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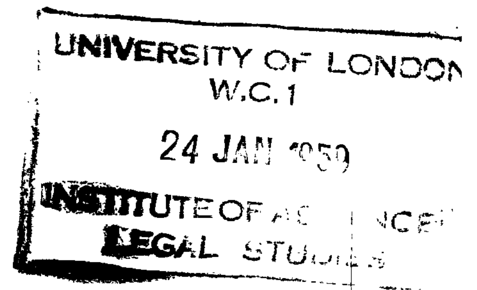
UNIVERSITY OF LONDON
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24 JAN 1959
INSTITUTE OF ADVANCED
LEGAL STUDIES

No. 5 of 1957

52064

IN THE PRIVY COUNCIL

O N   A P P E A L
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

ARIADNE TZAMBURAKIS and
NAFSIKA LAMBROU
(Administratrices of the
Estate of NICO TZAMBURAKIS
10 deceased) ... Appellants

\- and -

EFTHICHIA RODOUSSAKIS Respondent

C A S E FOR THE APPELLANTS

RECORD

1\. This is an Appeal by leave of the Court of Appeal for Eastern Africa from a Judgment of the Court of Appeal for Eastern Africa at Dar-es-Salaam (Worley P., Sinclair V-P., and Briggs J.A.) delivered on the 18th July, 1956 affirming a Judgment of the High Court of 20 Tanganyika at Dar-es-Salaam (Cox C.J.) delivered on the 17th October, 1955 whereby it was ordered that the Appellants do render to the Respondent an account of sums alleged to be due to the Respondent under a Lease dated the 1st April, 1946 during the period 1st April, 1946 to 31st March, 1949 and of the profits of a sisal estate during the period 1st April, 1949 to 1st July, 1949 and that the Appellants do pay to the Respondent the 30 taxed costs of the suit.

p.68.

p.21.

p.43. ll.25 et seq.

2\. The main questions which arise for consideration in this Appeal are:

(1) Whether a determination of the question whether or not a suit is barred under the Indian Limitation Act, 1908, is an "order affecting the decision of the case" within Section 105(1) of Indian

RECORD

Code of Civil Procedure so as to entitle the Appellants to set forth an error in such determination as a ground of objection to the final decree in the Memorandum of Appeal.

(2) Whether upon the facts of this case the appropriate period of limitation to be applied is that set forth in Articles 89, 106 or 110 of the First Schedule to the Indian Limitation Act, 1908, or Article 116 or 120 of the said Schedule. 10

(3) Whether an amendment to the plaint in this suit raised a new cause of action and if so whether for the purpose of any period of limitation the suit is deemed to have been instituted at the date when the amendment was applied for or at the date of filing of the original plaint. 20

(4) Whether in any event a part of the Respondent's claim herein was barred under the Indian Limitation Act 1908.

(5) Whether there was any or any sufficient evidence to justify a finding of non est factum.

(6) Whether the Court of Appeal was right in holding that it was a proper exercise of the discretion of the learned trial Judge to refuse to order the Respondent to pay the costs involved in proving her signature to a document when such costs had been occasioned solely by her denial that she signed the same. 30

3. The principal facts which gave rise to these proceedings are summarised in the Judgment of Briggs J.A., as follows:

p.68,11.38 et seq.

"One Nico Tzamburakis now deceased and his sister, the Respondent, were co-owners as tenants-in-common, having shares of 70/100 and 30/100 respectively, of a large sisal estate from about 1932 onwards. They developed the estate 40

largely by raising loans and it became very prosperous. Unfortunately the deceased, who is said to have been domineering and autocratic, and his sister quarrelled continuously about the estate accounts and management. The deceased had always had de facto control, and in 1946 it was agreed that the Respondent should lease to him for three years her 30% share in consideration of a royalty on all sisal and tow produced. A Lease was executed and duly registered. It was in operation from 1st April 1946 to 31st March 1949. There was then an interregnum of some three months during which the deceased remained de facto, though perhaps not de jure, in possession of the estate. On 14th July, 1949, the co-owners executed a new Lease for three years to run from 1st July, 1949. Instead of a royalty this reserved a fixed money rent, which was duly paid. Soon afterwards, however, the estate was sold to a third party, the proceeds of sale were duly divided, and the second Lease ceased to operate. The Respondent complained that the deceased had not paid to her the sums properly due for royalty under the first lease, and raised various other minor claims, and in July 1952 she sued his widow and daughter, as his personal representatives. He died on 6th January, 1951."

4. The suit was brought by the Respondent as Plaintiff on the 23rd July, 1952 in the High Court of Tanganyika against the Appellants in their capacity as Administratrices of the estate of the deceased as Defendants. By her Plaint the Respondent alleged that in or about 1932 she had entered into partnership with the deceased in the Kerenge-Mulemua Estate and that on the 26th March, 1946, she had leased by a Registered Deed of Lease ("the First Lease") to the deceased for a term of three years therefrom her share in the business of the partnership (excepting the capital assets) upon the terms (inter alia) that the deceased should pay to her during the

p.1.

p.8.

RECORD

term a royalty on all grades of sisal and tow produced from the Kerenge-Mulemua Estate. By her Plaint the Respondent further alleged that this lease terminated on 31st March, 1949 whereupon the original partnership revived, and that on the 14th July, 1949 she had leased by a Deed of Lease ("the Second Lease") to the deceased from the 1st July, 1949 to the 31st December, 1949 all her share in the partnership upon the terms (inter alia) that the deceased should pay to her the monthly rent reserved in this second Deed of Lease, and that on the 11th October, 1949 the Estate was sold. The Respondent further alleged that since the commencement of the partnership the deceased had not supplied her with partnership accounts or details of sisal production on the Estate for any period and that the deceased had not paid to her the rent due under the Second Deed of Lease. The Respondent prayed for the following relief (inter alia), namely:

p.11.

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"(a) Appointment of receiver of partnership assets."

p.3,11.2 et seq.

"(b) Partnership accounts including royalties."

"(c) Rent for period from 14th July, 1949 to 11th October, 1949."

On the 27th July, 1954 the Respondent's legal advisers drafted an Amended Plaint in the suit. After drafting the amended plaint, they submitted it to the Appellants' advocate, who consented by letter to its being filed, and an order to that effect was made by consent on 10th August, 1954, and confirmed by a note made by the Judge on 1st September, 1954. The allegations made by the Respondent in her Amended Plaint were materially different from those made in her original Plaint in the following respects:

p.5.

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The Respondent alleged in her Amended Plaint:

(i) That on and before the 26th March, 1946, she and the deceased were owners as tenants-in-common of the Kerenge-Mulemua Estate.

(ii) That the deceased had failed to render to her accounts and failed to pay to her all that was due to her under the First Lease by way of royalties and profits.

(iii) That the deceased had failed to render to her accounts and to pay all that was due to her by way of profits in respect of the period 1st April, 1949 to 14th July, 1949.

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The Respondent did not repeat in her Amended Plaint any of the allegations concerning the alleged partnership and matters relating thereto, nor did she repeat the allegation that the deceased failed to pay to her the rent due under the Second Lease. By her amended plaint the Respondent prayed for the following relief namely:

p.7,11.1 et seq.

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"(a) that an account (a) of all sisal produced on the Sisal Estate during the period covered by the First Lease namely from the 1st April, 1946 to 31st March, 1949 (b) of the rent by way of royalty due to the Plaintiff on such total production and (c) of the machinery and other movables sold or otherwise appropriated by the Deceased be taken and payment to the Plaintiff of the amount found due on taking such accounts;

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"(b) that an account may be taken of the profits made by the Sisal Estate during the period from 1st April, 1949 to 14th July, 1949 and payment to the Plaintiff of the amount found due on taking of such accounts;

"(c) that an account may be taken of the movable and immovable property of the Deceased and that the same may be administered under the decree of the Court;

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"(d) Costs of this suit;

"(e) Any other or further relief as to this Honourable Court may deem just in the circumstances."

RECORD

5. The parties agreed that the following questions should be decided as preliminary issues;

(a) Whether the amended plaint should be dismissed on the ground that it disclosed a new cause of action and

(b) Whether the action was time-barred.

p.20.

A ruling on these preliminary issues was given by Mr. Justice Mahon, at Dar-es-Salaam on the 3rd December, 1954 in which he decided both of the above questions in the negative. 10

6. The suit accordingly proceeded to trial, and judgment was given by Sir Herbert Cox, Chief Justice, on the 17th October, 1955 whereby he decreed (inter alia) as follows:

p.42,11.30 et seq.

"The Plaintiff claims:

(a) That an account

(i) of all sisal produced on the KERENGE-MULEMUA SISAL ESTATE (hereinafter referred to as "the Sisal Estate") during the period covered by the First Lease namely from 1st April, 1946 to 31st March, 1949. 20

(ii) of the rent by way of royalty due to the Plaintiff on such total production and

(iii) of the machinery and other movables sold or otherwise appropriated by the deceased 30

be taken and payment to the Plaintiff of the amount found due on taking such accounts;

(b) That an account may be taken of the profits made by the sisal estate during the period from 1st April, 1949 to 14th July, 1949 and payment to the Plaintiff of the amount found due on taking of such accounts; 40

(c) That an account may be taken of the movable and immovable property of the Deceased and that the same may be administered under the decree of the Court;

(d) Costs of this suit;

(e) Any other or further relief as to this Honourable Court may deem just in the circumstances. "

10 "It is hereby ordered and decreed that:

(1) That the Defendants do render the account as prayed by the Plaintiff and detailed in paragraph (a) above.

(2) That the Defendants do render the account sought by the Plaintiff in the plaint and referred to in paragraph (b) above, ascertainable on the basis of the partnership 20 which existed between the brother (deceased) and sister (the Plaintiff) prior to the 1st day of April, 1946, that is to say, on a 70% figure and 30% figure basis, but not inclusive of any profits for the month of July, 1949.

(4) The Defendants to pay to the Plaintiff the Taxed Costs of the suit including the costs of the decree when such 30 costs are taxed by the Taxing Officer."

7. The Appellants appealed against this decree to the Court of Appeal for Eastern Africa and in their notice of Appeal set forth the following ground of appeal:

"(1) The Learned Chief Justice erred in law in failing to hold that a new cause of action was introduced for the first time in the amended plaint filed on the 10th day of August, 1954.

p.45,11.29 et seq.

40 (2) The Learned Chief Justice erred in law in failing to hold that the claim made in the amended plaint was wholly

RECORD

or alternatively partly time-barred by virtue of the provisions of the Indian Limitation Act, 1908.

(3) Alternatively the Learned Chief Justice erred in failing to hold that the claim in the suit as framed originally was affected by the provisions of the Indian Limitation Act 1908.

(4) The Learned Chief Justice erred in failing to hold that the Respondent's claim was sufficiently answered by a receipt in full settlement bearing her signature which was produced at the hearing. 10

(5) The Learned Chief Justice erred in upholding the contention of NON EST FACTUM in respect of the said receipt.

(6) The Learned Chief Justice erred in not directing himself to the evidence of the Plaintiff that she first contended that her signature on the said receipt was a forgery and later admitted that it was genuine. 20

(7) The judgment is against the weight of evidence.

(8) The Learned Chief Justice erred in failing to grant to the Appellants the costs unnecessarily incurred in proving the Respondent's signature to the said receipt. " 30

p.68
p.85.

8. The Appeal was heard by the Court of Appeal on the 27th June, 1956 and judgment was given on the 18th July, 1956, dismissing the Appeal with costs. Final leave to Appeal to Her Majesty in Council was granted by the Court of Appeal for Eastern Africa on the 26th day of February, 1957.

p.71,11.39 et seq.

9. As appears from the judgment of the Court of Appeal, the Court of Appeal held that the grounds of appeal which sought to attack the ruling of Mahon J. were incompetent by reason of Section 97 of the Indian Code of Civil Procedure. The provisions of Section 97 of 40

the said Code are as follows:-

"Section 97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

10 The other material provisions of the said Code are as follows:

"Section 2(2). "Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final...."

"Explanation. A decree is preliminary when further proceedings have to be taken
20 before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final".

"Section 2(14) "Order" means the formal expression of any decision of a Civil Court which is not a decree."

"Section 33. The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall
30 follow".

"Section 96(1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear Appeals from the decisions of such Court."

"Section 105(1). Save as otherwise
40 expressly provided, no Appeal shall lie from any Order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is

appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the Memorandum of Appeal. "

10. It was and is submitted and contended on behalf of the Appellants that upon a true construction of the aforesaid provisions the grounds of appeal referred to were competent under Section 105 of the said Code and that the case of Chanmalswami v. Gungadharappa 1915 39 Bom. 339 was rightly decided, and were not precluded by Section 97 of the said Code. 10

p.75,11.17 et seq.

11. The Court of Appeal further held that the material provision of limitation for the purpose of the claim under the First Lease was Article 116 of the First Schedule to the Indian Limitation Act, 1908, and that the material provision for the claim in respect of the period referred to by the Court of Appeal as the 'interregnum', namely the period from the 1st April, 1949, to the 14th July, 1949, was Article 120 of the said Schedule. It was and is contended on behalf of the Appellants that the material provisions were Articles 89, 106, 110 and 115 of the said Schedule. The material provisions of the Indian Limitation Act, 1908, are as follows: 20 30

p.77,11.27 et seq.

"Section 3. Subject to the provisions contained in Sections 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefore by the first Schedule shall be dismissed, although limitation has not been set out as a Defence.

FIRST SCHEDULE

Description of Suit	Period of Limitation	Time from which period begins to run
89. By a principal against his agent for movable property received by the latter and not accounted for.	3 years	When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates.

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FIRST SCHEDULE (continued)

Description of Suit	Period of Limitation	Time from which period begins to run
106. For an account and a share of the profits of a dissolved partnership.	3 years	The date of the dissolution.
110. For arrears of rent.	3 years	When the arrears become due.
115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	3 years	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
116. For compensation for the breach of a contract in writing registered.	6 years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.
120. Suit for which no period of limitation is provided elsewhere in this Schedule.	6 years	When the right to sue accrues. "

12. The Court of Appeal held that the claim under the First Lease was governed by the decision of Tricomdas v. Gopinath (1917) 44 Cal. 759 (P.C.). It was and is submitted on behalf of the Appellants that this case is distinguishable upon the grounds:

p.76,1.33.

(1) That the relief claimed by the Appellants in this action in respect of the First Lease cannot properly be described as "compensation";

(2) That the relationship between the deceased and the Respondent in the present case was different from that between the parties in the case cited. Further as regards the period of interregnum the Appellants submitted and submit that the facts of this case come within Article 89 110 or 115 of the First Schedule, and accordingly Article 120 has no application. 10

p.74,11.18 et seq. 13. The Court of Appeal further held that the effective date for the purposes of limitation was the date of the filing of the original plaint on the 23rd July, 1952, and not the date of the Application to file the amended plaint on the 27th July 1954. The Appellants submitted and submit that where a new cause of action is introduced on amendment, time will run from the date of the Application to amend (See Rustomji 5th Ed.448). The Court of Appeal did not 20
p.74,1.40. dissent from this view and agreed with the submission that the rule might be designed to allow the Court to remedy an earlier mistake.
p.75,11.9 et seq. The Court held, however, that in the present case there was or were no new cause or causes of action introduced by the amended plaint. It was and is submitted on behalf of the Appellants that the causes of action in respect of which judgment has been given for 30 the Respondent were first introduced in the amended plaint. The judgment given in favour of the Respondents was founded upon a cause of action to the effect that the Respondent was entitled to royalties under the First Lease which she had not received. No such cause of action is to be found in the original plaint which was based entirely upon an allegation of partnership. As regards the period of interregnum the judgment of the 40 Court of Appeal is based upon a cause of action arising from the position of simple co-ownership with one co-owner enjoying de facto possession and receiving the profits of the land. No such cause of action was pleaded in the original plaint.

14. The Appellants further submit and contend, as they did before the Court of Appeal, that even if the period of limitation

RECORD

was six years under Articles 116 and 120, and even if the suit is deemed to have been instituted at the date of the original plaint, the Respondent was not entitled to the relief granted in respect of the period prior to the 23rd July, 1946.

15. Amongst the matters set up by way of Defence to the claim herein the Appellants relied upon Exhibit 1, which purported to be an Agreement or memorandum executed on the 14th July, 1949, by the deceased and the Respondent and witnessed by one George Papoudopolus, the Deceased's clerk, confirming that all accounts between the parties up to the 30th June, 1949, had been settled and nothing was due by either to the other. When this document was produced the Respondent at first denied that she had ever signed it. The Appellants called hand writing evidence at considerable expense and on the resumed trial the Respondent changed her attitude and gave evidence admitting her signature. For the first time she then said that she had been induced to sign the document by fraudulent misrepresentations as to its nature. The learned trial Judge so found and his decision was upheld by the Court of Appeal. It was and is submitted on behalf of the Appellants that having regard to the fact that this plea of the Respondent involved an allegation of fraud against a dead person a heavy onus of proof rested upon the Respondent and that such a charge ought not to be held established unless strongly corroborated. It was and is submitted on behalf of the Appellants that the evidence of the Respondent upon this point should not have been accepted for the following among other reasons:

p.86.

p.32,11.2 et seq.

(1) The charge was only made at a very late stage and during the course of the trial;

(2) such a charge involved a complete volt-face on the part of the Respondent who originally denied having signed the document at all;

(3) there was uncontradicted evidence

to show that the document was probably drafted by Mr. Desai a Lawyer against whom no charge has been made; and

(4) that the Respondent made originally a claim under the second Lease which was found to be completely without foundation.

The Appellants accordingly submit that having regard to the matters set forth above and the rest of the evidence in the case there was no sufficient evidence to justify a finding of fraud and non est factum. 10

p.41,ll.37 et seq.
p.80,ll.20 et seq.

16. Furthermore the learned trial Judge and the Court of Appeal ordered the Appellants to pay all the costs of the action and of the Appeal including the costs of examining and proving the signature on Exhibit 1., notwithstanding that such costs had been incurred solely by reason of the Respondent's initial refusal to admit that the signature on the document was her own. It was and is 20 submitted that it was not a proper exercise of the discretion vested in the learned trial Judge to order the Appellants to pay such costs, and that on the contrary such costs ought to be ordered to be paid by the Respondent.

17. It is humbly submitted on behalf of the Appellants that the Judgment of the Court of Appeal for Eastern Africa was wrong and should be set aside and Judgment entered for the 30 Appellants in the said action with costs for the following among other

R E A S O N S

(1) BECAUSE the ruling that a suit is not time-barred is an Order affecting the decision of the case within Section 105 of the Indian Code of Civil Procedure so as to entitle the Appellants to set forth an error in such determination as a ground of objection to the final decree; 40

(2) BECAUSE the appropriate period of limitation to be applied in the present case is that set forth in Articles 89, 106 or 110 of the First Schedule to the Indian Limitation Act, 1908;

(3) BECAUSE the amendment to the plaint in this suit raised a new cause of action and accordingly for the purpose of any period of limitation the suit, as regards such causes of action, is deemed to have been instituted at the date when the amendment was applied for and not at the date of the original plaint;

10 (4) BECAUSE in any event a part of the Respondent's claim herein was barred under the Indian Limitation Act, 1908;

(5) BECAUSE there was no evidence or no sufficient evidence to justify a finding of non est factum;

(6) BECAUSE the Court of Appeal was wrong in holding that it was a proper exercise of the discretion of the learned trial Judge to refuse to order the Respondent to pay the substantial costs involved in
20 proving the Respondent's signature to the document Exhibit 1;

(7) BECAUSE the decision of the Court of Appeal for Eastern Africa and the decisions of Cox C.J. and Mahon J. were wrong and ought to be reversed.

FRANK SOSKICE.

No. 5 of 1957

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

ARIADNE TZAMBURAKIS and NAFSIKA LAMBROU (Administratrices of the Estate of NICO TZAMBURAKIS Deceased) — Appellants

\- and -

EFTHICHIA RODOUSSAKIS — Respondent

CASE FOR THE APPELLANTS.

THEODORE GODDARD & CO.,
5, New Court,
Lincoln's Inn,
London, W.C.2.