

26, 1958

UNIVERSITY OF LONDON
W.C.1.

24 JAN 1959

IN THE PRIVY COUNCIL

No. 10 of 1957 INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL FROM HER MAJESTY'S COURT OF
APPEAL FOR EASTERN AFRICA

52075

B E T W E E N :

MOHAMED HAJI ABDULLA and AHMED
HAJI ABDULLA ...

Appellants

- and -

- (1) GHELA MANEK SHAH
- (2) PUNJA KACHRA
- (3) KASTURBHAI M. SHAH

10 Trading as "Shah Ghela Manek"

Respondents

CASE FOR THE RESPONDENTS

1. This is an appeal, by leave of that Court, from a Judgment of her Majesty's Court of Appeal for Eastern Africa of the 13th day of October 1956 and the Order made in consequence thereof, itself pronounced upon an Appeal by the Appellants and a Cross-Appeal by the Respondents from a Judgment of the Supreme Court of Kenya of the 18th day of February 1954 and the Decree of the 7th day of June 1955 made in consequence thereof after a review of the said Judgment on the 7th day of April 1955 in an action by the Respondents against the Appellants for specific performance of a written Agreement for Sale dated the 6th day of December 1951 of a plot of land together with the building standing thereon (which at the date of the said Agreement consisted of three shops in the occupation of three tenants) with either vacant possession of that portion of the said building which had been occupied by one of the tenants who subsequently vacated the same, or damages or compensation in respect of the diminution in value of the said premises by reason of the Appellants having re-let the said portion.
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Appx. p. 80
 Appx. pp. 45-72
 Appx. pp. 73-79
 Appx. pp. 17-19
 Appx. pp. 41-44
 Appx. pp. 10-16
 Appx. pp. 35-36
 Appx. pp. 21-34
 Appx. pp. 1 - 5
 Appx. pp. 2, 6;
 p. 45
 ll. 6-10

2. The sole question of principle for determination upon this Appeal is whether the Appellants were entitled in the

period between the date of the agreement for sale and completion to relet the said portion of the said building which has been vacated by the tenant without reference to the Respondents. There is also a subsidiary question as to how the costs of the Application for the said review of the original judgment of the Supreme Court of Kenya herein ought to be borne.

Appx. pp.
7-8

3. The said Agreement for Sale was dated the 6th day of December 1951 and made between the Appellants of the one part and an agent of the Respondents of the other part. The description of the property therein contained is as follows:-

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"Plot known as L. R. No. 209/502 situate at River Road, Nairobi, together with the buildings standing thereon which is rented by (1) Hiragar Motigar (2) Velji Ravji Barber (3) Deva Naram, Shoemaker"

The purchase price for the said property was sh. 125,000/- against which a deposit of sh. 25,000/- was paid on the signature thereof and completion was fixed for on or before the 31st of March 1952. It was further thereby provided that the Respondents should be entitled to one fifth of the net rent from the date thereof to the date of execution of a proper Conveyance and that the Appellants were liable to pay Municipal Rates and Ground Rent only up to the date of execution of a proper Conveyance.

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Appx.
p. 10
11.28-36

4. On the 16th day of February 1952 and prior to the execution of any Conveyance one of the said tenants mentioned in the said Agreement, namely Velji Ravji, surrendered his tenancy of that part of the said building let to him and vacated the same. On the same day and without any notice to the Respondents the Appellants re-let the vacated part of the said building to a new tenant at the same rent as that formerly paid by the said Velji Ravji. The new tenant went into occupation of the said portion of the said building and was at all material times and still is in occupation thereof.

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Appx.
p. 45
11. 15-23

5. As the result of the surrender of the said tenancy there was an appreciation in the market value of the premises over the market value of the said premises immediately prior to such surrender to an extent of sh. 18,000/-. The

re-letting of the surrendered portion to the said new tenant resulted in a depreciation of the market value of the said premises to the figure at which it stood immediately prior to such surrender, so that by such re-letting the entire of the said appreciation in market value was lost.

Appx. p. 16
11. 13-15
Appx. p.47
11. 32-36

10 6. The Appellants being unwilling to compensate the Respondents in respect of such depreciation in value, the Respondents commenced the present action for specific performance of the said Agreement with either vacant possession of that part of the said building which had been occupied by the said Velji Ravji or alternatively damages or compensation to the extent of such diminution in value.

Appx. pp.
1 - 5

7. Owing to the operation of the Rent Restriction Ordinances in the Colony of Kenya, it would not have been practicable for the Appellants to obtain vacant possession of that part of the said building demised to the new tenant.

Appx. p. 46
11. 25-30
p. 54
11. 18-22

20 8. The obligations of the Vendor and Purchaser of immovable property in the Colony of Kenya are governed by the provisions (as amended prior to 27th November 1907) of the Indian Transfer of Property Act, 1882, applied by Article 11(b) of the East Africa Order in Council, 1897. This Act (as so amended) provides by Section 55 thereof more particularly as follows :-

"55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:-

30 (1) The seller is bound
.....

(e) between the date of the contract of sale and the delivery of the property to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents.

.....

(6) The buyer is entitled -

(a) where the ownership of the property has passed to him, to the benefit of any improvements in, or increase in value of, the property, and to the rents and profits thereof"

- Appx. pp. 10-16 9. The Supreme Court of Kenya (Bourke, J) by its Judgment herein delivered on the 18th day of February 1954 held that whilst the technical rules of English Law relating to the creation of an equitable estate in the purchaser by virtue of the agreement for sale alone did not form part of the law of Kenya, the obligations of a Vendor pending completion of the contract were closely analagous to those of a Trustee. The Court accordingly held that in law there was a duty upon a Vendor as trustee to give notice to the Purchaser of his intention to re-let where a tenancy determined, in order to ascertain his wishes and to give him an opportunity of agreeing terms upon which the premises could be kept vacant. 10
- Appx. p. 15 1. 16 p. 16 1. 1 10. The Supreme Court of Kenya found that the Appellants were in breach of this duty, and assessed the damages at sh. 18,000/- in accordance with the uncontradicted evidence. Counsel for the respective parties thereupon reached agreement as to the correct form of Order, namely that it should be one for specific performance with compensation. Owing, however, to a misunderstanding of this agreement the Supreme Court entered Judgment for the Plaintiffs against the Defendants in the sum of sh. 18,000/- and costs. 20
- Appx. p. 16 11. 13-19 11. As soon as the Respondents discovered that the Decree was to be drawn up in this form, and before the said Decree was so drawn up, their Advocates informed the Advocates for the Appellants of the matter and a joint letter was sent to the Registrar of the Supreme Court requesting that the decree should be drawn up as one for specific performance. The matter culminated in an application before the Supreme Court of Kenya (Bourke J.) brought by the direction of the Court, to review its said Judgment. The said application was however not heard until the 7th day of April 1955 the delay being in no way attributable to the Respondents. The Appellants in the meantime had changed their Advocates and through their new Advocates vigorously opposed the application which 30
- Appx. p. 49 11. 3-18 40
- Appx. p. 49 11. 19-27 40
- Appx. p. 71 11. 16-18 40
- Appx. pp 21-34 40
- Appx. p. 48 1. 16 40
- p. 49 1. 37 40

10	was dismissed, the Supreme Court refusing to vary the said judgment holding (i) that review of a judgment as opposed to a decree, could in no case be granted, so that since the proposed decree had not been signed the application was premature (ii) that the delay in seeking review would itself have justified dismissal of the application; and (iii) that on the facts the Respondents had at the time wholly and finally abandoned any claim for specific performance. The said Application was accordingly dismissed with costs.	Appx. p. 50 1. 40 p. 51 1.3
	12. The Decree in pursuance of the said Judgment was accordingly drawn up in the form originally proposed on the 7th day of June 1955.	Appx. p. 34 1. 34 Appx. pp. 35-36
20	13. From this Judgment and Decree the Appellants appealed and the Respondents Cross-Appealed to the Court of Appeal for Eastern Africa; the Appellants contending that they were under no such duty as had been found by the Supreme Court of Kenya and the Respondents contending that in all the circumstances they were entitled to a Decree for specific Performance with compensation to the extent of sh. 18,000/-	Appx. pp. 17-19 pp. 41-44
30	14. By its Judgment herein of the 13th day of October 1956 and the Order of the same day made in pursuance thereof of the Court of Appeal for Eastern Africa (R. O. Sinclair, Acting President, F. A. Briggs and Roger Bacon Justices of Appeal) dismissed the said Appeal of the Appellants with costs, and allowed the Respondents Cross-Appeal with costs to the Respondents and in substance varied the said Judgment and Decree of the Supreme Court of Kenya so as to grant the Respondents specific performance of the said Agreement for Sale with Compensation of sh. 18,000/-. The Court of Appeal also varied the Order for costs made by the Supreme Court of Kenya upon the said Application for review, by directing that the Appellants and the Respondents should each pay their own costs thereof.	Appx. pp. 45- 72 Appx. pp. 73- 79
40	15. On the point of principle, F. A. Briggs, Justice of Appeal (in whose Judgment the Acting President and Roger Bacon, Justice of Appeal, concurred) said in his Judgment:- "In general, I think the sellers must keep the property in the condition most advantageous to the buyers. In some cases there may be doubt what is	Appx. p. 70 11.16-25

most advantageous, but there was no doubt here: the property should have been kept vacant. I think the law of Kenya in this respect is in its practical consequences the same as the law of England, though the juridical basis is different".

16. With regard to the Application for Review, the learned Judge of Appeal expressed no concluded opinion on the point as to whether the Supreme Court of Kenya had power to review a judgment as opposed to a Decree. On the question of delay, in the circumstances that the Respondents made their application as soon as they learned that the Decree was to be drawn up in its actual form and that the delay since such date was not attributable to the Respondents, the learned Justice of Appeal held that it could not fairly be said that the Respondents had been guilty of such delay as should deprive them of the opportunity of obtaining relief. He further reviewed the evidence on the question of abandonment of the claim to specific performance and concluded that the Supreme Court of Kenya had misunderstood the position, and that such claim had never been abandoned. He accordingly concluded with regard to the costs thereof (with which the Court of Appeal for East Africa decided it had jurisdiction to deal under the East African Court of Appeal Rules, 1954) as follows :-

"I think the application ought to have succeeded, and in all the circumstances I should have been inclined to order that the sellers should pay one-half of the buyers' taxed costs of the application. The buyers, however, have contented themselves with asking that each party should bear its own costs, and I propose that any order should be made to that effect."

17. The East African Court of Appeal Rules provide inter alia as follows :-

74 (4) The Court may give any judgment and make any Order which ought to have been given or made and make such further or other Orders as the case requires.

78. No interlocutory Order from which there has been no appeal shall operate to prevent the

Court from giving such decision upon the appeal as is just.

18. Against the said Judgment of the Court of Appeal of East Africa this Appeal is now preferred final leave so to do having been granted by the Court of Appeal on the 2nd day of April 1957.

Appx. pp.
80-81

19. The Respondents humbly submit that this Appeal should be dismissed for the following among other

REASONS

- 10 (1) Because the Appellants were under a duty not to relet the property without consulting the Respondents as to their wishes in the matter and giving them an opportunity of agreeing terms upon which the same could be kept vacant.
- (2) Because the Appellants were under duties towards the Respondents analagous to those of a Trustee towards a Beneficiary and they failed to fulfil such duties.
- 20 (3) Because under the provisions of the Indian Transfer of Property Act, 1882, the Appellants were under a duty to take care of the property in the interests of both the Respondents and themselves and they failed in such duty.
- (4) Because the Appellants were under a duty to keep the property in the condition most advantageous to the Respondents and they failed in such duty.
- 30 (5) Because the Appellants were under a duty to take all reasonable steps to ensure that on completion there would pass to the Respondents the benefit of all improvement in, or increase in value of, the property occurring between the date of the agreement for sale and completion, and the Appellants failed in such duty.
- (6) Because for the reasons stated therein the Judgment of the Court of Appeal for Eastern Africa and (on this point) the Judgment of the Supreme Court of Kenya were correct and ought to be affirmed.
- (7) Because the said Application for Review of the Judgment of the Supreme Court of Kenya ought to have

been granted by consent, or ought otherwise to have been granted, having regard both to the agreement between Counsel and to all the circumstances of the case.

(8) Because in view of the agreement between the respective Counsel the Appellants ought not to have opposed the said Application for Review.

(9) Because under the East Africa Court of Appeal Rules 1954 the costs of the said Application for Review were a matter within the jurisdiction of the Court of Appeal for Eastern Africa upon the Appeal and Cross-Appeal and its discretion in respect thereof was properly exercised.

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(10) Because on these points as on all others the Judgment of the Court of Appeal for Eastern Africa was correct and ought to be affirmed.

RAYMOND WALTON

No. 10 of 1957

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FROM HER MAJESTY'S COURT OF APPEAL
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BETWEEN:

MOHAMED HAJI ABDULLA and
AHMED HAJI ABDULLA Appellants

- and -

(1) GHELA MANEK SHAH

(2) PUNJA KACHRA

(3) KASTURBHAI M. SHAH

Trading as 'Shah

Ghela Manek

Respondents

CASE FOR THE RESPONDENTS

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