the Respondent could sustain no possible prejudice by the postponement of its discussion to the appellate stage. It is sufficient to say, in reply to this contention, that there are very few cases of which it can be confidently stated that a failure to raise a relevant contention at the appropriate stage will not prejudice the other litigant . . . But I desire to draw attention to a consideration which in my view is both more general and more important. The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument 20 it is the invariable practice of appellate tribunals to require that the judgments of the Judges in the Courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the Appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the Judges in the Courts below. Decisions of this House have laid it down that in very exceptional cases, and in spite of the 30 considerations above referred to, new matters may be considered by your Lordships ; see the judgment of Lord Halsbury in *Sutherland v. Thomson* [1906] A.C. 51) and the judgment of Lord Watson in *Connecticut Fire Insurance Co. v. Kavanagh* [1892] A.C. 473). I have carefully examined the cases upon the subject which have been decided in this House, and my examination of them has led me more and more to the conclusion that such attempts must be vigilantly examined and seldom indulged.”

40 And in *The Garden Gully United Quartz Mining Company v. McLister* (1875), 1 A.C. 39, 57, their Lordships of the Privy Council went so far as to say this :—

50 “ Their Lordships are not disposed to hold parties too strictly to their pleadings in the lower Courts ; but they consider that it would be an act of great injustice to allow defences to be set up in appeal which have not been suggested or alluded to in the pleadings, or called to the attention of the Courts below. They do not, therefore, wish it to be understood that by hearing the learned Counsel for the Appellant, and by expressing an opinion upon points which were not raised in the Court below, they would have felt themselves justified in reversing the decision of the Court below, if they had considered that the points thus raised constituted a defence to the Plaintiff’s claim.”

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In the present case learned Counsel for the Respondent, though calling attention to the fact that the point was never raised before the lower Court, has put forward no objection to its being taken at this stage subject, if the event should so justify, to compensation through the medium of costs; and this Court has had the benefit of a very full argument on both sides. In my opinion the question is one that can be shortly answered. It would indeed be strange if the legislature set out to grant any degree of relief or come to the assistance in any way of a person who deliberately breaches, commonly, and as the findings in the instant case seem to disclose, for his own benefit, a covenant of this nature—against 10 assigning, sub-letting or parting with possession without the lessor's consent—and who makes, as in this case, no approach whatsoever to the lessor to ask for leave. It has never been the policy of the statute law in England to grant relief from forfeiture for breach of such a covenant, neither under section 14 of the Conveyancing Act, 1881, nor under the superseding provisions of section 146 of the Law of Property Act, 1925. It has even been held in the case of a covenant against assigning without the lessor's consent, such consent not to be unreasonably withheld, that the Court could not relieve against a forfeiture incurred through the lessee assigning without asking the lessor's leave, even where if he had asked 20 for it the lessor would not reasonably have refused it (*Barrow v. Isaacs* [1891] 1 Q.B. 417). The Courts (Emergency Powers) Ordinance, 1944, is in line with the English Courts (Emergency Powers) Act, 1939, which was closely considered in *Butcher v. Mayor & Ors., of the Borough of Poole* [1942] 2 All E.R. 572, a case which counsel on each side relies as being in his favour. Lord Greene, M.R., considered the Act as a whole and in particular the very same provisions of the subsection appearing in the local Ordinance with which we are now concerned. I do not propose to attempt to condense the reasoning of the learned Master of the Rolls for the purpose of this judgment because it seems to me sufficient for decision 30 upon the point in the circumstances of this case to state and adopt one conclusion reached in the judgment as expressed by the following words (*supra*, at p. 578)—

“ the truth of the matter, in my judgment, is that this subsection has nothing to do with the exercise of a remedy the right to exercise which does not arise by reason of default in payment of a debt, or performance of an obligation, . . . ”

and *per du Parcq*, L.J. (p. 579) :—

“ I am quite clearly of opinion that, when one looks at the whole Act, it is manifest that when the legislature speaks of a person to whom the remedy of re-entry upon land is available, it means in this context that person who has the right of re-entry by reason of the antecedent failure of the occupier of the land to fulfil some obligation.” 40

There is repeated reference throughout the judgment of Lord Greene, M.R., to the exercising of a remedy arising by the default of the performance of an obligation. A tenant can default in the performance of an obligation to pay rent—an affirmative obligation of that kind of which there is non-performance; but by breaching a covenant not to assign or sub-let or part with possession without consent of the landlord a tenant 50 accomplishes something with deliberation which he has obliged himself

not to do. In so acting no doubt it can be said that he has failed to observe an obligation under the contract—a covenant negative in its character obliging the covenantee to refrain from doing something; but I do not think that the subsection in the Ordinance has anything to do with or covers at all a remedy which arises and falls to be exercised by reason of such a positive course of action by a tenant in breach of a covenant of this nature. I can find nothing in *Butcher's* case to support a contrary conclusion, and I am of the view that a reading of section 3 (4) is decisive of the question. It is there provided that if on an application for leave
 10 as is required for the exercise of rights or remedies under the earlier subsections—

“the appropriate Court is of opinion that the person liable to satisfy the judgment or order or to pay the rent or other debt, or to perform the obligation in question, is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged . . .”

the Court may refuse the exercise of that right or remedy. How in all commonsense could the provisions of that subsection possibly be applied where it is a matter of a tenant who has broken a covenant by assigning
 20 or subletting his interest or parting with possession without the requisite permission? But of course it was never intended to cover such a case. As was said by MacKinnon, L.J., in *Bowmaker v. Tabor* [1941] 2 All E.R. 72, 78 :—

“Manifestly the object of the Act is to protect those in the position of debtors from the exercise against them of the rights of their creditors ”

The Ordinance was framed to afford some protection to the person liable otherwise to suffer hardship owing to circumstances springing from a state of war. So far from being made available as a shield to a person
 30 who of his own free will in breach of covenant, and in all probability to his own financial betterment and convenience, parts with his possession to another. The Ordinance was aimed at empowering to maintain a *status quo* in regard to the possession of property so that it should not pass to another through the exercise of a normal and legal remedy. The argument before this Court, or a large portion of it, was a good deal more labyrinthine in its direction than the route I have taken towards solving the question to my own satisfaction; but I am content to leave it at that. I am of the opinion that there is no substance whatsoever in this belated point put forward on behalf of the Appellants.

40 The next ground of appeal is that there should have been an act showing an intention to determine the tenancy before the filing of the suit; the bringing of the proceedings for recovery of possession is, it is submitted, insufficient. That brings one to section 111 (g) of the Transfer of Property Act, 1882, as it read prior to the amending Act of 1929 which altered the law by requiring that the lessor should give notice in writing to the lessee of his intention to determine the lease, but which does not apply to this Colony. Under section 111 clause (g) as applicable in Kenya it is only necessary for the lessor to do “some act showing his intention to determine the lease.” Mr. Nazareth for the Appellants bases his
 50 contention upon the reasons given in certain judgments of Courts in India, where decisions on the point appear to have been conflicting. The broad

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proposition relied upon may be observed from the following passage taken from the case of *Nowrang Singh v. Janardan Kishor Lal Singh* (1917) 45 Calc. 469 :—

“ . . . the institution of the suit for ejection cannot be rightly regarded as the requisite act to show the intention of the landlord to determine the lease within the meaning of section 111 clause (g). The forfeiture must be completed and the lease determined before the commencement of the action for ejection, for there must be a cause of action in existence antecedent to the suit.”

The learned judge in the Court below felt no hesitation in adopting the reasoning of the decision in *Isabali Tayabali v. Mahadu Ekoba* (1918) 42 Bombay 195, which was considered and approved on a review of the conflicting cases in *Prakashchandra Das v. Rajindranath Basu* (1931) 58 Calc. 1359, although in the latter case the Court was of opinion that the Transfer of Property Act had no application in the particular circumstances. In both cases under reference it seems evident that the judges inclined to think that the concluding words in clause (g) of section 111 were not intended to do anything more than lay down the law as it stood at the time according to the relevant English authorities. In *Isabali Tayabali v. Mahadu Ekoba* (*supra*) Batchelor, J., said this :—

“ Now the only requirement of section 111, clause (g) of the Transfer of Property Act is that the lessor ‘ does some act showing his intention to determine the lease.’ Neither in the Calcutta case nor in either of the Madras cases is any special reason given why the lessor’s election must be made at some time prior to the institution of the suit, and if the election has been made at the moment when the suit is instituted, that is, at the moment the plaint is presented, it seems to me difficult to find any ground for saying that the cause of action has not completely accrued. It is clear that in England, since the Judicature Acts, the landlord’s intention to enforce the forfeiture is sufficiently manifested by his bringing an action in ejection. In *Toleman v. Portbury* (1871), L.R. 6 Q.B. 245, it was held that by a writ of ejection there was a final and conclusive election to put an end to the tenancy ; and that, as explained by Mr. Justice Fry in *Evans v. Davis* (1878), 10 Ch. D. 747, 763, was because ‘ an action in ejection is an unequivocal assertion of a right to present possession. It is equivalent to the old entry.’ And the same law is laid down in *Jones v. Carter* (1846), 15 M. & W. 718 ; 153 E.R. 1040 and in *Serjeant v. Nash, Field & Co.* [1903] 2 K.B. 304. But if the bringing of the action is equivalent to the old entry in the English Courts, I can see no valid reason why it should not be equivalent to, and constitute the ‘ act showing the lessor’s intention ’ which is required by the Indian statute. And, that act being done and completed when the plaint is presented, it seems to me to follow that at that point of time the lessor’s cause of action is complete.”

With respect, I am in agreement with the conclusion arrived at by the learned trial Judge that the statement of the law given in the case from which I have just quoted is correct and should be adopted. I can see no good and sufficient reason to hold that the bringing of an action in ejection is not an act showing the lessor’s intention to determine the

lease within the meaning of the section and I find it unnecessary to deal with the Respondent's alternative argument that anyway the letters, Exhibits 2 (A), 2 (G) and 2 (Y), constitute acts indicating the lessor's intention antecedent to the filing of the plaint.

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On the question of waiver of the forfeiture I have little to say. Waiver was not expressly pleaded but argument has proceeded thereon both here and before the lower Court. In dealing with the point the learned Judge below reached the following conclusion of fact—

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of
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14th March
1949,
continued.

10 “During the whole period under review the landlord was unaware of the true position as I have now found it to be. He was deliberately misinformed as to what had happened and his reactions to the misrepresentations cannot be relied upon as a waiver.”

In my opinion that finding was fully justified having regard to the evidence. Until the landlord had ascertained the true circumstances, which he endeavoured repeatedly to do and was put off with evasive and, on the findings, misleading replies, he could not reasonably be said to be in possession of that knowledge requisite to a valid waiver under section 112 of the Transfer of Property Act.

20 A further ground of appeal argued before this Court consists of the allegation that the lower Court erred in declining to consider whether it was reasonable to make an order for possession. That raises the question as to the applicability or otherwise of the Rent and Mortgage (Restrictions) Ordinance, 1940, and in particular section 11 thereof, in the circumstances of the case. Now it is not in dispute that the premises are business premises to which the Ordinance applies by virtue of the provisions of section 19. The point really comes down to this, whether the principle established by *Skinner v. Geary* [1931] 2 K.B.D. 546, and *Heskins v. Lewis* [1931] 2 K.B. 1, can have any bearing in relation to a letting of
30 business premises. No English authority in precise point is available because the English Acts do not apply to business premises and the question does not seem to have arisen during the short period that s. 13 of the 1920 Act was in force; but the decisions in the two cases mentioned were reached largely through an analysis of the essential purposes and objects of the Acts and to my mind the present question can only be resolved by pursuing a similar line of enquiry. It may in the first place be noted that under section 19 of the Ordinance its provisions, with certain obviously necessary modifications, are made to apply as
40 fully and comprehensively to business premises (in areas and districts covered by the requisite Proclamation of the Governor in Council) as to dwelling-houses. I make no excuse for referring once again to the well known principles. In *Heskins v. Lewis*, Scrutton L.J. spoke of 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 who is making money by sub-letting it.” And in the same case Romer L.J. said that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home. Where, therefore, when the contractual tenancy came to an end the tenant was not in physical possession of any part of
50 the premises, there was nothing in the Act which enabled him to resist

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a claim of his landlord to possession whether he had gone out without sub-letting the premises or whether he had sub-let the premises as a whole. In *Tara Singh v. Harnam Singh*, XI C.A.E.A. 24, in which *Skinner v. Geary* was followed by this Court, Sheridan C.J. said—

“ The decision in *Skinner v. Geary* on a construction of the provisions of the English Rent Restriction Act similar to section 11 (1) of the local Ordinance was that the fundamental principle of the Rent Restriction Acts being to protect a tenant who is residing in a house, a tenant to be entitled to the protection of the Acts must be in personal occupation or actual possession of the premises in respect of which he seeks that protection.” 10

One can readily speculate as to the varying problems that might arise according to circumstances in the case of business premises, where it is not a matter of the conception of residence or a home and where the field for clothing an inward intention with some formal outward and apparent sign of it in proof of possession in fact is so much extended—a visible state of affairs in which the *animus possidendi* finds expression. But I can see no room for any vital distinction, and in my opinion the fundamental principle of the Ordinance, when one considers the general purpose of rent restrictions legislation, remains the same whether the premises are used as a dwelling or for “ business, trade or professional purposes ” (s. 19). A non-occupying tenant of either kind of premises is not protected under the Ordinance, and “ non-occupying ” is a matter of fact and degree (see *Brown v. Draper*, 170 L.T.R. 144 ; *Brown v. Brash* (1948), L.J.R. 1544). 20

In the present case it has been established that the tenants, Defendants 2 and 3, parted with possession of the premises, in fact they sold their interest in the premises and the hotel business on 24.11.1946 as a going concern to Defendants 4 and 5 who in turn transacted similarly on 2.3.47 with Defendants 6, 7 and 8. Then the Ngara Hotel Ltd. (Defendant 1) was formed in which Defendants 2 and 3 were granted one share each and the leasehold interest and the business was passed on to the Company on 22.6.1947. All these “ purported assignments ” as the trial Judge styles them, were effected without the consent of the Plaintiff landlord being sought or obtained. Clearly Defendants 2 and 3 were not tenants in occupation and Defendant 1 was in possession at the time of action by virtue of at most a defeasible title. In my opinion the Court below was right in law in holding that the Appellants were not entitled to protection under the Ordinance. 30

As to the ground of appeal set forth in paragraph 4 of the memorandum of appeal I respectfully agree with what has been said by the learned President in his judgment and I feel that there is nothing that I can usefully add. 40

I would dismiss the appeal of the Defendants 1, 2 and 3 with costs.

The appeal by the Plaintiff landlord has been confined to the order for costs made below in favour of Defendant 8. The learned judge reserved the question of costs as regards the Defendants 4 to 8 for further argument. As appears from the record of the resumed hearing Counsel for the Plaintiff, though submitting that there should be no order for costs on the ground that these Defendants were trespassers, agreed that if they were wrongly 50

joined they were entitled to costs. The judge concluded that they were wrongly joined since they had vacated the premises before the action was brought and the leases terminated. No appeal has been brought in respect of the costs awarded to Defendants 4 to 7. I am not satisfied that there is ground for interference with the exercise of the discretion in granting costs to Defendant 8 and I would dismiss the appeal with costs.

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(Sgd.) PAGET J. BOURKE.

14.3.49.

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of
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14th March
1949,
continued.

No. 19.

DECREE.

No. 19.
Decree,
14th March
1949.

10

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
Civil Appeal No. 23 of 1948.

(From Original Decree in Civil Case No. 123 of 1947 of H.M. Supreme
Court of Kenya at Mombasa).

1. NGARA HOTEL LIMITED
2. DHIRAJLAL NARANJI JESSANI
3. MAGANBHAI PRABHUDAS PATEL (Original
Defendants 1, 2, 3)

Appellants

v.

20 KASSAM SULEMAN DAMJI (Original Plaintiff) - Respondent.

This Appeal coming on 14th March, 1949, for hearing before His Majesty's Court of Appeal for Eastern Africa in the presence of J. M. Nazareth Esqr. Advocate on the part of the Appellant and of J. E. L. Bryson Esqr., Advocate on the part of the Respondent.

IT IS ORDERED that the Appeal be and hereby is dismissed with costs.

* * * * *

D. F. SHAYLOR,

Registrar,
H.M. Court of Appeal for East
Africa.

30

Dated this 14th day of March, 1949.

Issued this 22nd day of February, 1950.

No. 21.

ORDER Granting Final Leave to Appeal.

*In the
Court of
Appeal for
Eastern
Africa.*

ORDER :

1. The application to rescind the order for conditional leave to appeal is refused. There is no evidence of sufficient lack of diligence in the prosecution of the appeal to justify rescinding the order for conditional leave. As to the stay of execution we see no reason to interfere with it, for the same reason.

No. 21.
Order
granting
Final
Leave to
Appeal, 2nd
February
1950.

2. Final leave to appeal is granted.

10

G. GRAHAM PAUL, Ag. President.

D. EDWARDS.

G. B. RUDD.

2nd February 1950.

1. As regards the application to rescind the order for conditional leave the application is refused with costs to the Respondent to that application.

2. As regards the application for Final leave to appeal the costs will abide the result of the appeal and in the event of the Appellant not proceeding with the appeal the Respondent will be entitled to the costs of the application.

20

G. GRAHAM PAUL, Ag. P.

D. EDWARDS.

G. B. RUDD.



Exhibits.

No. 1.
Memo-
randum of
Agreement,
24th April
1946.

PART II**EXHIBITS.**

No. 1.

MEMORANDUM OF AGREEMENT.

1/- Postal Stamp

24.4.46

MEMORANDUM OF AGREEMENT made the 24th day of April One thousand nine hundred and forty six Between KASSAM SULEMAN DAMJI, British Indian Landlord of Mombasa in the Protectorate of Kenya (hereinafter referred to as the Landlord) of the one part and DHIRAJLAL 10 NARANJI JASSANI and MAGANBHAI PRABHUDAS PATEL British Indian Merchants trading under the name and style of Ngara Hotel of Mombasa aforesaid (hereinafter referred to as the Tenants) of the other part Whereas the Landlord is the owner of the premises No. J.276 standing on Plots Nos. 125 and 126 of Section XXVII situate on Salim Road North, Mombasa And whereas the Landlord has agreed to let and the tenants have agreed to take the ground-floor of the said premises, wherein the The Success Corporation Limited Mombasa had been carrying on business of caterer under the style of Ritz Restaurant (now known as Ngara Hotel) on monthly tenancy at Shs. 500/- (Shillings five hundred) 20 per month subject to the following conditions :—

1. The tenancy will commence from the 1st day of April 1946 and will be terminated by either party on giving one calendar month's notice in writing.

2. The rent shall be payable in advance on the first day of each calendar month.

3. The tenants shall not store in the said premises any inflammable goods such as alcohol acids spirits petrol, gun or blasting powder, dynamite chemicals salt, cotton or any articles which may endanger the safety of the premises. 30

4. The tenants shall keep the premises clean and in good condition (damage by reasonable wear and tear and fire excepted) and shall whitewash the same as and when required at the costs of the tenants.

5. The tenants shall not assign underlet or part with the possession of the said premises or any part thereof without the written consent of the Landlord.

6. The tenants shall not carry on in the said premises trade in wines, spirits or any other liquors wholesale or retail or as a bar or hotel, and shall not do or permit to be done any act or thing which may cause discomfort or annoyance to the neighbouring occupiers. 40

7. The tenants shall bear and pay all water and electric light charges.

8. The tenants shall not make any additions to or alterations in the said premises without the written consent of the Landlord and such

additions and alterations shall not be removed by the tenants and shall be the absolute property of the Landlord and no compensation shall be payable therefor.

9. On determination of the tenancy the tenants shall repair all damages done by the tenants and hand over the premises in the same good condition. Failing such repairs by the tenants the Landlord shall be at liberty to execute the necessary repairs and recover the cost of such repairs from the tenant.

10. If any monthly rent shall remain in arrear and unpaid for the space of fifteen days (whether legally demanded or not) or if there shall be any breach or non-observance of any of the conditions herein contained the tenancy shall thereupon determine and it shall be lawful for the Landlord to re-enter upon the said premises or upon any part thereof in the name of the whole, but without prejudice to any claim which the Landlord may have against the tenants in respect of any breach of the stipulations contained herein.

In Witness whereof the parties have hereunto set their hands and seals the day and year first above written.

Signed Sealed and Delivered by the } (Sgd.) KASSAM SULEMAN
20 Landlord in the presence of } DAMJI.
(Sgd.) A. C. SATCHU,
Advocate,
Mombasa.

Signed Sealed and Delivered by the said } (Sgd.) MAGANBHAI
Tenants in the presence of } P. PATEL.
(Sgd.) A. C. SATCHU, (Sgd.) DHIRAJLAL
Advocate, N. JASSANI.
Mombasa.

COLONY & PROTECTORATE OF KENYA.

30 In His Majesty's Supreme Court, at Mombasa.

Civil Case No. 123 of 1947.

Exhibit No. 1.

Put in by Plaintiff.

This 23rd day of April, 1948.

(Sgd.) M. C. N. DE L.,
Judge,
Supreme Court of Kenya.

Drawn by :

40 A. C. Satchu,
Barrister-at-Law,
Mombasa.

Exhibits.

No. 1.

Memo-
randum of
Agreement,
24th April
1946,
continued.

Exhibits.

A.
Receipt
for Rent,
19th July
1946.

No. 703.

No. A.
RECEIPT for Rent.
KASSAM SULEMAN DAMJI

Date
Mombasa, 19th July, 1946.

Received from Messrs. Nagara Hotel (Ritz Restaurant) the sum of Shillings five hundred only. Rent Ground floor H. No. I 276 being payment of Sec. No. 27 for the month of July 1946.

With thanks,

For KASSAM SULEMAN DAMJI, 10
(Sd. on a -/10 stamp) NARAN MEGHJI.

Shs. 500/-
Cash.

A (1).
Receipt
for Rent,
21st August
1946.

No. 742.

No. A (1).
RECEIPT for Rent.
KASSAM SULEMAN DAMJI

Date
Mombasa, 21st August, 1946.

Received from Messrs. Nagara Hotel (Ritz Restaurant) the sum of Shillings five hundred only being payment of Rent Ground floor H. No. I 276 20 Section 27 for the month of August 1946.

With thanks,

For KASSAM SULEMAN DAMJI,
(Sd. on a -/10 stamp) NARAN MEGHJI.

Shs. 500/-
Cash.

A (2).
Receipt
for Rent,
20th
September
1946.

No. 784.

No. A (2).
RECEIPT for Rent.
KASSAM SULEMAN DAMJI

Date
Mombasa, 20th Sept., 1946. 30

Received from Messrs. The Nagara Hotel (Ritz Restaurant) the sum of Shillings five hundred only being payment of Rent Ground floor H. No. I 276 Section 27 for the month of September 1946.

With thanks,

For KASSAM SULEMAN DAMJI,
(Sd. on a -/10 stamp) NARAN MEGHJI.

Shs. 500/-
Cash.

No. B.

Exhibits.

STATEMENT OF PARTICULARS required under Business Names Ordinance.

COLONY AND PROTECTORATE OF KENYA.

STATEMENT OF PARTICULARS REQUIRED TO BE GIVEN, PURSUANT TO THE RE-REGISTRATION OF BUSINESS NAMES ORDINANCE, IN THE CASE OF A FIRM.

B.
Statement
of
Particulars
required
under
Business
Names
Ordinance,
7th October
1946.

- | | | |
|----|---|--|
| 10 | 1. Business name to be registered. (Where a business is carried on under two or more business names, each of these business names must be stated.) | “ Ngara Hotel.” |
| 10 | 2. General nature of business. | Restaurant and Confectionery. |
| | 3. Principal place of the business. (Full address, viz. house number, name of street, should be stated.) | Mombasa. House No. 1/276, Salim Road, Mombasa. |
| 20 | 4. Present Christian name (or names) and surname and age of each of the individuals who are partners. (If any of the individuals who are of non-European origin, such individual or individuals, as the case may be, must also state the Christian name (or names) and surname of his, her or their father respectively.) | 1. Maganbhai Prabhudas Patel, full age.
2. Dhirajlal Naranji Jasani, full age.
3. Narain Dass s/o Moolraj Ghai, full age
4. Jugal Kishore s/o Mayadhari Chatrath, full age. |
| | 5. Former Christian name (or names) and surname (if any) of each of the individuals who are partners. | Nil. |
| | 6. Nationality of each of the individuals who are partners. (If the nationality stated is not the nationality of origin, such nationality of origin must in every case be stated.) | All British Indians. |
| 30 | 7. Usual place of residence of each of the individuals who are partners. (Full address of each individual, viz. house number, name of street, etc., should be stated.) | 1. Maganbhai Prabhudas Patel, Plot No. 209/2489/14, Off Ngara Road, Nairobi.
2. Dhirajlal Naranji Jassani, Plot 209/2489/38, Off Ngara Road, Nrb.
3. Narain Dass s/o Moolraj Ghai, Plot 2177, Sclaters Road, Nairobi.
4. Jugal Kishore s/o Mayadhari Chatrath, Plot No. 2177, Sclaters Road, Nairobi. |
| 40 | 8. Other business, occupation if any of each of the individuals who are partners. | 1. Maganbhai Prabhudas Patel, partner in Ngara Hotel, Nairobi and Sole proprietor of his own business.
2. Dhirajlal Naranji Jassani, partner in Ngara Hotel, Nairobi and Proprietor of Kabete Canteen, Kabete.
3. Naraindas Ghai, Proprietor of Kiambu Trading Co. and Director of Industries (Kirparam) Ltd.; also Director of Chatrath & Co. Ltd., Nrb.
4. Jugal Kishore, Director of Industries (Kirparam) Ltd. and Director of Chatrath & Co. Ltd. Nairobi. |

50

Exhibits.
 B.
 Statement
 of
 Particulars
 required
 under
 Business
 Names
 Ordinance,
 7th October
 1946,
continued.

- | | |
|--|--|
| 9. Date of commencement of business. | 5th April, 1946. (The parties proposed to form a limited liability Coy. and hence the delay in registering this name.) |
| 10. Corporate name of each corporation which is a partner. | Nil. |
| 11. Registered or principal office of each corporation which is a partner. | ————— |

(Signed) **MAGANBHAI P. PATEL,**
DHIRAJLAL N. JASANI, 10
N. D. GHAI,
J. K. CHATRATH.

Dated this 7th day of October, 1946.

I certify that this is a true copy.

(Sd.) **D. B. CUMMING,**
 Registrar.

9th August, 1947.

NOTE.—This form must be signed either (a) by all the individuals who are partners (or if one or more of the partners is a corporation, by a director or secretary thereof), or (b) by one individual who is a partner in the firm, or (c) by a director or secretary of a corporation which is a partner in the firm : but in cases (b) and (c) a statutory declaration as to the truth of the particulars contained in the form must be made as per reverse. (Vide section 6 of the Ordinance.) 20

STATUTORY DECLARATION.

I, _____ of _____
 Colony and Protectorate of Kenya, do solemnly and sincerely declare that the particulars contained on the other side hereof are true and correct, and I make this solemn declaration conscientiously believing the same to be true and according to the Statutory Declaration Ordinance, 1926.

Declared at _____ this _____ day of _____ 19 _____ 30

Before me,

Magistrate or Commissioner for Oaths.

Stamp Duty Sh. 2.



No. 4A.

NOTICE issued by Medical Officer of Health to K. S. Damji.

Exhibits.

Received on 12.11.46.

MUNICIPAL BOARD OF MOMBASA.

P.O. Box 440.
Telephone 575.
No. 968/4.

Public Health Dept.,
Mombasa,

4th November, 1946.

No. 4A.
Notice
issued by
Medical
Officer of
Health,
to K. S.
Damji, 4th
November
1946.

To Mr. Kassam Suleman Damji,
Station Road,
Mombasa.

10

TAKE NOTICE that under the provisions of the Revised Laws of Kenya, and Regulations made thereunder, the Medical Officer of Health being satisfied of the existence of a nuisance at

Re Premises Nos. I-276-277, Salim Road, Mombasa.

ARISING FROM

- (1) Two soakage pits and one soil pit full at rear of premises.
- (2) Existing drainage arrangements are insufficient in that the present soil and soakage pits are not capable of dealing with soil and waste water from the premises

20 as to be a nuisance, DOES HEREBY REQUIRE YOU WITHIN 28 (Twenty eight) days as from the date of service of this notice, to abate, and to prevent a recurrence of the said nuisance and for that purpose to :

- (1) Empty the said soil and waste water pits.
- (2) Provide two additional pits on such a site to be indicated and approved by the Municipal Engineer and Medical Officer of Health

and do all such other works as may be necessary to the satisfaction of the Medical Officer of Health.

Dated this 4th day of November, 1946.

30 (Sgd.) J. HUFFORD,
Sanitary Inspector.

(Sgd.) C. W. JAMES,
Medical Officer of Health.

Sanitary Inspector may be seen by appointment during Office Hours.



Exhibits.

B (2).
 Notice of
 Change in
 Particulars
 under
 Business
 Names
 Ordinance,
 12th
 December
 1946.

NOTICE of Change in Particulars under Business Names Ordinance

COLONY AND PROTECTORATE OF KENYA.

Notice of change in particulars registered.

Pursuant to the Registration of Business Names Ordinance.

Filed
 on 14.12.46.

To The Registrar,
 (Appointed for the purposes of the above-mentioned Ordinance)

WHEREAS We/I the undersigned were/was duly registered pursuant 10
 to the provisions of the Registration of Business Names Ordinance, on
 the 4th day of October, 1946, under the Number 7624 in the Index of
 Registration :

AND WHEREAS a change/or changes has/or have occurred/or been
 made in respect of the particulars registered as hereinafter mentioned :

Now We/I the undersigned hereby give notice that on the date/or
 dates hereunder specified the following change/or changes occurred/or was
 or were made in the particulars registered, that is to say Maganbhai
 Prabhudas Patel and Dhirajlal Naranji Jasani retired from the partnership 20
 viz. : Narain Dass Mool Raj Ghai and Jugal Kishore Mayadari Chatrath
 will carry on the business under the same name and style as the continuing
 partners thereof.

Dated 12th day of December, 1946.

(Sgd.) MAGANBHAI.
 DHIRAJLAL N. JASANI.
 N. GHAI.
 J. K. CHATRATH.

I certify that this is a true copy.

(Sgd.) D. B. CUMMING,
 Registrar.

9th August, 1947.

30

Note :—This form must be signed either (a) by all the individuals
 who are partners (or if one or more of the partners is a corporation, by
 a director or secretary thereof) or (b) by one individual who is a partner
 in the firm or (c) by a director or secretary of a corporation which is a
 partner in the firm ; but in cases (b) and (c) a statutory declaration as

to the truth of the particulars contained in the form must be made as per reverse. (Vide section 6 of the Ordinance.)

STATUTORY DECLARATION.

I, _____, of _____ Colony and Protectorate of Kenya, do solemnly and sincerely declare that the particulars contained on the other side hereof are true and correct and I make this solemn declaration conscientiously believing the same to be true and according to the Statutory Declarations Ordinance, 1926.

Declared at _____ this _____ day of _____ 194_____

Exhibits.
B (2).
Notice of
Change in
Particulars
under
Business
Names
Ordinance,
12th
December
1946,
continued.

10 _____ Magistrate or Commissioner for Oaths.
Before me,
Stamp Duty Sh. 2.

No. 2 (A).

LETTER from Christie & Bryson to N. M. Ghai and Others.

Ref. 1015/1.

21st January, 1947.

Narandas Mulraj Ghai and
Jugalkishor Mayadhari Chatravedi,
The Ngara Hotel,
20 Mombasa.

No. 2 (A).
Letter from
Messrs.
Christie &
Bryson to
N. M. Ghai
and Others,
21st
January
1947.

Dear Sirs,

Mr. Kassam Suleman Damji.

Under instructions from our above-named client we have to write to you as follows :—

Our client is the owner of the premises in which the business of the Ngara Hotel is carried on. He leased these premises to Dhirajlal Naranji Jassani and Maganbhai Prabhudas Patel who undertook not to sub-let or otherwise part with the possession of the premises without the consent of the landlord, our client.

30 Our client has now been informed that you are in possession of these premises although he has given no written consent to any sub-letting or assignment to you. You are, accordingly trespassers therein, and on behalf of our client, we have to give you notice that unless you vacate the premises and deliver up possession thereof to our client on or before Monday next, the 27th instant, proceedings will be instituted in Court for your eviction.

Yours faithfully,

CHRISTIE & BRYSON.

Exhibits.

No. 2 (B).

No. 2 (B).
Letter from
R. C. Gautama
Gautama
to Messrs.
Christie &
Bryson,
27th
January
1947.

LETTER from R. C. Gautama to Messrs. Christie & Bryson.

R. C. Gautama,
Advocate.

Messrs. Christie & Bryson,
Advocates,
Mombasa.

Nairobi.

27th January, 1947.

Dear Sir,

Mr. Kassam Suleman Damji.

10

My clients' Messrs. Narandas Mulraj Ghai and Jugelkishor Mayadhari Chatrath of the Ngara Hotel Mombasa have handed to me your letter Ref. 1015/1 of 21st instant which was redirected to them here with instructions to reply thereto as follows :—

The contents of your letter are denied and in fact they have surprised my clients, for the reason that your client accepted Messrs. Ngara Hotel, wherein my clients are partners, as tenants and they are at a loss to understand your client's present attitude.

My clients are not prepared to vacate the premises and your client is at liberty to take such proceedings in the matter as he may be advised. 20

Yours faithfully,

(Sgd.) S. C. GAUTAMA,
for R. C. GAUTAMA.

No. 2 (C).
Letter from
Messrs.
U. K. Doshi
& Doshi to
K. S. Damji,
4th
February
1947.

No. 2 (C).

LETTER from U. K. Doshi & Doshi to K. S. Damji.

U. K. Doshi & Doshi,
Advocates.

To : Kassam Suleman Damji, Esq.,
Ndia Kuu,
Mombasa.

Mombasa.

4th February, 1947.

30

Dear Sir,

Acting on behalf of our clients Messrs. "The Ngara Hotel" of Mombasa, we enclose herewith our cheque for Shs.500/- being the amount due to you by our clients for the rent of the ground floor of the premises No. J276 situate on Salim Road, North, Mombasa, for the month of January 1947.

Our clients state that they tendered to you the said amount earlier, but for reasons best known to you, you did not accept the same. 40

Kindly acknowledge receipt.

Yours faithfully,

(Sgd.) U. K. DOSHI & DOSHI.

No. 2 (E).

LETTER from U. K. Doshi & Doshi to K. S. Damji.

U. K. Doshi & Doshi,
Advocates.

Mombasa.

25th February, 1947.

To,
Kassam Suleman Damji, Esq.,
Ndia Kuu,
10 Mombasa.

Dear Sir,

Acting on behalf of our clients Messrs. The Ngara Hotel of Mombasa, we enclose herewith our cheque for Shs.500/- being the amount due to you by our clients for the rent of the ground floor of the premises No. J.276 situate on Salim Road North, Mombasa, for the month of February, 1947.

Kindly acknowledge receipt.

Yours faithfully,

(Sgd.) U. K. DOSHI & DOSHI.

20

No. 2 (G).

LETTER from Messrs. Christie & Bryson to G. Rubani.

xxxxxxx & Bryson,
xxxxxxx J. E. L. Bryson,
Ref. 1015/2.

Mr. Gulam Rubani,
c/o Walimohamed,
Engineering Works,
Nairobi.

22nd March 1947.

Dear Sir,

Mr. Cassam Suleman Damji.

30 Under instructions from our above-named client we have to write you as follows :—

Our client is the owner of premises in Mombasa in which the business of the Nagara Hotel is carried on. These premises were in 1946 leased to Dhirajlal Naranji Jassani and Maganbhai Prabhudas Patel. It was a condition of this Lease that the Lessors would not sub-let or otherwise part with the possession of the premises without the consent of our client.

40 Our client has now been informed that you are in possession of these premises although he had given no written consent to any sub-letting or assignment to you. You are accordingly a trespasser therein and on behalf of our client we have to give you notice that unless you deliver up possession of these premises to our client on or before Wednesday next the 26th instant proceedings will be instituted in Court for your eviction therefrom.

Yours faithfully,

Exhibits.

No. 2 (E).
Letter from
Messrs.
U. K. Doshi
& Doshi to
K. S. Damji,
25th
February
1947.

No. 2 (G).
Letter from
Messrs.
Christie &
Bryson to
G. Rubani,
22nd March
1947.

Exhibits.

No. 2 (H).

LETTER from U. K. Doshi & Doshi to K. S. Damji.

No. 2 (H).
Letter from
Messrs.
U. K. Doshi
& Doshi to
K. S. Damji,
8th April
1947.

U. K. Doshi & Doshi,
Advocates.

Mombasa,
8th April, 1947.

To Kassam Suleman Damji, Esq.,
Ndia Kuu,
Mombasa.

Dear Sir,

Acting on behalf of our clients Messrs. The Ngara Hotel of Mombasa, 10 we enclose herewith our cheque for Shs. 500/- being the amount due to you by our clients for the rent of the ground floor of the premises No. J 276 situate on Salim Road North, Mombasa, for the month of March, 1947.

Kindly acknowledge receipt.

Yours faithfully,

(Sgd.) U. K. DOSHI & DOSHI.

B (1).
Notice of
Change in
Particulars
under
Business
Names
Ordinance,
10th April
1947.

No. B (1).

NOTICE of Change in Particulars under Business Names Ordinance.

COLONY AND PROTECTORATE OF KENYA.

20

NOTICE OF CHANGE IN PARTICULARS REGISTERED PURSUANT TO THE
REGISTRATION OF BUSINESS NAMES ORDINANCE.

To

Filed on 10/4/47

The Registrar,
(Appointed for the purposes of the above-mentioned Ordinance.)

WHEREAS We/I the undersigned were/was duly registered pursuant to the provisions of the Registration of Business Names Ordinance, on the 4th day of October 1946, under the Number 7624 in the Index of Registration :

AND WHEREAS a change/or changes has/or have occurred/or been 30 made in respect of the particulars registered as hereinafter mentioned :

NOW We/I the undersigned HEREBY GIVE NOTICE that on the date/or dates hereunder specified the following change/or changes occurred/or was or were made in the particulars registered, that is to say Gulam Rabani s/o Ibrahim aged 42 years residing on Plot No. 2389/68, Juja Road, Nairobi, British Indian, Abdus Sattar son of Amin Din aged 28 years, residing on Plot No. 2118, Wessels Estate, Nairobi, British Indian,

and Rehmat Ullah son of Mohamed Hasham aged 55 years residing on Plot No. 2389/68, Juja Road, Nairobi, British Indian, have joined as partners as from 2nd day of March, 1947.

Exhibits.

Dated 10th day of April, 1947.

(Signed) NARAIN DASS MUL RAJ GHAI.

JUGAL KISHORE MAYABHARI

I Certify that this is a true copy.

CHATRATH.

(Sgd.) D. B. CUMMING.

G. RUBANI.

Registrar.

A. SATTAR.

10 9th August, 1947.

R. ULLAH.

B (1).
Notice of
Change in
Particulars
under
Business
Names
Ordinance,
10th April
1947,
continued.

NOTE: This form must be signed either (A) by all the individuals who are partners (or if one or more of the partners is a corporation, by a director or secretary thereof) or (B) by one individual who is a partner in the firm or (C) by a director or secretary of a corporation which is a partner in the firm ; but in cases (B) and (C) a statutory declaration as to the truth of the particulars contained in the form must be made as per reverse. (Vide section 6 of the Ordinance.)

STATUTORY DECLARATION.

20 I, _____ of _____
Colony and Protectorate of Kenya, do solemnly and sincerely declare that the particulars contained on the other side hereof are true and correct and I make this solemn DECLARATION CONSCIENTIOUSLY believing the same to be true and according to the Statutory Declarations Ordinance, 1926.

Declared at _____ this _____ day of _____
194...

Before me,

30

Magistrate or Commissioner for Oaths.

Stamp Duty

Sh.2.

Exhibits.

No. 2 (K).

LETTER from Messrs. Christie & Bryson to U. K. Doshi & Doshi.

No. 2 (K).
Letter from
Messrs.
Christie &
Bryson to
Messrs.
U. K. Doshi
& Doshi,
17th April
1947.

Ref. 1015/3.

17th April 1947.

Messrs. U. K. Doshi & Doshi,
Advocates,
Mombasa.

Dear Sirs,

Kassam Suleman Damji.

We have to acknowledge receipt of your letter of the 8th instant
to our abovenamed client enclosing your cheque for Shs. 500/00. 10

Before accepting the same, we shall be glad if you will inform us
on whose behalf you have paid this rent.

Yours faithfully,

No. 2 (L).
Letter from
Messrs.
U. K. Doshi
& Doshi to
Messrs.
Christie &
Bryson,
28th April
1947.

No. 2 (L).

Letter from U. K. Doshi & Doshi to Messrs. Christie & Bryson.

U. K. Doshi & Doshi,
Advocates.

Mombasa,
Kenya Colony.

28th April, 1947.

To Messrs. Christie & Bryson,
Advocates,
Mombasa.

20

Dear Sirs,

Re : Kassam Suleman Damji & Ngara Hotel.

With reference to your letter No. 1015/3 of 17th April, 1947,
in the above matter, we have to write as under :—

The amount of rent was paid by us on behalf of the proprietors of
the Ngara Hotel, who, we understand, are residing at Nairobi. The
amount was paid at our office, by the manager of the hotel, Master Lahori
Ram, who was then managing the hotel. 30

Yours faithfully,

(Sgd.) U. K. DOSHI & DOSHI.

No. 2 (M).

LETTER from Messrs. Christie & Bryson to U. K. Doshi & Doshi.

Ref. 1015/4.

30th April, 1947.

Dear Sirs,

Kassam Suleman Damji

The Ngara Hotel

We are in receipt of your letter of the 28th instant.

As our client is the owner of the premises in question he is entitled to know who is in occupation thereof. Please, therefore, furnish us with
 10 the names of the Proprietors of the Hotel referred to in your said letter.

Yours faithfully,

Messrs. U. K. Doshi & Doshi,
 Advocates,
 Nairobi.

Exhibits.

No. 2 (M).
 Letter from
 Messrs.
 Christie &
 Bryson to
 Messrs.
 U. K. Doshi
 & Doshi,
 30th April
 1947.

No. 2 (N).

LETTER from U. K. Doshi & Doshi to Messrs. Christie & Bryson.

U. K. Doshi & Doshi,
 Advocates.

Mombasa,

2nd May, 1947.

20 To Messrs. Christie & Bryson,
 Advocates,
 Mombasa.

No. 2 (N).
 Letter from
 Messrs.
 U. K. Doshi
 & Doshi to
 Messrs.
 Christie &
 Bryson, 2nd
 May 1947.

Dear Sirs,

Re : Kassam Suleman Damji & Ngara Hotel

We thank you for your letter No. 1015/4 of 30th April, 1947.

Master Lahori Ram stated to us that he was acting as the Manager of the Hotel, on behalf of Messrs. Dhirajlal Naranji Jassani and Maganbhai Prabhudas Patel, the proprietors of the Ngara Hotel, and in support thereof certain documentary evidence was produced before us by Master
 30 Lahori Ram.

Yours faithfully,

(Sgd.) U. K. DOSHI & DOSHI.

Exhibits.

No. 2 (O).

LETTER from Messrs. Christie & Bryson to U. K. Doshi & Doshi.

No. 2 (O).

Letter from
Messrs.Christie &
Bryson to
Messrs.U. K. Doshi
& Doshi,
3rd May
1947.

Ref. 1015/5.

3rd May 1947.

Messrs. U. K. Doshi & Doshi,
Advocates,
Mombasa.

Dear Sirs,

Kassam Suleman Damji—The Ngara Hotel

Further to our letter of the 30th ultimo we have been instructed by our client to inform you that the reason he desires the names of the present Proprietors of the Hotel is that he wishes to contact them with a view to settling this matter and putting it on a proper footing. 10

In the meantime and pending such settlement he is willing to accept the three cheques forwarded by yourselves as mesne profits only.

Yours faithfully,

No. 2 (P).

Letter from
Messrs.Christie &
Bryson to
Messrs.U. K. Doshi
& Doshi,
7th May
1947.

Ref. 1015/6.

No. 2 (P).

LETTER from Messrs. Christie & Bryson to U. K. Doshi & Doshi.

7th May, 1947.

Dear Sirs,

Kassam Suleman Damji.
The Ngara Hotel.

20

We are in receipt of your letter of the 2nd instant.

Our client is unable to understand that the rent has been paid on behalf of Messrs. Dhirajlal Naranji Jassani and Maganbhai Prabhudas Patel, as they have already received a letter from a firm of advocates in Nairobi that Narandas Mulraj Ghai and Jugelkishor Mayardhari Chatrath are the partners in the Ngara Hotel.

We shall be glad therefore if you will have this matter cleared up and inform us by return, the proper names of the present proprietors of this Hotel. 30

We shall also be glad to have a reply to our letter of the 3rd instant at your convenience.

Yours faithfully,

Messrs. U. K. Doshi & Doshi,
Advocates,
Mombasa.

No. 2 (Q).

LETTER from U. K. Doshi & Doshi to Messrs. Christie & Bryson.

U. K. Doshi & Doshi,
Advocates.Mombasa.
12th May 1947.To,
Messrs. Christie & Bryson,
Advocates,
Mombasa.*Exhibits.*No. 2 (Q).
Letter from
Messrs.
U. K. Doshi
& Doshi to
Messrs.
Christie &
Bryson,
12th May
1947.

Dear Sirs,

10

Re : Ngara Hotel.

Acting on behalf of our clients Messrs. (1) Narain Dass Ghai (2) Jugal Kishore Chatrath (3) Gulam Rabani (4) Abdul Satar and (5) Rehmat Ullah, the proprietors of the above Hotel, we enclose herewith our cheque for Shs.500/- being the amount of rent due by our clients to your client Mr. Kassam Suleman Damji for rent of the Hotel premises, for the month of April, 1947.

Kindly acknowledge receipt.

Yours faithfully,

(Sgd.) U. K. DOSHI & DOSHI.

20

No. 2 (S).

LETTER from U. K. Doshi & Doshi to Messrs. Christie & Bryson.

U. K. Doshi & Doshi,
Advocates.Mombasa,
Kenya Colony.
12th May 1947.To,
Messrs. Christie & Bryson,
Advocates,
Mombasa.No. 2 (S).
Letter from
Messrs.
U. K. Doshi
& Doshi to
Messrs.
Christie &
Bryson,
12th May
1947.

Dear Sirs,

30

Ngara Hotel.

We are in receipt of your letter No. 1015/6 of 7th instant.

We have been informed that Mr. D. M. Jassani and Maganbhai P. Patel, the original tenants admitted Messrs. Narain Dass Ghai and J. K. Chatrath as partners in the business and at a later stage, the former two retired from the partnership business. At a still later stage Messrs. (1) Gulam Rabani (2) Abdul Satar and (3) Rehmat Ullah have been

Exhibits. admitted as partners in the business and therefore, the following five are the partners in the business :—

No. 2 (S).
Letter from
Messrs.
U. K. Doshi
& Doshi to
Messrs.
Christie &
Bryson,
12th May
1947,
continued.

1. Narain Dass Ghai
2. Jugal Kishore Chatrath
3. Gulam Rabani
4. Abdul Satar
5. Rehmat Ullah.

When January 1947 rent was paid, through us by Master Lahori Ram the Manager of the Hotel, we had inquired about the proprietors and it is possible that all the changes in the construction of the firm may have taken 10 place at subsequent periods.

We trust, that the above information would be satisfactory to you.

Regarding the suggestion to appropriate the amounts as mesne profits, we have to state that we are unable to agree to the same, as we were instructed to pay the amounts as rent of the premises.

Yours faithfully,

(Sgd.) U. K. DOSHI & DOSHI.

No. 2 (T).
Letter from
Messrs.
Christie &
Bryson to
Messrs.
U. K. Doshi
& Doshi,
30th May
1947.

No. 2 (T).

LETTER from Messrs. Christie & Bryson to U. K. Doshi & Doshi.

Ref. 1015/7.

30th May 1947. 20

Dear Sirs,

Kassam Suleman Damji
The Ngara Hotel

We have to refer to your letter of the 12th instant.

Our client has had such contradictory statements regarding the present occupiers of and proprietors of the Hotel, that he is still in the dark as to who is liable for the rent. He has had no notification with regard to any change of possession and sub-letting and has certainly given no consent to any assignment or sub-lease.

In these circumstances, our client can only have dealings with his 30 proper tenants, Dhirajlal Naranji Jassani and Maganbhai Prabhudas Patel and without prejudice, accepts your various cheques as payment of rent for the premises from these two persons.

Yours faithfully,

Messrs. U. K. Doshi & Doshi,
Advocates, Mombasa.

No. 2 (U).

LETTER from U. K. Doshi & Doshi to K. S. Damji.

U. K. Doshi & Doshi,
Advocates.Mombasa,
Kenya Colony.

7th June 1947.

To Kassam Suleman Damji, Esq.,
Mombasa.

Dear Sir,

10

Re : Ngara Hotel

We have been instructed by our client Mr. Rahematullah one of the partners of the above Hotel, to forward herewith our cheque for Shs. 500/- being rent of the premises for May 1947. Kindly acknowledge receipt.

Yours faithfully,

(Sgd.) U. K. DOSHI & DOSHI.

Encl. : Cheque.

Exhibits.

No. 2 (U).
Letter from
Messrs.
U. K. Doshi
& Doshi to
K. S. Damji,
7th June
1947.

No. 2 (W).

LETTER from U. K. Doshi & Doshi to K. S. Damji.

20 U. K. Doshi & Doshi,
Advocates.Mombasa,
Kenya Colony.

8th July, 1947.

To Kassam Suleman Damji, Esq.,
Mombasa.

Dear Sir,

Ngara Hotel

30 Acting on behalf of our client Mr. Rehemtullah, we enclose herewith our Cheque for Shs. 500/- being the amount of the above hotel premises for the month of June, 1947.

Kindly acknowledge receipt.

Yours faithfully,

(Sgd.) U. K. DOSHI & DOSHI.

No. 2 (W).
Letter from
Messrs.
U. K. Doshi
& Doshi to
K. S. Damji,
8th July
1947.

Exhibits.

No. 2 (Y).

LETTER from Messrs. Christie & Bryson to The Secretary, Rent Control Board.

No. 2 (Y).
Letter from
Messrs.
Christie &
Bryson to
Secretary,
Rent
Control
Board,
Mombasa,
14th July
1947.

14th July, 1947.

Dear Sir,

Kassam Suleman Damji—House No. J.276 on
Plots 125 and 126 of Sec. XXVII, Salim Road,
Mombasa.

We are instructed by Kassam Suleman Damji, the proprietor and landlord of these premises to apply to the Rent Control Board for its consent to the institution of legal proceedings for the ejection of the 10 tenants and others hereinafter named.

By virtue of a document dated 24th April 1946, our client let his building at Salim Road, North, to Dhirajlal Naranji Jessani and Maganbhai Prabhudas Patel from month to month as from 1st April 1946 and the document expressly precludes the tenants from assigning, underletting or parting with possession of the premises or any part thereof without consent in writing of the landlord.

It now appears however, that the said tenants broke this covenant on or about the 24th November 1946 by purporting to assign the lease to the following five persons who apparently were assumed as partners 20 in the partnership known as Ngara Hotel and they are now in occupation of our client's building and refuse to vacate it.

The persons referred to are (1) Narain Dass s/o Moolraj Ghai, (2) Jugal Kishore s/o Mayadhari Chatrath, (3) Gulam Rabani s/o Ibrahim, (4) Abdus Sattar s/o Amin Din and (5) Rehmat Ullah s/o Hasham.

No rent has been paid by Dhirajlal Naranji Jessani and Maganbhai Prabhudas Patel since December although the advocates of the alleged assignees have tendered cheques on behalf of their clients who we regard as trespassers.

We enclose the sum of Shs. 20/-. Kindly acknowledge receipt. 30

Yours faithfully,

The Secretary,
The Rent Control Board,
Mombasa.

No. 4.

NOTICE issued by Medical Officer of Health to K. S. Damji.

MUNICIPAL BOARD OF MOMBASA.

P.O. Box 440,
Telephone 575.To Mr. Kassam Suleman Damji,
Ndia Kuu,
Mombasa.

Public Health Department.

14th July, 1947.

*Exhibits.*No. 4.
Notice
issued by
Medical
Officer of
Health,
Mombasa,
to K. S.
Damji, 14th
July 1947.

Sir,

10 Re premises No. I.277, Salim Road, Mombasa.

I have to inform you of the existence of a nuisance on your premises,
mentioned above, due to

Cesspit full

and to request that you will WITHIN 7 (SEVEN) DAYS from the date of
receipt of this notice—Empty and if necessary deepen cesspit and dispose of contents
in such a manner as not to be a nuisance.

I am,

Sir,

20

Your obedient servant,
(Sgd.) J. SAVILLE.

No. 2 (Z).

LETTER from Messrs. Satchu & Satchu to Messrs. Christie & Bryson.

Satchu & Satchu,
Advocates.Mombasa,
Ref. No. 1236/47. Kenya.

19th August, 1947.

To,

Messrs. Christie & Bryson,
Advocates,
Mombasa.

30

Dear Sirs,

Rent Control Board Case No. 845 *Kassam Suleman
Damji v. Nagara Hotel Limited & Others.*We shall be obliged if you will ask your client Mr. Kassam Suleiman
Damji to produce at the hearing of the above case all his books of accounts,
receipts books etc. from April 1946 up-to-date showing all entries
memorandums in respect of the premises—the subject matter of the case.40 Please ask your client Mr. Kassam Suleman Damji to be present
personally at the hearing as we have instructions to ask him certain
questions.

Yours faithfully,

SATCHU & SATCHU,
(Sgd.) A. C. SATCHU.

Copy to :

The Rent Control Board,
Mombasa.No. 2 (Z).
Letter from
Messrs.
Satchu &
Satchu to
Messrs.
Christie &
Bryson
19th August
1947.

Exhibits.

No. 2 (AA).

No. 2 (AA).
Letter from
Messrs.
Satchu &
Satchu to
Chairman,
Rent
Control
Board,
Mombasa,
19th August
1947.

LETTER from Messrs. Satchu & Satchu to Chairman, Rent Control Board.

Satchu & Satchu,
Advocates.

Ref. No. 1237/47.

Mombasa.

19th August 1947.

The Chairman,
The Rent Control Board,
Mombasa.

Dear Sir,

Rent Control Board Case No. 845 *Kassam Suleman
Damji v. Nagara Hotel Limited and others.*

10

The above case has been fixed for the hearing on Wednesday the 20th inst. We represent the following :

1. The Nagara Hotel Ltd.,
2. Mr. Gulam Rabani,
3. Mr. Jugal Kishore,
4. Mr. Narain Dass,
5. Mr. Abdus Satter,
6. Mr. Rehmat Ullah.

We have to state that Messrs. Abdus Satter and Rehmat Ullah have no interest whatsoever in the premises in question.

20

Our client Mr. Satya Pal Chadha the Secretary of Nagara Hotel Ltd. was asked by your process server to accept service of the summonses issued to Mr. Maganbhai Patel of Nagara Hotel Nairobi and Mr. Dhirajlal Jessani. Mr. Satypal accepted the service as he was forced to but does not represent them. It is alleged that Messrs. Patel and Jessani are the tenants and as such they should be given enough time and proper opportunity to defend themselves. All parties to the suit must be before the Board properly represented at the time of its hearing.

It is for the Landlord to find out the parties. However we may state that Mr. Patel's address is care of Nagara Hotel, Nairobi and Mr. D. N. Jessani is in India at present on leave.

30

We have requested the advocates for the Landlord to bring the landlord Mr. Kassam Suleman Damji personally to give evidence before the Board at the hearing. We have instructions to ask him certain questions. If necessary please summon him to appear personally at the hearing.

Yours faithfully,

SATCHU & SATCHU,
(Sgd.) A. C. SATCHU.

Copy to :

Messrs. Christie & Bryson,
Advocates, Mombasa.

40

No. 3.

LETTER from Secretary, Rent Control Board to Messrs. Christie & Bryson.

COLONY AND PROTECTORATE OF KENYA.

Rent Control Board Coast Prov.,
Municipal Offices,
P.O. Box 440,
Mombasa.

Ref. No. RCB. 845.

26th August 1947.

No. 3.
Letter from
Secretary,
Rent
Control
Board,
Mombasa,
to Messrs.
Christie &
Bryson,
26th August
1947.

10 Messrs. Christie & Bryson,
Advocates,
Mombasa.

re Case No. 845.

Kassam Suleman Damji vs. Dhirajlal Naranji Jessani Maganbhai
Prabhudas Patel and 8 Others.

With reference to your application of 14-6-47, I have to inform you that the Rent Control Board, at its meeting held on 20th instant, granted permission to Mr. Kassam Suleman Damji to institute legal proceedings so far as necessary.

20 I enclose herewith the sum of Sg. 20/- being a refund of deposit.
Kindly acknowledge receipt.

(Sgd.) B. M. HAYNES.
Secretary,
Rent Control Board.

Copy to :—

Messrs. Satchu & Satchu,
Advocates,
Mombasa.

 No. 2 (AB).

LETTER from Messrs. Satchu & Satchu to Messrs. Christie & Bryson.

30 Satchu & Satchu,
Advocates.

Mombasa,
1st October, 1947.

Ref. No. 1499/47.
Messrs. Christie & Bryson,
Advocates,
Mombasa.

No. 2 (AB).
Letter from
Messrs.
Satchu &
Satchu to
Messrs.
Christie &
Bryson, 1st
October
1947.

40 Under instructions from our clients The Nagara Hotel of Mombasa, we enclose herewith our cheque of Shgs. 1000/- being house rent for the month of July and August 1947 for your client Mr. Kassam Suleman Damji the owner of the house.

Please acknowledge receipt.

Yours faithfully,
SATCHU & SATCHU.
(Sgd.) A. C. SATCHU.

*Exhibits.***No. 2 (AD).**

No. 2 (AD).
Letter from
Messrs.
Satchu &
Satchu to
Messrs.
Christie &
Bryson,
10th
November
1947.

LETTER from Messrs. Satchu & Satchu to Messrs. Christie & Bryson.

Satchu & Satchu,
Advocates.

Ref. No. 1758/47.
Messrs. Christie & Bryson,
Advocates,
Mombasa.

Mombasa.
10th November 1947.

Dear Sirs,

10

Under instructions from our clients The Nagara Hotel of Mombasa, we enclose herewith our cheque of Shs. 1000/- being house rent for the month of September and October 1947 of your client Mr. Kassam Suleman Damji the owner of the house.

Please acknowledge receipt.

Yours faithfully,
SATCHU & SATCHU.
(Sgd.) A. C. SATCHU.

No. 2 (AF).
Letter from
Chanan
Singh to
Messrs.
Christie &
Bryson,
10th
November
1947.

No. 2 (AF).**LETTER from Chanan Singh to Messrs. Christie & Bryson.**

20

Chanan Singh,
Advocate.

Messrs. Christie & Bryson,
Advocates,
Mombasa.

Nairobi,
Kenya Colony.
10th November 1947.

Dear Sirs,

C.C. No. 123 of 1947.

Kassam Suleman Damji vs. Ngara Hotel Ltd. and D. N. Jessani,
6 Others. 30

I am acting for Messrs. Narain Dass Mulji Ghai, Gulam Rabani and Jugal Kishore.

They will have a common defence, but it has not been possible for them to trace one or two signed documents which they have temporarily mislaid. In view of this they have not given me full instructions. Mr. Gulam Rabani has also been ill for some time.

Would it be possible for you to allow 14 days' extension for filing the defence ?

Yours faithfully,
(Sgd.) ? ? ?
for CHANAN SINGH.

40

No. 2 (AG).

LETTER from Messrs. Satchu & Satchu to Messrs. Christie & Bryson.

Satchu & Satchu,
Advocates.

Mombasa.

8th December, 1947.

Ref. No. 1916/47

Messrs. Christie & Bryson,
Advocates,
Mombasa.*Exhibits.*No. 2 (AG).
Letter from
Messrs.
Satchu &
Satchu to
Messrs.
Christie &
Bryson, 8th
December
1947.

10 Dear Sirs,

Under instructions from our clients The Nagara Hotel Ltd., of Mombasa, we enclose herewith our cheque of Shgs. 500/- being house rent for the month of November 1947 of your client Mr. Kassam Suleman Damji the owner of the house.

Please acknowledge receipt.

Yours faithfully,

SATCHU & SATCHU,
(Sgd.) A. C. SATCHU.

No. 2 (AJ).

20 LETTER from Messrs. Satchu & Satchu to Messrs. Christie & Bryson.

Satchu & Satchu,
Advocates.

Mombasa.

8th January 1948.

Ref. No. 39/48

Messrs. Christie & Bryson,
Advocates,
Mombasa.No. 2 (AJ).
Letter from
Messrs.
Satchu &
Satchu to
Messrs.
Christie &
Bryson, 8th
January
1948.

Dear Sirs,

30 Under instructions from our clients The Nagara Hotel of Mombasa, we enclose herewith our cheque for Shgs. 500/- being house rent for the month of December 1947 of your client Mr. Kassam Suleman Damji the owner of the house.

Please acknowledge receipt.

Yours faithfully,

SATCHU & SATCHU,
(Sgd.) A. C. SATCHU.

Exhibits.

No. 2 (AL).

No. 2 (AL).
Letter from
Messrs.
Satchu &
Satchu to
Messrs.
Christie &
Bryson,
10th
February
1948.

LETTER from Messrs. Satchu & Satchu to Messrs. Christie & Bryson.

Satchu & Satchu,
Advocates.

Mombasa.

10th February, 1948.

Ref. No. 218/48

Messrs. Christie & Bryson,
Advocates,
Mombasa.

Dear Sirs,

10

Under instructions from our clients The Nagara Hotel of Mombasa, we enclose herewith our cheque for Shgs. 500/- being house rent for the month of January 1948 of your client Mr. Kassam Suleman Damji the owner of the house.

Please acknowledge receipt.

Yours faithfully,

SATCHU & SATCHU,
(Sgd.) A. C. SATCHU.

No. 2 (AO).
Letter from
Messrs.
Satchu &
Satchu to
Messrs.
Christie &
Bryson, 2nd
March 1948.

No. 2 (AO).

LETTER from Messrs. Satchu & Satchu to Messrs. Christie & Bryson.

20

Satchu & Satchu,
Advocates.

Mombasa.

2nd March, 1948.

Ref. No. 324/48

Messrs. Christie & Bryson,
Advocates,
Mombasa.

Dear Sirs,

Under instructions from our clients The Nagara Hotel of Mombasa, we enclose herewith our cheque for Shgs. 500/- being the house rent for 30 the month of February 1948 of your Client Mr. Kassam Suleman Damji the owner of the house.

Please acknowledge receipt.

Yours faithfully,

SATCHU & SATCHU,
(Sgd.) A. C. SATCHU.

No. 2 (AP).

LETTER from Messrs. Satchu & Satchu to Messrs. Christie & Bryson.

Satchu & Satchu,
Advocates.

Mombasa.

7th April, 1948.

Ref. No. 510/48

Messrs. Christie & Bryson,
Advocates,
Mombasa.*Exhibits.*No. 2 (AP).
Letter from
Messrs.
Satchu &
Satchu to
Messrs.
Christie &
Bryson, 7th
April 1948.

10 Dear Sirs,

Under instructions from our clients The Nagara Hotel of Mombasa, we enclose herewith our cheque for Shgs. 500/- being the house rent for the month of March 1948 of your client Mr. Kassam Suleman Damji the owner of the house.

Please acknowledge receipt.

Yours faithfully,
SATCHU & SATCHU,
(Sgd.) A. C. SATCHU.

No. 5.

20 NOTICE issued by Medical Officer of Health to K. S. Damji.

Received Date 7.6.48 10.15 a.m.

MUNICIPAL BOARD OF MOMBASA

P.O. Box 440.
Telephone 575.
To Mr. Kassam Suleman Damji,
Ndia Kuu,
Mombasa.

Public Health Dept.
4th June, 1948.

No. 5.
Notice
issued by
Medical
Officer of
Health,
Mombasa,
to K. S.
Damji, 4th
June 1948.

Sir,

Re premises No. I-277, plot 7, Sec. XXVII Salim Road, Mombasa.

30 I have to inform you of the existence of a nuisance on your premises, mentioned above, due to

Cesspits full

and to request that you will within 10 (Ten) days from the date of the receipt of this notice

Empty and if necessary deepen cesspits and dispose of contents
in such manner as not to be a nuisance.

I am, Sir,

Your obedient servant,
(Sgd.) J. SAVILLE,
for Medical Officer of Health.

40

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

1. NGARA HOTEL LIMITED
2. DHIRAJLAL NARANJI JESSANI
3. MAGANBHAI PRABHUDAS PATEL (Defendants) - *Appellants*

AND

KASSAM SULEMAN DAMJI (Plaintiff) - - - - *Respondent*

RECORD OF PROCEEDINGS

T. L. WILSON & CO.,
6 WESTMINSTER PALACE GARDENS,
LONDON, S.W.1,
Solicitors for the Appellants.

A. L. BRYDEN & WILLIAMS,
53 VICTORIA STREET,
LONDON, S.W.1,
Solicitors for the Respondent.