Judgment 2(, 1958 Kenya

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IN THE PRIVY COUNCIL No. 10 of 1957

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

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
Trading as "Shah Ghela Manek" Respondents

RECORD OF PROCEEDINGS

Herbert Oppenheimer, Nathan & Vandyk,
20, Copthall Avenue,
E.C.2.

Solicitors for the Appellants.

Linklaters & Paines,
Barrington House,
59-67, Gresham Street,
E.C.2.

Solicitors for the Respondents.

IN THE PRIVY COUNCIL — No. 10 of 1957

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FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

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- and -

(1) GHELA MANEK SHAH
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RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL — No. 10 of 1957

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA

B E T W E E N:- MOHAMED HAJI ABDULLA and
AHMED HAJI ABDULLA — Appellants

- and -

(1) GHELA MANEK SHAH
(2) PUNJA KACHRA
10 (3) KASTURBHAI M. SHAH
Trading as "SHAH GHELA
MANEK" — Respondents

RECORD OF PROCEEDINGS

No. 1.

PLAINT

In the Supreme Court of Kenya.

No. 1.

Plaint.

31st January, 1953.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI
CIVIL CASE No. 200 of 1953

GHELA MANEK SHAH)
PUNJA KACHRA) Trading as
20 KASTURBHAI M.SHAH) SHAH GHELA MANEK — Plaintiffs

versus

MOHAMED HAJI ABDULLA
AHMED HAJI ABDULLA — Defendants

P L A I N T.

1. The Plaintiffs are merchants trading in partnership in the City of Nairobi in the Colony of Kenya under the firm or style of Shah Ghela Manek and their address for service is care of Hamilton, Harrison & Mathews, Nairobi House, Nairobi in the
30 said Colony. The Defendants are landowners and reside and carry on business at Box 843, Mombasa near market in the Protectorate of Kenya.

2. By a Memorandum of Agreement dated and

In the Supreme Court of Kenya.

No. 1.

Plaint.

31st January, 1953 - continued.

executed on the 6th day of December, 1951 (registered in the Crown Lands Registry at Nairobi in Vol. N. 20 Folio 105/137) and made between the Defendants and one KHETSHI GHELABHAI, the Defendants agreed with the said Ketchi Ghelabhai for the sale by them to him for the sum of Shs.125,000/- of the Plot of land known as L.R.No.209/502 situate at River Road, Nairobi, in the Colony of Kenya together with the building standing thereon which was then rented by (1) Hiragar Motigar (2) Velji Ravji Barber (3) Deva Naran Shoemaker, free from encumbrances. 10

3. By the said Agreement it was further provided that on the signing thereof the Defendants should be paid a deposit of Shs. 25,000/- in respect of the said sale and against the said purchase price of Shs. 125,000/- and that the balance of the purchase money viz: the sum of Shs. 100.000/- should be paid to the Defendants on the 31st day of March 1952 on completion of the sale. The said sum of Shs. 25,000/- was paid to the said Defendants on the 6th day of December 1951 but for reasons which will hereafter appear the said balance of Shs. 100,000/- has not yet been paid. 20

4. The said Agreement was entered into and the said payment of Shs. 25,000/- made by the said Khetshi Ghelabhai as the agent duly appointed for that purpose by the Plaintiffs.

5. The said letting to Velji Ravji Barber of portion of the premises so agreed to be sold duly terminated by surrender on the 16th day of February 1952, when vacant possession thereof was delivered up to the said Defendants. 30

6. After the termination of the said letting to Velji Ravji Barber and the surrender of that portion of the said premises comprised therein and prior to the 31st day of March 1952 the Defendants without the knowledge or authority of the Plaintiffs or of the said Khetshi Ghelabhai re-let the said portion of such premises to a stranger (whose name is believed to be Doshi & Co.), which letting is still subsisting with the result that the Defendants were unable on the said 31st day of March 1952 and have been unable at all times since to deliver to the Plaintiffs the premises so agreed to be sold with vacant possession of that portion thereof 40

In the Supreme Court of Kenya.

No. 1.

Plaint.

31st January, 1953 - continued.

which had been the subject of the letting to the said Velji Ravji Barber.

7. After correspondence between the parties and/ or their advisers, on the 16th day of January, 1953 the Plaintiffs, by their advocates, Messrs. Hamilton, Harrison & Mathews, submitted to the Defendants, by their Advocates, Messrs. O'Brien Kelly and Hassan, an engrossment in duplicate of an Indenture of Assignment prepared on behalf of the Plaintiffs for execution by the Defendants in pursuance of the said Agreement and by letter dated the 24th day of January, 1953 the said Advocates for the Defendants stated that the Defendants were quite prepared to execute the said Indenture of Assignment, but were unable, by reason of the re-letting so made by them, to give and would not give to the Plaintiffs vacant possession of that portion of the premises formerly occupied by the said Velji Ravji Barber, nor would they pay compensation to the Plaintiffs in respect of their refusal or inability so to give to the Plaintiffs vacant possession of such portion of the said premises. The Plaintiffs will refer to the said Agreement for Sale and to the said letters dated 16th January, 1953 and 24th January 1953 when produced.

8. The Plaintiffs are and have at all material times been ready and willing to complete the said purchase and pay to the Defendants the balance of the purchase price so agreed to be paid upon the Defendants executing in favour of the Plaintiffs a proper Assignment in the terms submitted to the Defendants as above-mentioned and delivering to the Plaintiffs the premises comprised in the said Agreement with vacant possession of so much thereof as had been so let to the said Velji Ravji Barber as above-mentioned and subject to the subsisting leases or lettings of other portions of the said premises to the said Hiragar Motigar and Deva Naran Shoemaker.

9. As a result of the said unauthorised re-letting of that portion of the premises so agreed to be sold which had been let to the said Velji Ravji Barber the market value of the said premises so agreed to be sold thereupon became substantially less than was the market value thereof immediately prior to the making of such re-letting and the present market value of the said premises if offered

In the Supreme Court of Kenya.

No. 1.

Plaint.

31st January, 1953 - continued.

for sale subject to the said re-letting is substantially less than the market value which would attach thereto if the same were offered for sale free from such re-letting and with vacant possession of the portion so let to the said Velji Ravji Barber.

10. By reason of such failure and refusal of the Defendants to deliver the premises so agreed to be sold to the Plaintiffs with vacant possession of so much thereof as was formerly let to Velji Ravji Barber as before-mentioned the Plaintiffs have suffered loss and damage. 10

11. The said Contract for Sale was made in the Colony of Kenya and within the jurisdiction of this Honourable Court.

WHEREFORE the Plaintiffs pray this Honourable Court :-

(1) That the Defendants may be ordered specifically to complete the said sale by delivering to the Plaintiffs, contemporaneously with the execution of the abovementioned Indenture of Assignment and on payment to the Defendants by the Plaintiffs of the said sum of Shs. 100,000/- the premises comprised in the said Agreement with vacant possession of so much thereof as was so surrendered to the Defendants by the said Velji Ravji Barber. 20

(ii) Alternatively:

(a) That the Plaintiffs be declared entitled to damages for the failure of the Defendants to preserve as from the date of the surrender to the Defendants by the said Velji Ravji Barber of his tenancy therein that portion of the said premises so surrenfered free from occupation or enjoyment by any other person and for their consequent inability or failure to deliver to the Purchasers the premises so agreed to be sold free from encumbrances and with vacant possession of the portion thereof which had been surrendered to 30 40

In the Supreme Court of Kenya.

No. 1.

Plaint.

31st January, 1953 - continued.

them by the said Velji Ravji Barber as above mentioned

(b) That the amount of such damages be determined by this Honourable Court and that for such purposes if necessary an enquiry be had.

(c) That the Defendants be ordered and directed that upon payment to them by the Plaintiffs of the said sum of Shs.125,000/- the agreed purchase price of the said premises, less by the sum of Shs. 25,000/- being the amount of the deposit so paid by or on behalf of the Plaintiffs and also less by the amount of damages awarded as above, they the Defendants do execute in favour of the Plaintiffs the said Indenture of Assignment and do deliver to the Plaintiffs the same together with the said premises subject to such lettings as may be subsisting therein.

10

20

(iii) That the costs of this action be paid by the Defendants to the Plaintiffs.

(iv) Or for such other relief as to this Court shall seem just

Dated the 31st day of January, 1953.

30

Sgd. R. H. MATHEWS,
FOR HAMILTON, HARRISON & MATHEWS
Advocates for the Plaintiffs.

Filed by:
Hamilton, Harrison & Mathews,
Advocates,
Nairobi House,
Nairobi.

In the Supreme Court of Kenya.

No. 2.

Defence.

(undated).

No. 2.

DEFENCE

1. Each and every allegation as set forth in the Plaint is denied save as herein specifically admitted.

2. The Defendants admit paragraph 1 of the Plaint and add that their address for service for the purpose of this suit is care of Messrs. O'Brien Kelly & Hassan, Advocates, Fort Jesus Road, Mombasa.

3. The Defendants do not deny paragraphs 2 and 3 of the Plaint in so far as same are consistent with the Agreement of Sale as between the Defendants of the one part and Khetshi Ghelabhai of the other part, which Agreement was executed on the 6th day of December, 1951. A copy of the said Agreement is attached hereto and marked 'A'. 10

4. The Defendants admit paragraph 4 of the Plaint save that they are strangers to the alleged agency as between Khetshi Ghelabhai and the Plaintiffs.

5. The Defendants admit paragraph 5 of the Plaint. 20

6. The Defendants do not deny paragraph 6 of the Plaint but maintain that they were legally entitled and justified in re-letting the portion of the premises referred to therein as alleged therein.

7. The Defendants admit paragraph 7 of the Plaint.

8. As regards paragraph 8 of the Plaint, the Defendants deny that the Plaintiffs were ready and willing to complete the purchase in accordance with the agreement of sale of the 6th December, 1951. They further deny that they ever contracted either expressly or impliedly to give to the Plaintiffs vacant possession of that part of the premises formerly occupied by Velji Ravji Barber. 30

9. As regards paragraph 9 of the Plaint, the Defendants deny that the market value of the premises in question has been reduced by the inability of the Defendants to give to the Plaintiffs vacant possession of that part of the premises formerly occupied by Velji Ravji Barber.

10. The Defendants deny paragraph 10 of the Plaint and admit paragraph 11 of the Plaint. 40

In the Supreme Court of Kenya.

No. 2.

Defence - continued.

(undated).

11. The Defendants maintain that they were at all times ready and willing to perform their part of the contract of sale of the 6th December 1951 and that they were at all times ready and willing to execute in favour of the Plaintiffs a Deed of Assignment in accordance with the terms thereof. They further maintain that the Plaintiffs have never been ready and willing to perform their part of the said contract and that they (the Plaintiffs) have, in fact, repudiated the same.

12. The Defendants deny that the Plaintiffs have got any cause of action against them or that they (the Plaintiffs) are entitled to any of the reliefs claimed.

WHEREFORE the Defendants pray that this suit be dismissed with costs.

Sd. J. O'Brien Kelly,
O'BRIEN KELLY & HASSAN.

Sd. K. I. Joshi.
K.I. JOSHI,
Advocates for the Defendants.

Filed by:
Messrs. O'Brien Kelly & Hassan,
Advocates,
Mombasa.

No. 3.

No. 3.

Annexure "A" to the Defence.

6th December, 1951.

ANNEXURE "A" TO THE DEFENCE

MEMORANDUM OF AGREEMENT OF SALE OF THE UNDER-MENTIONED PROPERTY BETWEEN THE PARTIES HERE-UNDER MENTIONED UPON TERMS SPECIFIED BELOW.

1. NAME OF THE VENDORS:-
MOHAMED HAJI ABDULLA and (2) AHMED HAJI ABDULLA.

2. NAME OF THE PURCHASER:-
KHETSHI GHELABHAI.

3. DESCRIPTION OF PROPERTY:-
Plot known as L.R. No.209/502 situate at River Road, Nairobi, together with the building standing thereon which is rented by (1) Hiragar Motigar (2) Velji Ravji Barber (3) Deva Naran, Shoemaker. Free from encumbrances.

In the Supreme Court of Kenya.

No. 3.

Annexure "A" to the Defence.

6th December, 1951 - continued.

4. PURCHASE PRICE

Shgs.125,000/- (Shillings One hundred and twenty five thousand only).

5. DEPOSIT AGAINST PURCHASE PRICE MADE ON THE SIGNING HEREOF :-

Shs.25,000/- (Shillings Twenty five thousand only)

6. BALANCE OF PURCHASE PRICE :-

Shs.100,000/- (Shillings One hundred thousand only) to be paid on or before the 31st of March, 1952 against execution of a proper conveyance by the Vendors in favour of the Purchaser, his Nominee or Nominees. 10

7. CONVEYANCE :-

To be prepared by an Advocate named by the Purchaser, their Nominee or Nominees. Cost of such Advocate, Stamping and registering the Conveyance to be borne by the Purchaser.

8. BROKER'S COMMISSION :-

Shgs. 2,000/- (Shillings Two thousand only) to be paid by the Vendors to Mr. Virchand Karamshi Shah. 20

9. FORFEITURE OF DEPOSIT :-

The aforesaid deposit to be forfeited only if the Purchaser fails to pay the balance of the purchase price against the execution of a proper Conveyance as aforesaid.

10. RENT AND RATES :-

The Purchaser is entitled to one fifth of the net rent from the date hereof to the date of execution of a proper Conveyance. The Vendors are liable to pay Municipal Rates and Ground Rent only up to the date of execution of proper Conveyance. 30

Dated at Mombasa this 6th day of December, 1951.

SIGNED BY THE VENDORS)
in the presence of :-) (Sgd.) Mohamed H. Abdulla
(Sgd.) K.I. Joshi,)
Advocate) (Sgd.) Ahmed H. Abdulla.
Mombasa.)

SIGNED BY THE PURCHASER)
in the presence of :-) (Sgd.) Khetshi Ghelabhai.
(Sgd.) K.I. Joshi,) 40
Advocate,)
Mombasa.)

Sh. 1/- Stamp
6th December, 1951.

In the Supreme Court of Kenya.

No. 4.

Reply.

28th February, 1953.

No. 4.

REPLY.

1. Save and except for (a) the admissions made by the Defendants in their Defence filed herein and (b) the Statements in the Plaint filed herein which are stated as not being denied as set forth in the Defence filed herein, the Plaintiffs join issue with the Defendants upon their Defence.

2. As to paragraphs 8 and 11 of the said Defence
10 the Plaintiffs further plead that by reason of the events as set out in paragraphs 5 and 6 of the Plaint, the obligation upon the Defendants under and by virtue of the Memorandum of Agreement dated the 6th day of December, 1951, referred to in paragraph 1 of the said Plaint, was to deliver up to the Plaintiffs on the 31st day of March, 1952, the premises comprised in such Memorandum of Agreement with vacant possession of so much thereof as had on the 16th day of February, 1952, been surrendered
20 by Velji Ravji Barber, the tenant thereof, to the Defendants as set out in paragraph 5 of the said Plaint.

WHEREFORE the Plaintiffs pray this Honourable Court for judgment as prayed in the Plaint filed herein.

DATED this 28th day of February, 1953.

For HAMILTON, HARRISON & MATHEWS.

Sgd. J.F.H. HAMILTON,

Advocates for the Plaintiffs.

30 Filed by:
Hamilton, Harrison &
Mathews,
Advocates,
Nairobi House,
NAIROBI.

In the Supreme Court of Kenya.

No. 5.

Judgment.

18th February, 1954.

No. 5.

JUDGMENT

On the 6th December, 1951, the parties entered into an agreement of sale (Exhibit A) of property described in Clause 3 thereof under the heading "Description of Property" as follows :-

> "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 Naran, Shoemaker" 10

The purchase price was fixed at Shs.125,000/-. A deposit of Shs.25,000/- was paid and the balance became payable "on or before the 31st of March, 1952, against execution of a proper conveyance by the Vendors in favour of the purchaser, his nominee or nominees" (Clause 6); the conveyance to be prepared by the Purchaser (Clause 7). It was further agreed by Clause 10 headed "Rent and Rates" as follows :- 20

> "The Purchaser is entitled to one fifth of the net rent from the date hereof to the date of execution of a proper conveyance ......"

There is no suggestion that the Plaintiffs accepted any part of the rent paid in respect of the new letting to which I am about to refer.

The agreed facts are that on the 16th February, 1952, and prior to the execution of any conveyance, the tenant Velji Ravji mentioned in the agreement surrendered the tenancy of that part of the premises - the centre shop - let to him and vacated the premises. On the same day and without any notice to the Plaintiff purchasers, the defendants re-let the vacated part of the property to Doshi & Company at the same rent of Shs.178/- a month. The new tenant went into possession and remains in occupation to this day. 30

The agreed issues are: (1) On the facts as so agreed were the Defendants entitled in law to re-let the premises referred to without the authority of the Plaintiffs? (2) If not, have the Plaintiffs suffered damage and if so what damage? 40

In the Supreme Court of Kenya.

No. 5.

Judgment.

18th February, 1954 - continued.

The Plaintiffs claim damages and have abandoned the claim for specific performance. They called one witness as an expert valuer to prove that the fact of the tenancy being determined, so leaving part of the premises vacant, would enhance its value by an amount of at least Shs. 18,000/-. They seek to be recouped in damages in this sum. The Defendants called no witness.

Now there is nothing in the agreement of sale itself putting in terms the Vendors under the obligation not to do anything in the way of reletting, should a tenancy be surrendered, without obtaining the authority of the Purchasers. The Plaintiffs' case is that the position arising at law rendered the Defendants bound, in the circumstances of part of the property becoming vacant, to hold their hands and refrain from creating a fresh tenancy unless they had obtained the express authorisation of the Plaintiffs so to do. The argument for the Plaintiffs has been founded in reliance upon the effect of S.55 (6) (e) of the Indian Transfer of Property Act which reads :-

> "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.
>
> (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".

It is said that this section operates to put the Defendants in the position of trustees and that upon a circumstance arising, namely, the surrender of a tenancy, increasing the value of the property, the Defendants should not have re-let except upon notice to and in pursuance of the wishes of the Plaintiffs. In taking the opposite course the Defendants have committed a breach of trust and the Plaintiffs are entitled to compensation being the estimate of the difference between the market "re-sale value" of the property with the previously

In the Supreme Court of Kenya.

No. 5.

Judgment.

18th February, 1954 - continued.

tenanted portion (the central shop) vacant and the re-sale value with a tenant in occupation of this same portion - a figure which is put on the evidence at Shs.18,000/-. In support of the submission reference has also been made to Section 55(6) (a) of the Act which reads :-

> "The buyer is entitled where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property and to the rents and profits thereof". 10

For the Defendants it is contended that even if they became trustees, so far from failing in a duty towards the Plaintiffs they took the only reasonable and necessary course in promptly re-letting at the same rent. Under the contract the Plaintiffs were entitled to a share of the rents and loss of part of such share was prevented by taking a new tenant; under the law the Defendants were entitled to the balance and larger portion of the rents until ownership passed by transfer. 20 There is section 54 of the Act under which a contract for sale "does not, of itself create any interest in or charge on" the property, and section 55(4) (a) which provides that "The seller is entitled to the rents and profits of the property till the ownership thereof passes to the buyer". The rents and profits are the fund out of which the Vendor performs the duties of maintenance (Mulla on Indian Transfer of Property Act 3rd Edition, 30 page 325).

It is necessary to ascertain what was the position at law of the Defendants upon the contract of sale being made. It is clear that under the Indian Act the contract does not operate to transfer any estate and so there is no parting with the equitable estate as in English law (Mulla op. cit. page 327). But it is also clear that by virtue of section 55 (1) (e) such a contract:- "imposes upon the seller a personal obligation in the nature 40 of a trust, and though he is still the owner, this sub-section imposes upon him the same duties as are imposed upon a trustee by Section 15 of the Trusts Act. The English law imposes the same liability....." (Mulla pages 315-6). He is bound to deal with the property "as carefully as a man of ordinary prudence would deal with such property as if it were his own" (section 15 Indian Trusts

Act, 1882). In the commentaries on the Transfer of Property Act, 1882, by Shephard and Brown, 7th Edition at page 200 it is stated:- "Although the Purchaser does not from the date of the contract acquire any interest in the property or assume the whole risk, he is entitled to have the same care taken of the property by the Vendor here as under English law and this obligation of the Vendor lasts until the property is delivered to the buyer".
10 Gour on the Act (Vol.I, 4th Edition, p.653) deals with Section 55 (1) (e) more fully and says that "the Vendor must take the same care of the property as a trustee would of the property of a cestui que trust".

I am told that there is no decided case on all fours with the peculiar circumstances of the instant matter. I note that in Gour (ib. p.653) it is said that where "the property sold be a house in the possession of tenants, the Purchaser is en-
20 titled to damages in the nature of compensation for loss of a tenant (due to the wilful act or at least negligence of the Vendor) the measure of which would be the rent lost". In the present times of shortage of premises and, no doubt, rent restriction, the loss of a tenant allowing transfer of vacant possession would apparently, on the uncontroverted evidence of the Plaintiffs' witness, which I have no reason to decline to accept, increase the value of such premises. What the Plain-
30 tiffs are saying in effect is:- "Had we been informed by the Defendants of the surrender of the tenancy, as they were bound to do as trustees, we could have required them against a promise to make up the four-fifths rental payment to date of transfer, not to re-let; and we could have taken steps toward completion thus acquiring a property that had become subject through partial vacancy to an "accretion" and an increase in value (see Gour ib. page 692). We were entitled to the benefit of
40 the "windfall" (Dart Vendors and Purchasers Vol.I, 7th Edition, 290) and have in breach of trust been deprived of it through this re-letting behind our backs".

The learned advocate for the Plaintiffs has been at pains to show that the duties and liabilities of a Vendor as Trustee under the Indian Act correspond with those of the Vendor under English law. I am then referred to the following passage

In the Supreme Court of Kenya.

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Judgment.

18th February, 1954 - continued.

from Williams on Vendor and Purchaser Vol. I 2nd Edition, page 514 as being conclusive in favour of the Plaintiffs :-

> "If any tenancy of lands usually let determine during the interval in question, the Vendor ought to notify the vacancy so occurring to the Purchaser, and unless the Purchaser should express a wish that the lands should remain unlet and promise to indemnify the Vendor against loss on this account in case of the purchase going off, the Vendor ought to take steps to re-let the lands. And the Vendor should do this whether the tenancy expired by effluxion of time or by reason of a notice to quit served by the Vendor at the Purchaser's request". 10

The authority referred to by the learned author is Egmont v. Smith 6 Ch. D. 469, which is also mentioned by Gour in the work cited at page 653. I have consulted the report of that case in which Jessel M.R. said that what he had to consider was "the position in law of a Vendor who, having sold estates subject to yearly tenancies which he is not compellable to determine, at the request and for the convenience of the Purchaser gives notice to the Tenants to leave". I quote the words of the learned Master of the Rolls revealing the conclusion he arrived at :- 20

> "I think it is his (the Vendor's) duty, as he has given the notices at the request of the Purchaser, which he was not compelled to do, at least before re-letting the farms, to consult the Purchaser to know if he wishes them re-let, and he should give him notice that he intends to re-let them. That it is his duty and obligation to re-let them I have no doubt whatever". 30

The judgment goes on to point out that under the general law a trustee who allowed the property to remain unlet would not be performing his duty and if he did so neglect voluntarily and knowingly would expose himself to a serious liability to the cestui que trust who loses his rent and who is entitled to have the lands kept in a proper state of cultivation. "That", said the learned judge (page 476), "I have no doubt is the general law. Whether 40

the vacancy happen in the ordinary course of determining the tenancy either by the Landlord or the Tenant, or whether the vacancy happen because the Landlord gave the notice at the request of the Purchaser, appears to me as regards the subsequent liability wholly immaterial". I quote the passage immediately following :-

> "I think it is the proper course that the Vendor should give notice of the impending vacancy to the Purchaser, and ask him what he wishes to be done; because if the Purchaser says I am willing to run the risk of the farms being unlet, and I will guarantee you against any loss that will arise to you in case the Purchase goes off, it might be a proper thing to allow them to remain unlet".

In this case under reference the Vendors had given notice of intention to re-let which was ignored. The Purchaser sued for damage caused to him by reason of the tenancies newly created (he had sold to sub-purchasers who threatened proceedings for non-delivery of possession to them). Jessel M.R. found the claim baseless saying (page 477) :-

> "I cannot see how the Vendors could, under the circumstances, assume otherwise than an assent on the part of the Purchaser to their re-letting, even supposing they had not been required by law to re-let; and I should have held that they were exonerated by the correspondence from any liability for the re-letting, even if my opinion as to the legal position of the parties had been different from what it is".

Accordingly it seems evident that in law there is a duty upon a Vendor as trustee to give notice to the Purchaser of his intention to re-let where a tenancy determines, whether this event occur through surrender by the Tenant or otherwise, and to ascertain what the Purchaser wishes to be done. Despite the obligation to re-let under the general law, it seems that the Purchasers in the instant case should have been given by notice the opportunity of saying "we will forego the one-fifth share of rent to which we are entitled in respect of this central shop, and we will indemnify or settle with you as regards the balance of the rental amount to which

In the Supreme Court of Kenya.

No. 5.

Judgment.

18th February, 1954 - continued.

you are entitled up to the time of completion". The failure of the Defendants to perform this duty amounts in my opinion to a breach of trust and the Plaintiffs are entitled to damages by way of compensation. As I have said, there is no suggestion that at any time the Plaintiffs accepted the one-fifth share of the rent in respect of the re-letting. In assessing the damages I have only the evidence of Mr. S. Thakore to go upon. I am satisfied that he is sufficiently experienced to render an opinion as an expert in the valuation of property and I have no reason to think that he is not an honest witness. His evidence stands uncontradicted and I have already intimated that I accept it. I assess the damages at Shs. 18,000/- and in view of the relinquishing of the claim for performance and the nature of the prayer in the plaint as it stands I will hear the parties as to the form in which judgment should be entered.

Paget J. Bourke,

PUISNE JUDGE.

18th February, 1954.

Judgment is entered for Plaintiffs against Defendants in sum of Shs. 18,000/- as damages with costs.

Paget J. Bourke,

18.2.54.

I certify that this is a true copy of the original.

(Sgd.) ?

Registrar,
Supreme Court, Nairobi.

No. 6.

MEMORANDUM OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA.

CIVIL APPEAL NO.34 of 1954

(From original Civil Suit No. 200 of 1953 of Her Majesty's Supreme Court of Kenya at Nairobi).

MOHAMED HAJI ABDULLA, and
AHMED HAJI ABDULLA Appellants
(Original Defendants)

versus

GHELA MANEK SHAH, PUNJA KACHRA,
KASTURBHAI M. SHAH, trading as
"SHAH GHELA MANEK" Respondents
(Original Plaintiffs)

MEMORANDUM OF APPEAL

The Appellants (Defendants) above-named appeal from the judgment of Her Majesty's Supreme Court of Kenya at Nairobi in its Civil Suit No. 200 of 1953 dated the 18th day of February, 1954 (a certified copy whereof accompanies this Memorandum of Appeal), on the following among other grounds :-

1. The learned Judge omitted to frame and record all the issues which arose on the pleadings, and/or on which the right decision of the case depended; and he erred in believing, as he appears to have done, that only the issues recorded by him were the issues between the parties or that the correct decision in the suit depended only on the said issues.

2. The learned Judge failed to appreciate that the Plaintiff's suit against the Defendants was one for specific performance plus compensation and that abandonment by the Plaintiffs of their claim for specific performance necessarily entailed dismissal of their suit and disentitled them to any relief; and the learned Judge further erred in that he omitted to take this abandonment into consideration even on the questions of the measure of compensation and the costs of the suit.

In the Court of Appeal for Eastern Africa.

No. 6.

Memorandum of Appeal.

13th May, 1954 - continued.

3. The learned Judge erred in holding that the Defendants, as Vendors, were, in law, trustees for the Purchasers or that there was a duty cast upon them by law to give notice to the Plaintiffs before re-letting the shop, tenancy of which was surrendered to the Defendants before completion of the sale by conveyance. In this respect the learned Judge erred in acting upon the opinions expressed by writers of the various commentaries on the Indian Transfer of Property Act that under the said Act the Vendor of immoveable property became a Trustee thereof for the Purchaser even though no interest therein passed to the Purchaser before completion, and that his duties and obligations in this respect were the same as those of a Trustee in English law; and as to the reference to the Indian Trusts Act, the learned Judge failed to appreciate that the said Act was not one of the Indian Acts applied in the Colony of Kenya. 10

4. In any event, having found or held that even under English law (where the Purchaser under a contract of sale of land acquired an equitable ownership in the property and the Vendor became a trustee for him) "the general law was that a Trustee who allowed the property to remain unlet would not be performing his duty and if he did so neglect voluntarily and knowingly would expose himself to a serious liability to the cestui que trust who loses his rent", etc., the learned Judge ought to have held that the Defendants were not liable to pay any compensation or "damages" to the Plaintiffs and he ought not to have allowed his judgment to be influenced by considerations of facts and circumstances which were neither in evidence before him nor admitted by the Defendants. 20 30

5. If the Plaintiffs were entitled to claim any compensation at all from the Defendants, on any lawful ground, the learned Judge erred in awarding them "damages" on the footing of what the property would have been worth to them in possession with physical occupation of the shop referred to in the Plaint; as, in doing so, the learned Judge (apart from failing to notice as stated in paragraph 2 hereinabove, that the Plaintiffs no longer required the property to be conveyed to them), in effect, construed the contract sued on as if it contained an express stipulation on the part of the Defendants to give the Plaintiffs vacant possession or physical occupation of a part of the property described in the said contract. 40 50

In the Court of Appeal for Eastern Africa.

No. 6.

Memorandum of Appeal.

13th May, 1954 - continued.

6. The learned Judge's estimate of "damages" was not supported by the evidence before him and it is based on an erroneous and imperfect view he took of the said evidence as a whole.

The Appellants, therefore, pray :-

(i) That this appeal be allowed and the judgment appealed from be set aside;

(ii) that the Plaintiffs' suit No.200 of 1953 in Her Majesty's Supreme Court of Kenya at Nairobi be dismissed; and

(iii) that the Appellants be allowed the costs of this appeal and the costs of the said original suit.

Mombasa, dated the 13th day of May, 1954.

(Sgd.) Narshidas M. Budhdeo.
ADVOCATE FOR THE APPELLANTS.

Filed on 17th May, 1954.

(Sgd.) M. D. Desai,
A.R.

Filed by :-
(Sgd.) Narshidas M. Budhdeo.
Advocate for the Appellants.

In the Supreme Court of Kenya.

No. 7.

Notice of Motion for review of the Judgment of the Supreme Court.

15th December, 1954.

No. 7.

NOTICE OF MOTION FOR REVIEW OF THE JUDGMENT OF THE SUPREME COURT.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 200 of 1953

Ghela Manek Shah)
Punja Kachra) Trading as
Kasturbhai M. Shah) Shah Ghela Manek   Plaintiffs

versus

Mohamed Haji Abdulla)
Ahmed Haji Abdulla)   Defendants

NOTICE OF MOTION

(Order XLIV Rule 1(2))

LET ALL PARTIES concerned attend the Judge in Court on Friday the 14th day of January, 1955, at

In the Supreme Court of Kenya.

No. 7.

Notice of Motion for review of the Judgment of the Supreme Court.

15th December, 1954 - continued.

10.30 o'clock in the forenoon on the hearing on an application on the part of the above-named Plaintiffs for an order that the judgment herein delivered by the Honourable Mr. Justice Bourke on the 18th day of February, 1954 whereby judgment was entered for the said Plaintiffs against the Defendants herein in the sum of Shs. 18,000/- as damages, with costs be reviewed and that in lieu of such judgment there shall be entered judgment for the Plaintiffs against the Defendants to the effect following, that is to say, that the Defendants be directed, upon payment to them by the Plaintiffs of the sum of Shs. 125,000/- being the agreed purchase price of the premises consisting of plot known as L.R. No. 209/502 situate at River Road Nairobi with the buildings standing thereon referred to in the Plaint less the sum of Shs. 25,000/- deposit paid by the Plaintiffs and less also by the sum of Shs. 18,000/- damages awarded to the Plaintiffs herein and less also by the costs of the Plaintiffs herein when taxed, to execute in favour of the Plaintiffs the Indenture of Assignment of the said premises already prepared on behalf of the Plaintiffs and submitted to the Defendants and to deliver the same when executed to Messrs. Hamilton, Harrison & Mathews, the Plaintiffs' advocates herein and to hand over to the Plaintiffs possession of the said premises subject to and with the benefit of such lettings as may be subsisting therein; and that the costs of this application be provided for:

WHICH application will be grounded on the affidavit of Gerald Harris, Advocate, dated the seventh day of December, 1954 and filed herein, the nature of the case and the reasons to be offered.

DATED at Nairobi this 15th day of December, 1954.

(Sgd.) W.S.O. Davies,

DY. REGISTRAR
SUPREME COURT OF KENYA.

This summons was taken out by :-

(Sgd.) Gerald Harris.

HAMILTON, HARRISON & MATHEWS,
Advocates for the Plaintiffs,
Nairobi House,
NAIROBI.

Copy to be served upon :-

(1) Narshidas M. Budhdeo,
P.O. Box 719,
Albert Building,
Treasury Square,
Fort Jesus Road,
MOMBASA.
(Advocate for the above-named Defendants)

(2) O'Brien Kelly, Hassan & Miller,
Armstrong House,
Delamere Avenue,
NAIROBI.
(Former Advocates for the above-named Defendants).

No. 8.

Order on the application for review of Judgment.

7th April, 1955.

No. 8.

ORDER ON THE APPLICATION FOR REVIEW OF JUDGMENT.

O R D E R

This is an application by way of notice of motion for the review of a judgment under Order 44 Rule 1 (2). The judgment was passed by this Court on the 18th February, 1954, in a suit between the parties, the present applicants being Plaintiffs in the action. In May, 1954, an appeal was lodged against the judgment by the present Respondents. On the 17th June, 1954, the record was settled by the Registrar of the Court of Appeal and in pursuance of an order for security for costs the amount fixed was deposited on the 30th June. As further appears from the affidavit of MR. BUDHDEO, being the advocate for the present Respondents and who entered the appeal on their behalf, he corresponded with Messrs. Hamilton, Harrison & Mathews, the advocates for the applicants, who appeared for them throughout, enquiring if it would be convenient for them to have the appeal listed for hearing during the sessions commencing at Mombasa on the 3rd August, 1954. He received a reply saying that no member of their firm would be at Mombasa for the said session of the Court of Appeal. The Appeal was eventually fixed for hearing on 12th January, 1955, a notice to that effect dated 17th December having been issued to the parties. On the 16th December, 1954, the notice of motion for review was filed in this Court and service was effected

In the Supreme Court of Kenya.

No. 8.

Order on the application for review of Judgment.

7th April, 1955 - continued.

on MR. BUDHDEO on 20th December. That was the first the Respondents learnt of any intention to seek a review. Ten months had been allowed to elapse from the time of delivery of the judgment until the date the application for review was lodged. The hearing of the Appeal was postponed pending the determination of this application.

It is necessary for an understanding of the matter to give a brief account of the nature of the action in which the applicants obtained the judgment they now seek to review. The parties had entered into an agreement of sale of a plot with the buildings standing thereon. The applicants were the Purchasers and the Respondents the Vendors. The purchase price was Shs. 125,000/-. A deposit of Shs. 25,000/- was paid and the balance became payable on or before a fixed date against the execution of a Conveyance by the Vendors. There were three tenants of the premises, each being in possession of a portion. Prior to the execution of any conveyance one of the tenants named VELJI RAVJI BARBER surrendered the tenancy of that part of the premises let to him and vacated. On the same day that vacant possession was so given the Respondents re-let this portion of the property to a new tenant without any notice to the Applicants.

The Applicants sued and prayed for the following relief:-

(i) "That the Defendants may be ordered specifically to complete the said sale by delivering to the Plaintiffs, contemporaneously with the execution of the above-mentioned Indenture of Assignment and on payment to the Defendants by the Plaintiffs of the said sum of Shs. 100,000/- the premises comprised in the said Agreement with vacant possession of so much thereof as was so surrendered to the Defendants by the said Velji Ravji Barber.

(ii) "Alternatively: (a) That the Plaintiffs be declared entitled to damages for the failure of the Defendants to preserve as from the date of the surrender to the Defendants by the said Velji Ravji Barber of his tenancy therein that portion of the said premises so surrendered free from occupation or enjoyment by any other

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7th April, 1955 - continued.

person and for their consequent inability or failure to deliver to the Purchasers the premises so agreed to be sold free from encumbrances and with vacant possession of the portion thereof which had been surrendered to them by the said Velji Ravji Barber as above-mentioned.

(b) "That the amount of such damages be determined by this Honourable Court and that for such purposes if necessary an enquiry be had.

(c) "That the Defendants be ordered and directed that upon payment to them by the Plaintiffs of the said sum of Shs. 125,000/- the agreed purchase price of the said premises, less by the sum of Shs. 25,000/- being the amount of the deposit so paid by or on behalf of the Plaintiffs and also less by the amount of damages awarded as above, they the Defendants do execute in favour of the Plaintiffs the said Indenture of Assignment and do deliver to the Plaintiffs the same together with the said premises subject to such lettings as may be subsisting therein".

At the trial of the action MR. HARRAGIN appeared for the Plaintiffs (present applicants) and MR. O'BRIEN KELLY for the Defendants (present respondents).

The agreed issues were: 1. In view of the agreed facts were Defendants entitled in law to re-let the premises referred to without authority of Plaintiffs? 2. If not, have Plaintiffs suffered damage, and if so what damage?

The Plaintiffs called evidence on the issue of damages, no evidence being led for the Defendants.

In opening his address on the legal questions involved, MR. HARRAGIN stated (I quote from my notes on record, which have been referred to on this application):-

"No notice or authority for re-letting sought from us. We were entitled to the benefit of

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the surrender, (we were) denied it, therefore, entitled to damages. What damages? We asked specific performance but this impossible. Only relief damages".

Judgment was given on a later date when MR. HARRIS (who appears for the Applicants) appeared for the Plaintiffs and MR. O'BRIEN KELLY for the Defendants. Having regard to what had been stated by MR. HARRAGIN I said in my judgment - "the Plaintiffs claim damages and have abandoned the claim for specific performance". I concluded the judgment as follows :- "I assess the damages at Shs. 18,000/- and in view of the relinquishing of the claim for performance and the nature of the prayer as it stands, I will hear the parties as to the form in which judgment should be entered".

My recollection of what then occurred is very clear and is borne out by my notes taken at the time and by what MR. HARRIS has stated on this application, which appears from my notes. MR.HARRIS said, in response to the enquiry as to entry of judgment: "There should be judgment for Plaintiffs for damages in sum assessed - Shs. 18,000/- - and costs". MR.O'BRIEN KELLY rose and said: "I agree". Thereupon I entered judgment accordingly and, following my practice, (Mr.Harris recollects that this was done), read out what I had written, namely, "Judgment is entered for Plaintiffs against Defendants in sum of Shs. 18,000/- as damages with costs". No objection was taken to that form of judgment entered at request and by consent of the advocates for the parties. My impression was that any differences concerned with the execution of the Conveyance had been smoothed out and had been the subject of arrangement or settlement between the parties, and that all that was required was judgment in respect of the damages estimated on adjudication of the agreed issues as to liability and amount. On the pleadings there was contest as to the alleged right to specific performance; but such was not included as an agreed issue: no evidence was led to any such issue: it was stated that the only relief sought was in damages; and finally it was stated as agreed that judgment should be for the damages as assessed and costs.

The granting of this application for review is sought in order that there may be a re-hearing

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(O.44 Rule 6), and, in the words of the notice of motion, that judgment should be entered :-

"for the Plaintiffs against the Defendants to the effect following, that is to say, that the Defendant be directed, upon payment to them by the Plaintiffs of the sum of Shs. 125,000/- being the agreed purchase price of the premises consisting of plot known as L.R. No.209/502 situate at River Road Nairobi with the buildings standing thereon referred to in the Plaint less the sum of Shs. 25,000/- deposit paid by the Plaintiffs and less also by the sum of Shs. 18,000/- damages awarded to the Plaintiffs herein and less also by the costs of the Plaintiffs herein when taxed, to execute in favour of the Plaintiffs the Indenture of Assignment of the said premises already prepared on behalf of the Plaintiffs and submitted to the Defendants and to deliver the same when executed to Messrs. Hamilton, Harrison & Mathews, the Plaintiffs' Advocates herein and to hand over to the Plaintiffs possession of the said premises subject to and with the benefit of such lettings as may be subsisting therein".

The applicants are, therefore, endeavouring to obtain the relief as prayed in paragraph (ii) (c) of the prayer in the plaint. The application is supported by the affidavit of Mr.Harris. There is no affidavit by either Mr.Harragin or Mr.O'Brien Kelly. In paragraph 5 of the said Affidavit it is deposed:-

"That at the hearing of the suit before the Honourable Mr. Justice Bourke on the 11th day of February 1954 the Plaintiffs were represented, in the absence of this Deponent by Mr. W.L. Harragin, Advocate, of my said firm and it was conceded on behalf of the Plaintiffs that if, as appeared to be the case, the unauthorized re-letting of the portion of the premises which had been surrendered was still subsisting, a decree for specific performance as claimed at para. (i) of the prayer to the Plaint would not be enforceable and should not be pressed for and that accordingly the issues for determination by the Court should be confined to the

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alternative relief claimed at para. (ii) of the said prayer".

The source from which the deponent obtained this information is not disclosed. I believe my notes on record accurately reflect what was said. Issues were fixed relevant to the matter prayed by paragraph (ii) (a) and (b); there was no reference to paragraph (ii) (c) of the prayer.

Paragraphs 7 and 8 of the Affidavit of Mr. Harris read as follows :- 10

"(7) That at the said hearing on the 18th day of February 1954 the Plaintiffs were represented by this Deponent and the Defendants by Mr. J.O. O'Brien Kelly, Advocate, a member of the said firm of O'Brien Kelly & Hassan, and that immediately following the delivery of the said judgment Mr. O'Brien Kelly agreed with this Deponent that judgment should be entered for the Plaintiffs in the form set out at para. (ii) (a), (b) and (c) of the prayer to the 20 Plaint save that in lieu of directing an enquiry as to damages as mentioned at clause (b) of that paragraph the damages should be the sum of Shs. 18,000/- referred to in the said judgment, and this Deponent, in reply to his Lordship's enquiry as to the form of order required, sought to intimate such agreement to the Court. I refer to a copy of a joint letter to the Registrar of this Honourable Court dated the 28th day of June 1954 from my 30 said Firm and the firm of O'Brien Kelly, Hassan & Miller (successors to O'Brien Kelly & Hassan) and signed by me and the said Mr. O'Brien Kelly (the original whereof is on the file of this Honourable Court) upon which marked with the letter "C" I have endorsed my name at the time of swearing hereof.

"(8) That in endeavouring so to convey to the Court the effect of such agreement between this Deponent and Mr. O'Brien Kelly it would 40 appear that this Deponent did not make himself clear, with the result that judgment was entered for the said sum of Shs. 18,000/- as damages, with costs, but the relief sought at clause (c) of para. (ii) was not included in the judgment as entered".

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I find it difficult to appreciate what the Deponent means in saying (paragraph 7) that he "sought to intimate such agreement to the Court", or that (paragraph 8) "it would appear that this Deponent did not make himself clear". I have already referred to what in fact was said by Counsel at the time judgment was entered. Every opportunity was given to the advocates to make their submissions as to the form in which judgment should 10 be entered; and it was clearly and concisely stated what the judgment should be as a matter of consent. Mr. Harris has said on this application that his attitude then was the result of a misunderstanding and that anyway he thought the relief sought in paragraph (ii) (c) of the prayer would appear in the formal decree to be drawn up - despite the provisions of Order 20 Rules 6 and 7. He said quite frankly - "I had not attended at the hearing and may have thought you had intimated there would be 20 the alternative relief directing assignment anyway; and I was concerned with entering a decree for the damages to be deducted from the purchase price. I didn't know what had been said during the proceedings by Mr. Harragin and Mr. O'Brien Kelly. I remember you read out the form of judgment and I thought the other matter as to directing assignment had been dealt with earlier and damages was the only matter left - so I said judgment for damages and costs. After all, we are clearly entitled 30 to the relief on the merits and admissions. We were both agreed on the full alternative relief claimed ..... Nothing was said about the alternative prayer (in the plaint) to the Court".

Mr. Budhdeo argues that if it was a matter of failing to communicate to the Court that there was to be a consent order for specific performance as prayed in paragraph (ii) (c) of the prayer, then there was a failure to exercise due diligence: there was no mistake or error apparent on the face 40 of the record and no sufficient reason for review by way of these very belated proceedings. He, Mr. Budhdeo, states that the other side was probably quite confident that Mr. O'Brien Kelly would get his clients to execute the agreement and an adjustment was being made between the parties.

The applicants rely upon the letter of 28th June, 1954, referred to in paragraph 7, quoted above, of Mr. Harris' affidavit, which sets out

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that it was agreed between the advocates appearing for the parties that the Order which should be made was in effect, "an order as claimed at paragraph (ii) of the prayer of the Plaint save that the enquiry as to damages is not necessary in view of the Court having already assessed the damages at Shs. 18,000/-".

Mr. Budhdeo contends that a review cannot properly be granted on a subsequent admission of this kind, which was made without his knowledge or that of his clients: if there was such an agreement at the time of the trial it was not made known to the Court and no mistake is apparent on the face of the record: there is no affidavit by Mr. O'Brien Kelly going to show any consent to an order for specific performance; but there is his formal consent on record to the judgment as entered. If the suit was re-opened on a granting of the application for review, it would be submitted that there was no case made out for ordering specific performance; performance, Mr. Budhdeo affirms, was never refused by his clients; there was no default by the Vendors.

Mr. Harris also referred to Sections 97, 99 and 100 of the Civil Procedure Ordinance, though he agreed it was not a matter for application of the slip rule (Section 99). Mr. Budhdeo pointed out that this was expressly an application by notice of motion for review under Order 44 Rule 1 (2) and he referred to Order 20 Rule 3 (3). It was not an application or a matter for the exercise of inherent powers (Section 97) or for amendment (Section 100) in a suit that had not reached the stage of determination. He further raises three preliminary objections to going to the validity of these proceedings for review.

In the first place it is argued that since no decree has been drawn up, the application is bad because review lies, under Section 80 of the Civil Procedure Code and Order 44, Rule 1, only where a person considers himself aggrieved by a decree, and there is no formal decree in existence but only a judgment. It is stressed that under the proviso to the definition of "decree" in Section 2 of the Civil Procedure Ordinance, it is only for the purposes of appeal that the word "decree" shall include judgment; a judgment is appealable notwithstanding

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that a decree in pursuance thereof may not have been drawn up. Section 80 and Order 44, Rule 1 are devised for the purposes of review and the use of the word "decree" therein is not for the purposes of appeal and so does not include judgment. I think there is substance in this argument. It is true that there is a judgment "from which an appeal is allowed" by virtue of the proviso under reference and the provisions of Section 66 of the Civil Procedure Ordinance (and see Mohamedbhai & Co. v. Ghani (1952) 19 E.A.C.A. 38); but there is no provision that for the purposes of review the word "decree" shall include judgment. A review is not the same thing as, or a substitute for, an appeal, A.I.R. Commentaries 5th (1951) edition, Vol. 3 page 3533). Since there is no decree it is not open to the applicants to obtain a review.

It is also contended that since an appeal has been preferred (by the Respondents), proceedings for review do not lie. This argument is based on the wording of Section 80 of the Civil Procedure Ordinance, from which flows the jurisdiction in review, and which reads as follows :-

> "80. Any person considering himself aggrieved -
> (a) by a decree or order from which an appeal is allowed by this Ordinance, but from which no appeal has been preferred; or
> (b) by a decree or order from which no appeal is allowed by this Ordinance.
>
> may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit".

The words of this section appear again in Order 44, Rule 1 (1); but sub-rule (2) of that rule, under which the applicants move, is in the following terms :-

> "(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review".

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It is submitted that this sub-rule is ultra vires the powers to make rules conferred by section 81 of the Civil Procedure Ordinance, as being inconsistent with Section 80 (a) of that Ordinance. Reference has been made to the Indian Code of Civil Procedure from which Order 44, Rule 1 has been taken (Order 47 Rule 1 - Mulla 10th Edition, p. 1142); but I do not find it necessary to consider the point based on the legislative authority, as to why Order 47 Rule 1 (2) of the Indian Code (equivalent to our Order 44 Rule 1 (2) is not ultra vires, though, according to the argument, it is also inconsistent with Section 114 (a) of the Indian Code, which is equivalent to Section 80 (a) of our Civil Procedure Ordinance. The whole of Mr. Budhdeo's argument is founded on this, that the words "but from which no appeal has been preferred" in Section 80 (a) of the Ordinance, must be read to preclude any review where an appeal has been preferred by the party on either side. On that reading Order 44 Rule 1 (2) would be inconsistent as permitting an application for review by a party not appealing notwithstanding the pendency of an appeal by some other party. It seems to me to be plain enough that the words under consideration in Section 80 (a) and Order 44 Rule 1 (a) are to be read as precluding application for review by the person considering himself aggrieved where such person has preferred an appeal. I refer to the A.I.R. Commentaries on the Indian Code of Civil Procedure 5th Edition, Vol. 3 p. 3532, and to Jankiram Co. v. Chunilal Shriram Chandak 1944 I.L.R. Bom. 675. At p. 680 of that report the observation of Sargent C.J. in Pandu v. Devji (1883) 7 Bom. 288 (not available) is quoted as follows :-

> "The intention of the law seems merely to be to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; and applying for a review while his appeal is pending".

I think that is right and I would, with respect, adopt that observation as affording the answer to the question raised. It is not a matter of the preferring of an appeal by either party to proceedings resulting in a decree or order, but of the person aggrieved being prevented from seeking review where he has resorted to the remedy of appeal. That being so, there is none of the alleged

inconsistency in Order 44 Rule 1 (2) and this sub-rule is not ultra vires the rule-making powers. The fact that the Respondents preferred an appeal before the applicants moved for review does not render these present proceedings bad and ineffective. This point accordingly fails.

The third point taken and specifically pleaded on behalf of the Respondents is that the application is time-barred. Mr. Budhdeo stated that he did not rely upon this defence if the Court decided in his favour on the first two points raised. As he has failed on the second point I proceed to consider the question of limitation.

It appears that there is no provision in any local Ordinance or law providing a period of limitation in respect of an application for review. Mr. Budhdeo accordingly relies upon the saving covering the Indian Limitation Act, 1877, contained in Section 41 of the Limitation Ordinance (Cap.11). By Section 162 of that Act, the period of limitation is twenty days from the date of the decree or order where the review is sought from any of the High Courts of Judicature at Fort William, Madras and Bombay or the Chief Court of the Punjab in the exercise of its original jurisdiction. Assuming that Mr. Budhdeo is correct in his argument that what was provided in respect of such specified High Courts in India is the law binding upon the Supreme Court in Kenya, by reason of the provisions of Sections 3 and 4 of the Indian Acts (Amendments) Ordinance (Cap. 2), he is left with the difficulty arising over the date of the decree. In India the date of the decree is the date of the judgment (Order 20 Rule 7), whereas in Kenya the date of the decree bears the date of the day on which it is signed (Order 20 Rule 7 (1)). Having already successfully argued that the judgment cannot be regarded as a decree for the purposes of an application for review, the Respondents' advocate now appears to be in some degree hoist with his own petard, for since there is no decree time never began to run; and if a decree were now taken out the twenty days would, according to the argument, commence on the date it was signed. Mr. Budhdeo submits, however, that here one should take the date of the judgment and not the date of any decree. I quite fail to see how this could properly be done. I may be wrong in having held that

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7th April, 1955 - continued.

"decree" in Section 80 (a) and Order 44 Rule 1 does not include judgment by virtue of the proviso in Section 2 of the Civil Procedure Ordinance, but, even if that be so, the word "decree" in Section 162 of the Indian Limitation Act, 1877, clearly cannot be given such an extended meaning. Limitation, after all, is the artificial creature of statute, and a party relying upon such a means of excluding resort to a remedy must be strictly kept within the restrictive provisions of the particular enactment. Mr. Budhdeo's argument that since the Applicants failed to take out a decree, they cannot avail of their own default to resist the defence of limitation has, in my opinion, no bearing whatever on the matter. This point accordingly also fails.

Lest it be held elsewhere that I have erred in deciding the first preliminary point, concerned with the absence of a decree, in favour of the Respondents, I think it right to address my mind to the merits. This is not an instance of a review being sought on ground of the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the party or could not be produced by him at the time when the decree (assuming "decree" includes judgment) was passed; nor is it an instance of some mistake or error apparent on the face of the record. The question remains whether there is "any other sufficient reason" to permit a review. These words refer to a reason analogous to those specified in the rule (Chhajju Ram v. Neki I.L.R. 3 Lah. (1922) 127). The advocate for the Applicants is saying in effect that, "the judgment I asked to be entered is not that which the parties really agree upon. I failed through a misunderstanding to communicate the true position to the Court and anyway I thought the decree would be in the form of an order for specific performance, as prayed at paragraph (ii) (c) of the plaint, allowing Shs. 18,000/- in account as damages". Then a letter to the Registrar, admittedly signed by Mr. O'Brien Kelly four months after judgment was given, is relied upon as indicating the attitude of the parties at the time judgment was entered. This letter was written without reference to the Respondents, who submit through their affidavits that its contents are not binding upon them. It is said before this Court by Mr. Budhdeo that any claim for specific performance would be a matter of contest on a re-opening of the case pursuant to the

In the Supreme Court of Kenya.

No. 8.

Order on the application for review of Judgment.

7th April, 1955 - continued.

granting of this application for review. He submits that the letter under reference should not be looked to as evidence of a subsequent admission as to the matter litigated (A.I.R. Commentaries 5th Edn. Vol. 3, p. 3548). An attempt, he argues, is being made to obtain review on the ground that the terms of a consent judgment, clearly expressed before the Court at trial, were not the correct terms agreed upon at the time, and this Court is being asked to change its judgment and finally adjudicate in the terms now said to have been agreed and communicated to it for the first time, which would incidentally have the effect of frustrating the Respondents' appeal.

I think there is substance in Mr. Budhdeo's submissions on the merits. Had the advocate for the Applicants ascertained what had taken place earlier in the trial when Mr. Harragin appeared, he would not have been under any misapprehension leading him to think that it had already been communicated to the Court as being agreed between the parties that an order for specific performance should follow upon a finding of liability in damages on the single issue settled. Any such misapprehension should anyway have been dispelled when the judgment entered by consent on the record was read out. Further, had notice been taken of Order 20 Rule 6 (1), it could not have been thought that the decree could contain an order for specific performance in view of the judgment entered as agreed. If there was a definite agreement that judgment should be entered in terms of paragraph (ii) (c) of the prayer in the plaint, it is extraordinary that the advocate appearing on each side should not only have failed to make that clear but have conveyed something quite different to the Court. Then there is the extraordinary factor of a delay of nearly a year before taking any step for review, though notice of the appeal having been preferred was received as long ago as May, 1954. In so far as review is a matter of discretion, I would think this long delay in the circumstances would in itself justify a refusal of the application. But leaving that aspect aside, I am of the opinion that no sufficient ground has been shown to merit the granting of this application.

In Venkayya v. Suryanarayana and Others A.I.R. (1940) Mad. 203, it was held that :-

In the Supreme Court of Kenya.

No. 8.

Order on the application for review of Judgment.

7th April, 1955 - continued.

"Where a specific question involved in an issue that was raised at the instance of the Plaintiff has been abandoned as a result of an erroneous view taken by the Plaintiff's pleader, the Court cannot interfere under Order 47 Rule 1 (providing for review). Otherwise there will be no finality to the decision of a Court if after judgment is pronounced the parties or advocates are allowed to come forward and say that a certain argument was addressed or given up in the course of the trial as the result of their (*not) remembering certain material facts". 10

* [sic]

In the course of his judgment the learned judge said (at p. 205) -

"If applications for review are allowed on such grounds, there will be no end to legal proceedings. The aggrieved party may have other remedies open to him but so long as the case does not fall within the purview of Order 47 Rule 1 it will not be correct to allow an application for review". 20

I think, with respect, that is plainly right, and I do not discern any material difference in the instant matter where the Applicants' advocate makes it clear that he took the course he did in consenting to the judgment entered, because he did not inform himself as to what had taken place earlier in the trial of the action, and was therefore under a misapprehension, and further took the erroneous view that the decree would provide for the additional relief and could be drawn up so as not to agree with the judgment. 30

The application is dismissed with costs.

Sd. PAGET J. BOURKE,

Judge.

7th April, 1955.

In the Supreme Court of Kenya.

No. 9.

Decree.

7th June, 1955.

No. 9.

DECREE

CLAIM:-

(i) That the Defendants may be ordered specifically to complete the sale referred to in the plaint by delivering to the Plaintiffs, contemporaneously with the execution of the Indenture of Assignment, and on payment to the Defendants by the Plaintiffs of the sum of Shs. 100,000/- the premises comprised
10 in the Agreement of Sale referred to in the Plaint with vacant possession of so much thereof as was surrendered to the Defendants by Velji Ravji Barber;

(ii) Alternatively:

(a) That the Plaintiffs be declared entitled to damages for the failure of the Defendants to preserve as from the date of the surrender to the Defendants by the said Velji Ravji Barber of his tenancy therein
20 that portion of the said premises so surrendered free from occupation or enjoyment by any other person and for their consequent inability or failure to deliver to the Purchasers the premises so agreed to be sold free from encumbrances and with vacant possession of the portion thereof which had been surrendered to them by the said Velji Ravji Barber as above-mentioned.

(b) That the amount of such damages be deter-
30 mined by this Honourable Court and that for such purposes if necessary an enquiry be had.

(c) That the Defendants be ordered and directed that upon payment to them by the Plaintiffs of the said sum of Shs.125,000/- the agreed purchase price of the said premises, less by the sum of Shs.25,000/- being the amount of the deposit paid by or on behalf of the Plaintiffs and also
40 less by the amount of damages awarded as above, they the Defendants do execute in favour of the Plaintiffs the said Indenture of Assignment and do deliver to the Plaintiffs the same together with the said

In the Supreme Court of Kenya.

No. 9.

Decree.

7th June, 1955 - continued.

premises subject to such letting as may be subsisting therein; and

(iii) That the cost of this action be paid by the Defendants to the Plaintiffs.

WHEREAS on this suit coming on the 18th day of February, 1954, for final disposal before The Honourable Mr. Justice Paget J. Bourke in the presence of Mr. Gerald Harris, Counsel for the Plaintiffs and Mr. J. O'Brien Kelly, Counsel for the Defendant, judgment was entered in favour of the Plaintiffs for Shs. 18,000/- as damages and for costs against the Defendants, IT IS HEREBY ORDERED that the Defendants do pay to the Plaintiffs Shs. 21,712/50 (Shillings Twenty one thousand seven hundred and twelve and Cents fifty) as per following particulars :-

Damages	Shs. 18,000.00
Costs as taxed	Shs. 3,712.50
Total	Shs. 21,712.50

GIVEN under my hand and the Seal of this Court this 7th day of June, 1955.

Sgd. PAGET J. BOURKE.
JUDGE.

(SEAL)

SUPREME COURT OF KENYA.

I certify that this is a true copy of the original.

(Sgd.) R. H. LOWNIE,
Dy. Registrar
Supreme Court
Nairobi
27.6.1955.

This is the Exhibit marked "X" referred to in the Affidavit of Gerald Harris Sworn this 9th day of July, 1955, Kenya

before me,
Signed: N. J. DAVE,
Commissioner for Oaths.

In the Court of Appeal for Eastern Africa.

No. 10.

Notice of Motion to serve Notice of Cross Appeal out of time.

12th July, 1955.

No. 10.

NOTICE OF MOTION TO SERVE NOTICE OF CROSS APPEAL OUT OF TIME.

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

CIVIL APPEAL NO.34 of 1954

BETWEEN: MOHAMED HAJI ABDULLA and AHMED HAJI ABDULLA — Appellants

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- and -

GHELA MANEK SHAH, PUNJA KACHRA SHAH and KASTURBHAI M. SHAH (trading as "SHAH GHELA MANEK") — Respondents

APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF KENYA AT NAIROBI (Mr. Justice Bourke) dated the 18th day of February, 1954.

in

20

CIVIL CASE NO. 200 of 1953

BETWEEN

GHELA MANEK SHAH, PUNJA SHAH and KASTURBHAI M. SHAH (trading as "SHAH, GHELA MANEK") — Plaintiffs

and

MOHAMED HAJI ABDULLA and AHMED HAJI ABDULLA — Defendants

NOTICE OF MOTION

TAKE NOTICE that on a day to be fixed later at
30 o'clock in the forenoon/afternoon or as soon thereafter as he can be heard Mr. Harris, Advocate, a member of the firm of Hamilton, Harrison & Mathews, Advocates for the above-named Respondents, will move a Judge of the Court for an Order that the said Respondents be at liberty through their said Advocates to give notice of cross-appeal herein notwithstanding that the time prescribed by the Rules of this Honourable Court for so doing has

In the Court of Appeal for Eastern Africa.

No. 10.

Notice of Motion to serve Notice of Cross Appeal out of time.

12th July, 1955 - continued.

expired and that for that purpose the Court do extend the time for giving such notice of cross-appeal on the following grounds :-

(1) That the necessity for taking such cross-appeal did not arise until after the delivery upon the 7th day of April 1955 of the judgment of the Honourable Mr. Justice Bourke on an application to him for a review of the Judgment dated the 18th day of February 1954 appealed from by the Appellants herein. 10

(2) That upon the said cross-appeal the Respondents seek to vary the terms of the decree of the Supreme Court of Kenya made on the hearing of this suit which decree was not perfected or signed until the 7th day of June, 1955.

Signed: GERALD HARRIS,

HAMILTON, HARRISON & MATHEWS,
Advocates for the Respondents.

DATED at Nairobi this 12th day of July, 1955.

C. G. WRENCH, 20
Registrar.

To: Mohamed Haji Abdulla and Ahamed Haji Abdulla of Mombasa or their Advocate Mr. Harshidas M. Budhdeo of P.O. Box 719 MOMBASA.

The said Mr. Harris will read in support of this application the Affidavit of Mr. William Lee Harragin sworn the 17th day of May 1955 and the Affidavit of the said Mr. Harris sworn the 9th day of July, 1955 and the several exhibits therein referred to. 30

The address for service of the Respondents is care of Hamilton, Harrison & Mathews, Advocates, "Stanvac House", Queensway, Private Bag, Nairobi.

In the Court of Appeal for Eastern Africa.

No. 11.

Order on Notice of Motion to serve Notice of Cross Appeal out of time.

4th November, 1955.

No. 11.

ORDER ON NOTICE OF MOTION TO SERVE NOTICE OF CROSS APPEAL OUT OF TIME

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

CIVIL APPEAL NO.34 of 1954

BETWEEN:

MOHAMED HAJI ABDULLA And
10 AHMED HAJI ABDULLA — Appellants (Original Defendants)

- and -

GHELA MANEK SHAH PUNJA KACHRA and KASTURBHAI M. SHAH (trading as "SHAH GHELA MANEK") — Respondents (Original Plaintiffs)

(Appeal from a Judgment of the Supreme Court of Kenya at Nairobi (Mr.Justice Bourke) dated the 18th day of February, 1954 in

20 CIVIL SUIT NO. 200 of 1953

BETWEEN:

GHELA MANEK SHAH, PUNJA KACHRA and KASTURBHAI M. SHAH trading as "SHAH GHELA MANEK" — Plaintiffs

and

MOHAMED HAJI ABDULLA, and AHMED HAJI ABDULLA — Defendants

IN CHAMBERS this 4th day of November, 1955

BEFORE THE HONOURABLE, THE PRESIDENT
30 (Sir Newnham Worley).

O R D E R

UPON MOTION this day made unto this Court by Counsel for the above-named Respondents FOR AN ORDER extending time for giving Notice of Cross Appeal herein AND UPON reading the said Notice of Motion and the Affidavits filed in support thereof AND UPON HEARING Gerald Harris Esq., Counsel for the said Respondents (Applicants) and Narshidas M.Bud-
40 hdeo Esq., Counsel for the above-named Appellants (Respondents to the Application)

In the Court of Appeal for Eastern Africa.

No. 11.

Order on Notice of Motion to serve Notice of Cross Appeal out of time.

4th November, 1955 - continued.

IT IS ORDERED THAT

(1) the said Application be and the same is hereby granted without prejudice to the Appellants' right to have the same referred to the full Court under the provisions of Section 14 (b) of the Eastern African Court of Appeal Order in Council, 1950 and/or to contend at the Hearing of the Cross-Appeal that such Cross-Appeal is incompetent by reason of the Respondents having already applied to the learned trial Judge (Mr. Justice Bourke) in the Supreme Court of Kenya for a review of the Judgment appealed from and their said Application for Review having been duly determined; 10

(2) the Respondents do file their Notice of Cross-Appeal within seven days from this day;

(3) the Respondents be at liberty at the Hearing of the Appeal and Cross-Appeal to refer to all documents referred to in this Application and

(4) the Appellants be at liberty to file such additional documents relating to the Appeal and Cross-Appeal as they may be advised 20

AND IT IS FURTHER ORDERED THAT all papers relating to this Application be filed in a separate file for use at the Hearing of the reference under Section 14 (b) of the said Order in Council or the Hearing of the Appeal as the case may be

AND IT IS FURTHER ORDERED THAT the Respondents and the Appellants do prepare and provide such extra copies of their own documents as may be required for the use of the Court 30

AND IT IS FURTHER ORDERED THAT the Respondents do pay the Appellants the costs of this Application in any event

Given under my hand and the Seal of the Court at Nairobi the 4th day of November, 1955.

(Sgd.) F.A. BRIGGS,

A Judge.

H.M.Court of Appeal for Eastern Africa.

SEAL OF H.M. COURT OF APPEAL FOR EASTERN AFRICA 40

ISSUED this 28th day of December, 1955.

In the Court of Appeal for Eastern Africa.

No. 12.

Notice of Cross Appeal.

10th November, 1955.

No. 12.

NOTICE OF CROSS-APPEAL

TAKE NOTICE that, on the hearing of this appeal Ghela Manek Shah, Punja Kachra Shah and Kasturbhai M. Shah (trading as "Shah Ghela Manek") the Respondents above named, will contend that the judgment above-mentioned and the decree granted in pursuance thereof dated the 7th day of June, 1955 ought to be varied to the extent and in the manner
10 and on the grounds hereinafter set out, namely :-

(1) By the substitution for the finding in the judgment that the Respondents' (Plaintiffs') claim for an order for the specific performance of the agreement for sale referred to in the Plaint herein had been abandoned, a finding that the Respondents' claim under paragraph (i) of the prayer to the Plaint had been abandoned in favour of the alternative claim under paragraph (ii) (a) (b) and (c) of the
20 prayer to the said Plaint but no further

(2) By varying the form in which judgment was entered herein for the Respondents (Plaintiffs) against the Appellants (Defendants) by substituting for the entering of judgment for the Respondents against the Appellants in the sum of Shs. 18,000/- as damages, the entering of judgment for the Respondents against the Appellants in the form or to the effect following, that is to say, that upon payment to the
30 Appellants by the Respondents of the sum of Shs. 125,000/- the agreed purchase price of the plot of land known as L.R. 209/502 situate at River Road, Nairobi(being the premises the subject of the suit) less by the sum of Shs. 25,000/- being the amount of the deposit paid by the Respondents and less by the sum of Shs. 18,000/- being the amount of damages herein awarded to the Respondents and also less by the amount of the taxed costs awarded
40 by the Supreme Court to the Respondents in these proceedings, the Appellants do execute in favour of the Respondents a proper Indenture of Assignment of the said premises subject to any subsisting tenancies but otherwise free from encumbrances and do deliver such Indenture together with possession of the said premises to the Respondents subject as aforesaid.

In the Court of Appeal for Eastern Africa.

No. 12.

Notice of Cross-Appeal.

10th November, 1955 - continued.

(3) By varying the form of the said decree herein by substituting for the words and figures therein: "It is hereby ordered that the Defendants do pay to the Plaintiffs Shillings 21,712/50 (Shillings Twenty one thousand seven hundred and twelve and Cents Fifty) as per following particulars :-

Damages	Shs. 18,000.00
Costs as taxed	Shs. 3,712.50
Total	Shs. 21,712.50

10

the words and figures following that is to say:

"It is hereby ordered that the Appellants upon payment to them by the Respondents of the "sum of Shs. 78,287/50 (being the sum of Shs. "125,000/- the agreed purchase price of the "premises consisting of plot known as L.R.No. "209/502 situate at River Road, Nairobi, with "the buildings standing thereon referred to in "the Plaint less by the sum of Shs.25,000/- "the amount of the deposit already paid by the "Respondents to the Appellants and less also "by the sum of Shs. 18,000/- the amount of the "damages awarded to the Respondents against "the Appellants herein and less also by the "sum of Shs. 3,712/50 the amount of the taxed "costs awarded to the Respondents against the "Appellants herein) do execute in favour of "the Respondents a proper Indenture of Assignment of the said premises for all the estate "and interest therein of the Appellants subject to such tenancies as may be subsisting "in relation to the premises but otherwise "free from encumbrances and do deliver the "said Indenture together with possession of "the said premises to the Respondents subject "as aforesaid".

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30

THE GROUNDS upon which it is submitted that the finding in the said judgment in regard to the claim for an order for specific performance ought to be so varied are as follows:-

40

(a) That the learned trial Judge failed to understand or did not correctly understand the true effect of the agreement come to between the Respondents and Appellants by their respective Counsel immediately prior to the hearing of

In the Court of Appeal for Eastern Africa.

No. 12.

Notice of Cross-Appeal.

10th November, 1955 - continued.

the case and communicated to his Lordship as to certain matters which, though arising as issues upon the pleadings, did not in the circumstances require to be established by evidence at the trial.

(b) That the effect of the said agreement between the said respective Counsel was as follows :-

(i) It being conceded by the Appellants that the Respondents had been at all material times ready and willing to complete the said sale upon the Appellants either handing over the entire of the said premises to the Respondents with vacant possession of the portion formerly occupied by one Velji Ravji Barber, or handing over the entire of the said premises without vacant possession of any portion thereof together with compensation or damages for their inability to give vacant possession of the said portion formerly occupied by Velji Ravji Barber, and it being conceded by the Respondents that the Appellants had been at all material times ready and willing to complete the said sale by handing over to the Respondents the entire of the said premises without vacant possession of any part thereof and without payment of such compensation or damages as aforesaid, it was agreed that a decision in favour of or against the Respondents (as the case might be) upon the legal issue of damages should ipso facto lead to and result automatically in a decision in favour of or against the Respondents (as the case might be) upon the issue of specific performance.

(ii) It being represented by the Appellants to the Respondents that the Appellants were not in a position lawfully to recover vacant possession of the portion of the premises formerly occupied by Velji Ravji Barber, it was conceded by the Respondents that in such circumstances the Court would not make an order for specific performance in the terms of paragraph (i) of the prayer to the Plaint and it was agreed between the parties that the Respondents should restrict their claim for an order of specific performance to that set out as paragraph (ii) (a) and (b) and (c) of the said prayer.

In the Court of Appeal for Eastern Africa.

No. 12.

Notice of Cross-Appeal.

10th November, 1955 - continued.

THE GROUNDS upon which it is submitted that the form in which the said judgment was entered ought to be so varied are as follows :-

(a) That the said judgment was entered in its present form by reason of a misunderstanding having arisen at the time of such entering between the learned trial Judge on the one hand and Counsel for both the Appellants and the Respondents on the other hand, the said respective Counsel having agreed immediately after the delivery of the reserved judgment of the learned Judge, and having sought to intimate to the said Judge that they had agreed, that judgment should be entered in favour of the Respondents in the form or to the effect set out at paragraph (ii) (a), (b) and (c) of the prayer to the said Plaint but substituting an award of Shs. 18,000/- in lieu of an enquiry as to damages. 10

(b) That the said judgment as so entered did not fully deal with or dispose of the several issues raised on the facts and pleadings in the suit and in particular did not either grant or refuse to grant a decree of specific performance of the agreement for sale referred to in the Plaint. 20

THE GROUND upon which it is submitted that the form of decree herein should be varied is that the proposed variation would be appropriate should the form in which judgment was entered be varied as hereinbefore contended for by the Respondents. 30

AND TAKE FURTHER NOTICE that on the hearing of the said appeal the said Respondents will apply for liberty to produce in evidence and rely upon the Affidavits of Mr.William Lee Harragin and Mr.Gerald Harris sworn on the 17th day of May 1955 and the 9th day of July 1955 respectively and the exhibits therein referred to.

DATED this 10th day of November, One thousand nine hundred and fifty five. 40

Sgd. W.L. HARRAGIN,
HAMILTON, HARRISON & MATHEWS,
Advocates for the Respondents

To:
The Honourable the Judges of Her Majesty's Court of Appeal for Eastern Africa

and to :-

Narshidas M. Budhdeo, Esq., P.O. Box 719, Mombasa, Advocate for the Appellants.

No. 13.

JUDGMENT

In the Court of Appeal for Eastern Africa.

No. 13.

Judgment.

13th October, 1956.

On 12th December, 1951 the Appellants and a person acting as agent for the Respondents made an agreement in writing for the sale of certain land in Nairobi and three shops thereon for Shs.125,000 of which Shs. 25,000 was paid as deposit. The shops were stated to be in the possession of named tenants, and these tenants were protected under the Rent Restriction legislation. Completion was to be on or before 31st March, 1952, and pending completion the buyer was to be entitled to one-fifth of the "net rent". On 16th February, 1952 one of the tenancies was determined by surrender and that shop became vacant. It was duly proved at the trial, and is not now in dispute, that this unexpected event had the effect of increasing the value of the property as a whole by no less than Shs. 18,000. Without consulting the buyers or their agent the Appellants immediately re-let the vacant shop at the same rent to a new tenant. This effectively destroyed the windfall of Shs. 18,000 by restoring the premises to their previous value. The Respondents protested that the re-letting was in breach of the Appellants' duty under the contract of sale and called on them either to give vacant possession of one shop on completion, or to pay compensation by way of deduction from the purchase price, if they could not give such vacant possession. The Appellants refused to do either of these things. They offered to complete and to give possession subject to the three tenancies, but not otherwise. A considerable time passed, chiefly because the Respondents' original solicitor had been suspended from practice, but by January, 1953 the respective attitudes of the parties were ascertained and the sellers gave the buyers notice to complete by 31st January under threat of rescission and forfeiture of the deposit, making it clear that the completion was to be without either vacant possession of the one shop or compensation for not giving such possession. On 31st January, the buyers filed suit in the Supreme Court claiming as relief, under paragraph (i), specific performance coupled with an order to give vacant possession of the shop in question on completion, or alternatively, under paragraph (ii), specific performance with a reduction of the purchase price by

In the Court
of Appeal for
Eastern Africa.

No. 13.

Judgment.

13th October,
1956.

such amount as might represent the loss caused to the buyers by failure to obtain vacant possession of that shop, such loss to be ascertained by an enquiry as to damages, if necessary. I would say at once that the plaint is drawn with considerable care and shows that the buyers' advocates had given much thought to the questions involved. The defence was of course that the sellers had been entitled in law to re-let the vacant shop. It was submitted that no decree of specific performance should be granted, because the sellers had always been ready and willing to complete in a proper manner. It was submitted also that the refusal of the buyers to complete without imposing unwarranted conditions as to vacant possession or compensation amounted to a repudiation of the contract.

The suit was listed for hearing on 11th February, 1954, and that morning Mr. Harragin and Mr. O'Brien Kelly, who were to appear as Counsel for the buyers and sellers respectively, had a discussion with the commendable object of ascertaining how far the parties were really in dispute and what course the trial should accordingly take. It appeared that the new tenant, like the others, was protected, and that it would therefore be impossible for the sellers to eject him. In consequence the Court would not grant specific performance with an order for vacant possession under para. (i) of the relief claimed. It was agreed, therefore, that the primary issue was whether the sellers were entitled in law to re-let the vacant shop as they had done. This was purely a question of law. If they were not so entitled the next issue was as to damages - a question of fact. It was agreed that, if the sellers had acted within their rights in re-letting, the suit must be dismissed. It is not quite clear whether Mr. Harragin accepted that in that case there would have been a repudiation by his clients which must involve forfeiture of their deposit; but I think he probably did. It would, of course, have been possible to contend that, although specific performance ought not to be decreed, since there had been no wrongful refusal to complete on the part of the sellers, the contract was still in existence and ought to be performed. Whether Mr. Harragin took that position, I am not certain; but, as matters now stand, it is not material. In any case it was agreed that, if the

re-letting was in breach of duty, the buyers were entitled to a decree of specific performance with a reduction of price by way of compensation. In coming to this understanding it is clear that Counsel were not only acting within their authority, but were also acting in the best interests of their respective clients by saving costs.

At the hearing of the suit immediately afterwards Mr. Harragin explained in opening that there had been an agreement between Counsel. He presumably said what it was; but the learned Judge's note is only "Agreed between us". The contract was put in by consent and the agreed facts as to the re-letting were recorded. Agreed issues were then also recorded in terms of Counsel's arrangement. Mr. Harragin called expert evidence on the issue of damages only and closed his case. Mr. O'Brien Kelly called no evidence. The learned Judge's note of Mr. Harragin's address begins as follows:-

"No notice or authority for re-letting sought from us. We were entitled to the benefit of the surrender, denied it therefore entitled to damages. What damages? We asked specific performance but this impossible. Only relief damages."

The remainder of the note deals with the question of law and the quantum of damages. The notes of Mr. O'Brien Kelly's speech and of Mr.Harragin's reply deal only with the same matters. The learned Judge reserved judgment and it was delivered on 18th February. Mr. Harragin was not present and the buyers were represented by Mr. Harris of his firm. The judgment held that the re-letting was in breach of the sellers' duty and found that the damages were Shs. 18,000. This assessment of damages has never since been questioned by either party. In the course of the judgment the learned Judge set out the agreed issues and proceeded,

> "The Plaintiffs claim damages and have abandoned the claim for specific performance."

He then dealt with the two issues at length and concluded,

> "I assess the damages at Shs.18,000 and in view of the relinquishing of the claim for performance and the nature of the prayer in

In the Court of Appeal for Eastern Africa.

No. 13.

Judgment.

13th October, 1956 - continued.

"the plaint I will hear the parties as to the form in which judgment should be entered."

Thereafter the learned Judge's note continues,

"Harris: There should be judgment for Plaintiffs for damages in sum assessed - Shs. 18,000 and costs.

O'Brien Kelly: I agree.

Judgment entered accordingly."

The real trouble between the parties may be said to have begun from that word "accordingly". The Plaintiffs' advisers were of opinion that, when the time came to draw up the decree, it would have regard to the claim in the plaint and the real position of the parties and would be a decree for specific performance with a deduction of Shs.18,000 from the purchase price. The decree could not be drawn until after 17th May, 1954 when taxation was completed. The Registrar sent to the parties on 6th June a draft decree drawn as a simple money decree for Shs.18,000 and Shs.3,712.50 cents. On 10th June Mr. Harragin attended the Registrar and explained what he wanted and the Registrar promised to consult the Judge. About a week later the Registrar, who may or may not have consulted the Judge in the meantime, told Mr. Harragin that he should submit a joint letter from himself and Mr. O'Brien Kelly setting out their contentions as to the form in which the decree should be drawn.

I must interpose here that the sellers were dissatisfied with the judgment allowing damages against them and had instructed Mr. Budhdeo to appeal against it. He filed the appeal on 13th May 1954, just within the time allowed by the 1925 rules, which were still in force. The decree had not then been extracted, but this was not necessary at that stage for the purposes of the appeal. The sellers had not for all purposes altogether terminated Mr. O'Brien Kelly's retainer and his name remained on the record of the suit as advocate for them. It was therefore proper, and probably necessary, that the buyers' advocates should continue to communicate with him on matters relating to the suit, as opposed to the appeal.

In accordance with the Registrar's request for a joint letter, Mr. Harris procured and sent

about the end of June to the Registrar a letter signed by himself and Mr. O'Brien Kelly, in the following terms,

> "As Advocates who represented the Plaintiffs and Defendants respectively at the Hearing before His Honour, Mr. Justice Bourke on the 18th February this year, we respectfully confirm that the Order which (subject to His Honour's approval) we agreed on that day should be made, in view of the terms of the Reserved Judgment delivered by His Honour, was in effect ....
>
> > "an order as claimed at paragraph (ii) of the prayer of the Plaint save that the enquiry as to the damages is not necessary in view of the Court having already assessed the damages at Shs. 18,000/-."

It must not be forgotten that in 1954 the Supreme Court was working under very great pressure, and it is perhaps not surprising that nothing further transpired until 17th September, when the Registrar wrote that the learned Judge had directed that the matter should be brought before him personally "on an application for a review of the judgment - Order XX Rule 3(3) of the Civil Procedure (Revised) Rules 1948 refers". There is apparently no specific procedure in Kenya for settling the terms of a decree or order when they are disputed. However, that may be, the buyers' advocates followed the direction given, prepared an application for review, and asked for a date for hearing. They were told that the Judge concerned was on circuit, and could obtain no date earlier than 4th March, 1955. The application was actually filed on 8th December 1954, but would probably have been filed much earlier if the difficulty about dates had not arisen.

When the application came on, the sellers had instructed Mr. Budhdeo to appear. Mr. Harris appeared for the buyers. The joint letter was before the Judge, but Mr. Budhdeo's instructions were to oppose the motion for review - apparently, on any grounds. He did not hesitate to suggest that Mr. O'Brien Kelly, in signing the joint letter, had acted in disregard of his clients' best interests, if not, indeed, in bad faith. This suggestion I

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can only describe as monstrous. Mr. O'Brien Kelly had been asked only to give a factual account of what he had done in his capacity of Counsel. He gave it, in moderate and considered terms, and it would have been a breach of etiquette, if not of professional duty, if he had refused to do so. Mr. Budhdeo in addition found it necessary to attack the good faith of Mr. Harragin. He commented acidly on the fact that the Affidavit in support of the motion had been sworn by Mr. Harris, not by Mr. Harragin. On the second day of the hearing Mr. Harragin was in attendance, prepared to be examined and cross-examined and to put before the Court the facts as he knew them. Mr. Budhdeo declined to question him.

I anticipate now to say that a later stage of the proceedings Mr. Budhdeo was asked officially, as the sellers' then advocate, to authorize a request by the buyers to Mr. O'Brien Kelly to make an affidavit giving a full and detailed account of what occurred before and at the trial. This suggestion was flatly rejected, and it was made clear that the sellers would rely to the limit on privilege to prevent Mr. O'Brien Kelly from giving his version of the facts. After that, a long affidavit by Mr. Harragin was used before the President, and later before us. Counter-affidavits were filed, but did not include one by Mr.O'Brien Kelly, and did not in any way contradict the facts as set out by Mr. Harragin. Mr. Budhdeo did not serve notice to cross-examine Mr. Harragin on his affidavit, but blandly invited us to say that it was inaccurate, which in the circumstances must have meant that it was dishonest. I find it difficult to express my opinion of this in measured terms. I confine myself to saying that I accept Mr. Harragin's affidavit as absolutely truthful, and reject any suggestion that it may not be so as completely unfounded.

I return to the application for review. The learned Judge held on 7th April 1955 in a reserved judgment, (i) that review of a judgment, as opposed to a decree, can in no case be granted, and that, since the decree in this case had not been signed, the application must be dismissed as premature; (ii) that the delay in seeking review would itself have justified dismissal of the application; and (iii) that, on the facts, the buyers had at the

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trial wholly and finally abandoned any claim for specific performance of any kind and could not in any event have a decree to that effect. He dismissed the application and gave costs to the sellers. I shall have occasion later to quote from, and comment on, the judgment. the Decree was signed on 7th June 1955 in substantially the form originally suggested by the Registrar.

During the interval of something more than a year since the appeal had been filed, Mr. Budhdeo had been making strenuous efforts to have it heard, and thus to by-pass, if I may so express it, the efforts of the buyers' advocates to extract a decree representing what should have been decided at the trial. The appeal was finally listed for hearing on 12th January, 1955, and half a day of this Court's time was wasted before it could be decided that the hearing must await the determination of the application for review. For this Mr. Budhdeo must be held solely responsible. Whatever his instructions may have been, and he says his clients are almost illiterate, thereby implying that he must take the initiative on their behalf, he must have known that this Court could not possibly attempt to do justice between the parties until the form of the decree had been settled.

When this was done, it became apparent for the first time to the buyers that they must cross-appeal. The time limited for this under the 1925 rules was one week after service of the memorandum of appeal, so they were over a year out of time. But it must be remembered that, until the decree was settled and signed, it was impossible for them to know whether a cross-appeal would be necessary or not. They filed on 12th July, 1955 a motion in this Court for leave to cross-appeal out of time. The papers were very voluminous and I do not think they could reasonably be expected to do it much sooner, particularly as they did not succeed in obtaining a certified copy of the decree from the Supreme Court until 27th June. The motion was heard by the learned President on 4th November, 1955. The long vacation had intervened, but even so I do not know why so long an interval took place. There is, however, no reason to suppose that it was the fault of the Applicants. The application was opposed by Mr. Budhdeo, but was allowed. The Applicants expressly submitted to pay costs in any event. Leave was given to use on the hearing of

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the appeal the various affidavits and documents put before the Court on the application in order to explain the rather complicated facts. The notice of cross-appeal was duly filed and asked that, in lieu of the simple money decree for Shs. 18,000/- and costs, this Court should direct that a decree be passed for specific performance of the contract, with a deduction from the purchase price of the sum of Shs. 18,000/- assessed as damages. The sellers referred the order of the learned president to the full Court under para. (b) of Section 14 of the Order in Council, and asked that it be discharged as erroneous and an improper exercise of the discretion. In addition the sellers, in case they should fail on their reference, took a preliminary objection to the cross-appeal, that it was incompetent by reason of the buyers having attempted without success to obtain by means of review the same relief as they asked on the cross-appeal.

The matters before us were therefore the reference, which sought to strike out the cross-appeal, the preliminary objection to the cross-appeal, the cross-appeal itself and the substantive appeal. I mention them in that order, partly because we found it convenient so to deal with them, and partly because the decision on the cross-appeal affected substantially the questions arising on the appeal.

Certain questions which were argued before us are relevant to more than one of the issues which we had to decide, and I shall discuss some of these questions in general terms before relating my conclusions on them to the specific issues. The first question is, "Immediately before the trial, were Counsel agreed that, if the Plaintiffs succeeded on the two issues, there should be a decree for specific performance with a reduction of price as claimed in para. (ii) of the claim for relief in the plaint?" On the Affidavit of Mr. Harragin, the joint letter and the general probabilities I answer this question unhesitatingly in the affirmative. The second question is, "Did Mr.Harragin explain this agreement to the learned Judge at the trial?", and it is bound up with the third question, which is, "Did Mr. Harragin at the trial abandon the claim of the Plaintiffs for specific performance and confine himself to a claim for damages?" I refer again to the passages from the judgment which I have cited, and must quote also from the

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proceedings on the application for review. The learned Judge's note begins as follows :-

"HARRIS:

Refers to circumstances of case. Proceeded on basis seeking the alternative remedy. Issue to damages left to Court. If Mr. O'Brien Kelly agreed judgment should be alternative prayer. Don't know if made ourselves clear.

10 JUDGE:

I have a very clear recollection of what was said and it appears in my notes on record. I was left under impression there had been an arrangement as to executing the assignment and no order was sought there. I read out the formal judgment. I was acting by consent of the advocates - no one objected.

HARRIS:

I was under impression that the order 20 for assignment would follow. Obviously misunderstanding. Only issue as to damages. By defence they admitted: under obligation to assign. I thought whole alternative relief was being granted".

The notes continue for another twelve pages. In his judgment the learned Judge referred to the passage from his notes of the trial which I have quoted, and said that it was on this that he based the statement in his first judgment that the claim 30 for specific performance had been abandoned. He says later,

"My impression was that any differences concerned with the execution of the conveyance had been smoothed out and had been the subject of arrangement or settlement between the parties, and that all that was required was judgment in respect of the damages estimated on adjudication of the agreed issues as to liability and amount. On the pleadings there 40 was contest as to the alleged right to specific performance; but such was not included as an agreed issue: no evidence was led to any such issue: it was stated that the only relief sought was in damages; and finally it was stated as agreed that judgment should be for the damages as assessed and costs".

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and again,

> "I believe my notes on record accurately reflect what was said. Issues were fixed relevant to the matter prayed by paragraph (ii) (a) and (b); there was no reference to paragraph (ii) (c) of the prayer".

It is clear that the learned Judge based himself on an express abandonment of the claim for specific performance by Mr. Harragin. I shall refer later to what occurred when judgment was given. I find it impossible to believe that Mr. Harragin ever abandoned the claim either expressly or by implication, and I think the learned Judge's notes themselves to some extent support this view. The sentence "We asked specific performance but this impossible", must be read in the light of the facts. The new protected tenancy rendered "impossible" the relief prayed in para. (i), i.e. specific performance with an order for vacant possession, but it in no way impeded, much less made impossible, an order for specific performance with compensation under para. (ii). The following sentence, "Only relief damages", clearly means that damages are the only possible remedy for the re-letting of the shop, not that they are the only relief sought in the action. The learned Judge in writing both judgments appears to me to have confused an "issue" in the technical sense with an issue in the colloquial sense. The question whether, if the Plaintiffs succeeded on the point of law, there should be a decree for specific performance, was never an issue in the technical sense, for the parties were agreed upon it. See Order XIV Rule 1. But it remained a matter of the greatest importance in the suit. Even if Mr. Harragin never expressly said that he wanted a decree for specific performance, he should still on the facts have been given one, unless he expressly abandoned his claim. On the probabilities I cannot believe that he ever abandoned it. There was no reason why he should. In particular, there was never any such undertaking to transfer as the learned Judge had in contemplation. Specific performance was just as necessary at the end of the suit as when it was filed. I am forced to the conclusion that, while Mr. Harragin may not have given a sufficiently clear explanation of the position to the learned Judge, and the learned Judge certainly misunderstood him, the claim for specific

performance was never abandoned and the right to such a decree was never lost. On any other view of the facts the joint letter is explainable only as a wilful attempt by both Counsel to mislead the Judge. I am certain that it was nothing of the kind.

The fourth question is, "Assuming a misunderstanding between both Counsel on the one side and the learned Judge on the other at the trial, what did Mr. Harris say when judgment was delivered, and what was its effect?" I find it difficult to know what Mr. Harris said and did. His affidavit in support of the application for review says,

"(7) That at the said hearing on the 18th day of February, 1954 the Plaintiffs were represented by this Deponent and the Defendants by Mr. J. O'Brien Kelly, Advocate, a member of the said firm of O'Brien Kelly & Hassan, and that immediately following the delivery of the said judgment Mr. O'Brien Kelly agreed with this Deponent that judgment should be entered for the Plaintiffs in the form set out at para. (ii) (a), (b) and (c) of the prayer to the Plaint save that in lieu of directing an enquiry as to damages as mentioned at Clause (b) of that paragraph the damages should be the sum of Shs. 18,000/- referred to in the said judgment, and this Deponent, in reply to his Lordship's enquiry as to the form of order required, sought to intimate such agreement to the Court. I refer to a copy of a joint letter to the Registrar of this Honourable Court dated the 28th day of June, 1954 from my said Firm and the firm of O'Brien Kelly, Hassan & Miller (successors to O'Brien Kelly & Hassan) and signed by me and the said Mr. O'Brien Kelly (the original whereof is on the file of this Honourable Court) upon which marked with the letter "C" I have endorsed my name at the time of swearing hereof.

(8) That in endeavouring so to convey to the Court the effect of such agreement between this Deponent and Mr. O'Brien Kelly it would appear that this Deponent did not make himself clear, with the result that judgment was entered for the said sum of Shs. 18,000/- as damages, with costs, but the relief sought

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at Clause (c) of para. (ii) was not included in the judgment as entered.

His affidavit in support of the application to the learned President says,

"I say that at the conclusion of the reading by Mr. Justice Bourke of his judgment herein on the 18th day of February 1954, Mr. O'Brien Kelly, the Advocate appearing for the Defendants (the above-named Appellants) agreed with me that the judgment constituted a decision entitling the Plaintiffs (the above-named Respondents) to judgment in the form set out at paragraph (ii) (a), (b) and (c) of the prayer to the Plaint therein substituting a finding of £900 by way of damages in place of an enquiry as to damages, whereupon I so informed his Lordship and proceeded to amplify my statement by reading out the terms of paragraph (ii) of the prayer. Before I had completed the reading of Clause (a) of the paragraph his Lordship asked Mr. O'Brien Kelly if he was agreeable to the making of the order which I was indicating to which Mr. Kelly replied in the affirmative.

His Lordship thereupon read out the terms in which he proposed to enter judgment for the said sum of £900 and Mr. Kelly and I assented to the terms so read out by his Lordship. In view of the fact that, as my said partner had already informed me, he and Mr. Kelly had agreed at the hearing before his Lordship on the 11th day of February, 1954 that the claim for specific performance contained in the said Plaint must necessarily succeed in the event of damages being awarded and must necessarily fail in the event of damages being refused, and that the contested issues for determination by the Court had accordingly reduced themselves to the single issue as to whether the Plaintiffs were entitled to an award of damages and in what sum, it was not appreciated that, in so reading out the terms in which he was proposing to enter judgment for the said sum of £900, his Lordship was indicating what he thought to be the entire of the order agreed to by the parties".

I have already quoted the learned Judge's note taken at the trial. His note on the application for review contains, in addition to the one already quoted, the following passages taken from Mr. Harris's submissions,

> "I thought I was getting full alternative remedy asked and you were only recording issue to damages. Specific performance in another form".
>
> "I didn't know what had been said during the proceedings by Mr. Harragin and Mr. O'Brien Kelly. I remember you read out form of judgment and I thought other matter as to completing assignment had been dealt with earlier and damages was only matter left so I said judgment for damages and costs. After all we are clearly entitled to the relief on merits and admissions. We were both agreed on the full alternative relief claimed. "I know at trial I turned to O'Brien Kelly and said after your judgment: "It means judgment in the alternative prayer?" and he agreed. Nothing was said about alternative prayer to Court. Hard to remember what said".

In his judgment on review the learned Judge said,

> "The advocate for the Applicants is saying in effect that, "the judgment I asked to be entered is not that which the parties really agreed upon. I failed through a misunderstanding to communicate the true position to the Court and anyway I thought the decree would be in the form of an order for specific performance, as prayed at paragraph (ii) (c) of the plaint, allowing Shs. 18,000/- in account as damages". Then a letter to the Registrar, admittedly signed by Mr. O'Brien Kelly four months after judgment was given, is relied upon as indicating the attitude of the parties at the time judgment was entered. This letter was written without reference to the Respondents, who submit through their affidavits that its contents are not binding upon them. It is said before this Court by Mr. Budhdeo that any claim for specific performance would be a matter of contest on a reopening of the case pursuant to the granting

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of this application for review. He submits that the letter under reference should not be looked to as evidence of a subsequent admission as to the matter litigated (A.I.R. Commentaries 5th Edn. Vol. 3, p. 3548). An attempt, he argues, is being made to obtain review on the ground that the terms of a consent judgment, clearly expressed before the Court at trial, were not the correct terms agreed upon at the time, and this Court is being asked to change its judgment and finally adjudicate in the terms now said to have been agreed and communicated to it for the first time, which would incidentally have the effect of frustrating the Respondents' appeal. 10

I think there is substance in Mr. Budhdeo's submissions on the merits. Had the advocate for the applicants ascertained what had taken place earlier in the trial when Mr. Harragin appeared, he would not have been under any misapprehension leading him to think that it had already been communicated to the Court as being agreed between the parties that an order for specific performance should follow upon a finding of liability in damages on the single issue settled. Any such misapprehension should anyway have been dispelled when the judgment entered by consent on the record was read out. Further, had notice been taken of Order 20 Rule 6 (1), it could not have been thought that the decree could contain an order for specific performance in view of the judgment entered as agreed. If there was a definite "agreement that judgment should be entered in terms of paragraph (ii) (c) of the prayer in the plaint, it is extraordinary that the advocate appearing on each side should not only have failed to make that clear but have conveyed something quite different to the Court". 20 30 40

From all this I conclude that Mr. Harris, whatever he may have intended to do, never made it clear to the Court that he was asking for anything more than a simple money decree. I think Mr. Harris was taken completely by surprise by the repeated assertions in the judgment that the claim for specific performance had been abandoned. It would have been extremely difficult for him, not having appeared

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at the trial, to suggest to the learned Judge that those assertions were, as I am convinced they were in fact, erroneous. I think that in this emergency Mr. Harris was momentarily at a loss and I do not think his memory can be relied on as establishing what was said or done. I accept the learned Judge's notes and judgment as a correct and sufficient record. But I must differ from the learned Judge as regards the effect of what was
10 said. Where a judgment is read and the Judge enquires, "In what form should judgment be entered?" the reply of Counsel must, I think, be at most a submission of law, from which he can resile on appeal or on review. Again, his reply must in propriety be based on the findings and other matters in the judgment. He can hardly be heard to say at that stage, "Your judgment is based on a misunderstanding and must be re-written before a proper decree can be based on it." It is perhaps
20 a pity that Mr. Harris did not say he was insufficiently instructed and ask for an opportunity to confer with Mr. Harragin; but it is easy to be wise when the emergency has passed, and I feel great sympathy for the difficulty in which Mr. Harris found himself. The learned Judge appears from several passages in his judgment on review to have considered that, since Counsel agreed on the form in which judgment was to be entered, it had the special qualities of a consent judgment. I must
30 with respect dissent from this view. It is of course good practice to hear Counsel as to the form of the judgment, and it is usually helpful if they agree; but the judgment gains no special validity from this, and certainly does not thereby become a consent judgment. My answer to the fourth question is therefore that Mr. Harris's action is correctly described by the learned Judge; but such action does not affect the previous misunderstanding or prevent its consequences from be-
40 ing remedied.

The fifth question concerns delay. The learned Judge took a serious view of the long period which had elapsed before the matter came before him on review. I think, however, that he blamed the Plaintiffs for something which was really not their fault. I cannot think that they were unreasonable or negligent in hoping that the decree could be drawn as they required when taxation was completed. I have tried to show, in setting out the facts,

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that substantially all the delay after that stage was attributable to the Registrar, or to the absence of the Judge, or to other factors beyond the control of the parties. In Kenya the Registrar normally settles the form of the decree, but the Judge must sign it, so the matter is really in his hands. Mr. Budhdeo made a long submission to us about "illegal attempts" to have the decree drawn otherwise than in conformity with the judgment; but he himself was, or should have been, aware that, in accordance with repeated directions of this Court at least from 1953 onwards, the decree should have been included in the appeal record and that he was therefore himself under a duty to ensure that it was duly extracted. He admits that when he received the judgment he wanted to see the decree, and that if it did not conform with the judgment he intended to appeal against it, as well as the judgment. His clients, on instructing him, had asked the very pertinent question, "What about the Shs. 25,000?" which seems to indicate that their knowledge of affairs is not so limited as is suggested. Mr. Budhdeo was perfectly aware of the rather ridiculous situation which would be created by a simple money decree, namely, that the Plaintiffs, though entitled to damages for breach of the contract, would not only be unable to enforce their primary rights under it, but would apparently lose their deposit of Shs. 25,000, by reason of res judicata. Apparently this did not strike him as unfair or unreasonable. Indeed, the question of the form of the decree affected his mind so little that, as he told us, after 18th June he forgot all about it, until it was brought back to his mind when the notice of motion for review was served on him and on Mr. O'Brien Kelly in December. He says that until that time he did not know whether a decree had been extracted or not. I simply do not believe all this. Mr. Budhdeo had applied to the Registrar by letter of 14th June for a certified copy of the decree and in reply the Registrar told him that it was being drafted by Mr. Harragin's and Mr. O'Brien Kelly's firms and he should apply again by 28th June. He never applied again. He said to us "Perhaps I didn't think it important". It is impossible for us to know what passed between the sellers and Mr. O'Brien Kelly, or between them and Mr. Budhdeo, but I believe Mr. Budhdeo's policy was one of what I may call inactive obstruction. He thought time was on his side. He does not, however,

dispute that the Registrar was entitled to consult the Judge in the matter, and he cannot, so far as I can see, deny that, once that had occurred, the remaining delays were inevitable. It is of some importance to note that the cross-appeal is brought against both the judgment and the decree, which, as I have said, was only signed on 7th June, 1954, and of which the Respondents did not obtain a copy until 27th June, 1954. Although a long time has passed, I do not think it can fairly be said that the Plaintiffs have been guilty of any such delay as should deprive them of the opportunity of obtaining relief. This was clearly the opinion of the learned President, and I respectfully agree with him.

I can now deal very shortly with the reference. The application to the learned President did not call for a written decision, but his notes are before us. Mr. Budhdeo, pursuing his policy of preventing the Courts from investigating the question whether there had been a failure of Justice owing to a misunderstanding, contended that on the facts the Plaintiffs should not be allowed to cross-appeal. He also contended that cross-appeal was in any event barred by the application for review, the point taken before us as a preliminary objection. He relied strongly on delay. We were of opinion that justice clearly required that this matter should be fully investigated, that the delay in cross-appealing was sufficiently explained, and that the learned President's order, save as to costs, should be confirmed. We reserved consideration of the question of costs of the application and of the reference, and proceeded to consideration of the appeal and cross-appeal.

Mr. Budhdeo's principal ground of appeal, as he himself described it, was that in this suit the claim for damages was purely ancillary to the claim for specific performance, and that upon abandonment of the claim for specific performance the claim for damages must necessarily disappear. As a general proposition of law this may well be correct. I am prepared to assume that it is. But of course it begs the question whether the claim for specific performance was in this case abandoned. Mr.Budhdeo submitted, as one of his principal arguments, both against review of the judgment and against admission of the cross-appeal out of time, that, if the

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judgment as it stood were amended and a decree for specific performance with compensation were passed, that would deprive him of his best ground for saying that the judgment for damages was wrong and should be set aside. This was clearly correct. It did not appear to us to be a good ground for refusing to enquire whether the judgment was erroneous owing to misunderstanding; but it seemed a good ground for making that enquiry before hearing argument on that particular ground of appeal. We accordingly heard argument on the cross-appeal before the substantive appeal.

Mr. Budhdeo opened his preliminary objection to the cross-appeal by reminding us that his appeal was lodged before the application for review, and that no appeal had been brought against the judgment on that application. He submitted that it was not open to us to do anything which would in effect reverse that judgment. In law, however, I think it was not a judgment but a mere ruling, which could have been, but I believe was not, embodied in an order. The application was a proceeding in the suit, and is so intituled. Its purpose was to determine the form of the decree in the suit - a purely procedural matter. On this ground I think that this application, though not necessarily all applications for review, may correctly be described as interlocutory. On that footing we have jurisdiction to vary or reverse any order, made thereon and relevant to the determination of the cross-appeal, without separate appeal. E.A. C.A. Rules, 1954, Rules 74 (4) and 78. Admittedly the order would have been appealable by leave under Order 42 Rule 1 (2), but that is immaterial. Mr. Budhdeo relied on Order 44 Rule 1. He contended that the words "who is not appealing" in sub-rule (2) must by necessary implication bar, not only a review where the party applying has already filed an appeal, but also an appeal where the party seeking to appeal has first applied for review. I think there is no such implication, and the suggested construction is not required either by grammar or convenience. The mischief which the provision meets is that it would be impossible properly to determine appeals from decrees, if they might at any moment during the pendency of the appeals be transformed by review into something quite different from what was appealed from. The subject-matter of an appeal must at least be ascertainable with

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precision. On the other hand, if review has been either granted or refused there is no reason why an appeal from the amended, or original, decree, as the case may be, should not follow. Mr.Budhdeo admitted that he could not support his submission with authority, and I think there is some authority against him. An appeal clearly lies from a decree as amended on review. Chitaley, Code of Civil procedure, 5th Edn. 3573. There seems to be no reason why it should not lie where review has been refused. We over-ruled the preliminary objection to the cross-appeal.

The nature of Mr. Harris's argument on the cross-appeal has already been indicated. He explained the misunderstanding which had arisen between the learned Judge and both Counsel, and stressed the important point that nothing had been said or done at the trial before judgment was reserved, which could have indicated to Counsel the existence of that misunderstanding, and so have enabled them to remove it. He submitted that the judgment itself; if it revealed the existence of misunderstanding, certainly did not not reveal its full extent, which only became apparent on the delivery of judgment on review. He explained that, until the hearing of the application for review, he had no idea that the learned Judge might take the line that Counsel were both wrong, and that it was for that reason he had not filed an affidavit by Mr. Harragin. Since the learned Judge had himself directed an application for review of the judgment, it was a shock to hear him hold that a judgment could not be reviewed, but only a decree. Mr. Harris relied on Rule 74 (4) and submitted that, whether or not the learned Judge was right in his limited construction of Order 44 Rule 1, and whether or not he could have acted under Section 97, Section 99 or Section 100 of the Civil Procedure Ordinance, we could put matters right now. He cited a number of cases where there had been misunderstanding of one kind or another between Counsel, and the Court had subsequently taken action to rectify matters; but neither he nor Mr. Budhdeo has been able to find a case where Counsel were agreed as to what should be done, and the Court, having misunderstood them, did something else, which, unless they agreed to it, could not properly have been done at all.

Mr. Budhdeo was at first inclined to submit

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that this had been a consent judgment and decree, but when we pointed to Section 67 (2) of the Civil Procedure Ord., he withdrew this submission, which, if accepted, would have barred his own appeal. He submitted that, if Mr. Harris was right about there having been mutual mistake, the proper remedy was by separate suit to set aside the judgment and decree. I think this is erroneous. A separate suit is appropriate where a judgment is to be set aside for fraud, and also, since appeal is impossible, where the judgment was passed by consent. See Huddersfield Banking Co., Limited v. Henry Lister & Son Limited, (1895) 2 Ch. 273, and Wilding v. Sanderson, (1897) 2 Ch. 534. But I think appeal is an appropriate remedy, even if not the only one, where the erroneous judgment is made through misunderstanding by the Judge of what Counsel have submitted. Mr. Budhdeo, as I have said, contested the cross-appeal on the facts. I have explained why I am against him on this issue. When pressed he said bluntly that his clients were not willing either to transfer the property, or to refund the deposit, even if he should not succeed on his substantive appeal. He submitted that Mr. O'Brien Kelly had in effect abandoned the defence of repudiation, and that, although this was technically within his authority as Counsel, he should not have done so. Mr. Budhdeo claimed to be entitled to re-open the question, as purely one of law, before us. I doubt if the point is purely one of law. Questions of sufficiency of notice to complete appear to be in issue. But on the view I take of the case generally this does not arise. Mr.Budhdeo could not possibly establish a repudiation by the buyers if they were justified in demanding compensation for the re-letting as a condition of completion.

We did not hear argument on the question whether the Supreme Court has power to review a judgment, as opposed to a decree, and I therefore express no firm opinion on that point; but I do not wish to be taken as agreeing with the decision made thereon in the judgment on review. I think Order 44 Rule 1 must be interpreted in the light of other provisions of the Civil Procedure Code, and it is arguable that Order 20 Rule 3 (3) must by necessary implication mean that a judgment can be reviewed. On this interpretation "decree" in Order 44 would mean not only a decree in esse but

also a decree in posse. It does not on the face of it seem very reasonable that it should be necessary to have a decree extracted before the Court can say in what terms the decree should be drawn. If there were any other method of having the terms of a decree formally settled, this argument might not be valid. It is beside the point to say that decrees must conform with the relative judgments. It is often difficult to know how that conformity may correctly be achieved. But whether or not the learned Judge was right in dismissing the application for review on this highly technical ground, we were of opinion that we were empowered, and ought to grant relief on the cross-appeal, and we so indicated to Mr. Budhdeo. In consequence he did not argue what would otherwise have been his principal ground of appeal; but he had other grounds.

It is necessary on all aspects of the substantive appeal to bear in mind the different effects of a contract for sale of land in England and in Kenya. In India the rules of English equity have no direct application, and it is clear law that the buyer obtains no equitable estate by virtue of the contract. Webb v. Macpherson, 30 I.A.238. Mian Pir Bakhsh v. Sardor Mohamed Tahar, 61 I.A. 388. It might perhaps be argued that in Kenya, since English equity applies unless excluded by statute, an equitable interest is created; but this would involve a restrictive meaning of the word "interest" in the last sentence of Section 54 of the Indian Transfer of Property Act, and I think the Indian rule must be held to apply in this country. The seller is not a trustee for the buyer, and the rights of the buyer are purely contractual until transfer is effected. Ariff v. Jadunath, 58 I.A. 91. The Act applies in Kenya as it stood on 27th November, 1907, and later amendments, e.g. section 53A, do not apply. Indian Acts (Amendments) Ord. s. 2. The contract is to be interpreted and enforced in accordance with the provisions of section 55 of the Act, and it is the true meaning of that section which we have to determine on this appeal. Mr. Budhdeo submits that, apart from the statutory terms imported by that section, there can be no such thing as an implied term in a contract for sale of land in Kenya. I do not accept this, but I do not think it is material in this case.

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No. 13.

Judgment.

13th October, 1956 - continued.

Mr. Budhdeo's first submission is that the scheme of the Act is to treat ownership and possession of land as two wholly independent matters. He says that the two things should not be confused, and that a buyer is not entitled to raise any question of possession until after completion. He refers to sub-sections (1) (f) and (4) (a) of Section 55, and to Mulla's Transfer of Property Act, 3rd Edn. p. 309, where in the table of mutual rights and duties it is stated that the seller's obligation to give possession arises only after completion. From this he argues that in a suit for specific performance it must be premature to discuss questions of possession. If the issue of possession of the re-let shop or compensation for loss of possession had been correctly postponed for consideration until after completion, it would have appeared in this suit that the sellers were ready and willing to convey in terms of the contract, and therefore that no decree of specific performance should be made against them, and indeed the buyers had repudiated. The argument is ingenious, but, I think, unsound. Unless the contrary is provided, a contract subject to Section 55 obliges the seller to give possession forthwith upon completion, if the buyer wants it. Except in a notional sense, completion and transfer of possession are simultaneous. If the seller before completion does something which makes it impossible for him to give possession which the contract requires him to give, he is guilty of an anticipatory breach which may well go to the root of the whole contract. If the law were otherwise, it would be possible for a seller to grant for a large premium a 99 year lease at a peppercorn rent the day before completion and still insist on the buyer completing, leaving him with nothing but a right to file suit for damages after having paid the purchase price. Mr. Budhdeo seeks to avoid this argument by saying that the lease would be an "incumbrance", but I think a lease is not an incumbrance. Apart from this, I think the authorities are against Mr. Budhdeo. Gour's Law of Transfer, 7th Edn. 746, seems to me to state the matter more precisely than Mulla, by saying that the seller's duty is "to deliver possession .... on completion of sale". In Krishnammal v. Soundararaja Aiyar, 38 Mad. 698, it was held that, although a claim for an order for possession need not be joined with a claim for specific performance, it can be so joined.

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13th October, 1956 - continued.

Krishnaji Babaji v. Sangappa, A.IR. 1925 Bom. 181, to which I have not been able to refer, appears to be another decision to the same effect. And, so far as this Court is concerned, the matter appears to be concluded by the judgment of Sir John Gray in Shantilal v. Gulzar Begum, 15 E.A.C.A., 25-27. I think this argument fails in both its aspects. The buyers were entitled to take the point about possession or compensation before completing and, 10 assuming that the sellers were in breach of duty, the buyers did not repudiate their contract by taking the point, nor were the sellers in any real sense "ready and willing to convey".

The main point of substance in the appeal is the submission that the sellers were entitled to re-let, as they did, on terms the same as those governing the previous tenancy. There is no dispute that the buyers took subject to any rights of the named tenants. The question is whether they 20 must take subject to the rights of any tenants whom the sellers might let in no similar terms. This seems to me to depend entirely on the true meaning of Section 55 (1) (e), which provides that,

> "In the absence of a contract to the contrary ..... the seller is bound ...... 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 30 owner of ordinary prudence would take of such property and documents".

These words may be compared with the provisions of Section 15 of the Indian Trusts Act, 1882, which are closely similar, but with the important difference that a trustee is bound to "deal with" the property as specified, while a seller of land is bound to "take care of it". It is submitted that this difference of wording indicates that a seller's duty is not analogous to a trustee's, but is con- 40 fined to physical preservation of the property. Cf. Clarke v. Ramuz, (1891) 2 Q.B. 456, where there was a breach of duty by failing to guard against wrongful acts by a trespasser. I think this interpretation is too narrow. The words "deal with" are appropriate to the trustee, whose duty with regard to the property may well be to sell or otherwise dispose of it. The words "take care of"

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are more appropriate to a seller of land, whose duty is, as I think, to ensure, so far as he reasonably can, that the buyer shall get all that he is entitled to under the contract. This may involve many matters besides the physical condition of the property. There is a curious dearth of authority in India on the meaning of para. (e). Mulla & Gour agree that, though the Vendor is not a trustee, his duties are the same under para. (e) as they would be if he were a trustee under s. 15 of the Trusts Act; but they cite no Indian authority for this. Indeed, in their commentaries on the paragraph, Mulla cites no Indian case and Gour only one, which is unhelpful in this connection. They both rely on the English authorities to define the extent of the duty, and accepting, as I do, that the duties are closely analogous to a trustee's, I think this is legitimate. I think with respect that Chitaley, 3rd Edn. 884-5, who also refers only to English cases, is not merely unhelpful, but has fallen into grave error, by accepting Mukerji's suggestion that para. (e) deals only with matters subsequent to execution of the transfer. This is contrary to the plain wording and would leave a dangerous lacuna in the Act. Mr. Budhdeo submits that, whatever may be the extent of a seller's duty under para. (e), he is entitled to treat his own interests as paramount and, so long as he is honestly acting in his own interests, he cannot be said to be in breach of duty. I think this is an over-simplification. Seller and buyer are both interested in the property in the ordinary sense of the word, if not in the technical sense. I think the seller is bound to have regard to the interests of both parties. If a situation arose where one party's interests must inevitably be sacrificed to the other's I think the seller would probably be entitled to protect his own; but so far as possible he should ensure that that situation should not arise, and it clearly did not arise here. The only legitimate interest of the sellers which was involved when the tenancy was surrendered was that they should not lose their four-fifths share of the net rent of the shop for the period of about six weeks expected to elapse before completion. This would be a matter of £10 - £15. They could not lawfully take a premium for the re-letting. As property-owners in Nairobi, they could not have been unaware that the vacancy had greatly enhanced the capital value of the premises, though

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they would not know precisely by what amount. I think they were entitled to protect their own right to the small sum involved, and that in the last resort they might even have been entitled to protect it by re-letting; but if they could protect it without destroying the valuable windfall which the buyers had obtained, or would obtain on completion, I think it was their duty to do so. Common-sense suggests that they should have consulted
10 the buyers, who would of course have agreed immediately to pay the amount, or to allow it to be deducted from their one-fifth share of the rent. That one-fifth share was never paid to the buyers and would have covered anything that might be due to the sellers before completion. In any event, the amount was trivial and there was never any real suggestion that they might lose it. If they had consulted the buyers, and the buyers had refused to make the small loss good in any way, the sellers
20 might have re-let with some confidence: but that is not the position. It must not be forgotten that, where a cestui que trust is absolutely entitled to the trust property and is sui juris, the trustee's primary duty is to deal with the property in accordance with such directions as the cestui que trust may give. The right to be consulted is not merely something which may be suggested as sensible or convenient, but has a legal basis. That is applies as between Vendor and Purchaser of land
30 in England is clearly shown by Egmont v. Smith, 6 Ch. D. 469, 475. Although factually the conclusion in that case appears to be against the buyers, the principles which it lays down are wholly in their favour, and I think the learned Judge in the Court below was right in treating it as good authority for giving damages in this case. I think the buyers were bound by the provisions of para. (e) imported into their contract to consult the Purchasers and to ascertain their wishes and in-
40 tentions, before taking any step so obviously detrimental to their interests as re-letting. I think section 55 (5) (c) and Section 55 (6) (a) support this view. The clear implication of the first paragraph is that the buyer should not have to bear losses which are deliberately caused by the seller, and the second seems to show that a benefit in the nature of a windfall is part of that which must be taken care of under Section 55 (1) (e). I think also that passages from the En-
50 glish text books on Vendor and Purchaser lead to

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the same conclusion, notably one in Williams, 4th Edn. 552, where it is said,

> "As the result of the Purchaser's equitable ownership of the property sold and the Vendor's consequent trusteeship for the Purchaser, the Vendor is bound, while he remains in possession of the property sold to take reasonable care to preserve the property in the same condition in which it was at the date of the contract for sale. He must use the same care that a trustee ought to use with regard to the trust property, of which he is in possession; that is to say, he must take the same care as a prudent owner would take of his own property".

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 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. I would dismiss the appeal and affirm the judgment for damages.

I would allow the cross-appeal, and vary the judgment and decree of the Court below by directing that judgment be entered and a decree passed for specific performance of the contract, subject to a deduction of the sum of Shs. 18,000/- awarded as damages from the balance of the purchase price, and to other deductions to which I shall later refer. The order of this Court should set out in detail the provisions of the decree to be passed in the Supreme Court and the draft of the order should be submitted through the Registrar to one of the Judges of this Court for approval. It will not, however, be necessary to attend to settle the draft formally unless the parties disagree as to its form.

It remains to deal with the costs in both Courts. The costs of the suit, other than costs of the application for review, were ordered to be paid by the sellers, and have been taxed. This I would affirm and those costs can be deducted at once on completion. The costs of the application

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for review were ordered to be paid by the buyers. They have not yet been taxed. I think this order must be varied. I assume that, partly through the fault of Mr. Harris when judgment was delivered, it was necessary to take proceedings in review to have the judgment and decree set right. I think that, if the sellers had followed Mr.O'Brien Kelly's advice in the matter, and he had appeared for them, review would have been granted by consent. In that
10 case I think Mr. Harris would probably have submitted to pay a small sum, say Shs. 300/-, for costs of the application; or it is possible that each side would have been ordered to bear its own costs. Owing to Mr. Budhdeo's as I think, misconceived opposition, the costs of the application were enormously increased. Also, I think the learned Judge overlooked the point that the application had been brought on his directions. I think the application ought to have succeeded, and in all
20 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 an order should be made to that effect. The costs of the application on 6th January, 1955 to postpone hearing of the appeal were reserved. I think they should be treated as "costs in cause", i.e. as part of the costs of the appeal. If the
30 application for review had been conducted as I have suggested, no cross-appeal would ever have been necessary. Although the buyers went to the learned President for indulgence, I think they ought never to have been obliged to do so. The application was in my opinion unnecessarily, and even unreasonably, opposed, and if the buyers had not expressly submitted to pay the costs of the application in any event, I doubt if the learned President would have ordered them to do so. We are not asked
40 by the buyers to vary that order and I do not propose that we should do so. But I would ensure that the sellers' costs are kept on what I think would be a reasonable basis for the work properly involved by assessing them at Shs. 200/- plus actual disbursements allowable. The costs of the reference to the full Court, of the preliminary objection to the cross-appeal, of the cross-appeal itself, and of the substantive appeal should all follow the event and be paid by the sellers.

50 The buyers have raised questions of interest

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Judgment.

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on their deposit of Shs. 25,000/- and have asked for an order under Section 55 (6) (b) of the Act. They did not claim such an order in their plaint, and I do not think we could now order payment of interest, at least in respect of any period before judgment in the suit. In any event there is an overriding objection. The contract provides that, having paid one-fifth of the purchase price, they shall until completion have one-fifth of the net rents. Having elected to receive rent, I do not think they can have interest. In fact, however, they have not received the rent. If judgment had been given in the terms we think proper, I think an order could have been made then for deduction of the rent from the purchase price, and for an account to ascertain the amount thereof, if necessary. I would include in the decree an order for deduction in that sense, and for an account, though I hope the amount due will be easily agreed. The decree should provide that all costs hereby ordered to be paid may be deducted from the balance of the price, whether incurred in the Supreme Court or in this Court. As the amount of the deductions for most of the costs and for rent cannot be ascertained for some time, and it is undesirable that completion should be delayed, I would include in the decree an order that a sum of Shs.25,000/- being part of the unpaid balance of the purchase price, should be paid into Court, instead of to the sellers, and should there await ascertainment of the deductions for costs and rent which are not yet ascertained, and thereafter be released to the parties in accordance with their respective rights. The decree should grant to both parties liberty to apply generally in the Supreme Court, and as a matter of precaution I would also grant leave to apply generally to this Court.

F. A. BRIGGS,
JUSTICE OF APPEAL.

JUDGMENT OF SINCLAIR AG. P.

I agree and have nothing to add. The order will be in the terms proposed by the learned Acting Vice-President.

R. O. SINCLAIR
ACTING PRESIDENT.

JUDGMENT OF BACON J. A.

I agree.

NAIROBI.
13th October, 1956.

ROGER BACON,
JUSTICE OF APPEAL

I certify that this is a true copy of the original

for REGISTRAR
25.10.1956.

In the Court of Appeal for Eastern Africa.

No. 14.

Order on Appeal and Cross-Appeal.

13th October, 1956.

No. 14.

ORDER ON APPEAL AND CROSS-APPEAL

In Court this 13th day of October, 1956.

Before the Honourable the Acting President (Sir Ronald Sinclair)
the Honourable the Acting Vice-President (Mr. Justice Briggs)
and the Honourable Mr. Justice Bacon, a Justice of Appeal.

10 THIS APPEAL and CROSS-APPEAL (setting out the above-named Respondents' intention to contend that the Judgment above mentioned and the decree granted in pursuance thereof, dated the 7th day of June 1955, should be varied to the extent and in the manner and on the grounds therein set out) COMING ON FOR HEARING on the 2nd day of October 1956, the 3rd day of October 1956 and the 4th day of October 1956, AND UPON HEARING Mr. Narshidas M. Budhdeo (Advocate for the Appellants) and Mr.Gerald Harris
20 (Advocate for the Respondents) it was ordered that the matter do stand for judgment and the same coming for judgment this day IT IS ORDERED :-

1. THAT the said Appeal be and the same is hereby DISMISSED and that the costs thereof, together with the costs occasioned by the adjournment granted on the Respondents' (Plaintiffs') Application on the 12th day of January 1955 shall be borne by the Appellants (Defendants).

2. THAT the Order made herein on the 4th day of
30 November 1955 by the President on the Respondents' (Plaintiffs') Application for leave to serve Notice of Cross-Appeal out of time BE AND THE SAME IS HEREBY AFFIRMED save and except that this Court doth direct that the costs awarded to the Appellants (Defendants) under and by virtue of the said Order shall be limited to the sum of Shs. 200/00 plus actual disbursements allowable.

3. THAT the said CROSS-APPEAL be and the same is hereby ALLOWED WITH COSTS TO THE RESPONDENTS
40 (Plaintiffs) AND THIS COURT DOTH ORDER that the Judgment of the Honourable Mr.Justice Bourke, dated the 18th day of February 1954, be and the same is

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hereby varied to the extent and in the manner set out as under :-

(i) by the substitution in the said Judgment for the finding that the Respondents' (Plaintiffs') claim for an Order for specific performance by the Appellants (Defendants) of the Agreement for Sale referred to in the Plaint filed herein had been abandoned A FINDING that the Respondents' (Plaintiffs) said claim for specific performance had been abandoned by the Respondents (Plaintiffs) in favour of their alternative claim against the Appellants (Defendants) under paragraph (ii) (a), (b) and (c) of the prayer to the said Plaint but no further: 10

(ii) by adjudging, in addition to damages in the sum of Shs. 18,000-00 and costs, in favour of the Respondents (Plaintiffs) against the Appellants (Defendants), an order for specific performance by the Appellants (Defendants) of the said Agreement for Sale: 20

4. THAT the Order made on the 7th day of April 1955 by the Honourable Mr. Justice Bourke on the Respondents' (Plaintiffs') Application for the said Judgment to be reviewed be and the same is hereby varied by the substitution for the direction in the said Order that the Respondents (Plaintiffs) should pay the costs of the said Application for review, a direction that the Respondents (Plaintiffs) and Appellants (Defendants) should each pay their own costs thereof. 30

5. THAT the costs of the Reference to the Full Court under the provisions of Section 14(b) of the East African Court of Appeal Order in Council 1950 of the order of the President dated the 4th November 1955 on the Respondents (Plaintiffs) application for leave to serve Notice of Cross-Appeal out of time shall be borne by the Appellants (Defendants).

6. THAT the costs of the Preliminary Objection raised by the Appellants (Defendants) to the Cross-Appeal be and the same are hereby awarded to the Respondents (Plaintiffs). 40

7. (a) THAT the Respondents (Plaintiffs) be at

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liberty to deduct the said sum of Shs. 18,000-00 in respect of the said damages and Shs.3,712-50 in respect of the Costs, as taxed, awarded to them under the said Judgment, making in all the sum of Shs. 21,712-50, from the balance of purchase price still due by them to the Appellants (Defendants) under the said Agreement for Sale:

(b) THAT the Respondents (Plaintiffs) be at liberty to deduct the total amount due to them in respect of all further costs awarded to them against the Appellants (Defendants) under and by virtue of the Judgment of this Court (whether such costs were incurred by the Respondents (Plaintiffs) in this Court or in the Court below) when taxed, TOGETHER with the amount due by the Appellants (Defendants) to them in respect of rent under Clause 10 of the said Agreement for Sale from the said balance of purchase price after the said sum of Shs.21,712-50 shall have been deducted as aforesaid.

(c) AND FOR THE PURPOSE of enabling the said sale to be completed without unnecessary delay the Respondents (Plaintiffs) shall be at liberty to pay to the Appellants (Defendants) the sum of Shs.53,287/50 and to pay into Court a further sum of Shs.25,000/00 (which said sums of Shs. 53,287/50 and Shs. 25,000/00 will, with the deposit of Shs. 25,000/00 already paid by the Respondents (Plaintiffs) to the Appellants (Defendants) together with the said sum of Shs. 21,712/50 in respect of the said danagos and Taxed Costs, amount to the sum of Shs. 125,000/00 being the purchase price referred to in the Plaint filed herein) which said sums of Shs. 53,287/50 and Shs.25,000/00 shall together be deemed to be in full discharge of the balance of purchase money due by the Respondents (Plaintiffs) to the Appellants (Defendants) by virtue of the said Agreement for Sale, the said sum of Shs. 25,000/- so to be paid into Court as aforesaid to remain in Court and await ascertainment of the amount due to the Respondents (Plaintiffs) by the Appellants (Defendants) in respect of the said further costs

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so to be taxed as aforesaid and the said rent and upon such ascertainment to be applied by the payment thereout to the Respondents (Plaintiffs) of the amount so to be found due to them for costs and rent upon such ascertainment so far as the said sum of Shs.25,000/- will extend and the balance, if any, of the said sum of Shs. 25,000/00 remaining after the payments to the Respondents (Plaintiffs) of the entire of the amount so to be found due to them shall be paid out to the Appellants (Defendants) upon demand provided always that in the event of the said sum of Shs. 25,000/- not being sufficient to pay the amount so to be found due to the Respondents (Plaintiffs) in respect of the said further costs and the said rent then and in such event the Appellants (Defendants) shall pay to the Respondents (Plaintiffs) on demand the amount of such deficiency.

(d) THAT either of the parties hereto shall be at liberty to apply to the Supreme Court for an account to be taken in the event of their being unable to agree the sum due to the Respondents (Plaintiffs) by the Appellants (Defendants) in respect of the said rent.

AND THIS COURT DOTH FURTHER ORDER that there be substituted for the Decree passed by the Supreme Court herein a decree in the following terms, that is to say:-

"IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI
CIVIL CASE NO.200 OF 1953

GHELA MANEK SHAH
PUNJA KACHRA
KASTURBHAI M. SHAH trading as
SHAH GHELA MANEK — Plaintiffs

versus

MOHAMED HAJI ABDULLA
AHMED HAJI ABDULLA — Defendants

D E C R E E

CLAIM for (i) That the Defendants may be ordered specifically to complete the sale to the

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"Plaintiffs of the premises comprised in the Agreement for Sale dated the 6th day of December 1951 and expressed to be made between the Defendants, as Vendors, of the one part and Khetshi Ghelabhai, as Purchaser, of the other part and known as Plot L.R.No. 209/502 situate at River Road, Nairobi, with the buildings and improvements thereon by delivering to the Plaintiffs contemporaneously with the execution of the Indenture of Assignment thereof already prepared by the Plaintiffs and on payment to the Defendants by the Plaintiffs of the sum of Shs.100,000/00 the premises comprised in the said Agreement with vacant possession of so much thereof as was surrendered to the Defendants by one Velji Ravji Barber as stated in the said plaint.

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(ii) Alternatively: (a) that the Plaintiffs be declared entitled to damages for the failure of the Defendants to preserve as from the date of the surrender to the Defendants by the said Velji Ravji Barber of his tenancy therein that portion of the said premises so surrendered free from occupation or enjoyment by any other person and for their consequent inability or failure to deliver to the Purchasers the premises so agreed to be sold free from encumbrances and with vacant possession of the portion thereof which had been surrendered to them by the said Velji Ravji Barber as above mentioned

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(b) that the amount of such damages be determined by this Court and that for such purposes if necessary an enquiry be had:

(c) that the Defendants be ordered and directed that upon payment to them by the Plaintiffs of the said sum of Shs.125,000/00, the agreed purchase price of the said premises, less by the sum of Shs.25,000/00 being the amount of the deposit so paid by or on behalf of the Plaintiffs and also less by the amount of damages awarded as above, they, the Defendants, do execute in favour of the Plaintiffs the said Indenture of Assignment and do deliver to the Plaintiffs the same together with the said premises subject to such lettings as may be subsisting therein.

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13th October, 1956 - continued.

"(iii) That the costs of this action be paid by the Defendants to the Plaintiffs.

THIS CAUSE coming on the 11th day of February 1954 FOR HEARING and on the 13th day of February 1954 for Judgment before the Honourable Mr. Justice Bourke in the presence of Counsel for the Plaintiffs and Counsel for the Defendants IT IS HEREBY ORDERED that upon payment to the Defendants by the Plaintiffs of the sum of Shs. 53,287-50 (being the sum of Shs. 125,000/00, the agreed purchase price of the premises consisting of Plot known as L.R. No.209/502, situate at River Road, Nairobi, together with the buildings standing thereon referred to in the Plaint filed herein, LESS by the sum of Shs. 25,000/00 the amount of the deposit already paid by the Respondents to the Appellants, LESS also by the sum of Shs. 18,000/00, the amount of the damages awarded herein to the Plaintiffs, LESS also by the sum of Shs. 3,712/50, the amount of the taxed costs awarded to the Plaintiffs against the Defendants herein, and LESS also by the sum of Shs. 25,000/00, to be paid into Court by the Plaintiffs as hereinafter appearing), THE DEFENDANTS do execute in favour of the Plaintiffs a proper Indenture of Assignment of the said premises for all the estate and interest therein of the Defendants subject to such tenancies as may be subsisting in relation to the said premises but otherwise free from encumbrances and do deliver the said Indenture together with possession of the said premises to the Plaintiffs subject as aforesaid AND for the purpose of enabling the Plaintiffs to deduct the amount due to them in respect of further costs and rent hereinafter mentioned from the balance of the purchase price still due herein and with a view to securing the completion of the sale without undue delay, IT IS FURTHER ORDERED that the Plaintiffs be at liberty to pay into Court out of the said balance of purchase price the sum of Shs. 25,000/00 above-mentioned, which said sum of Shs. 25,000/00 so to be paid into Court shall remain in Court and await ascertainment of the amount due to the Plaintiffs by the Defendants in respect of the further costs awarded to them under the Judgment delivered on the 13th October 1956 in Civil Appeal Number 34 of 1954

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"wherein the above-named Defendants were the Appellants and the Plaintiffs above-named were the Respondents TOGETHER WITH the amount due by the Defendants to the Plaintiffs in respect of rent under Clause 10 of the Agreement for Sale referred to in the Plaint filed herein and upon such ascertainment as aforesaid being had the said sum of Shs.25,000/00 shall be applied by the payment thereout to the Plaintiffs of the amount to be found due to them in respect of the said further costs and the said rent so far as the same will extend and the balance, if any, of the said sum of Shs. 25,000/00 remaining after the payment to the Plaintiffs of the entire of the amount so to be found due to them shall be paid out to the Defendants upon demand AND IT IS FURTHER ORDERED that in the event of the said sum of Shs. 25,000/00 not being sufficient to pay the amount so to be found due to the Plaintiffs in respect of the said further costs and the said rent then and in such event the Defendants do pay to the Plaintiffs ON DEMAND the amount of such deficiency AND IT IS FURTHER ORDERED that either of the said parties shall be at liberty to apply Generally to this Court and furthermore in the event of their being unable to agree the sum due to the Plaintiffs in respect of the said rent either party shall be at liberty to apply to this Court for an account to be taken.

GIVEN under my hand and the Seal of the Court at Nairobi this day of etc."

8. THAT either of the parties hereto shall be at liberty to apply GENERALLY to this Court and also be at liberty to apply GENERALLY to the Supreme Court in this matter as they may be advised.

GIVEN under my hand and the Seal of the Court at Nairobi, the 13th day of October, 1956.

Sgd. F. HARLAND,
REGISTRAR,
H.M.COURT OF APPEAL FOR EASTERN AFRICA.

ISSUED at Nairobi this 17th day of January, 1957.

In the Court of Appeal for Eastern Africa.

No. 15.

Order allowing final leave to Appeal to Her Majesty in Council.

2nd April 1957.

No. 15.

ORDER ALLOWING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

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

CIVIL APPLICATION NO. 14 of 1956

IN THE MATTER OF AN INTENDED APPEAL TO HER MAJESTY IN COUNCIL

BETWEEN: 1. MOHAMED HAJI ABDULLA and
2. AHMED HAJI ABDULLA Applicants 10

- and -

1. GHELA MANEK
2. PUNJA KACHRA
3. KASTURBHAI M. SHAH trading as "SHAH GHELA MANEK" Respondents

(Application for final leave to appeal to Her Majesty in Council from a Judgment and Order of Her Majesty's Court of Appeal for Eastern Africa at Nairobi dated 13th October, 1956, in Civil Appeal No. 34 of 1954 20

BETWEEN: Mohamed Haji Abdulla and Another Appellants

- and -

Ghela Manek and 2 Others trading as "Shah Ghela Manek" Respondents)

In Chambers this 2nd day of April, 1957.

Before the Honourable Mr. Justice Bacon, a Justice of Appeal.

O R D E R

UPON the application presented to this Court 30 on the 27th day of March, 1957, by Counsel for the above-named Applicants for final leave to appeal to Her Majesty in Council AND UPON READING the affidavit of MOHAMED BAKHSH of Nairobi in the Colony of Kenya Clerk sworn on the 26th day of March 1957 in support thereof and the exhibits therein referred to and marked "MB1" and "MB2" AND UPON HEARING Counsel for the Applicants and for Respondents THIS COURT DOTH ORDER that the application for

In the Court of Appeal for Eastern Africa.

No. 15.

Order allowing final leave to Appeal to Her Majesty in Council.

2nd April 1957 - continued.

final leave to appeal to Her Majesty in Council be and is hereby granted AND DOTH DIRECT that the Record including this Order be despatched to England within fourteen days from the date of issue of this Order AND DOTH FURTHER ORDER that the costs of this application do abide the result of the appeal.

GIVEN under my hand and the Seal of the Court at Nairobi, this 2nd day of April, 1957.

10

F. HARLAND,
REGISTRAR.

ISSUED this 3rd day of April, 1957.

IN THE PRIVY COUNCIL No. 10 of 1957

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

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
Trading as "Shah Ghela Manek" Respondents

RECORD OF PROCEEDINGS

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