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IN THE PRIVY COUNCIL

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No. 29 of 1957

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

B E T W E E N:

KHATIJABAI JIWA HASHAM (Defendant) Appellant

- and -

ZENAB D/O CHANDU NANSI Widow and
Executrix of Haji Gulamhussein
Harji, deceased as Legal
Representative ... (Plaintiff) Respondent

RECORD OF PROCEEDINGS

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

Solicitors for the Appellant.

HERBERT OPPENHEIMER NATHAN & VANDYK,
20 Cophall Avenue,
London Wall, E.C.2.

Solicitors for the Respondent.

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

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ZENAB D/O CHANDU NANSI Widow and
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Harji, deceased as Legal
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RECORD OF PROCEEDINGS

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UNIVERSITY OF LONDON
W.C.1.

- 7 FEB 1961

INSTITUTE OF ADVANCED
LEGAL STUDIES

50907

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IN THE PRIVY COUNCIL

No.29 of 1957

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

B E T W E E N:

KHATIJABAI JIWA HASHAM (Defendant) Appellant

- and -

ZENAB D/o CHANDU NANSI Widow and
Executrix of Haji Gulamhussein
Harji, deceased, as Legal
Representative (Plaintiff) Respondent

RECORD OF PROCEEDINGS

No. 1.

PLAINT

In the Supreme
Court of Kenya

No. 1.

Plaint.

2nd July, 1954.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI
CIVIL CASE NO.668 of 1954

HAJI GULAMHUSSEIN HARJI Plaintiff

versus

MRS. KHATIJABAI JIWA HASHAM Defendant

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1. The Plaintiff is a Land and Estate Agent residing and working for gain at Nairobi. His address for service is at the offices of Messrs. D.N. & R.N. Khanna, Advocates, Sheikh Building, Victoria Street, Nairobi.

2. The Defendant is a married woman residing at Mombasa and her address for service is care of Kit Kat Restaurant, Salim Road, Mombasa.

3. On or about the 18th day of February 1954 the Defendant in consideration of the sum of Shs. 5/- then paid or agreed to be paid to her gave a binding option to the Plaintiff, originally valid up to the 20th February 1954, but altered on the same day as valid to 22nd February 1954 up to 1 p.m. enabling him to agree to purchase Plot No.209/58/1 Sclaters Road, Nairobi, belonging to the Defendant, for himself or his nominees at the price of Shs. 100,000/-. The said option recited the property as

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being over 2 acres and went on to state that the sub-division was complete, and further provided for vacant possession to be delivered of the entire land and the house standing on the said property.

4. On the strength of the aforesaid option the Plaintiff entered into an agreement with Hasham Brothers Ltd., a limited liability company, having its registered office at Nairobi, on the 19th February 1954 for the re-sale of the said property to them for the price or sum of Shs. 107,000/- hoping to exercise his option, so as to call for a Conveyance from the Defendant. 10

5. The necessity for exercising the said option was, however, dispensed with on the signing on 19th February 1954 at the offices of one G.K. Ishani, Advocate, of a formal agreement of sale by and between the Plaintiff and the Defendant for the sale of the said property by the Defendant to the Plaintiff at the said price of Shs. 100,000/- upon substantially the same terms as in the said option and other material terms. The agreement so entered into provided inter alia for payment of Shs. 15,000/- against the purchase price on or before the execution of the said agreement, and for the sale to be completed within six months of the date of the said agreement, and for payment of Shs. 85,000/- against presentation of documents of transfer, either by the taking over of the mortgage for Shs. 81,000/- and payment of Shs. 4,000/- on completion of transfer, or if so required, free from encumbrances. A cheque for Shs. 15,000/- payable under the said agreement as aforesaid was made out in the Defendant's favour by the Plaintiff the body of which cheque was filled up by the said Mr. G.K. Ishani Advocate, and proffered to the Defendant. The Plaintiff will at the trial refer to the said Agreement for its full terms and effect. 20 30

6. A further agreement on the lines stated in paragraph 4 hereof (to which also the Plaintiff will refer at the trial for its full terms and effect) was duly prepared for execution as between the Plaintiff and the said Hasham Brothers Limited on the said 19th February 1954 by the said Mr. G.K. Ishani, Advocate. 40

7. After signing the agreement referred to in

paragraph 5 hereof the Defendant, for reasons best known to her, and further after the re-sale aforesaid had been made known or confirmed to her in answer to her enquiries, as having been made to the said Hasham Brothers Limited changed her mind and tore up the signed and stamped agreement and repudiated the same anticipatorily before the time fixed for its completion and refused to be bound by it and went away declining to go through with the completion of the transaction on due date or ever at all, and has despite repeated requests continued so to decline.

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2nd July, 1954
- continued.

10

8. The Plaintiff for his part has at all material times been and is now ready and willing to perform his obligations under the agreement referred to in paragraph 5 hereof, and the said Hasham Brothers Limited have in their turn at all material times been and are now ready and willing to perform their obligations under their agreement with the Plaintiff referred to in paragraphs 4 and 6 hereof.

20

9. The cause of action arose at Nairobi within the jurisdiction of this Honourable Court.

REASONS WHEREFORE the Plaintiff prays for :-

- (a) Specific performance of the aforesaid agreement of sale dated 19th February 1954 entered into between the Plaintiff and the Defendant;
- (b) Damages for delay, from 19th February 1954 to the date of judgment or actual specific performance;
- (c) Further or alternatively rescission of the said agreement and damages for breach of contract, and damages for loss of bargain;
- (d) A declaration that the Defendant is bound to indemnify the Plaintiff for anything he may have to pay to the said Hasham Brothers Limited in the event of the rescission of the said Agreement, as damages for breach of contract and damages for loss of bargain;
- (e) Interest at Court rates;
- (f) Costs of this suit;

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40

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2nd July, 1954
- continued.

(g) Any other or further relief which this Honourable Court may deem fit to grant;

(h) All necessary directions and enquiries.

DATED at Nairobi this 2nd day of July, 1954.

for D.N. & R.N. Khanna

Sgd. D.N. Khanna

ADVOCATES FOR THE PLAINTIFF.

Filed by :-

D.N. & R.N. Khanna
Advocates,
Victoria Street,
P.O. Box 1197,
Nairobi.

10

No. 2.

No. 2.

Written Statement of Defence.

WRITTEN STATEMENT OF DEFENCE

26th October, 1954.

- 1. Paragraphs 1 and 2 of the Plaint are admitted.
- 2. The Defendant will refer to the option and Agreement of sale referred to in paragraphs 3 and 5 of the Plaint upon production thereof. Subject to such production, the Defendant states as follows:-

20

3. During the month of February, 1954, the Defendant verbally employed the Plaintiff and the Plaintiff agreed to act for the Defendant as a land and estate agent for the purpose of negotiating the sale of a portion of the Defendant's land situate on Plot 58/1 L.R. 209 Sclaters Road, Nairobi, consisting of 0.513 acres or thereabouts together with the dwellinghouse and other buildings thereon which said portion is hereinafter referred to as the said portion of land. The Defendant instructed the Plaintiff that she required a price of Shs. 100,000/- for the said portion of land.

30

4. On or about the 18th day of February, 1954, the Plaintiff verbally represented to the Defendant that he had a prospective purchaser for the said portion of land and that in order to complete negotiations for the sale thereof it was necessary for the Defendant to give him (the Plaintiff) an option to purchase the same for Shs.100,000/- and he, (the Plaintiff) produced a document to the

40

Defendant written in the English language which he represented to be the said option.

In the Supreme
Court of Kenya

A.1. 5. The Defendant, acting upon the said representations signed the document hereinbefore referred to, which is the option referred to in paragraph 3 of the Plaint, without the same having been translated or explained to her, and without receiving or being promised any payment therefor.

No. 2.

Written State-
ment of Defence.

26th October,
1954

- continued.

10 6. On or about the 19th day of February, 1954, the Defendant at the request of the Plaintiff attended at the office of G.K. Ishani, Esquire, then Advocate for the Plaintiff in order to sign certain documents which the Plaintiff represented verbally to her were necessary for the sale of the said portion of land and were in pursuance of the said option. The Defendant admits that she affixed her signature to the agreement of sale referred to in paragraph 5 of the Plaint but states that the same was not prior to her signing translated or explained to her, that she affixed her signature thereto upon the strength of the representations by the Plaintiff herein before averred, and that while she was signing the said Agreement she came to learn for the first time from one, Sultan, who was present at the same time, that the said agreement referred to the sale of the whole of Plot 58/1 L.R.209, whereupon the Defendant refused to accept the terms of the said Agreement and tore up the same. The Defendant denies that any cheque for the purchase price was proffered to her.

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A.6.

7. The Defendant has no knowledge of the matters averred in paragraphs 4 and 6 of the Plaint and puts the Plaintiff to the proof thereof, and will in any event contend that the said matters are irrelevant.

40 8. The Agreement of sale sued upon, by introducing new terms not contained in the option, is not an unqualified exercise thereof, but constitutes a counter-offer, and the Defendant has at no time accepted the same, and has at no time completed the signing and delivery of the said agreement or acknowledged it as binding upon her as her act or deed.

9. In the alternative the Defendant was induced to grant the said option and make the agreement of sale sued upon by the fraud or misrepresentation of the Plaintiff who in order to induce the Defendant to sign the same had falsely by the words and

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Written State-
ment of Defence.

26th October,
1954

- continued.

conduct hereinbefore averred represented to the Defendant that the option and agreement of sale were in respect of the said portion of land.

10. In the further alternative the Defendant was induced to grant the said option and make the said agreement of sale by undue influence of the Plaintiff.

PARTICULARS

The Plaintiff in his capacity as an agent for the Defendant for the sale of the said portion of land had gained active confidence of the Defendant; the Defendant is an aged woman unable to read or write in the English language, the land described in the option and agreement of sale is of a value greatly in excess of Shs.100,000/-; the said consideration is unconscionable and the nature of her acts in signing the said option and agreement of sale was not explained to or understood by the Defendant. 10

11. In the further alternative the agreement sued upon was entered into by mistake in that the terms thereof have been drawn up so as to contravene the intention of the parties by purporting to refer to the whole of the Plot 58/1 L.R.209 aforesaid whereas it should have referred to the said portion of land only. 20

12. The Plaintiff has dealt with the Defendant in an unfair and unjust manner and is thereby disentitled from having specific performance of the agreement of sale sued upon. 30

13. The Plaintiff and the Defendant verbally agreed at the office of G.K.Ishani, Esquire, aforesaid on the said 19th day of February, 1954, to rescind the said option and agreement of sale.

14. The Defendant will object that the damages claimed in paragraph 4 of the Plaintiff's prayer for relief are too remote.

15. Save as hereinbefore specifically admitted each and every allegation contained in the Plaintiff's suit is denied as if the same were set out and traversed seriatim. 40

WHEREFORE the Defendant prays that the Plaintiff's suit be dismissed with costs.

Sgd. B.O. Donovan
for ROBSON & O'DONOVAN
Advocate for the Defendant

Drawn and Filed by :-

ROBSON & O'DONOVAN,
Advocates,
Nairobi.

To:

D.N. & R.N. KHANNA,
Advocates for the Plaintiff,
Sheikh Building,
Victoria Street,
NAIROBI.

10

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Court of Kenya

No. 2.

Written State-
ment of Defence

26th October,
1954

- continued.

No. 3.

JUDGE'S NOTES OF TRIAL

O'DONOVAN opens:-

ISHANI was acting for Plaintiff. Bundle Ex.
A. correspondence put in by consent. Bundle Ex.
B. ditto.

D.1. KHATIJABAI JIWA HASHAM, duly sworn, Defendant.

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30
Widow, 58 years old. I understand only Guje-
rati. My son normally looks after my affairs.
Shs. 152,000/- Property bought by husband 1948.
(Husband died about 1950). Plaintiff HARJI is a
broker - buys and sells land. My son SADRU DIN and
I met Plaintiff. I said I wanted to sell half an
acre for Shs. 100,000/-. By 1953 I became owner
of the lot. I paid Shs. 55,000/- for the half and
to take over liability mortgage Shs. 81,000/-. When
I met plaintiff, of this Shs. 55,000/- I had paid
Shs. 25,000/- to GHULAM HUSSEIN and balance Shs.
30,000/- was unpaid, of which I owed Shs. 81,000/-
to Diamond Jubilee Trust.

40
Plaintiff said I might try for Shs. 80,000/- -
Shs. 85,000/- for this quarter portion. I insisted
on Shs. 100,000/-. I had come to Nairobi from
Mombasa and was staying with my uncle. About 8
a.m. Plaintiff came to see me. He suggested Shs.
80,000/-, I said Shs. 100,000/-. When I signed Ex-
hibit A1, I thought I was binding myself for three
days to sell half an acre. Not a cent was paid to
me. My uncle's daughter AMINA signed as witness
to my signature. Two or three days later I went
to see Ishani. About 1 p.m. I got telephone mes-
sage through SULTAN. I went to SULTAN'S shop. I

No. 3.

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of Trial dated
2nd - 13th May,
4th October,
10th November,
1st December,
1955.

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1955

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saw HARJI, SULTAN, HARJI and I went to ISHANI'S office. When Sultan said "2 acres are here" I was struck with horror and said "How is it?" ISHANI said: "This matter is over. The bargain is cancelled".

There had been disputes about property owned in common between HASHAM and my husband. Maybe relations with HASHAM were not too good. I thought I would sell the plot.

1.50 Court adjourned.

10

2.25 Court resumed.

I had no objection to Plaintiff taking excess over Shs. 100,000/-. Al was not written before Plaintiff came to my house. Before I signed A.1 I did not ask AMINA to read it over. Value of half acre plot without holding is Shs.60,000/- to Shs. 70,000/-. ISHANI'S advocate is son of my husband's sister. Soon after signature ISHANI said: "The whole agreement is cancelled". Plaintiff agreed only by nodding his head that misunderstanding was understood. Signatures (3) on Exhibit 4 are not mine. ISHANI did not give me cheque Exhibit 3 for Shs. 15,000/-. SULTAN was present all this time.

20

2.5.55. 4.15 p.m. Court adjourned.

E.R. HARLEY.

3.5.55. 10.30 Court resumed as before.

D.1. (Cross-Examination continued):

On way to ISHANI'S Office Plaintiff did not talk about this sale or documents.

To Court: I did not talk to Sultan either.

30

The whole deal was washed out at ISHANI'S office and I was satisfied that it was so understood. But I thought it safe to consult another advocate. I did tell AKRAM that Plaintiff had agreed to it being washed out.

To Court: I did say: "Mr. HARJI agrees that this whole deal is off".

ISHANI did not tell me to see AKRAM, It was SULTAN. My talk was clear about one piece out of four

pieces. Plaintiff never read or explained Option Exhibit A1. A2 was never read over or explained. I personally have never spoken to ISHANI since the day in his office.

Re-examination.

Discussion about beacons was before I signed A.1. Signature on B.4 is like mine but I do not actually remember signing.

T.A.R.

E.R. HARLEY.

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10th November,
1st December,
1955

- continued.

10

D.2. GULAM HUSSEIN KASSAM ISHANI, duly sworn :-

Advocate - Ismaili - Advocate for Diamond Jubilee. Trust. 19th February Plaintiff came with HASHAM G. NANJI about lunch time. Plaintiff took out Option from his pocket, Exhibit A.1. Hd told me to prepare agreement of sale for Shs.107,000/- A.6. Defendant came with Plaintiff. I scribbled down agreement of sale. I think it was typed - it must have been three copies. Defendant would not accept cheque for Shs.15,000/-. She said: "No, I must have Shs.25,000/-". Defendant was only entitled to Shs.19,000/- at the most. She said: "No, I will release the mortgage myself I will release this one plot". SULTAN was reading. He said "This agreement is for the whole of the estate". Defendant got furious. Plaintiff collected the bits and pieces. "There seems to be a misunderstanding. Forget both of you". My impression was that both accepted. I was acting for Plaintiff.

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Cross-examined:

I started practice in June, 1948. I was once suspended from practice. I said to Defendant: "Do you sell this thing to HARJI?" That is all I asked. Defendant is my aunt.

I did not draft both agreements before Defendant arrived. I did not explain the draft or read

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4th October,
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it out to Defendant. I altered Shs.10,000/- to Shs. 15,000/-. I asked Defendant to sign the alteration - Shs. 10,000/- to Shs. 15,000/-.

Re-examined.

T.A.R.

E.R. HARLEY.

D.3. AMINA HASHAM, duly sworn:-

I signed A.1 as witness of Defendant's signature. I did not read it to her.

10

Cross-examined.

It is not true to say that A.1 had not been signed when I was called. Nor did I read it to Defendant.

Re-examined.

T.A.R.

E.R. HARLEY

4.15 p.m. Court adjourned.

4.5.55. 10.30 a.m. Court resumed as before.

20

D.4. SADRU DIN NANJI, duly sworn :-

Defendant's son. We paid Shs.55,000/- for one third share in 1953. Shs.355/- per month rent of house. In 1953 I understood the sub-division was approved. Exhibit C - plan. In February 1954 I came to Nairobi. Conversation with Plaintiff about

11.30 a.m. I left next day by Mombasa afternoon train. Nothing further had happened by then. I saw Defendant an hour before I left. Two days after my arrival my brother told me of (purchase) incident. Telephone about 9.00 p.m. That was a Friday.

Cross-examined.

I was back two or three days before 20th.

10 February 15th. Monday. Conversation.
 16th. Tuesday. Left Nairobi.
 17th. Wednesday. Arrived Mombasa.
 18th. Thursday.
 19th. Friday. 9.00 p.m. Telephone.
 20th. Saturday. Dinner.
 21st. Sunday. Saw Harji.

To Court. My advice would be futile.

(Cross-examination uncompleted).

E.R.H.

In the Supreme Court of Kenya

No. 3.

Judge's Notes of Trial dated 2nd - 13th May, 4th October, 10th November, 1st December, 1955

- continued.

20

D.5. GEOFFREY HOLIDAY MERRYWEATHER, duly sworn:

Auctioneer and Estate Agent. F.A.L.P.A.
 Eighteen months in Nairobi with Muter & Oswald.
 209/58/1 last week.

Value.	House.	120,175	
	<u>Less</u>	<u>4,000</u>	
		116,175	
		2,000	Boy's quarters
2709		118,175	
30	Land	<u>131,986</u>	
	Total:	<u>250,161/-</u>	Present. (264,000/-)

(Land value £3,267 per acre)

L.R. 209/90 10 acres. £25,000
 Nov. '54 L.R. 209/2048 ½ acre (£4,450 per acre).
 L.R. 209/2158 ditto ditto

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1953 L.R. 209/1567/1.1 acre. £3,800.
Nov. '54 L.R. 209/1567/2 - £1,500.
(far inferior position).

March to November 1954 - slight upward trend. 5%
or 10%.

March '47 resumed work. 1948 qualified.

Came to Nairobi December 1953.

Cross-examined.

I spent about two hours examining the property.
Cost of repairs £200. 10

Re-examined.

Cost of survey would be £300 to £350.

E.R. HARLEY.

5.5.55. Court as before.

10.35.

D.4. (evidence continued)

Re-examined.

There was a second call on Saturday night tel-
ling me to get key from Plaintiff.

T.A.R.

E.R. HARLEY.

20

D.6. RAJABALI KASSAM SULEMAN DAMJI duly sworn:

I am eldest son of Defendant. Friday 9.00 p.m.
- telephone call. Mother tore it up because mort-
gage was mentioned in agreement of sale. I do not
recollect my mother mentioning KHANNA'S letter of
demand. I saw ISHANI Saturday night, 20th. He said
he had cleared this misunderstanding - both parties
accepted that the bargain was cancelled.

Cross-examined.

30

ISHANI said not to write letters.

Re-examination. None.

D.7. SUITAN ALI ALLADIN LALJI, duly sworn :-

Plaintiff handed his cheque-book and ISHANI wrote on it. The cheque was never given to anybody.

Cross-examined.

10 ISHANI wrote for thirty seconds to a minute. Another five minutes for typing A.4 - may be alteration was there when Defendant signed it.

5th May. 4.15 Court adjourned. E.R. HARLEY.

6th May. Court resumed as before.

D.7. Cross-examination continued:

20 When I pointed out two acres land, defendant sprang up and said: "No, half an acre". I did hear Defendant tell AKRAM that she had only intended to sell half an acre. She signed the original before raising objections. She signed the duplicate in spite of having raised objections. Despite all her grumbles she did sign the duplicate.

Re-examined.

I thought nothing extraordinary about two acres when I read it. My intention was to persuade her. I did not expect her reaction.

T.A.R.

E.R. HARLEY.

D.8. HASSANALI JIVRAJ MERALI, duly sworn:-

30 I own property in Nairobi, Mombasa and Kampala. I could get £125,000 clear by selling my land in Mombasa. That includes all my properties. Owner wanted £15,000. Ex. 1 is my letter. I had in mind £10,000 to £12,000.

In the Supreme Court of Kenya.

No. 3.

Judge's Notes of Trial dated 2nd - 13th May, 4th October, 10th November, 1st December, 1955
- continued.

Cross-examined.

I saw D.6. I have done twenty sales of property in the last ten years; I may have made £2,000 to £3,000.

No re-examination.

DEFENCE CLOSED

Hearing Adjourned to 12th May, 10.30.

E.R. HARLEY.

12.5.55. Court as before.

First witness called by Plaintiff on request of defence

10

P.1. KAMRUDIN ISMAIL SAMJI, duly sworn.

I am Manager of Garden Hotel. D.4 did not stay but his brother D.6 did in February. Both stayed at the hotel on 28th January and went away on 29th.

Cross-examined.

I cannot recollect apart from my records.

20

(Further cross-examination deferred).

P.2. JOHN MACKINNON GRAHAM, duly sworn.

I am building inspector, Nairobi City council. Old building. Suspicion of dry rot and white ant in timbers. Drainage bad condition. 1944. Scheme to sub-divide into three. Approved. 1947 Scheme to divide into four. Approved in principle. Lands Office could still object to the sub-division and refuse registration of sub-plots, 1949. Application to use whole plot for hotel. That application cancelled previous sub-division scheme and approval previously given.

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Cross-examined.

I do not anticipate any opposition to sub-division.

Re-examined.

Exhibit 1 shows dry rot.

T.A.R.

E.R. HARLEY,
Acting J.

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10 P.3. AMIAS DOUGLAS CONNELL, duly sworn:-

Architect. Thirty years experience. President of local Association of Architects. 19th April 1955 inspection. Unsound structure. Floor needs re-laying. White ant in architraves and also in partitions.

Cross-examined. Re-examined.

T.A.R.

E.R. HARLEY

20 P.W.4. ARTHUR TISDALE JONES, duly sworn:-

Land and Estate agent seven to eight years. Good red soil plot. Ninety-nine years lease from 1914. Market value £5,350 whole, or £1,500 each half-acre plot. £4,250 for half acre plus house renovated. House as it is may be worth £1,000. £4,000 for plot; £1,350 for house.

T.A.R.

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P.5. PATRICK NEEVE PLATT, duly sworn:

Partner in George Tyson, Land Agent. Since 1948 in Kenya. 1948 qualified. £5,350 fair price. Building only fit for pulling down. House and out-buildings scrap value only.

L.R. 209/80/4 £1,900 (£1,000 per acre)

" " /80/5 £2,100 (£1,000 per acre)

L.R.1870/1/121 2.98 acres and house.

April '53 £4,700.

10

Value house plus half acre after sub-division possibly £2,500.

Cross-examined.

The developer might make 100% profit.

Re-examined.

T.A.R.

E.R. HARLEY,
Ag.J.

4.15 Hearing adjourned to 10.30. E.R. HARLEY,
Ag.J.
12.5.55.

20

P.6. HAJI GULAM HUSSEIN HARJI, duly sworn:-

Thirty-five years a broker. Twelve years land estate agent. 17th February met Defendant in bazaar. 9.30 to 10.00 Defendant by herself. D.4 not present. She said: "I want to sell a plot about two acres, for Shs.100,000/-". She said sub-division had been fixed. Three days option. 18th - I wrote option and took it round to Defendant. I went about 9.00 and read it over and then the alterations were made. I read it over in Gujarati. AMINA D.2 read it over to Defendant. Telephoned HASHAM NANJI that day at 11.30. We went to the plot that afternoon. I collected key from house of ALLADIN IALJI

30

afternoon of 17.7. - I got key then from Defendant, HASHAM agreed Shs.107,000/- 19th Next day 11.00 a.m. went to ISHANI'S office. My option was to be exercised, ISHANI suggested agreement of sale. Two agreements of sale typed out. 12.30 I was asked to call Defendant. Met Defendant in shop of SULTAN, D.7. We went to ISHANI'S office. No talk on way. ISHANI read out the Agreement. Defendant is ISHANI'S aunt. Defendant said "I want Shs.20,000/-, not Shs.10,000/-". I did not know about mortgage. We agreed Shs.15,000/- (Alterations). ISHANI made out Exhibit A.3. I signed, gave it to ISHANI for Defendant.

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- continued.

Then rest of agreement read over, and ISHANI handed over Exhibit A.3 to Defendant. Then Defendant signed. When Defendant heard that HASHAM was the buyer she tore up the Agreement. 21st February I went to Mombasa. SADRA DIN asked for the option. (Damages agreed at £50 if verdict for Plaintiff).

A.3.

20 Cross-examined.

ISHANI'S letter was delivered to me by SULTAN. Hearing adjourned to 16/17 June subject to approval of Registrar.

E.R. HARLEY.

P.1. KAMRUDIN ISMAIL SAMJI, re-sworn:

(Examination in chief by O'DONOVAN).

30 I am quite confident that my records are all right.

Cross-examined. KHANNA

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P.6. (Cross-examination continued)

O'DONOVAN argues.

Letter of 19th February from Mr. AKRAM was sent on 19th but it is an open question when it was received. I had no talk with ISHANI after the meeting.

Re-examined.

I delivered A.7 on 19th February to SULTAN and received in exchange A.9 (AKRAM'S letter also dated 19th February) Defendant did say she only intended to sell a portion of the land after tearing up the paper. She said in anger: "I have sold you only half an acre and not the whole plot. I will say and maintain the same in Court".

10

T.A.R.

E.R. HARLEY.

P.7. ANDREW RAMSHAW, duly sworn:

Sanitary Inspector City Council since 1941.

Cross-examined.

20

Re-examined.

E.R. HARLEY.

CLOSE OF PLAINTIFF'S CASE.

Hearing adjourned to date to be fixed by Registrar.

E.R. HARLEY,
Ag.J.

4.10.55. HEMATLAL for KHANNA.

ROBSON Junior for Defendant.

Hearing to be resumed on 10.11.55 and to be continued on 11.11.55.

30

R.H. LOWNIE,
Deputy Registrar.

10.11.55. KHANNA O'DONOVAN.

By consent hearing fixed for 1st and 2nd December.

E.R.HARLEY,
Ag.J.

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1.12.55. O'DONOVAN for Defendant.

No appearance for Plaintiff. A clerk brings a message that Mr.KHANNA is taking judgment in another Court - the presumption being that this Court can await Mr. KHANNA'S convenience.

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10 10.40 a.m.

- continued.

KHANNA appears to address Court.

KHANNA addresses Court:

20 Departure from pleadings cannot be admitted. Defence did agree that onus is on them. Damages for delay agreed at £75 (?). Damages for loss of sale measured by £5,350 re-selling price. Household v Como 1946 2 A.E.R.622. (at p.624) - Declaration of indemnity. Directions and enquiries may be finalised in Chambers.

Defence. Cancellation by mutual consent depends on ISHANI'S assurances. (Attention drawn to text of evidence). Only in Defence did Defendant first raise cancellation by mutual consent. At one stage Defendant had denied her signature - and only saw sense after an adjournment.

Court to O'DONOVAN:

30 Do you wish to rely on the "under influence" point?

O'DONOVAN: No.

Para,3 of Defence is not supported. When did Defendant "verbally employ Plaintiff as an agent?" He had an option on his own account.

Para.4. When did Plaintiff say he had a prospective purchaser? (pages 3/4 say nothing of it).

Para.4 suggests a ready-written document, but Defendant in evidence says "it was blank".

40 Plaintiff says he took instructions and made alterations.

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Para.6. What verbal representations did Defendant make? Her evidence was that Plaintiff said nothing.

Para.8. Further alternative.

Defence of non est factum not available to person knowing nature of document - Cheshire 3rd Edn. p.209. Misrepresentations as to the contents of the deed and not as to its class do not nullify a contract.

Value of this property would fluctuate. Defendant's sons had it patched up although ownership was sub judice. Consider the small profits which Vendor (Plaintiff) was to make. 10

ISHANI.

Acting as advocate for: (a) Plaintiff; (b) Jubilee Trust. S.128 Indian Evidence Act.

Damages for loss of bargain. S.73 Indian Contract Act.

20

O'DONOVAN:

Although I agreed at start that onus was on me, that did not apply to matters of law. I say no cause of action when Plaintiff brought case; he must prove a breach before he has a cause of action. Contract sued on was not to be completed till after lapse of six months. Indian Contract Act S.39. Hochster v. Delatour referred to in Johnston v. Milling. 16 Q.B. (1886) p.460.

Plaintiff was put to his election but he chose to keep the contract alive. One cannot at the same time hold Defendant to the contract and start an action for damages for breach BEFORE time due for performance. 30

Facts not in dispute

- (a) Defendant illiterate;
 - (b) " 58 years of age;
 - (c) She received no advice;
 - (d) Purchase price Shs.152,000/-;
 - (e) 1953 negotiated sale of half for Shs.53,000/- plus mortgage Shs.81,000/-.
- 40

(f) On 19th in ISHANI'S office she did tear up Agreement just signed.

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Key to whole case is why did she tear it up; three out of four of those present say why. Identity withheld according to letter 19th February.

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- continued.

Once one accepts Defendant's explanation about the one quarter, then everything else follows - including the fact that nothing was read to her.

10

Non est factum does apply. Chitty 20th Edn. p.238 - mistake as to subject matter. Agreement therefore not voidable but void. Option of no importance because contract counter-offer (contains fresh terms about mortgages, etc.)

Or voidably through fraud or misrepresentation (para. 8). Indian Contract Act S.18(3). In any case specific performance should not be granted - consider manner of dealing with an illiterate woman.

20

Plaintiff was not aware of mortgage terms. If ISHANI was an agent to introduce such terms, he also had authority to cancel. AKRAM'S letter of 19th February suggests that ISHANI had cancelled bargain.

KHANNA replies on law: cases cited not relevant. Only apply when both parties admit there is a contract. 1942 A.C. p.378.

C.A.V.

E.R. HARLEY,
Ag. J.

30

No. 4.

EVIDENCE OF KHATIJOBAI JIWA HASHAM

Defendant's Evidence.

No. 4.

10.30 a.m. Monday, 2nd May 1955.

Mr. Khanna, for the Plaintiff.

Khatijabai Jiwa Hasham.

Mr. O'Donovan for the Defendant.

Counsel are agreed that the onus of proof is on the Defendant and that he should open the case.

2nd - 5th May, 1955.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 4.

Khatijabai Jiwa
Hasham.

2nd - 5th May,
1955.

Examination-in-
Chief.

Mr. O'Donovan opens the case and calls:-

D.W.1. - MRS. KHATIJABAI HASHAM, sworn

Examined by Mr. O'Donovan:

Q. You are a widow, I believe? A. Yes.

Q. And you reside in Mombasa? A. Yes.

JUDGE: Do you know how old you are? A. 58.

Mr. O'Donovan: Do you speak any English or do you understand any English?

A. I understand only Gujerati.

Q. And you are the owner of the property involved in this suit? A. Yes. 10

Q. Who in general, looks after your affairs for you? A. My sons.

Q. I think this property, or rather a share of it was purchased for you by your husband during his lifetime? A. The property was purchased in three different parts by my husband for me.

Q. That was in 1948? A. Yes.

Q. When did your husband die? A. About 1950.

Q. The original price was, I think Shs.152,000/-? A. About that amount. 20

JUDGE: Was that for the land or the portion?

A. For the whole portion.

MR. O'DONOVAN: Of which you owned a third share? A. Yes.

Q. At the time when you acquired a share, had the sub-division of the property been approved? A. Yes.

Q. Does this plan (shown to witness) show the approved sub-division? 30

A. I cannot understand this plan.

Q. You know the Plaintiff in this suit - Mr. Harji?

A. I know him fairly well; he is a broker.

Q. Does he carry on business buying and selling land? A. Yes.

Q. Do you remember meeting Mr. Harji about the middle of February of last year?

A. Yes, I met him in the road.

Q. Was anyone with you? A. My son was with me.

Q. What is his name? A. Sadru Din. 40

Q. Did you have any conversation with him?

A. Yes. I knew that Mr. Harji was a broker. I said I wanted to sell land together with a building on it. The land comprised half an acre - one portion out of four, with a building on it. I said I wanted Shs. 100,000/-.

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Examination-in-
Chief

- continued.

Q. Did you make it clear to Mr. Harji that there was a sub-division and that you wanted to sell one of the sub-divided plots with a house on it?

10 A. That is so.

Q. At this time was the property all yours for sale?

A. Yes.

Q. Had you, after your husband's death, purchased first of all a one-third share from one of your co-owners? A. Yes.

Q. And the price you paid is shown in the transfer?

A. Yes.

Q. And then did you at the same time when you acquired the one-third share sell half of it, that is one-sixth, to your other co-owners, so that you became 50-50 owners? A. That is correct.

20

JUDGE: (to Mr. O'Donovan): At this stage then she had half of the whole property? A. Yes, my Lord.

MR. O'DONOVAN: Towards the end of 1953 did you agree to purchase the remaining half share? A. Yes.

JUDGE: (to Mr. O'Donovan); What do you mean by "the remaining half share"?

A. The remaining half share of the whole plot.

(To Witness): So by 1953 you became owner of all that piece of land which your husband bought for Shs. 152,000? A. That is so.

30

MR. O'DONOVAN: The consideration of the price for these various acquisitions is set out in the documents which you have seen me hand in to His Lordship? A. Yes.

Q. I am dealing with the last of those transactions. The document discloses that you agreed to pay for the remaining house on the whole plot Shs. 55,000/-? A. Yes.

40

Q. And you took over the entire liability for a mortgage of the Diamond Jubilee Investment Trust at Shs. 81,000/-?

A. I was prepared to take it over myself.

Q. How much of the Shs. 55,000 had you paid off

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Examination-in-
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- continued.

when you met Mr. Harji?

A. I paid Shs.25,000 to Ghulam Hussein, leaving a balance of Shs.30,000.

Q. So that at the time you saw Mr. Harji your total liability in respect of the whole plot was Shs. 30,000 still due to Ghulam Hussein and Shs.81,000 to the Diamond Jubilee Investment Trust? A. Yes.

Q. A total of Shs.111,000? A. Yes.

Q. Now you told Mr. Harji that you wanted him to try to find a purchaser for you for Shs.100,000 for this one plot out of four? A. Yes. 10

Q. And what did he say about the purchase price?

A. The Plaintiff said I might try for Shs.80,000 or Shs.85,000. I said no.

Q. You said you insisted on your figure? A. Yes.

Q. Did he try to find a buyer at the price you wanted? A. He said he would try.

Q. Did you rely on the Plaintiff to look after your interests? A. Yes.

Q. Did you trust him? A. I trusted him. 20

Q. Did you see Mr. Harji again after that?

A. He came to the place where I put up at my uncle's house.

Q. You were staying with your uncle at Nairobi at the time? A. Yes.

Q. Were you on a visit from Mombasa?

A. Only for a holiday.

Q. How long after your first interview with Mr. Harji did he come to your relative's house?

A. 2 or 3 days. 30

Q. What time of the day was it?

A. It was in the morning between 8 and 8.30.

Q. And I suppose you had some conversation with him? A. He suggested that I should accept

Shs.80,000 or Shs.85,000. I said no, I must get Shs.100,000. Then he started writing something.

Q. Was there any discussion about beacons?

A. The only talk was about the half acre plot, that is a quarter of the whole property. I agreed to pay for 3 beacons. 40

Q. You say he started to write on a piece of paper?

A. Yes.

Q. And did he say anything when he was writing?

A. No.

Q. Do you see Exhibit A.1. (shown to witness)?

A. I only recognise my signature.

Q. Do you recognise whether that is the piece of paper he wrote out?

A. The signature is mine; I can only say that.

Q. You do not recognise the piece of paper itself?

A. I was told that I was bound for three days; I relied on him and I signed.

Q. For what price? A. Shs.100,000.

10 JUDGE: Is that document Exhibit A.1, the piece of paper, or like the piece of paper which you signed on that occasion? A. Yes, this is the paper.

Q. You recognise your signature on it and you think that this is the document you signed on that morning after your conversation with Mr. Harji?

A. I can say that by recognising my signature on it that this is the piece of paper.

MR. O'DONOVAN: He said you are bound for three days to sell for Shs.100,000? A. That is so.

20 Q. Do you recall any alteration or corrections on the paper when you signed it?

A. No, I signed relying on him.

JUDGE: (to Mr. O'Donovan): What are these beacons?

A. I assume they refer to the beacons with which you delimit the 4 separate plots on the sub-division.

MR. O'DONOVAN: You say that your affairs were usually attended to by your sons? A. Yes.

30 Q. Did you sign this option without any reference to them?

A. The matter was under discussion in our house already.

Q. Where? A. At Mombasa.

Q. Did you refer to your sons before you signed this piece of paper?

A. I did not specifically refer to them before putting my signature, but discussion had already continued in the house between us in Mombasa before I came to Nairobi.

40 Q. Where were your sons when you signed the option?

A. Sadru Din, my son, had left for Mombasa.

Q. How many sons have you? A. Four sons.

Q. Where were the others? A. At Mombasa.

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No. 4.

Khatijabai Jiwa
Hasham.

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- continued.

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Examination-in-
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- continued.

JUDGE: Who had you talked with about selling the property before you left Mombasa - only with your sons, or with somebody else as well?

A. The discussion took place between myself and my sons.

Q. And the first discussion with Mr. Harji was when you met him in the street and your son Sadru Din was with you?

A. Yes, and I believe my son, Sadru Din, did overhear me talking to Mr. Harji.

Q. And on that occasion you say you told Mr. Harji that you wanted to sell half an acre? A. Yes.

Q. There was no further talk between you and Mr. Harji until he came to your uncle's house on the occasion when you signed this document Exhibit A.1?

A. That is so.

MR. O'DONOVAN: Why did he want the option which you signed binding yourself?

A. I can only say that I was bound for three days.

JUDGE: Bound to do what?

A. Bound for 3 days for selling the half acre plot together with the building for Shs. 100,000.

MR. O'DONOVAN: What was Mr. Harji trying to do for you?

A. I cannot say what he wanted to do. I knew him as a broker. I relied on him, and I put my signature on the document drawn by him.

JUDGE: Did you ask what you were signing? Did you know you were binding yourself for three days to sell for Shs. 100,000.

A. I did know and realise that I was so bound.

MR. O'DONOVAN: Was the document itself read over to you? A. No.

Q. Was there any discussion about Shs. 5? A. No.

Q. Was any money paid to you? A. Not a cent. That same document has another signature on it, has it not? A. Yes.

Q. Do you recognise that signature?

A. Yes, it is Amina's, my sister. She was a witness to my signature.

Q. Then what happened?

A. By that time this girl was nearby and I said, "Come here". She came; then Harji said, "Sign this document", and she put her signature to it.

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- Q. Was any explanation given to her?
 A. Nothing was explained to Amina.
- Q. You knew that Mr. Harji was trying to get a buyer for you? A. Yes.
- Q. Did you think that this bit of paper had any connection with his trying to get a buyer for you?
 A. The only talk was about half an acre. He may find out any buyer he likes.
- 10 Q. Where is the key of the house now?
 A. Harji took it away.
- Q. Did he leave after obtaining this bit of paper you signed? A. Yes.
- Q. When did he get the key? A. About next day.
- Q. You remember the day on which you went to Mr. Ishani's office? A. Yes.
- Q. That was on the 19th February? A. Yes.
- JUDGE: You spoke to Mr. Harji on the occasion when you and Amina signed that document Exhibit 1. When after that did you see him and Mr. Ishani?
 20 A. Two or three days after signing this document.
- Q. You are sure it was not the very next day?
 A. Not the next day.
- MR. O'DONOVAN: Was there any stamp on the piece of paper when you signed it?
 A. I did not see a stamp.
- Q. Did you see one being put on after you signed it? A. No.
- Q. On the day when you went to Mr. Ishani's office were you called there?
 30 A. There was a telephone call at Lalji's house.
- Q. Who telephoned you? A. Mr. Sultan.
- Q. What time of the day was this?
 A. About one o'clock.
- Q. Is Mr. Sultan coming here as one of your witnesses? A. Yes.
- Q. What did he say to you on the telephone?
 A. Come; there is a telephone message from Harji.
- Q. Where did you go? A. I went to Sultan's shop.
- Q. Did you see Mr. Sultan there?
 40 A. Yes, and Harji also came there.
- Q. And then where did you go?
 A. Then I was told, let us go to Ishani's office. The three of us went.

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 - continued.

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Examination-in-Chief

- continued.

Q. Is Mr. Ishani acting as your advovate? A. No.

Q. When you got inside his office, did he say anything to you?

A. Yes, I was asked by him, does this plot belong to you alone? and I said Yes.

Q. Did he make any inquiry about the option?

A. He also asked me whether the option was binding on me and I said Yes.

Q. Did he ask you anything further?

A. He took out a piece of paper and started writing. 10

JUDGE: What was he writing with - ink, pencil or what?

A. He wrote something down in pencil and gave it to somebody to type out.

MR.O'DONOVAN: Was it typed out?

A. Two or three papers were brought in duly typed out.

Q. Could you recognise the piece of paper which was typed out, if you saw it again? (Shown to witness)

A. I will see. 20

JUDGE: Is there any document in that bundle which looks anything like the typed document which he brought to you?

(Bundle Exhibit A is handed to witness who fails to identify the document).

MR.O'DONOVAN: What happened after the document had been typed out and brought back?

A. I was given one of them and told to put my signature to it.

Q. Who told you? A. Mr. Ishani told me. 30

Q. Did you sign it?

A. At the time of signing I said I wanted Shs. 25,000.

Q. What for?

A. Against the bargain which I wanted to make for Shs.100,000.

Q. What do you mean you wanted Shs.25,000 - a cash payment of Shs.25,000? A. Yes, I wanted 25%.

Q. Did Harji say anything about that?

A. Harji said he would give Shs.15,000, then he said he would give me Shs.20,000. At that moment Mr.Ishani intervened. 40

Q. Mr.Ishani intervened, Mr. Harji first said he would pay Shs.15,000 and then he went up to Shs. 20,000? A. Yes.

Q. And what did Mr. Ishani say?

A. He said that Shs.81,000 is due to the Jubilee Trust. I said "That is my responsibility". I will pay my dues in respect of this half acre and for the rest I will make an understanding with the Diamond Jubilee people.

Q. What do you mean by "make an understanding"?

A. I meant that I would not pay the whole amount of Shs. 81,000 but that I would pay a proportion.

10 JUDGE: You mean that Shs.81,000 was due to the Diamond Jubilee Trust in respect of the whole Plot of land? A. That is so.

Q. And you said you would pay that off in so far as the one quarter portion was concerned? A. Yes.

Q. Then after that it would be a matter of understanding between you and the Diamond Jubilee Trust how much they would still allow on mortgage on the remaining three quarters? A. That is quite right.

20 Q. When was it first mentioned that Shs.81,000 was due on mortgage in respect of this property? A. When I demanded Shs.25,000.

MR. O'DONOVAN: Mr. Sultan was there?

A. At that moment when we were discussing this Mr. Sultan said "Oh two acres are mentioned here". I was struck with horror.

Q. What did you do?

30 A. I snatched the paper on which I had put my signature and threw it away. I said, "What is all this nonsense"? Then Mr. Ishani said there was some misunderstanding, and that Mr. Harji admitted this misunderstanding. Mr. Harji lowered his head and then Mr. Ishani said that the matter was over and that the bargain was cancelled.

Q. At the time when you were surprised and tore up the agreement you signed, did Mr. Harji give you any explanation about the option or agreement?

40 A. Yes. Mr. Ishani said, "Don't you get puzzled. There is some misunderstanding and Mr. Harji admits this misunderstanding" - and, as if in consent, Harji lowered his head.

JUDGE: He lowered it or nodded it?
(Witness demonstrates)

MR. O'DONOVAN: Had the document which Mr. Ishani got typed out been read over to you before you signed it? A. No.

JUDGE: What he first wrote in pencil, was that read over to you? A. No.

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MR. O'DONOVAN: Did you know who the purchaser was who Mr. Harji had found?

A. No, I did not hear any reference to that.

Q. Did you know that he had found a purchaser?

A. No; I did not ask anything; I was not told anything; I simply agreed.

JUDGE: You thought you were selling half an acre for Shs.100,000? A. Yes, up to the last minute.

Q. Who did you think was buying it?

A. Maybe somebody within the knowledge of the broker. 10

Q. Did Mr. Harji say "I will pay the money", or "I have got a purchaser who will pay the money"?

A. There was no talk on that point. Harji only said that I should accept Shs.15,000 and later that I should accept Shs.20,000 when I demanded Shs.25,000.

Q. You did not know on whose behalf this property was being bought? A. No.

Q. Had you any idea whether Harji was buying it for himself or for somebody else? 20

A. It was understood by me that he was a broker: He might purchase and later on might sell.

Q. When you first asked him to find a purchaser, what did you think that he was going to get out of this, if he did find a purchaser?

A. I was under the impression that if Harji did find a purchaser he would charge his commission.

Q. When you agreed to sell this for Shs.100,000, were you not surprised that Mr. Harji did not ask you for some commission for himself? 30

A. The only talk was about a prospective buyer for Shs.80,000 or Shs.85,000.

Q. In the office of Mr. Ishani Mr. Harji said, "All right, you will get your Shs.100,000" - is that right?

A. No explanation was given to me, but when the documents were prepared I was under the impression that they agreed to my condition.

Q. Were you under the impression that you were to get Shs.100,000? 40

A. Yes, and on that impression I demanded 25% of the agreed amount.

Q. Who told you that you would get Shs.100,000?

A. Nobody mentioned it specifically.

Q. Do you mean to say that when you signed the document which you tore up you did not know how much you were selling for?

A. I was under the impression at the time that this sale was for Shs.100,000, and that is why I demanded 25% - Shs.25,000.

Q. Why were you confident that the price was Shs. 100,000?

10 A. From the very outset my demand was Shs.100,000, I have not moved from that demand, and when I was asked to put my signature to the document, I was under the impression that every term of mine had been agreed to by them.

Q. Did you never ask?

A. There was no need for further explanation because I had always stuck to my demand for Shs. 100,000.

MR.O'DONOVAN: Did you expect to have to pay commission to Mr. Harji?

20 A. Certainly, he was a broker.

Q. Where would the money come from to pay his commission? A. From the proceeds of the sale.

JUDGE: How did you fix the price at which you wanted to sell?

A. The building was (inaudible) by the end of 1953 and I thought it would fetch a very good price.

Q. Did you form an idea of the value out of your own mind or because of what other people had told you?

30 A. That was my own idea, because the building was a fairly big one; it was vacant; the plot was half an acre; and I thought it must fetch at least Shs. 100,000.

MR.O'DONOVAN: Did you discuss the price with your sons?

A. There was a discussion about this prospective sale.

Q. Did you think Harji had found a purchaser for you? A. Yes.

40 Q. And at what price did you think he had sold it?

A. Shs. 100,000.

CROSS-EXAMINED BY MR. KHANNA:

Q. You have told us that you are 58 years old?

A. Yes.

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Q. Do you admit that you are in full possession of your faculties? A. Yes.

Q. And you are well able to understand financial matters for yourself? A. Yes.

Q. Is it not true that you used to take a keen interest in all property affairs, even when your husband was alive? A. Yes.

Q. And in fact you used to advise him on what sales to effect and at what prices to buy? A. Yes.

Q. And you are now the guardian of your children? 10
A. Yes.

Q. They all look to you for guidance and advice in all family matters. A. Certainly.

Q. And in fact they do nothing concerning your late husband's estate without first consulting you?
A. We do discuss with each other.

Q. But you are the final voice in the matter?
A. We do it amicably.

Q. Are you not the final word in all matters after they have been discussed? 20
A. Even the final word may be

Q. You do not place your confidence in outsiders, do you? A. Yes.

Q. You rely either on your own judgment or to the extent in which that judgment is influenced by the advice of your sons?
A. The final word comes after discussion.

Q. Once having taken a final decision, do you finalise matters on your own, or do you have them by your side at every turn? 30
A. We amicably advise and consult with each other.

Q. After decision do you act on your own?
A. Once the matter is amicably decided by all of us, there is no question of further discussion.

JUDGE: You and your sons had already decided to sell a portion of land for Shs.100,000 - is that correct? A. Yes.

Q. Once that decision had been made, you and your sons were quite content that the finalisation or completion of the agreement should be left to you? 40
A. Yes, the final formalities are done by me.

KHANNA: You have alleged in your Defence that Mr. Harji, the Plaintiff, had gained the very active confidence of yours?

A. Yes, we saw that he was a trustworthy person.

Q. The Plaintiff says that he has never had any contacts with you ever; has never come into close contact with you to gain your confidence at all?

A. He is on our Jamat, and he is a broker.

JUDGE: You would trust him as far or as little as any other member of the community to which you belong? A. No, this person was more trustworthy.

10 KHANNA: Did you rely on his general reputation and high standing in the community, or did you rely on any personal experiences as a result of close contact?

A. I thought he was a sound honest business man.

Q. Apart from meeting him casually in the street or at the Mosque, you never see him - is that true?

A. No.

Q. He does not visit you in your house?

A. We are at Mombasa.

20 Q. You have no close relations with him either of a social private or business character?

A. On occasion when he used to visit Mombasa he used to come to see my sons.

Q. At your house? A. Yes.

Q. How often did he visit you? A. I do not know.

Q. After your husband's death, how often has he visited you or your sons?

A. I do not remember how many times.

30 Q. Would it be true to say that he has never visited your house since your husband's death?

A. He might have come.

Q. Not more than once at the outside since the death of your husband? A. I do not remember.

Q. Have you, since your husband's death sought Harji's advice on any matter?

A. We have not been to his house - I do not remember.

Q. Surely if a person gains your active confidence it must be as a result of your seeking advice.

Have you ever sought his advice on any matter?

40 A. No. Why should I ask for his advice.

JUDGE: You no more sought his advice than you would seek the advice of any other member of your community who is generally respected? A. Yes.

Q. What do you mean by "yes"?

A. He is a person belonging to the Sir Aga Khan sect.

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MR.KHANNA: Has he ever offered to advise you without your asking for it? A. No.

Q. Did you seek his advice as to how you should value this property or how much you should ask the Purchaser for it?

A. I only know what I told you first; I do not know anything more. I know only about this half acre plot.

JUDGE: Did you ask him how much you should sell for, or did you tell him how much he was to sell for? A. I only asked him to find a purchaser.

10

Q. You told him he was to get Shs.100,000 for the half acre?

A. I said that on his asking me how much I wanted.

Q. When he advised that Shs.80,000 or Shs.85,000 might be a fair offer you took no notice of his advice - is that correct?

A. I said No, if there is an offer of Shs.100,000, talk to me.

MR.KHANNA: Was your husband interested in the Hotel Avenue with Hasham Brothers Ltd.?

20

A. Yes, there was a partnership.

Q. You owned the Hotel Avenue property in common with Hasham Brothers Ltd.? A. Yes.

Q. Along with Mr. Hasham D. Nanji, your late husband was one of the directors of the Avenue Hotel and other properties? A. Yes.

Q. Is it true that differences later on arose concerning this property between you and Hasham?

A. The answer may be known to my sons.

30

JUDGE: Do you know whether there was a dispute with Hasham about property which Hasham and your husband owned or used to own in partnership?

A. Yes, there were some disputes.

MR.KHANNA: Your whole family is on bad terms with Hasham and his brothers? A. Maybe.

Q. Is it not true to say that this plot is situated next to the Mayfair Hotel, in which Mr. Hasham is interested?

A. Yes, but whether Hasham is interested in it or not I do not know.

40

Q. Is it not true to say that your husband bought this property next door in order to put up a competing hotel? A. It may be so - I do not know.

Q. This plot has always been in your name and you

do not know whether your husband bought it in order to put up a competing hotel next door?

A. That was not the idea to erect a competing hotel.

Q. Did you submit plans for an hotel to be erected on this plot? A. Yes.

Q. And the City Council consented to your putting up a hotel on the plot? A. Yes.

Q. This application you made in 1949?

10 A. This happened when we were partners in the property.

Q. In 1948 you submitted proposals for a sub-division - is that correct?

A. They were already sub-divided.

Q. I put it to you that the plot has never been sub-divided. They were only proposals submitted to the City Council for approval in principle. Now has this plot been surveyed to your knowledge?

20 A. I was told by my husband that these are four plots in three shares.

Q. Did you think that you were able to sell one plot if you wanted to sell and transfer it?

A. Yes, it was obvious because I was the owner.

Q. You knew all along that the plot had already been split up into four and any one of those sub-divisions could be formally transferred by you to any purchaser? A. Yes.

30 Q. How did you know that the plots had been split up into four different plots and were officially recognised as existing separately for separate transfers to be made?

A. Yes I knew that the plot had been sub-divided into four different plots and it was to me freely as to which plot should be sold (and I was at liberty to decide which plot should be sold).

Q. There was no question of surveying and putting in beacons to show the limits on each of the four plots? A. The beacons were not there.

40 JUDGE: You were certain that the plot had been divided by the Municipality and approved?

A. There was talk about 4 plots.

Q. Were you sure that the whole land had already been divided up into 4 plots and approved by the Municipality?

A. I only knew that the plot is in 4 divisions, as told by my husband.

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Q. And that you were at liberty to sell any single division and have it registered in the Land Registry without any further trouble?

A. I knew that the Municipality had arranged that these are the 4 plots.

Q. Did you know whether you were able to sell the land in 4 separate plots without any further action or approval?

A. Yes, I had that strong impression.

MR.KHANNA: Was not the true position this, that the Municipality said that they had no objection in principle to your proceeding to sub-divide the plot into four on the lines indicated on a provisional plan subject to your complying with their conditions? A. I do not know anything else. 10

Q. Had you got four separate survey plans of each sub-division? A. I do not know.

Q. Did the Municipality tell you that if you wished to put up a hotel then you could not proceed with plans to sub-divide the plot? 20

A. The question of hotels existed in the lifetime of my husband together with the other partners.

Court adjourns at 12.45 p.m.

Court resumes at 2.30 p.m.

Cross-examination continued:

Q. Is it true to say that Hasham and his brothers were the last persons into whose hands you wanted to see this property go?

A. No, that is not a fact.

Q. Would it be true to say that your first meeting with the Plaintiff was on the day previous to the day on which you signed that piece of paper? 30

A. I do not remember.

Q. And would it be about 11 o'clock when you met him in the bazaar? A. I do not remember the time.

Q. And it was you who stopped him?

A. Yes, I stopped him to have a talk.

Q. And you asked him for his assistance regarding the disposal of this property?

A. As he was a broker, I thought fit to talk to him. 40

JUDGE: What did you come to Nairobi for?

A. Just to have a holiday.

MR.KHANNA: He did not approach you to sell this property? A. That is a fact.

Q. And all you said to him on that day was that you wanted to sell this property next to the May-fair hotel - is that correct? A. Yes.

Q. And he specifically asked you what the property comprised? A. He did not ask anything like that.

Q. I suggest to you that he did ask you and that you stated in reply that it was over two acres of land and a house? A. No.

10 Q. And you mentioned to him that you required £5,000 for it?

A. I only mentioned the building on the half acre plot.

Q. And it was after you mentioned that you required £5,000 that he asked you whether the house was vacant? A. Yes.

Q. And you affirmed that it was vacant?

A. First I said that it is vacant.

Q. And he asked you whether beacons had been laid in this property?

20 A. There was no discussion about that.

Q. I suggest to you that on that day you represented to him that not only had the plot been already sub-divided but that the beacons also had been laid? A. No, I did not say so.

Q. And he suggested that he would like to have an option to purchase valid for one week? A. No.

Q. I suggest to you that you replied saying you would give an option for three days? A. No.

30 Q. Your reason for only agreeing to grant three days was because you wanted to go back to Mombasa?

A. My programme was not certain with regard to returning to Mombasa.

JUDGE: You told me that you had discussed with your sons the selling of this plot?

A. Yes, at Mombasa.

Q. Do you mean to say that when you came to Nairobi you had no idea at all of trying to sell the plot?

A. No.

40 Q. Why did you suddenly approach this man in the street and ask him if he could sell it. I knew him as a broker and when I saw him the idea came at once to me to ask him.

Q. Did you try in Mombasa to sell it? A. No.

MR.KHANNA: Was Harji the first and only person you ever approached regarding the sale of this property?

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A. Yes. Harji passed by and it then occurred to me to ask him.

Q. I suggest to you that at this meeting he said he would accept a three days option since you were not prepared to grant a longer option?

A. There is no talk of one week.

Q. And did he not after that ask you where he could meet you for the purpose of getting your signature to an option? A. No I was not asked.

Q. I suggest to you that he did ask you and you told him that you were staying at Mrs.Wadi Hasham's house in Nairobi? A. No. 10

Q. I suggest that you made an appointment for between 8.30 and 9 o'clock on the next day at that house?

A. No specific meeting was fixed; he simply said "I will ask for Shs.80,000 or Shs.85,000".

Q. I suggest that he never mentioned any figures at all? A. He did offer Shs.80,000 or Shs.85,000.

JUDGE: You say he did offer it - is that what you mean? A. Yes. 20

Q. Did you realise that that was his own offer? A. No.

Q. When you said just now that he did offer Shs. 80,000 or Shs.85,000 for the land, you meant to say he did offer to find a purchaser for that figure - Is that what you mean? A. Exactly.

Q. Did you say that the Plaintiff is a broker - he buys and sells land? A. Yes.

MR.KHANNA: And he buys and resells it later when he gets a purchaser at a better price? A. That I do not know, he is a broker. 30

Q. When you said that you wanted Shs.100,000, what was to happen if he sold it for more?

A. That may be his will.

Q. To whom was the difference to belong?

A. I only demanded Shs.100,000.

Q. Would you have made claim to the excess or over Shs.100,000?

A. That is always left to the broker 40

JUDGE: You ask for Shs.100,000 - is that correct? A. Yes.

Q. And if he paid you Shs.100,000 and then resold the property for Shs.200,000 you would be quite happy?

A. I had no objection in respect to this bargain.

MR.KHANNA: You had no objection to his making the excess over Shs.100,000? A. Not at all.

Q. Is it not true to say that when you come to Nairobi you sometimes live at Hasham's house, sometimes at Lalji's house and sometimes somewhere else?

A. I usually put up at my uncles as well as Hasham's house, but I go wherever I am invited.

10 Q. While staying here you first arrived at Hasham's house, and from there you shifted to other places?

A. Yes.

Q. Now do you suggest that you never made the appointment for the next day at 9 o'clock?

A. I deny that; the matter stopped there when we left each other.

Q. Were you surprised to see him the next day at 9 o'clock? A. I was not surprised.

Q. Were you expecting him at that hour of the morning? A. Not at all.

20 Q. I suggest to you that at the first meeting in the street your son was not there - he was not to be seen anywhere in the street? A. He was with me.

Q. Amina, who signed as a witness, is your first cousin, is she not? A. Yes, my uncle's daughter.

Q. Are you calling her to support you that this document was never read over by her and explained to you? A. Yes, I want to call her.

Q. She is one of your witnesses? A. Yes.

30 Q. Do you admit that Amina is a very literate woman?

A. I only know that Harji wanted her to sign.

JUDGE: The question was, do you admit that she is a literate woman? A. She is educated.

MR.KHANNA: Well able to understand what was written in the option?

A. That I do not know; she was only called by Harji as a witness to my signature.

Q. Are you definite that this option was written at the house? A. Yes.

40 Q. Was the paper supplied by you?

A. He took out the paper.

Q. Just a piece of paper or a writing pad?

A. I saw this piece of paper in his hand.

Q. It was blank? A. Yes.

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Q. I suggest you are not telling the truth. This piece of paper was already written up when it was brought to your house? A. No.

Q. And he read over and explained the contents of this option to you? A. No.

Q. I suggest further that when the option was read over and explained to you you recollected certain things. You said "Please put in the word 'nett'. You wanted Shs.100,000 nett and that word "nett" after the Shs.100,000 was accordingly added at your request after it had been read over to you? A. No.

10

JUDGE: Did you tell him that the property was over two acres?

A. I said it may be over two acres and therefore different plots.

MR.KHANNA: And then you asked him also to delete the words, "and beacons is already been put"?

A. I do not know.

JUDGE: If he did delete the words, "and beacons is already been put", can you give any explanation why he wrote that or why he deleted it?

20

A. I do not know.

Q. Did you ever speak about beacons or say anything to give him the idea that the plot was practically sub-divided already?

A. Harji told me that the beacons were not fixed there.

Q. How did he know that?

A. Harji asked me, are there beacons? I said no, but the beacons in respect of the half acre are to be paid by the purchaser.

30

Q. Harji told you that the beacons are already there? A. I said that the beacons were not there.

Q. Did you say this, "Harji told me that the beacons were not there"?

A. I was asked are the beacons there? I said no.

Q. Did you say two minutes ago, "Harji told me that the beacons were not fixed there"?

A. Harji did not say so; I said so. I might have misunderstood the question.

40

Q. You see, if Harji said anything about the beacons it must have been because of what you told him?

A. He asked and I replied.

Q. Did you say "The beacons are not there"?

A. Yes.

Q. What did you mean by that?

A. Harji asked "Are the beacons there?" I said "No".

Q. Did you mean that the land was not yet subdivided? A. I was only thinking that there are 4 plots.

MR.KHANNA: Did you see him strike off any words from this option after you told him that the beacons were not there? A. Not to my knowledge.

10 Q. You never saw him run through any words in the option? A. I did not see.

Q. Did he not request you to grant him 5 days instead of 3, which you had originally mentioned? A. No; he asked for 3 days himself.

Q. I suggest that you agreed to 5 days up to 22nd February at 1 p.m. A. No.

JUDGE: How many days did you agree to give him?

A. He himself said, You are bound for 3 days.

Q. Is that what you agreed? A. Yes.

20 Q. Then if you agreed to be bound up to 22nd February, presumably this agreement was signed on the 19th - is that right?

A. I cannot be precise about the dates.

Q. Did you know the date when you were signing it?

A. No.

Q. Do you know that this agreement is dated 18th February? A. I do not know.

Q. Are you suggesting that 18th February is a forgery? A. Perhaps. I do not know.

30 MR.KHANNA: Is it not true that before you signed the option you called Amina? A. That is false.

Q. I suggest that Amina came in and you handed over the option, unsigned, to her and that she read it over and explained it to you?

A. That is all false.

JUDGE: Do you mean to say that you have been dealing in property for years and you did not ask for the agreement to be read over before you signed it?

40 A. I have not done any business like signing any such documents.

Q. When you bought the property, or part of the property, did you not sign agreements? That was in the presence of my husband.

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Q. Have you signed quite a lot of agreements since your husband's death?

A. Yes, on my son's telling me.

Q. You either get your son to say, This agreement is alright or you get somebody to read it over before you sign it?

A. Yes, I sign on my son telling me.

Q. Did you not take Mr. Sultan with you so that he could read over the agreement before you signed it?

A. Yes. When Harji came to call me I said, "Come on Sultan". 10

MR.KHANNA: I suggest that Amina read over this option and explained it to you fully in Gujarati?

A. No, not at all.

JUDGE: Why did you not ask somebody to read it over to you?

A. Harji assured me over and over again that everything was all right.

Q. And you did not ask him to read it over to you before you signed it? A. No. 20

MR.KHANNA: Before you signed this option, I suggest that not only was it read over and explained to you by Harji but that it was also read over and explained to you by Amina?

A. No, neither Harji nor Amina read it over or explained it to me.

Q. I suggest that during the first conversation in the street with Harji you clearly understood that the sale was to be of 2 acres of land and the house? 30

A. Not at all; only one piece out of the 2 acres.

Q. Is it not true to say that this house which stands on this 2-acre piece is absolutely uninhabitable? A. People were staying there. I thought it could fetch a good value (price?).

Q. I suggest that it is practically a write off?

A. Only it is vacant in 1953. We were staying there prior to that.

Q. Do you know that it is 47 years old?

A. I did not know. 40

JUDGE: What do you say is the value of half an acre without a house?

A. Approximately Shs.60,000 to Shs.70,000.

MR.KHANNA: I suggest that the vacant plot of half an acre after sub-division would not fetch more than Shs.30,000 each?

A. The area is very good and I have borne that fact in mind in assessing its value.

Q. And before you had even realised Shs.30,000 per plot you would have to spend a lot of money on drains and so on? A. That I do not know.

Q. And some of the existing buildings would have to go also. The out-buildings encroaching on the boundary of the sub-division would have to be demolished completely?

10 A. That should be within the knowledge of the purchaser and the Advocate. I do not know about that.

Q. Is Mr. Ishani, the Advocate, related to you?

A. Yes.

Q. He is your nephew? A. Yes.

Q. When did you first come to know that a mutual cancellation at Mr. Ishani's office had been arranged?

A. I only knew that I had to go to Mr. Ishani's office when I had a call from him.

20 Q. You have told us that the whole thing was cancelled after you had found out that the agreement mutually made was in respect of the whole two acres?

A. Yes. When it was disclosed by Mr. Sultan I was struck with horror.

Q. Did you know about the cancellation on 19th February 1954, when you signed this agreement?

A. No.

30 JUDGE: Did you know on 19th February, or did you think that you and Mr. Harji had agreed that both the option and the agreement of sale were to be of no account?

A. I only came to know in the office of Mr. Ishani.

Q. You see, paragraph 13 of your Defence reads like this: (Reads)

40 A. When I received the telephone message I went to Lalji's shop and Harji came there and said, "Let us go to Ishani's office" - we went. Ishani said "Is there any partner? I said no. He then said, Do you agree to the option written down by Mr. Harji? I said yes. Then Ishani started writing something which was later typed out. One paper was handed to me to sign. I signed one of the papers and demanded Shs.25,000; then he said he would give me Shs.15,000, but I said I wanted Shs.25,000. Then Harji said, I will give Shs.

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20,000. I said no. Then Ishani said, how is it that the Jubilee Trust has got Shs.81,000? I replied that that was not his concern; it was my concern and that we will fix with the Jubilee people in respect of that half acre. Mr. Sultan by that time had read that paper and disclosed to me the fact that two acres were mentioned. I said, this is something like cheating and I tore up that paper.

JUDGE: Did you tell your advocate that this option or purported option, was signed on 18th February? 10
A. I had no advocate then.

Q. Did you tell your present Advocate, Mr.O'Donovan?

A. I said I have forgotten the date, but I will sign the option.

Q. Did you tell your advocate that an agreement for sale, or purported agreement for sale was signed the next day, 19th February?

A. I only narrated what happened in Ishani's office. 20

Q. Did you say that that incident took place on 19th February?

A. I do not remember; it is a long time ago.

Q. Did you tell your advocate that on 19th February at the office of Mr. Ishani you and Mr.Harji agreed to rescind both the option and the agreement of sale? A. I talked to him - I do not remember what about; it is a long time ago.

Q. This is what is said in your Defence, "Mr.Harji and yourself verbally agreed at the office of Mr. Ishani on 19th February to rescind the option and agreement of sale" 30

A. Ishani said the matter is now over and I disclosed all the incidents to my advocate.

Q. You mean that immediately after the agreement of sale was signed Ishani said, "Never mind; the whole thing is cancelled"? A. Yes.

MR.KHANNA: Did the Plaintiff say that it was cancelled?

A. He agreed only by lowering his head that there was a misunderstanding. 40

Q. I suggest that all that you have related about the alleged cancellation is an invention on your part? A. Not at all.

Q. Let us go back to this meeting at Ishani's office - can you recollect the time when you went there? A. About 1 o'clock.

Q. You went with Sultan? A. Yes.

Q. First of all did Harji come to call you?

A. Yes.

Q. Did he not tell you that the documents were ready for signature at Mr. Ishani's office?

A. Yes.

Q. And I suggest that when you went to Ishani's office there was no writing down in pencil or typing; the documents were all prepared and ready?

10 A. There was nothing ready.

Q. Are you suggesting that Harji came and told you another lie, that the documents were ready for signature - is that what you say?

A. Harji did not utter the words, "The documents are ready". He said "Let us go to Ishani's office".

Q. Did Mr. Ishani read over and explain the contents of the document before you signed it?

A. Not at all.

20 Q. I suggest that after Mr. Ishani had read over and explained it to you, you said that you wanted Shs.20,000 before you signed the document? A. No.

Q. And I suggest that Mr. Ishani had put down Shs. 10,000 originally as advance payment to you on account of the purchase? A. No.

Q. I further suggest that Mr. Ishani told you that your demand was unreasonable?

A. That is not true.

30 Q. Did he not tell you that you owed Shs.81,000 on the mortgage and that all that was to come to you on the whole property was Shs.19,000 nett?

A. He only said that Jubilee are owned Shs.81,000.

JUDGE: How did he know that Jubilee were owed Shs.81,000 on a mortgage? A. I do not know that.

Q. Did you keep quiet about it?

A. I demanded the reason when Ishani said that.

Q. Did you go to him and say, I want to sell half an acre, and did you not tell him that that half acre was mortgaged?

40 A. I told Ishani that I would undertake responsibility with regard to the Shs.81,000, and with regard to the half acre plot bargain I would say the time and people.

Q. Which of you first mentioned Shs.81,000 - You or Mr. Harji? A. Ishani mentioned Shs.81,000 first.

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Q. It is a fact that you went to Mr. Harji and said, Please sell some land for me, and you did not tell him that it was mortgaged or that you still had not paid for it - is that correct?

A. Why should I say so?

Q. And he found that out for himself?

A. He might have found out himself.

Q. He did - he mentioned the Shs. 81,000 to you?

A. He might have enquired.

Q. Was Mr. Ishani acting for you or for Mr. Harji, or for both of you? A. He was not my advocate.

10

MR. KHANNA: He is coming as your witness?

A. He will have to come because everything took place in his office.

Q. I suggest that after Mr. Ishani had explained to you that only Shs. 19,000 was owing to you, that in the net result you then asked for Shs. 15,000 to be paid in advance to you?

A. No, I demanded Shs. 25,000.

Q. I suggest that it was after that that the original figure of Shs. 10,000 deposit was altered to Shs. 15,000?

20

A. No, there was no talk to that effect.

Q. Was not a cheque for Shs. 15,000 made out in your name at Mr. Ishani's office?

A. I do not know.

Q. I suggest that after you had agreed to the figure of Shs. 15,000, Mr. Ishani made out a cheque for Shs. 15,000 payable to you, which the Plaintiff signed? A. That is not true.

30

Q. You have never seen this cheque before (shown to witness)? A. I have not seen it.

JUDGE: Do you know Mr. Ishani's writing? A. No.

Q. Would you be surprised if that cheque was written by Mr. Ishani and dated 19th February?

A. I do not know.

Q. If he wrote out a cheque for Shs. 15,000, you say you have not the faintest idea why he did it?

A. I do not know; no cheque was referred to at the meeting.

40

MR. KHANNA: How many copies of the agreement did you sign that day? A. One.

Q. Does this document A.2 (shown to witness) bear your signature? A. Yes, it is mine.

Q. Look at Exhibit A.4 (shown) There are two signatures in ink on it. Is either of them your signature? A. No.

Q. I suggest that you signed this agreement in duplicate and that you signed the duplicate? A. No.

Q. And that you also signed the alterations on both? A. Not at all.

10 JUDGE: Look again Mrs.Khatijabai. There are three signatures apparently on this document Exhibit A.4, and I want you to look at them again carefully and be quite sure before you say whether they are your signatures or not?

A. Not a single one is my signature.

Q. Do you agree that they look very much like your signature?

A. That I do not know. I signed one document and then tore it off (up).

20 MR.KHANNA: Do you suggest that somebody has put your name three times on this duplicate of the agreement which you tore up? A. I do not know.

JUDGE: Do you mean to tell me seriously that you cannot say. There is a strong resemblance, to put it mildly, between those three signatures and your own admitted signature?

A. I do not know of any resemblance; I still hold that I signed one and tore it up.

30 MR.KHANNA: I suggest that both these agreements, the original and the duplicate, were duly signed by you and that you handed them back to Mr.Ishani and that Mr.Ishani, in his turn, gave you this cheque? A. It is quite untrue.

Q. Is it not true that after that you asked Mr. Harji whether he had sold the property to a co-member of your community?

A. I did not ask about that.

Q. Did you not further ask whether he had sold the property to Mr.Hasham? A. No.

40 Q. I suggest that he answered Yes. At that you seemed to be very annoyed, you picked up the original agreement which was lying in front of Mr. Ishani on his table, tore it up and went away without saying anything further?

A. No that is not so.

Q. Now did you ever mention that the portion which you wished to sell consisted of 0.513 of an acre?

A. No.

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Q. You see, this option distinctly says, "The house on the above property will be given in vacant possession with all vacant land contained"?

A. Not at all.

Q. When did you first notice these words "all vacant land contained"?

A. When Sultan read it out.

Q. Now in your Defence you have said that on 18th February at the house of Mr. Hasham you were told definitely by the Plaintiff that he had a buyer and for that purpose it was necessary for you to give him the option?

A. That talk never took place.

Q. This Defence is completely false, is it not: nothing of the kind was ever represented to you at Hasham's house?

A. He simply said, I will try for Shs.81,000 or Shs.85,000.

Q. But he did say what you have said in paragraph 4 of your Defence?

A. Nothing of the sort.

Q. You knew you were binding yourself for this option, did you not?

A. Yes, for 3 days.

Q. And for binding yourself you could claim Shs.5 from the Plaintiff?

A. No.

Q. Did he not translate it to you and say, You can claim Shs.5 from me, that is the consideration for binding yourself up to 22nd?

A. He neither explained nor did I know anything.

Q. At what stage did you say that Mr. Sultan came into the offices of Mr. Ishani - was it after you had signed the documents or before?

A. He came with me.

Q. Why did you bring him?

A. There was no specific reason. I thought I must have a man with me.

Q. Was it for the purpose of translating the agreement that you were asked to sign?

A. No.

Q. Had you no confidence in Mr. Ishani, your nephew, explaining the contents of the document to you?

A. The advocate will do what is likely to be done at the request of the broker. They must have settled whatever was to be done.

Q. Did you ask him to come so that the advocate and the broker should not do you down?

A. I had no view of that kind in my mind when I asked him to accompany me.

10

20

30

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Q. Did you ask for the Shs.25,000 before you actually signed the document?

A. The talk took place beforehand and at the time of signing I said, 'Come on, bring me Shs.25,000.'

Q. Was Mr.Sultan there when Mr.Ishani explained that there was a mortgage of Shs.81,000, and all that was coming to your pocket was Shs.19,000?

A. Yes. When the Sultan heard this he picked up the paper.

10 Q. Was Sultan there all the time? A. Yes.

JUDGE: Did you agree in the end that you would take less than Shs.25,000? A. No.

Q. Did you say that you would not sign unless you got Shs.25,000?

A. I signed one document and demanded Shs.25,000 at the same time.

Q. Did you say that you would not sign until you got the Shs.25,000?

20 A. I was waiting for the Shs.25,000 before I could receive the other documents.

Q. Did you intend to have the Shs.25,000 in your hand before you signed one or more documents?

A. Yes.

Q. Did you not ask to see the cheque before you signed anything further?

A. No, before the money could come forth the topic of Shs.81,000 cropped up, so the matter was stopped there and then.

Court rises at 4.15 p.m.

30 MRS.KHATIJABAI HASHAM 2nd DAY

Cross-examined by Mr.Khanna (continued)

Q. Yesterday you told us that the Plaintiff came to call you to Ishani's office? A. Yes Sir.

Q. And you stated that all he said to you was. "Come to Ishani's office"? A. Yes Sir.

Q. You also said that he didn't say that the documents were ready for signature?

A. Nothing of that sort was talked over.

40 Q. From the time he walked with you from the place where he called you till you got to Mr.Ishani's office did he talk to you at all about the document or the contents of any documents that were ready, or to be prepared?

A. No talk whatsoever took place on the way Sir.

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Q. In paragraph six of your defence one of the things stated is that on or about the 19th day of February 1954 the Defendant (that is you) at the request of the Plaintiff attended at the offices of Ishani Esq., then appearing for the Plaintiff, in order to sign certain documents which the Plaintiff represented verbally to her were necessary for the sale of the said portion of land and were in pursuance of the said option?

A. That I told to my advocate. I am not definite about the date and day. 10

Q. I am asking you are you quite definite that nothing at all was said by the Plaintiff to you from the time he called you till you got to Mr. Ishani's office?

A. No talk whatsoever took place.

Q. So that this allegation in the defence that representations were made to you while you were being taken from Harilal Kamji's shop to Ishani's office is incorrect? 20

A. I don't remember of any talk taking place.

HIS HONOUR: Did you talk to Mr. Sultan about this deal?

A. Only talk that I am wanted in Ishani's office.

Q. But did you tell him why you were wanted at Ishani's Office?

A. It was in my mind to talk over with Sultan but I did not reveal anything to Sultan on the way.

Q. Did you talk to Sultan at Ishani's office?

A. No Sir.

Q. Were details of what you were going to sign explained to you before you signed? 30

A. No Sir.

Q. Did Sultan know that you wanted to sell a piece of land or which piece of land you wanted to sell?

A. No Sir. He did not know. No talk took place with him.

HIS HONOUR: In that case why did he suddenly say "Look you are selling two acres of land not half an acre"?

A. That I do not know. When Ishani referred to 81 thousand and 19 thousand it struck something - 40
Sultan he might have known something.

MR. KHANNA: Do you want us to believe that by mutual agreement between the Plaintiff and yourself the whole thing was washed out in Ishani's office?

A. Yes Sir. It was told us by Ishani.

Q. And you believed that? A. Yes Sir.

Q. And you were satisfied that the whole thing was over? A. Yes Sir. And I informed my son.

Q. Can you explain why immediately after that you should have gone to Mr. Akram to cancel the transaction?

A. Because the option and key were in possession of the Plaintiff and I was puzzled over this matter, so I thought safe to consult another advocate.

10 Q. But surely was it not amicably agreed that the whole thing should be washed out?

A. I was too much puzzled then.

Q. Did you ask Mr. Akram to write in the following tone in the last paragraph he says: "I am instructed to say that the whole transaction was fraudulent and she hereby cancels any papers signed by her in respect of the above property"?

20 A. As I said I was already puzzled and in my puzzled period I explained everything to Mr. Akram and he has written all this also. I informed this incident to my son on the telephone and asked him to see Mr. Ishani who had been to Mombasa.

Q. Did you tell Mr. Akram that it was by mutual agreement of yourself and of the Plaintiff that the whole thing had been cancelled?

A. Yes Sir. I mentioned everything to Mr. Akram. Mr. Harji may be nodding his head like this.

Q. Did you specifically tell him that you two were agreed that the whole thing should be washed out?

30 A. Mr. Akram was writing what I was telling him. I was too much puzzled and he wrote what I said about that. Now I don't remember today what I asked him to write.

HIS HONOUR: Did you say to him, "Mr. Harji agreed that the whole deal is off? A. Yes Sir.

MR. KHANNA: Was it not Mr. Ishani who sent you to Mr. Akram? A. No Sir.

Q. This is the first time you have been to Mr. Akram? A. First time in my life I saw Mr. Akram. I never knew him or his office I was led by Sultan.

40 Q. It was Sultan who took you to Akram and not Ishani who suggested that you ought to go?

A. No Sir. Not Ishani.

MR. KHANNA: Did you not say you would rather go to your usual advocate than to Sultan?

A. I didn't know anything my Lord, that was my mental agitation. I knew nothing about defence.

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Q. Will you carefully answer this question which I am going to put to you with a view to finding out exactly what your case is? Is it your case that you made a slip and told Mr. Harji that you wanted a hundred thousand for the two acres?

A. No, no, Sir. I know everything. No slip had been committed by me. I know the rates, the land, I know all my debts and liabilities. I have to pay three thousand to one Ghulam Hussein.

Q. You were quite clear as to what you were saying to Mr. Harji? 10

A. No Sir, I have not committed that slip. It was all in my mind. I knew everything.

Q. Did you use any words which could possibly have been misunderstood by Mr. Harji that you were really selling two acres?

A. No Sir. There is no question like any misunderstanding on his part.

Q. There was no room for misunderstanding your intention? You were quite explicit as to what you wanted to say? A. That is so, there was no room for misunderstanding. 20

Q. Either on your part or his part?

A. No Sir. My talk was clear about one piece out of four pieces of land.

Q. Did he by his persuasion or influence over you get round you and make you agree to sell the whole two acres for one hundred thousand shillings?

A. No Sir. No proper discussion ever took place.

HIS HONOUR: He never persuaded you to do something or to agree to something against your will? 30

A. No. Everything was explicit and clear.

MR. KHANNA: With regard to this document, the option, did he ever read it to you at all?

A. No Sir. Neither of them were explained.

Q. Did he misread or mis-translate it?

A. No Sir.

Q. Did he make any statements without reading the option as to what it related to?

A. No Sir. I heard nothing from him until he asked me "please sign". 40

Q. So he asked you to sign the document and obtained your signature without telling you what it contained?

A. I explained everything about this bargain and he said, "Please sign it now".

Q. Did he obtain your signature without mis-stating the contents of it - either stating or mis-stating the contents of it?

A. Yes Sir. I signed as I was told.

HIS HONOUR: Did he tell you truthfully what was in the document or did he tell you lies about what was in the document?

A. He said nothing at all either true or false. I was only asked to sign and I did.

10 Q. Not only did he fail to read it to you but he never even explained what was in the document. Is that correct?

A. Even not explained at all verbally.

MR.KHANNA: He made no statement whatsoever regarding the document is that correct? A. Yes Sir.

Q. You remember leaving Mr.Akram and then going to your usual advocate Messrs. Madan and Shah?

A. No Sir.

Q. You do not remember having written?

20 A. No Sir. I know nothing about Madan and Shah. What is that and who are they?

Q. You didn't know that they were your advocates until Mr. O'Donovan took over?

A. No Sir. I didn't know that.

Q. So that you didn't tell them to write that your signatures to the option and the agreement were obtained by fraud?

A. No Sir. I didn't make Madan and Shah write such a letter. I don't know what is Madan and Shah.

30

Q. I want to ask you some questions as to the agreement you signed. Is it your case that it was not read over to you or translated by anyone? Was it read over to you by anyone?

A. No Sir. It was never read out nor explained to me by anyone.

Q. Did anyone tell you lies about the contents of this agreement? A. No Sir. Not even that.

40 Q. Ishani didn't tell you any lies about the contents of this document?

A. Neither lies nor truth was told by Ishani.

Q. Did Mr.Harji tell you truly or falsely the contents of it? A. No Sir. He spoke nothing.

Q. Why did you put your signature to it without knowing the contents of it?

A. Everything was settled and then I had a call.

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Q. So you took the risk whether it contained the true agreement or not. You just accepted it and signed it?

A. There was no risk at all from my point of view. The Plaintiff was a broker, Ishani was an advocate and I relied on everything that was done by them.

MR.KHANNA: Who is the person who is said to have committed the fraud on you, Ishani or Mr. Harji?

A. I do not know that.

HIS HONOUR: Did you say somebody deliberately cheated you or did you say there was a misunderstanding or mistake between you and Harji?

10

A. My Lord, I believe still that there exists some misunderstanding on somebody's part, but if there is fraud it may be from the brokers side.

MR.KHANNA: You are not sure whether a fraud has been committed on you. Is that correct?

A. Ishani said there is a misunderstanding which I believed and the Plaintiff also believed.

Q. Did you believe that there was a misunderstanding and no fraud? A. Yes Sir.

20

Q. Can you explain why you should instruct your advocates to lay a serious charge of fraud against the Defendant?

A. Until then I believed that everything was over but I thought that he may create some other trouble for me and also I received a summons so now I believe the allegation was justified.

Q. You are merely putting it up as a counter-blast in order to escape from the obligations under the agreement, is that it?

30

A. No Sir. The talk was entirely explicit over half an acre.

Q. Ishani has acted for you many times has he not?

A. Yes Sir. Ishani was doing such type of work on behalf of my sons and my late husband.

Q. And in fact it is Ishani who introduced you to Mr. O'Donovan. Is that correct?

A. Ishani told me nothing about this. I received a reply from my son saying "We have seen Ishani don't worry at all, be at ease". First I telephoned and in reply to this telephone my sons pacified me after an interview between my sons and Ishani. My sons assured me on the telephone 'Don't worry everything is all right'.

40

HIS HONOUR: Did you see Mr.Akram before or after your telephone conversation with your son?

A. I saw Mr.Akram that very day of the incident.

Q. And when did you telephone your son?

A. That day at night. The night of that very day I informed my son on the telephone.

Q. And he had already spoken to Ishani?

A. Ishani left for Mombasa that day. I explained to him. After seeing Ishani I got my sons telephone reply at about noon.

HIS HONOUR: You mean after your son had seen Ishani he telephoned you a second time the next day?

10 A. Yes Sir.

MR. KHANNA: Have you spoken about this case to Ishani since 19th February? A. No Sir.

Q. He is coming as your witness?

A. Yes. He will have to come because all this happened in his office.

Q. And you have not spoken to him at all?

A. No Sir.

20 Q. Finally I suggest to you that this charge of fraud that you have made is the last straw. There is nothing in any of your allegations which you are putting up in your defence.

A. I could not understand this question, explain to me again.

Q. That your defence is without foundation. You have fairly extensively travelled in India and Europe, is that correct? A. Yes Sir.

Q. You have even travelled by yourself to Europe?

A. Not alone.

Q. Never alone? A. No Sir.

30 Q. Have you been alone to India?

A. Yes Sir because that is our country.

Q. You are able to manage all your travel fares and expenses without assistance?

A. No Sir. I am capable because my sons used to arrange for me my facilities by telegram and letters and all that. This question has no relevancy about this matter in question.

40 HIS HONOUR: Mr. Khanna before you conclude your cross-examination have you put to her specifically your version of the signing of these two documents? Whether they were read over and how interpretation took place? A. Yes my Lord I have.

Q. Is it correct that you asked Mr. Harji to return the key of the premises which he obtained from you? Just listen to this sentence, "Our client has asked

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Mr. Harji Gullamhussein to return the key of the premises which he obtained from her but he had not done so".

A. I beg your pardon My Lord, I was so much puzzled I didn't know what I said.

Q. But that sentence which I read out, does it refer to you?

A. Yes Sir. Harji took the key from me.

Q. That sentence comes from a letter written on the 26th February by Madan and Shah? Did you instruct Madan and Shah to write that letter or to write that sentence? A. I don't remember.

10

HIS HONOUR: Do you mean to say that Madan and Shah who were normally your advocates wrote a letter about this matter without seeing you first?

A. That cannot happen. They might have seen me I don't remember.

Q. Did you tell Madan and Shah that on the day of signing the agreement Mr. Harji was quite agreeable that it should not be binding?

20

A. My Lord that story is 12 or 13 months old I can tell nothing from my brain now.

Q. You see Madan and Shah wrote to Mr. Harji's advocates "Our client does not consider herself bound"? A. Is there any other name by which that Madan and Shah are known?

Q. Do you know Mr. Nazareth?

A. Yes Sir. I know Mr. Nazareth.

Q. Well did you ask Mr. Nazareth to write a letter about this business?

30

A. Yes Sir. He is our advocate. I told him.

Q. Presumably this letter has been read to you before you came to Court?

A. Many months have elapsed since that and I went to the United Kingdom.

Q. Before you came to court did you discuss this case with your present advocate, Mr. O'Donovan?

A. I only talked after receipt of a summons. Thereafter I only saw my advocate in court yesterday.

40

Q. Do you mean to say that before yesterday you have never talked to Mr. O'Donovan about the documents or letters?

A. Yes Sir. I was enquired of and said everything before coming into court yesterday.

Q. Are you or are you not aware of the contents of this letter dated 26th February from Madan and

Shah? A. May Your Lordship read again?

Q. I will ask the interpreter to read it to you again. The letter is dated 26th of February and is Exhibit A12?

A. Whatever he thought fit to write on my behalf must have been written by them.

Q. You mean that letter was written after your instructions? A. Certainly on my instructions.

10 Q. Did you tell Mr. Nazareth at that time that Mr. Harji himself agreed that the documents signed should not be considered binding?

A. It is a very old story. I do not know but I might have told.

Q. Your answer is that you might or might not is that it? A. I do not remember now.

HIS HONOUR: Do you remember when Mr. Nazareth wrote that letter whether you expected that Mr. Harji would hold you to the agreement?

20 A. My third son advised and led me to our own advocates Madan and Shah and I expect when Harji had so much over me even after having agreed in Ishani's office I thought it was better to pursue this matter further and defend.

RE-EXAMINED BY MR. O'DONOVAN

Q. Who in your family usually deals with advocates? Re-examination.

A. My sons.

Q. Who for example as regard to the previous documents - transfers - relating to this property - gave instructions for their preparation?

30 A. My sons contacted the advocates Sir.

Q. Would you normally go personally to any advocates office?

A. No Sir. If I am told by my sons I do put my signature.

Q. Do you understand anything personally about legal formalities of transferring property?

A. No Sir. I don't know of the complexities of law and transfer.

40 Q. Do you know the difference between an agreement for sale and a conveyance (a transfer)?

A. I don't understand any particular difference between these two.

Q. You say you cannot read English, can you read English figures? A. No Sir, not English figures.

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Q. I should say Arabic figures that is figures written by Europeans?

A. If I might see on the dial of a watch or clock the Roman figures I might be able to follow Roman figures.

Q. But figures in a letter or document, can you follow them? A. No Sir.

Q. Can you tell the time by looking at that clock (Roman numerals)? A. Half past eleven.

Q. I think you said you had some discussion with Mr. Haji about putting in the beacons which had to be put in? A. Yes Sir. 10

Q. Did I understand as correct when you said that was on the morning when you signed the option?

A. Yes the talk took place before writing the option.

Q. And it was only agreed to put in the beacons for three plots and he paid for the purchase of the beacons for the fourth plot?

A. Yes Sir. That is quite right. 20

Q. I think you said you knew you were binding yourself to sell three days for one hundred thousand shillings by signing that option? A. Yes Sir.

Q. And what property did you think you were binding yourself to sell?

A. One piece over which the building is situated.

Q. Was there any suspicion in your mind that the option referred to all four of these sub divisions?

A. No Sir. I had no doubt about what I understood.

Q. You said before that you knew Mr. Harji as a land agent who buys and sells land? 30

A. Yes Sir. I knew him.

Q. Do you mean by that he buys land for himself and sells it for himself or that he buys in his capacity as a broker for third parties.?

A. He is a broker. He buys and sells and tries to find out prospective buyers himself.

Q. Do you mean that he buys for himself or for clients? A. He is doing all this for others for his gain. 40

Q. You said in cross-examination that you had no objection to his making a profit on resale. Did you have any discussions with him about his making a profit on resale?

A. I only knew that a broker does the business of brokerage.

Q. Did you have any discussions with him about his making a profit on resale?

A. No discussion took place about his making any business of resale.

Q. I think you said that at Ishani's office the Plaintiff admitted that there had been a misunderstanding. I am just reminding you?

A. Yes Sir. While nodding his head in this way he had admitted.

10 Q. After that you received a letter from him did you not, in which he persisted in his claim?

A. Yes Sir.

Q. Did his persistence in the claim after agreeing it was a misunderstanding have any effect on your view of his good faith?

MR.KHANNA: I don't know whether it is held in re-examination My Lord.

20 HIS HONOUR: I think it holds acceptance on the possibility that if Harji said the deal is off why he so suddenly acted as though he were pressing for completion of the deal.

MR.O'DONOVAN: What view did you take after that as regards his good faith?

A. I was much afraid after that. This meant he has committed cruelty and fraud against me.

Q. Is that the view you formed? A. Yes Sir.

30 Q. You say you telephoned your son in Mombasa and asked, on the night after you had seen Mr. Ishani, him to confirm the next day with Ishani that the deal had been rescinded? A. Yes Sir.

Q. What is the name of the son? A. Hajib Ali.

HIS HONOUR: Was the letter from Mr.Harji delivered to you on the same evening as you signed the agreement? A. Yes Sir.

Q. Did you get the first letter from Mr.Khanna on the 19th February? A. Yes Sir.

Q. Did you tell your son that you had got that letter? A. Yes.

40 Q. And did you tell your son that Mr.Harji apparently wanted to make the agreement binding on you? A. Yes Sir.

Q. And the next morning after speaking to Mr.Ishani whom your son saw the agreement could not possibly be binding because Mr.Ishani said so?

A. Yes Sir. You be at ease nothing binding on you.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 4.

Khatijabai Jiwa Hasham.

2nd - 5th May 1955.

Re-examination - continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 4.

Khatijabai Jiwa
Hasham.

2nd - 5th May
1955.

Re-examination
- continued.

MR.O'DONOVAN: Go back to the time when you went to Ishani's office. You say that the option was for this half an acre? A. Yes Sir.

Q. Were you given any hint or reason to suspect that the agreement which you were asked to sign was not for the half acre in accordance with the option?

A. No Sir I was under the impression about half an acre.

Q. I want you to look again at the duplicate bearing your name (Exhibit A4). Will you look very carefully please. Could this be your signature? 10

A. The signature is like that of mine.

Q. Do you remember signing that document?

A. I don't remember.

Q. Is it your signature?

A. The writing is like mine and it looks like mine.

Q. Do you know where on a document to sign?

A. They will point out where to sign.

Q. Have you any idea of the meaning of this alteration where you have signed? Do you understand it? 20

A. I don't remember I was puzzled too much.

Q. Do you understand what it means?

A. I don't know the cause of this signature.

Q. You don't know what the writing next to it means?

A. I cannot understand anything. I can see cyphers.

Q. Were you in any financial difficulties or in any financial predicament at the time of signing this agreement? A. No Sir. 30

Q. Was there any conceivable reason why you should want to sell a property which had cost you nearly two hundred thousand shillings for one hundred thousand shillings?

A. No Sir. I could have disposed of it for three hundred thousand shillings if I wanted.

No. 5.

EVIDENCE OF GULLAM HUSSEIN KASSAM ISHANI

GULLAM HUSSEIN KASSAM ISHANI (Sworn)

Examined by Mr. O'DONOVAN.

Q. What are your full names? A.

Q. You are an advocate at the Supreme Court of Kenya? A. Yes.

Q. I think you have for many years been practising in Nairobi? A. Yes.

10 Q. Have you ever acted as advocate for the Diamond Jubilee Investment Firm? A. Yes.

Q. Do you remember the 19th February last year? A. Yes.

Q. Did you see Mr. Harji? A. Yes.

Q. Do you know him?

A. Yes, I knew him since many years.

Q. What is his business?

A. He is an estate broker.

Q. Dealing in purchase and sales of land? A. Yes.

20 Q. Did he come to your office?

A. Yes he came on that day about lunch time.

Q. Was he alone or with anyone?

A. He came with Mr. Hasham G. Nanji.

Q. What occurred after they came to your office?

A. They came to my office and Mr. Harji took out from his pocket an option.

Q. Could you identify it?

A. That is the option (Exhibit A1)

Q. What happened then?

30 A. He told me to prepare an agreement of sale between him and Mr. Nanji on the strength of that option.

Q. For what price? A. 107,000/- shillings.

Q. Did you do so? You prepared an agreement of sale. Were you busy at that time?

A. Yes. On that day I was to leave for Mombasa by the 4 o'clock train and I had quite a number of appointments between two and four. I was in a great hurry but as they wanted this agreement of sale I let go my lunchtime.

40

In the Supreme Court of Kenya

Defendant's Evidence.

No. 5.

Gullam Hussein Kassam Ishani.

3rd May, 1955.

Preliminary Examination.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 5.

Gullam Hussein
Kassam Ishani.

3rd May, 1955.

Preliminary
Examination
- continued.

Q. You drew up an agreement of sale and then what happened?

A. The agreement was typed out after I scribbled down and my typist brought it before me. And then it occurred to me that this lady who had given the option was not the sole proprietor of the estate because sometime back I had done their mortgage and there were three partners. I knew that one partner was discharged, leaving two, she and somebody else.

Q. Did you speak to Harji about that?

A. And then I spoke to Harji, "This option is given by this lady so far as I know there were two partners, she and somebody else, the third had gone". And then he told me "no even the second one has also gone, agreement of sale has been done".

Q. Harji told you that. Did he tell you where he had got his information from?

A. He seemed to know all about it.

Q. Where did you get the plot number to put in this agreement of sale to Mr. Nanji, and the other particulars of the property?

A. That I don't recollect. May be from my own files as I told you I had done the mortgage before.

Q. Did you have any further discussion with Harji?

A. Yes. After receiving his reply that now she is the sole proprietor and the option is now in order I told him that I see one or two alterations in the dates and I don't think they are signed by her.

So I told him, "What about these alterations". He said "That's all right". But then I advised him that my experience found never settle before you buy, this is an option but you have not still bought the thing by agreement of sale. And I gave him one or two examples about people who had to pay a very heavy price when they bought and I advised him not to and then executed this agreement and they agree.

Q. Both of them? A. Yes.

Q. So they decided not to complete their transaction? A. Yes.

Q. Yes. Then what happened?

A. Mr. Hasham left my office and Mr. Harji said, "I can call the lady". So he went out and I think in about five minutes time he brought the lady and some other fellow named Sultan.

Q. When you had drawn up the agreement for Mr. Harji had you inserted the clauses about money due on the mortgage?

10

20

30

40

A. I don't remember it now but I knew there was a mortgage. I don't remember now whether there was anything.

Q. You don't remember now whether there was anything about it put in the agreement you drew up for him? A. No.

Q. May I put to the witness exhibit A6? Is that the agreement? A. Yes that is correct.

10 Q. I don't think there is anything about a mortgage is there?

A. There is a mortgage matter here but I don't remember.

Q. Where did you get the information as to the amount of the mortgage?

A. As I said, that was the mortgage prepared by me.

HIS HONOUR: When you were acting as mortgagees on behalf of Jubilee Trust? A. Yes.

MR. O'DONOVAN: Did Mr. Harji know before you wrote it down?

20 A. I think he might be knowing but I don't remember.

Q. Anyway you advised him that it was safer not to go on unless he had an agreement of sale? A. Yes.

Q. Did you ask her anything when she came?

A. I asked her "Is this the option given by you to Mr. Harji?" She said "Yes". And I asked her, "You want to sell this to him?" She said, "Yes". So I scribbled out.

30 Q. Did you make any enquiries about co-tenants?

A. Yes. I asked about the second one, the partner she said, "No he has also gone and I am the sole proprietor".

Q. I want you to be very clear. Did you make any further enquiries apart from what you have mentioned? A. No. No further.

Q. What did you do then?

A. So from this option I just scribbled out the agreement of sale.

Q. Did you get it typed?

40 A. I don't remember it very well but it might have been typed - I think it was typed.

Q. Do you remember how many copies were typed?

A. If it was typed it must be three copies, two for the parties and one for the office.

Q. Would you care to look at Exhibits A2 and A4 again.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 5.

Gullam Hussein Kassam Ishani.

3rd May, 1955.

Preliminary Examination - continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 5.

Gullam Hussein
Kassam Ishani.

3rd May, 1955.

Preliminary
Examination
- continued.

HIS HONOUR: Were these typed in your office (Exhibits A2 and A4)? A. Yes, My Lord.

MR.O'DONOVAN: Then it was typed out? A. Yes.

Q. These agreements contain certain conditions. Would you look at them again. Conditions for example about taking over the mortgage and as regards paying purchase price and allotment of the site and other odd details. Did you insert those in the agreement? A. Yes, I think so.

Q. Without discussion with the parties? 10

A. Yes, because I had prepared the one agreement of sale between Nanji and Harji just a few minutes back.

Q. You thought those terms you had put in were usual or were accepted? A. Yes, usual.

Q. After it was brought back typed what happened?

A. I put it to the Defendant to sign it.

Q. And did she sign the original?

A. I don't remember whether she signed all the copies or not but I do remember she did sign. 20

Q. At the time of signing did any discussion take place on any subject?

A. The discussion at the time it was to be signed was that Harji said that 10% of the deposit always purchase price is to be paid and I put 10% according to that but she wanted 25 thousand shillings. Harji said, "No I cannot give 25 thousand. I will pay you 15 thousand". So I put in 15,000.

Q. There is a cheque there for 15,000 shillings. Will you look at the cheque? It was signed by Mr. Harji and the body of it filled in by you. When did you write that out? 30

A. That was just at the instant of the 10,000 usual, but she wanted 25 thousand and Harji says, "I pay only 15 thousand" so at that stage I wrote down 15,000.

HIS HONOUR: In front of everybody present?

A. Yes.

MR.O'DONOVAN: Did she accept 15,000?

A. She said, "No, I must have 25,000". 40

Q. And then what happened?

A. I thought, you see, that her demand for 25,000 was unreasonable and tried to explain the purchase release mortgage and if it is 81,000 to be released then she is entitled to 19 thousand at the most.

She said, "No, I will release the mortgage myself. I want to leave the rest of the amount on the mortgage. I want to continue with the mortgage. I will release this one plot". So by that time Sultan was reaching (reading?) the agreement of sale and spoke to her that this agreement is for the whole of the estate and she got furious.

Q. She got furious did she? Did her fury appear to you to be genuine? A. Yes.

10 Q. Did she say what she was selling?
A. But I told, "You are selling the whole estate of this option", and she said, "No I never gave option for whole estate". And she was talking in temper.

20 Q. The intervention by Mr. Sultan when he said as regards the agreement to which she had already put her signature for the whole property and not for one of the plots - was that the first time an explanation was given about the meaning of the agreement? A. Yes. That was the first time.

Q. Did you explain to her why you had drawn up the agreement?

A. So I told her, here is your option where you signed the whole estate, though it is in very bad English written.

Q. Was that why you drew up the agreement like that?

30 A. Yes. Otherwise generally we take instruction from the party but not when there is an option. She was in great anger and tore up the original agreement. I remember Harji collected up the bits and pieces. Nothing was left in my office.

Q. Did you intervene any further?

A. Yes. Then I told Harji and she was there also, "There must be a misunderstanding in this transaction and forget the instance both of you".

Q. Did they accept that?

A. Then they stood up. It was just why I told them, "Forget about this there is a misunderstanding". And both of them then left the office in a temper.

40 Q. Did they appear to accept or reject the suggestion? A. To my mind it was quite clear that they have accepted that it was a misunderstanding.

Q. Did you have any doubt about it?

A. No. To my mind there was not.

Q. Did you go to Mombasa?

A. Yes. I left by the 4 o'clock train.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 5.

Gullam Hussain Kassam Ishani.

3rd May, 1955.

Preliminary Examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 5.

Gullam Hussein
Kassam Ishani.

3rd May, 1955.

Preliminary
Examination.
- continued.

Q. Did you see anyone in Mombasa on your arrival there next day?

A. Yes. I went to certain meetings there and I remember that I think on that day - it, I think it was about midnight or something - one of the sons approached me and said his mother had telephoned and there was a big row about some transaction. I told him what had happened and I have told them to forget about this thing as it is all settled.

HIS HONOUR: Which son was it you spoke to?

10

A. Rajab Ali.

MR. O'DONOVAN: In effect you told him that there was nothing to worry about. It was settled?

A. Yes.

Q. Did you see Mr. Harji at all afterwards?

A. I saw Mr. Harji a lot.

Q. Did you ever speak to him again about this case?

A. Yes. I think I came to know that there was some exchange of letters and notices. Then I came to know very late about the filing of a case.

20

Q. For whom were you acting in this transaction?

A. I was acting for Mr. Harji.

Q. You will see amongst the exhibits a cheque for 10,000/- Look at it carefully. Have you any recollection of that?

A. I don't remember it very well but I think it was a cheque written down by Mr. Nanji for ten thousand shillings in my favour. But I never accepted this cheque as I said before when I told them just hold on and see its gone through. So that was just kept like that.

30

Q. Would you look at Exhibit A4, that is a carbon copy, do you recollect that being signed?

A. I don't remember it. She signed this but definitely it is her handwriting so she must have signed.

Q. Look at A2. I think she signed it twice once with a blue pen and once with a black pen. Do you know anything about that?

A. I cannot explain that but she might have. It seems here that the blue one, the nib was not working properly so she took something else and signed again.

40

Q. Can you recollect whether she would be told to sign her signature?

A. That should have been shown by me to sign on the stamp.

Q. You would have said, "Sign there"? A. Yes.

Q. Look at the carbon. Can you confirm her statement that she understands no English?

A. Oh! She is illiterate.

Q. Would you have told her where to sign on the other one?

A. Yes. There are alterations I must have asked her to sign.

HIS HONOUR: You knew that she was illiterate?

10 A. Yes I knew.

MR.O'DONOVAN: Did you have any reason, when you say you scribbled, to doubt the parties were agreeable about the terms as set out in the option? Did you think the option was in order?

A. There were two points (i) was she the proprietor and the other (ii) there were one or two alterations made in the dates as to the validity of the option.

Q. After that you were satisfied to go ahead with the agreement? A. Yes.

20 Q. So that in spite of her illiteracy you didn't feel that you had to exercise exceptional caution in translating everything before you got her to sign? A. No.

Q. You say you had previously acted with regard to this matter of the mortgages and so on? A. Yes.

Q. Who gave you instructions, apart from the Defendant, in the previous occasion?

A. Instructions have been coming to me from Mombasa.

Q. From whom in particular, do you know?

30 A. Generally the Diamond Trust.

Q. From her side?

A. I think they used to see the Diamond Trust people in Mombasa and they would write to me, because the documents were always with them.

Q. Can you say which members of the family usually conducted business affairs?

A. Generally one of the three sons do the business but the eldest son Rajib Ali is generally having a say in the matter.

40 Q. Does Mrs.Khatijabhai usually go round seeing lawyers and so on?

A. Of course she goes to the lawyers not so often.

HIS HONOUR: Do you think she is not used to conducting business on her own?

A. Her own sons are doing all these things.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 5.

Gullam Hussein Kassam Ishani.

3rd May, 1955.

Preliminary Examination
- continued.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 5.

Gullam Hussein Kassam Ishani.

3rd May, 1955.

Preliminary Examination - continued.

HIS HONOUR: She would not be likely to know what she was doing in this sort of deal?

A. I think this was her property and she must have thought that it is she who is going to sell.

Q. Has she got sufficient intelligence to understand a deal of this sort - a sale of land, a transfer or a conveyance?

A. She has not sufficient understanding of all these details but she has a little bit of knowledge.

Q. Did she understand the difference between selling the whole of her property and selling one quarter of it? A. On that of course she knows.

10

CROSS-EXAMINED BY MR. KHANNA:

Cross-Examination.

Q. Did I hear you say you have practised for many years? A. Six or seven.

Q. Will you be precise? You state in 1948. What month? A. June.

Q. During this period have you been suspended from practice? A. My Lord I object to this question.

Q. I ask you again have you been suspended from practice?

20

HIS HONOUR: I think the question is permissible. Your conduct as an advocate, Mr. Ishani, is certainly going to be called into question under the circumstances.

MR.KHANNA: Will you answer my question. I ask you again. A. If his Lordship directs.

HIS HONOUR: I do direct.

A. Yes I have been suspended.

30

MR.KHANNA: You were suspended because your cheque was not met. Is it usual for you to obtain signatures without informing what the contents of the agreement are? A. Certainly not.

Q. Why did you do so on this occasion then?

A. Because the option was there.

Q. Did you not think it was your duty first to inform the woman as to every detail of the agreement? I have explained

Q. Did you consider it your duty or not? I did not consider it my duty as I was only using the terms described in the option.

40

Q. Did you describe the contents of this option to the woman? A. No Sir.

Q. How is it that you are such a willing witness for the defence?

A. I am not giving defence at all.

Q. You were lawyer for Mr. Harji and you assured these people that there was nothing in this agreement, it had all been settled?

A. Yes, because it was settled in my presence there.

10 HIS HONOUR: You acted for Mr. Harji and then you had a private interview with Mrs. Hasham's son in which you stated nothing will come of this dispute?

A. Yes, because it was settled.

MR. KHANNA: Have you a file on this transaction?

A. On this transaction I have nothing.

Q. You never kept your drafts? A. No.

Q. Did you make a draft or write down or scribble as you call it, a draft in the presence of Mrs. Khatijabhai? A. Yes.

Q. Which draft was this?

A. I have not got the draft.

20 Q. Who was it between?

A. The first was between Harji and Nanji.

Q. I am asking you about the draft in the presence of this woman?

A. That was drafted between the woman and Harji.

Q. You made no agreements until the woman came in. Is that correct?

A. These agreements were not ready. I think the woman had come in.

30 Q. On whose instructions did you prepare the draft?

A. The personal instructions of Harji.

Q. Did you ask him what to put in it?

A. There was no question of asking him what to put in it. I asked the lady, "Will you sell this to Harji?" and she said "Yes".

Q. Is that all you asked? A. That is all I asked.

Q. And then you put in terms out of your own head? Is that how you practise? You didn't even ask on what terms they were selling or buying?

A. That was in the option.

40 Q. But surely there was nothing in the option about the deposit? A. The deposit is always understood - 10%

Q. Did it not occur to you to tell them?

A. It is usual to put in 10%.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 5.

Gullam Hussein Kassam Ishani.

3rd May, 1955.

Cross-

Examination

- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 5.

Gullam Hussein
Kassam Ishani.

3rd May, 1955.

Cross-
Examination
- continued.

Q. Did she realise that you had not provided for 25 thousand? A. She asked for 25 thousand.

Q. And though she didn't agree to less than 25 thousand you write a cheque for 15 thousand?

A. Because Harji said 15 thousand I want to pay only.

Q. Wasn't it because she had accepted 15 thousand?

A. She has related to you

Q. You have no documents whatsoever to substantiate your statements? A. Nothing whatsoever..

10

Q. I put it to you Mr. Ishani that what really happened is as follows: Mr. Harji and Mrs. Hasham saw you first in connection with this transaction?

A. Mr. Harji yes. Both of them came to me first.

Q. Harji asked you to exercise that option on her behalf and you said it would be better to draw up a formal agreement and have it signed. Is that correct? A. Yes.

Q. And then you drew up an agreement between Harji and Khatijabhai and another between Hasham and (inaudible)?

20

A. I made the agreement between Harji and Nanji.

Q. You only made an agreement between Nanji and Harji and you made the second agreement after the woman arrived? Now I suggest to you that you made both before the woman arrived?

A. That is not the case.

Q. I suggest that you fully explained the contents of the agreement to Mrs. Khatijabhai? A. No.

Q. And that the only query she raised was that 10 thousand was wholly as deposit? A. No.

30

HIS HONOUR: I suppose you know that you ought to have explained it to this woman?

A. I was in great hurry and it was during lunchtime that they had come.

HIS HONOUR: Do you think that is sufficient excuse for not reading this out?

A. I was in great hurry to go.

MR. KHANNA: As a practising advocate do you think it was proper for you to obtain a signature to a document before explaining the contents? You know what you are letting yourself in for? A. Yes.

40

Q. You say that you never explained it to her? I suggest that you read it out very fully and the only query raised was that she wanted 25 thousand,

Have you never seen her since that day or discussed the matter with her?

A. I have seen her many times but never discussed the matter.

Q. Do you recollect the figure of 25,000/- without any notes? A. I remember.

Q. Is not that the figure which you have agreed upon by discussions before coming into Court?

A. No.

10 Q. When she said 25,000/- did you not consider it your duty to say why you had only provided for 10 thousand?

A. There was no question of ten thousand. I told her she cannot have 25 thousand.

Q. Was it 15,000 before you told her that she could not have 25,000?

A. In the option Harji said I can only give you 15,000.

20 Q. Did you alter these figures?

A. Yes. It is my handwriting.

Q. At what stage did you make these alterations?

A. At the stage when Harji said I can give you only 15,000.

Q. You had put 10 thousand shillings. You had obtained her signature to the agreement before the alterations had been made? A. I don't know.

Q. You can remember a lot of things but you don't remember whether you took her signature before the alterations or after? A. I don't know.

30 Q. Had she already signed when she demanded 25,000/- deposit? A. I don't remember.

Q. How is it that you did not fall back on this 'I don't remember' during the examination in chief? You were able to remember everything Mr. O'Donovan led you, but you are not able to remember anything I ask you?

A. I don't remember at what stage.

40 Q. When she demanded 25,000/- you started telling her that her demand was unreasonable and you gave your explanation that only 19,000/- was coming to her? A. Yes.

Q. Was it not after some explanation that Harji said she ought to have 15,000/- because 19,000/- was coming to her and 4,000/- on completion?

A. No. That was just before when Harji said I can give you only 15,000/-.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 5.

Gullam Hussein Kassam Ishani.

3rd May, 1955.

Cross- Examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 5.

Gullam Hussein
Kassam Ishani.

3rd May, 1955.

Cross-
Examination
- continued.

Q. What was the sense in making out a cheque for 15,000/- when you knew she didn't agree?

A. It was for Harji to ask me to make out 15,000/-.

Q. So that there was really never any agreement reached in your office at any stage. She was not going to sign until she got 25 thousand shillings, was that her attitude?

A. No that wasn't but she wanted 25,000/- and she thought that by asking for 25,000/- she would get it.

10

Q. Did you not tell her 'I have not provided for 25,000/-'? A. That is what I told her.

Q. And yet she still signed it even after you had told her that she was not going to get 25,000/- under the agreement?

A. On that stage she had already signed it.

Q. Which do you want to say, that she raised the question of the 25,000/- before or after she signed the agreement? A. She raised it before.

Q. She signed without insisting on it?

20

A. She was insisting but she signed it.

Q. She knew that the document said 10,000/-?

A. I put only 10,000/- myself.

Q. At the time she signed this document what was written in it, 10,000/- or 15,000/-?

A. That I don't remember.

Q. But it is the one point which this woman raised and you say that you cannot remember about it?

A. Because I had usually put it 10,000/- and she wanted 25,000/- but Harji said I will give 15,000/- so I put it 15,000/-.

30

Q. Look at Exhibit A4. You got her to sign those alterations 15,000 and 85,000. Do you know as an advocate you should never get the signature to an alteration unless it is agreed to and accepted?

A. My Lord this

Q. Will you answer my question?

A. Yes. I know that, but I don't remember whether she signed it or not.

Q. And it was you who asked her to sign on those alterations? A. Yes that is so.

40

Q. Can you give any reasonable explanation why you made her sign that if she had not fully accepted those terms? A. No.

Court adjourned 12.45 p.m.
Court resumed 2.30 p.m.

Q. Will you carefully listen to my questions and try to answer directly. My allegations are that you read over and translated the contents of the agreement you drafted to Mrs. Khatijabhai? A. No.

Q. And after you had read over the contents she objected to the deposit of 10,000/- and asked for 25,000/-?

A. She asked for 25,000/- as part payment towards the purchase price.

10 Q. Was it not after you had read over and explained that she found out that 10,000/- was provided as a deposit? A. She asked for 25,000/-.

HIS HONOUR: How did she know she was only to get 10,000/-?

A. You are getting 10,000/- I told her. She said "I want 25,000/-".

MR. KHANNA: Did you tell her she was getting 10,000/- after she said she wanted 25,000/- or before? A. No first she was paid 10,000/-.

20 Q. When you say she was to be paid 10,000/- who gave her that information? A. I told her.

Q. And then she asked for 25,000/- Had she signed then can you recollect?

A. That I do not recollect.

Q. Did you at that stage ask her to sign a duplicate or sign on the alteration?

A. I don't know when she signed.

30 Q. My instructions are that you read over and explained the whole thing to her and the only query she raised was over the deposit? A. No.

Q. And when she asked for 25,000/- you then started explaining to her that she was going to get normally 19,000/- after the mortgage had been paid. It was then that Mr. Harji suggested that she could only reasonably demand 15,000/- at the most. I suggest to you that it was the Defendant who then requested 15,000/- after your explanation?

A. The Defendant was all the time for 25,000/-.

40 Q. You deny it? And when she asked for 15,000/-...

A. She never asked for 15,000/-.

Q. I suggest she did, and Harji is going to swear that it was then he agreed to the figure of 15,000/- and it was then that the agreement and duplicate were amended accordingly and Mr. Harji handed over his cheque book to you then, after the figure of 15,000/- had been agreed to.

A. He offered 15,000/-.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 5.

Gullam Hussein Kassam Ishani.

3rd May, 1955.

Cross-Examination
- continued..

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 5.

Gullam Hussein
Kassam Ishani.

3rd May, 1955.

Cross-
Examination
- continued.

Q. Didn't you think it foolish to fill in a cheque for 15,000/- when the matter was still under discussion as to whether it was to be 15,000/- or 25,000/-?

A. He can only pay 15,000/- that is all.

Q. But surely you don't fill up cheques until you know the agreement is going through?

A. That was the instruction of Harji to fill up 15,000/-.

Q. Could you swear that Harji told you to fill for 15,000/-? A. Yes.

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Q. You want us to believe that? A. Yes.

Q. Was the agreement not signed in duplicate and handed over to you, the agreement with the duplicate, and it was lying on your table?

A. Never left her hands.

Q. Both copies?

A. Yes. She signed one, held in her left hand and never parted with those agreements. Otherwise the documents would have been in my possession.

20

Q. I suggest to you that those documents were handed to you duly signed and you, after Mr. Harji signed the cheque passed on the cheque to the Defendant? A. No.

Q. And it was after she had signed the duplicate and the original of the alterations. She then put a question "Have you sold this property to a member of our community"?

A. No. She didn't say that.

Q. Did she say anything to the same effect?

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A. Yes she said something but the remark she passed was that you can sell it to anybody.

Q. What was the occasion of her saying, "You can sell it to anybody, I don't care"?

A. It was the nominee.

Q. How did discussion as to a nominee arise?

A. They were discussing many names and she said, "You can sell to anybody, you can sell to Mr. Nanji".

Q. Even Nanji was mentioned? Was she quite happy if the property went to Nanji?

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A. Nanji is next door neighbour.

HIS HONOUR: How did this remark arise?

A. It was just a casual remark because Nanji has got an hotel there.

MR. KHANNA: I suggest to you that when she found

out that the property was going to Nanji she was very annoyed and tore up the agreement?

A. Nanji's name was mentioned long before.

Q. You cannot tell us how the occasion for mentioning Hasham Nanji's name arose but you are quite definite that it was mentioned? A. Yes.

Q. When she tore up the agreement did she stay for many minutes? She was very annoyed and left, is that true? A. Yes.

10 Q. When did you have occasion to remark that it is all due to a misunderstanding?

A. When she tore up the document and I told both of them that.

Q. You say that they were very angry with each other and still you want us to believe that they were quite happy to wash out the agreement? Is it your hope and belief that it was washed out and cancelled or is it a fact?

A. No. That was my impression.

20 Q. Can you not give us something concrete on which your assumption is based?

A. No. Except the impression. They were satisfied.

Q. I suggest that you are using the wrong word and that it was your imagination?

A. There is no imagination.

Q. You are unable to point out anything concrete in the way of a word from which any reasonable person could deduce that answer?

A. That was my impression.

30 Q. And it was on the strength of your impression I take it that you have since advised the Defendant, "don't worry everything is all right it is all settled"?

A. It was on this impression. I was quite satisfied that they had agreed. Nobody had objected.

Q. You are very easily satisfied.

HIS HONOUR: You say nobody had objected Mr. Ishani. Hadn't the Defendant's son told you that his mother had already got a letter from Harji which indicated quite clearly that he expected her to go through with the agreement? A. No My Lord.

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Q. You see Mrs. Khatijabai swore that on the very evening at 6.30 p.m. she got a letter from Mr. Khanna which made it quite clear that Mr. Harji expected her to go through with the agreement. She rang up her son and told him about that letter. Do

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you therefore mean to say that the son never mentioned it to you?

A. No he never mentioned anything. I was also very busy in Mombasa and they just called me outside at dinner time. I told them that there is nothing to worry about.

HIS HONOUR: As Mr. Harji was your client if there was anybody on the other side telling you there was a row is it not normal to say, "I must see my client first"?

A. There was no possibility of litigation at that stage because I was quite certain in my mind that they had agreed.

Q. Your client Harji had already told the Defendant that he was going to try and enforce this agreement and the Defendant had told her son and her son knew that when he saw you?

A. Just a very brief talk I had with him when they called me outside.

Q. You have seen the letter haven't you? It is from Mr. Khanna dated 19th February (Exhibit A7)?

A. No. I have not.

Q. You have never heard about this letter?

A. No. As I said in the beginning I came to know later on that letters were exchanged and I have never seen any letters.

Q. Do you know that after the meeting in front of you at which you say everything was settled both parties immediately dashed off to their advocates and wrote each other letters?

A. That I don't know.

Q. At any rate immediately after that Mr. Harji dropped you as his advocate?

A. I have no idea at all what was in their minds. I have never seen the notice and I don't know who started it all. I was told that the reason was because one had started the other did.

MR. KHANNA: Because one had started the other had started! Surely this is not a game that they play. If one sends a notice the other goes for a notice. There is no reference to this amicable settlement in any of the correspondence you can take it from me.

HIS HONOUR: Mr. Khanna, be careful, Mr. O'Donovan has already pointed out that there is one suggestion of it in a letter of 19th February. The notice says that there has been a misunderstanding on your part which you admitted. It doesn't go as

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far as to say that you further agreed that the document would not be binding, it merely says you admitted there was a misunderstanding.

MR.KHANNA: Did Mr.Harji say anything which would be misunderstood? Has he admitted that there was a misunderstanding? A. He never objected.

Q. Did he say anything. Will you please answer the question?

10 A. My Lord ten times my learned friend has asked me the question.

Q. You must answer specifically the question that is put to you. You had admitted that nothing was said to the effect that there was a misunderstanding. Did Mr.Harji behave in some peculiar fashion after your remark? A. No.

Q. You noticed nothing in particular? A. No.

HIS HONOUR: "He just stood up", I think you said, "And then they just left my office".

MR.KHANNA: And they were quite angry? A. Yes.

20 Q. When a settlement is made people usually calm down and say it's all right? A. Not necessarily.

Q. You know of settlements at which people are daggers drawn and also in a very embittered mood? A. There are many grades I think.

Q. Was it an unwilling settlement? Is that what you mean? Will you tell us what grade of settlement this was? A. Well there was no shake hands.

30 Q. How do you jump to this wild conclusion that there was a mutual amicable settlement?
A. To my mind it was just preferred, they left as if they were angry with each other.

Q. Did you promise to be their witness? When the story went to Mombasa did you give assurance to the mother that she could go to bed without any worry at all about this?

A. Yes. I told the son. There was no question of their mother being worried afterwards. The impression I got was that the mother was very glad about what happened.

40 HIS HONOUR: Where did you get that impression from? A. That was the sons.

MR.KHANNA: Did you tell them everything is all right I will go as witness?

A. I told them "This is a misunderstanding and forget about it". I was satisfied that they had forgotten about it. There was no question of court.

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No. 5.

Gullam Hussein Kassam Ishani.

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Cross- Examination - continued.

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- continued.

Q. Did you think you were the last word?

A. There was no question of court.

Q. How did you know there was no question of coming to court? A. It was settled in my office.

Q. Did you say you would be available to support their case for settlement?

A. There was no question of court.

Q. When did you know you were first requested to give evidence as a witness in this case?

A. The first was by Mr.O'Donovan. First he met me and came to my office and said a summons had been issued for attendance at the court. 10

Q. Was that the first intimation ever? A. Yes.

Q. How many months ago was that?

A. I cannot remember very well. I think may be two or three months.

Q. Apart from Mr.O'Donovan's approach two or three months ago nobody else has ever requested you? Did he take down a statement? A. Yes.

Q. That was two or three months ago? A. Yes. 20

Q. Had the defence been filed then?

A. I don't remember.

Q. He didn't tell you the details?

A. He just asked me what had happened.

Q. Did he not say "I have to find a defence". I want to know as much as I can from you"? A. No.

Q. It was then you knew you would be required as a witness?

A. No. Even then there was no question of being a witness. He just asked me two or three days back. 30

Q. Before coming to you did Mr.O'Donovan tell you that he had been given to understand by his client that you would be a witness for his side? A. No.

Q. Did he ask you whether you would be prepared to make any statement to him or why and on whose instructions he was trying to contact you?

A. Yes of course. The son had asked me.

Q. What did you tell the son that you would be willing?

A. No. He said he wants my statement that's all. 40

Q. When did the son ask you that?

A. That was two or three months back.

Q. How long before Mr.O'Donovan contacted you?

A. On the same day.

Q. Before that had there been any approach on behalf of the Defendant? A. No.

Q. When you gave him assurance that everything is all right don't worry, did you expect them to understand that you would come as a witness?

A. There was no question of witnesses. No court litigation at all.

Q. When did you talk to the Plaintiff when you say you question him about why the case had been filed?

10 A. The Plaintiff comes so often to my office and then I came to know that this case had been filed. I was told by him that this case had been filed long before.

Q. Did you tell Harji that it was your personal impression that the matter had been settled?

A. I asked him not to bring it to court.

Q. Did you mention the settlement?

A. Which settlement?

20 Q. This settlement that you have been talking about all along? Did you tell him that it was your impression that the matter had been settled?

A. No I just told him that it was all over and why go to court. He replied, "Because they wrote a letter".

HIS HONOUR: Did you ever send him a bill for the draft of this agreement?

A. I cannot follow my Lord.

Q. Did you ever send Mr. Harji a bill for the drafting of these agreements? A. Yes my Lord.

30 Q. Has he paid it? A. He has not paid so far.

Q. On that day did he not report that your impression must be faulty? A. No.

MR. KHANNA: Because he had never said or done anything that could convey that impression. Have you got a note of that interview of what he said?

A. Which interview?

40 Q. When you say that you told him everything had been settled and he admitted it? Do you want us to understand that Mr. Harji filed a case merely to have a little argument in court? A. No.

Q. Did he say he was going back on a settlement?

A. This was what he said because they had sent him the first notice alleging swindling.

Q. Did he give that reason?

A. To my mind he went back against the settlement.

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No. 5.

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Cross-Examination
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Q. Will you use the exact words?

A. The exact words were that when he came I told him that I understand a case has been filed. He said "It has been filed long before it was the alleging of those lies". He said that because Khatijabai sent him a letter alleging swindling and that he wanted to defraud her "So I make a case".

Q. Which particular words of Mr. Harji's did you seize upon to say that Harji admitted that there was a settlement before you on the 24th February? 10

A. His reply was simply that they sent him a notice alleging fraud so "I had to file it".

HIS HONOUR: Yes but that is not an admission on his part that the matter was ever settled is it. On this last occasion when you spoke to him and said "Why did you file the case" did he say anything which indicated that he agreed on the 19th February that the whole thing had been settled?

A. He didn't speak anything. It was my remark only as I said. 20

MR. KHANNA: Did you willingly lend yourself to Mr. Harji in obtaining the signatures of the Defendant fraudulently on the agreement?

A. There was no fraud at all.

Q. Was there no underhand business in your office?

A. No.

Q. Were she and Sultan present throughout? A. Yes.

Q. And the Defendant? A. Yes.

Q. At what stage did Sultan make the agreement?

A. Sultan made the agreement when I was explaining to her that her demand for 25,000/- was unreasonable because of the mortgage. I started explaining how can you have 25,000/- because purchase to release the mortgage is 81,000/- and you cannot have money more than 100,000/-. 30

HIS HONOUR: This was the first mention of the mortgage was it? A. Yes.

Q. You provided this agreement on the strength of the option and because the option was signed by the Defendant you thought it was safe to draw up the agreement on the same lines, and you let her sign it before reading it or explaining it to her? 40

A. Yes my Lord. I had two queries to make in the option; if she was the sole proprietor and that there were one or two alterations in the option of dates.

Q. You draft an agreement and put it in front of her without a word of explanation? How did she know about the 81,000/-?

A. She knows I have renewed it three times.

Q. There is nothing about 81,000/- in the option is there? And Mr. Harji didn't know either did he? A. Mr. Harji to my mind he knows it.

10 MR. KHANNA: Do you suggest that Mr. Harji knows about everything that you know concerning the Diamond Jubilee Trust?

A. Yes in this connection because he is an estate agent he knows.

Q. When the mortgage was made was he consulted?

A. No. He knows because she must have told him. There were three partners. Mr. Harji knows one partner has gone out and he immediately told me the second partner had gone out - he knew before myself.

20 Q. What right had you to put 4,000 on completion of transfer without consulting?

A. The question was after the 100,000/- I had put first 9,000/- 10,000/- deposit I remember (inaudible) and 81,000 goes to the company leaving 19,000/-. Then Harji offered to pay 15,000/- then I altered.

Q. Why should she not have made her own arrangements to pay the 81,000/-. Why should you put it in this agreement unless it was agreed?

A. Just to protect the purchaser.

30 Q. Surely when you say in the agreement that the purchaser shall receive the property clear of all encumbrances you must also see that it is carried out?

HIS HONOUR: Mrs. Khatijabhai knew nothing about the inclusion of the mortgage. She didn't know it was in and you didn't bother to read it to her?

A. She knew my Lord.

40 Q. How did she know? She knew there was a mortgage but she didn't know that you had put anything in this agreement about it which you pushed in front of her to sign.

A. The mortgage was in her knowledge.

MR. KHANNA: She could not sign this agreement and undertake to pay the mortgage herself. Why did you push the agreement under her nose?

A. It was just to protect the purchaser.

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HIS HONOUR: Is your way of protecting the purchaser to get the vendor to sign something which she does not understand?

A. Suppose now there was 81,000/- mortgage and I didn't know and they pay 25,000/- that means the vendor has been overpaid by the Purchaser.

MR. KHANNA: You have here put in 85,000/- to be paid on presentation of documents of transfer which can be executed by both parties within six months from the date of transfer of this agreement. Did you put this in also out of your head? 10

A. Yes, because I also made the first agreement.

Q. And without getting her to agree to them you took her signature? Did you think that was honest?

A. It was to her benefit.

Q. What you consider to the parties benefit you never told them about or got their formal agreement? A. I think that was in her benefit.

Q. Because you thought it was in her favour you thought there was no need to tell her? Why in this case? A. There was no time I was in a hurry. 20

Q. Had you any right to take on the work if you were in a desperate hurry? You charged the full fee did you not?

A. I don't know what full fee I charged.

Q. Was it not your duty to give in return the fullest services that any advocate can give?

A. I have given the fullest services to the purchaser.

Q. If you are in a hurry you have no business to take on this job? 30

A. I think I have done justice to the purchaser.

Q. And injustice to your Aunt? I put it to you finally that you are making all this up to defend the case for your Aunt?

HIS HONOUR: Where is the third copy of this agreement?

A. My Lord I don't know about that. The clerk brought these three copies and then it never came into my possession these copies. 40

Q. You said earlier on that when you provide an agreement like this you do two copies for the clients and one for yourself?

A. I said that I scribbled down the agreement I gave it to the clerk and don't remember when she signed these things. But definitely even in the

duplicate its my surprise that she has signed. And even the corrections I have no idea that she signed the corrections.

HIS HONOUR: You think she signed all three?
A. Yes.

Q. And you were in too much of a hurry to look after your own copy?

A. Unless they signed and give it to me at the time she signed I got nothing absolutely nothing.

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Defendant's Evidence.

No. 5.

Gullan Hussein
Kassam Ishani.

3rd May, 1955.

Cross-
Examination
- continued.

Re-examination.

10 RE-EXAMINED BY MR. O'DONOVAN:

Q. A question was put to you about your suspension. Did you appeal?

A. Yes. I appealed to the East African Court.

Q. Did the East African Court emphasize in their judgment that they would not for one moment suggest that you had been guilty of any moral turpitude?

A. Yes.

Q. No client of yours had in fact suffered financially, is that correct? A. Yes.

20 Q. Is this a copy of their judgment? A. Yes.

MR.KHANNA: My Lord I object to this being used in evidence.

HIS HONOUR: I don't see any objection to putting it in Mr.Khanna.

MR.ISHANI: My Lord, Mr.Khanna has maliciously attacked my character I am entitled to

HIS HONOUR: That is all right Mr.Ishani I am admitting the judgment. Tell me this though, do you still think that it was quite unnecessary to read over this agreement to Mrs.Khatijabai?

30 A. No. Because it was an option before me and certain facts I knew and I was in a hurry.

Q. You have no regrets. You found no fault with your own conduct?

40 A. No my Lord. I have never gone away from the option. Whatever was in the option I put down and so far as the 81,000/- is concerned, I knew and I wanted to protect the purchaser. I would not agree to her being paid more at all otherwise I would have asked Mr.Harji to pay 25,000/-.

MR.O'DONOVAN: With regard to the signature would you look again at Exhibits A2 and A4. You notice on A2 that there are certain corrections which have

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Re-examination
- continued.

not been initialled. In the normal course of events which would be signed first the original or this carbon copy? In the normal course of events if that alteration had been put in before she signed that original would you or would you not have said to her, "Put your signature there too"?
A. Yes I would have.

Q. Look at the carbon copy A4. You see there the corrections are signed. Could you infer from that that somebody must have said to her put your signature in this place? Would you agree that that must have happened?

10

A. No, because from this one can notice that she the Vendor signs after purchaser signs and then I put the date

Q. Mr. Ishani, perhaps you have not heard my question. Looking at A4 carbon copy - remember you are dealing with an illiterate woman?

A. She knows her vernacular language.

Q. You are dealing with a non English speaking person then. As a matter of routine would somebody have told her where to sign that copy?

20

A. I don't know.

Q. Comparing these two documents, that is to say the original has an alteration unsigned or initialled and the carbon copy of which has the alteration signed. What would you have to say about the probability as to whether the question about payment of the 15,000/- was agreed before or after the signature of the original?

30

A. As I said before I don't know whether the signature and the alteration - what was their relation at all.

Q. Wasn't it about the time of signing that she raised the question of payment?

A. She was raising the question of payment quite from the beginning. Then Harji said all right make it 15,000/-.

Q. If the alteration had been put in the original before she signed it would you or would you not in the normal course of events have required her to sign the alteration?

40

A. Yes I would require her to sign the alteration, and I would require even Harji to sign. It is not dated even.

Q. Would you infer from that that the alteration was not made on the original when she signed it?

A. I don't remember but it seems so.

- Q. Look that the document which you had drawn up prior to this one, that is to say during the first interlude, between the Plaintiff and Nanji and yourself. Did you show that document (Exhibit A6) to the Plaintiff at that first interview?
- A. It was on his instructions that I have made it.
- Q. Did he see what you have written down?
- A. Yes both of them.
- Q. Do they speak English?
- 10 A. Yes quite reasonably well.
- Q. In A6 you mention a mortgage of 81,000/-?
- A. Yes.
- Q. Having regard to that would you say that Mr. Harji knew or didn't know about this mortgage before he brought Mrs. Khatijabai to your office?
- A. He knew and I knew.
- Q. Did you have any discussion with Nanji and Harji about the mortgage at the first interview?
- 20 A. Yes. I am putting this that there is a mortgage of 81,000/- which should be paid to the trust.
- Q. Have you continued from since this incident to act for Mr. Harji as advocate? A. Yes, frequently.
- Q. And when did he last ring you up?
- A. He must have brought work about two or three months back.
- Q. You say you recollect the name of Mr. Hassan Nanji being mentioned in conversation? A. Yes.
- Q. Conversation between whom?
- A. Between Khatijabai and Harji.
- 30 Q. Were they talking to each other? A. Yes.
- Q. Can you remember the context in which the remark cropped up?
- A. No, because Khatijabai knew he is not buying for himself and he wants to sell. She said you can sell it to anybody even Mr. Nanji.
- Q. You were not taking part in the conversation?
- A. No. No.
- Q. In point of time was that prior to the signature or after?
- 40 A. No that was prior to the signature.
- Q. Well before? A. Yes.
- Q. The suggestion has been put by the defence that the reason why Mrs. Khatijabai refused to go on with the agreement was that she had discovered that it

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was, the property, to be resold to Mr. Nanji or his
company or his friends. Is there any truth in
this? A. No. No. No.

Q. Did she make it clear that she refused to go on
with the agreement?

A. She said I am selling only one plot.

No. 6.

Amina Hasham.

3rd May, 1955.

Examination.

No. 6.

EVIDENCE OF AMINA HASHAM

AMINA HASHAM (Sworn):

Examined by Mr. O'Donovan.

Q. What are your full names? A. Amina Hasham. 10

Q. Are you a relative of the Defendant Mrs. Khati-
jabai? A. Yes.

Q. What is your relationship? A. She is my cousin.

Q. You remember her staying in February last year
in your father's house? A. Yes.

Q. That was about the middle of February? A. Yes.

Q. You recollect one morning when Mr. Harji came to
the house? A. Yes.

Q. You know Mr. Harji? A. Yes.

Q. Did you know him before then? 20

A. Yes. I know him as an Ismaili.

Q. Do you remember the date on which he came?

A. No. I don't remember the date.

Q. Would you tell His Lordship in your own words
what happened so far as you were concerned on the
occasion of his visit?

A. I was passing by when the Plaintiff and the
Defendant were sitting in the house. I was called
by Mrs. Khatijabai. When I went there Mr. Harji
asked me to sign on a paper which was already
written up. Mr. Harji also told me that this is
the signature of Khatijabai and to witness that
you put your signature. And I signed there and
went off. 30

Q. Did you see Mrs.Khatijabai's signature on this paper? A. Yes.

Q. Did you read what the paper said? A. No.

Q. It is suggested that you yourself carefully translated it to Mrs.Khatijabai. Is that true?

A. That is a false story.

Q. Is that all you know about that incident?

A. Yes Sir.

10 Q. Would you recognise the piece of paper again if you saw it? A. Yes Sir.

Q. Will you look at Exhibit A1. Is that your signature at the bottom on the left hand side?

A. Yes.

Q. What is your age? A. 18 years.

Q. Did you consider that you had any right to interfere in the business dealings of a lady very much your elder in your community?

A. Yes Sir. I am entitled to interfere in such things according to my age.

20 HIS HONOUR: You work for East African Airways don't you? A. Yes.

Q. Do you need an interpreter between you and Mr. O'Donovan? A. No.

Q. In your community how do you treat your elders? Do you treat them as your betters?

A. We keep respect of elders.

30 Q. If a person very much your senior in age says or requires you to witness a signature and that is all, would you consider you had any right to become curious about what it is all about?

A. I cannot interfere. It is disrespect if I do so.

CROSS-EXAMINED by Mr.KHANNA:

MR.KHANNA: Have you discussed your evidence with your cousin the Defendant? A. Yes Sir.

Q. How often? A. Once or twice.

Q. When did she first ask you to be ready as a witness? A. When she came back from Mombasa.

Q. How many days after you witnessed her signature?

40 A. Not days but months elapsed between these two incidents.

Q. When were you first told that there was a dispute over that document?

In the Supreme Court of Kenya

Defendant's Evidence.

No. 6.

Amina Hasham.

3rd May, 1955.

Examination - continued.

Cross-Examination.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 6.

Amina Hasham.
3rd May, 1955.

Cross-
Examination
- continued.

A. Sometime before from today. I am not sure about that.

Q. Your cousin requested you to come in? A. Yes.

HIS HONOUR: Did she say it was she and not Mr. Harji who asked you to come in and witness the signature?

A. I was called in the first instance By Khatijabai.

MR.KHANNA: In whose hands was this paper when it was given to you? (Exhibit A1).

A. It was lying on the stool. 10

Q. Did you pick it up yourself?

A. I didn't pick it up.

Q. I suggest to you that that paper was put into your hands by the Defendant who asked you to read it over to her and explain it to her? A. No Sir.

Q. Did you know that your cousin the Defendant could not read or write? A. Yes I know.

Q. Has she never asked your assistance to read anything in English to her ever before? A. No Sir.

Q. I suggest to you that the paper had not been signed when it was handed over to you? 20

A. No. The paper was already signed by Khatijabai.

Q. Can you tell me what words were on that paper on that day? Is it exactly as it was on that day?

A. I have no idea My Lord because I never read the contents of the document I only saw the signature of Khatijabai.

Q. I suggest to you that she called you in order that you could read and explain the contents to her? A. No Sir. 30

Q. I suggest that you did in fact read a translation to your cousin?

A. No Sir. I did not read it.

Q. And it was after that that the Defendant signed it? A. I have neither read nor explained to her.

Q. Did you ask your cousin whether it was her signature?

A. When Mr.Harji told me to witness the signature of Khatijabai I looked towards Khatijabai and she nodded in consent. 40

Q. You made sure that your cousin acknowledged it was her signature before you witnessed it?

A. Yes Sir, I made sure.

Q. And although you knew that she didn't understand

English it didn't occur to you to ask if she knew what was in it?

A. No Sir because I didn't want any sort of interference.

Q. Did you make sure that your cousin assented that it was her signature?

A. Yes Sir. I looked at her and saw her wave her head in consent.

10

Q. And you think that was signed before you actually witnessed it?

A. It didn't occur to me in that sense but when I was told by Harji that this signature is that of Khatijabai I looked at her and she nodded.

Q. Do you mean then that you didn't even know what it was all about. Whether it was in connection with property or contracting a marriage or what, you don't know?

A. I occurred to know I didn't enquire or ask.

20

Q. When did you first come to know of the character of the document you witnessed? Do you know what this document is about now? A. Yes Sir.

Q. In connection with what?

A. In connection with a plot.

Q. When did you first realise that this document was in connection with a plot?

A. When there was talk and discussion in the house.

Q. How long after you put your signature to this document? A. That I don't know.

30

Q. Did you swear that on that day, 18th February you didn't know whether it was related to a plot or a marriage? A. Yes Sir. I never knew that then.

Q. Did the document rest on the stool while you signed it? A. Yes Sir.

Q. You must have looked at it casually? A. Yes.

Q. And a casual glance did not indicate that it was something to do with a plot?

A. No Sir. It didn't occur to me even by a casual glance.

40

Q. Can you easily read and recognise English handwriting? A. Yes Sir.

Q. Can you read this. Will you read it?

A. Re my house on Slater Road up to 1 p.m. to you or to your - (Witness reads whole letter with the exception of the last word) (Exhibit A1)

In the Supreme Court of Kenya

Defendant's Evidence.

No. 6.

Amina Hasham.

3rd May, 1955.

Cross-Examination
- continued.

A.1.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 6.

Amina Hasham.

3rd May, 1955.

Cross-
Examination
- continued.

Q. Has your cousin stressed the importance from her point of view of your saying that this document was not read or explained to her?

A. Yes. She says so.

Q. You tell us that you are so dutiful and obedient as to carry out the directions of your elders. Are you so dutiful and obedient as to carry out instructions even to the extent of helping them by saying what they want you to say?

A. If the person is of my family or among my relations I do whatever they say, as a dutiful child should. 10

Q. Have you sufficient independence and strength of character to be able to give evidence against your own mother if she were charged with murder. Would you consider yourself independent enough to tell the truth? A. Yes Sir.

Q. How can you reconcile the two statements? A minute ago you said you carry out, you are dutiful and do whatever you are told. Even if you are told to give evidence according to their desires you will give it and on the other hand you say you are independent enough to be able to tell the truth against your own mother? 20

A. I will do what my conscience says.

Q. I suggest to you that you are carrying out the bidding of your cousin in this matter in denying that you never explained it to her?

A. No Sir. I neither read nor explained it to her.

HIS HONOUR: Mrs. Khatijabai was staying at your father's house was she? A. Yes Sir. 30

Q. Do you remember what time of day you signed this document? A. Morning.

Q. Was it before you went to work or was it not a working day?

A. On that day my Lord I was not in work, in service.

Q. Do you remember what day of the week it was?

A. No Sir.

Q. And the next day was Mrs. Khatijabai still staying in your house? A. Yes. 40

Q. And did Mr. Sultan come round to the house?

A. Not to my knowledge.

Q. You remember that night, that is the night of the day after you signed this document, whether there was some discussion about selling land?

A. The discussion might have taken place but I don't know before anything about.

Q. Do you remember if a letter was delivered to Mrs. Khatijabai about 6.50 p.m.?

A. No Sir I don't.

Q. Have you got a telephone in your house?

A. Yes Sir.

Q. Was a call put through to Mombasa?

A. I don't know Sir.

Q. Have you read this document before today?

A. No Sir.

10 Q. Did you know before you came into court what this document was about?

A. Yes Sir. I knew before coming to court.

Q. When did you know?

A. A week before from today Sir.

Q. Who told you?

A. When Mrs. Khatijabai came from Mombasa she talked to me.

Q. And she told you what was in the document did she? A. Yes Sir.

20 Q. Did she tell you what was wrong with the document? A. Yes Sir.

Q. What did she tell you was wrong with it?

A. She said she wanted, she had in fact sold half an acre but two acres are mentioned in the document.

Q. Did she tell you why she signed it or not?

A. That she didn't tell me.

Q. Did you know that you would have to give evidence that the document was not read over before you signed it?

30 A. Yes Sir. I knew after a talk with Khatijabai.

RE-EXAMINED BY MR. O'DONOVAN:

Q. Have you told the truth? A. Yes.

Q. Has anybody put those words into your mouth?

A. No Sir.

Q. Has anybody instructed you what you had to say?

A. No Sir.

Q. Are you capable of telling the truth even in spite of your relationship to the present concern?

A. Yes Sir.

40

Court Adjourned 4 p.m.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 6.

Amina Hasham.

3rd May, 1955.

Cross-Examination
- continued.

Re-Examination.

In the Supreme
Court of Kenya

No. 7.

EVIDENCE OF SADRU DIN NANJI.

Defendant's
Evidence.

10.30 a.m. Wednesday, 4th May, 1955 Third Day
Court as before.

No. 7.

Sadru Din Nanji.
4th May, 1955.
Preliminary
Examination.

SADRU DIN NANJI, (Sworn)

Examined by Mr. O'Donovan:

Q. You are one of the sons of the Defendant?

A. Yes.

Q. You knew that your mother was the owner of some property near the Mayfair Hotel in Nairobi? A.Yes. 10

Q. I think that towards the end of 1953 an agreement was entered into with Mr.Ghulam Karim, who was the co-owner in respect of the purchase of his half share? A. Yes.

Q. You know that of your own knowledge? A. Yes.

Q. Do you know how much had to be paid?

A. We had to pay him Shs.55,000 and my mother had to pay Shs.81,000 in respect of the mortgage with the Diamond Jubilee Trust.

JUDGE: His share of the total part of two acres was one-third or one-sixth? A. One-third. 20

Q. When was that? A.1953.

MR.O'DONOVAN: You took over the mortgage and agreed to pay Shs.55,000?

A. Yes, and my mother became the owner of the whole plot.

Q. At that time how much of the Shs.55,000 had been paid?

A. Shs.25,000 to Messrs. Madan & Shah, and an agreement of sale was drawn up. 30

Q. So there is Shs.30,000 still due? A. Yes.

Q. There is a house on the property - was it occupied during 1953?

A. Yes, and I remember we got vacant possession of the house at the end of 1953.

Q. What rent had been received prior to that?

A. We used to get Shs.355 per month, plus municipal rates which used to come to Shs.1,600 per year.

Q. Did any discussions occur with regard to the property after the tenants vacated it? 40

A. Yes, in Mombasa, at our house. It was in January, 1954. My mothers and my brother decided to see if we could fetch a good price for the half acre and the house.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 7.

Sadru Din Nanji.

4th May, 1955.

Preliminary
Examination
- continued.

Q. Did you decide to sell? A. Yes.

Q. What? A. The house and the half acre.

Q. Do you know whether a sub-division scheme had been submitted to the Municipal Council in respect of the plot?

A. In 1953 I went to the Municipal Council and enquired about the plot, whether the sub-division had been approved, but I was told by the clerk that the sub-divisions were approved in 1948.

10 Q. Did you get a copy of the sub-division as approved? A. Yes.

Q. Is this it? (Shown to witness) A. Yes.

JUDGE: Where did you get this from?

A. The Municipal Council.

Q. Where did they get it from? A. From their file.

Q. How did it get into their file? (No reply).

MR. O'DONOVAN: Do you know who prepared the plan?

A. No.

20 Q. What price did you decide upon in Mombasa?

A. £500 for the half acre and the house.

Q. Did you come to Nairobi in February of last year? A. Yes.

Q. Did you come alone or with anybody?

A. I came alone.

Q. Where did you stay? A. At the Garden Hotel.

Q. Where was your mother? A. She was in Nairobi.

Q. Where was she staying? A. at her uncle's place.

Q. Had she come before you or after you?

A. Before me.

30 Q. Did anything occur while you were here with regard to this property? Did you see anybody or talk to anybody?

A. I remember after 2 or 3 days my mother and I went shopping. My mother saw Mr. Harji coming towards us in the opposite direction in the same street. My mother said. "Here is Mr. Harji; he is a broker and estate agent. Let us go and talk to him about that offer of property we had decided to sell".

40 Q. Did you know he was an estate agent and broker?

A. Yes.

Q. Is he well known as such? A. Yes.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 7.

Sadru Din Nanji.

4th May, 1955.

Preliminary
Examination
- continued.

Q. Then what happened?

A. Mr. Harji came to us and there was some conversation about my mother's intention to sell the half acre plot, plus the stone building for Shs.100,000.

Q. Did you hear everything that was said? A. Yes.

Q. Were the sub-divisions discussed?

A. Yes; he asked us whether there were any sub-divisions. When I said it was a half-acre plot, he wanted to know whether the sub-divisions had been approved. I said that as far as I could recollect they had been approved by the Municipal Council. 10

Q. Was the position explained to Mr.Harji? A.Yes.

Q. Was any enquiry made about the exact acreage?

A. Yes, Mr. Harji enquired whether it was exactly half an acre. I said I could not tell him exactly but that it was about half an acre.

Q. Did you learn whether he had any previous knowledge of this plot?

A. He said, Don't worry, I will find out myself. 20

Q. Was there any discussion about his reactions to the price which you mentioned of Shs.100,000?

A. Yes. He asked me to request my mother to agree to a figure of Shs.80,000 or Shs.85,000. I said that I did not think my mother would agree to that.

Q. What did he say? A. He said, I will try.

Q. Was there any discussion at that time about any option to be given to anybody? A. No.

Q. Are you sure? A. Yes.

Q. Was there any discussion at that time fixing any appointment for Mr.Harji to see your mother the next day, or anything of that sort? A. No. 30

Q. Are you sure? A. Yes.

JUDGE: Do you know the date of this conversation?

A. No, but I was here in the middle of February.

Q. What time of the day was it?

A. It was about 11.30 in the morning.

Q. When did you go back to Mombasa?

A. The next day.

Q. By train? A. By the evening train.

Q. Now by the time you returned to Mombasa had to your knowledge anything further occurred?

A. Nothing.

MR. O'DONOVAN: Did you see your mother before leaving? A. Yes, the next day.

Q. How long before you left? A. It was before going to the train.

Q. How long before? A. An hour.

Q. And did she indicate to you that anything had occurred? A. Nothing.

Q. How long after you arrived in Mombasa did you first hear anything further about this property?

10 A. It was after two days, when I had got back from the pictures.

Q. What happened? A. My brother spoke to me that something had happened in Nairobi in connection with this plot, that my mother had given an option to Mr. Harji to sell for half an acre, but that the option unfortunately mentioned 2 acres.

Q. You had your brother there? A. He had telephoned from Nairobi.

JUDGE: At what time? A. About 9 o'clock.

20 MR. O'DONOVAN: Do you remember the day of the week? A. Friday.

Q. Did you get any further messages the next night? A. I do not know.

Q. When did you next see Mr. Harji? A. I saw him on Sunday.

Q. The following Sunday? A. Yes.

Q. Where? A. At the Railway Station in Mombasa.

Q. At what time? A. I cannot say when the train arrived.

30 Q. Did you go there to see him? A. Yes.

Q. Why? A. Because my brother told me that he had a telephone call from my mother that Mr. Harji had left for Mombasa.

Q. What day was that? A. Saturday - and I tried to get the keys from Mr. Harji.

Q. Did you speak to him? A. Yes, I asked him... (inaudible) and if he wanted a key for the house. He said it was none of my business.

Q. He dismissed you? A. Yes.

40 Q. It is suggested that your family are on terms of grave animosity with the family of Mr. Hasham Nanji? A. No, that is not true.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 7

Sadru Din Nanji.

4th May, 1955.

Preliminary Examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 7

Sadru Din Nanji.

4th May, 1955.

Preliminary
Examination
- continued.

Q. You know Mr. Hasham quite well? A. Yes.

Q. Was he in the habit, up to February, 1954, of coming to Mombasa? A. Yes, sometimes.

Q. When he came to Mombasa did he ever come to your house for meals? A. Many times.

Q. At whose invitation? A. At our invitation.

Q. I believe there are some differences between your family and his which are the subject of pending litigation? A. Yes, some disagreement about business. 10

Q. Does that make you bitter enemies? A. No.

Q. Since February, 1954, have you seen Mr. Hasham in Mombasa? A. So far as I can recollect, I have not seen him.

Q. Have you since February, 1954, received any invitation from Mr. Hasham? A. I had an invitation from Mr. Hasham; he invited me to lunch.

Q. Were there any invitations previous to February, 1954? A. Yes.

Q. Does Mr. Hasham, when he comes to Mombasa, ever live in your house? A. Yes. 20

Q. Do you ever see Mr. Harji in Mombasa? A. Often.

Q. He called on you when he goes there?

A. When we used to have a restaurant in Mombasa he used to come and see us there.

Q. Did he ever come to your house? A. Yes.

Q. Since your father's death? A. Yes.

Q. Many times? A. Twice.

Q. Did he ever consult you about market conditions in Mombasa? A. Yes. 30

Q. Did you ever consult him about market conditions in Nairobi? A. Yes.

Q. How did you regard Mr. Harji?

A. As a respectable and reliable man.

Cross-
examination.

Cross-examined by MR. KHANNA:

Q. I suggest that your evidence is a tissue of lies and is made up to support your mother?

A. No.

Q. Can you say definitely during what days in the middle of February you were in Nairobi?

A. I can tell you exactly because, as I told you, we used to run a restaurant in Mombasa. There was a conference in Mombasa and I was handling it for the restaurant. A dinner was arranged for 28th February, but 7 days previous to that I had to go to Nairobi on certain business and had to return to Mombasa before 28th to arrange for the dinner party.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 7

Sadru Din Nanji.

4th May, 1955.

Cross-
examination
- continued.

10 JUDGE: Your date was at Mombasa on 28th?

A. On 20th.

Q. Were you back by 20th?

A. I was back in Mombasa 2 or 3 days before the 20th.

MR. KHANNA: When did you come to Nairobi - on 13th or 14th? A. I cannot remember.

Q. How many days were you in Nairobi?

A. 4 or 5 days.

JUDGE: Do you remember if the 20th was a Saturday?

A. I do not know.

20 MR. KHANNA: You were here for 4 or 5 days, all of which you spent at the Garden Hotel? A. Yes.

Q. There would be a record of your stay there?

A. There may be. I did not sign the book - they know me well.

JUDGE: Did they give you a bill? A. Yes, but I don't know where it is.

MR. KHANNA: They would have a duplicate of the Bill?

A. I think so.

30 Q. Have you made enquiries at the Garden Hotel to find out the exact dates you were there?

A. I have not.

Q. Were you on the 18th, 19th and 20th February in Mombasa? A. Yes.

Q. And the 17th? A. I am not sure about the 17th.

JUDGE: You left Nairobi on Tuesday, 16th? A. Yes.

MR. KHANNA: Let me take you to your evidence with regard to this agreement between Karim and your mother. That agreement is in writing? A. Yes.

40 Q. You have a copy? A. My elder brother has it.

Q. Were you present when the agreement was settled in Madan & Shah's office? A. No; my brother was there and he told me.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 7

Sadru Din Nanji.

4th May, 1955.

Cross-
examination
- continued.

Q. You are telling us what your Brother has told you? A. Yes.

Q. Does your mother attend lawyer's offices? A. Yes, when we request her.

Q. Do you know if your mother had arranged this contract with G.H. Karim? A. I was not present.

Q. Do you know whether your mother finalised it? A. My mother and my elder brother.

Q. Was the agreement made in the presence both of your mother and your brother or only one person? A. That I cannot say. 10

Q. Is your mother not an active woman who likes to know what she is doing? Or is she merely a signing machine? A. No.

Q. She likes to make a bargain herself? A. Whenever she wants to make a bargain or we wish to make a bargain, we always consult each other.

Q. She might consult you, but is it her own decision? A. So far as I can remember, she has never made any bargain by herself. 20

Q. Does your mother take an active interest in the purchase and sale of property, or does she take a passive interest; whatever you do she endorses at your request? A. She trusts us.

Q. That is not answering the question.

JUDGE: It is more a question whether you trust her to do the dealing and bargaining? A. We do trust her.

MR.KHANNA: She is quite a capable woman. She knows about business affairs? A. She knows something about business affairs, but she does not understand anything about legal things. 30

Q. She knows about the commercial side of property? A. She knows about values of property. I cannot say.

Q. Does she know the value of her own property? A. I do not know.

Q. Does she make any real contribution in the discussions when decisions are taken to buy or sell property? A. No. 40

Q. She keeps silent? A. Not exactly.

Q. To what extent does she take part in the discussions? A. She contributes to the conversation whatever she thinks fit.

Q. Does she make any sensible suggestions with regard to the buying or selling of property?

A. I do not remember.

Q. Your mother has told us that she is the binding influence in the family since your father's death?

A. Maybe; I cannot say.

Q. Would you have us believe that she is a woman with no idea of the value of properties and no idea of business matters? A. Yes.

10 Q. So she is not telling the truth when she says in the box that she understands business matters and property matters.

MR.O'DONOVAN: (to Judge) That, in my submission, is a distortion of what the lady said. She said that she had no idea of legal formalities.

JUDGE: We have got the actual words on the record, but my recollection is that, apart from legal technicalities, she did claim to be an average business woman. (to witness): Has she in your opinion
20 got good business judgment or no business judgment at all? A. She has, but in what capacity I cannot say.

Q. You were not consulted about the Shs.55,000 deal? A. I do not remember.

Q. Is this the first time you have been consulted about buying or selling part of the family land?

A. Yes.

MR.KHANNA: Your mother said that she has a very good appreciation of property matters and that she used to advise her husband? A. I was too young
30 to know that.

Q. Would you say that her claim to having a good judgment in property matters - an independent judgment - is a true one or not? A. She has never disclosed her independent opinion to me or to us.

Q. Has she taken no part in the differences you had with Mr.Hasham over property held jointly?

A. Our two brothers are the joint administrators of our estate.

40 Q. I asked you about your mother - to your knowledge has she taken any part in instructing advocates or in instructing the two administrators how to go about matters? A. If she has, then it is not within my knowledge.

Q. Do you know that before a plot can have a separate existence, it has got to be surveyed, beacons

In the Supreme Court of Kenya

Defendant's Evidence.

No. 7

Sadru Din Nanji
4th May, 1955.

Cross-examination
- continued.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sadru Din Nanji.

4th May, 1955.

Cross-examination - continued.

laid and a survey plan prepared?

A. Yes, I know that.

Q. Did you know that a sub-divided plot cannot be transferred unless a deed plan is also agreed?

A. Yes, but an agreement of sale could be made.

Q. Did you intend only to enter into an agreement for sale or to sell a portion? A. At that time we did not arrive at any final decision. We only arrived at the decision that such a price is very good.

10

Q. You had not decided to enter into an agreement to execute a conveyance? A. Yes, in respect of the portion.

Q. Well knowing that you were not then in a position to do it? A. It was our intention to sell.

Q. And to execute a conveyance in favour of the purchaser? A. That was not certain. We talked to Mr.Harji that we wanted Shs.100,000 in respect of this portion of land, together with the building on it. He said he would find a prospective buyer for about Shs.80,000 or Shs.85,000, but we insisted upon Shs.100,000.

20

JUDGE: The point is that you did not realise that you were not capable of giving a legal title to anybody who bought that portion? A. It was our intention, in the event of Mr.Harji finding a prospective buyer, to approach a lawyer to have all the formalities settled.

Q. You did not realise that an immediate legal title could not be given to a purchaser?

30

A. I did not realise it.

MR.KHANNA: When did you first realise that you were not in a position to confer a legal title?

A. I realised just now, in Court.

Q. When I put the question to you - not earlier?

A. Yes.

JUDGE: Until today you thought all the formalities of division had been completed? A. I was under the impression that it was within the jurisdiction of an advocate to do all these things.

40

MR.KHANNA: Do you know what a vacant plot of half an acre without a house is worth?

A. I cannot say; I have no experience.

JUDGE: You do not know anything about transfers of land or land values, or anything about land in Nairobi? A. No.

Q. And you do not seriously suggest that anybody would take your advice in connection with a deal in land? A. My advice would be futile.

MR. KHANNA: You would not intervene to protect your mother over any quotations she might make to anybody? A. Yes, I will not intervene if it is outside my capacity.

JUDGE: You had your dinner party on 20th?

A. Yes.

10 Q. Was it the next day you saw Mr. Harji on the train or 8 days after? A. Next day.

MR. KHANNA: On Sunday, 21st do you remember going to the station? A. Yes.

Q. Do you remember taking a policeman with you? A. No.

Q. Was anyone with you? A. No.

Q. Have you a police inspector friend? A. No.

Q. Do you know the man who acts as Court Bailiff at Mombasa? A. No.

20 Q. You do not know him at all? A. No.

Q. Don't you know that fat chap who looks like an Arab, but is not an Arab? A. How should I know.

Q. He was not with you on this Sunday? A. No.

Q. Did you not offer threats to Mr. Harji on that Sunday, backed up by that policeman? A. No. I simply asked for the key.

30 Q. Did you not tell him that unless he gave up the key you would attack him bodily? A. I asked him for the key. He replied that it was none of my business and that my mother could see the advocates.

Q. Were you not told by your mother that, the matter was also in the hands of the advocates and that letters had been exchanged? A. My brother attended to the telephone call and never talked directly to my mother about this.

Q. Did your brother tell you that letters had been exchanged between advocates?

A. He did not talk about that.

40 Q. He merely instructed you to go and ask for the keys? A. He said such and such an incident has happened in Nairobi and that Harji is coming down.

....

JUDGE: What sort of incident? A. Then my mother gave an option in respect of half an acre.

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Defendant's Evidence

No. 7

Sadru Din Nanji

4th May, 1955.

Cross-examination
- continued.

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Defendant's
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No. 7

Sadru Din Nanji.
4th May, 1955.

Cross-
examination
- continued.

Q. What was Mr. Harji's attitude about this option or agreement of sale. When you heard the telephone call, did he say that there was a dispute between your mother and Mr. Harji or not? A. My brother conveyed to me in the name of Ishani that Ishani has said the matter is settled, and he also said that Ishani was coming down on the same train.

MR. KHANNA: Did your brother tell you to tackle Mr. Harji and get these keys at any cost? A. No. He just told me to go and ask for the keys. 10

Q. Did he tell you that he would be carrying the keys on the train? A. No.

JUDGE: Did your brother suggest that he had spoken to Ishani on the telephone or not? A. No.

Q. You mean your brother said that Ishani said it was all right because that is what your mother had told him? A. Yes, my mother conveyed to my brother on the 'phone all these things; that this incident has happened, and even Ishani said the matter is over. 20

MR. KHANNA: Did you speak respectfully to Mr. Harji, or did you talk in a threatening attitude? A. With all due respect.

Q. You did not come to words with him? A. No.

Q. You deny all knowledge about threatening him that he would not be bodily safe? A. Yes.

Q. Since the difference between your family and Hasham's family, do you suggest that there has not been any acrimony or rivalry between you in business matters? A. No. 30

Q. Do you know that your family wanted to put up a competing hotel on this plot? A. No.

JUDGE: Never heard the suggestion before?

A. No. I was schooling. I left school in December 1950.

Q. How old are you now? A. 22.

MR. KHANNA: You would not know if any acrimony existed between the two families or not?

A. Apart from some disagreement with regard to business matters, our relations are very cordial. 40

Q. Mr. Hasham tells me that what you have told the Court is quite untrue, that he has never extended any invitations after the differences?

A. Invitations have been extended and we have accepted.

Q. You have had meals at his place after the filing of this suit, in which Hasham Brothers are also claiming to be reimbursed in respect of damages.

Did you accept this invitation last week?

A. Because I was busy. I did not accept.

Q. But every other invitation you accepted?

A. I cannot say positively but when we were invited we used to accept certain invitations.

10 Q. It is a standing invitation to your family to drop in for lunch? A. Not that way. Whenever any member of the family used to visit Nairobi and used to see Mr. Hasham he used to extend invitations.

Q. Do you make it a practice to call on Mr. Hasham whenever he is at his hotel or residence?

A. We used to see him in the mosque. We would meet either between 8 and 9 in the morning or between 6.30 and 8 in the evening.

20 Q. And would he extend to you an invitation for that evening or for the next day? A. According to his convenience.

Q. Would he say, Come after 7 days for lunch?

A. He is at liberty to say so if he wishes.

Q. I suggest that you are making up all these invitations. How could you have accepted those invitations if you were coming here for only a day or two at a time? A. Sometimes we stayed here for 5 or 6 days.

30 Q. Would he take out his diary and say, I can invite you to lunch on such and such a day only?

A. No; he would say, To-morrow we will dine together.

Q. And you accepted his invitation each time and next day you would go and have a meal? A. Yes.

Q. So if you happened to go to the mosque and if you happened to meet Mr. Hasham, you would get an invitation? A. Apart from meeting him at the mosque we might meet on the way and he might extend an invitation.

Q. If there was a chance meeting he would say, Come for lunch? A. Yes.

Q. I suggest that there is no truth in what you are asserting? A. It is true.

Q. Now with regard to Mr. Harji, I suggest that he was not a visitor to your home? A. He has come to our house.

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Q. Have you invited him to your house? A. No.

Q. Since your father's death he has only called once and that was for only a few minutes?

A. I am not precise about minutes; I never calculated the time.

Q. But you were away somewhere else?

A. I was in the other room.

Q. These consultations about mortgage conditions - were they conducted at your home? A. Yes, and also in the restaurant with Mr. Harji.

10

Q. How often at your house? A. Once or twice.

Q. He had no particular invitation for lunch or dinner? A. No.

Q. And you started asking for his advice on property matters? A. We used to ask him and he used to ask us - we about Nairobi properties and he about Mombasa properties.

Q. Can you give any instances of the advice that he sought from you and the type of advice that you gave him? A. I remember one instance. My brother enquired the value of a plot in Eastleigh - a two acre plot - and he advised Shs.60,000 to Shs.70,000.

20

Q. And the advice that he sought from you?

A. I do not remember; my brother might be able to tell you.

Q. Did you ask Mr. Harji for information?

A. We simply enquired about the market value of our property.

Q. Did you act on his advice at any time?

A. No occasion has yet arisen in that respect.

30

Q. You were actually using him to test his knowledge for your own benefit? A. Yes, and he would benefit from our knowledge of market conditions in Mombasa.

Q. You wanted to find out from him from time to time whether your property had appreciated or gone down? A. That is right, and the same applied to him.

Q. Were his questions general ones, or did he ask you about specific properties? A. According to the area he used to enquire about property.

40

Q. Was it in the nature of property gossip, or was your approach to him that of a person upon whom

you would place reliance in order to sell property?
A. With no particular aim but to be aware of the value from time to time of our property.

Q. You told us that your brother telephoned on Friday, 19th - is that correct? A. Yes.

Q. And from that did you learn that your mother had signed an option on the 18th - the previous day? A. Yes.

10 Q. Was your meeting with Mr. Harji on the 17th or earlier? A. Two or three days before the 18th.

Q. If your mother said that it was the day previous to the signing of the option would she be correct? A. I do not believe that my mother would be correct. The next day I left Mombasa and had the option taken place my mother would have told me.

Q. Are you prepared to go to the Garden Hotel and produce a certified copy of your bill? A. Yes.

20 Further cross-examination of D.4. is left unconcluded in order that the witness D.5 may be interposed; by consent of both counsel.

Court adjourns at 12.45 p.m.
Court resumes at 2.30 p.m.

No. 8

EVIDENCE OF GEOFFREY HOLIDAY MERRYWEATHER

D.5 GEOFFREY MERRYWEATHER, sworn.

Examined by Mr. O'Donovan:

30 Q. What is your business and what are your qualifications? A. I am an auctioneer and estate agent - F.A.L.P.A.

Q. How many years experience have you?
A. I started in the U.K. in 1938.

Q. Have you carried on practising as such since then? A. Yes, except for service during the war - 7 years in the Royal Navy.

Q. How many years experience have you in Nairobi?
A. 18 months.

JUDGE: Do you work on your own? A. With Muter & Oswald.

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Cross-examination - continued.

Cross-examination unconcluded.

No. 8

Geoffrey Holiday Merryweather.

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Preliminary Examination.

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Examination
- continued.

MR. O'DONOVAN: Are they one of the leading firms of estate agents here? A. Yes.

Q. The leading firm? A. They like to think so.

Q. Have you an idea of the values of land in Nairobi? A. I would say so, yes.

Q. Have you made a valuation of the property in dispute in this suit, that is to say plot 209/58/1 Sclaters Road? A. Yes.

Q. When did you inspect the property?
A. On Friday of last week. 10

Q. Where is it situated? A. It is next door to the Mayfair Hotel and has a frontage on to Mpaka Road.

Q. Is one of the frontages tarmacadamed? A. Yes.

Q. Would you describe the plot to the Court?

A. It is a plot of about 2.02 acres and in the north there is a fairly large stone dwelling house.

Q. What sort of soil is there? A. Red soil.

Q. Is that a desirable feature? A. Yes.

Q. Is the slope of the plot gentle? 20

A. Fairly gentle - probably about 20 ft. from one corner to the other.

Q. How is the building constructed?

A. Stone with corrugated iron roof.

Q. What does the accommodation consist of?

A. Four good bedrooms, kitchen, bathroom, outside W.C. and a store. The W.C. is reached under the cupboard of a verandah. And there are boys' quarters of corrugated iron.

Q. Did you examine the building carefully? 30

A. I did.

Q. What have you to say about its state?

A. It is in a good state of repair. A certain amount of work had been carried out. The windows required reputting.

Q. Were there any serious structural defects?

A. Nothing serious.

Q. How does that compare with other places in Nairobi? A. A large part....(inaudible).

Q. Does that account for the dilapidations you have seen? A. I would not say it was in first-class condition. 40

Q. Is there anything seriously wrong with it?

A. No.

Q. Was it tenantable? A. Yes.

Q. Even in its present state? A. Yes.

Q. What do you value the price of the house at, exclusive of land? A. Shs.120,175, from which I made a deduction for repairs of Shs.4,000.

Q. Is that a reasonable deduction? A. Yes, in the condition I saw the house in.

10 Q. What about the boys' quarters? A. On those quarters I put a nominal figure of Shs.2,000.

JUDGE: This is the house without the plot?

A. The main building only.

Q. How many square feet has it? A. 2709.43 and the verandah separately is 1268 sq.ft., making a total of 3977.43 sq.ft. including the verandah.

MR.O'DONOVAN: Could you sell it at that price today? A. I should say so.

20 Q. What do you value the land at? A. 2.02 acres and I valued it on a footage basis - 87,991.2 sq.ft., which gives a total of

Q. What would you say its value was in February of last year? A. I was using that figure for valuation.

Q. Is there any difference between March and February of last year? A. Nothing at all.

Q. Do you base that on your knowledge of values as at March of last year? A. Yes.

30 Q. Between a willing buyer and a willing seller? A. Yes.

Q. How do you arrive at these figures - is it by comparison with precedents? A. I use comparisons; i have one or two precedents.

Q. Would you explain what these precedents were? A. I took first of all the unimproved site value where the Municipal valuers used exactly the same figures as mine.

Q. The Municipal valuer agreed with you? A. Yes.

40 JUDGE: How much an acre? A. £3,267 per acre, that is taking into account the truncation where the corner of the land is cut away.

MR.O'DONOVAN: What is the other precedent?

A. The other is more recent. There is a plot

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which is half a mile or so to the east down Sclaters Road with the Sclaters Road frontage - a 10 acre plot - and the price £25,000, that is roughly £2,500 per acre.

JUDGE: Did that include the house? A. Yes, but the house was valueless.

MR.O'DONOVAN: Does the price per acre vary?
A. Yes.

Q. How many miles from the post office is that plot? A. About 2 miles. 10

Q. Is that in Nairobi regarded as being fairly central or far out? A. It is near in comparison with the majority of places.

Q. Any other precedents? A. Yes. There is a plot L.R.2048 which sold, again towards the end of last year - that was a half acre plot and realised Shs.2/05 a sq.ft.

JUDGE: How much did it realise for the half acre?
A. Roughly Shs.89,000 per acre.

MR.O'DONOVAN: Was it improved or not? 20
A. Unimproved. There is also L.R.2518 - same date and same price.

Q. Any others? A. There is another to the north of Sclaters Road, with no Sclaters Road frontage - approximately one acre and that sold at Shs.1/03, that is Shs.56,628 per acre.

Q. Unimproved? A. Yes.

Q. No road frontage? A. Not to the tarmac. There was also another plot which sold for £1,500 per acre; it was inferior. 30

Q. In what way was it inferior? A. It was considerably back from Sclaters Road.

Q. Now what would you say about the relation of prices in March and the prices in November, 1954?
A. A slight upward trend. I should say no higher than 10% - probably less.

Q. What would you say is the present value of this property? A. About Shs.264,000.

Q. Could you find a buyer at that price?
A. I think so. 40

Cross-
examination.

Cross-examined by Mr. Khanna:

Mr. Merryweather, you said you started in the U.K. in 1938? A. Yes.

- Q. Is that when you first qualified? A. No, not until after the war.
- Q. In 1938 were you with any firm? A. Yes; I was an articled clerk in 1938.
- Q. In what part of the U.K. were you operating? A. Portsmouth.
- Q. You were working under supervision? A. Yes.
- Q. And what were you called upon to do? A. Assisting in valuations.
- 10 Q. Did you ever value from the point of view of a mortgage? A. Not on my own.
- Q. I want to get a clear idea of what you have done off your own bat in the U.K. from 1938 until you joined the Navy. What was the nature and the type of work that you were asked to do? A. It consisted in going out and inspecting houses and measuring them up. My supervisor would have a look at them afterwards.
- Q. And that was until 1939? A. Yes.
- 20 Q. How many years experience have you in this type of work? A. Rather more than 10 years.
- JUDGE: When did you actually qualify?
A. In 1948. I came here towards the end of 1953. I was at first with Dalgetty's and helped with their country valuations.
- MR.KHANNA: What is your type of work with Muter & Oswald - do you conduct auctions? A. Yes.
- Q. What else? A. Valuation work, selling of houses.
- 30 Q. Do you conduct sales by auction? A. Yes.
- Q. Have you sold any properties in the Nairobi area? A. Yes, about 20.
- Q. And in the Selaters Road area how many have you sold? A. None.
- Q. Would you agree that Asian properties carry a static value? A. No.
- JUDGE: Do values of Asian properties fluctuate more than European properties? A. Yes.
- MR.KHANNA: You can say that from personal experience? A. Yes.
- 40 Q. Can you give us an example of the extent to which Asian property has fluctuated? A. Yes, in Pangani where we sold three plots, two of which

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Cross-examination - continued.

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were almost identical. They were $\frac{1}{4}$ acre plots and one sold for £1,600 and the next one sold for £2,200.

Q. Would you say that the market was good in February, 1954? A. Not as good as at the moment. It was a little static.

Q. Would you seriously advise a mortgagee that this plot is worth Shs.264,000? A. I would advise a mortgagee that I could get that much money in the open market. 10

Q. What is the maximum you would advise a mortgagee to lend? A. £8,000.

Q. For that purpose would you examine the property in great detail? A. Yes.

Q. And you would be prepared to advise any investor to invest £8,000. A. Yes.

Q. How long did you spend on this property? A. Possibly about two hours.

Q. And did you examine it with care? A. Yes.

Q. And in minute detail? A. I certainly did not go into the roof, if that is what you mean. 20

Q. Did you conduct the ordinary examination that any valuer would be expected to conduct?

A. I looked for major structural defects.

Q. Would you agree that the outer walls are badly cracked? A. No.

Q. I am going to call the Municipal expert who has been over the property with very great care, and he is going to swear that the outer walls are badly cracked? A. I noticed no bad cracks on the outer walls. 30

JUDGE: Do you swear that they are not badly cracked or that you did not notice it? A. I swear that I did not notice it.

MR.KHANNA: I put it to you that you did not conduct a very thorough examination of this place?

A. I think I conducted a sufficiently thorough examination - sufficient enough for a person to lend money on a mortgage.

Q. Is it not one of the first things to look at the outer walls? A. Yes. 40

Q. Would you say that the place is structurally very unsound? A. No.

Q. Did you examine the floor joists in the back?

A. I did not go into the roof or lift the floor boards.

Q. Did you notice signs of dry rot and white ant?
 A. I noticed that a large part of the floor had been renewed.

Q. Is the place structually sound? A. Yes.

Q. I am going to call not only the Municipal expert but also the architect. Are you satisfied with these categorical statements or would you like to see the property again? A. I am satisfied with the statements I have made, but I won't make them categorical.

Q. When did you think the flooring had been renewed? A. Probably within the last fortnight or 3 weeks - possibly more recently than that.

Q. Has your client informed you that she has done that specially for the case? A. No.

JUDGE: Is it possible to make a really thorough and detailed examination in two hours?

A. I would not say a detailed structural examination; I was called upon to value it, which is a different matter altogether.

Q. In any case the filing of your report had to be rushed because you inspected the property on Friday and had to submit the report on Saturday?
 A. Yes.

MR.KHANNA: Have you made an estimate of what it would cost to reinstate this structure?
 A. About £200.

Q. And you do not think that it would cost many times more that that? A. I should not think so.

Q. Mr. , an architect, is going to be called. Have you heard of him? A. Yes.

Q. He says: "It is my opinion.....(Reads). Now would you like to qualify your statement in view of what this witness is going to say?
 A. I suppose I ought to.

Q. I suggest that this house is a complete write off; it cannot be considered at all, and all that you can consider is the value of the land?
 A. I disagree.

Q. Did you find out how old the house was?
 A. I have had no chance of finding out.

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Cross-
examination
- continued.

Q. What would you say is the age of this house?

A. I consider it was built just after the first war
- about 1925.

Q. So it would be about 30 years old? A. Yes.

Q. It is made of stone? A. Yes.

Q. And the internal partitions are of asbestos and
fibre board? A. Yes, and some are of plaster.

Q. Do you agree that it mainly consists of asbestos
and fibre board? A. I would say light stud (?)
partition. 10

Q. The property is in a dilapidated condition?
A. No.

Q. Under the flooring there is absolutely hollow
ground? A. Yes.

Q. What about the out-buildings - did you look at
them? A. Yes.

Q. Are they in a poor and dilapidated condition?
A. They are not very good.

Q. Had you known that the house was as old as 47
years, would you have conducted a more careful in-
spection? A. Yes if I had had sufficient time. 20

Q. Don't you think you ought to have had more time?
A. I would have liked more time.

Q. Did you not think that it would have been wiser
to have asked for more time in order to express an
opinion? A. I was told that I would be heard
on Saturday morning and there was no time.

Q. You made a slipshod job of it?
A. I do not agree.

Q. You did not have time to inspect either the
roofing the timbers or the space under the floors? 30
A. This is a valuation - not a report on the struc-
tural defects.

JUDGE: Can you value the property without consider-
ing the structure? A. I think so.

MR. KHANNA: Did you consider the valuation from the
point of view that some of the buildings would
have to be demolished? A. The boys' quarters
were slightly encroaching on one of the sub-
division boundaries.

Q. Were you given a scheme of sub-division to work
on? A. Yes.

Q. Did you look at the facing of the house to see if the sub-divisions were carried out?

A. It would still face Sclaters Road.

JUDGE: What frontage would it have?

A. A slightly wedge-shaped plot of about 65 or 70 ft.

Q. If it had only about, say, 40ft. frontage on Sclaters Road, would that reduce its value much?

A. I do not think so.

Q. Well, 40 ft. is not very much, is it?

10 A. I think the main factor is whether it has an access to a tarmac road.

MR.KHANNA: Did you not take into account the condition of the structure when making the valuation?

A. Yes, but I did not make a detailed structural examination of it.

Q. Are you prepared to swear that the house is in a habitable condition? A. Yes, all the windows are there, it does not appear to leak.

20 Q. Evidence is going to be given that it will require extensive repairs before it could be put in habitable condition? A. I cannot agree.

Q. You are prepared to swear that it is in a habitable condition? A. It is far better than many I have seen.

Q. That is not an answer. It is structurally sound or is it not? A. I would say it is habitable.

Q. And after a two-hour examination you are prepared to say that it is in a habitable condition?

30 A. An occupation certificate is issued after far less than a two-hour examination.

Q. Did you see any evidence of white ants?

A. Yes, in the boys' quarters - that was the only place.

Q. Would you swear that in any part of the house white ants exist? A. I cannot say.

Q. Are you aware of two plots just behind this particular plot which is 4 acres in extent?

A. No.

40 Q. Would it surprise you to know that at a public auction in May, 1954, it sold for approximately £4,500? A. Somebody got a very good buy. I am surprised.

Q. And in the light of that, would you not considerably scale down your value of this property? A.No.

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Cross-examination - continued.

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Q. Tell me, Mr. Merryweather, if two plots are rated the same by the City Council, is that a true criterion that they are equal in attraction as regards price? A. Not necessarily.

JUDGE: Behind the plots in this case which face on to Sclaters Road there are other plots leading onto Mpaka Road? A. Yes.

Q. Are those plots very much lower in value than the ones facing Sclaters Road?

A. Yes, considerably. 10

Q. All the Parklands area is fairly close to main roads? A. Fairly close.

MR.KHANNA: Have you assumed that there are no road charges in respect of this property? A. There would be road charges on the two sub-divisions.

Q. Have you taken that into account? A. Yes.

Q. By how much? A. My instructions were to value the whole, and I valued the whole at Shs.1/50 a square foot.

Q. Did you prepare a valuation of the house plus the half acre on which it would eventually stand if sub-divided? A. No. 20

Q. Are you in a position to give any value as to that? A. I would like to have a look at it. I am not in a position off hand to give any value.

Q. Have you made any calculations of the cost of sub-dividing - laying down roads and drains and so on - for the sub-division? A. I was shown a survey plan, so presumably it has been surveyed.

JUDGE: You have assumed that it is already sub-divided and that there will be no further costs to be incurred for sub-division? A. Not for survey. 30

MR.KHANNA: I suggest that after the survey had been completed those sub-divisions could not fetch more than £1,500? A. I would say £2,225.

Q. Would you agree that prices have risen between 25 and 35% between January and November, 1954?

A. Certainly not.

Q. Would you say that building costs have risen considerably? A. Yes. 40

Q. Does that not reflect upon prices?

A. I am talking about an unimproved site.

Q. Would that reflect on site values?

A. Not necessarily.

Q. Does it reflect on the market condition of site values or not? A. Not very much.

Q. How much? A. About 5%.

Q. Did you know before coming to Court that there was no completed sub-division of this plot?

A. No. I understood it had not been registered.

JUDGE: You thought everything was complete except registration? A. Yes.

10 MR.KHANNA: And if you were told now that there is only a scheme of sub-division on paper and that it has never been carried out, would you have to take into consideration in fixing values of sub-division?
A. Yes.

Q. Are you aware of the City Council practice not to allow sub-divisions until roads and drains are laid? A. They sometimes grant it.

Q. Have you acquainted yourself with the conditions under which the City Council approved in principle the sub-divisions? A. No.

20 Q. Did you not think it was important to do that?
A. Not all that important. My instructions were to value the whole, which presupposed that everything had been approved.

Q. Should you not have taken full instructions from your clients as regards sub-division?

A. I suppose I should have done, but if one is presented with a survey plan that is not a drawing.

30 Q. It merely says it is a scheme. Did that not give you an inkling that it was merely a proposal for a sub-division? A. I knew that it had been approved in principle by the City Council.

Q. On what evidence? Did your client give you to understand it? A. No, my client told me that sub-division approval had been granted in 1947.

Q. Your best precedent is one completed sub-division, which is plot 90? A. That is not a completed sub-division; that is a 10-acre plot.

Q. It was not sub-divided at all? A. No.

40 JUDGE: If it is not sub-divided already, £2,500 is a reasonable price? A. Yes.

Q. The cost of sub-division makes a big difference to the value per acre? A. Yes.

MR.KHANNA: Do you say that all conditions are equal

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examination
- continued.

with regard to plot 90? A. Plot 90 is generally supposed to be in a better district, but only slightly so. On the other hand, I believe that approval has been given for a hotel to be erected on it, which would automatically alter it the other way round. But that is hearsay.

Q. What is the value of the house in round figures?

A. I maintain that if the property was given to my firm to sell we could obtain that price for it.

Q. If a developer came along to you and told you that this property has yet to be surveyed, that the house is structurally unsound, how much, in the light of those facts, would you advise him to pay per acre for the whole plot? Would you advise him to pay more than £2,000 per acre? A. Yes most certainly. 10

Q. How much? A. I think £3,000 or more per acre.

Q. How much would you ask him to allow for the house, assuming that it is structurally unsound? A. I think the house is worth the value of the materials in it. I know what I could sell that house for. 20

Q. How much would you sell it for? A. It is not a sort of thing that a firm like mine would like to sell at all. We would put a nominal value on the stone and timber, window frames and boards.

Q. Would you write off the house from the point of view of a developer? A. Most certainly not.

Q. What would you expect to realise for it? A. Possibly £800 to £1,000. 30

Q. It is very old and dilapidated? A. I have your word for that.

Q. You have said that the structure is old and that dry rot has set in. Under those conditions do you still hope to realise £800 to £1,000.

A. It depends on the extent to which the white ants have damaged it.

Q. If you knew that borer(?) beetle had attacked most of the timbers, would that make any difference? A. Of course it would. 40

Q. Would you scale your figure down if you knew that it had been so attacked? A. Yes.

Q. How much would you scale it down?

A. Assuming that there was no timber at all - £400 to £500.

Q. I suggest that this plot is not worth at the very outside more than £2,000 per acre; the land is worth £4,000, and then there is the scrap value of the house? A. It is difficult to appreciate your suggestion.

Q. You do not agree? A. I most certainly do not.

Re-examined.

Re-examined by Mr.O'Donovan:

10 Q. What is the number of the plot opposite..... (inaudible) A L.R.209/2048 and 209/2, which sold at £4,450.

Q. Do you think that a firm of your standing would have been aware of this spectacular rise of 25% in values? A. We certainly should.

Q. If it had occurred? A. Yes, we could hardly have failed to have noticed it.

Q. Did you make a careful examination of the property? A. Yes.

20 Q. Was it adequate for the purpose of arriving at a valuation? A. Yes.

Q. How does it compare in condition with other properties which you sold? A. It is not as good as many I have sold.

Q. Do you act as an assessor of the Rent Control Board? A. With the Landlord and Tenant Court.

Q. And in that capacity do you examine a number of houses in Nairobi? A. In most cases I act as a witness.

30 Q. How then does this property compare with other houses in Nairobi which are inhabited? A. Generally speaking, it is in poor condition, but I have seen worse.

Q. What do you think the value of the half acre plot would be to somebody who sub-divided and sold the sub-divided plot separately? A.The figure I gave you £4,450.

Q. Do the details shown indicate that a survey has been completed? A. Yes.

40 Q. And what would a survey of that sort cost? A. About £300 to £350.

In the Supreme Court of Kenya

Defendant's Evidence

No. 8

Geoffrey Holiday Merryweather.

4th May, 1955.

Cross-examination - continued.

Re-examination.

In the Supreme Court of Kenya

Defendant's Evidence

No. 8

Geoffrey Holiday Merryweather.

4th May, 1955

Re-examination - continued.

Q. Did you examine the outside walls of the house?
A. I did.

Q. With sufficient care to observe whether there were any serious cracks? A. Yes.

Q. You noticed some cracks? A. Yes, but they might have occurred 20 years ago.

Q. Do you or do you not adhere to your view as to the value that property would fetch in the open market? A. The only alteration I must make is with regards to the amount of the survey charges which I think should be deducted from the capital value I gave.

10

Court adjourns at 4 p.m.

No. 9

Sadru Din Nanji.

5th May, 1955.

Cross-examination

No. 9

FOURTH DAY

EVIDENCE OF SADRU DIN NANJI - recalled

SADRU DIN NANJI (Recalled on same oath).

Cross-examination continued by Mr.KHANNA.

Q. Did you bring a certified copy of your bill from the Garden Hotel? A. I put my request as I was asked here to the Hotel keeper. He said, "I have no time. I will have to find it. It will take some time". And that is why I am unable to produce it now. My Lord thereafter I tried unsuccessfully twice, at 5.30 and half seven in the night yesterday. They say that, "We have no name of yours on the record" and the hotel keeper said "Ask your advocate to write us officially for production of any document".

20

Q. I put it to you that my client has checked up on whether you went to the hotel and it appears you went there and they looked for your name in the record but it was not there, you had never stayed there during February, and they told you they could not certify that you had been there. When you asked for a certificate they said: "We cannot issue a false document,"?
A. I emphasize My Lord I did stay there.

30

Q. Is it the truth that you didn't come to Nairobi in the middle of February? A. I have come to Nairobi.

40

Q. And you have made up your evidence with a view to corroborating your mother's evidence?

A. No Sir. That is not true.

Q. Are you prepared to bring evidence of the railway booking that you went from Mombasa to Nairobi during the middle of February? Did you go by train?

A. Yes.

10 Q. First class or second class? A. Usually I travel by second class. But it is possible at the last minute a passenger doesn't get a booking and just gets into the coach and on the way with the ticket collector fix the matter of second class or third class ticket.

Q. Oh! I see. You think that on that occasion you got into the train without a ticket? How do you manage that - take a platform ticket and get into the train? A. I don't remember that.

20 Q. I suggest to you that the truth of the matter is that you were not in Nairobi, you never went by second or first class? A. I positively remember I was in Nairobi Sir.

30 Q. Have you got anything to prove that you were in Nairobi from the 15th to the 17th or 16th or even earlier? A. Yes. Only need I remember now in support of my version that the second day of our meeting between Harji and myself and mother on the road I was offered by Mr. Harji for a cup of coffee. And in company of a third man Hassan Ali Dedar of Eldoret we three went to a coffee house near the market.

Q. Did you get into the train at Mombasa in the same fashion without a ticket hoping to buy one on the way? A. I don't remember sir. Very frequently we come here. At least twice or more in a month.

Q. So you are not sure whether a first, second or third class booking exists in your name during the middle of February from Nairobi to Mombasa?

40 A. Had I travelled on second class in the formal manner they might have got a record. Had I travelled in third class for lack of a second class they might not have a record.

HIS HONOUR: What did you come to Nairobi for?

A. For an interview with our advocates.

Q. Did you have the interview? A. Yes Sir.

Q. The same day as you spoke to Mr. Harji or not?

In the Supreme Court of Kenya

Defendant's Evidence

No. 9

Sadru Din Manji.
5th May, 1955.

Cross-examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 9

Sadru Din Nanji.
5th May, 1955.

Cross-
examination
- continued.

A. That I don't remember. My stay was in Nairobi for four to five days.

MR.KHANNA: If you had come here for four or five days, you were not urgently required at any particular moment for an interview by Madan and Shah. Can you therefore explain how you could have travelled in a hurry in third class or any class without a ticket, hoping to get a ticket on the way? A. It is just possible because I had to reach back to Mombasa in two or three days.

10

Q. Come Come Mr.Sadru Din. Were you given notice that Messrs. Madan and Shah would like to see you and when? A. My Lord we don't communicate with our advocates in writing we communicate through the telephone when they can at leisure hours we see them.

Q. How urgent was the interview? Had you to appear in court on the day after it? A. I don't particularly remember. It was not in connection with a precise case but some settlement in connection with two or three documents received.

20

HIS HONOUR: Did you make an appointment with them or not? A. I used to go to their office. If Mr. Nazereth were free he would see me.

MR. KHANNA: So it was not a previous appointment. You just took your chance in the office - waited for an hour or so before you could see him? A. Usually they have no fixed time to be in the office. They are often in court, so we are always told, "Come through and if free we will see you.

30

HIS HONOUR: Did you spend the weekend in Nairobi? A. I don't remember my Lord. I stayed five days.

Q. If you went back on Tuesday and if you were four or five days in Nairobi you must have been here for the weekend mustn't you? A. Which date Tuesday Sir.

HIS HONOUR: Tuesday the 16th February. A.It is just possible the weekend might have been spent by me in Nairobi.

Q. Do you think that Madan and Shah will have a record of your interview? A. They don't keep any written record but if they do remember they will support me Sir.

40

MR.KHANNA: Did you sign any papers or documents? You say you came in connection with certain documents? A. I had nothing to sign in their office. I only conveyed instructions through my brothers.

Q. If you had no authority to sign on behalf of the administrators what was the urgency of your interview with Madan and Shah? A. The thing is this, whenever Messrs. Madan and Shah receive some information from the other party in our interest they convey to us in writing in Mombasa and my brothers decide what to reply and what to instruct our advocates, and with these instructions and advice to convey them to the advocates I had to come.

10 HIS HONOUR: Written or Verbal? A. Verbal My Lord.

MR. KHANNA: They never instruct their advocates by correspondence? A. Sometimes they used to reply in writing but if they thought I should go personally with the instructions I would be sent.

Q. Do you mean to say you were acting as messenger and your being there was so urgent you could not wait for a booking? You took a chance on getting on the train and buying a ticket on the way?
20 A. I don't remember what type of urgent letter was there and in what connection I came here. I do not also remember whether I got my formal booking with the railways or not.

HIS HONOUR: Do you remember whether you conveyed the instructions that you came up to Nairobi to convey? A. I only remember the matter was in connection with the Avenue Hotel.

Q. How long did it take you to discuss.
A. That I don't remember.

30 Q. Do you remember who you saw in Madan and Shah?
A. Their clerk, one Mr. Bulweir(?). I think Mr. Nazereth was on leave in those days.

Q. So your visit was in vain? A. I remember Mr. Bulwier might have in the absence of Mr. Nazereth given the instructions to another partner of Mr. Madan.

MR. KHANNA: Is it not true that during Mr. Nazereth's absence on leave you left Madan and Shah in connection with the Avenue Hotel?

40 HIS HONOUR: A question has been asked in English which you understand and it has also been translated to you. Nearly every time you give a long pause before you answer. The questions are quite simple. You know the suggestion is that while Mr. Nazereth was on leave you, or because he was on leave, you took the Avenue Hotel case right out of

In the Supreme Court of Kenya

Defendant's Evidence

No. 9

Sadru Din Nanji.

5th May, 1955.

Cross-examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 9

Sadru Din Nanji.
5th May, 1955.

Cross-
Examination
- continued.

Re-examination.

his hands? A. Yes Sir. When the date was to be fixed in court for hearing and when Mr. Nazereth was out we took a file back away from them. But My Lord the only thing was to give the file and seek advice from another advocate. Another file, a duplicate, and other correspondence were already with Madan and Shah.

MR.KHANNA: I put it to you, will you agree that you have made up all your evidence with a view to supporting your mother? A. No. Sir.

10

Re-examined.

Re-examined by MR.O'DONOVAN.

Q. How many times did you visit Nairobi in February last year? A. Once I arrived in Nairobi on 22nd January and stayed to the third of February.

Q. Yes. And the next time? A. And the second visit was in the middle of the month.

Q. Where did you stay on your first visit?

A. That also in the Garden Hotel. My brother was with me.

20

Q. Which brother? A. Rajib Ali.

Q. He stayed there as well? A. Yes Sir.

HIS HONOUR: Have you checked that from the Garden Hotel record? A. Yes Sir. Yesterday at the interview with the hotel keeper myself was also accompanied by my brother when no record was found out about my visit in the middle of the month we were recollected of our previous stay in the hotel. That record was not also available. I said give us the file, we will look. They said, "Not now come afterwards". We went later the hotel was closed.

30

MR.O'DONOVAN: At what time did they tell you to come back again? A. Between 10.30 and 11.00 we were asked to go back again. Night.

Q. And you got there and found the Hotel closed.

A. Yes.

MR.O'DONOVAN: My Learned Friend, My Lord, has agreed he will call this gentleman from the Garden Hotel.

40

MR.KHANNA: At the request of My Friend, My Lord, because on every point contradictory evidence is brought and the enquiry is dragging itself into side lines.

HIS HONOUR: It is agreed then between you that you are going to call evidence from the Garden Hotel.

MR.KHANNA: My friend asked me if I was prepared to call him and I do so on the understanding that he will not raise any objections to the introduction of such evidence in this court.

HIS HONOUR: The evidence is being given by his full consent so he cannot take any objection to it.

10 MR.O'DONOVAN: What was the attitude of the Garden Hotel people when you went there at Lunchtime yesterday? A. They were sympathetic and ready to help me but said come afterwards when lunch hour is over.

Q. What was their attitude in the evening.
A. They said straight away we don't have any record of yours.

20 Q. Did you see the plaintiff there at the Garden Hotel? A. At the point of our reaching the hotel I saw the plaintiff and Mr.Hasham next to him coming out of the hotel.

Q. That was in the evening? A. Yes.

Q. You say that you had coffee with Mr.Harji the day after your meeting with him in the street?
A. Yes Sir.

Q. At what time of day was it? A. About 11 o'clock.

Q. You mention a third person was present?
A. Hassan Ali Dedar.

30 Q. Where is he now? A. I don't know where he is now. He is called from Eldoret.

Q. What is he? A. I don't know. He was a friend of my father.

Q. Did the three of you have coffee together?
A. Yes Sir.

Q. What did you talk about? A. There was no particular talk Sir. In fact the third person was introduced to me by Mr.Harji and then Hassan Ali recollected that he knew my father well.

40 Q. You were asked about the impossibility of conveying an immediate legal estate in a portion of an unsurveyed plot? Do you understand what those words mean? Do you know what the difference between a legal and an equitable estate is?
A. I don't know the difference.

In the Supreme Court of Kenya

Defendant's Evidence

No. 3

Sadru Din Nanji

5th May, 1955.

Re-examination - continued.

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 9

Sadru Din Nanji.

5th May, 1955.

Re-examination
- continued.

Q. Has it ever occurred to you that there was any problem in agreeing to sell a portion of an undivided plot? A. It never occurred to me.

Q. That there were formalities to be completed before there was a conveyance? Who would you expect to deal with them? A. An advocate my Lord.

Q. Refer to the time when you got back to Mombasa after your Nairobi visit. I think you said there was a telephone call on Friday night from your mother? A. That was told by my brother.

Q. That is Friday night? A. Yes Sir.

Q. And when was it that you were told to collect the keys from Mr. Harji. A. I was told that there was another call on Saturday night and you come and collect the key from Mr. Harji when he comes.

10

No. 10

Rajabali Kasam
Suleman Damji.

5th May, 1955.

Preliminary
examination.

No. 10

EVIDENCE OF RAJABALI KASAM SULEMAN DAMJI.

RAJABALI KASAM SULEMAN DAMJI (Sworn).

Examined by Mr. O'Donovan.

20

Q. What is your name? A. Rajabali Kasam Suleman Damji.

Q. You are, I think, the eldest son of the defendant? A. Yes.

Q. Did you come to Nairobi in February of last year? A. I think it was the end of January up to the beginning of February.

Q. What date in February did you leave?
A. I think I left on the 4th or 5th.

Q. And where did you go to? A. I went to Mombasa. 30

Q. Where did you stay? A. I was staying in the Garden Hotel.

Q. With anybody? A. With my younger brother.

Q. Who? A. Sadru Din.

Q. Do you travel a lot by train? A. Sometimes by train sometimes by road.

Q. When you travel by train do you always reserve accommodation for yourself? A. Yes. I always reserve accommodation.

Q. And what class do you travel? A. Sometimes first. Sometimes second. It depends upon the accommodation I get.

Q. Does your brother do the same? A. Yes. He also does the same.

10 Q. During February and after your return to Mombasa did your brother go anywhere? A. He was here. I went alone to Mombasa.

HIS HONOUR: You mean he stayed on? A. Yes.

MR. O'DONOVAN: How long did he stay on?
A. Four or five days more.

Q. Where did he go then? A. He came to Mombasa.

Q. Did he leave Mombasa again? A. Yes, on the 10th, 11th or 12th February. I don't remember the exact date but it was in the second week of February.

20 Q. Where did he go? A. He came to Nairobi.

HIS HONOUR: Did you see him off in the train?
A. My younger brother went to see him off.

MR. O'DONOVAN: He disappeared from circulation as far as you were concerned? A. I don't follow the question.

Q. After he was supposed to go in the train did you see him in Mombasa. A. He went to Nairobi and returned I think on the 16th or 17th February.

30 Q. Did you see him on his return? A. At my house yes.

Q. Do you know who paid for his train ticket?
A. Yes my office paid.

Q. Have you a record at your office? A. Yes. They have a record.

Q. Could you produce that if you were required to?
A. Of course, yes.

40 HIS HONOUR: When did your mother come up. Do you know? A. I don't know exactly whether they travelled together but it was during the same period my mother also travelled.

Q. Did you get a ticket for her? A. Yes.

Q. So that you have records of two tickets round about that time? A. There must be records of two tickets.

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 10

Rajabali Kasam
Suleman Damji.

5th May, 1955.

Preliminary
Examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 10

Rajabali Kasam
Suleman Damji.

5th May, 1955

Preliminary
Examination
- continued.

MR.O'DONOVAN: Do you know Mr.Harji, the plaintiff?

A. I know him.

Q. How well do you know him? A. I think for the last three or four years.

Q. How often have you seen him? A. When he comes to Mombasa I often see him.

Q. Do you often speak to him? A. Yes. he once or twice visited my house, but mostly when we were running the restaurant he used to come.

Q. Did he talk about business before? A. Yes. 10

Q. You cannot recollect the particular business?
A. Yes. He approached once for one building at Government Road.

Q. Do you know Mr.Hasham Nanji? A. Yes.

Q. What are your relations with him? A. My father and him were very closely related in business.

Q. Are you enemies now? A. No.

Q. Your mother was the owner of a plot in Nairobi next to the Mayfair Hotel? A. Yes.

Q. Do you recollect any plan to erect a hotel there? A. I don't know anything about it. 20

Q. Did discussions occur in Mombasa as regards the sale of this property? A. Yes.

Q. When was that? A. I think it was sometime in January - the time I got possession of the house through rent control board. We thought that if we got a good price we could sell off a piece with a house thereon.

Q. You had previously been receiving, I think, 355/- a month. Who fixed that rent? A. It was fixed by the rent control Board. 30

Q. Did you at any time receive any notice from the Municipality or the Rent Board about the dilapidation of the house? A. I received no notice from any source whatsoever.

Q. Would you have known had any been received?
A. I would.

Q. Who takes the leading part in the conduct of property affairs in your family? A. I can be considered the family spokesman. 40

Q. I think it is not in dispute that towards the end of December you were in process, or your mother was buying half share of this property for taking over the entire liability of mortgage of

81/000/- and paying in 55,000/-. A. Yes. It was in 1953 this transaction.

Q. Who negotiated it? A. Mr. G. H. Karim who was the co-owner of my mother at that time.

Q. Who did he deal with? A. He dealt with my mother first, and then I consulted him over the price and my mother including the other members of my family.

Q. And you agreed to terms? A. Yes.

10 Q. Now after your brother's return did you receive a telephone call from Nairobi? A. Yes. From my mother.

Q. What time was that? A. It was about 9 o'clock at night.

Q. On what day? A. It was a Friday night.

Q. How long after your brother's return to Mombasa? A. One or two days after my brothers return to Mombasa.

20 Q. What did she tell you? A. She told me that she was urged to go to Ishani's office and some options and agreements of sale were produced and some signatures were obtained without being read over to her, and during the discussions she demanded some payment and Ishani intervened about some mortgage payments which according to my mother had no business of the purchaser and therefore she tore up the agreement and Mr. Ishani cleared the misunderstanding and there was nothing to worry about. Ishani was on his way to Mombasa and I could verify this statement from Ishani.

30

Q. How would you describe your mother's attitude when she telephoned you. Was she calm or excited or what? A. I was also perturbed at that time when I listened to the telephone conversation and similarly my mother was also very perturbed.

Q. Did you have any more telephone calls?

A. Again we had a telephone call the following day informing us that Harji had left for Mombasa and if you could send one of your brothers to the station you can have the keys from him and option.

40

Q. What time was that? A. It was half nine or ten. I don't distinctly remember the time.

Q. Had you at that time seen Ishani? A. I was to....

Q. But had you seen him? A. No.

In the Supreme Court of Kenya

Defendant's Evidence

No. 10

Rajabali Kasam Suleman Damji.

5th May, 1955.

Preliminary Examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 10

Rajabali Kasam
Suleman Damji.

5th May, 1955.

Preliminary
Examination

- continued.

Q. Had you tried? A. Yes I had tried my best.

Q. There was a conference? A. Yes.

Q. Was any enquiry made by your mother whether you had seen him? A. Yes. I said I am going to see him after this meeting.

Q. I want you to think carefully. On either of these two occasions did she mention the letter of commitment she had received from Messrs. Khanna?

A. I don't recollect it.

Q. Did you speak to Mr. Ishani on the subject of the letter? A. I did speak to Ishani. 10

Q. Did you see Ishani? A. I saw him at 12 o'clock at night. It was Saturday night.

Q. Do you remember the date? Was it the 20th? A. I think it must have been the 20th February.

Q. Would you tell us what your conversation was?

A. I first told him that I had received a telephone call yesterday from my mother and I wanted to know full details as to what is the exact position. And then he said there was some misunderstanding about this bargain and he had cleared it before leaving for Mombasa. 20

Q. Did he say anything else? A. That the bargain was cancelled and accepted by both parties. He further added that on your next telephone call to your mother you can add 'don't worry and don't enter into any correspondence with anybody'.

Q. Did you confirm it to your mother?

A. I told my mother.

Q. I think that you learnt on the next day that your brother was unsuccessful and that Mr. Harji kept the keys of the house? A. Yes. 30

Q. I think it is not in dispute that the house has remained vacant ever since and he had still the keys? A. Yes.

Q. When did you next see this property?

A. It was sometime last September or October.

Q. In what condition was the property?

A. At that time I was staying at the house opposite this property so when I was coming out of the house I saw some four or five urchins on the boundaries of the property, so I followed them and on enquiry I was told that this house was vacant for a long time and it was the duty of the security 40

forces to inspect this house because houses remaining vacant for a long time the Mau Mau took the habit of assembling there. All the glasses were smashed and there were some green leaves in the dining hall.

Q. What do you mean by glasses smashed?

A. Glasses in the windows. All doors were all smashed.

10 Q. Was that its previous condition? A. It was not so. It was quite in good condition when I got possession from the Rent Control Board.

Q. What about the doors? A. The doors were open.

Q. You could just walk in and out? A. Yes.

Q. Did you make a report to anyone about what you had seen there? A. I reported back to my advocates.

Q. Did you make a report anywhere else.

20 A. I went to the Parklands Police Station and reported it.

Q. Did you do anything about this state of dilapidation? A. Yes I got hold of one fundi and asked him to carry out some repairs. I got estimates and he agreed to the terms.

Q. How much did you pay? A. As far as I remember up to now I think I have paid 150 pounds.

Q. Have you the records? A. I paid by cheque.

Q. Can you produce your vouchers if required?

A. Yes.

30 Q. Has anybody ever approached you to buy the property since this dispute? A. Yes after this there was some enquiry. I told them that verbal enquiry must not be enough and if they were interested they should write me a letter.

Q. Who made enquiries? A. An Asian Working in the firm of Riley Bros. (Merali Bros?)

Q. What is his name? A. Hassan Ali. He told me that he had a prospective buyer. There was some Hindu doctor who had already seen the property.

40 Q. What price did he mention. A. He told me that he could get me about 15 thousand pounds.

Q. Was it confirmed in writing? As. Yes he gave me a letter.

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 10

Rajabali Kasam
Suleman Damji.

5th May, 1955.

Preliminary
Examination

- continued.

In the Supreme Court of Kenya

Defendant's Evidence

No. 10

Rajabali Kasam Suleman Damji.

5th May, 1955.

Preliminary Examination - continued.

HIS HONOUR: It is addressed to Mrs. Kassam Suleman Damji and reads as follows: "Dear Madam, with reference..... commencing from the 27th instant. (Exhibit D).

MR. O'DONOVAN: Were you able to continue with that matter? A. I consulted my advocates.

Q. And were you able to continue or not? A. I was told that since the matter was sub judice I was not advised to do anything until the matter was fixed.

10

HIS HONOUR: You say you don't recollect whether your brother went with your mother or before or after her? A. That I don't exactly remember.

Q. Do you remember what business he went to Nairobi on? A. We have got properties also.

Q. Yes but was he going to see about this Sclators Road property? A. No, we had no idea. We had only discussed that if we had any buyer for this house.

Q. Had your brother got any special business in Nairobi? A. Yes. He had come to see one tenant Mr. (?) of the White Rose Laundry in connection with some lease.

20

Q. And that was the object of his visit was it? A. Yes. And because we have got lands here in Nairobi it was routine for our family that a member often comes to Nairobi and has the market conditions in mind.

Q. He didn't have any legal business so far as you know? A. Not so far as I recollect. They come very often so we don't know on what trip we come for what business.

30

Q. You spoke to your mother about this Sclators Road property before she left? A. Yes, because I had come from Nairobi and during that period we had recovered the possession of the vacant house.

HIS HONOUR: Did you give your brother any special instructions or was he on a routine visit.

A. There were no special instructions. The routine business that he was to come for this White Rose lease.

40

Q. He had no special business concerned with the restaurant for instance? A. My restaurant may be yes, to buy something. I don't exactly remember because there was a big party four or five days after.

Q. He hadn't any advocates to see? A. I was not managing - that was his own department you see.

Q. If he went to see advocates on the restaurant you would not know? You don't give him any instructions about any other business?

A. Actually when our business representative is in Nairobi there are many business properties so when we come from Mombasa we don't know what particular business it is. When we go in the town we have a market review.

10

Q. Who were acting as your advocates in February?

A. In the matter of?

Q. Any matters? A. Mr. Nazareth.

Q. Was he on leave then or not? A. In February I don't remember.

Q. Did you have any legal business in February?

A. Maybe yes. There is some business of this Avenue Hotel. There was a lot of correspondence exchanged.

20

Q. Was there any special business about that Avenue Hotel? A. May be because there were many visits undertaken. What special business with any advocates I don't exactly remember.

Q. You don't recollect any special business either with an advocate or with the Avenue Hotel?

A. No. No special business because it is now over one year.

30

Q. So far as you know your brother had no special business to come to Nairobi for? A. He had only this lease business of the White Rose so far as I recollect.

Cross-examined.

Cross-examined by MR. KHANNA.

Q. This visit of your brother was not planned at the last moment? A. Sometimes our visits are really at the last moment.

Q. Did he take a booking? A. Yes he must have.

Q. He didn't take a platform ticket and get on the train without a ticket? A. I should not think

40

so.

MR. KHANNA; Have you checked up that he left Mombasa on the 10th? These dates are important?

In the Supreme Court of Kenya

Defendant's Evidence

No. 10

Rajabali Kasam Suleman Damji.

5th May, 1955

Preliminary Examination - continued.

Cross-examination.

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 10

Rajabali Kasam
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5th May, 1955

Cross-
examination
- continued.

A. I did not know these dates were important.

Q. You discussed this case months ago and then you didn't realise that these dates were important. You never thought to check up if there is an entry in your books or records of your brother having left? A. I was not asked to refer to the record.

Q. If I suggest to you that he didn't come to Nairobi at all what would you say? A. From the 10th he was in Nairobi. 10

Q. And was he staying at the Garden Hotel?
A. That I don't know.

Q. Is it normal for you to stay at the Garden Hotel? A. Whenever we go to hotels we go to the Garden Hotel.

Q. Do you also put up with friends? A. Yes.

Q. How often have you stayed at the Garden Hotel?
A. Myself about four or five days during 1954 that is all.

Q. Never after that or before? A. Only once I have stayed. 20

Q. And your brother also stayed during that time?
A. During that time he was with me.

Q. And he stayed at the Garden Hotel when you left?
A. I think. I don't exactly remember who left first.

Q. You told us a minute ago that on 27th January you came up and stayed till 4th or 5th February.
A. Yes.

Q. Both of you stayed at the Garden Hotel. Now you say you don't remember who left first? 30
A. I was there up to the 4th or 5th.

Q. Did your brother leave before? A. After four or five days a man called Mr.P(?) came and took away the baggage of my brother and he insisted that he should stay with him. That was on the 4th or 5th when I was leaving for Mombasa.

Q. Was it on the day you were leaving?
A. It is possible that it was the day I left.

Q. You knew that this matter is sub judice since July 1954? A. Yes. 40

Q. Can you give any reason why you should go and undertake extensive repairs? A. I didn't make

extensive repairs I gave instructions that these glasses and all should be refitted and these doors should be in proper order because there was some of our furniture inside.

MR. KHANNA: You also had the floors repaired?

A. All was entrusted in one contract.

Q. How many items did you require to have remedied?

A. I didn't give any items.

Q. You know that this case is about this property?

10 A. Yes.

Q. Did you not do it in order to get some sort of value for this house? A. No I didn't do it from that view-point.

Q. If you knew that the house was all open and is under dispute why should you go and repair it without informing the other side? A. There was some of our furniture inside.

Q. Didn't it occur to you that you should tell your advocate you were going to undertake repairs?

20 A. No it didn't strike me. I didn't make any outside repairs so far as I know because it is a coral block concrete house. All the damage done by those Mau Mau was done inside the dining room.

Q. Was not the damage done by dry rot and white ants? Do you know what dry rot is? A. No Sir.

Q. Not by white ants? A. No.

Q. No cracks in the walls? A. No.

Q. No cracks in the walls outside? A. No.

30 Q. The floors hadn't collapsed? A. No. Not collapsed.

Q. Would you say that the repairs carried out by you were merely minor repairs. A. I would say because it cost only three thousand shillings.

Q. I put it to you that the house was in a very very dilapidated condition and is still in a dilapidated condition despite the repairs carried out.

A. I have not been there for a few months.

40 Q. I suggest to you that even if you spent five times or ten times as much as three thousand shillings you could not put it back - restore it - to a habitable condition. A. I am not prepared to spend that.

Q. You said you got possession in January 1954?

A. December or January I don't know exactly.

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Defendant's Evidence

No. 10

Rajabali Kasam Suleman Damji.

5th May, 1955.

Cross-examination - continued.

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Court of Kenya

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No. 10

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5th May, 1955.

Cross-
examination
- continued.

Q. You never thought of re-letting the place after that? A. No at the time I didn't know I was returning to Mombasa.

Q. Your mother didn't tell you when she telephoned that she had gone and seen a lawyer about it?

A. Yes I recollect that she can verify the statements by Mr. Ishani.

Q. Did she see any lawyer other than Ishani's?

A. I don't remember.

Q. When did she tell you that she had been to another lawyer? A. I don't remember.

10

Q. She has never told you that? A. I don't remember.

Q. When did you first know that she had been to a lawyer about this contract? A. The date I don't know. I am not very certain when she told me actually.

Q. Did she write concerning this matter a number of letters over this dispute on her own without your intervention. A. It must be through one of my brothers or somebody else.

20

Q. You are the family spokesman and she didn't apply to you for assistance? A. No.

Q. She didn't tell you that it was important that you should come over from Mombasa and consult lawyers. A. I instructed my younger brother.

Q. But nobody has so far told us that he has been to a lawyer in connection with this.

HIS HONOUR: You see, on the 19th February by the time you received your telephone call your mother had not only caused an advocate to write a letter to Mr. Harji but she had also already received a letter from Mr. Harji's advocate. A. On the telephone conversation I remember that she had been to Ishani's office and there had been some misunderstanding about this property and I could verify all this from Mr. Ishani who was on his way to Mombasa.

30

Q. You have seen these letters of the 19th February? A. Yes.

40

Q. You say you don't know whether your mother mentioned this on the telephone.

A. I don't recollect.

Q. It would be very remarkable if she didn't tell

you that the matter had already reached a stage where solicitors' letters had been exchanged.
 A. But at that time I was also very shocked to learn all these things and my mother was. We don't remember exactly what happened in that period.

MR. KHAMBA: Do you want us to believe that your mother consults you at every turn in legal matters?
 A. She must have told me.

10 Q. On the following Saturday and the next day did she tell you that Harji would willingly give up the keys and the option back? A. What I do remember is this; she telephoned again on Saturday whether I had seen Ishani or not and I said that I hadn't so far been able to get hold of him. Then she told me that Harji had left for Mombasa and if you like you can see your brother to the station and get from him the key and option.

20 Q. Did she give you to understand that Harji would willingly part with the keys and the option?
 A. She didn't.

Q. What was your impression? A. I thought he would give the keys and the option.

Q. After you had talked to your mother you thought that you would get these things? A. Yes.

30 Q. Are you surprised that she should have withheld from you the information that there was a dispute which had crystallized by letters? That both parties disagreed on the whole transaction, one was trying to enforce it and the other was trying to get out of it? A. What my mother told me on the telephone was that owing to the presence of Mr. Ishani this bargain was cancelled and you can verify it from Ishani who is in Mombasa.

HIS HONOUR: She didn't tell you that as soon as she left his presence he wrote a rather sharp letter to your mother to say he was going through with the bargain? A. I don't recollect whether it was said on the telephone.

40 Q. She must have left you with some impression as to whether Harji was going to insist or try to insist on this bargain. A. I heard that the bargain was cancelled.

Q. What impression did you get from Mr. Harji's attitude? Did you think he was quite agreeable to this being cancelled?

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Defendant's
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No. 10

Rajabali Kasam
 Suleman Damji.

5th May, 1955.

Cross-
 examination
 - continued.

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No. 10

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Cross-
examination
- continued.

MR.KHANNA: Can you recollect these two things: on the one hand you say that your mother said all this is cleared up and on the other hand you say she was perturbed. If she asked you not to worry why then should she worry. Was she worried on the telephone or not? A. There was excitement in the tone.

Q. She wanted you not to worry because she was satisfied the whole thing was cleared up?

A. She was satisfied I think.

10

Q. And that was what she wanted you to understand. Then why did you say she sounded worried?

A. When I asked the question what has happened and she said don't worry.

Q. She tells you what has happened and then finishes up by saying that the whole thing is cleared up is that correct? A. She told me don't worry.

Q. How did you get the impression she was perturbed? A. When I was asking questions she was getting perturbed by my attitude as to why I was very angry, why was this done without our knowledge.

20

Q. Then I suggest to you she must have withheld all this correspondence, the fact that she had received letters and written letters back?

A. About these letters I didn't write the letters.

Q. How is it you can recollect everything about Ishani and all the details of the transaction and what had transpired in Ishani's office, all of which are very clear in your memory and yet you know nothing about the letters she had received and written.

30

A. I don't recollect.

Q. You don't want to recollect is that the truth of the matter?

A. I don't recollect.

Q. And the only reason she rang you was to ask you to verify from Ishani for your own satisfaction is that correct?

A. She said if you don't believe me you can ask that from Mr. Ishani.

40

Q. How long was this conversation on the telephone?

A. I think six or seven minutes.

Q. Does she usually keep back things from you like letters? A. She doesn't generally.

HIS HONOUR: You say you didn't see these letters until after the case started is that right?

A. No. These letters were in the hands of the solicitors there when I visited Nairobi for a few months after I saw these letters in Mr. Nazereth's office.

In the Supreme Court of Kenya

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No. 10.

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5th May, 1955

Cross-Examination - continued.

10

MR. KHANNA: Did your mother at any time impress upon you that this was an important matter and you should take it over in your hands or entrust one of the sensible brothers to deal with it?

A. When do you mean?

Q. Has she at any time told you that the matter was important enough for your intervention?

A. I don't remember.

20

Q. She never applied to you for assistance?

A. When she came to Mombasa we were together.

Q. She never told you, "Will you take up the matter of instructing lawyers"? A. I don't remember.

Q. The fact of the matter is you don't like to remember if it is in any way inconvenient?

A. You may take it like that.

Q. I do.

HIS HONOUR: Who gave instructions to Mr. Akram a second time, that is on the 23rd February, to write another letter to the plaintiff's advocates?

30

A. I was not in Nairobi at that time.

HIS HONOUR: The answer is then that your mother gave instructions?

A. Maybe my brother or any relative.

Q. Have you seen that letter?

A. If I see I may recollect it.

Q. "Mrs. Khatijabai Jiwa Hasham has handed me your letter of the 19th February 1954...charges will be paid." (Exhibit All). Was that the letter written solely on your mother's instructions?

40

A. I think it must be one of my brothers or a relative. I was not there.

Q. And you agree that the letter sounds as though your mother had taken the matter completely into her own hands?

A. My brother

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Cross-
Examination -
continued.

Q. Will you agree that the letter reads as though your mother had taken the matter completely into her own hands? A. The advocates might write.

MR. KHANNA: This was one occasion on which a family conference was not held? A. It was held.

Q. Any yet you know nothing of it?

A. I didn't say I didn't know anything about it.

Q. You didn't hear about this until months after - letters exchanged between lawyers in connection with these things? 10

A. I came - I saw when I came to Nairobi.

Q. She left out the spokesman of the family?

A. Because there was no correspondence being exchanged for months.

Q. Have you no recollection of being consulted before any answer was sent out either by the second letter by Mr. Akram or further letters by Madan and Shah? A. Because I was not in Nairobi.

HIS HONOUR: You say Mr. Ishani's advice or instructions were to you, "Don't write any correspondence". Is that right? A. Yes. 20

Q. In spite of that these solicitors go on writing? Mr. Akram writes on the 23rd Feb. and Madan and Shah write on the 26th Feb.

A. At that time I believe one of my brothers must have left for Nairobi.

Q. Didn't anybody tell your mother that the family plan was to stop writing?

A. Yes. I told her on the telephone. 30

Q. She ignored your advice then apparently?

MR. KHANNA: Does she normally carry out your advice? A. Yes, we respect each others views.

Q. Merely respect without surrendering? Do you admit your mother is independent enough to be able to deal with even legal disputes?

A. I don't think she is.

Q. Is she independent in commercial matters?

A. I don't know.

Q. Is she independent in property matters? 40

A. Except this transaction no transaction has been carried out.

Q. Is your mother a complete fool according to the opportunities you have had of judging her abilities, or is she sensible enough to know what she is doing?

A. What she has done she has done in great faith.

Q. Are you prepared to answer the question?
 A. Normally in all routine matters we're all together.

Q. Have you had sufficient chance of judging her capabilities to be able to express an opinion one way or another?
 A. In regard to what?

Q. Don't hedge. The question is quite simple?
 A. I don't understand your question.

10 Q. Interpreter. Does he consider himself to have had sufficient opportunities of assessing the abilities of his mother as regards dealing in property?
 A. It was the first transaction by herself.

Q. Otherwise do you suggest she is completely ignored and left in the kitchen, never consulted?
 A. I cannot say so.

Q. What can you say? Can you say anything about your mother? Is she a complete fool?
 A. I cannot say so.

20 Q. Is she able to understand anything? Does she know what five thousand pounds is?
 A. Yes Sir.

Q. Does she know the acreage of plots?
 A. Yes she has some idea.

Q. Has she any idea of prices at which she has bought?
 A. Yes Sir.

Q. Does she know that a big plot if sub-divided has to be surveyed and plans prepared for it?
 A. She must have that idea.

Q. This man Hassan is he your relation?
 A. No Sir.

Q. Not at all?
 A. No.

30 Q. Have you known him a long time?
 A. No.

Q. You don't know him at all?
 A. I knew him by name.

Q. Only by name?
 A. Yes.

Q. Do you know that he was habitually in debt and coming under arrest almost daily to these courts?
 A. I didn't know.

40 Q. Do you suggest that he approached you and the approach was not made by you to him?
 A. In connection with this piece of land I had a telephone call one day from Nairobi to Mombasa when I was there.

Q. Is he an estate agent this man Hassan?
 A. I don't know whether he holds any licence in respect of such business. He is a broker in Merali Brothers.

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No.10.

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5th May, 1955

Cross-Examination - continued.

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Defendant's
Evidence

No.10.

Rajabali Kasam
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5th May, 1955

Cross -
Examination -
continued.

Q. He is an ordinary employee at possibly 40 to 45 pounds a month. A. I don't know anything more.

Q. Is that the only offer that you can get from anybody? A. He on his own initiative gave me an offer.

Q. Have you tried to consult any of the official auctioneers and estate agents?

A. I have some initiative over this sort of business and I know the prices of land.

Q. Do you usually consult mere employees in a firm and get their offers?

A. I have never consulted anybody.

10

Q. Did he tell you who this prospective buyer was?

A. He simply said there is a Hindu doctor who has seen the property and he is interested in it.

Q. He didn't give you the name? A. No. No name.

Q. Was he a Government servant or a private employer, did he tell you that?

A. No clarification was made.

Q. With regard to this man opposite, this house where you were putting up? Is he a relation?

A. No Sir.

20

Q. You often put up with him? A. Occasionally.

Q. Your mother also puts up there?

A. That is not a fact.

Q. She said she was at this house when the keys were taken from her?

A. So far as I remember she has never put up at that house. She has got her uncles house and she puts up there.

Q. What is the association of Sultan with your family?

A. He is only some sort of reference place for any of our communications in writing and telephone between Nairobi and Mombasa.

30

Q. Your permanent address is c/o Sultan? Not only yours but your mother's and everybody's. Is that correct? A. That is not a fact.

Q. Well what is your association with Sultan?

A. A good acquaintance.

Q. He is only an acquaintance? A. Yes.

Q. Your mother and you all stayed at his shop when you were here. All your messages are received there?

A. It is some sort of support in our activities.

40

Q. Why does he support you to that extent if he is only an acquaintance?

A. He is the best man to reply to that.

Q. He has been doing that for years now?
A. For the last two or three.

Q. And you still call him an acquaintance?
A. A very solid sincere acquaintance.

Q. You have depths of sincerity with an acquaintance is that correct? A. I have never.

Q. Such as your mother could rely on even over heavy transactions of property? A. Yes.

10 Q. He could alternate for one of her sons?
A. I cannot say to what extent I can be replaced by Sultan.

HIS HONOUR: Had he got an intimate knowledge of your family affairs? A. No, Sir.

Q. As far as you know he knew nothing about this land deal?

A. If he may be knowing anything superficial I cannot say. He can say better as to what extent he knows of our matters.

20 MR. KHANNA: Do you think your mother could take him along to the lawyers with a view to instructing in place of you or your brothers?
A. Yes Sir. She could take him.

Q. And would you be quite satisfied with that?
A. Yes Sir. I can only say I would be contented.

30 Q. You say that you consulted your advocate when you got an offer and you were told the matter was sub judice and you could not do anything. Did you tell him then that you had undertaken certain repairs notwithstanding the matter was sub judice.
A. I didn't disclose anything about the repairs having been undertaken.

Q. Did you not think that you should have done after your advocate said that you must not interfere with the property?

A. I was only warned by my advocate not to interfere with regard to the sale of the property so I thought it unnecessary to disclose anything about these repairs.

40 Q. Did your mother consult you or ask if she should sign a binding option in respect of this property?
A. I was told nothing by my mother.

Q. Were you surprised at that action?
A. I was surprised.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 10.

Rajabali Kasam
Suleman Damji
5th May, 1955
Cross-
Examination -
continued.

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Court of Kenya

Defendant's
Evidence.

No.10.

Rajabali Kasam
Suleman Damji
5th May, 1955

Cross-
Examination -
continued.

Q. She always consults you before signing any papers or before undertaking any business on her own.
A. On many occasions we are together.

Q. When you had decided to find a buyer for 100,000/- had you decided who would put the transaction through?

A. Nothing was certain in our minds. We only thought if by chance we got a good offer - better dispose of it.

Q. Did you warn your mother not to enter into any transaction on her own? A. I don't think so. 10

Q. Was it understood that your mother could enter into a transaction if a buyer were found while she was in Nairobi?

A. We were under the impression that mother would certainly consult us, before doing anything.

Q. Did you say that your mother cannot be trusted to carry out a transaction on her own?

A. It would be trustworthy on her own initiative.

Q. And that was your belief right through? 20

A. Yes that was my impression - what mother will do will be right.

HIS HONOUR: Was it part of the family plan to get 100,000/- cash for this portion of land without revealing that there was a mortgage on it?

A. There was nothing like this.

Q. You said your mother was annoyed because Ishani had put the fact in the agreement for sale that 81,000/- was due on a mortgage?

A. I don't know, my mother getting annoyed at anything from Ishani. 30

Q. Didn't you say that on the telephone one of the things she disagreed with was this mention of the mortgage figure in the agreement of sale?

A. She never got annoyed on the matter of the mortgage.

Q. Anyway when you were selling this land did you want to pay off the mortgage or did you want to leave it as it was just paying interest?

A. My Lord, in the course of this plan of disposing of the portion I had prior consultation with the Managing Director of the Diamond Jubilee Trust, that in the event of disposing of the portion of this land all this land would be attended if we give you some money and also keep this mortgage for the rest of the plot. He said yes it will be. 40

Q. You said that your mother told you that mention of the mortgage in the agreement for sale was no business of the purchaser. Do you remember saying that? Repeat what you think you said.

A. When my mother, on the telephone, demanded 25,000/- then Ishani told that there is a mortgage of 81,000/- Diamond Jubilee. Then my mother says this mortgage was not concerning the purchaser.

10 HIS HONOUR: And she thereupon tore up the agreement of sale?

A. At that time she was still arguing about the money.

Q. But she was annoyed about this mention of the mortgage in the agreement? A. Not on the mortgage.

Q. In other words she didn't want the 81,000/- shillings deducting from the 100,000/- which she expected to receive and she was annoyed because Ishani had put this in?

20 A. No she was annoyed that she was not to get 100,000/- or at least 25,000/- clear cash. She demanded 25,000/- and then after some discussion Ishani said "You cannot have 25,000/- there is a mortgage of 81,000/-."

Q. It was over this payment, especially in connection with this mortgage that a dispute arose between your mother and Mr. Ishani?

A. My mother wanted 25,000 and Ishani referred to this thing and my mother said this is no concern whatsoever I must have my 25,000/-.

30 Q. In other words your mother told you that there had been a dispute about how much cash she was to receive?

A. Yes Sir. And when she discussed with him over the dispute about payment of the amount then everything was disclosed. It came to light that instead of half an acre two acres are mentioned in the documents.

40 Q. Did she tell you anything about having a cheque offered to her for 10,000/- or 15,000/- or anything like that?

A. I enquired did you receive any money and she said, "No I received nothing".

Q. How much were they ready to offer her cash?

A. I didn't enquire or ask anything like that.

Q. She said she wanted 25,000/- and she could not have it. Is that right?

A. My mother simply disclosed that when she put her demand for 25,000/- the cat came out of the bag.

In the Supreme Court of Kenya

Defendant's Evidence.

No.10.

Rajabali Kasam
Suleman Damji

5th May, 1955

Cross-
Examination -
continued.

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Cross-
Examination -
continued.

Q. What cat?

A. That instead of half an acre two acres were mentioned.

Q. How did that suddenly come to light?

A. She first signed then demanded 25,000/-. She was told by Ishani she won't get 25,000/- "you accept 10%." Then instead of 25,000 she was offered 15,000 and told not to be unreasonable. Repeatedly my mother insisted, "I do want my 25,000/- because the whole bargain is for 100,000/-". 10
Then Ishani says how can you get 100,000/- because there is a mortgage in respect of 81,000/- on this property, you are only entitled to 19,000/-. Then my mother says, "I will get my half acre released and keep back the other three plots with the Diamond Jubilee Trust after giving some additional amount". By that time Sultan must have picked up and read and at once intervened these are two acres and not half an acre, and then my mother lost her temper. The whole plot is about half an acre. "How is this," 20
Ishani said, "this option is in respect of two acres." Mother objected to it. Then Ishani said "There is some misunderstanding and I now say that this matter should be forgotten".

Court adjourned 12.45 p.m.

Court resumed 2.30 p.m.

HIS HONOUR: Your mother made it clear to you that two things which were wrong about this agreement for sale were (i) that it described the land as two acres instead of half an acre and (ii) that it included a clause for paying off the mortgage. Is that right? 30

A. She did not say so on the telephone.

Q. Did she make it clear on the telephone that she had signed an agreement to sell the land?

A. She didn't use the word agreement of sale expressly, but she said I have signed an agreement and then torn it up.

Q. Didn't she make it quite clear to you that the agreement she signed was for selling your land or part of it? 40

A. I was told by my mother that the document is in respect of two acres "So I tore it off".

Q. But she knew it was an agreement to sell land of some sort or other didn't she?

A. Yes Sir. She made it clear that in respect of half an acre of land we went to Ishani's office.

Q. Also she was quite clear that the option concerned the right to purchase the land or part of it?

A. She said when I went to Ishani's office he took down a paper and said have you given this in writing. She said yes.

Q. The only fault she had to find in the option and agreement for sale was that they mentioned two acres instead of half an acre is that right?

A. Yes Sir.

10 Q. Would your mother have sufficient knowledge to know what the position would have been if the agreement for sale had not mentioned the mortgage? By that question I mean would she have known where the liability for payment of the mortgage would lie?

A. My mother's understanding was actually that the liability of mortgage rested solely on her head.

20 Q. Supposing somebody paid you 100,000/- cash for the half acre you wanted to sell, would you know whether the purchaser could be held liable? Do you think your mother took the same view? A. Yes Sir. I believe that my mother had also the same interpretation.

Q. Did you discuss the mortgage at the same time as you discussed the sale of the half acre between you in the family?

A. As I said before lunch. I talked with the manager of the Diamond Jubilee. I assured my family members that we could sell part or portion of this land with certain arrangements with the Jubilee Trust people.

30 HIS HONOUR: Did you know if Mr. Harji knew whether there was a mortgage on this plot?

A. I don't know Sir.

No. 11.

EVIDENCE OF SULTAN ALI ALADIN LALJI

SULTAN ALI ALADIN LALJI (Sworn).

Examined by Mr. O'Donovan;

Q. We have heard that you are a friend of the defendant's family? A. Yes.

Q. You are a merchant in Nairobi? A. Yes.

40 Q. Are you related to the defendant's family in any way? A. No Sir.

Q. Are you related to anyone who has an interest in this case? A. Yes to Mr. Hasham.

In the Supreme Court of Kenya

Defendant's Evidence

No.10.

Rajabali Kasam
Suleman Damji
5th May, 1955.

Cross-
Examination -
continued.

Defendant's Evidence.

No.11.

Sultan Ali
Aladin Lalji.

5th May, 1955.
Examination-in-
chief.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No.11.

Sultan Ali
Aladin Lalji.

5th May, 1955.
Examination-in-
Chief -
continued

Q. Have you any business concerns in common with the defendant? A. No. Sir.

Q. Do you intervene in any way in business matters? A. No Sir.

Q. Do you recollect the 19th February last year. A. Yes Sir.

Q. Can you remember clearly what happened on that day? A. Yes Sir.

Q. Did you receive a telephone call at about lunch-time from Mr. Harji. A. Yes.

10

Q. What did he say to you?

A. The message said call Mrs. Khatijabai at your shop.

Q. Did you do so? A. Yes.

Q. How did you call her? Did you walk over?

A. I called by telephone.

Q. Then what happened? A. She came.

Q. Did anyone else come? A. Yes. Mr. Harji.

Q. Did you hear any discussion between them?

A. No Sir.

20

Q. There was nothing said to you? A. No Sir.

Q. Then what happened?

A. Come with me Mrs. Khatijabai told me, I am going to Mr. Ishani's office.

Q. Did she explain why? A. No Sir.

Q. Did you have any idea why you were being called?

A. I had an idea that may be some legal matters.

Q. Why should they want you? A. That I cannot say.

Q. Did you go with her? A. Yes.

Q. Did you enter Mr. Ishani's office? A. Yes.

30

Q. With the Plaintiff and the Defendant? A. Yes.

HIS HONOUR: Any talk on the way?

A. No Sir, but they were talking both of them.

MR. O'DONOVAN: Did you hear what was said?

A. No Sir. Because I was following.

Q. On arrival did Mr. Ishani say anything?

A. Yes.

Q. What did he say to her?

A. Mr. Ishani first enquired of her are there any partners in this. There was a paper in his hand and he also enquired is this the option you gave and do you agree that you have sold this for 100,000/- Mrs. Khatijabai said yes.

40

- Q. Then what happened? A. So Mr. Ishani went to have some papers typed and came back and took a seat.
- Q. What was this paper? A. Those papers were agreement of sale.
- Q. Did you see it being prepared or had it already been prepared? A. I saw them going in the process of being prepared.
- 10 Q. What exactly did you see Mr. Ishani do? A. Mr. Ishani entered an adjoining room with signature papers.
- Q. Where did he get them from? A. They were on the table.
- Q. Where they already written up when you arrived or not? A. That I don't remember, whether written up or blank.
- Q. He came back did he with the papers? A. Yes.
- 20 Q. How long was he away? A. About five minutes.
- Q. Then what happened? A. He handed over that paper to Mrs. Khatijabai.
- Q. Did he say anything? A. He was saying "Sign in this". Mrs. Khatijabai completed her signature and demanded the money, "Give me cash 25% that is 25,000/-". Mr. Ishani said "We will give you 10% that is 10,000". And he gave another paper to her.
- 30 Q. What happened then? When he said she would get 10%? A. Mrs. Khatijabai insisted upon her original demand of 25,000/-.
- MR. O'DONOVAN: Did Mr. Harji say anything? A. Mr. Harji said, "All right we will give you 15,000/-".
- Q. Did you see any cheque book in the office? A. Yes Sir.
- Q. Where was it when you went into the office? A. It was in front of Mr. Harji on the table.
- 40 Q. Yes. And what happened to it? A. He handed over that cheque book to Mr. Ishani and Mr. Ishani wrote something in the cheque book.
- Q. Was that cheque ever given to anybody by Mr. Ishani? A. No.

In the Supreme Court of Kenya

Defendant's Evidence

No. 11.

Sultan Ali Aladin Lalji.

5th May, 1955.

Examination-in-chief - continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No.11.

Sultan Ali
Aladin Lalji.

5th May, 1955.

Examination-in-
chief -
continued

Q. What happened to the first piece of paper that was signed?

A. Mr. Ishani, after that first piece of paper was completed by signature of Mrs. Khatijabai, crossed out something and turned it down left on the table very near to me.

Q. Face downwards? A. Yes.

Q. Was there another piece of paper?

A. Another piece of paper was placed before Mrs. Khatijabai.

10

Q. Was anything said to her about that? A. Yes.

Q. By whom?

A. Mr. Ishani. He pointed out with the finger "sign here, sign here, sign here", three places.

Q. Did she accept the 15,000/-. A. No Sir.

Q. There was no further talk about it was there?

A. Yes there was further talk.

Q. Was that while this was going on?

A. Yes Sir. It was simultaneously taking place.

Q. What was the further discussion?

A. About money. Mrs. Khatijabai had repeatedly insisted upon her original demand of 25,000/-.

20

Q. Did anybody but Mr. Ishani say anything?

A. Yes Sir.

Q. What did he say?

A. Like this is mortgaged for 81,000/- and your share comes only to 19,000/-. So Mrs. Khatijabai said the matter of the question of 81,000/- is my concern. And she said, "I will arrange all leaving the remaining three pieces of land of mine with the Diamond Jubilee Trust and will manage my affairs".

30

Q. Think carefully about what she said. Was there any talk about acreage?

A. There was no other talk then.

Q. Then what happened?

A. By that time by sheer inquisitiveness I thought better I should look and I read there was no reference to the pieces of land.

Q. Which paper did you pick up?

A. The original, the first which was stamped.

40

Q. Is that the one which was face downwards?

A. Yes.

- Q. Would you look at exhibit A.2. Is that the document? A. Yes.
- Q. Do you notice it is signed twice? A. Yes.
- Q. Do you remember that happening? A. Yes Sir.
- Q. How did that happen?
A. First I gave my biro pen to Mrs. Khatijabai and then Mr. Ishani objected that biro pen is no good on a document and she was given a pen holder by Mr. Ishani, and she signed again.
- 10 Q. You picked up this document? Did you read it?
A. Yes.
- Q. And what did you notice about it?
A. I saw having been mentioned but four (sic) acres, the whole piece of land.
- Q. Did you say anything?
A. Yes Sir. I spoke to Mrs. Khatijabai two acres have been mentioned in this. Mrs. Khatijabai jumped on her seat.
- 20 Q. Did she say anything?
A. She demanded at once for an explanation from Mr. Ishani.
- Q. Did Mr. Ishani say anything?
A. Ishani said "Yes, the whole piece of land including the building on it is involved." Mrs. Khatijabai remonstrated and uttered, "There is half an acre." Mr. Ishani said "There is no question of getting angry, here is your option. I have copied it from your option." Mrs. Khatijabai refuted that and said only half an acre is mentioned and half an acre intended to sell. She got angry and tore up the agreement.
- 30 Q. She tore this one? A. Yes.
- Q. And then what happened?
A. Then Mr. Ishani said there is no question of losing temper but some misunderstanding exists. Mr. Harji lowered his head like this.
- Q. What impression had you got of his behaviour?
A. I thought that a misunderstanding. Then myself and Khatijabai left the office.
- 40 Q. Did you take any papers with you? A. No Sir.
- Q. What happened to the torn up agreement?
A. It was in the hands of Mr. Harji as he picked it up.
- Q. You left with the defendant? A. Yes Sir.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 11.

Sultan Ali
Aladin Lalji.

5th May, 1955

Examination-in-
chief -
continued

In the Supreme
Court of Kenya

Defendant's
Evidence.

No.11.

Sultan Ali
Aladin Lalji.

5th May, 1955.

Examination-in-
chief -
continued

Q. Where did you go? A. We went to my shop.

Q. And did you go anywhere from there?

A. Yes to Mr. Akram.

Q. How did it occur that you went to Mr. Akram?

A. Mrs. Khatijabai pointed out to me, "Look Ishani is an advocate of Mr. Harji and we have not got back our key and the option. She said, "Let us go to Mr. Akram".

Q. Whose lawyer is he? A. Mine.

Q. You took her there? A. Yes Sir.

10

Q. Were you there when she gave instructions for a letter to be written?

A. In my presence the advocate was instructed by Mrs. Khatijabai.

Q. Do you know who instructed Mr. Akram to write a letter on the 23rd February?

A. That is not to my knowledge Sir.

Cross-
Examination.

CROSS-EXAMINED

Cross-examined by Mr. Khanna.

Q. How long were you in that gallery listening to the evidence of Mrs. Khatijabai? 20

A. Two or three minutes.

Q. Quite a long time? A. No Sir.

Q. Were you not sitting there for as much as half an hour? A. No Sir.

Q. Did you know that you should not have come into hear evidence? A. I didn't know Sir.

Q. Have you discussed your evidence since the 19th with Mrs. Khatijabai? A. No Sir.

Q. Have you discussed it with any other member of her family? A. No Sir. 30

Q. Have you given a statement to Mr. O'Donovan?

A. Yes.

Q. When did you give him that?

A. About four or five months before.

Q. Apart from that you had no discussions whatsoever with anyone connected with this case? A. No Sir.

Q. Are you on terms of very close intimacy with the family of the defendant? A. No Sir.

Q. Why then do you accompany her leaving your business and go with her to this office?

A. I was friendly with her son Rajib Ali.

Q. And that is why you summoned her to your shop and then went with her to the office? A. Yes Sir.

Q. Are you a close friend of Rajib Alis?

A. We are friends. Not close.

Q. How friendly?

10 A. Only in connection with some mutual postal correspondence, nothing more than that.

Q. When you were asked to go with her to the office why did you readily agree?

A. I didn't readily agree.

Q. You protested? A. I didn't protest.

Q. You say that Ishani asked a question, "Have you sold this?" Did he use the word this? A. Yes Sir.

20 Q. What exactly did he say? Have you sold this for a 100,000/- or did he wave the paper and say "Have you sold this for 100,000/- or what did he say?"

A. Holding the paper and pointing he said, "Have you sold this?"

Q. Did he say the same thing "Are there any partners in this" also? A. No Sir.

Q. Surely by "this" did you understand what he meant? He never used the word property or your property next to the Mayfair Hotel?

A. No specific mention was made.

30 HIS HONOUR: When did you first know that a piece of land was being sold?

A. When I heard Mr. Ishani speaking. "Are there any partners in this Estate". Then I first realised that this is about some property.

Q. He did use the word "estate" when he was asking if there were any partners?

A. The word was used.

MR. KHANNA: Which was the first question, was it "Have you sold this". Did he say, "Have you sold this or have you sold this estate".

40 A. "Have you sold this", were the express words.

Q. Do you think Mrs. Khatijabai heard the word "estate"?

A. I think she must have heard it clearly, but I am not positive whether she did or not.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 11.

Sultan Ali Aladin Lalji.

5th May, 1955.

Cross-Examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 11.

Sultan Ali
Aladin Lalji.

5th May, 1955.

Cross-
Examination
- continued

Q. Who was closer to Mr. Ishani you or Khatijabai? Were they not all sitting at the table Ishani on the one end on one side Mr. Harji and Mrs. Khatijabai (inaudible).

HIS HONOUR: You said the first question was "Have you sold this" and the second question "Are there partners in this estate" is that correct?

A. That is correct.

MR. KHANNA: You used this word 'estate' the second time? A. That is so.

10

Q. When this word 'estate' was used, where exactly in the room was Mrs. Khatijabai?

A. Opposite to Mr. Ishani.

Q. On a chair? A. Yes Sir.

Q. Was it quite close to the table? A. No Sir.

Q. Will you demonstrate how far from the table? (about 5 ft.).

Q. How far away from Ishani was Mr. Harji?

A. Mr. Harji was on the right hand side - two or three feet.

20

Q. Where were you? (four feet).

Q. You heard Mrs. Khatijabai answer clearly?

A. Yes.

Q. To that question? A. Yes Sir.

Q. Did you see Mr. Ishani scribble down something on a piece of paper? A. Yes Sir.

Q. How long was he in writing?

A. About 30 seconds, to one minute.

Q. Did he fill up the paper?

A. I think copies were filled in.

30

Q. Did he fill in copies or write on blank piece of paper? A. I don't know.

Q. Where these papers that you saw him take out written in pencil, ink or typewritten.

A. I don't know that.

Q. After about how many seconds or minutes did he come back with typewritten papers?

A. about five minutes he might have taken.

Q. In all for how many minutes were you in Ishani's office with Mrs. Khatijabai?

A. May be about 30 minutes.

40

Q. What time did you first go in?

A. About one o'clock.

Q. What time did you go away?

A. That I don't know.

Q. Did you not hear Mr. Ishani translate the whole document before it was signed by Mrs. Khatijabai?

A. No Sir.

Q. Have you ever entered into any legal transactions? A. Yes Sir.

Q. Did you first read in the agreement that you were asked to sign. Where you found difficulty in understanding English did you ask that the matter be explained to you? A. Yes Sir.

10

Q. Did you not think that Mr. Ishani was doing wrong by asking her to sign without explaining to her?

A. No Sir.

Q. It was against everything that you had been used to and yet you didn't protest in the interests of the defendant?

A. It was not to my knowledge. I was under the impression that the woman might have been made to understand in advance.

20

Q. How can you think it might have been explained before hand?

A. The matter was not of my personal interest I didn't therefore pay much attention to this matter.

Q. Did it not dawn on you that was why you were accompanying her? A. It didn't dawn on me.

Q. During all this discussion you have made no reference to any argument over the acreage. Can you explain why it suddenly occurred to you that you should warn her that it referred to two acres?

30

A. It was impressed on my by her reference to the three pieces.

HIS HONOUR: Yes but she didn't mention the size of the three fixed pieces.

A. I was not interested in the size.

Q. How did you know there were not four pieces of two acres each?

A. When she specifically mentioned I will keep my three pieces and have it separately mortgaged, then it occurred to me and I disclosed what I read.

40

Q. How did you know she was not selling one piece of two acres and that there were not four pieces making eight acres in all?

A. It was not to my idea.

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 11.

Sultan Ali
Aladin Lalji.

5th May, 1955.

Cross-
examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No.11.

Sultan Ali
Aladin Lalji.

5th May, 1955.

Cross-
Examination
- continued

Q. How did you know the size of the land or the size of the pieces?

A. I heard only the words two acres and explained to her that the mortgage is disclosed about these two acres which you are selling.

Q. But how did you know the size of the land or the size of the portions of it?

A. After reading the document My Lord I only referred her about the two acres.

Q. How did you know that that was not the portion she wanted to sell - the one fourth portion? 10

A. I was explaining the lady.

Q. She had said, "I am selling one portion of the mortgage and I will keep the other three portions" Why did you suddenly say "Ah two acres"?

A. In ordinary tone I only said to her, "You are selling two acres" and "They are giving you all this money for two acres".

Q. Did you think the money was too much or too little for two acres? A. That is beyond my power. 20

Q. But why did you suddenly make this only contribution to the conversation - the one and only remark - Why should you think it was important to point out that the land consisted of two acres?

A. Everthing was within her knowledge My Lord, what the land is priced and what she wanted to sell.

MR. KHANNA: You saw Mrs. Khatijabai put her name to two pieces of paper five times? A. No Sir.

Q. How many times? A. About three or four times.

Q. You saw the places that she was signing? 30

A. No Sir.

Q. You weren't able to see from the position you were in? A. I could see.

Q. How is it then that you didn't, you were quite close to the table?

A. It was not a matter of my interest.

HIS HONOUR: Were you standing by her shoulder or sitting beside her?

A. Further away from her shoulders and sitting.

Q. Right next to her? 40

A. One or two feet away from her.

Q. There was nobody in between you and her?

A. Nobody between.

MR. KHANNA: Did you see her sign on the alterations?

A. No to my knowledge.

Q. Will you look at Exhibit A.4. Did you see her sign this piece of paper? A. Yes.

Q. Do you see two signatures on top? A. Yes Sir.

Q. Had those alterations already been made when she signed? A. May be.

Q. Come, come. You were there. You had your eyes open did you not? A. I was in my ideas.

Q. You were engrossed in your thoughts when it comes to remembering an inconvenient signature?

10 A. That was not against her interest. I never went with a view to have any interest in this matter or interference. As she is a woman I accompanied as requested out of simple courtesy.

Q. If you had no particular interest why is your memory so vivid about all the other details? You know the proper sequence in which things happened.

A. I saw what I saw sir.

Q. Why did you fail to see her signing on the alterations?

20 A. It was not necessary for me to watch all this.

Q. Was it Mr. Ishani who made these alterations?

A. He might have done.

Q. You don't know? A. No Sir.

Q. You have said that Mr. Ishani said "sign here, sign here, sign here", quite distinctly three times. Did you then suddenly turn your face away in order not to see what those three places were?

A. That matter was not of my interest.

30 HIS HONOUR: You heard Mr. Ishani say "Sign here three times". Did you see the defendant sign three times or didn't you look?

A. I saw Khatijabai writing at three places but I didn't see or watch the signature itself.

MR. KHANNA: But you could see distinctly the places where she was signing?

A. I could see, but seeing was not in my interest and I don't know.

Q. So that at times your interest arose and at times suddenly went. Is that correct?

40 A. How can I say so.

Q. Were you able to see the figures which she was signing?

A. The altered figures she may have signed.

Q. You are not even sure whether she signed?

A. I only heard Mr. Ishani expressly say "Sign here".

In the Supreme
Court of Kenya

Defendant's
Evidence

No. 11.

Sultan Ali
Aladin Lalji.
5th May, 1955.

Cross-
Examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No.11.

Sultan Ali
Aladin Lalji.
5th May, 1955.
Cross-
Examination
- continued.

Q. You heard the directions to sign in three places but you never observed the execution. Is that correct? A. Yes.

Q. Was the defendant insisting on 25,000/-?

A. Yes Sir.

Q. And she was asked to sign despite her figure not having been accepted? A. Yes Sir.

Q. Did that not arouse your suspicions? A. No Sir.

Q. Did it not occur to you as an honest man to aid an illiterate woman at that stage?

A. She had never disclosed to me anything and I was under the impression that she must have been explained all this by Mr. Harji and Ishani.

Q. There was clear disagreement as to the figure to be put - to be paid by way of deposit and yet she was asked to sign in three places as if she had accepted the altered figures? A. I thought they would settle afterwards as to what to accept and what to give.

Q. You are a commercial man of standing are you not? 20

A. Yes.

Q. And you understand commercial transactions? A. Yes.

Q. You know that once you put your signature to a thing you cannot expect to settle subsequently?

A. Yes Sir.

Q. You are not so credulous as regards yourself as to sign and then hope the people will settle and alter again? A. Yes.

Q. Even as a disinterested person why did you not raise your voice in protest and say "You cannot ask her to sign she has not accepted this figure. Why not strike a bargain first and then ask her to sign". 30

A. There was an advocate and I had no necessity to interfere.

MR. KHANNA: Did you know who the advocate was?

A. No Sir.

Q. Now Mrs. Khatijabai has said here that she never parted possession of these papers after she had signed she held them and demanded 25,000/-. Do you accept that? A. No Sir. I do not accept. 40

Q. I suggest to you that the agreement was fully read over and explained to Mrs. Khatijabai, and if you had paid sufficient interest you would know it - unless you became disinterested. A. No Sir I have not heard.

Q. Did it not even occur to you to protest even as a disinterested person, that that is not how things are done? A. No Sir.

Q. I suggest to you that Mrs. Khatijabai had fully accepted the altered figures of 15,000/- and 85,000/-. 50

Q. After you went with Mrs. Khatijabai to Mr. Akram's office did you hear her say, "I never agreed to accept anything under 25,000/-? A. I don't hear her explaining to Mr. Akram all this.

Q. Did you also aid her in giving instructions to Mr. Akram? A. No Sir.

Q. Were you present at the interview with Mr. Akram and Mrs. Khatijabai? A. I was there.

Q. Did it not occur to you to tell Mr. Akram that the lady demanded 25,000/- the whole time she was there and never agreed to anything less yet Mr. Ishani took her signature to 15,000/- as if she had accepted it? A. I was listening while the lady was speaking to Akram.

10

Q. You never prompted her the whole way through?

A. I did not interfere.

Q. Why didn't you leave her at the office and come away? What was the object of going inside? A. She was a lady and I had to accompany her all the time.

Q. You might well have stayed outside. Why didn't you? A. My going in was not objectionable to anybody.

20

Q. Did you form the opinion that she was capable of instructing her own lawyer? A. Yes Sir. I was confident about her intelligence.

Q. Where was this duplicate A4 at the time she tore up this piece of paper, the original.

A. It was in the hands of Mr. Ishani.

Q. Is it not true that when Mr. Ishani had made out the cheque and after it had been signed by Harji he had given it to Mrs. Khatijabai? A. No Sir.

30

Q. Are you quite sure that after tearing the agreement or before tearing the agreement there was quite a lot of argument over this matter? A. Yes Sir.

Q. For how many minutes? A. Five or ten minutes.

Q. And during that time in whose hands was the original? A. It was left in front of Khatijabai.

Q. When did you have it? Was it after you read it that you placed it in front of Khatijabai?

A. Yes Sir.

Q. Why didn't you put it back where it was?

40

A. Mrs. Khatijabai and Mr. Ishani were in front of each other and I placed the piece of paper in between them.

Q. Did you place it there deliberately so that Mrs. Khatijabai could pick it up and tear it up?

A. No Sir.

Q. Why did you not put it back exactly where you picked it up from?

A. I had no idea as to put it back.

Q. Why did you suddenly become sufficiently interested so as to read the document?

50

A. Only by sheer inquisitiveness when I heard the reference of 81,000/- and 19,000/- respectively it occurred to me to have a look.

Q. Why did you suddenly change your attitude and become interested without being requested?

A. I cannot explain that.

Q. Because no explanation exists? A. The only explanation is if a man thinks to read he may pick up and read but if he doesn't want he may not at all.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 11.

Sultan Ali Aladin Lalji.
5th May, 1955.

Cross-Examination - continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 11.
Sultan Ali
Aladin Lalji.
5th May, 1955.

Cross-
Examination -
continued.

HIS HONOUR: Did you think at the end of this discussion that the thing had finished in a friendly way? A. Yes Sir.

Q. You thought that there had been an unhappy mistake and both parties recognised it and that the whole deal was off? A. Yes Sir.

Q. And that it was an unfortunate mistake for which nobody was to blame? A. Yes Sir.

Q. In Mr. Akram's office did you hear Mrs. Khatijabai tell Mr. Akram to write and say that Harji was a fraud? A. Yes Sir. 10

Q. Were you surprised to hear that?

A. I was surprised.

Q. According to your explanation Mr. Harji and Mr. Ishani had said, "Here is a document signed by mistake, of course we all know it is a mistake", and everybody said, "Yes we don't want to take advantage of the lady at all". That was the attitude wasn't it? A. Yes Sir I inferred that way.

HIS HONOUR: Did you know that Mr. Akram wrote immediately after this meeting, "I am instructed to say that the whole transaction was fraudulent"? 20

A. My Lord, I am not aware of the word fraud or any such allegation.

Q. But Mr. Akram wrote the letter there and then while you were there didn't he?

A. No Sir. I was not there while he was writing it?

Q. Where were you? A. We had left.

Q. He never read over the letter to Mrs. Khatijabai before she left? A. No Sir. 30

MR. KHANNA: Did you hear Mrs. Khatijabai instruct Mr. Akram that the whole thing had been washed out? A. No Sir.

Q. If the whole thing was washed out would it not have been the right thing to ask for the return of the keys and option?

A. Yes Sir. I agree the only thing left for Khatijabai was to ask back the key and option.

Q. And did you not advise her that this was the proper thing to do in view of what you had seen? 40

A. We went to Mr. Akram's office.

Q. And yet you say that you didn't hear Khatijabai saying that the agreement had been cancelled by mutual consent? A. I don't remember.

Court adjourned 4.10 P.M.

6th May 1955.

11 a.m. Friday, 6th May, 1955.

Fifth Day

Court as before.

Cross-examination of MR. LALJI continued:

MR. KHANNA: Was half an acre specifically mentioned during all the time you were in Mr. Ishani's office by the defendant? A. Before or after? 50

Q. During the conference at Mr. Ishani's office.

A. When I disclosed about the two acres of land mentioned in the document, she sprang up and said, "No, half an acre".

Q. When Mr. Ishani said, "Are you selling this for Shs. 100,000 he did say selling the half acre for Shs. 100,000? A. That is not to my knowledge.

Q. You mean you would have remembered it if he had said so? A. Yes. 60

Q. Did you hear the defendant mention to Mr. Akram that she only intended to sell half an acre?

A. Yes.

Q. You are quite definite about that?

A. According to my ideas I know and heard.

Q. Are you in a position definitely to assert that on oath? A. Yes.

Q. Are you sure that the defendant told Mr. Akram that she intended to sell half an acre, but she never mentioned the Shs. 25,000 deposit?

10 A. I do not remember.

Q. Did she tell Mr. Akram that she intended to sell one plot before, or did she specifically say half an acre?

A. According to my recollection, she specifically referred Mr. Akram to the half acre plot.

Q. Whose suggestion was it that you should go and instruct Mr. Akram about this matter?

A. I suggested it.

20 Q. And the defendant did not suggest that she would like to go to an advocate in this matter?

A. It was the idea of the defendant.

Q. Whose idea was it first?

A. According to my recollection, it was first her idea.

Q. Are you mind reading or are you telling us what she said? A. I am only saying what I in fact heard.

JUDGE: What did you hear the defendant say about going to an advocate?

30 A. I was told by the defendant. I saw that she was perturbed. She said, Ishani is Mr. Harji's advocate. We have not received the option. So I associated from all this that she wanted to go to somebody for advice and that that somebody might be an advocate.

Q. Before this was said, did you suggest, Let us go to an advocate? A. No.

Q. So the first suggestion came from the defendant?

A. I think so.

40 Q. She realised the importance of getting back the option and the keys without any suggestion from you? A. Yes.

Q. Did Mr. Harji say anything which would amount to acknowledging that the whole thing was a misunderstanding? A. He did not utter anything.

In the Supreme Court of Kenya

Defendant's Evidence.

No. 11.

Sultan Ali Aladin Lalji.

6th May, 1955

Cross-Examination
- continued.

In the Supreme
Court of Kenya

Defendant's
Evidence.

No. 11.

Sultan Ali
Aladin Lalji.

6th May, 1955

Cross-
Examination
- continued.

Q. Mr. Ishani has said that Mr. Harji merely stood up? A. We all stood up simultaneously.

Q. Did you pay particular attention to any peculiar behaviour on the part of Mr. Harji? A. No.

Q. What do you think he did in the way of physical behaviour which led you to believe that he had agreed to cancel the whole transaction?

A. He lowered his head.

Q. Once or twice?

A. According to my recollection, once only.

10

Q. Merely nodded his head? A. Yes.

Q. Did he lower his head in shame?

A. I cannot say that.

Q. Did he lift up his hand and put it against his mouth?

A. His fingers were already on his cheek over his face, and then he lowered his head.

Q. Have you discussed with the defendant Mr. Harji's physical behaviour? A. Not at all.

Q. You were sufficiently interested in the physical behaviour of Mr. Harji to be able to remember it right from the 19th February, 1954, to this day? 20

A. According to my power of intelligence, I do remember.

Q. In this part of the affair you were sufficiently interested definitely to remember it? A. Almost.

Q. But you do not remember anything about the signatures or the alterations when they were made.

A. Yes.

Q. Was Mr. Hasham Nanji's name mentioned at any stage at the office of Mr. Ishani? 30

A. No mention was made of his name, according to my recollection.

JUDGE: Was there any talk about a purchaser?

A. No.

Q. Did anybody say, I do not mind who buys it?

A. Not to my knowledge.

Q. To your recollection, there was no discussion at all about the identity of the purchaser?

A. No mention whatsoever.

40

Q. Was there any talk at the Ishani meeting about having a loan on the balance of the property?

A. Yes.

Q. What did the Defendant say about that? A. The Defendant said, I will get a loan reduced by keeping the remaining three pieces of my property with the Diamond Jubilee Trust.

Q. Was that agreed to? A. No.

Q. You see, according to the letter from Mr. Akram, Mr. Harji made the Defendant sign an Agreement? Did he do anything to make her sign? A. Mr. Harji said nothing about getting the Defendant to sign the document.

Q. Did the Defendant sign after saying that she wanted a loan on the balance of the property? A. Before this the original was signed by her and put aside.

Q. And it was not until after signing that she raised an objection about paying off the Shs. 81,000 of the mortgage - is that right? A. No.

Q. Did she sign first and then start discussing about a mortgage loan, or did she discuss about a mortgage loan and then sign? A. First she signed the original before raising this discussion.

Q. And then, after signing the original, how did she know that the mortgage was mentioned in the paper? A. Mr. Ishani referred to it and then she came to know.

Q. Was she annoyed when she found that the mortgage was mentioned in the agreement for sale? A. She did not get angry; she only said, "That is my concern".

Q. Did she mean, I don't want that to go into this agreement for sale? A. The lady objected to those words.

Q. That was really what had annoyed her and made her disagree with the paper she had already signed - is that right? A. No.

Q. You see, the sentence in Mr. Akram's letter can be interpreted in this way: You, Mr. Harji, made this lady sign the paper, in spite of the fact that she said she did not want to pay off the mortgage, but wanted it transferred to the other three portions of the land? A. I know

In the Supreme Court of Kenya

Defendant's Evidence

No. 11

Sultan Ali
Aladin Lalji
6th May, 1955

Cross-Examination continued.

In the Supreme
Court of Kenya

Defendant's
Evidence

No.11

Sultan Ali
Aladin Lalji
6th May 1955
Cross-
Examination
continued

nothing of Mr.Akram's letter.

Anyway, what you are quite sure of is that she signed the original first and raised not one word of objection until after signing it? A. That is right.

MR.KHANNA: Did she sign the duplicate notwithstanding the objections that she had raised? A. Yes, to my recollection she did.

Q. She knew before signing the duplicate that this mortgage term was in the agreement? A. According to my recollection I should say she must have known. 10

Q. She knew, did she not, before signing the duplicate that she was not getting Shs. 25,000 by way of deposit? A.How can I say that?

JUDGE: She was still objecting and grumbling, but nevertheless she signed. A. That is so.

MR.KHANNA: Did she sign the original before raising the objection as to the deposit, or after? A. Before.

Q. Now I suggest to you that the agreement was read over, explained to her; she accepted it and signed willingly? A. According to my recollection, it was not read over and explained. 20

Q. And I suggest further that it was only when she found out by enquiries that the property was going into the hands of Mr.Hasham or his concerns that she tried to get out of it? A.How can I say that?

Q. And she tore it up without assigning any reason? A. How can I say that? 30

Q. She never raised any queries about the mortgage term or the deposit? (No reply)

Q. The only discussion was she wanted Shs.20,000 and eventually she agreed to Shs.15,000. (No reply)

Q. And the cheque was filled up after she had accepted the figure of Shs.15,000? (No reply).

Q. And you are not telling the truth when you say that no approach has been made to you or

on behalf of the Defendant to give this evidence in Court? A. I am standing here on oath; I am not telling lies - I am telling the truth.

In the Supreme
Court of Kenya

Q. I suggest that you have been requested to come here and give evidence about the physical behaviour of Mr. Harji at the request of the Defendant or her sons? A. I have no personal interest in these affairs.

Defendant's
Evidence

No.11

10 Q. Do you also deny that during the course of this case you have had no discussions whatsoever with the Defendant or her sons or any of the other witnesses? A. I deny it on oath.

Sultan Ali
Aladin Lalji
6th May 1955

Cross-
Examination
continued

RE-EXAMINED

Re-examined by MR.DONOVAN:

Re-
Examination

Q. When you picked up the agreement to read it in Mr.Ishani's office, you noticed that it was for the sale of the two acres of land for Shs. 100,000? A. Yes.

20 Q. When you observed it, did that strike you as being in any way extraordinary? A. No.

Q. Why did you point it out to the Defendant?
A.*It occurred to me naturally that while this woman does not agree the straightforward transaction it is a good amount of Shs.100,000. My intention was to persuade her which she was not convinced by others.

30 * (It naturally occurred to me to convince her although she was not convinced by others, that this was a straightforward transaction, involving the good figure of Shs.100,000.)

Q. Did you expect the reaction which your remark produced when she jumped up and said, "No, half an acre, half an acre"? A. I expected nothing like that.

Q. You said that Mr.Ishani mentioned that there was a mortgage of Shs.81,000? A. Yes.

40 Q. Do you know whether Mr.Ishani mentioned that the mortgage had been referred to in the document? A. Yes, it occurred to me from Mr. Ishani's expressions that it must have been mentioned in the document.

In the Supreme Court of Kenya

Defendant's Evidence

No.11

Sultan Ali Aladin Lalji
6th May 1955

Re-Examination continued

Q. Did he say so? A. No.

Q. Was there any way by which the Defendant could have known that there was a reference to the mortgage in the document at the time when she signed either the original or the duplicate? A. How can I say that.

Q. Are you aware of anything by which she could or must have known? A. I was under the impression that she must be aware of that because these people were talking to each other.

10

Q. What do you mean? A. It was my impression that she must have known that the mortgage was mentioned in the document.

Q. Did you hear anybody say that the mortgage is referred to in the agreement? A. I heard nothing - no discussion about that.

Q. Did you hear anybody say that the amount of Shs. 10,000 or Shs. 15,000 deposit was referred to in the agreement? A. No.

Q. Was the question of how much she should be paid by way of deposit ever settled? A. According to my idea, no decision took place about the amount of deposit.

20

No.12

Hassanali Jivraj Merali
6th May 1955
Examination-in-Chief

No.12

EVIDENCE OF HASSANALI JIVRAJ MERALI

JIVRAJ MERALI, sworn.

Examined by MR.O'DONOVAN:

Q. What is your occupation? A. Broker.

Q. I must ask you about your financial position. Do you own any property? A. Yes, in Nairobi, Mombasa and Kampala.

30

Q. What is the value of the property which you own personally at Mombasa? A. About £125,000.

JUDGE: Unencumbered? A. Yes.

Q. You could sell it and realise £125,000. A. Yes.

In the Supreme Court of Kenya

MR.O'DONOVAN: There is no mortgage on it? A. There is, but after paying the mortgage that would be my share.

Defendant's Evidence

Q. There is a suggestion about your bankruptcy - have you ever been bankrupt? A. No.

No.12

Q. What is your personal fortune worth today? A. £125,000 including all the properties.

Hassanali Jivraj Merali
6th May 1955

10 Q. Was your father a well-known land and estate agent? A. Yes.

Examination-in-Chief
continued

Q. Do you know the property belonging to the Defendant? A. Yes.

Q. Did you ever have anything to do with that? A. Yes, once I was interested on behalf of a client of mine.

Q. When was that? A. Some time last year.

Q. Do you remember the month? A. Between June and August.

20 Q. Who was your client? A. He was a doctor.

Q. What is his name? A. I am not prepared to disclose it as my business with him is still pending.

Q. If my learned friend asks, you will have to tell us where he is living? A. In Jinja.

Q. What sort of price had you in mind? A. The price wanted by the owner was roughly £15,000.

Q. Was he interested at that price? A. He could have been interested.

30 Q. Did you discuss that price with him? A. I did.

JUDGE: Did you discuss the price with the owner first? A. Yes.

Q. Is this your letter - exhibit "D" (shown to witness) A. Yes.

In the Supreme Court of Kenya

Defendant's Evidence

No.12

Hassanali Jivraj Merali

6th May 1955

Examination-in-Chief continued

Cross-examination

MR.O'DONOVAN: You did not get the option? A.No.

Q. Do you think you could have sold the property at that price? A. Not exactly at that price; it is difficult to say - he would have made a counter offer.

Q. What sort of price had you in mind? A. Anything between £10,000 to £12,000.

CROSS-EXAMINED

Cross-examined by Mr.Khanna:

Mr.Merali, your father died quite recently? A. About 1½ years ago. 10

Q. Until your father's death you were very hard up? A. True.

Q. You were often here in the courts under arrest? A. No, only once.

Q. You had chamber notices asking you to show cause why you should not be sent to prison? A. A number of them.

Q. And it was at the request of the sons that you made an offer of £15,000? A. No. 20

Q. Did you see any of the owners at all before writing this letter? A. Yes.

Q. Did you make up your mind before seeing any of the owners that you would offer £15,000. A. No.

Q. Who prompted this figure of £15,000? A.That is the price the owner wanted.

Q. Who is the owner? A. Mrs. but it was her son Rajab Ali Kassam, who acted on her behalf. 30

Q. When did he see you first? A. It is hard to say - some time during last year.

Q. When did you first make up your mind that you would interest somebody as a prospective purchaser? A. I was approached by a certain party.

Q. I want to get this clear - you have known of the existence of this property for many years? A. Yes.

Q. You made no active attempt to find a buyer for it until quite recently. A. Quite true.

Q. And it was after you had seen Rajab Ali and he mentioned that he would want a figure of £15,000? A. I had approached him.

10 Q. You approached him? A. Yes, with a view to finding out whether he was interested.

Q. When did you first approach him? A. Sometime last year.

JUDGE: That was before any purchaser had approached you? A. No, after the purchaser had approached me.

MR.KHANNA: You are not prepared to disclose the name of this Purchaser? A. No.

20 Q. I suggest that this Purchaser does not exist? A. If you want to take it that way, that is your shauri.

Q. Will you tell us his name? A. I cannot disclose it.

Q. Why - you think this deal will go through? A. Not necessarily.

Q. Why do you insist on keeping his name back? A. I am engaged in business with him which is still pending.

Q. He is a doctor in private practice? A. Yes.

30 Q. Are you still employed by Merali Brothers? A. Yes.

Q. What is your salary? A. £75.

Q. What are your hours of work? A. From 8 to 12 and from 2 to 4.

Q. And you had your private business of estate agency after those hours? A. Under the condition of the agreement with my employers, I have the right to do that.

In the Supreme Court of Kenya

Defendant's Evidence

No.12

Hassanali Jivraj Merali

6th May 1955

Cross-Examination continued

In the Supreme
Court of Kenya

Defendant's
Evidence

No.12

Hassanali
Jivraj Merali

6th May 1955

Cross-
Examination
continued

Q. Since when? A. Since I joined the firm.

Q. Is your firm interested in estate agency?

A. No.

Q. Have you personally done any estate agency transactions? A. Yes - a number of them.

Q. So numerous that you cannot even hazard a guess? A. I can tell you if you want to know.

Q. Why does it take you so long? A. There were about 20 bargains over the past 10 years.

Q. Sales of properties for clients? A. Yes.

10

Q. How much have you made on each transaction? A. about £2,000 or £3,000.

Q. And yet you have found yourself in financial difficulties before the death of your father?

A. I had quite a lot of debts.

Q. Did Rajab say in writing that you should pay the figure of £15,000? A. He wanted to sell at that price - £15,000 - and he was prepared to give an option.

Q. Did he tell you about this case? A. No.

20

Q. This is the first time you have known of this case? A. I have known about it for a week.

Q. Did you receive a witness summons? A. This morning.

Q. Until this morning you did not know that you would be required as a witness? A. No.

Q. Can you remember when you gave Rajab the letter? A. 23rd September. It was typed in the office in the presence of Mr. Alibhai.

JUDGE: Why was it typed in his presence? A. Because he was there.

30

Q. Why did you need to write him a letter? A. He wanted to consult his family.

Q. Did he have a say in the wording of the letter? A. No.

MR.KHANNA: You say you were not told about this case? A. No.

In the Supreme Court of Kenya

Q. When were you told that your letter was required to be used in this Court? A. I was never told.

Defendant's Evidence

Q. Have you given a statement of your evidence to Mr.O'Donovan? A. No.

No.12

Q. Apart from the summons, you have never been approached with regard to giving evidence in this case? A. No.

Hassanali Jivraj Merali
6th May 1955

10

Q. You have never been here in connection with this case before this morning? A. No.

Cross-Examination continued

Q. You have never discussed this case with the Defendant or any of her sons? A. No.

Q. You had no idea until coming to Court this morning what your evidence was to be? A. I had not the faintest idea.

Case for the Defendant closed.

Court rises at 12 noon.

20

Hearing adjourned to 10.30 a.m.
Thursday 12th May, 1955.

No.13

EVIDENCE OF KAMRUDIN ISMAIL SAMJI

SIXTH DAY

Thursday 10.30 a.m. 12th May 1955.

Plaintiff's Evidence

Court as before.

No.13

Mr.Khanna informs the Court that his first witness, Mr. Samji is called by the Plaintiff at the special request of the Defence.

Kamrudin Ismail Samji
12th May 1955

30

KAMRUDIN ISMAIL SAMJI, sworn.

Examination-in-Chief.

Examined by Mr.Khanna:

Q. What is your position at the Garden Hotel?
A. I am the manager.

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.13

Kamrudin
Ismail Samji
12th May 1955

Examination-
in-Chief,
continued

Q. Do you keep a record of people who stay at your hotel? A. Yes.

Q. And do you keep it in the regular course of business? A. Yes.

Q. Did Sadru Din Nanji stay at your hotel at all during February? A. No, not in February, 1954.

Q. Have you a record of Sadru Din and Rajab Ali Kassam having stayed at your hotel during January? A. Yes, they stayed at my hotel on 28th January.

10

Q. On this occasion did they stay until the 28th January? A. They went away on the 29th.

JUDGE: What was the name of the brother who stayed? A. R.K.S.Nanji; the other man's name is S.K.S.Nanji.

Q. You know them both by sight? A. I know Sadru Din by sight.

Q. Sadru Din stayed in January but not in February? A. Yes.

MR.KHANNA: Did Sadru Din come to your hotel to enquire about the record of his having stayed there during February? A. He came once at lunch time to enquire the record. I told him I had no time to see the files but that if he came later I would search my records, and then he came at 7.30 p.m. At that time I told him that he did not stay at my hotel.

20

Q. Did you ask him to come back again at 11 o'clock? A. He told me that he wanted to see the file himself, and I told him that when my business is finished he could come after 10 o'clock, but he did not come.

30

Q. What time do you close? A. About 10 o'clock.

Q. You know Mr.Nanji? A. Yes.

Q. Do you know Mr. Hasham G. Nanji? A. Yes.

Q. Did these two gentlemen come to you in connection with Sadru Din staying at your hotel in February? A. They came the next day.

Q. And they enquired from your records whether he had stayed or not? A. Yes.

Q. Did you give them the information? A. Yes, I told them that he did not stay.

40

CROSS-EXAMINEDIn the Supreme
Court of Kenya

Cross-examined by Mr. O'Donovan:

Q. I take it that you have to rely on your records whether people stay or do not stay at your hotel? A. Yes.

 Plaintiff's
Evidence

Q. Your cannot recollect yourself, apart from your records? A. No.

No.13

Q. So if your records were not completely accurate they would be misleading? A. We keep proper records.

 Kamrudin
Ismail Samji
12th May 1955

10 Q. Have you a register? A. I have a file.

 Cross-
examination.

Q. Do you know what a register is? A. Yes.

Q. Do you keep one? A. We have special forms.

Q. Where are these forms?

JUDGE: Your register, instead of consisting of one book, consists of a series of separate documents for each visitor? A. Yes.

MR.KHANNA: It is kept loose? A. Yes.

Q. And who keeps them. A. I do.

20 Q. Have there been other occasions when Sadru Din or his brother have stayed at your hotel? A. Yes, many times.

Q. Now forms that are not completely filled up do you leave blank spaces? A. It depends upon whether clients want to commit themselves.

Q. Do you keep these loose forms in a book? A. They are in the files.

Q. Then it would be easy to remove one of the forms? A. Yes but the file is secure; nobody has access to the file.

30 Q. It is easy to lose one of the forms? A. No.

Q. You deal with hundreds of these and you do not lose one? A. We get about 5 to 10 clients a day.

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.13

Kamrudin
Ismail Samji
12th May 1955

Cross-
Examination
continued

Q. Did Mr.Sadru Din not tell you that towards the end of January he had come to stay at your hotel? Did you inform him that you had no record of that?
A. No. He only asked me whether he stayed in the middle of February.

Q. Did he not come back later with his brother?
A. He did not ask me about staying in January.

Q. I suggest that Mr.Hasham Nanji came to see you on the very same day on which Mr.Sadru Din approached you? A. No, he came the second day in the evening. 10

Q. Mr.Sadru Din has told the Court that he saw Mr. Nanji come out of your hotel in the evening?
A. That is not right.

Q. He is imagining that he saw him? A. It might be.

Q. Did he tell you why your evidence was needed?
A. I do not know about that.

Q. Mr.Sadru Din has also said that you became very hostile to him in the evening? A.No; there is no reason why I should be hostile to anybody. 20

Q. Do you keep account books apart from this? A. I keep cash sales books.

Q. Have you looked through them? A. No.

JUDGE: If you had a visitor and he paid his account, there would be a record of his account?
A. Yes.

Q. And of his name? A. Yes.

Q. If anybody wanted to look at the cash sales book you could produce it? A.Yes, it would take some time but I could bring it. 30

MR.KHANNA: You say there is a record of a stay by them at the end of January - where is it? Did they pay you at the end of January? A. Yes.

Q. Where is the receipt? A. I made a note in pencil.

Q. You have a record? A. Yes.

JUDGE: You will have to go back and produce the receipts or accounts you have for people who stay at your hotel in February and bring the one referred to for January. 40

No.14

EVIDENCE OF JOHN MACKINNON GRAHAMIn the Supreme
Court of Kenya

JOHN MACKINNON GRAHAM, sworn.

Plaintiff's
Evidence

Examined by Mr.Khanna:

No.14

John Mackinnon
Graham.

12th May 1955

Examination

Q. You are a building inspector employed by the
City Council? A. Yes.Q. And how long have you been with the City
Council of Nairobi? A. A little over 2 years.10 Q. And your qualifications? A. City and Guild
London Building Construction, and about 35 years
practical experience of building.Q. Do you know this plot No.58/1 L.R.209 Sclat-
ers Road? A. Yes.Q. You know its situation? A. I do; it adjoins
the Mayfair Hotel.

Q. Is it a plot? A. No, it is not.

Q. Apart from Sclaters Road, is there any other
road near to this side road? A. Mpaka Road,
near Slater & Whittaker's.20 Q. Is that very much further away from Mpaka
Road? A. A few hundred yards.Q. Do you know the acreage of this plot? A. It
is 2.08 acres.Q. Have you the file relating to this plot?. A.
I have.Q. Will you look at it and tell us its acreage?
A. It is 2.04 acres.Q. And you have the building plan in connection
with this plot? A. I have.30 Q. Have you inspected the house on this plot?
A. I have.

Q. And also the outbuildings? A. Yes.

Q. When did you do it last? A. I think on 8th
April.

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.14

John Mackinnon
Graham

12th May 1955

Examination
continued

Q. What was the condition of the house? First of all, how old is the house? A. It is a very old house, and from our records I think it was started in 1908.

Q. Will you tell the Court what the house comprised? A. It is a 3-bedroomed house, bathroom, boys' quarters and kitchen.

Q. What is the main house built of? A. It is a stone structure, with a galvanised iron roof and the usual timber members. The internal work is wood stubbing with a fibre board facing back and front. 10

Q. What are the floors made of? A. Wooden floors on wooden joists.

Q. What is the condition of the structure and the state of repair internally? A. The floors are not too sound; the ceilings are in the same condition, and for the time the building had been standing I would strongly suspect dry rot and white ant in the building. 20

Q. Would you say that the house is habitable in its present condition? A. No, definitely not; I should say it wants very considerable repairs and the drainage is in a very bad condition.

Q. Did you examine the outer walls? A. Yes - a visual examination.

Q. What did you notice? A. I noticed that there were cracks from the plinth down, which is rather a bad sign.

Q. What about the bottom part of the building? A. I would not like to say anything about the foundation. 30

Q. Have any applications been made to the City Council to sub-divide this plot? A. Yes, there have been two applications, one in 1944 - a subdivisinal scheme to sub-divide into three smaller plots.

Q. Will you explain the procedure governing the submission of a scheme for sub-division? Is it submitted on a piece of paper? A. A preliminary plan is submitted first. 40

Q. And had you anything more than a preliminary plan for the sub-division into three plots submitted in 1944? A. I have a plan that is approved that has definitely gone to its full extent and had been approved in 1944. There were two sub-divisions.

Q. Which is the second one? A. The first was in 1944; the second in 1947, dividing the whole into 4 plots of roughly .5 of an acre.

10 Q. Was that also approved in principle? A. Yes.

Q. Has any of these schemes actually been carried into effect? A. No, neither of them.

Q. Did the first scheme envisage the demolition of the outer houses? A. The second one did; the first one did not.

Q. Were there any conditions attached to the two sub-division schemes approved in principle? A. The usual conditions there was the question of drainage to consider and wayleaves.

20 D. Did both of those schemes contemplate the continued existence of the house on one of the plots? A. Both of them did.

Q. According to your records, have any surveys been carried out on either of these schemes? A. Before approval in principle, a survey would have to be made in the usual manner.

Q. Would it have to be re-surveyed for any sub-division scheme? A. Yes, entirely re-surveyed.

30 JUDGE: You mean by one of the City Council officers? A. Not necessarily. They could employ a private registered land surveyor to do that on their behalf, and he would submit a plan to the Lands Office.

Q. Has the survey plan been submitted to the Lands Office for the 1947 scheme? A. Yes.

MR.KHANNA: Are there any deed plans ready for either of those sub-divisions? A. That we have no knowledge of.

JUDGE: And in order to constitute the proposed

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.14

John Mackinnon
Graham

12th May 1955

Examination
continued

In the Supreme Court of Kenya

Plaintiff's Evidence

No.14

John Mackinnon Graham

12th May 1955

Examination continued

sub-division into recognised sub-plots, it has to be registered at the Lands Office? A. Yes. The Lands Office go into the details and submit any objections that they have to it to the City Council.

Q. Although it is approved in principle? A. Yes.

MR.KHANNA: You said that the floors are wooden and placed on joists. Is the space below hollow or solid? A. There is a gap between the stone piers which are hollow.

10

Q. What is the condition of the internal partitions? A. They are not in a very good condition at all.

Q. Can you say anything about the condition of the corrugated iron on the roof? A. The front portion of it is in a very much better state of repair than the rear. The rear would have to be stripped and redone.

Q. Can you say anything about the roof timbers? A. That I would not like to give an opinion on. I would have to examine it.

20

Q. Was any other application made in regard to this plot for the purpose of erecting a hotel on the site? A. Yes, in 1949.

Q. Was that application approved in principle? A. Yes.

Q. Then the sub-division schemes were completely washed out? A. Yes.

JUDGE: Does that mean that anything following the 1949 proposal for building a hotel would have to be considered afresh? A. Most definitely. If anybody wanted to sub-divide after putting forward the 1949 proposal they would have to start from the beginning.

30

Q. Have any other applications been made since 1949 with regard to sub-divisions? A. No.

CROSS-EXAMINED

Cross-Examination

Cross-examined by Mr.O'Donovan:

Q. You say this is not a corner plot - what do

you mean? A. You are quite right; it is a corner plot.

In the Supreme Court of Kenya

Q. You say you last inspected the property on 8th April of this year? A. Yes.

Plaintiff's Evidence

Q. When had you previously inspected it? A. I have not at any time.

Q. How long did you take over your inspection? A. Roughly about 1½ to 2 hours.

No.14

John Mackinnon
Graham

12th May 1955

Cross-
Examination
continued

10 Q. You thought that adequate for the purpose? A. Yes.

Q. Has any request or order been issued with regard to the repairing of this property at any time? A. I know of none.

Q. But you would know if there had been? Not necessarily.

Q. Would you describe it as a very large house? A. As an average size house.

20 Q. Two sides of the house have a large verandah? A. Yes - that was an extension done in 1920.

Q. Then the main walls are surely the walls on the inside of the verandah? A. Yes.

Q. I want to suggest that there is not one single crack in any one of those main walls? A. The outer walls show the most cracks.

Q. What about the main walls? Not a single crack? A. I would not like to say.

30 Q. Did you observe any defects? A. I had a look at the walls inside under the building, and I would not like to say that the mortar in the joints is first-grade mortar. I would say it is "dead".

Q. Did you examine it? A. Yes, by using a knife on the joints of the main wall underneath the building.

Q. I suggest that the main walls appear to be in first-class condition? A. My opinion would be that they are not terribly sound, because I

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.14

John Mackinnon
Graham

12th May 1955

Cross-
Examination
continued

think the mortar is "dead".

Q. In Zanzibar you have buildings built of lime 3 hundred years old? A. I would not like to say what is the period of usefulness of lime mortar, but it is inferior to cement mortar.

Q. What sort of mortar is this? A. A cement mix is normally 4 in 1 standard cement mix; a lime mix is 2 in 1 sand and lime.

Q. Would you agree that it looks a very strongly built house? A. Definitely not. 10

Q. I suggest that the only cracks which occurred were the cracks on one corner of the verandah? A. I examined that minutely outside and it is cracked all the way round the verandah; hence at the base on three sides the main walls look all right, but I would not like to vouch for them.

Q. Now did you observe any movement of the house? A. All I could observe was a slight bulge in one of the verandahs. 20

Q. Did you observe that the house was moving at all? A. I should not like to say.

Q. Would you expect any movement after 47 years? A. No.

Q. It is not falling to pieces? A. Visually, no.

Q. If it is not falling to pieces, then I suggest that cracks on a few feet of verandah are not serious? A. It is alarming to see cracks, even if it is on a verandah because these walls also take part of the overhang of the roof. They are taking a load. 30

Q. But it would require much further examination to come to any definite conclusion? A. Yes.

Q. How do you think the state of that house compares with a number of houses which are occupied in Nairobi? A. Normally, in a house in that condition the medical officer of health steps in and compels the people to do something about it.

Q. You say it is not habitable at present and you mentioned drainage - is that the main reason 40

why it is not habitable? A. I think the structure needs much money spent on it, apart from the drainage.

Q. What part of the structure? A. Internally, I should have to take all the partitions out. I should have to examine the walls to see if they are capable of taking the load.

10 Q. You cannot say now whether or not a lot of money would have to be spent on strengthening the structure? A. I would not like to name any sum, but a considerable sum would have to be expended on it. My examination showed that in my opinion the place could not be lived in in its present state.

Q. And I suggest that one of the main reasons is that it has become very dirty? A. I would not like to say.

20 Q. Is that one of the reasons? A. That is one of the reasons, apart from the fact that it is not a sound building. The roof is sound, but the floors are not - there is too much spring in them.

Q. And the cracks? A. I should like to investigate further.

Q. Did you see any white ants? A. No, but I suspect there were.

Q. Did you see any dry rot? A. No but the partitions would have to be opened up.

30 Q. Did it occur to you to find out? A. A would have to be employed to strip the partition.

Q. You may be wrong? A. Possibly.

Q. Did you know that the house had been unoccupied for over a year? A. No.

Q. It appeared to you surely that it had been unoccupied for some considerable time? A. It looked as if it had not been lived in for some time.

40 Q. Do you think that any defects which you have observed could be attributed to long disuse?

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Court of Kenya

Plaintiff's
Evidence

No.14

John Mackinnon
Graham

12th May 1955

Cross-
Examination
continued

In the Supreme Court of Kenya

A. I would not like to say because there may be boys around.

Q. Is it possible? A. It is possible.

Plaintiff's Evidence

Q. It is possible that some of the dilapidations occurred during the 15 months in which the house stood empty? A. It may be to the outer appearance of the house; structurally, it would not make much difference.

No.14

John Mackinnon Graham

Q. Would not the Municipal Council in 1947 have examined the house? A. No, not necessarily.

12th May 1955

10

Cross-Examination continued

Q. The 1947 sub-division is still on your files, approved? A. Yes.

Q. Was the hotel scheme only provisionally approved? A. Yes.

Q. So the whole matter is in a provisional state in which the owner could proceed with one scheme or the other? A. It would have to be re-submitted. What applies in 1949 would not apply in 1955.

Q. Once the Municipal Council in 1947 had given their approval to the sub-division into 4 half-acre plots, do you anticipate the slightest difficulty now in getting that sub-division completed? A. It would have to be re-submitted and a fresh consent given.

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Q. Would you anticipate any obstacle? A. None at all.

Q. In fact in that area a number of plots are half acre plots? A. Yes.

Q. Do you know anything about the Rent Tribunal? A. I do not know.

30

Q. You do not know whether they examined the house before they fixed the rent? A. Yes.

Q. Has there been any complaint made by the Medical Officer of Health with regard to this property? A. I have not seen the Medical Officer of Health's files, so I cannot say.

RE-EXAMINED

Re-Examination

Re-examined by Mr. Khanna:

Q. Do you think you have made a sufficient examination to be able to express an opinion about

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the structure? A. I can only give the limits of a visual examination.

Q. But you would say that it is absolutely structurally unsound? A. I would have to suggest that the foundations of the building be opened up.

Q. From such evidence as you have in your possession, would you say that the building is sound or unsound? A. It was built in 1908, and that is a long time ago for a building in this Colony.

Q. Would you say that the building is sound in its present state? A. I can only express an opinion, and I should say it looks unsound.

Q. My friend has asked you whether you had seen the timbers in this house. Assuming this to be one piece (shown to witness) which has come from the house, would you say this is dry rot - is eaten up by ants? A. I should say it has been attacked very much by dry rot.

(Piece of timber marked Exhibit 1)

JUDGE: That piece of timber looks to you as if it had been attacked by dry rot only? A. Possibly dry rot, possibly white ant.

JUDGE: If a sub-division is approved in 1940 or 1947, does that follow that it will still be approved in 1955? A. Not necessarily, if it is a half-acre zone. I should say there would be a lot of trouble in re-submitting the same original proposal and having it passed.

Q. The conditions of drainage have tightened up recently? A. Yes.

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Court of Kenya

Plaintiff's
Evidence

No.14

John Mackinnon
Graham

12th May 1955

Re-Examination
continued

In the Supreme
Court of Kenya

No.15

EVIDENCE OF AMIAS DOUGLAS CONNELL

Plaintiff's
Evidence

AMIAS DOUGLAS CONNELL, sworn.

Examined by Mr.Khanna:

No.15

Amias Douglas
Connell

12th May 1955

Examination

Q. You are an architect practising in Nairobi?

A. Yes.

Q. What are your qualifications? A. A.R.I.B.A., and I am registered as an architect to practise in the U.K. and in the East African territories.

Q. How long have you practised as an architect?

A. 30 years.

10

Q. Do you belong to the local Association of Architects? A. I am its President.

Q. Do you know Mr.Hasham G.Nanji? A. Yes.

Q. Did you at his request inspect this property at the corner of Sclaters Road and Mpaka Road?

A. I inspected the house on that property.

Q. When did you inspect it? A. 19th April, 1955.

Q. This plot is adjacent to the Mayfair Hotel?

A. Yes.

20

Q. Did you express any opinion as regards the existing structure? A. Yes, I wrote a letter to Mr.Nanji in which I said: "In my opinion, it would not be a profitable proceeding for you to repair the existing structure because of the ravages of dry rot and white ant. The whole structure is in an unsound condition, and it would be more economical in my opinion to demolish the house and build a new one than to attempt to reinstate it".

30

Q. Do you still hold the same opinion? A.I do.

Q. Did you see evidence of dry rot and white ant? A. Yes.

Q. Would you give the Court an idea of the general condition of the whole structure? A. Generally, my opinion is that it is an unsound

structure, and that is the extent of the opinion for which I was asked. The floors of the building spring to a considerable degree when you jump on them, and consequently, in my opinion, that floor would need to be taken up and reinstated with any sound timber that there might be in it and new timber. There was evidence of white ant in the architraves, as far as I examined the building: I did not pull any of the structure down. Now there is a hollow space under the floor, and with white ant above it, it means that those white ants have come across the wooden joists under the floor.

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JUDGE: They came up from below? A. Yes, and in order to get into the partitions inside the building, it would be necessary for the white ants to crawl across the under side of the wooden floor. The evidence of their being white ant in the partitions above the floor was sufficient in my mind, together with the springiness of the floor, to advise my client that that floor, to be a sound floor would necessarily have to be taken up and either re-laid or completely reinstated which in itself is a very costly performance. So far as dry rot is concerned, I prised away certain timbers round the eaves of the building and saw evidence of dry rot. It is evident from a visual point of view to be able to say that that particular timber has dry rot in it because the surface of the timber cracks, with cracks up to possibly half an inch, and that the surface comes out in a sort of convex form, and that particular surfacing of timber, where it is evident that water has been coming through, can be accepted as evidence of dry rot.

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MR. KHANNA: Did you have a look at the out-houses? A. No. I noticed that there were out-houses there, but from the point of view of the instructions which I received from Mr. Nanji to inspect the house, there was no point in my doing so. The general condition of the house gave me professionally to believe that the house was in an unsound condition and that it would not justify the spending of money on its reinstatement.

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Q. When you say it would be more economical to demolish the existing house than to attempt to

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Plaintiff's
Evidence

No.15

Amias Douglas
Connell

12th May 1955

Examination
continued

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Plaintiff's
Evidence

No.15

Amias Douglas
Connell

12th May 1955

Examination
continued

Cross-
Examination

reinstate it, would you translate that opinion into pounds, shillings and pence? A. No, I would not. Without a very much closer inspection, it was evident to me, advising a client, that the state of the building would not justify its repair to a condition where it might be lettable. It would be a more economical proposition to pull it down and rebuild a modern house that you can let and get a reasonable rent for.

CROSS-EXAMINED

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Cross-examined by Mr.O'Donovan:

Q. How long did you take to look at this house?

A. I should say about one hour.

Q. Have you any other uncomplimentary remarks to add to those you have already made about the house? A. I do not go in for uncomplimentary remarks; I go in for giving a professional opinion when I am asked for it.

Q. Mr.Nanji asked you to look at the faults? A. He asked me to give an opinion.

20

Q. Did you go there to look at the faults? A.I went there to look at the house and to give a professional opinion on the house.

Q. With particular reference to the faults? A. With particular reference to nothing.

Q. The dry rot and white ant would not affect the stone walls? A. I am not quite certain. I have seen white ant affect stone walls.

Q. Did you see any white ants affecting these stone walls? A. No.

30

Q. You saw nothing wrong with the stone walls? A. I saw various things that were wrong with them so far as the reinstatement of the house was concerned.

Q. Anything serious? A. I should say that the mortar in the walls was unsound mortar.

Q. Why do you say that? A.Because of the colour of it; because of the disintegration of the surface of it; and because when an architect looks at certain aspects of a building it becomes apparent to him that a thing is either sound or unsound.

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Q. You said nothing about the walls in examination-in-chief? A. The walls are a very small part of the building costs.

Q. You did not think they were worth mentioning?
A. No.

Q. How many of the floors did you test? A. Three, probably more. The spring in the floor was such that I came to the conclusion that the whole floor would necessarily have to be taken out.

10 Q. To put it back in first-class condition? A. Yes, I would say in letable condition, because any process other than taking up the whole of the floor would have required a maintenance that would have been very upsetting to any tenant and the place would have become more of a nuisance than it was worth.

20 Q. Would it not be a fact the same observations which you made about this house could be made about any number of similar houses in Nairobi which continue to be occupied? A. I could not answer that - I would not like to say.

Q. From appearances, this house surely looks well up to the standard of an old Nairobi house? A. I should say that it looks like a very badly maintained old Nairobi house.

30 Q. How much of the roof did you inspect? A. I inspected all those parts which were reasonably and readily available to me. There was evidence of white ant in various parts of it, and the evidence of dry rot round the eaves, where it is visual, suggested to me that that roof, in order to make it in any way sound, would have to have all those elements cut out of it.

Q. Do you know to what extent it is unsound? A. No, it would involve Mr. Hasham in re-instructing me; it would involve him in fees for which it would be unreasonable for him to be subjected.

40 Q. You could not give any idea of the cost of rehabilitating the house? A. No, certainly not; that would require a much greater scale of instruction than I received.

Q. When we were speaking about the most economical way of dealing with this property, I took it you had in mind that this is a very valuable plot on a main road? A. The only factor I would consider would be the house itself, and I

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Plaintiff's
Evidence

No.15

Amias Douglas
Connell

12th May 1955

Cross-
Examination
continued

In the Supreme Court of Kenya

would say that it would be a better business proposition to have a new one, taking a long-term view.

Plaintiff's Evidence

Q. For the next 40 years? A. Possibly half.

No.15

Amias Douglas Connell

Q. You could not give the Court any idea about the relative cost of repairs and the construction of a house of somewhat similar size? A. I am not prepared for that.

12th May 1955

RE-EXAMINED

Cross-Examination continued

Re-examined by MR.KHANNA:

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Re-Examination.

Q. From what you have seen and observed with your trained eye, do you think a closer examination would be luckier for my friend, Mr. O' Donovan, or unluckier? A. It might be 2½d unlucky or 3d lucky.

Q. You still adhere to your view that it would be more economical to demolish and re-build than to reinstate? A. Certainly.

No.16

No.16

Arthur Tisdale Jones

EVIDENCE OF ARTHUR TISDALE JONES

20

12th May 1955

ARTHUR TISDALE JONES, sworn.

Examination

Examined by Mr.Khanna:

Q. You are a Land and Estate Agent in Nairobi?
A. Yes.

Q. How long have you been practising? A.Nearly 8 years.

Q. Are you fairly well acquainted with values in Nairobi? A. I believe so.

Q. What are your qualifications? A. I am a Member of the Valuers Institution, and I am entitled to call myself an incorporated valuer and surveyor.

30

Q. You know this property which is situated next to the Mayfair Hotel? A. I know it.

Q. Have you visited it? A. Yes.

Q. Is it a corner plot? A.It is a corner plot

situated at the corner of Mpaka Road, which is not made up, and the other south boundary is the tarmaced Sclaters Road.

In the Supreme Court of Kenya

Q. Is the plot waterlogged or level? A. It is a good plot, slightly elevated and it has trees. It is a very good red soil plot.

Plaintiff's Evidence

Q. It is a leasehold plot? A. It is - for 99 years from June, 1914.

No.16

10 Q. Do you know what the ground rent is in respect of the plot? A. I cannot remember.

Arthur Tisdale Jones

12th May 1955

Q. Do you know the area of the plot? A. A little over 2 acres.

Examination continued

Q. Have you seen the house on it? A. I have.

Q. What kind of house is it? A. A very old settler type of house made of stone, with a corrugated iron roof which extends over a covered verandah.

Q. Did you look at the out-building? A. Yes.

20 Q. Did you form a general view of the value of the house and out-building? A. I did. The condition of both is very poor. The out-buildings are virtually useless, and the main house is in a very badly maintained - one might almost say filthy - condition. There is furniture there, but the place is quite open, or was a few days ago. It was quite open to any African who might want to wander through it.

30 Q. What is the extent of the accommodation in this main house? A. I did not pay particular attention: there was a very large room, an extremely filthy kitchen at the back, and there was some evidence of an attempt to put in new hardboard linings on the rear of the verandah. Some of the linings were coming away due to a leak in the roof.

Q. You were instructed to express an opinion as to its market value? A. That is correct.

40 Q. Did you express an opinion? A. Yes, that it should be possible to obtain a figure of £5,350 for the property as it stood.

Q. And did you form an opinion as to what it would be possible to obtain for it if it was

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Court of Kenya

Plaintiff's
Evidence

No.16

Arthur Tisdale
Jones

12th May 1955

Examination
continued

sub-divided into 4 half-acre plots? A. I did. I considered that as it was a half-acre area there would be no difficulty in getting permission to sub-divide into 4 half-acre plots, either by demolishing, the existing house, which I considered to be in a very poor state of repair, or perhaps by careful planning to divide into 4 half-acre plots, leaving the house on one. My calculation was that, having sub-divided, one could expect to get £1,500 a plot, and if one chose to attempt to renovate the house, then one could perhaps expect to get £4,000 to £4,250.

10

Q. Did you take into account the cost of surveying and the cost of laying beacons? A. I did. It would be necessary to make proper entrances; that would mean the construction of four entrances. It would necessitate the submission of a plan and the final fixing of beacons by a qualified surveyor.

20

Q. To a person who goes to the extent of subdividing two acres into 4 plots what is the normal profit in your experience reasonable for him to expect, after having laid out money on sub-divisions and so on? A. It would be difficult to answer your question. He should in my opinion make a profit, but not a vast one.

Q. And if a purchaser or developer tried to put the house into a reasonable condition, would he stand to make anything. A. I think he would, but nothing extraordinarily high.

30

Q. What is the maximum value that you can put on this property after sub-division has been carried out? A. Without repairing the house, one would have 4 half-acre plots worth, in my opinion, about £1,500 each, and one would have the relics of the old house on it.

Q. What would you put the house and the half-acre plot at in its present condition? A. It is virtually worth a little more than the value of the plot, plus a little over £1,000

40

Q. You are familiar with transactions in that area? A. Yes

Q. And you based your valuation in accordance with precedents? A. I valued it as it stood,

as to £4,000 for the plot; that is, £2,000 per acre and the remaining £1,350 for the house as it was.

Q. Do you know Mr. Merryweather, of Muter and Oswald? A. Yes.

Q. He is valuing the property at Shs. 264,000. What would you say to that? A. It is extremely optimistic.

10 Q. He gave us to understand that he could sell it in no time for that figure, if instructed? A. I am surprised.

Q. And he gave as the value of the house Shs. 116,000? A. I cannot agree

Q. Do you think those figures have any relationship to actualities? A. Truthfully, no.

CROSS-EXAMINED

Cross-examined by Mr. O'Donovan:

Q. Mr. Merryweather belongs to a firm of standing? A. Yes.

20 Q. In fact, without inviting invidious comparisons, the leading estate agents? A. I think that would be difficult to deny.

30 Q. I suggest that from your own experience you have become aware that municipal valuations placed on property in Nairobi have always been on the conservative side? A. I think it would be true to say that at one time the Valuations were conservative. I think it is equally true to say that they are now very much nearer accuracy than they used to be.

Q. I am instructed that the municipal valuation of the land is Sh.1/50 per sq.ft.? A. I do not know that.

Q. On the assumption that it is Sh.1/50 per sq. ft. that comes to £3,300 per acre. Had you known what I have suggested is the municipal valuation, which has always been conservative but now are more accurate, would you be inclined to

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Plaintiff's Evidence

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Examination continued

Cross-examination

In the Supreme
Court of Kenya

think that possibly Sh.1/50 is correct? A. I think the answer is no.

Plaintiff's
Evidence

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Arthur Tisdale
Jones

12th May 1955

Cross-
Examination
continued

Q. I suggest that had the answer been no, this would have been the first time in the history of Nairobi that any valuer has valued any land other than the municipal valuation? A. No. There was a very famous case when the Court of Appeal for Eastern Africa had a valuation from the City Valuer of £1,500; they accepted my valuation of £500 as against the valuation of the City Valuer. That was quite extraordinary. Mistakes can happen.

10

Q. You were in Nairobi during the whole of 1953?
A. Yes.

Q. Can you tell us about the relative land values in February, 1954, compared with November, 1954? Mr. Merryweather said they went up by 5 or 10%.
A. I think one cannot generalise.

JUDGE: It is presumably affected by the Emergency and the likelihood of its ending? A. Yes, by many things. I look at a piece of land merely as an estate agent, not as an architect, as to what it could be sold for.

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Q. And looking at it, would you say that there was no very dramatic increase in land values between February and October, 1954? A. No, I think I can say that there has been very little change: the major change was in 1947, 1948 and 1949.

MR. O'DONOVAN: Would you agree that these particular plots are about the same value as land on the opposite side of Sclaters Road? A. Other things being equal, there should be a very little difference.

30

Q. Or no difference? A. Very little difference.

Q. Mr. Merryweather has told us that two undeveloped half-acre plots almost opposite this, on the other side of the road, were sold in

November, 1954, upon the basis in each case of £4,450 per acre. Did you know about that? A. No.

Q. If you had known, would it have influenced your opinion? A. Very little, because I do not fix the price; I merely try to advise my clients as to what is a reasonable price.

10 Q. But surely what neighbours in the immediate vicinity obtain is a very fair indication of what your clients could be advised to obtain? A. Yes.

Q. And if someone thought half an acre across the road sells at a price of £4,450 per acre and somebody else sells another half an acre, also immediately across the road, would you tell a client of yours that he could probably accept that price? A. I was not asked to advise on the price of half an acre; I was asked to advise on the property as a whole.

20 Q. Would you agree that a person who has subdivided these plots into 4 half-acre plots could probably have expected, in February, 1954, to get roughly what was got for the plots across the road? A. It is merely an assumption, but it would be a fair assumption.

Q. But making the assumption, which you say is fair to make, the total value of the 4 sub-divided plots is over £4,000? A. Yes, if they are sold.

30 Q. Could you suggest any reason why somebody would pay that for a plot across the road and not for the half-acre plot? A. In my opinion I would (inaudible) and in the case of the other two half-acre plots on Sclaters Road, they are very near the hotel. I personally would not pick them as a first class residential plot.

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Court of Kenya

Plaintiff's
Evidence

No.16

Arthur Tisdale
Jones

12th May 1955

Cross-
Examination
continued

In the Supreme
Court of Kenya

Q. I have quoted you two sales. Would you concede that you may be wrong? A. I am prepared to stand by the figures that I gave.

Plaintiff's
Evidence

Q. Did you compare it with any other plots in the vicinity? A. I cannot answer that.

No.16

Arthur Tisdale
Jones

Q. You went over the house? A. Yes.

12th May 1955

Cross-
Examination
continued

Q. How much of the dilapidations you saw could be attributed to its being unoccupied for 15 months except by casual African migrants? A. Apart from the accumulation of dust and dirt, very little.

10

Q. Did you know that there had been a scheme provisionally approved? A. Only when I heard evidence given in this Court this morning.

Q. In your experience if there had been a provisionally approved plan, is there any difficulty in reinstating that plan? A. Normally sub-divisions do lapse, in my experience. I have come across a 1947 or 1948 sub-division which has lapsed and a new scheme has had to be put forward.

20

Q. And has there been any difficulty? A. Sometimes, on a road-widening scheme.

Q. Therefore, to a speculator he would be very interested at the possibility of subdividing 4 half-acre plots? A. Yes.

Q. Would not the putting up of a hotel enhance the value? A. Possibly. It is difficult to fix, because we have already given a figure

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of £3,000 per acre. Unless one becomes speculative, it is difficult to imagine an acre of land getting very much more than that - hotel or no hotel.

In the Supreme Court of Kenya

Q. You think the whole plot was worth £3,000 an acre? A. Yes.

Plaintiff's Evidence

No.16

10 Q. That is less than the value of the half-acre plot next door? A. Except that the plot on the other side has been sub-divided. There is a difference according to the size of the land.

Arthur Tisdale Jones

12th May 1955

Cross-Examination continued

Q. Were you aware of the prices paid for this actual land? A. No.

20 Q. Would it surprise you to know that the present legal owner of the property had herself agreed to buy the half-share from the co-owner for a total consideration of Shs. 90,500 a half-share? A. I can only advise as far as my opinion goes. It would surprise me.

Q. And have you ever heard of a person, at the very same time as she is acquiring a half share for over Shs. 90,000 agreeing to sell the whole share for Shs.100,000? A.I have heard of some very mysterious deals.

In the Supreme
Court of Kenya

No.17

EVIDENCE OF KAMRUDIN ISMAIL SAMJI

Plaintiff's
Evidence

(Recalled)

No.17

KAMRUDIN ISMAIL SAMJI, recalled, on same
oath.

Kamrudin
Ismail Samji
12th May 1955
Cross-
Examination

Cross-examination by Mr.O'Donovan continued:

Q. Have you examined your account books?
A. Yes.

JUDGE: Are you sure that every guest was
given an account and that there is a record
of every account in that book? A. Yes.

10

MR.O'DONOVAN: This book goes up to 31st Janu-
ary? A. These books go up to 1st February.

JUDGE: You will have to leave your books here
to be examined, and if Mr. O'Donovan finds
nothing in the books to cross-examine you about,
you will not be recalled, but if he does find
something we will have to recall you for fur-
ther evidence.

Court adjourns at 12.30 p.m.

EVIDENCE OF PATRICK NEEVE FLATT

In the Supreme Court of Kenya

Plaintiff's Evidence

No.18

Patrick Neeve Flatt
12th May 1955

Examination

C.C.668/54

2.30 P.M. - 12th May, 1955.

PATRICK NEEVE FLATT - SWORN.

Examined by Mr.KHANNA:

Q. You are a partner in George A.Tyson Limited?

A. That is correct.

10 Q. You are a Chartered Land Agent and a Fellow of the Land Agent Society? A. Correct.

Q. How long have you practised in Kenya? A.Since 1948.

20 Q. Will you tell His Lordship about your training in valuation matters, both in this country and in the United Kingdom? A.When I left school I worked for my father who was a senior partner to a firm of chartered surveyors in the city, after he had completed his work as a valuer to the City of London. I subsequently was articled by my father to Mr.Leonard Hern who was subsequently President of the Rating Surveyors Association in Great Britain. Before my article was completed the war interfered and I joined the territorials. After the war I completed my examinations, first with Mr. Frank T....., President of the Land Agent Society, and with another firm in the West Country before coming out to Kenya.

JUDGE: When did you actually qualify? A. Early 1948.

MR.KHANNA: And what is the extent of valuations you have done in this country?. A. My firm are very much engaged in valuation work, consultant valuers to a number of very large companies here, such as Shell Co., of East Africa, to Government concerns such as East African Industries, we advise the Power and Lighting Company and there are a number of other large firms who use us as consultants. We are also surveyors to the Savings and Loans Society and we carry out probably between two or three hundred valuations a year.

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Q. Do you continually advise in connection with lending money on mortgages? A. We do a great deal of that work.

Q. And in connection with rent restriction cases, have you given evidence of valuations? A. Frequently, Sir.

Q. And are you also on the panel of Valuers for the Landlord and Tenant Court? A. Yes.

Q. Were you approached in connection with the valuation of plot LR.20958/1? A. Yes.

10

Q. Who approached you? A. I was approached by Mr. Nanji who told me that he had bought a plot - this particular piece of land, which is situated next to the Mayfair Hotel and there was a dispute with it and he wished me to come along and give him an opinion on the value. That was about the 22nd or 24th of February last year.

Q. And will you tell His Lordship how many inspections have you taken of this property? A. Two, one on that date when I wrote a letter to Mr. Nanji giving my opinion, and the second inspection about ten days or so ago when I went back and looked at it again to see what state it was in at that stage.

20

Q. How long did you spend on the first occasion? A. I spent a relatively short time, approximately three-quarters of an hour on the property itself. I spent a lot of time after that searching the sale records.

Q. On this second occasion did you inspect the house itself? A. Yes, I went over the whole place again and I made a very much more detailed inspection of the house.

30

Q. How many hours did you spend? A. About an hour in the house itself.

Q. You have expressed an opinion as to the value of this property. What do you place this value at - this two acre plot? A. I was told at that time that he'd purchased it for the figure of £5,350, and he asked me if that was a fair price. My opinion was that it was a fair and reasonable price at that date.

40

Q. Is that still your opinion? A. Yes sir.

Q. Now you know the acreage of this plot, don't you? A. Yes sir, it's a fraction over two acres in extent.

Q. And it is a leasehold property? A. It is held on lease from the Crown for 99 years from the 1st November, 1904.

10 JUDGE: Does the fact that the lease is half expired affect the value of it? A. It will do so very shortly when this lease has less than 48 years, then it will affect the land for mortgage purposes as far as building societies are concerned. At the same time the Crown has re-granted so much leasehold land on new leases that they are considered over as one would a private leasehold property.

20 Q. When the 99 years expires the Crown might well resume the lease? A. No, Crown have, on a number of occasions, re-granted new 99 year leases and we have an undertaking, I think in 1944, that land only can be resumed by Crown when it was wanted for town planning or other purposes.

MR.KHANNA: And what is the ground rent in respect of these two acres? A. It is nominal.

30 Q. This is a corner plot situated on Sclater's Road and there is another road along the side of it, M'paka Road? A. Yes sir, it is a good corner plot with frontage on a main road and a frontage on M'paka Road.

Q. Is Sclater's Road made up? A. Yes, but M'paka Road is not.

Q. And there would be street charges in respect of M'paka Road whenever it is constructed? A. Yes sir, at the same time we generally find that whenever we allow mortgages when streets are made up, these have appreciated by a similar amount of value.

Q. What kind of soil is it? A. Good red soil.

40 Q. Are there any trees on the property? A. Yes.

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Q. Is there any kind of house on it? A. there is an old European-type dwelling house on the property which was built originally in 1907 according to the building plan. The original house was then extended in 1920, and at the time when I inspected it, it was in extremely poor condition throughout.

Q. Will you describe the accommodation that it contained? A. Approximately, the accommodation is a lounge with dining-room adjoining, joined together with an archway between.

10

Q. What would you say is the general condition of this house? A. On my original inspection I went and looked at the house immediately because the land values were quite easy to check up from other sources having seen the plot, and going into it it appeared to be in a semi-dilapidated condition. Most of the windows were broken and the walling on the verandah was coming loose. There appeared to have been white ant activity behind the skirtings because some of the skirting appears to have been pulled out in the living room. There had been quite definitely, and still was, activity by borer beetle in the floor timbers.

20

Q. Did you extract a sample? A. I didn't. On my second visit I got underneath the floor and went round a good deal of the house. Quite a lot of work had been carried out to the property. For example, the floors and the passage-way by the bathroom were in a highly dangerous state originally. These had all been torn out and replaced with concrete and on my second visit I crawled through a hole in the floor and went underneath the house and I brought out a piece of floor joist which had been damaged severely by white ants.

30

Q. Is that the one? (WITNESS HANDED PIECE OF WOOD) A. If not the piece, it is in identical condition to the piece I saw - completely finished. Quite a lot of work had been done to the floor boards under the second bedroom and new joists had been put in and new floor boards in places and it had been patched up in a way which would make it temporarily useable.

40

Q. Did you inspect the roof? A. Yes Sir, I

inspected the G.C.I. from the outside. Parts of it were not bad. A front portion was badly rusted; the whole of the area covering the back portion of the verandah was very rusty and in poor condition.

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10 Q. What was the condition of the ceiling and the roofing timbers? A. The ceiling in the second bedroom had been replaced together with quite a lot of other ceiling in the back verandah. In the passage roofing timbers there was a little evidence of borer and on the back verandah.

Q. What about the internal partitions? A. They appeared to have been either replaced or repaired and were in better condition than when I saw them originally. A certain amount of paint had been used - I should say distemper - and wall mesh had been fitted over the windows, but it was still a very old type of dwelling.

20 Q. Did you inspect the walls? A. I inspected the walls. On the west wall there was evidence of a serious crack in the lounge. I didn't worry about the walls unduly because I was satisfied that the building was obsolescent in any case, due to other repairs necessary, and as such was only fit for pulling down.

30 Q. Is it a European style of house or Asian? A. The house, according to the records, originally belonged to Mrs. Lebbrandt and it is the type of dwelling which we now come across situated on quite a big plot where the house has gone out of style due to a change in that neighbourhood and where a European now would not normally want such a house and an Asian equally would prefer to have the modern Asian type of house.

Q. Would you say that this plot of land is situated in a predominantly Asian or European area? A. Originally, I believe it was predominantly European, but over the years a change has taken place and it is, I should say, nearly 100% Asian.

40 Q. Did you actually see with your own eyes any white ants? A. There were no white ants operating at the time I saw it, either originally or recently, but the pieces of timber which I took out recently could only have been damaged by white ant and there was clear evidence of white

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ant activity in the floor timbers when I first inspected it. Furthermore, the white ants will go back again shortly because the method by which the repairs to the floor had been carried out is such that there is no seal between the supports under the floors and the floor joists themselves.

Q. Did you consider it habitable in February, 1954? A. No sir, and the City Council records clearly showed that the house had given considerable trouble for one purpose or another at that date. 10

Q. Now the outbuildings and the boys quarters. What state were they? A. They were a tin shack in extremely poor condition.

Q. For the purposes of valuation, how far can you consider the house and the out buildings. What character value do they really possess? A. Scrap.

Q. And you have allowed for that in arriving at your valuation? A. I have; at the same time it is not easy to make an allowance for materials in a house, particularly when the house itself is in extremely poor condition. Some of the G.C.I. roof can be used again; some of it is in very poor shape. Again, the stone could be used, but generally speaking when a contractor is called in on this type of work, he is not prepared to pay very much for an old dwelling house because his chances of making money out of the residual parts is, to a great extent, offset by the difficulty he has in taking the stone-work down and the removal from the site of such parts of the building as are valueless but cost him quite a lot of money to take to pieces. An example of that would be the concrete verandah; it is of no value and will cost quite a lot to break it up, and your timber cannot possibly be used again in other building work. 20 30

Q. Are you familiar both with the Asian and the European markets as regards properties? A. Yes sir. For example, checking my file I find that in the five years from the middle of 1950 up to now, we have done 12 valuations for one building society in that part of Parklands alone, that is to say from Sclater's Road up to 5th or 6th Parkland's Avenue. I am sorry, we have done 60 valuations which is equivalent to twelve a year and I have 40

three properties up there at the time upon which advances are being made for building.

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Q. So you are actually in possession of a large number of precedents which could be used by way of comparison? A. No Sir, I have a good knowledge of building costs and developer costs in that area, but not a number of precedents. I have three in mind but it is very difficult to get comparisons even in a small area.

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10 Q. Comparatively speaking, would you say that the Asian land is more speculative than European?
A. That is our experience and it is borne as far as that our advances on certain larger types of Asian Houses are concerned. They are more restricted than they would be on European.

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20 Q. The reason being? A. The Asian market is more liable to fluctuation. Asians do not normally buy houses, and on the other hand, they are restricted and either Government, the High Commission or others are always in the market for houses. Even then, the individual himself may feel that costs are either too high or unfavourable.

30 Q. Would you give us some idea of the state of the market as regards Asian properties in January, 1954, for instance? A. Last year, early in the year, the market was not in any great demand. Mr. Dean (?) was murdered at Christmas and the general atmosphere was rather pessimistic, and for a little incident like that at time when the security forces were not doing well, affected the market; there was no money coming into the country at that time and the rent ordinance on commercial premises was holding up development there. It was a stale-mate period.

40 Q. What would you say the state of the market was in 1948? A. In 1948 we were entering a relative boon period when there was a tremendous demand for all types of property, again except commercial, mainly because the possession could not be obtained.

Q. Has there been any change in the market during 1955 or say, during the November and December of 1954 and these few months of 1955? A. Yes Sir, we have experienced since the new year a great

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demand for Asian commercial property and the emergency is very seriously affecting building prices in that the effects of Operation 'Anvil' and so on were really felt by the end of last year. Some of your basic commodities like sand and stone have been forced up by almost 100%. Building stone, for example, early last year I believe I am right in saying was in the vicinity of Shs. 90/-. Within the last month one had to pay up to Shs. 153/-, and I can speak to some extent personally on this because I placed a contract for my own house at Shs. 40/- a sq.foot and my architect advises me that if I had to place that same work out I would not get it done under Shs. 50/-, and I might have to pay up to Shs. 60/- a square foot; and tenders we have had recently for a very small block of flats near the Muthaiga Club, we were quoted Shs. 58/- a square foot - the lowest tender.

10

Q. As regards the standing of a valuer and the extent of experience, is the position of a valuer parallel with that of a barrister, namely that it is purely personal, or does it relate to the firm in that standing the inexperience of the person operating? A. I would say that a great deal of it is personal.

20

Q. Here Mr. Merryweather says that he has been operating in Nairobi just over 18 months and he claims for himself the leading position in Kenya for his firm. Would you say that that claim is justified? A. Well, I think that one requires more than a year and a half in this town to become acquainted with the values.

30

Q. He has given us some figures which are really very high figures. He says that the total value of the property is something like £12,500. What would you say to that? A. I was here when his evidence was given and I am not prepared to agree with it. The basis of his valuation, I understand was Shs. 35/- a foot on the house. I would say that the average Asian house now under construction is valued from Shs.35/- to Shs.40/-, in fact it frequently does not cost as much as that. But he has put a value of Shs.35/- a foot on a house which is not of Asian style; it is European style and of a type which is completely out of date and, apart from that, in an appalling condition of repair.

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Q. For the house alone, he put it at £6,000 less £200 required for putting it in a reasonable condition. Would you say that his estimate of £200 for putting or reinstating the house into reasonable condition is an accurate estimate? A. No.

Q. Would you say it would require much more than that? A. It is my opinion that the house does not justify reinstatement.

10 Q. And he was comparing large acreage plots and taking that as a basis for comparison with half acre plots. Do you think that is a recognised form of comparison? A. It is difficult to get good comparisons in an area which is very highly developed as in this case. On the other hand, the plot in question is two acres and all the comparisons with the exception of one, were with half-acre plots. Now the demand for land is nearly always for a small plot which has been surveyed and which has its own title deeds. Most purchasers
20 want to borrow money on which to build. Consequently it is not a correct relationship to value a two acre plot which is only in the very preliminary stages of sub-division with a surveyed plot of half acre which is far more likely to attract a buyer. That is to say, the buyer of a large plot is going to buy because he hopes to make something out of it, or in a few places it may be a rich man with a big scheme on. Equally well, he used the comparison of plot 90 which is a little the other
30 way in the sense that 90 is a ten acre plot and there are even less people who would buy a ten acre plot than there are a two acre plot.

40 Q. Taking the household property, he has put it down as less 4,000 for repairs. If you are able to put any value at all, other than demolition value, on this building, what is the maximum value that you would put to the house? A. I wouldn't do it because I consider that even if you pull out the timber which you'd have to due to the fact that there is considerable borer activity in the joists, even after that, it is not the kind of house that a buyer wants to buy and the original house, built in 1907, has been the cause, I believe and I say this purely as an opinion, for the entry of white ants into the building because I couldn't see any sign of a damp course or protector course against white ants and as long as the building still stands, white ants will go

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into it with the greatest of ease.

Q. Mr. Merryweather has put the demolition value at between £400 and £500 for this house, assuming it to be uninhabitable. Would you agree with this figure? A. Now he might be lucky and get it. Last year I would say he would be very lucky to get it.

Q. Coming to the out buildings, Mr. Merryweather said that they were £100? A. I didn't put a value on that. They consist of iron sheeting with pretty poor timbers holding it up. The value is what you would get for the iron.

10

Q. Would you expect £100? A. It might be worth it to someone using it themselves.

Q. Have you inspected the municipal records to find out what the municipal valuation of this property is? A. Yes Sir, the council valuation of this property is on the basis of 1/50 cts. per square foot for the four half-acre plots, then there is a nominal sum at 40 cts. per square foot for the remainder of the land over and above 2 acres. Q. At 1/50 cts. a square foot, would it not work out at more than £3,000 an acre? A. Yes, at the same time, I have other evidence of these other sales which I mentioned around that time which show that the City valuation for rating purposes at that date was on the high side.

20

Q. It is suggested that Municipal valuations some years ago were on the conservative side and were not equal to the real values and it is contended that, generally speaking, the Municipal or the City values are not in accord with the real value. What would you say to that? A. I would say the city valuer generally values at less than market value because there are times in the market such as this particular time, when there is very little demand, and the difference which he may put at ten per cent between his valuation and the market value at that date, and the date of his valuation was 1st August, 1952, just before the emergency when the market was much stronger, and there is a fall of ten per cent the other way. That is borne out by the best comparison which I could find, being LR.209, plot 80/4 and 80/5. Plot 4 is 1.86 acres; it is valued by the City Council at Shs. 1/20 cts per square foot and it

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was sold in a public auction at around April or May last year for 48 cents per square foot - that is to say Shs.38,000/-. At the same time, plot 5, which is 2.15 acres and again valued by the Council at Shs.1/20 cts, per square foot, sold at the same auction for 45 cents per square foot, or Shs. 42,000/- making the total of £4,000 for just over 4 acres of land. The rateable value is a little less than the land which we are concerned with because it is not quite so well situated; probably about 300 yards away to the North, without such good roads. At the same time the public auction is the best evidence of the value.

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JUDGE: What was the price per acre of 80/4? The price per foot

Q. How many acres was it? A.1.86 acres valued at 1/20 cts. per square foot sold for 48 cents per square foot total figure Shs.38,000/- and the other plot was 2.15 acres

Q. Both work out at about £1,000 an acre? A.Yes.

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MR.KHANNA: The last Municipal or City Council valuation was prepared when ? A. The operative date is 1st August 1952.

Q. And the value must have been compiled on sales at that date? A. Yes.

Q. Now, will you tell us how you reconcile the rise of £5,350 which you say is fairly valued, with the figure of £7,000 paid for it in 1948?

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A. I understand the house was occupied in 1948 and it may well have been that at that time, if the tenant had looked after it, a lot of the damage which was going on unseen might not have been known to the purchaser and he may therefore have paid for what he considered to be quite a good house, and to some extent this is borne out by the fact that Mr. Merryweather didn't notice anything wrong when he went round it. At the same time the records on the building file in the City Council I think speak more than any evidence that I can give you as to the number of notices which were served on the plot for various reasons and, in fact, at the date at which this valuation is concerned, February, 1954, the house or the one plot couldn't have been sold separately from the whole because the City Council wouldn't have allowed it. The approval which had been granted was

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conditional and it is the type of approval which one frequently sees. In this case the City Council had agreed to sub division into four plots subject to conditions such as the removal of the septic tank, the building of boys' quarters and other works, which would have to be completed by the Vendor before the sale could go through.

Q. Have you seen the provisional sub division that was approved in 1947? A. Yes.

Q. Will you tell us the effect of that on the house and the plot in relation to the other plots? 10

A. Firstly, the scheme would bring the house very close to the boundaries, the back boundary of one and the side boundary of another of the proposed sub division, and one of the two main verandahs of the house will, in all probability, face on to servants quarters adjoining the other plots. Secondly, the existing boys quarters, which are denoted here by a temporary shed, would have to be demolished and rebuilt in stone to City Council requirements, and the septic tank would have to be erected elsewhere at the same time, which is another quite expensive job. The plot is rather a narrow one, it is actually wedge shaped, and it is nice land, it is the best sub division obviously that can be done - because the house is not placed in an area really suitable for that purpose. 20

Q. Now before a sub division can be carried, there is a certain amount of expense involved, is there not? A. Anyone purchasing a fairly large plot or plot which requires sub division, has to carry out Council's requirements plus survey - when he can get hold of a surveyor of which the average delay is about a year at the present time - and he expects to make a certain degree of profit. 30

Q. What is a fair profit considered? A. Some cases people make two or three hundred per cent profit. Bernard Estate was purchased at the rate of £350 per plot and it is sold from £800 to £1,000 per plot, after expenses have been added on, and the expenses I am told come to around £100 a plot. At the same time where you have a fairly simple job like this one, your developer would probably be satisfied with probably twenty to twenty-five per cent. 40

Q. Would you like to elaborate the basis on which you have put this valuation of £5,350 as a fair value, and if the plots are sub divided at a value of £1,500 each? A. I will make it clear that I have not done a valuation of this. It was an opinion, but it is an opinion which I have subsequently gone into a second time and I am satisfied. My original opinion was that there were four plots here which, at that time, would sell for around £1,500 average. Obviously there would have to be one plot or two plots, which would not be so good as the others, but I assumed that the four plots would bring in something like £6,000, in addition to which there was probably two or three hundred pounds demolition value attached to the dwelling house; the purchaser at a figure of £5,350 was buying quite a good investment and something that he could see his money back, together with a small profit straight away.

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Q. And have you since checked up your valuation by way of comparison? A. At that time plots in Parklands fetched between £1,200 and £2,000 each, and there is the case of an adjoining property which is not a bad comparison, being LR 1870, Section 1, plot 121 of 2.985 acres, which was purchased for the deceased estate by Mr. Mangat in April, 1953, together with a house - an older house - but a habitable house for the sum of £4,700. Again in December, 1954 a half acre (?) was assigned for Shs.50,000/- which shows a slight increase. Probably they did not want to raise it very much because of the stamp duty, which does show a slight increase from the time of purchase in 1953. The plot itself is slightly larger than this one; it is almost adjoining, situated on M'paka Road and has no frontage to Sclater's Road, but the deceased estate was dealt with by Hamilton, Harrison and Mathews, and I don't think they'd let it go cheaply. The house on it is some 220.4 feet in extent with one or two small partitions and varandah, together with 330 feet of boys quarters. Another plot, which is not very near but is a further type for comparison is a property which belongs to a Mr. McKay and is situated opposite the High Road where the Limuru Road turns into Muthaiga. It has two acres freehold. It is known as LR 92212. I sold this in 1949 for Shs.93,500/-. The house is quite a good one still occupied but people are not particularly interested in buying

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a larger plot, although half-acre plots there are worth £1,500 each average.

JUDGE: When you say that you sold it, the Vendor actually wouldn't get that much? A. Less our commission. We tried to sell it for £6,500. We tried for three months and then Mr. McKay got tired and he sold it through us after a good deal of bargaining. It was an old style of house with a double storey, just at the beginning of the turn off down to Muthaiga; a Tudor style house in good condition but in spite of that we could still only get that for it and I believe the subsequent purchaser has sub divided it into four separate plots.

10

MR. KHANNA: This ten acre plot that Mr. Merryweather used as a comparison. He said that the house on it was valueless. Can the house reflect on the value of the land? A. It can be if it is not the right setting. More important, if it is in good condition and secondly if it is placed in such a way that either the other sub divisions are affected or the house itself is not badly situated on that plot.

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Q. And he cited an example on the opposite side of the road which is £2,250 per half acre? A. Yes sir, I don't contend that a half acre plot with title deeds is a reasonable comparison with a larger plot of land.

JUDGE: Mr. Merryweather quoted two 2-acre plots at £4,450, £2,225 per half acre, you mean? A. Yes. I have a breakdown from the City Council of the other plot 90, which is a ten acre plot; there the City Valuer has allowed for 16 ½-acre plots at 1/20 cts. per square foot, 2 acres at 40 cents per square foot and then he has allowed 25% of the whole because that would entail sub division. In fact, it sold for £2,500.

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MR. KHANNA: Having regard to the conditions created by the emergency, and having regard to the extent of the demand on the Asian market and your experience of valuations that you have conducted in the area and the sales that have taken place, do you still adhere to your opinion that the fair value of this property was £5,350 as at February, 1954? A. Yes sir.

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Q. And would you say that price since February, 1954 - say at November, 1954 - had gone up considerably? A. Yes sir. Building prices and land prices, to some extent, are married in that if building prices go too high, people will try to buy a house with land; but after a time the house owners, equally, will put their prices up to keep in line. Consequently, they cannot be separated.

10 Q. Do you still adhere to your opinion despite the fact that in 1948 as much as £7,600 was paid for the same property? A. I do sir, and I am very much influenced not only by the fact that probably November, December, '54 and January, 1955 were about rock bottom figures for building. Since then building costs have never stopped to rise. I know people who placed contracts around Shs. 35/- a foot for a first class house. Since then they have never stopped moving upwards; and that, I would say, is also reflected to a degree
20 in land prices. For example, last year, even in the middle of last year, we were called upon to value a property in Hardinge Street which we valued for £45,000, and at that time I don't think we would have found a buyer for it. We have subsequently sold it this year, in about February, for £65,000.

30 Q. Do you think this wedge-shaped plot with this dilapidated house was worth £5,000 or anything near it in February, 1954? A. No, sir.

Q. Would it ever be worth that much, even after the emergency is completely over - the house in its present condition, or the condition in which it was in February, 1954 along with that wedge-shaped plot, having regard to its relationship to the other sub divisions? A. In my opinion, no.

40 Q. And what would you say would the maximum price for the house plus the land, plus a half acre of that sub-division; what would the maximum be that one could ever hope to get for it under the most favourable conditions? A. I haven't valued it, I am afraid, but I am prepared to put a value on it.

Q. Would that value come as near as £5,000? A. No sir.

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Examination
continued

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continued

Q. And according to your valuation of £200 for demolition value of this house plus £1,500 for the half acre, that would come to £1,700 to £1,800, assuming that there was a willing buyer prepared to pay for this scrap? A. At that stage it was not sub divided.

Q. No, but assuming somebody carried out the sub-division? A. I would say that after one had carried out the sub division, then it would be worth rather more. 10

Q. How much would it be at the outside. How much more than £1,700 to £1,800? A. Possibly £2,500.

Q. Now if there is a hotel, which is the case, next door and a lot of cars coming in at odd hours, would that reflect on the value of the property? A. I don't think so because the house is set back.

Q. And if the property, instead of being sub divided, sold as residential plots; if it were sold as a whole with a condition attached that it has been approved as a hotel site, would that enhance the price? A. Yes, it could do. 20

Q. That would assume that the house would have to go? A. I don't think the Building Inspector would be at all happy with that house if it was going to be used for hotel purposes.

Q. By how much would the value be enhanced? A. I can't say, this is the first time I have had that one.

Q. But if it were to be sold with the knowledge that it can be sub divided into four sub plots for the purposes of residence, you don't value it at more than £5,350? A. No sir. 30

CROSS-EXAMINED

Cross-
Examination

Cross examined by Mr. O'Donovan.

Q. How long have you been in Nairobi as a Land Agent? A. Since 1948.

Q. And how long after your arrival did you start making valuations? A. Very nearly right away - by January, 1949. 40

Q. And you arrived in 1948? A. Towards the end.

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Court of Kenya

Q. And when you started in 1949, were you able to value competently? A. My business in England had always been valuation. When I came out here I had to take the job of selling houses to start with, and the only way I could arrive at prices was to break down the values of properties and I was able to get a good deal of help from one or two professional people here, but I would say that it took me two or three years at least to feel that I could stand up to Court interrogation.

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Q. Yes, but some people don't necessarily ever qualify for that but are still quite good land agents? A. I mean it took me two or three years to know the various districts in detail.

Cross-
Examination
continued

Q. But you could carry out valuations after one year quite competently? A. Yes.

Q. And it wouldn't be fastidious if Mr. Merryweather could after eighteen months? NO REPLY.

Q. You don't throw his 18 months at him as the reason for saying that he does not know what he is talking about? A. No sir. I think that 18 months is not a long time and obviously where the personal aspect enters into valuations, it must. That is one of the basics of an expert's evidence.

Q. And can you recollect occasions on which your firm has very strongly contended with a Municipal valuation on Nairobi properties. The City rating valuations of Nairobi land values is very much on the conservative side? A. We have contended both ways on different valuations. The circumstances depend on the individual case under valuation, that is to say that each case must be treated separately and individually.

Q. Would you say that in general, City valuations are conservative? A. In general, yes sir.

Q. When did you look at the City valuation with regards to this particular property? A. At the time I was asked to value it.

Q. By the way, how many running feet of stone are there in this building? A. I haven't the figures.

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Cross-
Examination
continued

Q. About? A. I am sorry, I am not a demolition expert. I don't think it would be a fair question to ask me; that is entirely a matter of quantities.

Q. You haven't even an approximate idea? A. No sir.

Q. So that you haven't even an approximate idea of what the stone would be worth? A. I can only base my opinion on other demolitions.

Q. You have not explained how you arrive at a figure of £5,350. How do you do it? A. I did make it quite clear that this was not my figure. I was told the purchase price was £5,350 and I was asked if it was a fair one. I have said that there were four plots worth an average of £1,500 a piece, to which there is some demolition value of the building, and as such the gross income of £6,000, plus £300 for the house, making £6,300 is a fair figure, bearing in mind that there are certain expenses attached to it such as survey.

10

20

Q. I don't believe any precedents you've got are nearer in situation than the two half acre plots immediately up the road. I think you contend that a half-acre plot is not a fair basis of comparison. Do you say that? A. The half-acre plot is not nearly such a good comparison.

Q. No, but supposing somebody bought this property and sub-divided it and got four separate titles, then you would naturally expect that the values of each single plot would bear some relation to the value of an identical size plot? A. Yes, as a developer I have got to take the risk as to what prices are going to be and I expect a margin of profit.

30

Q. So it would not surprise you if, in this particular property, the same price per half acre plot were obtained as was obtained next door? A. That is quite possible.

Q. So that a developer could quite easily expect to get £9,000 for the sale of these four plots? A. He might do, but not at that time, in my opinion.

40

Q. And it would cost him another £100 per plot to

put this sub division into effect, about? A. His survey fees would probably be about £50 a plot.

Q. And other expenses? A. It depends on what he wants to do with the house.

Q. Would you say it was a fair price from his point of view - Mr. Nanji's point of view? A. Yes sir, he couldn't lose on it. I consider it was a reasonable price.

10 Q. Do you really contend that there was all that difference in market conditions between February and November last year? A. Well sir, I must be guided by the evidence which I am given in a public auction.

Q. I am asking you again, do you really seriously contend that there was any fairly significant difference in market value prevailing in February, 1953, from those which prevailed in November, 1953? A. In my opinion there was a considerable difference.

20 Q. And expressed in percentages of what? A. I haven't tried to express any percentage.

Q. You heard Mr. Tisdale-Jones give evidence to the effect that he knew of no difference? A. I haven't.

Q. You wouldn't agree? A. No.

Q. You heard Mr. Merryweather say there might have been a difference of five or ten per cent? A. Yes sir.

30 Q. Surely he was in a position to judge that matter equally as well as you? A. I would disagree because he wouldn't produce the (inaudible) ... sale as a comparison.

Q. Where is the 1.86 acres situated? A. Behind the plot.

Q. Not on the main road? A. No.

Q. Is it a 'macadamed road?' A. No.

Q. Is it sub divisible? A. Oh yes, and it was valued by Mr. S. on the basis of three $\frac{1}{2}$ acre plots at 1/20 cts per square foot and the balance,

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Cross-
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continued

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Cross-
Examination
continued

which is less than a plot and therefore not sub
divisible, at 40 cents.

Q. But surely there is all the difference in the
world between the value of a plot on the main
road and one three plots behind? A. My experi-
ence is, if a rate payer can argue against the
City valuer, then he will not hesitate to do so
and there was no objection to the rates of these
plots.

Q. At what do you value this land? A. I consider
that the £5,350 was a fair market price. 10

Q. How do you value the land without the build-
ing? A. I value it on the basis that there
would be four $\frac{1}{2}$ -acre plots worth £1,500.

Q. That is £6,000? A. Worth that after sub divi-
sion has been carried out, which hadn't been
done.

Q. And it would cost £400 to carry it out? A.
Survey plus interest on capital, plus what the
market is at. 20

Q. Having surveyed it and having carried it out,
on what basis do you distinguish it from the im-
mediately adjoining $\frac{1}{2}$ -acre plots? A. They may
well be worth as much as the adjoining $\frac{1}{2}$ - acre
plots.

Q. That makes £2,250 each, doesn't it? A. Then
why didn't Mr. Mangat pay that price?

Q. Was his on the main road? A. Within 100
yards.

Q. Is it 100 yards from the main road? A. Yes. 30

Q. On a 'macadamed road? A. No.

Q. Do you think properties are more valuable when
they are on main roads or not? A. Yes.

Q. Who, by the way, paid your fees in this case?
A. I charged five guineas.

Q. Who has undertaken to pay them? A. Mr. Nanji.

Q. He has shown an intense interest in the

Plaintiff's side of this case? A. I know very little about this case. I know what it's about.

In the Supreme Court of Kenya

Q. When you valued it, I think one of the things you bore in mind particularly was that it was restricted to residential purposes only? A. Yes, I understood all Parklands is, but I didn't value it on the basis of being out of the ordinary.

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Q. Supposing you had been informed that there had been approval in principle to erect a hotel? A. It depends a lot on the approval.

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Q. That a plan had been officially approved by the City Council; would that affect your valuation? A. It would, on the other hand I would need to satisfy myself that the Department of Lands had approved it.

Cross-
Examination
continued

Q. There are two stages for an official approval? A. Two stages for nearly everything.

JUDGE: Even if the City Council has approved it, can the Department of Lands turn it down? A. Yes, but not normally.

MR. O'DONOVAN: So it would be a safe assumption that if it had the approval of the City Council it would be approved by the Lands Department. What would you say the plot was worth as a hotel? A. I don't think I can give you a figure.

Q. Would it be worth much more? A. It would make a difference of possibly a thousand. Again, at that time, how much difference that could be worth I don't know. There are a great many hotels in the Upper Parklands area which are on land that is restricted to residential user and I don't think their land has been greatly enhanced in value by their use as a hotel.

Q. You say you took into account the previous sale in 1948 for £7,600? A. Yes.

Q. And you put down that difference to the fact that damage to the building might not have been deducted in 1948. Is that right? A. Yes.

Q. You also said that it might not have existed, the trouble in 1948? A. It would not have developed and this house appeared to have been left

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Cross-
Examination
continued

empty for a while when I saw it and it was in a very very dilapidated condition.

Q. A dirty condition? A. That was one of the factors.

Q. Would it astonish you to know that it had been rented with the approval of the Rent Control Board right up to the end of 1953 (?) A. Quite possibly. I can only say that the tenant must have either been out of the place...

Q. Or it might have got dilapidated after he'd left? A. It wouldn't have been. 10

Q. Did you know that at the time - that is January, 1954 - the owners of the property was in the process of acquiring a half share for just about £9,000? A. No.

Q. Would you have taken that into account? A. I would have taken note of it, at the same time I would not have taken as much notice of it as I would in an outright sale.

Q. Did Mr. Nanji say that he had bought the property, or was merely negotiating? A. Just negotiating. 20

Q. Would you like to look at your report? A. I have said "You are negotiating".

Q. You say negotiating? A. I didn't say what state it was.

Q. You thought the land was worth £1,500 per plot, that is £6,000 plus about 350 for the house? A. Yes.

Q. The Municipal valuation at 1/50 per square foot is its present valuation? A. No sir, valuation on 1st August, 1952. 30

Q. I am sorry, but it was made upon the whole plot, and charges and rates were levied on that valuation, although the sub division had not been put into effect? A. Yes sir.

Q. In other words, the City authorities in valuing a plot - a large plot like two acres - calculated its value having regard to its potentialities to sub division? A. Yes sir. 40

Q. And the result they arrived at was 1/50 cts. per square foot undivided? A. Yes.

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Q. And I think you have said that you've known of cases where developers have made two or three hundred per cent profit? A. Yes.

Plaintiff's Evidence

Q. It wouldn't be a fair price unless the developer could make a profit? A. I wouldn't even say that; people buy land which they hope to appreciate in the future.

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10 Q. Assuming, assuming that Mr.Nanji could have acquired this plot and sub divided it and obtained the same price as was paid next door - £2,250 per half acre plot - would you still regard the price that he was prepared to pay a fair price? A. Yes.

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Cross-Examination continued

Q. Even though he would probably get more than twice his money? A. Most certainly.

20 Q. You see nothing unreasonable in a developer making profits like that? A. I tried to make it clear that the profits of a developers scheme vary with the risk involved. A person buying land has to survey it and it may be delayed more than a year.

JUDGE: What you mean is that even if a man sells property at double the price he paid for it, it doesn't necessarily mean that he had made 100%? A. Yes, and in this country in particular, people are so chary of buying against that sort of thing. Clever speculators have, in some cases, made very high profits.

30

MR. O'DONOVAN: You said the plots at Parklands were averaging £12,000 an acre? A. £1,200 to £2,000.

Q. To what plots were you referring? A. 1st, 2nd and 4th Avenue, Parklands.

RE-EXAMINED

Re-Examined by Mr.Khanna:

Re-Examination

40 Q. In answer to my friend, you said that a person might or might not secure £9,000 for this property in the future. Now would you say that that answer is nothing more than a mere speculative prospect? A. There is a speculation upon the exact amounts.

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Re-Examination continued

Q. And could he have got 9,000 or anything like it in February, 1954? A. Not in my opinion.

Q. And then my friend has been telling you that if a plot is on a tarmacadamed road it is worth as much as double the value of the plot that lies behind, that is the sum total and effect of Mr. Merryweather's evidence. Would you say that it would affect it as much as that? A. I would have said that it may make a difference of between 25% and 33%.

10

Q. And did you say in examination in chief that the state of the market was much stronger in 1948? A. We were on a rising market at that time.

Q. And if £7,000 was paid for it in 1948, does it necessarily follow that 1948 prices would continue in 1954? A. In my opinion, the deterioration of the house was sufficient evidence to account for the difference between the value in 1948 and the value as at February last year.

20

Q. Now City valuation rates are prepared at intervals of five years, are they not? A. Yes.

Q. And their valuation of 1/50 cts. per square foot was on 1st August, 1952? A. Yes.

Q. Does it mean that that is a fair guide if prices have changed between 1st August, 1952 and February, 1954. Does it hold good at all times? A. No sir; for that reason the City Valuer has always allowed a certain amount of margin between the figures and the normal market, but there are times when land will fall well below his figures.

30

Q. Would you say that £5,350 is an unconstitutionably low price to pay? A. No sir.

Q. And do you still adhere to your opinion that in February 1954, the fair market value of this property, having regard to the condition of the house, was £5,350? A. Yes sir.

THE COURT ADJOURNED AT 1605

12th MAY, 1955.

40

EVIDENCE OF HAJI GULAMHUSSEIN HARJI

In the Supreme
Court of Kenya

SEVENTH DAY
13th May, 1955

Plaintiff's
Evidence

No.19

Haji Gulam
Hussein Harji
13th May 1955
Examination

HAJI GULAMHUSSEIN HARJI (Sworn)

Examined by Mr.Khanna:

Q. What is your full name? A.Haji Gulamhussein Harji.

10 Q. For how long have you been a broker Mr.Harji?
A. Since thirty five years.

Q. For how long have you been a land and estate agent? A. For the last twelve years.

Q. Do you live permanently in Nairobi? A. Yes Sir.

Q. And you work for gain also in Nairobi? A.Yes Sir.

Q. Do you work at other places also? A.Yes Sir.

Q. What are those places? A. Uganda, Kenya and Tanganyika, all three.

20 Q. Do you know the defendant Khatijabai? A. Yes Sir.

Q. You heard her say that she met you in an Indian Bazaar? A. Yes Sir.

Q. Can you remember the date when she met You? A. Yes Sir.

Q. What is the date? A. 17th February 1954.

Q. What was the time? A. It was in the morning.

Q. Round about what time? A. Between half past nine and ten in the morning.

30 Q. Did you talk to her? A. We greeted each other when we saw and met each other.

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13th May 1955

Examination
continued

Q. Did you stop her or did she stop you? A. She called me and stopped me.

Q. Was she by herself? A. She was by herself.

Q. You have heard Sadru Din give evidence. You know him? A. Yes.

Q. Was he there with her? A. No Sir.

Q. Was he anywhere in the street to be seen? A.No Sir.

Q. You have heard Sadru Din's evidence. He said he also met you on the next day. Is there any truth in that? A. No truth.

10

Q. He says that you offered him coffee on the next day somewhere near the market? A. No Sir.

Q. He also says that one Hassan Ali Dedar was with you? A. No Sir.

Q. Is there any coffee house near the market to which you went in 1954? A. There are native hotels around about the market Sir.

Q. Do you go into any of these hotels? A.No. You remember there was one actually inside the market. The 'Polar Bear' it was called. Was it in existence in 1954? I remember also that there was a restaurant but I don't know specifically whether it was in existence on the date in question.

20

Q. Did you go to that Polar Bear with Sadru Din and Khatijabai? A. No Sir.

Q. Did you see him at all on the next day? A.No Sir.

Q. What was the substance of your conversation with the defendant on the 17th February in the morning? A. When she saw me in the morning first we greeted each other. She said, "I have got a plot about two acres with a building there upon and I want to sell it off - in Sclaters Road."

30

Q. What else happened on that day? A. I asked some more information about that. She said, "The land is over two acres with a building." And I enquired, "Is it in vacant possession." And she

said "Yes". She intimated her intention that she wanted One hundred thousand shillings for that land and building. I said, "All right would you be able to give me an option for one week only?" She said "I wanted to return to Mombasa immediately so I will only agree for three days option." I have forgotten something in between talk. At the time of reference to two acres or over I also enquired, "Is that land sub-divided and have beacons been fixed?" She said "Yes, both needs have been done." She asked that she will only be willing to give three days option because of her impending return to Mombasa. I said, "All right where and when should I contact you again?" She said, "Come tomorrow to see me at the house of Mrs. Valli Hasham". I asked the time. She said, "Come about nine o'clock." And accordingly I went the next day. I wrote down the option on paper at my house and took it with me there.

10

20 Q. Is this the option (Exhibit A.1)? A. Yes.

HIS HONOUR: You wrote that down on the morning of the 18th and took it round to her the same morning? A. Yes.

MR. KHANNA: Look at the options again? Were the deletions and additions already there? A. When I read it over and explained the option thereafter the deletions and additions took place.

30

Q. You went round about 9 o'clock to Valli Hasham's house. Will you tell us what happened there? A. The defendant was there when I went.

Q. In what room? A. I think in the dining room.

Q. Was she alone? A. She was alone in a chair.

Q. Did you enter that dining room? A. First I rang.

Q. And when you got admission? A. I enquired of Khatijabai and was directed towards the room where she was. I went there, greeted first, and said, "I have brought this option." I read it over and explained her.

40

Q. In what language did you explain it to her? A. In Gujerati.

Q. You are Gujerati speaking persons? A. Yes.

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Examination
continued

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Examination
continued

Q. And the defendant also? A. Yes.

Q. You both belong to the same community? A. Yes Sir.

Q. You are both followers of His Highness the Aga Khan? A. Yes.

Q. And after you had read over the paper to her what happened? A. After reading it over I also explained it to Khatijabai, and she pointed me out some deletions and omissions.

HIS HONOUR: When you say she pointed out some deletions and additions you mean she asked you to make some? A. Yes Sir she pointed me out to alter some. When I was translating this option to her she said, "Write One hundred thousand net, not only One hundred thousand shillings" When I translated the sentences concerning sub-division already taken place and beacons have been fixed then she said "Wait sub-division has taken place but about the beacons I am not sure." And asked me to cut that out. 10

MR.KHANNA: She said, "Put down One hundred thousand net" and did you put the word net down?. A. Yes. Her suggestion. 20

HIS HONOUR: Which were the words you crossed out when you had this conversation about beacons? A. "And the beacons is already been put." I initialed that correction myself.

MR.KHANNA: Then what happened? A. I requested three days option is not enough if you cannot grant me one week please give me two more days - altogether five days - that is up to the 22nd. She agreed to my request and after her agreeing I crossed out the date 20th and put 22nd. After all this was read over and explained to her Khatijabai called Amina. Then when Amina comes Khatijabai said, "Well baby just read this and explain to me" then Amina read over and explained to the defendant. 30

Q. In what language did she explain it? A. In Gujerati. 40

Q. Is Aminabai also of the same community as the defendant and you? A. Yes Sir, She is also a relative.

Q. And after she had read over and translated in Gujarati to the defendant what happened? A. Then Khatijabai signed this document.

Q. Did you see her sign? A. Yes.

Q. Was Amina there? A. Yes.

Q. Did she see Khatijabai sign? A. Yes. Then I requested Aminabai, "Will you please sign this document because you have read and explained it to Khatijabai."

10 Q. Did she sign the document? A. Yes.

Q. What happened after that? A. I left with the option in my possession.

Q. And then what did you do after that? A. That day at about half past eleven I telephoned to Mr. Hasham Nanji at Hotel Avenue.

Q. Did you after the telephone call meet him? A. On the telephone I talked to Hasham about this property and said this is just adjacent to your Mayfair Hotel.

20 HIS HONOUR: Is Mr. Hasham Nanji the proprietor or one of the proprietors of the Mayfair hotel?
A. Yes Sir.

MR. KHANNA: Did you make any appointment with him? A. Yes.

Q. At what time? A. About three or half past three in the afternoon that day.

Q. Did you two meet? A. Yes Sir.

Q. And after that meeting where did you go? A. We went to the plot.

30 Q. And what happened at the plot? A. When I tried to open the building on the plot I found it was locked.

Q. What did you do after that? A. Just opposite to this building there is a house belonging to Aladin Lalji (?) I went there and the defendant was there. I requested her for the key and got it.

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Examination
continued

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Haji Gulam
Hussein Harji

13th May 1955

Examination
continued

Q. Did you go alone or did you go with Mr.Hasham to this house? A. No Sir. I went alone.

Q. Where did you leave Mr.Hasham when you went to bring the keys? A. On the building.

HIS HONOUR: When you mention going to the house of Aladin Lalji was that the Witness D7, Sultan, who gave evidence here? A. My Lord, Aladin is the father of Sultan but I cannot say whether that building is in the name of Aladin or Sultan.

Q. The man whose house you went to to collect the key from the defendant is the father of Sultan (D7) who gave evidence here. Is that correct? A. Yes. 10

MR.KHANNA: Does Sultan also live with his father? A. I don't know Sir.

Q. What happened there? A. I got the key from Khatijabai and I opened the building and showed the building to Mr.Hasham. I took him over the open plot up to all the boundary, up to Mpaka Road and showed him the whole plot. Hasham saw everything and enquired of the price from me. I said "110,000/- I wanted." And in consequence of the discussion we finally agreed at 107,000/- 20

HIS HONOUR: That same afternoon? A. Yes there and then.

MR.KHANNA: Then what did you do? A. I enquired of Hasham when we shall meet next day we may go to the advocate and prepare the deeds etc. And next day 11 o'clock was fixed for the meeting.

Q. The two of you met the next day? A. Yes. 30

Q. After the meeting where did you go? A.I went to the office of Mr.Ishani, advocate.

Q. And what happened at the office of Mr.Ishani? A. I took out the option and handed it over to Ishani and asked him that this was to be exercised. He read the option and said "there is no need to exercise it because the time is not mature and as you have come to make an agreement of sale - no need to have this exercised."

Q. What happened then? A. He prepared an agreement of sale. 40

Q. Did he do it in pencil first, or how did he do it? A. He took notes with his pencil.

Q. Did he do anything else after he had taken the pencil notes? A. It was typed.

Q. How many agreements did he have typed? A. Two, My Lord, original and duplicate.

Q. And this agreement was between you and the Defendant? A. Yes Sir.

10 Q. Did you make any agreement between you and Hasham? A. Yes.

Q. Then or later? A. Then.

Q. What happened after this had been typed out. A. After all these things were being typed Mr. Ishani asked me to call Khatijabai.

Q. What time was it when you were asked to call the Defendant? A. About half past twelve.

20 Q. Where did you go after leaving the office of Mr. Ishani? A. Underneath the office of Ishani there is a shop Aladin Lalji. I went there. I saw Khatijabai there.

HIS HONOUR: Is that the man who gave evidence or is that the father? A. Sultan is attending in the shop but the board shows Aladin Lalji and Co.

Q. Has Sultan got a separate shop or does he work in his father's shop? A. Sultan works there in the shop of Aladin Lalji.

Q. I see. They have got separate residences but only one shop between them? A. Yes Sir.

30 MR.KHANNA: Before you go further, what happened to Mr.Hasham. Did you leave him at the office of Ishani? A. Hasham went away.

Q. You went to the shop of Aladin Lalji and found her there? A. Yes.

Q. You heard Sultan say that he called her by telephone and that she was not there when you went? A. No Sir, she was already there when I went.

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Court of Kenya

Plaintiff's
Evidence

No.19

Haji Gulam
Hussein Harji

13th May 1955

Examination
continued

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Q. And then what did you tell her when you saw her at this shop? A. I said, "Let's go to the office of Ishani where the agreement is to be signed."

Q. Did you mention anything more about the agreement? A. Nothing more.

Q. And did she accompany you to the office of Ishani? A. Yes Sir.

Q. Did she come by herself or did anyone else come along too? A. Sultan was with her. That day I knew him as Aladin's son - not by name.

10

Q. Did the three of you enter the office of Mr. Ishani? A. Yes Sir.

Q. On the way from this shop of Ishani's office did you at all speak to her any further? A. No talk took place on the way.

Q. When you three got into Ishani's office what happened? A. We were offered a seat and Mr. Ishani spoke to Khatijabai that on the strength of the option which you have given to Mr. Harji this agreement has been prepared. And Mr. Ishani thereafter read out and explained the content of the agreement to her.

20

Q. What language did Mr. Ishani explain the agreement to the Defendant? A. Gujerati language.

Q. Is Mr. Ishani a Gujerati speaking born person? A. Yes.

Q. Is he of the same community as you and the Defendant? A. Yes.

Q. Is Mr. Ishani in any way related to the Defendant? A. Yes Sir.

30

Q. What relationship is she? A. Maternal Aunt to Mr. Ishani.

Q. Mr. Ishani has given evidence to say that he never read over the agreement or explained it to the Defendant. Is there any truth in that? A. That is all false.

Q. What happened after the agreement had been read over and translated in Gujerati to the

Defendant? A. When the matter came to reference of 10,000/- while explaining, she objected.

Q. What objection did she raise? A. The lady said, "I wanted 20,000/-. I am in need of 20,000/- and I must have 20,000/-"

Q. Are you sure she mentioned the figure of 20,000/- and nothing more and nothing less? A. The full amount of 20,000/- was required.

10 Q. She didn't for instance say 25,000/- at any stage? A.No Sir.

Q. When she asked for 20,000/- what happened? A. Then Mr.Ishani explained her that this estate is on mortgage for 81,000/- and only 19,000/- remained to her share.

HIS HONOUR: Tell me this. When the Defendant raised this objection to the 10,000/- had the whole agreement already been read out or had they only got part way through reading it? A.No Sir. She objected when Mr.Ishani reached at that stage.

20 Q. Just look at this agreement and tell me how far Mr. Ishani got in reading out the agreement when the Defendant raised this objection? A.(The witness points out where originally it was mentioned 10,000/- and subsequently altered.)

Q. You mean when he read out '10,000/- to be paid cash as a deposit' that was when she raised the objection? Is that right? A. Yes Sir.

30 Q. And it was then that Ishani explained that money was due on mortgage? A. Yes Sir. At that stage.

MR.KHANNA: When Mr.Ishani mentioned this mortgage of 81,000/- did you already know about the existence of this mortgage? A. I didn't know befor Mr.Ishani referred to it.

40 Q. When she raised the objection on the 10,000/- deposit and said she wanted 20,000/- what happened then? A. Then Mr.Ishani pointed out while explaining that her share comes to 19,000/- and how on earth can you demand 20,000/-. Then she said, "That all right, give me 15,000/-"

Q. What happened when she requested 15,000/-? A.I

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said, "Ishani, that all right agree to her demand of 15,000/-"

Q. And was any alteration made to the agreement at that stage? A. Two alterations were made at this stage, 10,000/- altered to 15,000/- and 90,000/- was altered to 85,000/-

Q. Who altered it? A. Mr. Ishani altered it.

Q. And then what happened? A. I took out my cheque book and handed it over to Mr. Ishani to write a cheque and Ishani made out a cheque in the amount of 15,000/- in favour of Khatijabai. (Exhibit A.3)

10

Q. Was the cheque given to you to sign? A. Then the cheque book was turned towards me. I signed the cheque and tore it off and gave it to Mr. Ishani to be given to Khatijabai.

Q. And did Mr. Ishani do anything with the agreement? Did he read it or explain it further? A. Yes. Subsequently the remaining portion of the agreement was read over and explained to her.

20

Q. What happened next? A. He also handed over a cheque to the Defendant.

Q. After he had handed over the cheque to the Defendant, what happened? A. Then the agreement was signed by her.

Q. Look at the original and the duplicate. Did you see her sign? A. Yes Sir. I saw with my own eyes.

Q. Now on the original look at the two signatures on the stamp. Are they both the Defendant's signatures? A. Yes Sir.

30

Q. Did you see her make those? A. Yes Sir.

Q. Look at the duplicate? Did you see the Defendant place any signature on the duplicate? A. Yes Sir.

Q. How many signatures did you see her place? A. Three Sir.

Q. At what places? A. One at the alteration the other at the other alteration and the third down below.

40

MR.KHANNA: Then after she had signed twice on the original and three times on the duplicate did anything happen? A. After having signed these documents she enquired of me, "You might have sold this piece of land and building to some of our Ismailis."

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Q. Your community is known as Ismaili? A.Yes Sir.

10 Q. Did you answer? A. Yes, I said, "Generally it is my procedure to give preference to our community men." She again enquired of me perhaps you might have sold to Hashambhai. I said, "Yes, I sold it to Hashambhai." On hearing the reference and name of Hashambhai she got wild at once. She sprang up from the chair. The agreement was just in front on the table, she took it and tore it off, and without saying bye your bye or any formalities she left the office.

20 Q. Was she any appreciable number of seconds or minutes before leaving the office after tearing up the agreement? A. She didn't wait any moment.

Q. You heard Sultan say that she was confronted by Ishani, asked not to get excited and that there was a good deal of explanation at that stage? A. No. Sir. Nothing of that sort happened.

Q. Ishani has said that he got the impression that you agreed to wash out the whole thing after the Defendant tore up the agreement? A. No Sir. That is wrong.

30 Q. The Defendant and Sultan both say that you made a gesture as follows (put your hand to your mouth and shake your head?) A. No. Sir. I did nothing in fact.

HIS HONOUR: Did Ishani say "There seems to be a misunderstanding forget both of you." A. No Sir. He said nothing of the sort.

40 MR.KHANNA: In her defence the Defendant says that she merely employed you as an agent. I will put the exact words of the defence, in paragraph three it is stated, "During the month of February 1954.for the said portion of land. First of all, did she instruct you to act as her agent verbally at any time in selling this property? No. Sir.

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Q. Did you accept or agree to act as her agent to negotiate sale? A. No Sir. I have never agreed in that capacity.

Q. Did she ever say that "You are instructed to sell a portion of land which is 0.513 acres? A. No Sir.

Q. And did she ever say that for a portion consisting of 0.513 acres she wanted 100,000/-? A. No Sir.

Q. Has she ever mentioned those figures of 0.513 during this verbal conversation on 17th. A. No Sir she never.

10

Q. Have you, until the mention of it in the defence, ever heard anyone mention 0.513 of an acre? A. No Sir. Never before the defence filed.

Q. Was there anything - any question of anything less than the whole two acres and the house being sold for One hundred thousand shillings on the 17th February? A. No Sir. No reference was ever made.

20

Q. Did she ever use any words which could have been misunderstood, to the effect that 100,000/- referred to the house and only one portion of the land? A. No Sir. Nothing whatsoever.

Q. Did she ever specifically mention half an acre on the 17th February? A. No Sir.

Q. Look at this option, it says the words, house and all vacant land". These words, "all vacant land" were they clearly translated to the Defendant before she signed the option. A. Yes. I did explain to the Defendant there properly and carefully and also she was explained by Aminabai in addition.

30

Q. In para.4 of the defence the Defendant states, "On or about the 18th day of February 1954 the plaintiff verbally represented to the Defendant that he had a prospective purchaser for the said portion of land." Did you ever on the 18th day tell her that you already had a prospective purchaser in hand? A. No Sir. I never said so.

40

HIS HONOUR: Before you signed the option did you

say anything about having a prospective purchaser?
A. No Sir.

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MR.KHANNA: It is further stated in para.4 of the defence that you verbally represented that this purchaser was for only a portion of the land? A. No Sir. I didn't talk to her like that.

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10 Q. And then it says "that in order to complete negotiations for the sale thereof it was necessary for the Defendant to give the Plaintiff an option to purchase the same for shillings One hundred thousand." Did you verbally represent to her that you wanted this option for the purpose of completing negotiations with a purchaser you already had?
A. No Sir.

Q. This defence further goes on in para.4, that you verbally represented that the option was required for One hundred thousand shillings in order to purchase only a portion of this land. A.No Sir.

20 Q. This para.4 also says that you produced a document to the Defendant written in English language which you represented to be the option in connection with only a piece of the land? That is not true.

MR.KHANNA: Also or rather in this defence the Defendant says that you produced a document written in the English language, in her evidence she has said that you produced a blank paper and wrote it out in her presence at Mr.Hasham's house. Is that correct? A. That is false what she says.

30 HIS HONOUR: You write English with some difficulty? A. Yes. I am not well educated, only by experience I can read and write and understand.

MR.KHANNA: With regard to this 5/- which is mentioned in this option. Did you actually pay her five shillings? A. No Sir. Not given.

Q. Has she up to this day asked for it? A. She has never demanded it up to now. Had she demanded it I would have paid her.

40 Q. In paragraph 5 of the defence she says that she signed the option without it having been translated or read over? A. That is not a fact.

Q. And she says she signed it because you told

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her that it was only in reference to a portion of the land and the house? A. No Sir. That is false.

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Q. She says that she didn't receive 5/- nor was she promised 5/- for this option. A. It is a fact that I have not yet paid but I have to pay as it has been mentioned therein.

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Q. Did you explain to her that a promise of 5/- is made in this option? A. Yes Sir.

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Examination continued

Q. In para.6 of her defence she says, "On or about the 19th February 1954 was proffered to her." Did you while talking to her from the shop of Aladin Lalji to the offices of Ishani on the way verbally tell her that the agreement only related to a portion of the land and was in accordance with the option which was also for a portion of the land? A. No Sir.

10

Q. Then she goes on to say that she admits that she affixed her signature to the agreement of sale referred to in para.5 of the plaint but states that the same was not prior to her signing, translated or explained to her. Is there any truth in that allegation? A. Mr. Ishani has explained to her very properly.

20

Q. She then goes on to say that she fixed her signature thereto upon the strength of the representations by the Plaintiff? Now did you make any representations to her when you went to call her either in the shop or on the way to Ishani's office or inside Ishani's office? A. No sir.

30

Q. She also says that while she was signing the said agreement she came to learn for the first time from Sultan who was present at the same time that the agreement referred to the whole of plot 58/1/L.R. 209, whereupon the Defendant refused to accept the said agreement. She says that while she was signing, not after she had signed but while she was actually signing, Sultan drew her attention to the fact that it was for the whole plot and not for a portion? Did Sultan draw her attention to the agreement being in respect of the whole two acres before she had signed or when she was actually in the process of signing? A. No Sir. That is not true.

40

HIS HONOUR: Was there at any time in Ishani's

Office any dispute or misunderstanding about whether the agreement was meant to refer to the whole two acres or only to a half acre portion?
 A. No dispute arose at any stage. Whatever was written down was explained to her by Ishani.

Q. Did Sultan make any remark during the meeting? A. No sir he said nothing.

10 Q. Do you know if he picked up the original agreement or copy and read it? A. No Sir. Not to my knowledge.

Q. You mean he may have done but you don't recollect it? A. I never saw him doing like that.

MR.KHANNA: Would you have seen it had he picked it up and read it? A. I could have seen had he done so.

Q. The Defendant further says that she denies that any cheque for the purchase price was proffered to her. Is there any truth in that allegation? A. No truth whatsoever.

20 Q. Was Sultan present throughout the meeting at Ishani's office? A. He was present throughout the meeting.

Q. In para.7 of her defence she says that the Defendant has no knowledge of the matters averred in para.4 and 6 of the plaint and puts the plaintiff to the proof thereof and will in any event contend that the said matters are irrelevant. Throughout this meeting was Mr.Hasham at any stage present? A. Mr.Hasham was not there at any time.

30 Q. Was the sale to Mr.Hasham disclosed to her in answer to her queries? A. No Sir. She said, "It might have been sold to any of our Ismailis". I said, "Yes, that is my usual habit to give preference." Then she said, "Perhaps you might have sold to Hasham?" I said, "Yes I have."

Q.Did she know at that stage that in fact the property had been sold to Hasham?" A. She came to know on my disclosing her after the documents were signed.

40 HIS HONOUR: Is the shop of Aladin Lalji one of that group of shops beside the petrol pump on the left just before you come to the Mayfair Hotel?

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MR.KHANNA: The shop is below Ishani's office in Stuart Street My Lord.

Q. It is alleged that you are on terms of great intimacy and close contact with the Defendant and her family? A. There is no truth in that.

MR.KHANNA: It is said that by virtue of your opportunities and through close contact with the Defendant you acquired some sort of confidence and influence over her. That you gain the confidence of the Defendant and came to have some degree of influence over her. A. There is no truth in that allegation.

10

Q. Have you advised them in any of their property matters? A. No Sir.

Q. Had she or her sons ever come to you for advice as regards disposals or purchases of properties. A. No.

Q. You have seen her casually in the mosque and at other places have you not? A. That is so Sir.

Q. And from what opportunities you have had of judging her abilities - physical and intellectual - would you say she is a woman who is infirm intellectually or bodily? A. Yes Sir. That is my impression I formed that she is firm.

20

HIS HONOUR: Your impression is that she is firm in body and intellect, is that what you mean? A. Yes Sir.

MR.KHANNA: Is the sum of shillings 100,000/- according to your experience as a land and estate agent, a fair value for these two acres and the house in the condition in which it is. Is there anything unconscienable about this bargain? A.No Sir.

30

Q. Do you think you have done anything unfair or unjust in this matter? A. No Sir I don't feel so.

Q. Have you any regrets or qualms about this transaction? A. Why should I regret.

Q. Have you ever agreed to cancel, revoke or rescind this agreement for sale? A. No Sir.

40

Q. Did you pursue the matter the same day as the tearing up of the agreement through your advocate? A. Yes.

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Q. Is Ishani telling the truth when he says the whole agreement was by mutual agreement washed out? A. It is not true it is false.

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Q. Did Mr. Ishani render you a bill in respect of this transaction? A. Yes Sir.

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Q. Is this the bill? (Exhibit 3) A. Yes.

10 Q. Can you think of any reason why Ishani should come and tell an untruth against you - being your advocate and having rendered you a bill - and allege that you had agreed to wash out the whole transaction? A. The only reason I can infer is that the Defendant is Ishani's relative.

Examination
continued

Q. In your experience as a land and estate agent have prices or values gone up since February 1954? A. Yes Sir values have gone up.

20 Q. To what extent? A. It depends upon the location and area.

Q. In Sclaters Road area? Do you think prices have gone up and to what extent? A. From 10 to 15%, the value has gone up.

Q. You remember the Sunday 21st February, did you go to Mombasa? A. Yes I did and my wife.

Q. What time did your train arrive at Mombasa on this Sunday? About quarter past nine the train steamed into Mombasa.

30 Q. Will you tell His Lordship in your own words what transpired at the railway station platform on that day? A. No sooner the train reached the platform than Sadru Din came near the carriage in which I was, with an inspector.

Q. What kind of inspector? A. Police Inspector Sir. He asked me to give him the key and papers.

Q. Did he specify what papers? A. He used the word paper.

Q. And then what happened? A. I said I won't

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give it to you. In front of the inspector he threatened me, "If you won't give me the key and papers the matter will be very serious and the consequences very dangerous for you". I resisted his demand. I said "I won't do anything." And in this connection I was about to go to report to the police station. On my way to the police station I saw Mr. Ishani. I talked to him and revealed what had happened at the railway station. Mr. Ishani persuaded me that "You need not go to the police station I will see Sadru Din and I will persuade him also."

10

Q. You ask for the specific performance of this agreement and that the property should be transferred to your name. A. Yes Sir. That is what I request.

Q. Are you also claiming damages for delay from the 19th February 1954 to the date of actual transfer. A. Yes.

Q. What do you put the damages for delay at? A. I leave it to the honourable court in the hands of His Lordship whatever he may think.

20

Q. You have heard that the nett rental value of this property is 355/- a month? A. Yes Sir.

Q. Are you claiming something more or equal or less than that? A. I only claim whatever is controlled because residences are under rent control.

Q. Did you have this paper signed by the Defendant and one of her sons? A. Yes Sir.

Q. Where did you get the signatures at? A. I was handed over this paper by Mr. Ishani after they were signed.

30

Q. You didn't go to get the signatures from them? A. No.

Q. How often have you been to the house of Mrs. Khatijabai in Mombasa after her husband's death. A. Once or twice My Lord.

Q. How long did you stay? A. Five or ten minutes each time.

Q. On those occasions were you consulted about

40

10 matters of property or was other advice sort" A.
My visit was in connection with their estate.

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Q. Yes but with what object A. In connection
with the building where Jardeen's (?) office is
on Government Road.

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Q. What was the object? A. To purchase that
building.

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Q. You approached them on your own behalf? A. On
behalf of my customers.

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10 Q. You went to ask them whether they would sell?
A. Just to enquire that.

Examination
continued

HIS HONOUR: On the 19th February you were in Mr.
Ishani's office from 10 till 11.30 am. while the
two agreements were being prepared and typed? A.
That is correct.

Q. And then you went to call the Defendant? A.
Yes.

Q. Did you and the Defendant and Sultan go straight
back to Ishani's office? A. Yes Sir.

20 Q. Did you get to his office at about one o'clock
or before or after? A. We reached Ishani's of-
five at about half past twelve and we remained
there until quarter past one.

Q. What time did you go to see your advocate Mr.
Khanna? A. That day in the evening.

Q. What time? A. About five or a little after
that.

30 Q. By that time had you or had you not received
the letter from Mr. Akram? A. Yes Sir I have
received.

Q. What time did you receive Mr. Akram's letter?
A. About 4.30.

Q. You told me just now that during the meeting
in Ishani's office there was no talk at all about
the Defendant wanting to sell only half an acre
and not the whole acre. A. Yes Sir.

HIS HONOUR: Your advocate in his letter said

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this: "After signing the agreement it appears you changed your mind, putting forward the excuse that you were only selling the house and part of the land and not the whole of the 2.04 acres, and you tore up the stamped and signed agreement and went away." Does that sentence mean that during the meeting in Ishani's office there was a dispute about whether the whole plot or only half an acre portion had been sold? A. No express talk took place my Lord.

10

Q. What I want to know is how your advocate at 5 p.m. on the same afternoon wrote a sentence like that? A. My Lord this was written before I received a letter alleging fraud by Mr. Akram. First I saw the reply from Akram this letter is based on the letter from him.

Q. Does that mean that the dispute mentioned in your advocates letter (this letter of Mr. Kanna's) was referring to Mr. Akram's letter? A. Yes Sir. That is based on the allegation of Mr. Akram's letter.

20

Q. Was Mr. Akram's letter the first time it was ever suggested to you that the Defendant wanted to sell only one quarter and not the whole of the property? A. I knew it for the first time.

Q. Going back a little earlier on that day the 19th the Defendant signed the option about nine o'clock in the morning? A. Yes Sir.

Q. Is it right that you had no contact with her until you met her at Lalji's house? A. No Sir.

30

Q. You mean it is right? A. That is right.

Q. You went to her to get the key for the house because you wanted to show it to Mr. Hasham. How did you know that she was to be found in Aladin Lalji's house at that particular hour? A. She talked to me before my seeing her that "I have left the key at the house of Aladin Lalji."

Q. It was just by chance that you found not only the key but the Defendant herself there? A. I was not positive about her presence but only positive of the key at Aladin's house.

40

Q. Switching once more in time to the meeting at

Mr. Isnai's office please remember what you told us about the mention of a purchase. You had already agreed verbally with Mr. Hasham to re-sell the plot to him is that correct? A. Yes.

Q. And you say that the Defendant seemed to know in advance that possibly Mr. Hasham might be the purchaser. A. She suspected.

10 HIS HONOUR: One of the reasons I asked you whether Aladin Lalji's house was beside the Mayfair Hotel was because I presumed it would be quite possible for her, if she was in that house, to see you walking about or to have reported to her that you had been walking about on the plot with Mr. Hasham? A. That is My Lord just possible.

20 Q. Any way in Ishani's office you knew for certain that the purchaser was Mr. Hasham and the Defendant already suspected it? A. Perhaps she might have suspected about Mr. Hasham to purchase that ultimately and that is why I think she put me repeated questions, first about any Ismaili and secondly about Hasham.

Q. Anyway the last thing that was finally known between you was that Hasham was the purchaser? A. Yes Sir.

Q. I want you to tell me what this sentence means in your advocates letter, "It appears that the identity of the sub-purchaser was withheld from you although you seemed to know Mr. Haji Gulam-hussein Harji does not know now"

30 It is pointed out by the Learned Counsel to the Honourable Judge that the words 'does not know now' are 'does not know how'.

Court adjourned 12.30

Court resumed 2.30

40 Mr. O'Donovan: My Lord, My learned friend and I have agreed on the damages for delay in the completion of this matter. They are agreed at fifty pounds. Secondly, with regard to the hotel keeper I should like to question him about the adequacy of his books. I have not been able to find an entry relating to the visit of the middle of February.

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MR.KHANNA: No objection My Lord.

HIS HONOUR: He may be recalled. There was a suggestion that he might have to be.

Q. You remember you said that the agreements for sale were drawn up and typed in Ishani's office before you went to collect the Defendant? A. That is so.

Q. Did you read them before you left the office to collect the Defendant? A. No Sir.

Q. You are quite sure of that? A. Yes Sir. 10

Q. And you are also quite sure that Mr. Ishani put in these terms about the mortgage payments without instructions from you? A. Yes Sir.

A. I think the terms about the mortgage in the agreement of sale to my recollection is that Khatijabai was explained verbally about these things.

HIS HONOUR: Well there is something about payment off of the mortgage in the agreement of sale. It says that the purchaser shall arrange to take over the present mortgage of 81,000/- Do you know that? A. Does it mean that the purchaser, myself, take over 80,000/- liabilities. Does it come to that Sir. 20

Q. Never mind the exact interpretation of the clause. But there is in fact a mention of the mortgage held by the Diamond Jubilee Trust. A. Yes Sir. In that wording Ishani might have explained to her verbally.

Q. But whatever the actual wording of the term in the agreement of sale you gave Ishani no instructions about it? A. I gave no instructions in this respect. 30

Q. He was apparently safeguarding the interests of a client of his namely the Diamond Jubilee Trust? A. It is just possible.

Q. As far as you know he inserted this clause without any instructions from the Defendant and certainly without any instructions from you? A. Yes Sir. 40

Q. You are quite certain that in fact he never even informed you that he had put such a clause in this agreement? A. Yes Sir I was never told.

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CROSS-EXAMINED

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Cross-Examined by Mr.O'Donovan.

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Q. Mr.Harji was any communication made verbally or in writing in the course of your interview with Mr. Ishani of a confidential nature which you don't wish disclosed in court A. No Sir.

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10 Q. Have you given the court a complete account of everything material that was said by Mrs. Khatijabai? A. Yes Sir.

Examination
continued

Q. You are well known as a broker and land agent, particularly in your own community? A.Yes Sir.

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Q. And generally speaking when people approach you about the sale of property they are approaching you in that capacity? A. Yes Sir.

20 Q. Do you consider it your duty when people approach you about the sale of their land to do your best to obtain the best price for them? A. Yes Sir, I take ~~it~~ ~~was~~ as my duty.

Q. And was it not obvious to you that the Defendant was approaching you as an agent to help in the sale of her property? A. That is right.

Q. It was your duty to do your best for her and you were charging a commission? A. My Lord in this bargain there was no question of commission but I have offered the amount which Khatijabai demanded.

30 Q. Do you usually ask for options from persons who approach you as a land agent? A. Most probably I do - so far as possible I do ask.

Q. When people approach you as a land agent you usually get an option from them? A. Yes.

Q. For the purpose of guarantee as their agent? A. Yes Sir.

Q. And the option gives you a certain safeguard

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in your negotiations with other persons? A. My options are also for nett price and also on commission basis.

Q. What right had you as a land agent to go about surreptitiously making a secret profit? A. There was no question like secret profit.

Q. You kept secret from her that you were making 7,000/- and that you had tried to make 10,000/- on the result? You tried to get 110,000/- from Mr.Hasham? You tried to get as much as you could to put into your own pocket without disclosing to the woman who had approached you? A. So long as I was in possession of the option for 100,000/- I had no reason to disclose anything more than that.

10

Q. You say you were interested in this as an agent or only as a purchaser? A. As a Purchaser.

Q. Your interests were opposed to Mrs.Khatijabai, instead of it being your business to look after her? A. I have safeguarded the interest of Khatijabai.

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Q. Do you ask his Lordship to believe that there was no discussion whatsoever about the price of 100,000/-? A. Yes Sir.

Q. You didn't know this property did you? A. No Sir.

Q. You didn't know whether it was worth a hundred thousand fifty thousand or two hundred thousand shillings? A. As an agent it would be within my knowledge.

Q. Well did you or did you not know about this property? A. I was knowing.

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Q. What did you know about it? A.Khatijabai already disclosed to me from the beginning that she had property next door to the Mayfair Hotel.

Q. Did you know anything about it prior to her talk to you? A. No Sir.

Q. Did you know in what condition the house on it was? A. I saw the condition of the building only when I took Mr.Hasham after getting the option from her.

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Q. And yet, without knowing you were quite prepared to take an option and without any discussion - not knowing whether you were wasting your time or not? A. I didn't argue further because she had already disclosed to me that the plot is little over two acres, that the house on it is in vacant possession and then I assessed this should be a reasonable price what she demands.

10 Q. There was no question of your buying a portion of a sub-divided plot? A. No Sir.

Q. Then why should there have been all this discussion about sub-division? A. In the course of my duty it was my job to enquire all about any sub-division.

Q. I suggest to you that the sub-division was specifically discussed because it was emphasised to you that she was selling one plot and the house? A. No Sir. I enquired.

20 Q. Did you make any independant inquiry about the plot apart from what Mrs.Khatijabai told you? A. No Sir.

Q. You didn't check up whether she was the legal owner? A. After getting the option in my possession I went with Mr.Hasham and then enquired everything.

Q. Where did you make your enquiries? A. Not enquiry in the sense of enquiry but to see with my own eyes the whole plot and the building on it.

30 Q. But how did you know the lady was even in a position to sell it to you?

HIS HONOUR: How did you know she had the title to it? A. As she gave me option I took it for granted that she must be the legal owner.

MR.O'DONOVAN: And on the strength of that you committed yourself to re-sale to Mr.Hasham - on the blythe assumption that she would probably be able to sell to you is that it? Without checking up at all?

40 HIS HONOUR: Did you commit yourself to pass the title on to somebody else before you knew that this lady had the title to pass to you? A.I did everything on the strength of the option My Lord.

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MR.O'DONOVAN: You mean you had her caught by the option and if she didn't convey you could sue her for damages? A. In that event the option is not meaning.

Q. Is that what you mean? That you had bound her by the option you had got her caught so that if she could not convey you could sue her for damages. A. It is obvious open fact.

Q. Is that what you thought? A. Yes.

Q. Where did you get the plot number to put in the agreement Ishani provided? A. It was in possession of Mr.Ishani.

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Q. Did he tell you that he had the particulars? A. Yes.

Q. One particular Mr.Ishani could not have had was the negotiation about the purchase of the half share by Mrs.Khatijabai because that had not been transferred to her. She was only a half owner? A. That is the business of an advocate?

20

Q. But did Mr.Ishani not point out to you that to the best of his recollection she only owned a share in the property? A. Ishani didn't talk to me.

Q. Did you not tell him that you had found out that there was an agreement to purchase that remaining half share that was to be arranged by another firm of advocates? A. No Sir I didn't speak to Ishani.

Q. Did you know that? A. No Sir.

30

Q. So that you ask His Lordship to believe that Mr.Ishani although he has documents in his possession indicating that she is only a part owner, just gaily carried on drawing up an agreement for the whole of the share which she could not carry out? A. No Sir I don't want to impress that.

Q. But that would be the position which follows from your answers? A. No Sir not at all.

Q. What is your explanation? A. Ishani said to

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me that I have got all the particulars. I made the impression that Ishani is both an advocate and an agent of the Trust - Jubilee Trust, so that whatever he will do will be necessary.

Q. But Ishani's documents disclose that Mrs. Khatijabai was only the owner of a share that is all. A. That I don't know.

Q. You went there to instruct Mr. Ishani to act for you didn't you? A. Yes.

10 Q. And you handed him that option with the object that he act as your agent in regard to the matter. A. Yes.

Q. He was to exercise it for you? That is what you asked him to do? A. I asked him and he said, "The time is not yet mature."

Q. Did he wish to act generally for you in this matter? A. Yes.

Q. Did you regard him as a reliable person? A. Yes.

20 Q. Even since the 19th February you have continued to be his client? A. Even still.

Q. Did you ever tell Mr. Ishani 'This matter of this property is withdrawn from you. You no longer have any authority'? A. I never said so.

Q. Did you know at the time that this property had been purchased in 1948 for 7,600 pounds. A. Not to my knowledge.

30 Q. Did you know that at the very time when you got this woman to sign an agreement for One hundred thousand shillings she was engaged in acquiring a half share for 90,000/-. A. I knew nothing about that.

Q. If you had known that it would have been obvious wouldn't it that there was a mistake somewhere? A. Nothing like that.

40 Q. You went with Mr. Hasham did you not with the express object of drawing up and signing an agreement of sale to Mr. Hasham on the strength of the option which was to be exercised? A. Yes Sir.

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Q. And in fact your agreement with Mr.Hasham or his company was drawn up and typed out ready to be signed? A. Yes.

Q. Did you explain to Mr.Ishani all the terms which you required to be put in your agreement with Mr.Hasham? A. I didn't explain anything to Ishani. Ishani said, "Whatever is necessary and useful will be contained."

Q. And he drew it up for you to sign it? A. Yes Sir.

Q. Why didn't you sign it? A. He pointed out that the law demands that the seller must sign first and then the re-seller. And then after that talk Ishani asked Mr.Hasham to give out a cheque for 10% that is 10,000/-.

Q. And Mr.Hasham produced a cheque for 10,000/-? A. Yes Sir.

Q. You were some hours in Mr.Ishani's office with Mr.Hasham were you not? A.About 90 minutes.

Q. Do you ask His Lordship to accept that although you went there for the purpose of sale to Mr.Hasham, although the terms were drawn up on the document which was typed out ready to be signed and although in pursuance of what was typed out a cheque for 10,000/- was made out, that neither you nor Mr.Hasham had the faintest knowledge of what was in the agreement? Yes or No? A. I have to explain my dear Sir.

Q. Don't call me 'My dear Sir'. Answer my question Yes or No. A. My Lord, at the time of handing over that option to Ishani I explained to him that this is the property near the Mayfair Hotel which I propose to re-sell to Mr. Hasham. He assured me that I had got all the particulars and all these things were in possession of the advocate.

Q. Will you now answer my question? if you don't understand the question it can be repeated. A. Yes Sir I assure you if I don't follow a question I shall ask you to repeat it.

Q. Do you ask His Lordship to believe that you didn't know - that no explanation was given by

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Mr. Ishani of what he had written in the agreement of sale between you and Mr. Hasham. A. The agreement which took place between myself and Hasham had been read by both myself and Mr. Hasham.

Q. Yes. Of course it had. By Mr. Ishani? A. Mr. Ishani also read and we also took hold of it and read.

10 Q. So you saw in that agreement that it was provided that Mr. Hasham would not pay the 107,000/- himself but would take over a mortgage for most of the purchase price - for 81,000/-? look at the exhibit yourself? (Exhibit A6) Do you observe in that agreement that you read for yourself - it provides a matter of some interest to Mr. Hasham. Namely that instead of having to pay the whole purchase price in cash he will take over a mortgage for 81,000/- out of the 107,000/- A. It is mentioned that within six
20 months documents should be fulfilled.

Q. Don't evade the question I am referring to the mortgage? A. Yes Sir I understand your question.

Q. So you knew all about the mortgage at your first interview with Ishani that morning? A. Yes Sir.

30 Q. And it follows that you were lying then when you said in examination in chief that you didn't know about the mortgage of 81,000/- before Ishani raised the point to Mrs. Khatijabai. A. That was my impression. It was out of my recollection about this thing when I was questioned this morning.

Q. It is not true what you said? A. It may be my mistake.

Q. What do you mean Maybe. Is it true or not true? A. I was under the impression and that is why I said so this morning. Now after reading this I come to my correct recollection.

40 Q. You say the agreement with Mrs. Khatijabai was also drafted out in the morning at your first interview when Mr. Hasham was there. A. Yes Sir.

Q. I suppose that too was explained carefully to

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you was it? A. Not at that time in absence of Khatijabai.

Q. But it was explained in the presence of Khatijabai? So, you didn't know what was in that one!! A. I only came to know what was written when it was read out and explained to Khatijabai.

Q. Was it typed out ready to be signed without any blanks to be filled in? A. Yes Sir.

Q. Wasn't your advocate assuming a very great deal in thinking that Mrs.Khatijabai would sign whatever was put in front of her? A. he was to read over and explain and then after she was to sign. 10

Q. You anticipated no difficulty. A. Not at all Sir.

Q. Although you must have realised that there would be provisos about 10% deposits which you have never even discussed with her? A. Whatever was written by the advocate was all right. 10% was the amount. 20

Q. Agreed between whom? A. With advocate Ishani.

Q. Oh! I see. You made your agreement with Mr. Ishani and the woman had to sign it. Is that right? A. Not that Sir. Ishani said that usually in such bargains 10% is the precedent and that amounts to 10,000/-.

Q. But you got from Mr.Hasham 10% of the price you were paying? A. Yes I took a round figure of 10,000/- from Hasham.

Q. So as to cover what you had to pay Mrs.Khatijabai. A. Yes. 30

Q. You thought that all out in the morning? A. Ishani got all this down.

Q. Yes he is your advocate? So, you were proposing without discussion with the woman, to bring her to sign the document already completed providing for 10,000/- deposit which you had never even explained to her. A. After getting her explained by Mr.Ishani I expected her to sign and the matter was expected to be over. 40

Q. Without opposition? You thought she would be easily persuaded to put her pen to anything? A. Not before having been explained to her.

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Q. You write good Gujerati as well as speak it?
A. Yes.

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Q. You know very well in the course of your experience that an option written in Gujerati is perfectly valid? A. Option is option whether in Gujerati or English.

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10 Q. Then why do you write this one in English which you write with difficulty and which the Defendant doesn't understand? A. Generally when I write out any option I write in English My Lord.

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continued

Q. You knew she was illiterate in English? A. She may not be knowing English but she is not illiterate.

Q. You know that she knows no English? A. She understands something.

20 Q. I suggest that you wrote it in English because you deliberately didn't want her to understand it?
A. That is quite false.

Q. Are you in the habit of calling on women at nine o'clock in the morning at their homes? A. She told me expressly to come at nine o'clock.

Q. Did you understand my question? Are you in the habit of doing so? A. Nothing like that. Whatever time I am asked I go.

30 Q. Did it occur to you that it would be a convenient time because her men folk would not be at home? A. She herself fixed the hour of our meeting and so I went there.

Q. Have you got a fountain pen? A. I haven't got.

Q. Did you have a fountain pen in February 1954?
A. I had two.

Q. You wrote this option at your home did you? What did you write it with? A. A fountain pen Sir.

Q. Whose fountain pen? A. My own Sir.

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Q. And you altered it in Mrs.Khatijabai's house?
A. After having read it over and explained what
I was asked to alter I altered.

Q. And what pen did you use to alter it? A.The
same pen.

Q. And was it stamped? A. No. Sir.

Q. When did you put on the stamp? A. About two
weeks before from today I got it stamped.

Q. The option? It is two weeks now since I put
the stamp.

Q. And you wrote on it 18th February two weeks
ago? A. I wrote that down in the land office on
the instruction of the land office clerk, with a
view to cancel the stamps.

Q. You say it was Mrs.Khatijabai who called Amina
into the room? A. Yes.

Q. You weren't expecting her to call anybody in
were you? A. I expected Khatijabai would call
somebody.

Q. Did you when you drew up the option intend
her to have it witnessed or not? A. Yes cer-
tainly.

Q. So you wrote the word witnesses at home did
you? A. Yes Sir.

Q. You didn't think it better to settle the terms
of the option with her by discussion? You as-
sumed she would sign whatever you wrote out did
you? A. I wrote down the option in accordance
with talk which took place the previous day with
Khatijabai?

Q. Did she mention 5/- the previous day? A. It
is customary to write a few shillings, 3 - 4 - 5,
in options so I wrote.

Q. Had she mentioned it the previous day? Don't
you want to answer the question? A. She didn't
mention the previous day.

Q. You thought she would accept whatever you
wrote down? A. Not so Sir.

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Q. Why did you mention the sub-division in the option? A. I had particularly asked her about that.

Q. Why mention it in the option if you were buying the whole property? A. It was necessary for me to ask an enquiry about sub-division and beacons, so I asked. When the option was read over to her while explaining and that time she said, "I am doubtful about the beacons you cross that out".

10

Q. I suggest to you that you deliberately put into the option the statement about the sub-division so as to introduce a little ambiguity into the document in case you were challenged about what it meant. A. No Sir that is not so.

Q. I suggest to you that the subject of sub-division is one which you would naturally take up so as to keep (inaudible) so that she would think that she was selling you a quarter of the whole plot? A. Not at all.

20

Q. There was no question of your buying anything except the whole plot? A. No Sir.

Q. You were prepared to make a very confident assumption that she was the legal owner just on what she had told you the previous day. Why was it therefore necessary to incorporate in the option the other statement of yours about the sub-division. A. It was my duty in the course of my job to enquire whether sub-divided or not.

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Q. Yes but you had done so the previous day? A. Previous day was all verbal but it must be in writing also.

Q. Did you make it quite clear to her that what you wanted was an option to buy the whole of the property - that is the four plots and the house? A. She herself expressly disclosed that, "I am selling you the whole property which comprises of two acres and a little more with a building on it."

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Q. And did you make it very clear to her that that is what your option meant when you explained it to her? A. Yes Sir.

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Q. There was no possibility of a misunderstanding?
A. Not at all.

Q. And so she was happy about the purchase price of 100,000/-?
A. Very happy.

Q. Very happy. In spite of the fact, which you now know, that she still owed 111,000/- on the plot?
A. That is up to her free will.

Q. You still say that she was very happy, although she would be losing hands down?
A. She never argued anything about our talk.

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Q. Don't you think now Mr.Harji, looking back on it, that she must have been mentally unbalanced if she was selling for 100,000/- what she still hadn't paid for and still had 111,000/- to pay?
A. Not at all Sir. She was not mentally impaired.

Q. Did you come to the decision immediately after she tore up the agreement that you would hold her to it?
A. It was obvious.

Q. Did you or did you not?
A. Yes.

20

Q. Did you instruct Mr.Ishani to insist upon this stupid woman carrying on with her bargain?
A. I didn't tell Mr. Ishani.

Q. You just left his office without saying a word?
A. We all left.

Q. But Mr.Ishani was the advocate you had employed in this matter and who enjoyed and still enjoys your confidence?
A. That is so.

Q. I suggest that you went to a different advocate to act for you to enforce your claim because you knew that Ishani, who was acting for you, could not support you because he had recognised that there was a mistake?
A. My only answer to this question My Lord is that unfortunately Mr.Ishani also left for Mombasa that day and in his absence I, within an hour, received a letter from Mr.Akram. I had got to go to another advocate.

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Q. Yes but Mr.Ishani was there until four o'clock

and this happened at 1.15 p.m. Why didn't you tell him that he had to complete this and insist on it, saying, "She is your aunt tell her not to be foolish or she will get into trouble."?

A. My further reply to this is that when she left the room it was 1.30. Ishani went for his lunch and I also went away and a little after 4.30 I received a letter and Ishani was to leave Nairobi for Mombasa and so I have got to go to another advocate.

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Q. You have altered the times so as to get Ishani on the train? A. Ishani had to go to the railway station at about 4 o'clock. We had departed at 1.30.

Q. If Ishani hadn't been going to Mombasa you would have told him to insist on the completion of this? A. Naturally so, even if I had not received Mr. Akram's letter.

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Q. There was nothing he said in the morning in the presence of the Defendant to indicate any adverse view about your claim that there had been a mistake and you should drop the matter? A. No Sir.

Q. Nothing was said. So you would have expected Mr. Ishani to come into court and support you? Did you expect that? A. Yes he would have come as my advocate in court.

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Q. Did you either personally or through your advocates ever make the slightest effort before Mr. Ishani came into court as a witness, to get a statement from him about what had happened? A. I never gave any thought to this.

Q. Because you knew that his evidence would be unfavourable to you? A. Not to that.

Q. Can you understand how it came about that Ishani on Saturday night in Mombasa should confirm to the Defendant's son that the matter was settled? A. I knew nothing about that then.

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Q. You know about it now don't you? A. Now I know it.

Q. Well can you explain it? He was your advocate? A. I don't know with whom my advocate talks in Mombasa, what happened.

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Q. So you got this letter from Akram at 4.30.
Did you take it to Mr.Khanna's Office? A. Yes.

Q. Did you show it to Mr.Khanna? A. Yes.

Q. Did you tell him everything that had occurred?
A. Yes.

Q. Did you ask him to reply to the letter? A.Yes.

Q. All that before he wrote on the 19th February?
A. Yes.

Q. Can you explain why, if Mr.Khanna had that
letter or you received it, he wrote on the 19th
February to Mrs.Khatijabai instead of her advo-
cate Mr.Akram? A. I asked my advocate to reply
to Khatijabai.

10

Q. Personally? A. Because fraud was alleged in
the letter of Mr.Akram.

HIS HONOUR: But you never mentioned Mr. Akram's
letter in your letter did you? A. I think my
Lord it might have referred to that letter of Mr.
Akram.

MR.O'DONOVAN: Can you explain why there is no
repudiation of the allegation of fraud which so
wounded you? You have got the letter from Mr.
Akram 19th February. You instructed Mr. Khanna
to answer Mr.Akram's letter direct to Mrs.Khati-
jabai. Is that correct? A. I might have told
him.

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Q. You can't remember now? A. The letter is
addressed personally to Khatijabai then it is ob-
vious that I might have asked him to address the
letter personally to Khatijabai.

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Q. Why doesn't it mention Mr.Akram's letter? A.
I cannot say.

Q. Why doesn't it refute the allegation of fraud?
A. It may be somewhere there.

Q. Don't try to get rid of the letter as though
you don't like it. I have got one or two more
questions to ask about that letter. Why should
it end "You would be well advised to consult

your advocate," if you knew that she had already consulted Mr. Akram? A. Whatever my advocate thought fit to safeguard my interest he might have written it.

10 Q. And this reply - why should he write on the 22nd February, three days later and acknowledge Mr. Akram's letter. Look at that (exhibit A.10) (?) Can you explain why, if you handed the letter of the 19th to Mr. Khanna he should only on the 22nd write A.10 to Mr. Akram? Let me refer you to the first paragraph, "With reference to your letter by way of an answer to your letter." Can you explain that?

HIS HONOUR: When you and Mr. Khanna wrote the first letter was it part of the policy to say, "Well, let's write as though we have not had any solicitor's letter yet"? A. No Sir.

20 HIS HONOUR: You see after getting Mr. Akram's letter on the 19th you go to your solicitor but no mention of receiving a letter is made? A. There is a reply to this letter addressed to Mr. Akram.

Q. Yes but that is dated three days later. Well as I said was it part of your policy to say we won't write a formal letter at the moment we'll just ignore it as though we hadn't received it? A. No Sir it was not our policy.

30 Q. But you cannot say why the letter from Mr. Akram was never mentioned in the first letter from Mr. Khanna? A. I cannot say why.

MR. O'DONOVAN: I suggest to you that Mr. Akram's letter was not delivered until the 20th February? A. No Sir. I received his letter on the same day, 19th February.

40 HIS HONOUR: Don't you agree that it is fairly obvious from the correspondence that Mr. Khanna wrote not knowing of Mr. Akram's letter? A. It may be possible My Lord, I might not have talked to Mr. Khanna or referred to him about receiving Mr. Akram's letter.

MR. O'DONOVAN: These are your instructions to Mr. Khanna and he goes into detail about what happened in Mr. Ishani's office. He talks about

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a cheque being made out, about the agreement being signed and then torn up and Mrs.Khatijabai leaving. He says two things in that context with reference to Mr.Ishani's office. He says, "It appears that the identity of the sub-purchaser was withheld from you, although you seem to know Mr.Harji does not know how." Did you tell Mr.Khanna that? A. I disclosed Hasham's name on her enquiry.

Q. Did you tell Mr.Khanna that the identity of the sub-purchaser had been withheld? A.I don't remember.

10

Q. How does it come into this letter unless you told him. A. There may have been talk but I don't remember.

Q. If your explanation on the vital point of this case is true - mainly that you told her it was Mr.Hasham - then what was said in his letter is an untruth is it not? A. Now I explained, I remember, to Mr. Khanna at the time of instructing that when Hasham's name was disclosed immediately she got up from the chair and got wild.

20

Q, Can you explain why he doesn't mention that point? A. I don't know how he writes to the contrary.

Q. Are you suggesting that he didn't write according to your instructions? A. He may have written according to my instructions.

MR.O'DONOVAN: He goes on to sayA.Time was very short. That is my explanation. And Mr.Khanna had specially to keep his office open and hold his staff there. I remember having delivered this letter at about 6.30 personally.

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Q. Listen carefully to the next paragraph. Mr. Khanna writes this: "After signing the agreement.....with the completion of the transaction." You understand that paragraph do you? I want to ask you two questions. A. I would like it reading again.

HIS HONOUR: I read it over to you once and counsel had read it over to you. Are you sure you are not wanting to read it a third time so as to think out your answers? A. I only wanted to know from whom this letter has been written.

40

Q. That letter is from Mr. Khanna and you say it was written at five o'clock after you had got Mr. Akram's letter. But there is no mention of Mr. Akram's letter in it. Now look at that other paragraph which has been read over to you twice. A. May be I had better have it explained by the interpreter.

MR. O'DONOVAN: You now understand it? A. Yes.

10 Q. Does it purport to relate to what happened in Mr. Ishani's office? A. Yes.

Q. Is it true? A. Yes.

Q. So that the Defendant did say in Ishani's office that she was not selling the whole of the two acres but only a part? A. No Sir. She mentioned nothing, she only sprang up on listening to Hasham's name.

Q. Then how does that paragraph come to be written? A. That story must have been narrated somewhere by somebody.

20 Q. To Mr. Khanna? This story is narrated by your advocate a few hours after this incident? A. Yes I know.

Q. I asked you "Is it true what he wrote" and you said, "Yes".

30 HIS HONOUR: How did your advocate know that there had already been a dispute about whether this lady wanted to sell two acres or half an acre? A. Khatijabai might have talked somewhere and I might have heard it and I might have narrated to Mr. Khanna that, "See how Khatijabai talks."

MR. O'DONOVAN: You based it on something you have heard in the town is that it? A. Yes Sir on the rumours I heard.

MR. O'DONOVAN: You are quite certain? A. Yes.

Q. You can recollect clearly can you? A. Yes.

Q. When did you hear these rumours? A. The letter which I received from Mr. Akram was told to me by Mr. Sultan and when I read that letter by Mr. Akram I come to know what she is talking about.

40 Q. Yes but that is an advocate's letter let us pursue these bazaar rumours which you so clearly

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No. 19

Haji Gulam
Hussein Harji
13th May 1955

Cross-
Examination
continued

In the Supreme Court of Kenya

Plaintiff's Evidence

No.19

Haji Gulam Hussein Harji

13th May 1955

Cross-Examination continued

recollect. Where did you hear them? A. Now no rumour exists but now I recollect it was all based on information which I read from Mr.Akram's letter.

HIS HONOUR: It was not bazaar rumours then, it was based on Mr.Akram's letter which made you inform Mr.Khanna of this dispute. Is that it? A. Yes this paragraph is based on my information from Mr.Akram's letter.

Q. You disclosed the information but you didn't disclose Mr.Akram's letter or did you? In other words you said that there was an excuse being put forward by the lady that she only intended to sell half an acre, but you didn't disclose to Mr.Khanna the fact that Mr.Akram had already mentioned this in a letter? A. I disclosed the receipt of Mr.Akram's letter also to Mr.Khanna.

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MR.O'DONOVAN: So this was an excuse she had put up for the first time in Mr.Akram's letter? A. That was the first excuse she raised in Mr.Akram's letter.

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Q. It is rather important to make it quite clear that it was something she had thought about afterwards? A. Yes Sir. That is an after-thought raised by her.

Q. Did you explain that to Mr.Khanna? A. Yes Sir.

HIS HONOUR: You see what you would expect Mr. Khanna to write is something to this effect; "My client understands now that you are spreading around a story that the lady only wanted to sell half an acre and not two acres. Not only is that not true but the excuse was never even put forward or suggested at this afternoon's meeting". A. Yes Sir I explained to Mr.Khanna and expected him to write to Khatijabai like that.

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MR.KHANNA: Mr.O'Donovan has agreed to produce the delivery note of the letter from Mr. Akram provided it is obtainable My Lord.

40

Court adjourned 4.05 p.m.

No.20

KAMRUDIN ISMAIL SAMJI (RECALLED)

EIGHTH DAY.

In the Supreme
Court of KenyaPlaintiff's
Evidence

No.20

Kamrudin
Ismail Samji
29th July 1955
Recalled
Examination

10.30 a.m. Friday, 29th July, 1955.

KAMRUDIN ISMAIL SAMJI, recalled, sworn.

Q. Does the hotel where you work keep separate books or records of visitors to the hotel? A. We keep a file of each person coming in.

10 JUDGE: You keep a record of every visitor? A. Yes.

Q. But the separate sheet of paper comes out of a book of vouchers? A. It comes out of a file.

Q. Out of a book - a duplicate book? A. There is no duplicate book. There is a separate sheet of paper and when it is signed by the visitor it goes into the file.

Q. At the last hearing you produced about 13 books of duplicate vouchers, did you not? A. Those are my cash books.

20 JUDGE: You have two sets of records, one in effect a bill and the other, for your private information, is a file containing the names of every visitor? A. Yes; one book is for general cash and in that book we write down the names of the people who pay money.

Q. You have a bundle of pieces of paper on which are noted the names of visitors to your hotel? A. It is a file.

Q. Composed of loose pieces of paper? A. Yes.

30 Q. Which are put in one by one. A. Yes.

Q. And could conceivably have omissions? A. It is not possible.

Q. You think your system is infallible? A. Yes, to my knowledge.

Q. You think nobody would lose a piece of paper? A. No.

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.20

Kamrudin
Ismail Samji
29th July 1955

Recalled
Examination
continued

Q. If a person putting together these loose pieces of paper made a mistake and lost a piece of paper, there would be no way from your books by which you could check it? A. If a piece of paper is lost there is no check, but there is no possibility of losing it.

Q. It depends upon the person who keeps the record making no mistakes? A. Yes.

Q. You have no book in which is recorded the vouchers? A. No. 10

Q. And your cash receipts for visitors are mixed up with numbers of other cash receipts? A. Yes.

Q. I suggest that at some periods you ran about three of these cash receipt books together? A. No.

Q. I suggest that you have produced to this Court books covering the same dates? A. Yes.

Q. And in that you might find about 3 or 4 vouchers of which 5 or 6 might be receipts for visitors staying at your hotel and the others might be in respect of purchases of foodstuffs? A. Yes. 20

Q. And you depend entirely upon the reliability of the person keeping these records making sure that any particular visitor's name is put on a piece of paper and put in the file? A. Yes.

Q. There is no check on it? A. Yes.

JUDGE: I think you told us before that you know both these brothers, Sadru Singh and Ali Aladin Lalji quite well - is that right? A. I know one of them - Sadru Din - very well.

You told us last time that Sadru Din and his brother stayed on 28th January? A. Yes. 30

From your own recollection apart from any records, can you tell us whether Sadru Din ever stayed at your hotel after that night? A. No.

You cannot tell from your own recollection? A. As far as I can remember, he did not stay after 28th January. The last visit to my recollection, was on 28th January.

Have you full confidence in the accuracy of your records? A. I am quite confident that my records are all right. 40

CROSS-EXAMINED

In the Supreme Court of Kenya

Cross-Examined by MR.KHANNA:

Q. Now Mr.Samji, to have no record of any person staying at the hotel you would have to lose both those slips? A. If one is lost it can be traced from the other.

Plaintiff's Evidence

No.20

JUDGE: There are two documents from which you could trace whether he came to the hotel or not?
A. No. The book is for cash sales; if money is paid the thing is written in the book.

Kamrudin Ismail Samji
29th July 1955

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You mean the only case in which there is only one document is if a man goes off without paying, but if he pays there are two documents by which you can check when he has been at the hotel?
A. Yes.

Cross-Examination

Q. If a person does not pay cash and goes away, you have a credit account for him? A.We do not keep a credit account for visitors.

20

Q. Does a person normally escape without paying?
A. No.

Q. Who checks up in the hotel when visitors leave that they pay? A. We have a night watchman.

No.21

No.21

EVIDENCE OF HAJI GULAMHUSSEIN HARJI (RECALLED)

Haji Gulamhussein Harji
29th July 1955

HAJI GULAMHUSSEIN HARJI, sworn.

Examined by MR.O'DONOVAN:

Recalled; Examination.

30

Q. Do you recollect a conversation with your advocate Mr.Ishani, some time after the events which occurred in his office? A. I had no talk with Mr.Ishani thereafter.

Q. Did you hear his evidence when he said he asked you why you had filed a suit and you replied that it was because an allegation had been made against you? A. I had no talk with Mr. Ishani in this respect.

Q. Was the reason that you felt wounded by an

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.21

Haji
Gulamhussein
Harji
29th July 1955

Recalled;
Examination
continued.

imputation against your honesty and that that was why you filed the suit? A. Yes, apart from the removal of the blot on my honesty, I had to have recourse to the courts because she did not agree according to the option given to me.

Q. When did you decide to file proceedings? A. When she tore up the paper after signing it and said I had only sold half the portion, it was then that I decided to file proceedings.

Q. That occurred on the 19th February last year? 10
A. Yes.

Q. And you were still corresponding with your advocates months later? A. No.

Q. And did you file suit in July. A. I had already given instructions to my advocate and my advocate sent a notice.

Q. My question is this: How do you explain filing a suit in July, 1954, which you had decided to file in February what were you waiting for?

A. It was because the correspondence took some 20
time.

Q. You think there was no undue delay? A. I do not think so.

Q. Your only explanation of it being filed in July was that the correspondence took some time?
A. That is my explanation.

Q. But well before the end of February you knew what the Defendant's attitude was? A. No.

Q. There was an exchange of letters in February, which ends up with the letter dated 26th February from Madan and Shah? A. Yes. 30

Q. Then there is no correspondence until the 18th May? A. Yes.

Q. That was the reason for the delay in filing the suit? A. No specific reason.

Q. No reason for the delay? A. No.

Q. I suggest that you had second thoughts later

on because you were being pressed by Mr.Hasham?
A. That is not the case.

Q. Did Mr.Hasham tell you you had to file this
suit? A. Mr.Hasham has no concern in my affairs;
it was my own concern.

Q. He is not concerned but he had a decided inter-
est, as he has been in Court every day? A. No
doubt Mr.Hasham is interested to buy the property
in question, but the Court is open to all members
of the public and even members of the opposite
party.

Q. I put it to you that you know very well why Mr.
Hasham is anxious to acquire this plot. You agree
he is very eager to acquire this plot? A. Un-
doubtedly it is natural for him.

Q. In spite of its not being a very interesting
bargain for him - in spite of its not being worth
any more than he has agreed to pay for it?

MR.KHANNA: I do not understand the question.

JUDGE: The question is why should he be so des-
perately interested in this action if the piece
of land he is going to get is not a particularly
good bargain according to Mr.Harji? A. The only
interest of Mr.Hasham is that the plot in ques-
tion is just adjoining his hotel.

Cross-examined by MR.KHANNA:

Q. Mr.Harji, you have told us that your business
interests are not confined to Kenya, but extend
over Tanganyika and Uganda? A. Yes.

Q. Do you travel quite a lot? A. Yes.

Q. In connection with your business? A. Yes.

Q. This letter of 18th May, 1954, to Messrs.Madan
& Shah has been put in as an exhibit and it says
"We were not able to refer the letter of 26th
February to you until 18th May because you were
away in connection with your business to Dar es
Salaam, Mombasa and other places".

A. Is that true? A. That is right.

Q. And is that the reason why the last letter of
Messrs. Madan & Shah was not dealt with until
18th May? A. Yes, That was the reason.

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.21

Haji
Gulamhussein
Harji

29th July 1955

Recalled;
Examination
continued

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In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.21

Haji
Gulamhussein
Harji

29th July 1955
Recalled;
Examination
continued.

Q. And can you remember when you instructed me to file this action? A. It may be after May, June or July - I am not positive. If insisted upon I can find out exactly from a check I keep in respect of Court fees at the filing of the suit.

Q. Did you find it easy to make appointments with me? Did you find me very busy or not busy at all? A. You were busy whenever I wanted to see you.

10

Q. Now have you since the last adjournment carefully read those letters which have been sent out? A. Yes.

Q. Having read those letters and thought about it, can you say whether you received Mr. Akram's letter on 19th February? A. When I went to Sultan's shop to deliver my letter dated 19th February signed by Mr. Khanna, I received from Sultan in exchange Mr. Akram's letter also dated 19th February.

20

Q. Did Mrs. Khatijabai after tearing up the agreement say that she intended only to sell a portion of the land and not the whole? A. Yes, She was very angry.

Q. Can you remember the substance of the words she uttered? A. She said: "I have told you only half an acre and not the whole plot. I will say and maintain the same in court"

Q. You have entered into a binding agreement to re-sell this property to Hasham Bros. Ltd.? A. Yes, that was done on the strength of the option.

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Q. And is Mr. Hasham one of the people concerned in Hasham Bros. Ltd.? A. Yes.

Q. Can you be more specific as to the reason why he wants this plot? A. Because it adjoins the Mayfair Hotel.

Q. What does he want to do with it? A. I do not know what he is contemplating.

No.22

EVIDENCE OF ANDREW RAMSHAWIn the Supreme
Court of Kenya

ANDREW RAMSHAW, sworn.

Plaintiff's
Evidence

Examined by MR.KHANNA:

No.22
Andrew
RamshawQ. What is your position? A. I am a Sanitary
inspector of the Nairobi City Council.Q. How long have you been with the City Council
as Sanitary Inspector? A. Since 1941.29th July 1955
Examination10 Q. Do you know this plot No.58/1 L.R.209 Sclaters
Road? A. Yes.

Q. It is next to the Mayfair Hotel. A. Yes.

Q. Does it come within your area? A. Yes.

Q. Have you from time to time inspected it in
your official capacity? A. I have.Q. Have any notices concerning this plot been
served upon the owner? A. Yes.20 Q. How far back are those notices? (Witness re-
fers to file) A. There is a notice dated 12th
May, 1947. It required him to provide an open
concrete drain from the bathroom to discharge
waste water, and also to repair the leaking roof
of the servants' quarters. There is another no-
tice dated 8th June, 1949, addressed to Mr.
(inaudible) and that required him to build a new
latrine within 28 days.Q. Was that the only thing that is required him
to do? A. Yes on that particular notice. On
25th April, 1950, a notice was sent, but was re-
turned unserved as the addressee was in Mombasa.30 Q. What did that notice require to be done to
the house? A. It drew attention to the choked
condition of the water closet and to the insani-
tary condition of the bathroom and water-closet.
The premises were in such a state as would be
likely to harbour rats. The water storage tank
was uncovered. The ventilation over the latrine
door was not fly proof. On 14th December, 1950,

In the Supreme
Court of Kenya

Plaintiff's
Evidence

No.22

Andrew Ramshaw
29th July 1955

Examination
continued

a joint notice was sent to Mr. Gulamhussein and Messrs. Kassem Suleiman Danji: defective wall cover of silt pit defective; septic tank choked and overflowing; water closet out of order. Another notice in respect of the flush system was sent on 5th October, 1951, to the same people.

Q. Have you recently examined the plot and the houses on it? A. I went this morning.

Q. And in your opinion is the house habitable at the present time? A. The house is vacant and the out-buildings, chiefly of corrugated iron and wood, are in an extremely dilapidated condition. There have been some repairs done round the flooring. A skirting board has been removed from one of the room walls in the main house. The floor appears to have been recently skimmed. There is no proper drainage for the kitchen, and there is no water tank hanging off from the eaves outside. There has been some new panels put on the walls. The water closet is short of height owing to the floor having been raised to build a plinth round the W.C. which I imagine was formerly used by Europeans.

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Q. Is the house in good or poor condition from the point of view of sanitation and habitation? A. It would require a considerable amount of money to be spent on it to provide a suitable kitchen and there are signs on the ceiling that the roof has been leaking in one or two places.

30

Q. In its present condition does the house offend against the Public Health Ordinance? A. There would have to be something done about it. Some time ago a verbal application was made to our department as to whether the premises were suitable for a boarding house and we had to advise that the premises were not suitable for that purpose and we could not recommend a licence.

CROSS-EXAMINED

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CROSS EXAMINED BY MR. O'DONOVAN:

Cross-
Examination

Q. Have you any records showing notices having been sent out to the Defendant in this suit?

A. The last one was a joint notice addressed to Messrs.Kassam and Mr.Gulamhussein.

In the Supreme Court of Kenya

Q. Have you any record of any further action being taken by your Department beyond sending out the notices? A. No.

Plaintiff's Evidence

Q. Is the inference to be drawn from that that the notices have been complied with? A. With regard to the wall, I do not think that that was ever done satisfactorily; but I notice this morning that that wall had been covered with hard board.

No.22
Andrew Ramshaw
29th July 1955

Cross- Examination continued

Q. Where no further action is taken, the inference is that the requirements of the notice have not been met, otherwise a prosecution would follow? A. Yes.

Q. Is the inference that these notices have been complied with? A. Most of them have been complied with.

Q. You know that the house was in fact let and occupied not as a boarding house but as a private house up to the end of 1953? A. Yes.

Q. And it was at that time habitable so far as your Department is concerned? A. Yes.

Re-examined by MR.KHANNA:

Re-Examination

Q. Do you think from your inspection of the premises that there is a case for prosecution? A. I think the premises.....(inaudible)

JUDGE: You do not take action unless there is a tenant in occupation: A. That is so. I would say that the outbuildings are extremely dilapidated and that we would be justified now in serving notices.

Q. Would you be justified in permitting occupation of the main house? A. If anybody came to us and asked if they could go in, we would advise them not to go in, but people might go in without coming to us.

The Court rises at 11.45 a.m.

In the Supreme
Court of Kenya

No.23

J U D G M E N T

No.23

Judgment

13th January
1956.

Plot No.209/58/1, consisting of a house and just over 2 acres of land situated next to the Mayfair Hotel, Nairobi, was bought by Defendant's husband in 1948 for Shs.152,000/-. Subsequent transactions indicated that the plot had maintained or increased its value, and one valuer (Mr. Merryweather, D.5 in the present action) has even suggested that the 1954 value of the plot was over Shs.250,000/-. I am more inclined to accept the evidence of another valuer, Mr.Flatt (P.5) that in 1954, Shs.107,000/- would be a fair price. But, on the view I take of this case, a consideration of the actual value of this plot can have little influence on the negotiations concerning it which the Court now has to consider.

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The Defendant, a widow aged 53, and the then owner of the plot, came to Nairobi in February 1954 as she says (P.36) "just to have a holiday". About 10 a.m. on 17th February she saw the Plaintiff in the street. She started talking to him, and she was by herself. I accept the Plaintiff's account of this conversation which was as follows :-

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When she saw me in the morning first we greeted each other. She said, 'I have got a plot of about two acres with a building there upon and I want to sell it off - in Sclaters Road.'

Q. What else happened on that day? A. I asked some more information about that. She said 'The land is over two acres with a building.' And I enquired 'Is it in vacant possession', and she said 'Yes'. She intimated her intention that she wanted One hundred thousand shillings for that land and building. I said, "All right would you be able to give me an option for one week only?" She said, "I wanted to return to Mombasa immediately so I will only agree for three days option." I have forgotten something in between talk. At the time of reference to two acres or over I also enquired "Is that land sub-divided and have beacons been fixed?" She said "Yes both

30

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needs have been done". She asked that she will only be willing to give three days option because of her impending return to Mombasa. I said, "All right where and when should I contact you again?". She said, "Come tomorrow to see me at the house of Mrs. Valli Hasham." I asked the time. She said, "Come about nine o'clock".

10 By the morning of next day, 18th February, Plaintiff had reduced to paper a form of option reading as follows :-

(Ex.A)

Nairobi, 18.2.54.

Mr. Haji G. Harji,
Nairobi.

Dear Sir,

re My house on Sclaters Road
Adjoining Mayfair Hotel, Nairobi.

20 In consideration of Shs.5/- five, I hereby giving you option to purchase the above property for Shs.100,000/- One hundred thousand.

The above property is over 2 two acres and sub-division is completed and Beacons is already been put.

The house of above property will be given in vacant possession with all vacant land contain.

30 This option is good up to 20th February, 1954 up to 1 p.m. to you or your nominis.

Yours sincerely,"

Plaintiff read Ex.A over to Defendant and explained it to her. To continue his evidence.

HIS HONOUR: You wrote that down on the morning of the 18th and took it round to her the same morning? A. Yes.

In the Supreme
Court of Kenya

No.23

Judgment

13th January
1956.
continued

In the Supreme
Court of Kenya

No.23

Judgment

13th January
1956.

continued

MR.KHANNA: Look at the options again. Were the deletions and additions already there? A. When I read it over and explained the option thereafter the deletions and additions took place.

HIS HONOUR: When you say she pointed out some deletions and additions you mean she asked you to make some? A. Yes Sir she pointed me out to alter some. When I was translating this option to her she said, "Write one hundred thousand and net, not only one hundred thousand shillings". When I translated the sentences concerning sub-division already taken place and beacons have been fixed then she said, "Wait sub-division has taken place but about beacons I am not sure". And asked me to cut that out. 10

MR.KHANNA: She said, "Put down one hundred thousand net" and did you put the word net down? A. Yes. Her suggestion.

HIS HONOUR: Which were the words you crossed out when you had this conversation about beacons? A. "And the beacons is already been put". I initialled that correction myself. 20

MR.KHANNA: Then what happened? A. I requested three days option is not enough if you cannot grant me one week please give me two more days - altogether five days - that is up to the 22nd. She agreed to my request and after her agreeing I crossed out the date 20th and put 22nd. After all this was read over and explained to her, Khatijabai called Amina. Then when Amina comes Khatijabai said, "Well baby just read this and explain to me" then Amina read over and explained to the Defendant. 30

MR.KHANNA: In what language did she explain it? In Gujerati.

Q. Is Aminabai also of the same community as the Defendant and you? A. Yes Sir. She is also a relative.

Q. And after she had read over and translated in Gujerati to the Defendant what happened?. A. Then Khatijabai signed this document. 40

Q. Did you see her sign? A. Yes.

Q. Was Amina there? A. Yes.

Q. Did she see Khatijabai sign? A. Yes. Then I requested Aminabai, "Will you please sign this document because you have read and explained it to Khatijabai.

In the Supreme
Court of Kenya

Q. Did she sign the document? A. Yes.

No.23

Q. What happened after that? A. I left with the option in my possession.

Judgment

13th January
1956

continued

10 Q. And then what did you do after that? A. That day at about half past eleven I telephoned to Mr. Hasham Nanji at Hotel Avenue.

Q. Did you after the telephone call meet him?
A. On the telephone I talked to Hasham about this property and said this is just adjacent to your Mayfair Hotel.

HIS HONOUR: Is Mr. Hasham Nanji the proprietor or one of the proprietors of the Mayfair Hotel?
A. Yes Sir.

Q. Did you two meet? A. Yes Sir.

20 Q. And after that meeting where did you go? A. We went to the plot.

What happened there? A. I got the key from Khatijabai and I opened the building and showed the building to Mr. Hasham I took him over the open plot up to all the boundary, up to Mpaka Road and showed him the whole plot. Hasham saw everything and enquired of the price from me. I said "110,000/- I wanted". And in consequence of the discussion we finally agreed at 107,000/-.

30 HIS HONOUR: That same afternoon? A. Yes there and then.

MR. KHANNA: Then what did you do? A. I enquired of Hasham when we shall meet next day we may go to the advocate and prepare the deeds etc. And next day 11 o'clock was fixed for the meeting.

40 Now, reverting for a moment to the earlier part of that day, 18th February, it may be worthy of comment that Defendant had not informed Plaintiff that 81,000/- was due from her to Jubilee Trust on mortgage in respect of this plot. I do not know what Defendant's object was

In the Supreme
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No.23

Judgment

13th January

1956

continued

in altering the option price from 100,000/- to 100,000/- "net", but she might have had in mind this undisclosed mortgage. I am satisfied that by her agreement with Plaintiff, she was to get 100,000/- "net" for the two acres, and he was to be allowed to keep any profit he might make by re-selling at a higher price. Consider the following passage in her (Defendant's) evidence :-

JUDGE: You asked for Shs.100,000/- is that correct? A. Yes. 10

Q. And if he paid you Shs.100,000/- and then re-sold the property for Shs.200,000/- you would be quite happy? A. I had no objection in respect of this bargain.

MR.KHANNA: You had no objection to his making the excess over Shs.100,000/- A. Not at all.

So Plaintiff, having got his option to buy at 100,000/-, on the same day agreed to sell the land to Hasham for 107,000/-. The re-sale price of 107,000/- is not only some indication of the value of the plot, but it also leads one to speculate whether conceivably, for a profit of 7,000/- the Plaintiff was planning an elaborate fraud on Defendant. Consider the first (in time) issue of fact between Plaintiff and Defendant. Plaintiff says that the original conversation between himself and Defendant on Wednesday morning 17th was between themselves alone. Defendant swears that her son was present and listening. The son Sadru Din D.4 swears that he was in Nairobi, and was present at the original conversation which, he says, took place on Monday 15th. He says that on Tuesday 16th he left Nairobi to return to his home at Mombasa. Now I do not for a moment doubt that the conversation was in fact on Wednesday 17th and not on Monday 15th. However the matter does not end there. Sadru Din Says (P.97) that he spent about 4 nights previous to 16th February in the Garden Hotel. The Manager of the Hotel gave evidence that Sadru Din was never at the hotel at all in February. If Sadru Din, as I believe, was not even in Nairobi in February, and certainly was not present at the original conversation, what am I to think of a Defendant who unblushingly fabricates his presence to bolster up her own story? 20 30 40

Then there is a dispute as to whether this option was read over to Defendant at her Uncle's house on the morning of 18th February. I am quite satisfied to accept the Plaintiff's word that the option was twice read. It seems to me most unlikely that the Plaintiff, if the intention was to sell a half acre only, would deliberately gamble, both the option and in the final agreement on the words "over two acres" not being read out. If he had wanted to cover up the fact that the whole 2 acres were being sold, he would have gone about it with more camouflage. The final arrangements for the sale by Plaintiff to Hasham, and by Defendant to Plaintiff were discussed on Friday, 19th February. On that morning Plaintiff and Hasham went to Mr. Ishani, an Advocate. The option Ex.A was given to Ishani, and on the strength of that option, Mr. Ishani was asked to prepare an agreement for sale of the plot by Plaintiff to Hasham. Mr. Ishani apparently suggested that it might be wiser for Plaintiff to have a simultaneous agreement for sale prepared between him (Plaintiff) and Defendant. Plaintiff agreed and left it to Mr. Ishani to draw up both agreements. I want to stress at this point that Mr. Ishani was the Plaintiff's Advocate and also Defendant's nephew. Furthermore he was Advocate for the Jubilee Trust, the mortgagees of the plot. Mr. Ishani, on Plaintiff's instructions, prepared the two agreements, one for Defendant (Ex.A2 and duplicate Ex.A4), and one for Hasham (Ex.A6) His (Ishani's) first act of unprofessional conduct was, without instructions from any of the parties concerned, to include in both forms of agreement a clause safeguarding the mortgage and the mortgagees. Mr. Ishani gave evidence for Defendant, and the following is an extract from his own evidence given in chief

40 Q. These agreements contain certain conditions. Would you look at them again. Conditions for example about taking over the mortgage and as regards paying purchase price and allotment of the site and other odd details. Did you insert those in the agreement? A. Yes, I think so.

Q. Without discussion with the parties? A. Yes, because I had prepared the one agreement of sale between Nanji and Harji just a few minutes back.

In the Supreme
Court of Kenya

No.23

Judgment

13th January
1956

continued

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Court of Kenya

No.23

Judgment

13th January

1956

continued

Q. You thought those terms you had put in were usual or were accepted? A. Yes, usual.

Q. After it was brought back typed what happened?
A. I put it to the Defendant to sign it.

Q. And did she sign the original? A. I don't remember whether she signed all the copies or not but I do remember she did sign.

Now, while the final agreement between Plaintiff and Defendant was being prepared, Plaintiff went off to fetch Defendant. Defendant came accompanied by one Sultan (D.3) who, on his own showing, had no idea what was afoot or what the agreement was about. His ignorance of the proposed deal is also confirmed by Defendant herself.

10

HIS HONOUR: Did you talk to Mr. Sultan about this deal? A. Only talk that I am wanted in Ishani's office.

Q. But did you tell him why you were wanted at Ishani's office? A. It was in my mind to talk over with Sultan but I did not reveal anything to Sultan on the way.

20

Q. Did you talk to Sultan at Ishani's office? A. No Sir.

Q. Were details of what you were going to sign explained to you before you signed? A. No Sir.

Q. Did Sultan know that you wanted to sell a piece of land or which piece of land you wanted to sell? A. No Sir. He did not know. No talk took place with him.

So we get these three, (Plaintiff, Defendant and Sultan) assembled with Mr. Ishani in Mr. Ishani's office. I regret to say that I cannot trust any account of what then took place except the account of Plaintiff. This is Plaintiff's evidence :-

30

Q. When you three got into Ishani's office what happened. A. We were offered a seat and Mr. Ishani spoke to Khatijabai that on the strength of the option which you have given to Mr. Harji this agreement has been prepared. And Mr. Ishani thereafter read out and explained the contents of the agreement to her.

40

2. What language did Mr. Ishani explain the agreement to the Defendant? A. Gujarati language.

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Mr. Ishani swears that in spite of the fact that he had inserted a mortgage clause to which he knew that Defendant (and his client the Plaintiff) had not agreed, nevertheless he presented the agreement for signature to his Aunt the Defendant without even reading it over to her. This profession of unprofessional conduct is most amazing. I am unable to accept it in opposition to the Plaintiff's evidence. At this stage it is necessary to set out the agreement, which was in duplicate (Ex.A 2 and A 4). It reads as follows:-

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Judgment

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1956

continued

MEMORANDUM OF AGREEMENT OF SALE OF
PLOT NO.209/58/1 SCLATERS ROAD,
NAIROBI.

Vendor:- Khatijabhai Jiwa Hasham P.O.
Box, Mombasa.

Purchaser:- Haji Gulamhussein Harji of P.O.
Box 977, Nairobi.

Property:- Plot No.209/58/1 measuring 2.04
acres or thereabouts together
with all the buildings situate
on Sclaters Road, Nairobi in
complete vacant possession.

Purchase Price. Shs.100,000/- (Shillings One
hundred thousand) payable in
the following manner.

Shs.15,000/- to be paid cash as a deposit on
or before the execution of
these presents (the receipt of
which the Vendor doth hereby
acknowledge)

Shs.85,000/- to be paid on presentation of
documents of transfer which
shall be executed by both par-
ties within six months from the
date of this agreement. The
Purchaser shall arrange to take
over the present mortgage of
Shs.81,000/- on the said pro-
perty of The Diamond Jubilee
Investment Trust Limited, Mom-
basa or transfer the same with
the property to his nominee at
his own expense and pay the bal-
ance sum of Shs.4,000/- on com-
pletion of transfer.

Shs.100,000/-

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continued

OTHER CONDITIONS:-

(1)

The Vendor hereby gives complete vacant possession of all the buildings on the above property and the purchaser acknowledges the receipt of vacant possession duly received by him.

(2)

The Site Value Tax shall be apportioned between the parties. The Vendor to pay Site value tax from 1.1.54 to 19.2.54 and the Purchaser to pay from 19.2.54 onwards. Same shall apply to apportioned Insurance Fire premium of the said property.

10

(3)

The Vendor undertakes to transfer the said property to the Purchaser or his nominee or nominees free from encumbrances.

20

(4)

The Vendor undertakes to pay all the dues owed on the said property up to and including 19.2.54 and give a clearance certificate of the Municipality to the Purchaser or his nominee or nominees.

DATED AT NAIROBI THIS
. 1954.

DAY OF

30

Signed in Vernacular.

(Stamp 1/-)

The figures 15,000/-, 85,000/- and 4,000/- stand as they are after alteration. I think that Defendant was irritated at finding a clause covering payment of the mortgage which she had not disclosed. This is what took place in Ishani's office, as I accept the account of it given by Plaintiff:-

Q. Mr. Ishani had given evidence to say that he never read over the agreement or explained it to the Defendant. Is there any truth in that? A. That is all false.

40

Q. What happened after the agreement had been

read over and translated in Gujarati to the Defendant? A. When the matter came to reference of 10,000/- while explaining, she objected.

Q. What objection did she raise? A. The lady said, "I wanted 20,000/-. I am in need of 20,000/- and I must have 20,000/-."

Q. Are you sure she mentioned the figure of 20,000/- and nothing more and nothing less? A. The full amount of 20,000/- was required.

10 Q. She didn't for instance say 25,000/- at any stage? A. No Sir.

Q. When she asked for 20,000/- what happened? A. Then Mr. Ishani explained her that this estate is on mortgage for 81,000/- and only 19,000/- remained to her share.

20 HIS HONOUR: Tell me this. When the Defendant raised this objection to the 10,000/- had the whole agreement already been read out or had they only got part way through reading it? A. No Sir. She objected when Mr. Ishani reached at that stage.

Q. Just look at this agreement and tell me how far Mr. Ishani got in reading out the agreement when the Defendant raised the objection? A. (The witness points out where originally it was mentioned 10,000/- and subsequently altered).

Q. You mean when he read out '10,000/- to be paid cash as a deposit' that was when she raised the objection? Is that right? A. Yes Sir.

30 Q. And it was then that Ishani explained that money was due on mortgage? A. Yes Sir. At that stage.

MR. KHANNA: When Mr. Ishani mentioned this mortgage of 81,000/- did you already know about the existence of this mortgage? A. I didn't know before Mr. Ishani referred to it.

40 Q. When she raised the objection on the 10,000/- deposit and said she wanted 20,000/- what happened then? A. Then Mr. Ishani pointed out while explaining that her share comes to 19,000/- and how on earth can you demand 20,000/-. Then she said, "That all right, give me 15,000/-".

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continued

Q. What happened when she requested 15,000/-?

A. I said "Ishani, that all right agree to her demand of 15,000/-"

Q. And was any alteration made to the agreement at that stage? A. Two alterations were made at this stage, 10,000/- altered to 15,000/- and 90,000/- was altered to 85,000/-

Q. Who altered it? A. Mr. Ishani altered it.

Q. And then what happened? A. I took out my cheque book and handed it over to Mr. Ishani to write a cheque and Ishani made out a cheque in the amount of 15,000/- in favour of Khatijabhai (Exhibit A.3). 10

Q. Was the cheque given to you to sign? A. Then the cheque book was turned towards me. I signed the cheque and tore it off and gave it to Mr. Ishani to be given to Khatijabhai.

Q. And did Mr. Ishani do anything with the agreement? Did he read it or explain it further?

A. Yes. Subsequently the remaining portion of the agreement was read over and explained to her. 20

Q. What happened next? A. He also handed over a cheque to the Defendant.

Q. After he had handed over the cheque to the Defendant, what happened? A. Then the agreement was signed by her.

Q. Look at the original and the duplicate. Did you see her sign? A. Yes Sir. I saw with my own eyes.

Q. Now on the original look at the two signatures on the stamp. Are they both the Defendant's signatures? A. Yes Sir. 30

Q. Did you see her make those? A. Yes Sir.

Q. Look at the duplicate? Did you see the Defendant place any signature on the duplicate. A. Yes Sir.

Q. How many signatures did you see her place? A. Three Sir.

Q. At what places? A. One at the alteration the other at the other alteration and the third down below.

MR. KHANNA: Then after she had signed twice on the original and three times on the duplicate did anything happen? A. After having signed these documents she enquired of me, "You might have sold this piece of land and building to some of our Ismailis."

10 Q. Your community is known as Ismaili? A. Yes Sir.

Q. Did you answer? A. Yes. I said "Generally it is my procedure to give preference to our community men". She again enquired of me perhaps you might have sold to Hashambhai. I said "Yes, I sold it to Hashambhai, on hearing the reference and the name of Hashambhai she got wild at once. She sprang up from the chair. The agreement was just in front of the table, she
20 took it and tore it off, and without saying bye or bye or any formalities she left the office.

After contradicting himself Plaintiff added (in re-examination) a further point which I accept as the truth.

When I went to Sultan's shop to deliver my letter dated 19th February signed by Mr. Khanna, I received from Sultan in exchange Mr. Akram's letter also dated 19th February.

30 Q. Did Mrs. Khatijabhai after tearing up the agreement say that she intended only to sell a portion of the land and not the whole? A. Yes. She was very angry.

Q. Can you remember the substance of the words she uttered? A. She said. "I have sold you only half an acre and not the whole plot. I will say and maintain the same in Court.

40 Plaintiff's mention of two letters of 19th February refers to what took place after the abortive meeting. But before we consider how the parties acted after the meeting, there is one passage from the otherwise untrustworthy evidence of Sultan which seems to contain more than a half measure of truth :-

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continued

Did she sign first and then start discussing about a mortgage loan, or did she discuss about a mortgage loan and then sign? A. First she signed the original before raising this discussion.

Q. And then after signing the original, how did she know that the mortgage was mentioned in the paper. A. Mr. Ishani referred to it and then she came to know.

Q. Was she annoyed when she found that the mortgage was mentioned in the agreement for sale? 10
A. She did not get angry; she only said "that is my concern".

Q. Did she mean, I don't want that to go into this agreement for sale? A. The lady objected to those words.

Q. That was really what had annoyed her and made her disagree with the paper she had already signed - is that right? A. No.

Q. You see, the sentence in Mr. Akram's letter can be interpreted in this way: You, Mr. Harji, made this lady sign the paper, in spite of the fact that she said she did not want to pay off the mortgage, but wanted it transferred to the other three portions of the land? A. I know nothing of Mr. Akram's letter. 20

JUDGE: Anyway, what you are quite sure of is that she signed the original first and raised not one word of objection until after signing it? A. That is right. 30

MR. KHANNA: Did she sign the duplicate notwithstanding the objection that she had raised? A. Yes, to my recollection she did.

Q. She knew before signing the duplicate that this mortgage term was in the agreement? A. According to my recollection I should say she must have known.

Q. She knew did she not, before signing the duplicate that she was not getting Shs. 25,000/- by way of deposit? A. How can I say that? 40

JUDGE: She was still objecting and grumbling,

but nevertheless she signed? A. That is so.

MR.KHANNA: Did she sign the original before raising the objection as to the deposit, or after?

A. Before.

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10 It is penultimate admission in this passage which rings true, although the actual words were put by the Court I do believe that Defendant "was still objecting and grumbling but nevertheless she signed". If on first hearing of the mortgage clause, she had said frankly, "I will have nothing of that in this agreement", I think that certainly she could have rejected that clause at least if not the whole agreement. But instead of that she heard the agreement read; she heard the plot described as measuring 2.04 acres; she agreed and she signed with only a slight alteration of cash figures. Then she got irritated, regretted her signature, lost her temper (politically perhaps), tore the agreement and tried to
20 back out of it, protecting her retreat by a barrage of excuses and accusations.

30 Mr. Ishani had to go off to catch the 4 o' clock train that day to Mombasa. On his arrival at Mombasa he was met by Defendant's son, whereupon he, the Plaintiff's advocate, assured Defendant's son that there was no need to consider the agreement for sale as binding. Meanwhile on the afternoon of 19th February, almost as soon as the meeting split up, Defendant instructed an advocate to write rejecting the agreement, and Plaintiff instructed an advocate to insist on performance of the agreement. The resulting two letters, exchanged at Sultan's shop on 19th February (as mentioned in the last passage quoted above from Plaintiff's evidence, read as follows :-

MISC/H/54.

19th February, 1954.

Mrs.Khatijabhai Jiwa Hasham,
NAIROBI.

40 Madam,

Re: Plot No.209/58/1 - Sclaters Road.

We have been consulted by Messrs. Hasham

In the Supreme
Court of Kenya

Bros. Ltd. and Mr. Haji Gulamhussein Harji, in connection with the Agreements of Sale, made concerning the above property.

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13th January
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continued

It appears on the 18th February, 1954, you gave a binding option to Mr. Haji Gulamhussein Harji, originally valid up to the 20th February, 1954, but altered on the same day to 22nd February, 1954 up to 1 p.m. enabling him to agree to purchase the said property for himself or his nominees the said property at the price of Shs. 100,000/-. The said option recited the property as being over two acres, and goes on to state that the sub-division is complete. The said option was signed by you on the 18th instant at about 9.45 a.m. and was witnessed by Miss Amina Valli Hasham. 10

Mr. Haji Gulamhussein Harji, informs us that on the strength of the said option, he arranged to resell the said property to Messrs. Hasham Bros. Ltd., at the price of Shs.107,000/- at about 5 p.m. yesterday, hoping to exercise his option, so as to be able to call for a conveyance from you. 20

The necessity for exercising the option was, however, dispensed with, as it appears, a formal agreement was signed between Mr. Haji Gulamhussein Harji and yourself, at the offices of Mr. G.K. Ishani, advocate, today, the 19th instant in the afternoon. A further agreement was, we are informed, duly prepared for execution as between Mr. Haji Gulamhussein Harji and Messrs. Hasham Bros. Ltd., also at the offices of Mr. G.K. Ishani. A cheque for shs. 15,000 payable under the agreement was also made out in your favour by Mr. Haji Gulamhussein Harji, the body of which cheque was filled up by Mr. G.K. Ishani. It appears the identity of the sub-purchaser was withheld from you, although you seemed to know (Mr. Haji Gulamhussein Harji does not know how). 30

After signing the agreement, it appears you changed your mind, putting forward the excuse that you were only selling the house and part of the land and not the whole of the 2.04 acres and tore up the stamped and signed agreement and went away, declining to go through with the completion of the transaction. 40

The agreement is quite explicit on the extent of the land sold, and there is absolutely

no justification for your trying to recede out of it, and should you persist in your refusal, we regret our instructions would leave us no alternative but to sue for specific performance.

It may be that you do not fully appreciate the legal consequences of your refusal to complete, and if that is so you would be well advised to consult your advocate at once.

Yours faithfully,

for D.N. & R.N. KHANNA.

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Court of Kenya

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continued

10

MISC/K/54.

19th February, 1954.

Mr. Haji Gulamhussein,
Nairobi.

Dear Sir,

Re: Plot No. 209/58/1. Sclaters Road,
Nairobi.

I am instructed by Mrs. Khatijabhai Jiwa Has-
ham the proprietress of the above plot to write
you as follows :-

20

That on 17th February, you visited my client
and took a certain option of the property. My
client told you that the above plot has been di-
vided in four parts and that she is prepared to
sell the fourth part with a house on for Shs.
100,000/-. You agreed to sell this property where-
upon you got her to sign a paper which was later
on witnessed by a girl in the house.

30

Today at about 1 p.m. you called upon my
client and took her to Mr. G.K. Ishani to sign a
certain document in relation to the sale of the
said one fourth part of her above plot. You made
her to sign an agreement she told in presence
of Mr. Ishani that she would like a loan on her
balance of the property i.e. other three parts
from the Jubilee Insurance Co. Ltd. While she
was signing the document Mr. Sultan read the du-
plicate copy and informed my client that the doc-
ument purported to sell the whole property. My
client tore the document when Mr. Ishani informed
my client that there has been misunderstanding
on your part which you admitted.

40

In the Supreme
Court of Kenya

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13th January
1956
continued

I am instructed to say that the whole transaction was fraudulent and she hereby cancels any paper signed by her in respect of the above property. Perhaps you would like to learn that my client bought this property for over £8,000.

Yours faithfully,

Sgd. S. M. AKRAM.

Copy to G.K.Ishani Esq., Advocate, Nairobi.

P.S. Please return the key of the house to my office.

10

There was further correspondence dragging on to May, 1954. The Plaintiff was filed on 2nd July, 1954. The Defence is undated but was apparently filed on 26th October, 1954. Paragraphs 4, 5 and 6 of the Defence are unsupported by the evidence. Paragraph 8 reads as follows:-

"The agreement of sale sued upon, by introducing new terms not contained in the option, is not an unqualified exercise thereof, but constitutes a counter offer, and the Defendant has at no time accepted the same, and has at no time completed the signing and delivery of the said agreement or acknowledged it was binding upon her as her act or deed."

20

As I have already said, there may well have been a point at which Defendant was entitled to reject the agreement of sale, but she read it and accepted it, even if reluctantly.

The allegation of fraud in paragraph 9 is quite unjustified. The suggestion of undue influence in paragraph 10 is insupportable, and this was very properly conceded in due course by Counsel for the Defence. I might add that Defence Counsel's handling of his client's case has been impeccable.

30

The issue of mistake or of non est factum can carry no weight in view of the facts as I have found them. Finally there is the issue of rescission. Paragraph 13 of the Defence pleads:-

"The Plaintiff and the Defendant verbally agreed at the office of G.K.Ishani, Esquire,

40

aforesaid on the said 19th February, 1954, to rescind the said option and agreement of sale".

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1956

continued

10 I cannot accept this as proved, indeed I find it quite untrue. I do not believe that Mr. Ishani cancelled the agreement, or that he had any authority so to do. I certainly do not accept that Plaintiff agreed to cancellation or rescission. It may also be relevant to point out that Mr. Ishani is not permitted to disclose communications made to him by the Plaintiff, or any advice given by him to Plaintiff, in the course of the meeting on 19th February (S. 126 Indian Evidence Act). I will not quote in extenso from the script, but I have noted certain passages of evidence (at pp.49, 52, 128 and particularly in Plaintiff's own evidence) which make it clear to my mind that Plaintiff had no intention of rescinding the deal and the Defendant knew it.

20 Counsel for the Defence argued as a matter of law that Plaintiff's action was not maintainable in any event because it is premature. He says that the contract sued upon (if any) was not to be completed until after the lapse of 6 months from 19th February and that the Plaintiff was filed on 2nd July 1954 before the time had arrived to make possible a breach of such contract. The argument, is ingenious, but I cannot accept it. By the terms of the contract, although Plaintiff
30 was to be allowed 6 months to pay the outstanding 85% of the purchase money, and the same period was allowed for the execution of the conveyance, nevertheless the Defendant undertook to give "complete vacant possession of all the buildings on the above property", and in the same clause the purchaser also acknowledged "receipt of vacant possession duly received by him." The effect of the "other conditions" particularly condition (I) of the Memorandum of Agreement Ex.A.2
40 shows that at least part of the contract was to come into immediate operation. The breach of that part constitutes an immediate breach of the whole contract. I would add, in the circumstances of the present case that, even if the contract were not due for performance until after the lapse of six months, nevertheless there had been a breach by anticipation, and also S. 39 of the Indian Contract Act would apply. In any case, if there has been no breach, there are no grounds
50 on which to refuse specific performance.

In the Supreme
Court of Kenya

No.23
Judgment
13th January
1956
continued

In the event I give judgment for Plaintiff as follows :-

- (a) Specific performance as prayed.
- (b) Damages for delay. I understand that Counsel agreed these at £75, but before entering this figure finally I request confirmation from Counsel.

£75 confirmed by Khanna.

E.R.HARLEY

Final figure £75 to be entered in Judgment.

10

E.R.HARLEY.

- (c) The prayer for Rescission in the alternative is not applicable.
- (d) A declaration is asked for "that the Defendant is bound to indemnify the Plaintiff for anything he may have to pay to the said Hasham Brothers Limited in the event of the rescission of the said agreement, as damages for breach of contract and damages for loss of bargain".

20

I am not prepared to grant this declaration for three reasons.

(1) It would appear, although I do not find so as a fact, that there was no binding contract between Plaintiff and Hasham at the time of the meeting in Mr. Ishani's office on February 19th.

(2) If Hasham brings an action, against the present Plaintiff, I doubt whether the latter is debarred from bringing in the present Defendant as third party.

30

(3) The decision in Household v. Cosmos 1946 2 A.E.R. 622 is unusual and appears to be almost isolated. Moreover the grant of such a declaration is surely discretionary.

- (e) Interest at Court rates.

- (f) Costs of this suit.
 - (g) Further relief does not seem applicable at this stage.
 - (h) As regards the prayer for "all necessary directions and enquiries". I am prepared to give these in due course, if Counsel agree, and if they are necessary to clarify or particularise this judgment.
- 10 (Both Counsel express agreement with this, which accordingly becomes part of the Judgment).

In the Supreme Court of Kenya

No.23
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13th January
1956
continued

E.R.HARLEY
ACTING JUDGE
13.1.56.

Khanna asks for costs on higher scale - complicated case
Application refused.

E.R.HARLEY.

No.24
D E C R E E

No.24
Decree
28th July 1956

CLAIM for

- (1) Specific performance of an agreement dated the 19th day of February, 1954, whereby the Defendant agreed to sell to the Plaintiff, the property described in the Schedule hereto annexed and marked "A" at the price of Shs. 100,000/- on the terms and conditions set out in the Schedule hereto annexed and marked "B" ;
- (2) Damages for delay from the 19th day of February, 1954, to the date of judgment or actual specific performance ;
- (3) Interest at Court rates and costs of

20

30

In the Supreme Court of Kenya

this suit;

FURTHER OR ALTERNATIVELY

No.24
Decree
28th July 1956
continued

- (a) A rescission of the said agreement and damages for breach of contract and damages for loss of bargain;
- (b) A declaration that the Defendant is bound to indemnify the Plaintiff for anything he may have to pay to the said Hasham Brothers Limited in the event of the rescission of the said agreement as damages for breach of contract and damages for loss of bargain;
- (c) Interest at Court rates and costs of this suit;

10

THIS SUIT coming on the 2nd, 3rd, 4th, 5th, 6th, 12th and 13th days of May, 1955, the 29th day of July, 1955 and on the 1st and 2nd days of December, 1955, for hearing and on the 13th day of January, 1956, for judgment before The Honourable Mr. Acting ^{Trustee} Harley in the presence of Counsel for the Plaintiff and Counsel for the Defendant.

20

IT WAS ORDERED:

- 1. That the Contract constituted by the said agreement be specifically performed by the Defendant;
- 2. That the Defendant do pay to the Plaintiff the sum of Shs. 14,471/31 as more particularly set forth hereunder with interest thereon at the rate of six per cent per annum from the 14th day of January, 1956, until payment in full;

30

Damages for delay: Shs. 1,500.00
 Interest thereon at 8%
 p.a. from 2.7.54 to
 13.1.56: Shs. 183.81
 Costs of the suit as
 taxed: " 12,787.50

TOTAL:- Shs. 14,471.31

40

GIVEN under my hand and the Seal of the Court at Nairobi this 28th day of July, 1956.

Sgd. E.R.Harley,
ACTING JUDGE,
SUPREME COURT OF KENYA.

SCHEDULE "A"

In the Supreme
Court of Kenya

No.24

Decree

28th July 1956
continued

10 ALL THAT piece or parcel of land comprising two decimal Nought Four acres or thereabouts situate in Parklands (Sclaters Road Nairobi) in the Nairobi District of the Ukamba Province of the Colony of Kenya being Re-subdivision Number 1 of Subdivision Number 2 of Section Number XLIV of Portion Number 3 of Meredional District South A.37 (Land Office Number 209/58/1) G. IID. which said piece or parcel of land is portion of

20 the premises comprised in and demised by an Indenture of the 15th day of March, 1905 and is more particularly delineated and described on the Plan annexed to an Indenture dated the 9th day of June, 1921 (Registered in the Crown Lands Registry at Nairobi in Volume N 17 Folio 84/1) and thereon bordered red together with the buildings and improvements erected and being thereon now vested in the Defendant under and by virtue of three Indentures dated respectively, the 31st day of May, 1948, 1st day of June, 1953 and the 1st day of June, 1953 (Registered in the Crown Lands Registry at Nairobi in Volume N 17 Folios 92/23, 92/25 and 92/26).

SCHEDULE "B"

30 The agreement so entered into provided inter alia for payment of Shs. 15,000/- against the purchase price on or before the execution of the said agreement, and for the sale to be completed within six months of the date of the said agreement and for payment of Shs. 85,000/- against presentation of documents of transfer, either by the taking over of the mortgage for Shs. 81,000/- and payment of Shs. 4,000/- on completion of transfer or if so required, free from encumbrances.

Sgd. E.R. Harley
Acting Judge.

In the Supreme Court of Kenya

No.25

NOTICE OF APPEAL

No.25
Notice of Appeal
13th January 1956

TAKE NOTICE that Mrs.Khatijabai Jiwa Hasham being dissatisfied with the decision of the Honourable Mr.Justice Harley given herein at Nairobi on the Thirteenth day of January 1956, intends to appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the said decision.

Dated this 13th day of January, 1956.

Sgd.Robson & O'Donovan
Robson & O'Donovan
Advocates for the Appellant.

10

To the Registrar of the Supreme Court,
at Nairobi

And to Messrs.D.N.& R.N.Khanna,
Advocates for the Defendants,
Victoria Street, Nairobi.

The address for service of the Appellant is care of Messrs.Robson & O'Donovan, Advocates, Lullington House, Queensway, Nairobi.

20

NOTE A Respondent served with this notice is required within fourteen days after such service to file in these proceedings and serve on the Appellant a notice of his address for service for the purposes of the intended appeal, and within a further fourteen days to serve a copy thereof on every other respondent named in this notice who has filed notice of an address for service. In the event of non-compliance, the Appellant may proceed ex parte.

30

Filed the 13th day of January 1956 at Nairobi.

Sgd. R.H.Lownie

Dy. Registrar

No.26

MEMORANDUM OF APPEAL

In the Court
of Appeal for
Eastern Africa

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

No.26

CIVIL APPEAL NO.21 of 1956

Memorandum
of Appeal
15th March 1956

Between

KHATIJABAI JIWA HASHAM APPELLANT

And

HAJI GULAMHUSSEIN HARJI RESPONDENT

10

(Appeal from a judgment and a decree of Her Majesty's Supreme Court of Kenya at Nairobi (Mr. Justice Harley) dated the 13th day of January 1956.

IN SUPREME COURT CIVIL CASE No.668 of 1954

Between

HAJI GULAMHUSSEIN HARJI PLAINTIFF

And

KHATIJABAI JIWA HASHAM DEFENDANT

MEMORANDUM OF APPEAL

20

The Appellant above-named appeals to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decision above mentioned on the following grounds, namely :-

1. That no cause of action at the date of institution of the suit is disclosed by the Plaint or the evidence.

2. That, if the Plaintiff had any legal right

In the Court
of Appeal for
Eastern Africa

of action on the contract, the subject matter of
the suit, he was not in equity entitled to speci-
fic performance.

No.26

3. The judgment is against the weight of evid-
ence.

Memorandum of
Appeal
15th March 1956
continued

The Appellant prays that the judgment and
decree of the Supreme Court at Nairobi be set
aside with costs and that this appeal be allowed
with costs.

Dated at Nairobi this 15th day of March 1956.

10

Sgd.....

Robson & O'Donovan
Advocates for the Appellants.

Filed by:
Messrs. Robson & O'Donovan
Advocates
Lullington House
Nairobi.

No.27

No.27

Order Granting
Stay of
Execution
13th August
1956

ORDER GRANTING STAY OF EXECUTION

20

In Chambers this 13th day of August 1956

Before the Honourable the President (Sir
Newnham Worley)

UPON the application of the above-named
Appellant KHATIJABAI JIWA HASHAM presented to
this Court on the 10th day of August, 1956 AND
UPON READING her Affidavit sworn on the 6th day
of August, 1956 in support thereof and the ex-
hibits therein referred to and the affidavits in
reply of AKBARALI GULAMGUSSEIN NANJI of Nairobi
in the Colony of Kenya a Director of HASHAM
BROTHERS LIMITED and HIMATLAL NARAN of Nairobi
aforesaid Clerk in the firm of Messrs. D.N. & R.N.
Khanna Advocates both sworn on the 13th day of
August, 1956, and the exhibits therein referred

30

to AND UPON HEARING Counsel for the Appellant and for the Respondent THIS COURT DOETH ORDER that all further proceedings on such part of the decree in Civil Case No.668 of 1954 of Her Majesty's Supreme Court of Kenya at Nairobi as orders specific performance of contract (but not in regard to payment of sums for costs or otherwise) BE STAYED until determination of the above appeal or until further order of this Court on the following conditions -

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(1) that the Appellant do within two weeks from the date of this Order file in this Court an undertaking -

(a) for due performance of such decree or order as may ultimately be binding upon her;

(b) that she shall not make any further payments of the capital of the present mortgage of the property, the subject of the said contract, except to the extent to which the said mortgage requires her to do so;

(2) that the Appellant do within the said two weeks furnish and file in this Court a Banker's Bond in the sum of Shillings 10,000/-

(a) to secure the payment of interest on the said mortgage and rates and taxes affecting the said mortgaged property, and

(b) to secure the Respondent against any loss which she may be shown to have suffered by reason of this Order;

AND DOETH FURTHER ORDER that the Appellant do forthwith and in any event pay to the Respondent the sum of Shillings 519/- the agreed costs and disbursements of this application.

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

F.HARLAND. REGISTRAR

Issued this 28th day of August, 1956.

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NOTES BY SIR RONALD SINCLAIR V.P. of
ARGUMENTS

No.28

Notes by Sir
Ronald Sinclair
V.P. of Argu-
ments 1st/19th
February 1957.

Notes taken by the Honourable the Vice-President -
Sir Ronald Sinclair.

Coram: Sinclair V-P., Briggs J.A., Connell J.
O'Donovan, Winayak with him,
for the Appellant
Khanna for the Respt.

1/2/57

10

O'Donovan:

No dispute as to follg. facts.

1. A. a Khoja Ismaili of 58 yrs. of age.

Widow, Husband died a few years ago leaving
her certain property. She cannot understand
English. She was not in reduced circum-
stances. No common sense reason why she
would be a party to a disastrous bargain.

2. By Feb.1954 A was registered owner of $\frac{1}{2}$ the
property. She had entered into an agreement
to acquire remaining half from her co-tenant. 20

3. Plot purchased for 152,000/- in 1948, by A's
husband and two others each holding 1/3
shares. After the husband's death A became
owner of $\frac{1}{2}$ plot. Towards end of 1953, she
entered into an agreement to purchase the re-
maining half for 55,000/- subject to her tak-
ing over the entire responsibility of the
mortgage which originally stood at 90,000/-
of which there was 81,000/- owing at that
time. In Feb.1954 A. had paid 25,000/- out
of 55,000/- 30

A. therefore still owed 25,000/- and 81,000/-
a total of 110,000/- before the title could
be cleared.

R. was a broker and also an Ismaili.

Do not attack finding that son was not pre-
sent at first meeting. Although that finding

lessened view of A's credibility, that was no reason for rejecting all her evidence.

100,000/- is 11,000/- less than she still owed on property. According to R. she did not attempt to bargain with him.

R. wrote out option in English knowing very well she could understand no English. Witnessed by young Ismaili girl. At that stage A. was the owner of only half the property.

10 R. immediately resold at 107,000/- and went to his advocate Ishani on morning of 19th and got Ishani to draw up two agreements.

Agreement drawn up by Ishani on morning of 19th but it is not fully in accordance with the option. It introduces new terms, e.g. period of 6 months to purchaser to pay purchase price, immediate possession and references to mortgage.

20 As it introduced new terms, it alone is basis of Ptf's case.

Evidence was that varied terms contained in agreement were discussed between R and Ishani only. My client not a party to that discussion. No evidence of option being exercised. Not pleaded that option exercised. Agreement superseded the option. Case rested entirely on agreement.

Ishani was R's advocate exclusively. He did not advise A.

30 Sultan's evidence was that A actually signed original and was putting her signature to one of the counterparts when it suddenly dawned on her from other observations made that it was sale of whole property. She then tore up agreement and walked out.

Common ground that immediately after signing something did happen to cause A to tear up agreement.

40 All important question is why did she act in that way (i.e. to show where truth lies).

A. was dealt with in an oppressive manner.

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Ishani said there seemed to be some misunder-
standing. Confirmed that at Mombasa next morning.

Then there was an exchange of correspondence
p.385, 383. Attitude of R. at 383 was that he
would hold A. to the bargain. p.386 reaffirms
attitude of R. in 383 that he was insisting on
specific performance.

Plot vacant at the time. Had been vacant for
some months.

R. kept the key - p.388

10

Silence until 18th May, (p.388/9) Khanna said he
was going to sue. No change in R's attitude
still.

First point is that on those facts there was no
breach of contract when the suit was filed at
beginning of July. That is irrespective of view
taken of facts.

Declaration by A that she did not intend to
complete the contract had no effect if R intend-
ed to insist on completion of contract.

20

S.39 In. Contract Act. See Pollock & Mulla
p.273 (5th edn.) 2nd paragraph.

Khanna:-

Is this ground in M/Appeal. Point not taken
below. Not covered by Ground I.

O'Donovan:

Hope to put the argument now as I put it in
S.C. - see p.285. Will refer to same authori-
ties here.

Khanna:-

30

See p.285. Only point stressed is that there
was no breach.

Ct.

Point is covered by Ground I.

O'Donovan :-

Other side has right to rescind. Rochester v.
De la Tour.

Anticipatory breach. Frost v Knight (1872)
7 Ex. Cases p.111; 112.

Johnstone v. Milling, (1886) 16 Q.B.D.460, 467.

10 R. was put upon his election in Feb.1954
either to treat contract as at an end subject
only to his right to sue for damages or else
to treat it as still continuing in which case
no breach would occur until the time for com-
pletion had elapsed i.e. by 19th August. If he
decided to rescind the contract forthwith any
question of suing for specific performance was
out. Could not sue for specific performance
until a breach occurred which would be six weeks
or so after action brought.

p.285 of judgment. Not a suit for possession.
R. did have possession. Duty to give immediate
possession does not accelerate the duty to give
a conveyance.

20 p.285. In view of the election of the R.
there was no breach. Unless there is a breach
there is no complaint. Person not entitled to
bring action unless aggrieved party. ("A" at
p.285)

As to refusal to take the 15,000/-, there is
no duty money. Not distinguishable from her ac-
tion in tearing up contract.

30 Could not by itself be an independent breach.
She could take the cheque and frame it. Submit
she has not abandoned all rights to the cheque.
Worst that can be stated against my client is
that A. made it clear she was refusing to go on
with the contract.

Had she simply given Resp. back his cheque,
that would merely be notice of her intention to
proceed with the contract.

40 Concede that filing of suit could be treated
as the election in certain circumstances. Con-
tract between suit before breach and after
breach. After breach can sue for both. But
where there is as yet no breach then R. is put
on his election and a pre-requisite for a suit
for damages is a breach.

On the evidence, there is clear evidence of
an election in favour of s.p. He cannot have
it both ways.

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Agree if I succeed on this basis there
would be no bar to a further suit tomorrow.

Review of evidence as to circumstances in
which agreement signed.

When J. accepted R. as a truthful witness
and rejected Ishani and the other witnesses, he
did so without a sufficiently critical examina-
tion of the facts.

Khanna:-

Does Ground 3 entitle A. to attack all find-
ings of fact?

10

Lutterell v. Addicott (1946) 2 All E.R.625,
628. E.A.C.A. Rule 62.

Ct.

We think there was no embarrassment in this
case.

R.O.Sinclair V.P.

O'Donovan

Explanations as to why A. tore up the agree-
ment :-

20

p.229 p.231/2,233 Ptff. committed himself
very firmly to this one explanation. That
does not conform with the correspondence p.384
Then p.236/7, 253, 256/7.

False explanation a palpable falsehood. Not
in accordance with his instructions the same
day to his advocate. In RXN p.264, there is a
striking volte face, line 11. This was con-
trary to plaint, to evidence-in-chief to case
put to A.

30

Improbable A. would give two different
reasons for tearing up the agreement. Refer-
ence to Hasham Bros. is a little improbable.

J. deals with that conflict at p.278/9 ("A")
very lightly. If A. really wanted a lot of
cash would she really have signed an agreement
providing for payment of only 15,000/- deposit.

A. only a sound business woman if position explained to her. Still in process of acquiring remaining half. 96,000/- for $\frac{1}{2}$ share - 55,000/- to be paid in cash and took over half of mortgage.

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10 Evidence established that A. tore up agree-
ment because it referred to whole plot. How
could that have occurred if it had been properly
explained to her? J. did not analyse any of
that. Casts doubt on whole credibility of R.
Why should A. suddenly change her mind in a matt-
er of seconds? Simple answer is that A. did not
know what was in the agreement and as soon as
she did know, she repudiated it.

Once it is conceded that R. gravely contra-
dicted himself on central issue, and J. did not
pay sufficient attention to that, rest of find-
ings do not carry same weight. Probabilities
all in my favour.

20 Non-direction by J. on central point and
matter should be treated by this Court as at
large.

Values:

R's insistence on specific performance -
glaring case of where contract was to his advan-
tage.

In equity even if A. by her foolishness
bound in law, R. should be left to his legal
rights.

30 Even admitted facts reveal a most disturbing
state of affairs. Reference to subdivision was
misleading.

Part of my case that the wording of the op-
tion when interpreted might bear the meaning to
A. that only house and land appertaining thereto
was to be sold.

40 Where there are circumstances such as illit-
eracy, want of legal advice which does not ap-
pear consistent with intelligent consent, there
may be good reason for refusing s.p. which is a
matter of discretion only even when it cannot be

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found that the Ptff. was deliberately unfair.

These matters standing in way to equitable relief are :-

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- (1) Age
- (2) Illiteracy
- (3) Want of legal advice.
- (4) Agreements did not contain the very terms of the option.
- (5) Most unfortunate bargain made at that time at that price.

10

If Ct. finds there was some basis for A's complaint that agrmt. not read over to Ishani, then a fortiori ptff should not get s.p.

Ct. Adjt. to 2.30 p.m.

2.30 p.m. Bench and Bar as before.

Khanna;

Legal issue.

In action for damages a breach is required and an intention of other party intimating to party in breach that he intends to put an end to Contract. Then he sues for damages.

20

On other hand in an action for s.p. a party to be able to claim that remedy must be able to show his willingness to perform contract.

Second distinction is between non-recognition of contract as a whole and refusing to carry out without denying its binding nature.

Johnstone v. Milling was a case where a single covenant was not carried out. That was treated as a breach and an action for damages brought. Held not competent.

30

Frost v Knight again a case of damages. Contract contained a stipulation which was entire contract. See top 113.

Question is whether contract as a whole has been repudiated.

Shaffer v. Findlay (1953) 1.W.L.R.106, p.112, 114. (Lord Wright in (1942) A.C.356 at 379 quoted); 121, 116, 117.

When contract is repudiated in sense that it is not binding that is a different proposition.

Here both an action for damages and s.p. permissible as contract repudiated.

Complete anticipatory breach amounting to a repudiation. All I had to show was that an intention was evinced to repudiate the contract.

10 Equity looks to the intent rather than the form.

Freeth v. Burr. L.R. 9 C.P.208, 213.

8 Halsbury, 3rd, p.205, para.346, para.345.

Equity helps the diligent and looks to the intention. He would be out of Court if he delayed bringing action for s.p. until time for performance.

Declaration of intention may be accepted as a breach.

Snell's Equity, 24th, p.542, para.5.

20 Virani v. K.Singh and anor, 13 E.A.C.A.3 Civ. App.4 of 1945.

Repudiation is a form of breach by a declaration of intention. No difference between anticipatory breach and an actual breach.

Jurisdiction to recover decree if circumstances change.

Can this be enforced in equity.

30 p.549 - Snell. para.2. No finding of misrepresentation or mistake. p.52. A. said no room for misunderstanding. J. carefully considered the evidence and quoted fully from it. Fraud - p.54. Says there was a misunderstanding.

Ct. Adj. to 10.30 p.m. on 5/2/57 R.O.Sinclair V.P.

18.2.57. Bench and Bar as before.

Khanna:

First point. We have Indian Contract Act

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on question of damages. But we have English law on question of specific performance. Art.4 of 1921 which applies English law up 12/8/97.

Not concerned with s.39 of Indian Contract Act. That concerns damages solely.

Muralidhar Chatterjee v International Film Co. Ltd. L.R.70 I.A.35, 45 (top) 48.

Here we are concerned solely with English law. Canadian law same as English law. Canadian authorities in point.

10

Ardeshir Mama v. Flora Sassoon. 55 I.A. 360, 364, 371 (middle para.) - 372.

Two Canadian cases :- Roberto v Bumb. (1943) 2 Dominion law Reports, 613. Roy v. Kloepfer Wholesale Hardware & Automotive Co.Ltd. (1951) 3. D.L.R. 122.

13 E.A.C.A.25, 26 Alibhai Gulam v. Mohamed Yusuf.

Party cannot rely on subsequent supervening circumstances once he has broken the contract.

20

Judge quite right when he referred to two further breaches. (1) Refusal to take the deposit. (2) Also keys and possession claimed back. Actual breach apart from the refusal to go on with the contract - p.285, Evidence of those breaches - p.124 L.12-16, p.95, p.235 L.24 p.236 L.12, p.135 L.14-22

Repudiation is enough. Two actual breaches take the case even further.

Hardship, illiteracy, etc. Equitable grounds. Rely on the two Canadian cases on this aspect also.

30

Snell's Equity (24th) p.558. Hardship must exist at the date of the contract. No particulars of hardship set and A. did not submit to equity of Court. Court cannot thrust hardship on her if she does not make out a case. Inadequacy of price not sufficient (page 559) No fraud found. No finding even that price inadequate. Indeed Court accepted evidence of Flatt.

40

Distinct evidence that Mau Mau made use of the plot. Building could have been demolished. p.128, L.38, p.132 L.42, p.133, p.141.

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Evidence of Platt - P.196 et seq.

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Judge was entitled to accept that evidence.

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Judge could not have made any finding amounting to hardship.

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10 Facts.

Ample evidence to support finding of Judge.

Sadru Din. Finding as to his credibility not contested. Judge entitled to observe as to A's demeanour. Impossible for court to believe her. p.156/7. p.52-54. A. said there was no mistake. Court cannot make out a different case for her. She stands on fraud or nothing.

20 A. (p.52) said no undue influence and did not misread the option. It was not read at all. (Ct. That is unconnected with the case - paras. 4 and 9 of defence).

p.80 l.24 - Ishani's evidence. He said no fraud at all.

p.65 - Ishani's evidence. p.66 p.75, p.77 p.79, p.44, p.149 Sultan Ali.

30 A. put forward a defence of undue influence well knowing she could not support it. Judge entitled to take this into consideration - see p.31/2

P.104/5 evidence of son Sadru Din.

Judge also entitled to take into a/c that A based her case on principal and agent but had to abandon that in her evidence.

p.272.- judgment as to above. A. had no objection to R. reselling and making profit. But in defence paras.3 & 4 she alleged relation of principal and agent.

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Judge also entitled to take into account fact that A. denied there was any cheque referred to - see p.46.

A. even denied her signature on the duplicate - see p.47. It was only after the adjournment in RXN at p.60 that she admitted the signature to be hers.

Ct. Adjd. to 2.30 p.m.

2.30 p.m. Bench and Bar as before.

Khanna continues:- Judge also entitled to take into a/c that A. asserted she was a business woman and that she would not sign the agreement unless it was read over to her.

10

Every known defence put forward without any relation to the facts - Judge entitled to take this into consideration.

A. quite unable to explain how the amendments and deletions made - if option were just written out as she alleged there would be no reason for deletions.

20

Ishani gave an amazing account - must be untrue.

A. set up two sets of defences in regard to misrepresentation. p.32 - A. acknowledged that all the formalities left to her: but at p.36 she went back on that.

Scheme for a hotel superseded the proposed subdivision.

At p.37 A. said there was no discussion about beacons. But at p.58 she gave a very different story - said there was a discussion about putting in beacons.

30

p.40 re beacons and insertion of "nett" - also
p.41 as to reading over.

p.48 - A. agrees Resp. did not say what is alleged in pa.4 of defence.

p.49 As to para.6 of defence. Having pleaded in para.6 that misrepresentation took place she saw she had no talk.

10 p.273 of judgment as to Ishani's evidence. Do not think it was unprofessional for Ishani to include provision for taking over mortgage.

Would R. have gone to Ishani, A's nephew and advocate for Jubilee Trust, if he had intended an elaborate fraud on A.?

Ishani's evidence. pp.62, 65 (Ishani said A. tore up original and R. picked up the pieces) - p.73 to 77.

20 Son Rayabali: Incredible witness. Guilty of patching up the place in order to get some sort of a valuation. p.126 L.34 says got no notice - but at page 265 official witness says several notices sent. p.266, L.15-39, p.267. p.137

p.141 - - - - - tried to make out that Sultan was a mere acquaintance yet agreed that if son not available Sultan would be quite suitable.

p.142, L.35 said his mother did not get annoyed about mortgage yet at p.127 he said the contrary.

Sultan Ali.

30 Ishani said both agmts never left A's possession.

p.147/8 - this witness says the contrary.

One of the reasons J. found A. tore up agmt. was because she was not going to get 100,000/- This witness confirms this view.
pp.154-163

Harji's evidence

40 p.255 L. 31-34 Hardly proper to confuse R. in that way as Akram's letter not delivered until the next day, the 20th. Judge came to the correct conclusion.

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O'Donovan :- Two Canadian cases. They arrive at the same results by contradictory lines of reason. Roberto's case pp.620-621.

Maturing of the action after such distinguished in Kenya. Tantamount to saying that no cause of action at time suit commenced but that did not matter because it accrued before Judgment. Judgment given on a cause of action which accrued subsequent to institution of the suit. That may be permissible in Province of Ontario but it is not permissible in Kenya. 10

I.Halsbury (2nd edn) 8. para.9. That definition has found favour in Indian commentaries.

Mulla 12th, p.120. Cause of action must be antecedent to the date of the suit.

I.Chitaley (5th) C.P.C. p 379. Same definition adopted.

2.Chitaley (5th) p.180 3 - comment on O.7 r.7. Identical with Kenya O.7 r 7. See under "Events happening after suit" O.7 r.1(e) Indian C.P.C. 20

Kenya O.7 r.1. is in similar terms.

Ask Ct. to say Canadian decisions wrongly decided.

Not good enough in India to claim that right of action arose after institution of the suit.

Ct. Adj'd. to 10.30 a.m. on 19.2.57. R.O.
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19.2.57. Bench & Bar as before.

O'Donovan continues:- Roberto's case based on cause of action arising after institution of suit. 30

(1) Either complete cause of action in equity or
(2) Anticipatory breach did not itself create a cause of action and subsequent to institution of suit cause of action occurred for the first time.

Rangoon case. A.I.R. (1941) Rangoon, 27. U Ba Maung v. U Chit Hlaing and anor. Injunction under Specific Relief Act - at p.29 last para. 2nd column.

Dominion of India.

(1950) A.I.R.Cal.207. Note (b) - p.208 para.20.
Suit for damages.

Ramamadan Chetti v. Servai. I.L.R. (1898) 21 Mad-
ras, 288,290. Only matters which can be taken
into a/c after issue of writ are those which
affect defence, counterclaim, set off.
R.S.C.O.24.

10 No place in our Rules or practice for premature
suits where cause of action is incomplete.

Appears that in Canada procedure is a provincial
matter. 11 Halsbury, 2nd. p. 92; 93 (paras.13 &
14).

Roy's case.

Carefully analysed line of reasoning comes into
collision with Roberto's case which in effect
said there was no cause of action at time of in-
stitution of suit.

20 Roy's case the opposite - says where there is
an anticipatory breach there is a complete cause
of action. p.131,132. Judge did not direct him-
self on the diametrically opposite view in Ro-
berto's case. Roberto's case does not support
the view he took. Line of reasoning erroneous.
Judge wrong when he says that by depriving the
person repudiating of taking advantage of any
supervening defence the courts of equity are
acting in accordance with the common law.

30 In common law when repudiation not accepted
wrongdoer can take advantage of supervening de-
fence.

Court not enabling wrongdoer to take advantage
of anything. He is not taken at his word and
he is left in same position as before. That is
not taking advantage of anything.

Equity must follow the law.

(1) s.39 Contract Act has to be applied and has
to be followed in equity. s.39 intended to be a
restatement of common law position.

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Tearing up of the document is a nullity and does not found a common law action at all.

Pollock v. Mulla, 5th, p.278. As to the principle. Either there is a breach which entitled party to put an end to contract or there is no cause of action.

Avory v. Bowden. 119 E.R.647, 652 (foot).

Burn & Co.Ltd. v. Thakur. (P.C.) A.I.R. (1925) P.C.188, 193 (middle of 2nd column).

Tearing up of the contract did not give a right of action. Promisee required to wait (Johnstone v. Milling).

10

Equity does not act in some mysterious way. It acts in accordance with fixed rules.

Transfer of Property Act. s.53A. P.C. held doctrine part performance could not apply. Mulla, 4th. 268 3rd 282.

Ariff's case 58 I.A.91.

13 Halsbury, 2nd p.83. note (n)

Snell, 24th, p.22.

20

Unless there was a sustainable cause of action for damages there could not be any equitable cause of action at all.

Matter cannot be a nullity at common law and yet found an action in equity.

s.2 of Lord Cairn's Act 1858 is a cogent reason for that. Not repealed until 1925 so is the law of Kenya.

Snell p.539. Court of Chancery could award damages

Exceptions to rule that equity follows the law are narrow and well defined e.g. relief against forfeiture.

30

31 Halsbury, 2nd, 327, para.356. There must be a breach. p.330, 331 as to attitude of court of equity to common law. 13 Halsbury 2nd p.13 para 9.

If no cause of action in law how can there be one in equity?

31 Halsbury 2nd. p.401, para.468.

Where repudiation is not accepted no right of action either for damages or specific performance arises.

10 Fry, 6th Chapter 1, para.3. (page 3). (I Chitty p.192) Pollock on Contract - 13th, 548 line 12 supports Fry. As stated in Johnstone v. Milling if promisee elects to treat the contract as subsisting he must wait until time for performance. This must apply to specific performance unless here equity does not follow the law.

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continued

If I am wrong there is ground for leaving Respondent to his legal remedies.

My client under a misapprehension as to the extent of what she was getting. Mistake arises as to the contract.

20 Even if we failed to prove fraud mistake etc. s.p. is a discretionary remedy and here ptff. should be left to legal remedies if Ct. takes view that Appellant thought she was selling only $\frac{1}{4}$ acre.

Rest of my case will succeed or fail on balance of probabilities. Admitted established facts point only one way.

Admitted in end that Appt. said she tore up the contract because she thought she was selling only $\frac{1}{2}$ acre.

30 Respondent going to Ishani. Resp. lied about mortgage. At first said there were no discussions about it. No evidence that Ishani dealing with Appellant's contract to purchase the other half of the property. Obvious Ishani acting in concert with Resp. Matter of some significance that Ptff. never took a statement from Ishani or asked him to come into court.

Whatever property worth, Appellant obviously

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thought it was worth more than 100,000/-. She must have been a lunatic to sell it for that sum.

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p.147/8 Sultan's evidence makes it clear that Appellant wanted 100,000/- cash.

Appellant was under the impression that she could arrange with Jubilee Trust to leave the mortgage on the other three plots.

Khanna:- (with leave in view of new law cited).

Repudiation gives at once a right to sue for damages or sue for specific performance. 10

Decision in Roy's case is very full.

Each cause of action must depend on its own particular incidence.

In Rangoon case the sole question was whether Ptf. held a particular office.

Impossible to get damages in Kenya in a suit for specific performance. See 1928 55 I.A.860.

Indian Contract Act is a code complete in itself and there is no room for equity. The Order in Council says that matters apart from Contract Act and Transfer of Property Act only governed by equity. 20

Court will be bound by English statutes up to 1897 when applying equity but not bound by Contract Act when applying remedy of specific performance.

Contract Act must be put aside when it comes to the remedy of specific performance.

S.53A Transfer of Property Act came into force in 1929. If equity has to follow any statute law it is that indicated in Art.4 of 1921 Order in Council. 30

Sec.2 of Lord Cairn's Act does not alter the circumstances in which damages at common law could be recovered. Roy's case in conformity

with 55 I.A.860. Roy's case is the true decision.
C.A.V.

R.O.Sinclair
V.P.

15.3.57. Bench & Bar as before save that O'Donovan is absent.

10 Jts. read. Appeal dismissed with costs. Costs of obtaining the reports of the two Canadian cases should be included in the Respondent's costs and the costs previously reserved also should be included in Respondent's costs.

R.O.Sinclair
V.P.

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Notes taken by the Honourable Justice of
Appeal - Mr. Justice Briggs.

1/2/57.

O'Donovan.

20 Facts not in issue. Appt. Khoja lady 58 years old. Widowed 6 yrs. ago. Knows no English at all. Not in financial difficulties.

In Feb. '54 she owned half of a pty. next to Mayfair Hotel and had entered into agrt. to acquire remainder. Plan 396.

30 Plot was bought for Shs.152,000/- in 1948 by appts. husband and two others in thirds. Appt. acquired another 1/6 and in end of 1953 agreed to buy remaining half for 55,000 but subject to taking over whole liability for mtge. of Shs.81,000 (originally Shs. 90,000)

In Feb. '54 appt. had paid Shs.25,000 out of the Shs.55,000 Still owed Shs.30,000 to co-tenant and Shs.81,000 to mtge = Sh.111,000.

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Ptff. a broker. Conversation in Feb. '54 re purchase of this plot. Appt. says her son was present, but it was found he was not, and I do not attack that.

Ptff's case that he was offered the whole ppty. for Shs.100,000 - although she still owed S111,000 on it. Ptff. came to her house and got her to sign agrt. in English. She can't read it. Agrt. cd. have been in Gujerati. No enquiries about title. Immediate resale to Hasham Bros.Ltd. Ptff. instructed Ishani and told him to prepare two agrts. Sales Appt. to Respt. and Respt. to Hasham Bros. Ltd. Agrt. with Respt. contains new terms re time of payment and mtge. 10

Confident that he would be able to make her sign. There was no ev. of any oral exercise of the option. On the pleading it is contended that the agrt. superseded the option, and exercise was not needed.

Ptff. stands on the agrt. alone.

20

After signature of original and one counterpart, she realised that agrt. dealt with whole plot. Then got up, tore up agrt. and went out.

Other version is that she tore it up because it had been resold to people she did not like.

Common ground that she tore it up.

Why? This is the key to the truth. Parties immediately consulted solrs. For Appt, Akram's letter. 385.

For Respt, Khanna's lt, 386.

30

Resp. tries to hold appt. to her bargain. cf.also 387 House was vacant, and ppty. remained vacant.

Delay before suit. P.388/9.

(1) There was no breach of contract when the suit was filed.

The declaration of intention not to perform has no effect if the other party elects to treat the contract as subsisting. S.39 Contract Act. Here this was done, for sp.perf. is claimed.

Pollock & Mulla 5th 273.

Khanna: This point is not taken on the memorandum and was not taken below.

Ct. We think it is sufficiently taken, and it was also argued below.

O'Donovan: The right to rescind was not exercised. Hochester v. Delatour. 3 E & B 678 is the leading case.

Frost v. Knight. L.R. 7 Ex.111, 112-3.

Johnstone v. Milling. 16 QBD 460; 467

10 Respt. here was put on election in Feb. '54 either to treat the contract as at an end and sue for damages, or to treat it as subsisting in which case there wd. be no breach till 19/8/54.

If rescission, no sp. perf. If he waited, he must prove breach before getting sp. perf. or damages. Judgt. 285 The duty to give immediate possession was not broken. The Purchaser had the key. Had sufficient possn. to satisfy agrt. 285.

O'D.

20 She was not obliged to take it. It was all part of her repudiation. Never a breach of contract to refuse to take money. I do not admit that she has abandoned all claim to the money.

30 The filing of the suit would not necessarily amount to an acceptance of repudiation so as to entitle pttf to damages. That wd. be all right after breach: but where there is no breach, the plaintiff must at least show an election to rescind, and no claim for sp. perf. can be joined. Here the election is the other way.

If I succeed on this basis, there would be no bar to a further suit being filed tomorrow.

(2) The disputed facts.

Ct. insufficiently examined both ev. and probabilities.

Khanna. Not raised Luttrell v. Addicott. 1946 2 A.E.R.625, 628. E.A.C.A. Rule 62(1)

Ct. We think in this case no embarrassment.

O'Donovan: Why did appt. react so violently in

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Ishani's office. p.229. Respt's explanation.
Does not fit with 384. 237/8 253, 254, 258
position.

The mention of $\frac{1}{2}$ acre cannot have arisen from
the letter sent by Akram. Clearly proved un-
true.. 264. complete volte face. She did give
the reason " $\frac{1}{2}$ ac. not 2acs" for tearing up the
agrt. Almost certainly not the other one about
Hasham.

Ct. May not the real trouble have been that she
discovered she was not getting enough cash? 10

O'Donovan: That is pure theory. I was entitled
to a finding that she destroyed the agrt because
it covered 2 ac. not $\frac{1}{2}$ ac.

Grave doubt was cast on the Ptff's whole ev.

Probabilities from prices. Grounds for appt.'s
action?

Contradictions of ptff. on central point. Not
appreciated by Ct.

Other findings are open to question 20

All probabilities are in my favour.

(3) Where parties are not dealing on a basis of
reasonable equality, through illiteracy, lack
of intelligence etc. sp. perf. of a hard bargain
may be refused, even if it is not in any way a
dishonest or unfair one.

I rely on age illiteracy, lack of legal advice.
new terms in option. No real or intelligent
consent to the agrt. If her complaint that not
explained properly was justified a fortiori,
even if bound she shd. not be held to sp. perf. 30

2.30 p.m. Bench & Bar as before.

Khanna: Essential difference between sp. perf.
and damages.

A.1. For damages, a repudiation or a breach is
needed.

2. For sp. perf., readiness to perform by ptff.
and refusal by deft.

B. Difference between non-recognition of contract
and mere refusal to carry it out. 40

Johnstone v. Milling.

A single term was concerned. Expressed intention not to carry that out. Action for damages held not competent.

"One of the stipulations".....repudiated.

Frost v. Knight.

Also a damage case. Anticipatory total repudiation. p.113.

Schaeffer v. Finlay 1953 1 W.L.R.106,112,
114.

10 Hayman v. 1942 A.C.356,379.

Ld.Wright. Difference between "repudiating a contract" and "repudiating liability under it."

I go further than the Judge did: apart from any minor breach, the repudiation itself was a breach.

Freeth v. Burr. L.R.9 C.P.208

8 Simonds 205 p.346

Snell 24th 542.

20 Fazal Banji v. Kehar Singh. C.A. 4/45
(1946) E.A.C.A.3

(2) Discretion

Snell 24th 549. Unilateral mistake? Not found.

No claim for rectification. (But sp.perf. may still be refused).

S/O 5/2.

F.A.B.

18.2.57. Bench & Bar as before.

30 Khanna: Resuming first point. Sp.perf. is governed by English law; not Sp.Relief Act. - law as at 12th Aug.1897.

54.1921 Kenya O.in C. s.39 of Ind.Contract Act not relevant - applies only as to damages.

Even as to damages English law is different.

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Murlider Chatterjee v International Films
70 I.A.35 - 44,45.

"only brought to an end sub mode".

Canadian law is similar to English. Indian law is different.

Ardishir v. Sassoon. 55 I.A.360,364,371.

X Roberto v. Bumb. 1943 2 DLR 613 (Can)

X Roy v. Kloefer Wholesale 1951 3 DLR 122 (Can.)

The Court's direction is that the contract be carried into effect. Contract does not in fact determined, but for purpose of damages is treated as if it had. 10

Alibhai Ghulam v Urd. Yusef. 13 E.A.C.A:25.

Refusal to take deposit. claim to have back keys and possession. Judgt. p.284-5. These were actual breach owing action. Ev.387/8 124 L.12-16

95
235
135

(2) No hardship. Illiteracy immaterial. 20

Hardship considered only if it existed at the date of the contract.

No submission to equity of Court. Claims to be a business woman. Snell 24th 568. Inadequacy of price not enough - unless fiduciary position or "near-fraud".

Value was depressed by

- (i) Emergency. Mau Mau used the plot.
- (ii) deterioration of house.
- (iii) difficulty and cost of development including delay of survey. 30

Ct's findings on this were correct. Show clearly no hardship

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(3) The general facts.

Findings as to Sadrudin is not contested.

It follows that appt. personally was perjured.

Sultanali's ev. at 150.

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I agree that the true reason why appt. tore up the agrt. is the key to the whole case on the facts.

10 X 52 - 54 Not based on misunderstanding. Ct. cannot so find when she disclaims it. The defence alleges in para.9 fraud by the express misrepresentations and conduct alleged in para.4. The evidence above contradicts this.

Ishani XXd.80, L.2. A flimsy and untenable defence of cancellation by mutual consent was put up, but not believed.

Sultanali 149. 22 - 40.

20 Ct. was also entitled to take into account the false defence of undue influence put up.

31,43 32 - 34

son. 104/5

Also appt. falsely alleged agency in pleading, but had to admit this was wrong. Judgt. 272 - 273

Also she denied the facts about the cheque at Ishani's office.

46

Also denied her own signature.

47

After adjournment she admits signatures.

60

30 2.30 p.m. Bench & Bar as before.

Khanna continues: Ct. also must remember. She claims to be an average business woman.

She wd. naturally have the option read over. Ct. entitled to believe that she did. Story about the blank paper - story about amendments. Appt's account of these incredible.

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Ct. entitled to reject Amina, as not being inde-
pendent.

Do. Ishani's appt's nephew.

Conflicting pleading and evidence as to nature of
misrs.

p.32
36

Shuffling and prevaricating about sub-division.

10

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Pltff would never have gone to Ishani if he had
intended to defraud the deft. Appt's anger arose
when she found she was not going to touch much
cash.

Son's evidence also quite incredible.

20

Relations with Sultanalali

Sultanalali unworthy of credit. generally.

Haji's evidence.

The apparent contradiction springs from a confu-
sion. If Appt's instrs were that letter was not
delivered It is obvious that at Haji at p.229,15
is mistaken as to date of receipt of letter. The
offer to produce Akram's delivery slip was never
implemented. Conceivable that before the trial
he may have forgotten that she gave her reason
for destroying the agrt.

30

O'Donovan.

(1) The Canadian cases. Roberto's case. at 620,621.

"Cause of action not complete etc."

That did not matter in Canada, provided that
it accrued before judgt.

40

Secus in Kenya Definition of cause of action.

1 Hailsham 8 para.9 Mulla 12th 120 "must be antecedent to inception of suit. (not all relief and be available).

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1 Chitale 5th ed. 379

2 " 1813 on Order 7.r.7. O.7 r.1 It is not good enough in Kenya to

19.2.57. Bench & Bar as before.

O'Donovan continues: Judgt. of Laidlaw J.A. at 620. Cause of action only accrued after suit filed.

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10 U Ba Maung v. U Chit Hlaing A.I.R.1941 Rang.27,29
Claim for injunction under Sp. Relief Act.

Dominion of India v. A.I.R.1950 Cal.207,
208 para.20.

Ramanadan Chetti v. Servai (1898) 21 Mad.288,290.

In England, the only matters subsequent to writ which will be taken into account are those affecting defence or c.c.

O.24

20 In Canada, matters of procedure are within jurisdiction of provinces. Ontario rules may be special.

11 Hailsham 92-3 para.157.

Roy's case.

Views conflict with the earlier case. It holds that the cause of action was complete.

130 131,

Question of supervening defences - misunderstood.

The 'common law' position.

s.39 Contract Act. 278.(1863) 1 M.H.C.

30 Avory v. Bowden. 119 E.R.647, 652 foot.

XX Burn & Co. Ltd. v. Thakur Sahib AIR 1925
P.C. 188, 193.

Equity must follow the law, i.e. the statute law of India applicable here. cf. the I.T.P. Act s.53A.

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Ariff v. Jadunath 58 I.A. 91

1st Hailsham 83 note (n) Snell 24th 22

There cd. be no cause of action in equity un-
less there is also a cause of action at common
law for damages.

Ld. Cairns Act 1858. s.2

Not repealed till 1925 and therefore part of
the law of this Colony.

Snell 24th. 539 31 Hailsham 327. para.356

13 do. 13

10

31 do. 401 para.468

B. Chitty. 21st ed. 192

O'D. Fry. 6th 3.

Pollock 13th 548 Not sp. perf. in any case.

Facts.

Khanna is given leave to reply on the new law.

Repudiation gives at once a right to the wrong-
ed party to sue for either damages or sp.perf.
If he goes for damages he must "put an end to
the contract". If he goes for sp; perf. he
treats it as alive (See Chitty). The causes of
action are wholly different. The type of act-
ion appropriate for each is so different that
the remedies cd. not be pursued together.

20

Ardeshir v. Sassoon.

In questions of sp. perf. the Contract Act
must be disregarded. Amendments after 1907
do not apply here.

C.A.V.

F.A.BRIGGS J.A.

15.3.57. Bench & Bar as before save that O'
Donovan is absent

30

Jts. read. Appeal dismissed with costs.

F.A.Briggs. J.A.

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No dispute; Appellant Khoja Ismaili of 58; husband died 6 years ago leaving her properties; doesn't understand word of English; neither she nor family in reduced circumstances; no common sense reason why party to disastrous bargain.

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10 February 1954 appellant registered owner of half property situated next to Mayfair; had entered into agreement to acquire remaining half from co-tenant; monies paid; in a sense beneficial owner of whole property.

20 P.396 Plan; Plot purchased in 1948 for 152,000/- by Appellant's late husband and two other co-tenants in equal 1/3 shares; we become later owner of 1/3; towards end of 1953 she entered into agreement to purchase remaining 2/3 for 55,000/-, subject to her taking over entire responsibility of mortgaged property with Diamond Jubilee; 81,000/- (originally 90,000/-). In February 1954 Appellant had paid on account of purchase price of remaining 1/3, 25,000/- out of 55,000/-. In addition to what plots had costs she owed 81,000/- plus 30,000/- = 111,000/- before title could be cleared.

Plaintiff a broker - Khoja Ismaili; conversation in February 1954 re purchase of this land; Appellant's case is son present at conversation, plaintiff denied at trial.

30 I don't attack finding that son not present.

Finding though weakens J's view of Appellant's credibility should not rule out rest of her evidence on truth. Great deal I submit pointing one way.

Broker alleged she accepted offer to buy all for 100,000/- happy - no discussion at purchase price. 11,000/) less than she still owed and didn't attempt to bargain.

40 Broker arrives her house 9 a.m. and gets her to sign agreement in English; she can't read English; broker knows should be in Gujerati; girl timorous approach towards elders;

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No real reason for preferring English to Gujarati.
Cunning - refer to sub-division unnecessary unless
trying to mislead. At that stage client didn't
bother to enquire of title - only owned $\frac{1}{2}$.

Rapid movement. Harji resold 170,000
(107,000/-?) to Hasham Limited and went to his
Advocate Ishani; on 19 morning he got Ishani to
draw up two agreements (1) self and Hasham Ltd.
(Prior to exercise option) (2) self and appellant
(memorandum);

10

The Memorandum of Agreement drawn in morning
and signed subsequently by Appellant is not fully
in accordance with option and introduces new terms;
6 months till purchaser to pay purchase price and
reference to mortgage.

I submit plaintiff had sufficient confidence in
ability to over-reach Appellant that he had arranged
to have agreement drawn up in advance and expected
to be signed without demur.

p.378; as it introduces new terms it forms basis of
plaintiff's case and can be attacked.

20

Briggs; evidence indicating exercise of option.

O'Donocan: Evidence has the terms of Mem. discussed
between Respondent and Advocate only; put in point
as fait accompli.

Briggs; When handling document must have been oral
exercise of option;

O'Donovan; No evidence of option exercised; pleaded
not necessary to exercise it and defendant pleads.

Briggs; Case rests wholly on the agreement.

30

O'Donovan; Yes.

Violent dispute as to what happened in office.

Ishani's though relative didn't act as her ad-
vocate and was plaintiff's advocate exclusively;
she entered into agreement without legal advice.

Ishani and Sultan gave evidence as to what
happened; that she signed original and put sign to
one of c.parts suddenly dawned on her agreement
etc; she sprang up and tore it up.

Plaintiff's version read over to plaintiff understood signed; told property already resold to Hasham Ltd. whom she disliked and she tore it up.

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Common ground seconds after signature S/
then cause her to get angry and tear. All important
question is why she so act?

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Briggs: Also what effect in law is? Had it any
effect?

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10 O'Donovan: profound importance in equity; doesn't
tear up agreement to which given willing acquies-
cence in 10 seconds - dealt with in oppressive
manner.

Exchange of correspondence; before she left
Ishani said "misunderstanding"; forget it; confirms
in Mombasa to plaintiff's son. Both go to Advocates;

P. 385 and para.2 "identity" part.

Khanna writes p.383; in violent conflict with what
Harji tried to induce judge to believe.

20 22.2.54 to Akram; p.386; reaffirms attitude; letter
26/2; it was a vacant plot for some months; keys
handed to plaintiff property remained vacant; Caveat
entered; doors open later and repairs carried out.

Silence until 10th May; p.388/9; explains delay;
refers to 22/2 letter: no change in attitude.

1st point: On those facts no breach of contract
when Suit filed; filed at beginning of July; irres-
pective of view of facts I'm entitled on pleading
for dismiss of plaint;

30 Declaration of intent not to perform not suf-
ficient unless other party terminates the contract
- Briggs; If elects to continue it as subsisting
has no effect whatever.

S.39 Contract Act: promisee may put an end,
decl. except for damages. Commentary "refusal to
perform contract" para. "As correctly laid down".

Khanna: Not taken in Memorandum of Appeal; Does he
say no breach on his part? p.285; only point
stressed was no immediate breach. Differ. from
saying whenever breach accepted.

40 If you sue for sp. etc: my point is he should
have put forward ground precisely.

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Court: Point is covered by 1st ground.

Pollock & Mulla "Law in England; if disallowed from performing other party has right to rescind it;
Hochster v. De La Tour.

Anticipatory Breach Cockburn C.J. in Frost v. Knight Vol.VII Exch. p. 111; p. 112; promisee may treat notice as inoperative; but he keeps it alive and remains subject to liabilities; see also Lord Esher in Johnstone v. Milling 16 Q.B.D. p.460; at 467; "renun. or total refusal before time does not by itself amount to breach but may give immediate right of action; declares his intent to rescind; by wrongfully making renunciation entitles other side to bring an end of it; other party can act so that he brings it at an end; he can't proceed on so that he brings it at an end; he can't proceed on position that it still exists; otherwise he must wait for arrival of time; that is the only doctrine.

Respondent put upon election in February 1954 either to treat it at end subject to right to sue for damages, or else treat it as continuing in which case no breach would occur until time for completion elapsed on 19th August.

If decided to rescind forthwith any question of specific performance out; if elected to wait he'd no right to damages or s.p. until breach occurred. That couldn't accrue till 6 weeks or so after suit filed.

Harley J. at p. 285.

(1) I submit its not a suit for possession. 30

Briggs: Arguable he had possession; he had the key.

(2) Duty to give immediate possession doesn't acceler duty to give conveyance.

p. 285 in view of election No breach; I agree S. 39 does apply; I submit unless breach no complt; can't take action unless aggrieved parties.

That concludes my 1st submission.

Briggs: What about refusal to receive 15,000/-?

O'Donovan: No duty to take money; to convey;

Briggs: How arise? If to go on I'll take 15,000/- but I won't take it as I'm not going on. 40

O'Donovan: Part and parcel of repudiation could't amount to independent breach; she could take cheque and frame it?

Briggs: Has she abandoned all right to it?

A. No part and parcel of her refusal gives no differ, that totally to go on with the contract.

Had she given back his cheque he might have taken it as indicating she entitled not to be bound therefore announcement of her intention.

10 Briggs: Plaint alternative as s.p. or damages; for general breach; if this point succeeded would it be fair to say was he bound prematurely re specific performance?

O'Donovan: I had considered that point; I concede filing suit itself could be election between repudiation and breach; contract between rights of parties before future date and after; once date for performance arises both remedies can be pursued; and not put on election.

20 But where no breach but indication of refusal he is put on election and a prerequisite for suit for damages is election to treat contract as repudiated; plaintiff puts cases clearly when he sues for s.p. and claims damages in alternative.

On evidence of election its clearly in favour of s.p. and not damages; Can't have it both ways. If sued only for damages 19th February letter a complete answer.

Briggs: No bar to further suit to-morrow? A. No.

30 2. Review of evidence on circumstances agreement was obtained. Submit when he accept Harji as truthful and rejected others out of hand he did so in not sufficiently critical examination of evidence of facts.

Khanna: Does ground 3 allow that?

1946 2 S.E.R. I think p. 628; see judgment 278/9; Rule 62(1) Court of Appeal Rules.

You must define facts specifically.

Court: No embarrassment in this particular case.

40 O'Donovan: Why appellants should so violently the main question of fact;

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Explanation given by Harji; p.229 1st 4 ques-
tions and Answers p.210/11;

Put by Court; p. 233 plaintiff committed self
very firmly to the explanation of dislike of Hasham
Bros. Unfortunately it doesn't conform with the
correspondence; difficult to reconcile with Khan-
na's letter;p.382.

Briggs: Isn't it consistent with respondent
She didn't know but did know at the meeting?

A. Yes.

10

Then p.236/7 p. 238 letter put. "No express
talk took place". p.253 page 256/7 (later he
had it in town) whole page; page 257/8; original ex-
planation palpable falsehood and not in accordance
with his immediate instructions to his advocate.

Para. 7 Plaint. Striking volte face at p.
line

Contrary to examination in chief to pleading,
to case put to my clients one has this change of
front after adjournment to study correspondence and
how untenable was his position.

20

Client never gave 2 different reasons and for
tearing up agreement; Plaintiff's story improbable
story; "Carrying hatred to great length"; She
would say selling so that Hasham wouldn't get plot.

P. 279 "A further point which I accept as
truth". With great deference not sufficiently crit-
ical. Reasons for leaving up.

O'Donovan: (1) Half acre (2) Hasham's plot
Briggs ? (3) That she was going to get a lot of
cash and not a little? (see page 271 Khanna)

30

O'Donovan: Defendant has never canvassed never put;
if hypothesis should remain hypothesis (2) If she
wanted lot of cash would she sign agreement. She
understood for 15,000/- and balance to be paid 6
months later and mortgage to be made over? (3) Fin-
ally this possible no woman in senses would sell 4
sub-divisions for 100,000/- when they'd cost a lot
more and she still owed;

She won't but half in 1953 for 96,000/- to sell for
100,000/-

40

Question if daughter read out option in favour
of respondent.

(4) Surrounding circumstances not alluded to; woman agreed by own family sound business if explained.

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Has plot regarded as 4 plots; in process of acquiring remaining half astute and owes 111,000/- before its all her property; knows can't sell without paying off mortgago.

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55,000/- cash, half share of mortgage purchased; that she was getting good bargain.

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10 Entitled to finding she tore it up on ground it was a mistake as to conveying 1/4 not whole plot; rely on re-examination of plaintiff.

Then gravest doubt to be cast on credibility of Harji's evidence: p.281 line 13.

Fundamental thing is if she interested worth only 100,000/- and signed why suddenly changed mind to back out of a reasonable bargain?

20 Leaves one in mystifying state; answer we didn't know what was in repudiation as soon as we knew; why should Ishani say appears some mistake; once conceded contract on central issue and back on pleading and sufficient regard not given to that, rest of findings cease to be as reliable as they otherwise be.

Real reason agreement not in accordance with what she intimated she was doing; points all in my client's favour; non-direction on essential point; at large; another view of facts can be found here.

30 Values: plaintiff's insistence on s.p. clear indication of where he thinks his advantage lies.

(3) Finally; in equity even if by her foolishness committed self by agreement plaintiff and left to his legal rights; even admitted facts reveal disturbing state of affairs in which advocate not free from blame. Where circumstances indicating etc.

Briggs: Original option; what effect on mind if translated into Gujarati; Re my House: "land appertaining to the house. Genuine misunderstanding is that your case or blankly fraudulent?

40 O'Donovan: I had said reference to sub-division misleading; I do rely on misunderstanding whether deliberate misrepresentation or not.

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She thought she was selling one sub-division
and house. I did put we ended this way so that if
translated in Gujarati it could bear the interpretation put by me.

Interpretation is Gujarati int. mean selling
her house with vacant land on 1 plot while whole
property larger than that.

Lastly where circumstances as illit. want of
legal advice not appearing consistent with
consent, a good reason for refusing specific
performance, a discretion even if one didn't go so
far as to find plaintiff had been deliberately un- 10
fair. Age. Mut. want of advice, varying terms
from option drawn up without committing her; most
important bargain at that time for that price; even
if in need of money (no evidence) and get round
mortgage that inconsistent with her having
consented to that memorandum of agreement.

If you find basis for her complaint that docu- 20
ment not read over a fortiori plaintiff should not
get s.p.

Adjourned till 2.30 Sgd. C.P.C.

2.30 p.m. Bench and Bar as before.

KHANNA:

1) The legal Issue; Two fundamental distinctions;
A) Difference between damages and s.p.; damages a)
breach b) intent on other party intimating that he
puts end to contract and won't perform future obli-
gation and sues for damages.

But in s.p. a party must plead and show he is ready 30
and willing to perform every step whichever in fu-
ture or at present;

B) difference between non-recognition of contract
as a whole and refusing to carry out a single clause
without denying valid or existence; see Lord Wright;
cf. Johnstone's case; single covenant not carried
out; intent expressed it'll not be carried out;
without treating it as wholly at end treated as
breach and action for damages brought; not competent;
see headnote ?? if Hochster's applies where whole 40
contract can't be put end if one clause not carried
out by promisor.

10 Frost v. Knight; Breach of promise "so soon as father died" applied and plaintiff could sue; entirely repudiated long before performance; could sue straightaway; p.113; Both cases on damages; whenever contract as a whole has been repudiated; clear intention to put end to contract; see Shaffer v. Findlay 1953 1 W.L.R. 106; Goods to be supplied over 5 years up to £80,000 to be sold in one year; Contractors not up to the stipulated amount; held on own account of plaintiff clear (p.112) that "deft. made it clear doing best but since S. ill no one w. compar. knowl. of mkt". Orders passed on. Proceedings commenced for damages for repudiation Sheatfield "liable"; reversed (p.114); If one party before time of performance declares intent not other party may treat as immediate breach and bring action for damages; Lord Wright 1942 A.C. 356 "at p.379". Where evinces intent no longer to be bound and other accepts it - ended so far as regards future performance on both sides; under arbitration clause only dispute; no difference between refusal to take further instalments or whole delivery. Must be rescission; anticipatory breach doesn't necessarily involve intent to repudiate.

Difference between repudiated contract and repudiated liability under it - former puts end entirely. Difference if she said "I've performed but won't convey".

30 Shaffer's case; not complete breach; Upjohn J. "unable to come to conclusion that they evinced intent no longer to be bound."

In present case total repudiation.

Point 2 Shaffer's case; no opinion expressed as to whether could sue for damages; must you put precise ground on which you later rely; p.121.

All I have to show is intent not to be bound; Therefore sufficient breach and repudiation to entitle me to sue at once.

40 Briggs: Only on basis you have rescinded on basis that other side repudiated.

D.K. Fundamental theory of s.p.; on basis contract was alive and not rescinded;

Briggs: Not also condition 2) some sort of breach;

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Khanna: My cause of action 1) letter 2) When I get other letters enough to let me sue; p. para.

All required for s.p. is breach by other side; V.P. p.467 Johnstone;

Khanna: 1) If one stipulation broken and to be perform. in future you wait 2) You can sue straight-away.

Briggs: Is this case of s.p. on anticipatory breach?

Khanna: If you renounce in entirety sufficient breach for repudiation.

10

Intent no longer to be performed is a breach. Freeth v. Burr is referred to; s.p. L.R.9 C.P.208. Halsbury Vol.8 3rd edition; p.205; para.348; under contract; breach and remedies; breach does not generally release from liability to perform except where mutual promises so that each condition prec'd for other - not discharged if other party received subst. consideration or treats as still subsisting Para.347; where damages increased s.p.; Para.345.

Sinclair: This was a repudiation as strict from breach. Equity looks to intent; repudiation must ? other than that contract broken; I accept that and put end or if for s.p. "I'm ready and willing to perform." P.213 Freeth v Burr; acts and conduct evince an intent not to be bound and "altogether refusing to go on with contract.

20

Passage in Johnstone v Milling, Cotton L.J. at page 471;
P.203 Halsbury.
P.542 Snell's Equity.
1946 C.A. 4/1946; Kehar Singh & Ajit Singh;
13 E.A.C.A.

30

Repudiation is sufficient breach; by declaration of intention: Shaffer p.108

Foolish to wait 6 months for abandonment whether can be enforced in equity.

549 Snell 24th Edn. Mistake - no finding known.

Khanna: p.52 The defendant's version as to not having documents to read out. No room for any equitable relief; you must ask for it.

40

Briggs: Suppose she really believed she was only

offering half? D.K. only if other side agreed.

D.K. If finding of fact hardship then intent be ground for so finding; he has dealt with the question of equitable relief; says she was annoyed and says it was merely an excuse; impossible for judge to believe her evidence. See p.54: How can she get relief?

Adjourned till Tuesday.

Sgd. G.P.C.

10 18.2.57 Bench and Bar as before.

KHANNA; (1) On Damages Indian Contract Act applies;
(2) On s.p. we have not I.S.R. Act which makes subst. departure; Art.4 K.C. Order in Council "equity and stats. on general application". English law up to 12.8.1897. Not concerned with S.39 Indian Contract Act which is damages for breach.

20 English law Hochster v De La Tour not applicable to extent they apply in India;

1942 Vol. I.A. 70 I.A.35 at p.44.

Muralidhar Chatterjee v. International Film; see page 45. We are concerned solely with s.p.; Canadian law is English law.

Lord Blanesburgh 1928 Vol.55 I.A.360;

Ardeshir Mama v Flora Sassoon; see p.364; at p.371.

Roberto v. Bumb 1943 Vol.2 Bom.L.R. p.613.

30 Roy v Kloefer Wholesale Hardware and Automotive Co. Ltd. 1951 Vol.3 D.L.R.122.

Vol.13 p.25 Ali Ghulam v. Mohd. Yusuf a judgment for months tenancy to new tenancy on expiry of sitting tenant; at p.26;

Harley J. notes 1) Refusal to take deposit
2) Keys and possession claimed back
page 285; Evidence at p. 288/9; 3rd para. letter; and p.124; lines 12-16; p.95 in demand keys back and actual taking steps to get back, plus refusal to take deposit - breach of covenants p.215
40 line ; p.135. 2 actual breaches.

Resuming previous arguments last time;

Great Hardship p.558 Snell's Equity; must exist at

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date of contract: no specific hardship set out; none found, no attempt to raise eq. in her favour; you must admit you made a ; it can't thrust hardship on her. 24th edn.; Court below accepted Flatt's evidence; affected by Emergency 2) deterioration 3) developing costs. Fair price. Difficulty and delay in finding surveyor. 4) Mau Mau used the plot; power to demolish or confiscate - see p.124; Appellant's sons; line 38; and p. 132; p.141; Flatt's evidence; p.196 et. seq. (24.2.54) - was 4 days after contract): he made one inspection in February and one 10 days before action

10

So much for hardship and in ad. of price; justifying in accepting that evidence; no hardship, fraud unconscionability - so found.

The facts:- ample evidence to support finding.

Sadrudin: p.273; not contested by O'Donovan.

He was entitled to observe on demeanour of appellant "unashamed and laid false charge of fraud." Unconscionable attitude herself, by attitude, for Court to witness her.

20

p.157 - (lines 37-39) Sultan Ali, "was surprised", no fraud (note rather thin).

Briggs: If Judge didn't appreciate grounds for thinking that respondents evidence also perjurious, might be ground for interfering.

V.P. Why respondent continually deny the acreage dispute - rumours in market etc. If Judge hasn't directed mind fully, matter at large, very cogent circumstance.

30

KHANNA: Not enough to reverse whole decision.

BRIGGS: Key to truth why did she tear it up.

KHANNA: No Judge could accept Ishani.

KHANNA: I agree might be crux; Judge has paid more than ample attention. Taken extracts and shows how mind works; one has to take broad picture.

V.P. If his failed sufficient to take into account one matter which fundamental affects credibility.

KHANNA: I am prepared to examine as fully as possible, p.52 - 54. Madan & Shah's letter p.387/8. 40

BRIGGS: Way in which it was impliedly represented was it dealt with $\frac{1}{2}$ acre and house.

No particulars of fraud; see para. 9 defence; p.53/4 p. "talk over half acre"; p. ; line ; (Ishani's); Judge must piece together all little bits; he concluded very flimsy evidence of washing out agreement by consent; p.65 line 31; p.66; Misunderstanding says Ishani. p.75; line 10 onwards; p.77 line 4 and p.78; "Angry" but settlement; p.79 line 8; which settlement? (Sultan Ali); $\frac{1}{2}$ acre talk and misunderstanding. Judge said defendant of undue put in knowing she couldn't support it; 10 p.31 line 43; p.32; key important; p.34 very important - re the $\frac{1}{2}$ acre conversation; See p.104; (son); Judge entitled to take into account twisting relationship of principal and agent (of defence into buyer and seller); judgment p.272/3.

Entitled to take into account any cheque made or referred to in Ishani's office; p.46; She denied even her signature on duplicate very important on credibility. p.47; p.66; signatures;

20 Adjourned till 2.30.

Sgd. C.P.C.

2.30 p.m. Bench and Bar as before.

KHANNA continues;- Denied signature and pleaded ignorance of duplicate; in re-examination admitted her signature. After the adjournment Sultan said duplicate handed to Ishani.

Judge entitled to take into account she was a business woman; Judge ruled out non est factum. She said Ishani acted for her - he had before; when she puts up incredible account of "blank" etc. how did she explain the amendments in option? Must have been read over to her. 30

I breath no then said in conversation she told him beacons had been put. Judge disbelieved Amina. Judge mild expressions re Ishani - untruthful and amazing; She'd set up 2 sets of misrepresentations re option.

Para. 9 defence - quite inconsistent with her evidence. See as sample page 32 lines 38-41; cf. page 40 35 lines 36-38 and onwards. Original scheme of subplots abandoned and hotel scheme put in. At p.37 she denies discussions as to beacons; p.40 No discussions on beacons; but page 58 a different story; quite inconsistent with what she said before.

At p.40 "Nett": L. at the original; apparent word inserted afterwards (option Exh.A.1);

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Briggs: Must be at her request.

KHANNA: Page 40 conversations re beacons; p.41;
More at 42 on $\frac{1}{2}$ acre. p.48; Defence contra-
dicted put in. p.49; Most important
contradictory defence; Though pleads misrepresentations says at 49 she never had any talk. Judge P.273

I agree one comment wrong.

Briggs: If plaintiffs party to fraud why go to defendant's nephew.

Khanna: I agree negatives fraud;

10

Ishani's evidence p.62,63,64,65; misunderstanding - what defendant signed (important); non reading over;

Credibility of Hajibhai: Incredible; patching up case to get revaluation; p.126 lines 34; p.265 several minutes; p.266; Sultan acquaintance but admits contented if he were there. p.142 line 35, denies she got annoyed on mortgage earlier on he says the contrary, important. Sultan's credibility. p.147/8. "Not to my interest to see or observe" then p.154/5, why go to Akram.

20

Briggs: If this witness to be believed she expected to get the whole 100,000/- without the mortgage being paid off. Important.

Khanna: p.154 and 155 - 163.

Now to Harji's evidence:- p.255 why then build up another line of. He admitted receiving letter same day, p.258, agrees to provided D.N. I suggest he admit it got it till next day.

30

Briggs: Is it false if error only as to date?

Khanna: I submit he got it next day; he was confused and cross examination built up on series of confusions. V.P. p.238, line 22, Khanna My letter refers to that statement.

p.383 Letter out on his instructions.

V.P. Why deny it? Khanna See Judgment - explanations: 1) Confusion 2) 1 year after trial, p.273, and p.278, not such contradiction as completely destroys credibility of other witnesses.

40

O'Donovan: The Canadian Cases, same result by contradiction. lines of reasoning, property in Ontario Court of Appeal, 628 and 621 Laidlaw, right fo keep

contract open - can be maintain action for specific performance before time for performance.

" - of decision although contract not completed, even counteraction commenced, completed by t of judgment, then Procedural Act.

Briggs: In fact it is not at an end. "You treat it as end but is not.

10 I distinguish the line of reasoning, tant. to saying no counteraction when suit filed and real cause only subsequent accrued, that did not matter as it accrued before judgment.

Therefore in Ontario Court of Appeal judgment given on a counteraction which accrued subsequent to institution of proceedings, Court wished to give effect to avoid multiplicity. Not permissible in Kenya. Halsbury 2nd Edn. Vol.1.p.8, para.9 which accrues on happening of latest of those facts. Indian law Mulla p.120, Code of C.P. 12th Edn. fact which if traversed necessary to prove to support judgment; must be entitled to institution of suit; 20 Chitale 5th Edn. C.P. Code; p.379 Vol.1; "fact necessary for plaintiff to prove if traversed to support right to judgment." Commentary on O.VIII identical with Kenya O.VII p.1803; exception; "change of circumstances"; inappropriate to shorten litigation; doesn't apply to where no counteraction at all no right of action to damages as clear election to keep contract alive. O.VIII r.1 "particulars of 30 Plaint". Counteraction "and when it arose". Kenya Rules O.VIII r.1; I'm asking Court to say Canadian cases wrongly decided. Not good enough in Kenya to claim right arose after institution of suit.

Adjourned till 10.30.

Sgd. C.P.C.

19.2.57. Bench and Bar as before.

40 O'Donovan continues:- Earlier case: decision based on cause of action arising after institution of suit. Infringed on O.VII Kenya rules. Laidlaw p.620, arguments, (1)alter. immed, cause of action of before perform. (2) anticipatory breach not itself creates cause of action; no difference between incomplete cause of action and no cause of action; and to say subsequent to suit it accrued for first time;

Refer to 1 or 2 Indian decisions supporting notes Mulla and Chitale.

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U Ba Maung v. U Chit Hlaing and Anor. A.I.R. 1941
Rangoon 27. Nearer to this case than the damages
one. S.R.A. Whether equity that apply to relief
by injunction; p.29 2nd column last paragraph.
Dominion of India A.I.R. 1950 Cal. p.207; Note (b);
Cause of action complete before suit filed; Suit
for damages; p.208 paragraph 20. Ram Chetty v.
Sirvai I.L.R.1898 Vol. 21 Mad.288; Entitled to
relief completed pending suit; dismissed.

A lease B - sold to C; not entitled; p. 290;

10

Practice: In U.K. matters subsequent to writ in
a/c are those affecting defence or reply to set off
or c/c. O.24 "matters arising pending action".

No place in our rules for premature suits when
cause of action incomplete.

2nd Canadian Case; Contrs. and proc. exclusively
provincial - might vary between provinces; Vol.XI
Hailsham p.92; 93; exclusive jurisdiction; 13 and
14.

Roy's case; line of reasoning of Ontario High Court
collides with earlier case of Ontario Court of
Appeal for there was no cause of action at date of
institution of suit. Later judgment says wherever
anticipatory breach there is immediate right for
specific performance and suit not premature; p.131;
132; hadn't directed self on diametrically opposing
line of that in earlier case.

20

130 orig. that in Roy's case; erroneous reason-
ing; 1) Judge wrong when he says by depriving pers-
on announcing refusal of opportunity of taking
advantage of supervening defence. Courts of equity
are acting in accordance with the enforcing of C.L.

30

Clear under C.L. if announcement of refusal
not accepted he has locus penitentia till time of
performance. (ship to Odessa); approach to equity
leads to opposite result; Court not allowing wrong-
doer to get away if left in same point as never
announced refusal; left in same point with rights
and burdens; doesn't give him advantage.

Common Law first then equity. S.39 Indian Contract
Act has to be applied and followed in equity; refer
to English decisions ev. 39 intended to be codifica-
tion of common law.

40

Here contract which is wrongfully torn up; followed by letter in which buyer says "I'll hold and force you not accept repudiation"; tearing up document a complete nullity and forwards no common law right at all.

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1863 Mad (refusal by promisor) Pollock and Mulla - promisee may put end to contract. p.286 6th Edn. "notice by vendor a nullity."

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Avery v. Bowden;

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10 Briggs: He considered it didn't alter English law; didn't say "exercise option to bring it to an end." Not what the section says. "Put an end or acquiesce in conten."

Briggs: To put end is to rescind, not treat it as rescinded.

O'Donovan: May argum, equal - either by putting end to contract or allows prom. to treat it as rescinded for damages or else no cause of action.

20 Fact that no cause of action unless announcement of refusal accepted as breach clear from Avery v. Bowden. Vol.119 at p.647. Clear announcement promisor wouldn't be bound if accepted as termination, immediate right to damages; not accepted; war makes contract illegal p.652 Cap. could treat as breach if declaration before war that no intention to load contract; but can hardly be considered as renunciation, not so when he continued to insist as per charter party.

30 A.I.R. 1925 P.C. p.188; promisor failing to perform; promisee can rescind; must do all his part.

Plaintiffs order with defendant to deliver to state 50 wagons; inst. payment; defendant failed to pay second; supplier Bird entitled to rescind contract and sue damages; kept alive by delivery of wagons; then write letter not losing to deliver balance unless cash; Thakur treated as breach; suppliers had kept alive and failed to take advantage of breach were themselves liable to breach; I submit equitable; p.193 edge; 2nd column; when default in paying 2nd instalment defendant could treat as void and rescind; tearing not accepted as ending contract; no immediate cause of action; Johnstone v. Milling had to wait.

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Rules of equity must be in conformity; Khanna says ignore 39 as its damages and we apply English equity.

1) Equity acts according to fixed rules;

2) follow statutory law of India - shown in applying S.53 Transfer of Property Act; part performance can't be applied to India of 53A; Ariff v. Jadunath Mulla 268 4th T. of P. 58 Ind. Appeals 91; Halsbury Vol.13 p.83; footnote (n); Jekyll M.R. 24th p.22 Snell; "never claim to override common law. Unless sustain. counteraction for damages no equity counteraction at all; situation can't arise where nullity at common law but action in equity; that is Roy's case; wrongly decided; nothing to give plaintiff immediate right under common law but gives perfect right to equity. Very cogent reason why is S.2 Lord Cairns Act; 1858; not repealed till 1925 and is applicable in Kenya. Snell 539; in every case where suit for s.p. lies Chancery Court has power in alternative to award damages. Regarding damages as common law remedy Roy can be reduced to absurdity - on given fact document torn up and other side hold you to it. At common law no right to damages at all but if immediate right to s.p. its by Lord Cairns Act. 10 20

must conform and act under identical rules. Equity acts on relief against forfeiture and cases under Statute of Frauds.

Halsbury Vol. 31 2nd Edn; p. 327; eq. 1e. relief in case of "breach of contract"; must be a breach; p.330 and 331; unless in point to recover damages at law before equitable relief relaxed but Court wouldn't interfere where no damage suffered. 30

Vol. 13 Halsbury p. 13; specific performance para. 9 "where contract not duly performed, option to perform or pay damages; where remainder of damages not adequate equity assumed jurisdiction."

You can't have common law regarding it as nullity and equity regarding it as cause of action. In Roy purported to follow equity follows law. Don't quarrel where breach gives rise to C.L. right; if in given case no cause of action in law how can there be one in equity unless flies off in a tangent. 40

Halsbury Vol. 31 para. 469; p. 401; "when by

words or conduct evinces intent etc." other party can say "repudiated" as much determination by rescission as by consent; either default at roots or acts making performance impossible; in such cases either side S.P. (V.P. if repudiated acquiesce) i.o. where breach not accepted no cause of action for damages or specific performance. See Fry on S.P.

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Briggs: says see (b) supra where they render performance possible.

10 O'Donovan: I concede that;

Fry 6th Edn. para. 3 Ch.I; directs party in default. Court rarely if ever interfere till time for performance passed.

Briggs: Chitty and Hailsham's statement of principle very different.

O'Donovan: If Chitty were for s.p. gilbertian one grants decree for sale of land of enemy alien for sale next year - war breaks out - what happens then?

20 Author very clear on breach when refusal to perform in picture - acceptance of breach as putting end to contract.

Pollock 13th Edn. p. 548; line 12; rarely interferes till time for performance passed. Johnstone v. Milling if elects to treat as subsistence he must wait and then sue; applies to common law and equity unless adv. extraordinary reason why equity difficulty and maintains equity does not follow the law.

30 If I'm wrong re equity le. principles then there's ground in Snell for leaving client with legal remedies if on correct view of facts client under misapprehension about extent she sold. She meant she was clear on what she sold must on effect of contract thinks she sold 1/4 acre;

Briggs: says misled by fraud; he can't assume it was mistake if not fraud.

40 O'Donovan: Legal defences void or voidable if succeed - entitled to tear up; submit even if we fail on fraud, mistakes etc. nevertheless discretionary remedy and court should in exercise of discretion decide whichever on those facts remedy at law or s.p.; an answer to s.p. if view taken that appellant though bound and no mistake that she was selling 1/4 acre.

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Briggs: How come to that conclusion? one side or other.

O'Donovan: Fraud high degree of proof: rest on balance of probability; assume all unreliable I am content that decision as to probability based on established facts pointing one way;

1) No ground for awarding s.p. that judge thought unfair view of client(s) credibility; its not a ; its a question of plaintiff's conduct; look at his conduct in and out of witness box; all untruth; estate agents; only one view on probabilities from admitted facts; once accept. Plaintiff after down-right prevaric. At interview appellant after signing tears up in anger and states as not selling all 4 plots, from that easy step to probab. She was mistaken as to effect and was entitled to sell only 1/4. 10

Appellant's character - consistent view should be taken; either shrewd business woman wanting options translated etc.; she does not when perfecting title of 110,000 sell for 100,000 or 2) regard her as decay; don't say far too clever to sign options until satisfied what was in it. 20

Khanna: stressed plaintiff went to defendant's nephew. Must be innocent; but when plaintiff went to office in morning he showed her title to land; demied over mortgage at first; later he admits as its embodied in the contract. They'd (documents) show appellant owned only $\frac{1}{2}$; when Ishani advises plaintiff to have agreement of sale to secure title I'd adopt observation that he knew all about her affairs; he drew up whole title as he knew she was disposing of $\frac{1}{2}$ interest; he knew property purchased years before for 160,000/- and that there was Jubilee Mortgage; he also knew that it was going to cost her additional sums to get sole ownership for self; he and Harji didn't have reports of Flatt before them; his documents revealed amount on transaction of disastrous bargain; $\frac{1}{2}$ share given as present; 55,000/- for other $\frac{1}{2}$ and 81,000/- to Diamond to sell all for 100,000. If Ishani interested would say are you sure you want to go on with it? Not a word. But Ishani in concert with Plaintiff and without defendant's consent draws up agreement, giving immediate possession and liable to pay interest on mortgage for next 6 months. 30 40

When she acts with violence he gives it up.

Significant that plaintiff never thought statement from Ishani and never suggested he'd come to court. Once she stated an obvious cogent reason its an easy step to say she was under a misapprehension. If we enforce s.p. she has to pay balance of 55,000 and 30,000 to co-tenant and 81,000 to Diamond Jubilee.

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Why shrewd business woman engage in bargain of this nature.

10 Briggs: House was a wreck.

O'Donovan: Obviously she thought it worth over 100,000/- unless insane what's in her mind? She's not in straitened circumstances - on account of purchase price rejection shortly before; possible explanation was she wanted cash; not put to her.

Of course she wanted 100,000/- cash for property not for whole property but for one plot; Sultan p.; comprehension if she sells one out of four; she is bound to give clear title; under impression she could arrange with Diamond to lease 81,000/- for 3 plots and get 100,000 for remaining. Is she a fool or does she know what she does.

20 If astute over documents and foolish over contract and terms of sale.

Khanna: Kernal of whole matter is repudiation gives at once a right to elect 1) for s.p. or 2) damages; but in latter case he must put an end and rescind.

30 When effect of decision is to be considered look at whole decision; there is a complete cause of action and right to sue at once; court will see that time for performance is passed.

Wells a very full decision; Judges went into many English cases and explanation of doctrine anticipatory breach meaning complete breach and more lies with the other side. Other side must say "no breach on my side. When must a cause of action arise. Each depends on own peculiar incidents. Can't sue in currency of term;

40 O'Donovan: Doesn't say narrow facts where wide principle enunciated; in Rangoon was he holder of option of profit under statute? He had refused before statute and cause of action never accrued under that ordinance.

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Dominion case narrow fact part of Pakistan; Indian courts no jurisdiction.

Is there peculiar system in Ontario? O'Donovan said Court of Appeal and Wells case irreconcilable. Can't (Alibhai Yusuf) take advantage of own wrong.

Khanna: If no s.p. could Court dismiss the action. Court could not deal in same action with 2; Lord Cairn's only incidental power; 5 Indian Appeals says mutually exclusive; amend under Indian Law under S.R.A.; acts based on different facts; in 17 I.A. Film Company they say not equating English and Indian law; later says void contract to recover monies paid apart from damages; Damages for misdescription in Kenya; not for breach of contract in suit for s.p.; Ardeshi Mama v. Flora Sassoon; s.p. based on readiness and willingness. 1928 55 I.A. p.360; under s.39 Indian Contract Act like Transfer of Property Act a code complete in self, no room for doctrines of equity; Col. Order in Council says apart from the Indian Acts; in India Specific Relief Act only; wise thought to introduce English equity and English Statutes up till 12.8.97 and will disregard Contract Act; if equit, re contract are based on different principles court bound to follow doctrine in English, not bound to follow Indian Contract Act re s.p. 10 20

Order in Council fountain source; I.C.A. must be put aside re s.p.; to tem. extent recognised by S.53A (in 1929); we aren't bound by those amendments; ours is 1877 Act; by our Ord. we say amendments up till 1907; applied Acts Ord. in Vol.2 s.2. 30

Lord Cairn's Act; doesn't alter original doctrine of equity and rules of law says Blanesburgh; equity didn't get j.d. to etc. notwithstanding no acceptance of repudiation; if those things present s.p. out; you can only get damages on a full rescission of contract.

O'Donovan; says only s.p. where you can sue for damages at law. Blanes. shows you can't pursue remedies concurrently; accept breach and put an end for damages; for s.p. you must show you have done nothing to put it at an end. 40

Roy case accords with P.C. decision in 55 I.A. Should be follows; this court not in any way fettered; go to first principles. Consistent with

Blanesburgh Roy is true case. No subst. in legal argument there is election to sue at once.

C.A.V.

15.3.57. Bench and Bar as before, save that O'Donovan is absent.

Judgments read. Appeal dismissed with costs.

Sd. C.P. Connell.
JUDGE.

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JUDGMENT OF SINCLAIR, V.P.

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

CIVIL APPEAL NO.21 of 1956

BETWEEN

KHATIJABAI JIWA HASHAM

APPELLANT

AND

ZENAB D/O CHANDU NANSI widow and Executrix of HAJI GULAMHUSSEIN HARJI, deceased, as legal representative

RESPONDENT

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(Appeal from a judgment of H.M. Supreme Court of Kenya at Nairobi (Mr. Acting Justice Harley dated the 13th January 1956

in

Civil Case No.668 of 1954

Between

Haji Gulamhussein Harji

Plaintiff

and

Mrs. Khatijabai Jiwa Hasham

Defendant)

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JUDGMENT OF SINCLAIR V.P.

This is an appeal from a judgment and decree of the Supreme Court of Kenya for specific performance of a contract for the sale by the appellant to

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the respondent of Plot No.209/58/1 consisting of a house and just over 2 acres of land situated next to the Mayfair Hotel, Nairobi. The Supreme Court also awarded to the respondent Sh.1,500/- damages for delay and made other consequential orders.

The appellant is a Khoja Ismaili woman of about 58 years of age. She is not literate in English, nor can she understand it. The respondent is a land and estate agent residing and carrying on business at Nairobi. He, also, is a Khoja Ismaili. In 1948 the appellant's husband and two others purchased the premises in question for Shs.152,000/- each holding a one-third share. In 1950 the appellant's husband died leaving her his share. In June 1953 the appellant became the registered owner of half the property. Towards the end of 1953 she entered into an agreement to purchase the remaining half for Shs. 55,000/-, subject to her taking over the entire responsibility for the mortgage to the Diamond Jubilee Investment Trust Limited on which there was at that time owing the sum of Shs.81,000/-. By February 1954 she had paid Sh.25,000/- of the Sh.55,000/-, so that she then owed the balance of Sh.30,000/- for the purchase of the other half of the property and Sh. 81,000/- on the mortgage, a total of Sh.111,000/-.

On the 18th February, 1954 the appellant signed a document giving the respondent an option to purchase the property for Sh.100,000/-. The option was written by the respondent in English and was witnessed by a young Ismaili girl named Amina Hasham. It reads:-

"Nairobi. 18.2.54.

Mr.Haji G. Harji
Nairobi.

Dear Sir,

Re my house on Slater Road ad-
joining Mayfair Hotel, Nairobi.

In consideration of Sh.5/- five I hereby giving you option to purchase the above property for Sh.100000/- net one hundred thousand.

The above property is over 2 acres and sub-division is completed.

The House of above property will be given in

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vacant Possession with all vacant land contain.

This option is good up to 22nd February 1954 up to 1 p.m. to you or your nominees.

Yours sincerely,

(Signature in Gujarati)

Witness: Amina V.Hasham".

Later that day the respondent agreed to sell the property to one Hasham Nanji, one of the proprietors of the Mayfair Hotel, for Sh.107,000/-. He had already obtained from the appellant the key of the house which was vacant. On the following day, the 19th February, the respondent and Hasham Nanji went to Mr. Ishani, the respondent's advocate. Mr. Ishani was also the advocate for the Diamond Jubilee Investment Trust Limited. The respondent handed the option to Mr. Ishani and instructed him to prepare two agreements of sale, one between the appellant and himself and the other between himself and Hasham Nanji. The respondent then went away and called the appellant who arrived at Mr. Ishani's office with one Sultan Ali. Mr. Ishani was not acting as the appellant's advocate in this transaction, though he was her nephew and had acted for her or her family on previous occasions. The agreement between the appellant and the respondent which had been prepared by Mr. Ishani in duplicate, was signed by the appellant, the original first and then the duplicate. It provided inter alia for payment of Sh.15,000/- against the purchase price of Sh.100,000/- on or before the execution of the agreement, for the sale to be completed within six months of the date of the agreement and for payment of the balance of Sh.85,000/- on presentation of documents of transfer, either by the taking over of the mortgage for Sh.81,000/- and payment of Sh.4,000/- on completion of transfer, or, if so required, free from encumbrances. In the agreement the appellant gave complete vacant possession and the respondent acknowledged receipt thereof. Almost immediately after signing the duplicate of the agreement, the appellant tore up the original agreement stating that she intended to sell only a portion of the whole plot. She thereby repudiated the contract. She did not take the cheque for Sh.15,000/- deposit which the respondent had signed. Later the same day the respondent's advocates wrote to the appellant insisting on the performance of the contract, and the

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appellant's advocate wrote to the respondent confirming her repudiation of the contract and alleging that the whole transaction was fraudulent.

The plaintiff was filed in July, 1954, the respondent claiming specific performance of the agreement of the 19th February, 1954, and damages for delay, or, alternatively, rescission of the agreement and damages for breach of contract and loss of bargain. In her defence the appellant set up a number of alternative defences:

- (a) that the agreement of sale, by introducing new terms not contained in the option, was not an unqualified exercise thereof, but constituted a counter-offer which the appellant at no time accepted, and that the appellant at no time completed the signing and delivery of the agreement or acknowledged it as binding upon her as her act and deed;
- (b) that the appellant was induced to grant the option and make the agreement of sale by the fraud or misrepresentation of the respondent;
- (c) that the appellant was induced to grant the option and make the agreement of sale by undue influence of the respondent;
- (d) that the agreement was entered into by mistake in that the terms thereof were drawn up so as to contravene the intention of the parties by purporting to refer to the whole of Plot No. 209/58/1, whereas it should have referred to a portion only;
- (e) that the respondent dealt with the appellant in an unfair and unjust manner and was thereby disentitled from having specific performance of the agreement;
- (f) that the respondent and the appellant verbally agreed at the office of Mr. Ishani on the 19th February, 1954 to rescind the option and agreement of sale.

The learned trial Judge rejected those defences and gave judgment for the respondent as indicated above. The appellant appeals against that judgment.

I shall deal first with the submission of the

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appellant that no cause of action at the date of institution of the suit is disclosed by the plaint on the evidence. Mr. O'Donovan's argument in support of this ground ran as follows: a cause of action must be complete at the time when the suit is instituted; the time for completion of the contract in the present case was not until six months after its execution, namely on the 19th August, 1954, some weeks after the plaint was filed at the beginning of July 1954; when the appellant repudiated the contract on the 19th February, 1954, the respondent was put upon his election either to treat the contract as at an end subject only to his right to sue for damages, or to treat it as still continuing in which case no breach could occur until the time for completion had elapsed; in the former case, having treated the contract as at an end, he could not sue for specific performance at all and, in the latter case, no cause of action could arise until after the 19th August, 1954. He referred us to section 39 of the Indian Contract Act and to Hochster v. De la Tour, 2 E. & B., 678. Frost v. Knight (1872) L.R. 7 Ex.111 and Johnstone v. Milling, (1886) 16 Q.B.D. 460 amongst other authorities.

Mr. Khanna for the respondent submitted that the repudiation of the contract by the appellant constituted a complete anticipatory breach which gave the respondent an immediate right to sue either for damages or for specific performance. He also submitted that, in any event, the appellant committed actual breaches of the contract when she refused to take the deposit and claimed back the key and possession of the house. I shall dispose of the latter submission at once. In my view those acts of the appellant were not breaches of the contract but were merely indications that her repudiation was genuine and adhered to.

Section 39 of the Indian Contract Act reads:

"When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance."

That section is in substance a codification of the English law and it should be read in the light of the English decisions. The English law relating to

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an anticipatory breach of a contract, in so far as it concerns an action for damages, was thus stated by Cockburn, C.J. in Frost v. Knight (supra) at page 112:

"The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of Hochster v. De la Tour and The Danube and Black Sea Co. v. Xenos on the one hand, and Avery v. Bowden, Reid v. Hoskins, and Barwick v. Buba on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.

On the other hand, the promisee may, if he think proper treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

That passage was cited with approval by Cotton, L.J. in Johnstone v. Milling. At common law therefore, if the injured party accepts the repudiation by the other party, he may at once bring an action for damages as on a breach of the contract; but, if he does not accept the repudiation, he must wait until the time for performance of the contract has arrived. The question for decision in this appeal is whether, if the injured party does not accept the repudiation, he may, nevertheless, treat such repudiation

as a breach of the contract entitling him to sue at once for specific performance. There appears to be no reported decision in England on the point, and it therefore becomes necessary to examine the principle upon which Hochster v. De la Tour and the later cases were decided.

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10 The doctrine of anticipatory breach was first clearly laid down in Hochster v. De la Tour where a travelling courier sued his employer who wrote before the time for performance arrived that he would not require his services. The courier sued for damages at once, and it was held, as stated in the headnote of the report, that a party to an executory agreement may, before the time for executing it, break the agreement either by disabling himself from fulfilling it, or by renouncing the contract, and that an action will lie for such breach before the time for the fulfilment of the agreement. The following extracts from the judgment of the Court, which was delivered by Lord Campbell C.J., are pertinent:

20 "Another reason (in support of such an action) may be, that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation..... In this very case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement."

30 It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consistent with principle, if the defendant were precluded from saying that he had not

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broken the contract when he declared that he entirely renounced it."

Hochster v. De la Tour was followed in Danube and Black Sea Company v. Xenos, 2 E. & B. 678, where Williams J. said that, if one of the parties to a contract expressly repudiates and renounces it before the time for performance arrives, the party to whom the promise is made may treat that as a breach of the contract, at his option; but he is bound to exercise his option if he means to rely on the breach. Williams J. went on to say: "I think it is a necessary consequence of the decision in Hochster v. De la Tour that, where there is by the party making the promise a renunciation which amounts to a breach, it must operate as a discharge of the other party from the performance of the contract on his part." He was then considering a cross-action for breach of contract by the party who had repudiated the contract, and he clearly meant no more than that, if the injured party accepts the repudiation, he is discharged from further performance of the contract. The same view was taken in Frost v. Knight as the following passage from the judgment of Cockburn, C.J. indicates:

"The considerations on which the decision in Hochster v. De la Tour is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

It is true, as is pointed out by the Lord Chief Baron, in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is - and the decision in Hochster v. De la Tour proceeds on that assumption - a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has

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an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

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The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote."

Counsel for the appellant, however, relied strongly on the following passage from the judgment of Lord Esher, M.R. in Johnstone v. Milling in support of his contention that the repudiation of a contract by one party does not amount to a breach of the contract unless it is accepted by the other party:

"..... a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted, by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and

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there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue." 10 20

The passage is, no doubt, correct in its context but, if it is to be taken as a statement of general principle, I think it is too widely expressed. But I do not think that Lord Esher intended to lay down as a principle of general application that the repudiation of a contract by one party cannot amount to a breach of the contract, or cannot be treated as a breach by the other party, unless the other party adopts the repudiation as a rescission of the contract. That would, in my view, be inconsistent with the opinions expressed in Hochster v. De la Tour, Danube and Black Sea Company v. Xenos and Frost v. Knight. Lord Esher was considering an action for damages for breach of contract and, read in that context, I think the passage must be understood as meaning no more than that the repudiation of a contract unless adopted by the injured party as a rescission of the contract, does not amount to a breach on which an action for damages can be founded. That appears to have been the view of Cotton, L.J. who said in the same case at page 471 of the report: 30 40

"It must be taken therefore that the law is

that, when one party has done an act which amounts to a wrongful renunciation of the contract and the other has acted upon it as such, there is a cause of action in respect thereof, but, when the other has not done so, then both parties, as well he who has attempted to renounce the contract as he who asserts its existence, are entitled to the benefit of its provisions."

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10 Strictly speaking, the contract is not rescinded even when the injured party accepts the repudiation. As Lord Macmillan said in Heyman v. Darwins Ltd., (1942) A.C.357 at p.373:

20 "Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party still has his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called

30 a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken."

40 My conclusion from the authorities is that, although the repudiation of a contract by one party before the time for performance has arrived, is perhaps, not an actual breach of the contract, it may be treated by the other party, if he thinks fit, as an immediate breach of the contract giving him the right to bring an action for damages or for specific performance. As Lord Campbell said in Hochster v. De la Tour "it would be more consistent with principle if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it." I also repeat the words of Cockburn, C.J. in Frost v. Knight:-

"It is therefore quite right to hold that such

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an announcement (of repudiation) amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly."

If the injured party sues for damages, he must treat the contract as having been brought to an end by the breach except for the purposes of the action, since he clearly cannot recover damages for the total breach of the contract and still treat it as subsisting for all other purposes. But the same considerations do not apply if he sues for specific performance; if the injured party does not accept the repudiation, the contract subsists for all purposes, but he may treat the repudiation as a breach for the purposes of an action for specific performance. 10

There are two Canadian decisions which are in point; one of them supports the conclusions to which I have come. As the reports of those cases are not readily available, I feel it necessary to quote from them at length. In Roberto v. Bumb (1943) 2 D.L.R., 613, which was a decision of the Ontario Court of Appeal, Laidlaw J.A. said at page 620: 20

"The respondent did not wait until after the time fixed for completion of the sale, viz. October 15th, 1942, but commenced this action on October 8th, after the appellant had repudiated the contract. The respondent had the right to keep the contract open as a subsisting and effective contract and the sole question is whether he could properly maintain an action for specific performance before the time for performance by the appellant. 30

It is clear that the renunciation by one of the parties before the time for performance has come does not of itself put an end to the contract, but it discharges the other, if he so chooses, and entitled him at once to sue for the breach. Frost v. Knight (1872) L.R. 7 Ex.111; Hochster v. De la Tour, 2 El. and Bl. 678, 118 E.R. 922; Dulles v. Taylor, (1873), 34 U.C.Q.B. 12; Dalrymple v. Scott (1892), 19 O.A.R. 477; Neostyle Envelope Co. v. Barber-Ellis Ltd. (1914) 16 D.L.R. 871. 6 O.W.N. 43 reversing 12 D.L.R. 335, 4 O.W.N. 1585; American Red Cross v. Geddes Bros. (1920), 55 D.L.R. 194, 61 S.C.R. 143; Martin v. Stout, (1925) A.C. 359. 40

The cause of action was not complete when the proceedings were commenced in the Court, but when the matter came on for trial the appellant was in default and all conditions precedent to relief then existed. The respondent was prepared to show an existing contract; that he was willing and anxious to fulfil his obligations and that the appellant was in default. I think that a Court of Equity would not permit an appellant to avoid the contract merely because the action was started prematurely, nor would the respondent be thus deprived of his equitable right to a decree of specific performance, if he were otherwise entitled to it, Such a Court would not look favourably on such defence. Moreover no real benefit could be had by the appellant by giving effect to this objection to the proceedings, because the respondent would be free to commence a new action and to make the same claim as in the present one. The result would be multiplicity of proceedings concerning the matter and that should be avoided. The Judicature Act, R.S.O. 1937, C.100, S.15 (h)".

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In that case, as in the instant case, the time for performance of the contract had not arrived when the action was commenced, but the defendant was in default at the time the action came on for trial. It will be observed that Laidlaw J.A. stated that the cause of action was not complete when the proceedings were commenced. The same point arose later before the Ontario High Court in Roy v. Kloepfer Wholesale Hardware and Automotive Co. Ltd., (1951) 3 D.L.R., 122. In his judgment on that case Wells J., after reviewing the English authorities, said at page 129:

"It is, of course, quite clear that these decisions, and the rule that established them, arose in cases where all that was being considered was the common law right to damages for breach of contract. None of them deals with the situation where the equitable remedy of specific performance is sought, and until recently there seems to have been little authority in this respect. If, however, as Cockburn C.J. stated in Frost v. Knight, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, surely he is

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not deprived of his rights in equity

It may, of course, be argued that by the bringing of the action for specific performance the party repudiating is deprived of the opportunity of taking advantage of any set of circumstances which might, in law, relieve him from performing the contract from which he is attempting to escape. This fact has not deterred the Courts from giving the wronged party an immediate right of action where damages are sought, and, in my opinion, there is no reason why there should be any distinction in dealing with an equitable remedy such as the one asked here. It is obvious, I think, that an action for specific performance does not put an end to the contract. The purpose of it is, of course, to obtain the assistance of the Court in the performing of the contract. Moreover, if the party attempting to repudiate is given the opportunity of otherwise escaping from the consequences of the contract by virtue of something which may arise between the time of the repudiation and the time fixed for performance, and the Court insists on giving him that time, surely the Court is then assisting the wrongdoer to take advantage of his own wrongful act. If the wronged party is prepared to grant this advantage to the one repudiating that is one thing, but I know of no case in equity where the Court assisted a wrongdoer to reap the fruits of his own wrongdoing. The proper rule would seem to me to be to follow the procedure indicated by the common law decisions, that is, where there is an unequivocal repudiation, to permit the party seeking the completion of performance of the contract to bring his action at once. The matter is discussed by Williston on Contracts chiefly in relation to the common law decisions, and it is interesting to note that after a very critical examination of these cases by the learned author, in which the defects in the reasoning followed are thoroughly examined, he says in reference to the decision in Hochster V. De la Tour, supra. at pp. 3710-11, Revised Edition, Vol. 5, para. 1314: 'It has, however, settled the law in England that an action may be brought for an anticipatory repudiation, and that doctrine has been adopted in Canada, and in the United States, either by dictum, or

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decision, both in the federal courts and in the courts of almost all the states in which the question has arisen.'

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In applying these principles to an action for specific performance of an agreement to sell land, Williston says in the same volume at pp. 3708-09, last part of para. 1311: 'Where the owner of specific property agrees to sell it at a future day, it is certainly much easier to imply a promise that he will not otherwise dispose of it in the meantime, than it is to imply a promise in every contract not only to do but to say nothing inconsistent with the principal promise. But would a court, it may be asked, grant specific performance on January 1st, of a contract to convey Blackacre the following July, on the ground that the defendant had been guilty of an anticipatory repudiation on the earlier day? If such repudiation is an actual breach justifying an action at law, there seems no reason why a suit in equity should not be maintainable. Certainly no decree would require performance before July 1st, and it would at least be made clear that repudiation does not accelerate the obligations of a contract.'

That decision appears from the 1952 Current Law Year Book, 655, to have been upheld by the Ontario Court of Appeal and the Supreme Court of Canada. With respect, I agree with the conclusion arrived at by Wells J., though not with all his reasons. I am unable to agree that "by the bringing of the action for specific performance the party repudiating is deprived of the opportunity of taking advantage of any set of circumstances which might, in law, relieve him from performing the contract from which he is attempting to escape." Neither the bringing of an action for specific performance nor a decree for specific performance can advance the time for performance. A decree for specific performance orders the defendant to perform the contract according to its terms. Until the time for performance has elapsed, the party who has repudiated the contract is, in my view, entitled to take advantage of any supervening circumstance which would justify him in declining to complete it; if a decree has already been made, I think he would be entitled to be relieved from the performance. A decree for specific performance of a contract where the time for

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performance has not arrived would necessarily be in a special form which would provide for such relief to be given. I do not agree that the court would be assisting the wrongdoer to take advantage of his own wrong.

For these reasons, I think that the appellant had a complete cause of action when the suit was instituted, and that the first ground of appeal must fail.

I turn now to the contention of the appellant that the judgment is against the weight of evidence. According to the respondent, whose evidence the learned Judge accepted, he met the appellant by chance in an Indian bazaar on the 17th February 1954. She was alone. She stopped him and said "I have got a plot about two acres with a building thereupon and I want to sell it off - in Sclaters Road". She told him that the land was over two acres, and that it was vacant and that she wanted Sh.100,000/- for the land and building. In answer to his enquiry, she said that the land was subdivided and that beacons had been fixed. She agreed to give him an option for three days and it was arranged that he should meet her on the following day at the house of Mrs. Valli Hasham. The next day, the 18th February, he wrote out the option in English and took it to the appellant who was alone in the dining room. He read over and explained the option to the appellant in Gujerati which is the language of both of them. When he was translating the document she asked that the word "net" should be inserted after "sh.100,000/-" and that the words "and Beacons is already been put" which appeared after the words "the above property is over 2 acres and subdivision is completed" should be deleted, as she was not sure whether beacons had been fixed. He made the addition and deletion requested. He had written that the option was good up to the 20th February, but she agreed to extend it to the 22nd February. He accordingly crossed out the date "20th" and put "22nd". These alterations appear in the option Ex.A. The appellant then called Amina Hasham who read over and explained the option to the appellant. Thereupon the appellant signed it and Amina Hasham also signed it as a witness. On the 19th February, when he brought the appellant to Mr. Ishani's office Mr. Ishani produced the agreement of sale between the appellant and the respondent, told the appellant that he had prepared it on

the strength of the option given by her to the respondent, and read over and explained the contents to the appellant. The agreement as originally drafted provided for a deposit of Sh.10,000/-. When Mr. Ishani reached the reference to Sh.10,000/- deposit, the appellant said she was in need of Sh.20,000/- and must have it. Mr. Ishani explained that as there was a mortgage of Sh.81,000/- on the property, the balance was only Sh.19,000/- and she could not demand a deposit of Sh.20,000/-. She said "Thats all right, give me Sh.15,000/-". Mr. Ishani made the necessary amendments to the agreement and he, the respondent, signed a cheque for Sh.15,000/- which was handed to the appellant. Mr. Ishani read over the remainder of the agreement which the appellant then signed, the original first and then the duplicate. In examination-in-chief the respondent said immediately after signing, the appellant asked him if he had sold the property to Hashambhai. He agreed that he had sold it to Hashambhai, whereupon the appellant sprang up from her chair, tore up the agreement and left the office. He said that the appellant made no mention of intending to sell only half an acre. He maintained the same story in cross-examination, but in re-examination, in answer to a leading question, he agreed that after tearing up the agreement the appellant said that she intended to sell only a portion of the land and not the whole.

The appellant in her evidence said that when she met the respondent on the first occasion, her son Sadru Din was with her. She told the respondent that she wanted to sell a half-acre plot together with a house on it for Sh.100,000/- that the land was sub-divided into four half-acre plots and that it was the plot with the house on it which she wished to sell. The respondent told her that he would try to find a buyer for her at the price she wanted. Two or three days later the respondent called to see her at her uncle's house where she was staying. She was on a visit from Mombasa where she lived. The respondent suggested that she should accept Sh.80,000/- or Sh.85,000/-. She insisted on Sh.100,000/-. The respondent then wrote something on a piece of paper which she signed. He did not read it over to her, but said only that she "was bound for three days to sell for Sh.100,000/-". She saw no alterations or corrections on the paper and none were made at her request. She signed the paper, having called Amina Hasham to witness her signature. Nothing was explained to Amina Hasham, nor did Amina Hasham explain the contents of the document to her. The document she signed is the option, Exhibit A. Her account of what happened at Mr. Ishani's office

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on the 19th February was as follows:-

"Q. When you got inside his office, did he say anything to you? A. Yes, I was asked by him, Does this plot belong to you alone, and I said Yes.

Q. Did he make any inquiry about the option? A. He also asked me whether the option was binding on me and I said Yes.

Q. Did he ask you anything further? A. He took out a piece of paper and started writing. 10

JUDGE: What was he writing with - ink, pencil or what? A. He wrote down something in pencil and gave it to somebody to type out.

MR. O'DONOVAN: Was it typed out? A. Two or three papers were brought in duly typed out.

Q. Could you recognise the piece of paper which was typed out, if you saw it again? (Shown to witness) A. I will see,

JUDGE: Is there any document in that bundle which looks anything like the typed document which he brought to you? (Bundle Exhibit A is handed to witness who fails to identify the document). 20

MR. O'DONOVAN: What happened after the document had been typed out and brought back? A. I was given one of them and told to put my signature to it.

Q. Who told you? A. Mr. Ishani told me.

Q. Did you sign it? A. At the time of signing I said I wanted Sh.25,000 30

Q. What for? A. Against the bargain which I wanted to make for Sh.100,000.

Q. What do you mean you wanted Sh.25,000 - a cash payment of Sh.25,000? A. Yes, I wanted 25%.

Q. Did Harji say anything about that? A. Harji said he would give Sh.15,000, then he said he would give me Sh.20,000. At that moment Mr. Ishani intervened.

Q. Mr. Ishani intervened. Mr. Harji first said he would pay Sh.15,000 and then went up to Sh.20,000? A. Yes.

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Q. And what did Mr. Ishani say? A. He said that Sh.81,000 is due to the Jubilee Trust? I said "that is my responsibility. I will pay my dues in respect of this half acre and for the rest I will make an understanding with the Diamond Jubilee people."

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10 Q. What do you mean by "make an understanding"?
A. I meant that I would not pay the whole amount of Sh.81,000 but that I would pay a proportion.

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JUDGE: You mean that Sh.81,000 was due to the Diamond Jubilee Trust in respect of the whole plot of land? A. That is so.

Q. And you said you would pay that off in so far as the one quarter portion was concerned.
A. Yes.

20 Q. Then after that it would be a matter of understanding between you and the Diamond Jubilee Trust how much they would still allow on mortgage on the remaining three-quarters? A. That is quite right.

Q. When was it first mentioned that Sh.81,000 was due on mortgage in respect of this property? A. When I demanded Sh.25,000.

30 MR. O'DONOVAN: Mr. Sultan was there? A. At that moment when we were discussing this Mr. Sultan said, "Oh, two acres are mentioned here." I was struck with horror.

Q. What did you do? A. I snatched the paper on which I had put my signature and threw it away. I said, "What is all this nonsense?" Then Mr. Ishani said there was some misunderstanding, and that Mr. Harji admitted this misunderstanding. Mr. Harji lowered his head, and then Mr. Ishani said that the matter was over and that the bargain cancelled.

40 Q. At that time when you were surprised and tore up the agreement you signed, did Mr. Harji give you any explanation about the option or agreement? A. Yes. Mr. Ishani said, "Don't you get puzzled. There is some misunderstanding and Mr. Harji admits this

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misunderstanding"- and, as if in consent, Harji lowered his head.

JUDGE: He lowered it or nodded it? (Witness demonstrated).

MR. O'DONOVAN: Had the document which Mr. Ishani got typed out been read over to you before you signed it? A. No."

The appellant called Sadru Din, Amina Hasham, Sultan Ali and Mr. Ishani to corroborate her account as to what occurred at her interviews with the respondent. The learned Judge disbelieved the evidence of the appellant and her witnesses and, as I have said, accepted the evidence of the respondent. But, in accepting the evidence of the respondent he did not, in my view, give sufficient consideration to the respondent's repeated denials in his examination-in-chief and cross-examination that the appellant made any mention in Mr. Ishani's office of intending to sell only half an acre. In his judgment he dealt with the respondent's evidence on this point as follows:

"After contradicting himself Plaintiff added (in re-examination) a further point which I accept as the truth. "When I went to Sultan's shop to deliver my letter dated 19th February signed by Mr. Khanna, I received from Sultan in exchange Mr. Akram's letter also dated 19th February.

Q. Did Mrs. Khatijabai after tearing up the agreement say that she intended only to sell a portion of the land and not the whole?

A. Yes. She was very angry.

Q. Can you remember the substance of the words she uttered? A. She said "I have sold you only half an acre and not the whole plot. I will say and maintain the same in Court.

The reason why the appellant tore up the agreement immediately after signing it was a fundamental question to be decided, and the reason for doing so given by the appellant at the time was, of course, evidence to be taken into consideration in determining that question. The respondent's denials that the appellant said she intended to sell only half an acre seem somewhat pointless in view of the following passage in his advocate's letter to the

appellant of the 19th February, 1954:

"After signing the agreement it appears you changed your mind, putting forward the excuse that you were only selling the house and part of the land and not the whole of the 2.04 acres, and tore up the stamped and signed agreement and went away, declining to go through with the completion of the transaction."

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10 Nevertheless, I cannot accept the submission of Mr. Khanna that the respondent's denials were merely the result of a lapse of memory; to my mind it is clear that the respondent was definitely lying on this point, and lying because he thought the reason given by the appellant for tearing up the agreement would be detrimental to his case. "An impression as to the demeanour of a witness ought not to be adopted by a trial Judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial Judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the Judge as to his demeanour must necessarily lose its value"; per Lord Greene, M.R. in Yuill v. Yuill, (1945) 1 All. E.R. 183 at p.189. Although the learned Judge made no comment on the demeanour of the respondent and clearly took into account the inherent probabilities when coming to his conclusion to accept the respondent's evidence, I think that

20 his failure to appreciate that the respondent told a deliberate untruth on a material point or, if he did appreciate it, his failure to attach any importance to it, must detract from the favourable view which he took of the respondent's credibility. In those circumstances the issues of fact become at large for this Court, and a fresh evaluation of the evidence is necessary.

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40 I can see no reason to differ from the unfavourable view which the learned Judge took of the credibility of the defendant and the other witnesses for the defence. There can be no doubt that the defendant herself gave perjured evidence and that she suborned her son, Sadru Din, to commit perjury. Mr. O'Donovan did not attempt to put her forward as a witness of truth. Sadru Din testified that he was present on the first occasion when the appellant and the respondent met and discussed the sale of the

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property. That was on the 17th February, 1954. He supported the appellant's evidence as to what was said on that occasion. But it was proved that he was not present at that meeting and was not even in Nairobi at the time. It is not surprising that the learned Judge commented: "What am I to think of a defendant who unblushingly fabricates his (Sadru Din's) presence to bolster up her own story?"

From the testimony of the appellant herself and that of her sons, it is apparent that she was an astute business woman whose advice was sought by her family in transactions relating to property. It is impossible to believe that she would sign such a document as the option unless it were read over and fully explained to her. Moreover, I can think of no reason why the respondent should make the alterations which were in fact made to the option, unless they were made at the instance of the appellant when the option was being read over to her. With the exception of the extension of the date, they could not benefit the respondent. Amina Hasham, who is the appellant's cousin and understands English, said that she merely witnessed the appellant's signature to the option and did not read it herself or explain it to the appellant. But I can see no purpose in her being called by the appellant merely to witness her signature. The obvious inference is that she was called because of her knowledge of English in order to explain the document to the appellant in her own language.

Mr. O'Donovan argued that whatever the property was worth, the appellant obviously thought it was worth more than Sh.100,000/-. Only a few months before she signed the option, she had purchased her co-owner's half share in the property for Sh.55,000/- and taken over the entire responsibility of the mortgage of Sh.81,000/-. In February 1954 she still owed Sh.111,000/- on the property. She must, therefore, it was argued, have been a lunatic to sell the whole property for Sh.100,000/-; as she was not a lunatic, but said to be a good business woman, the probability must be that she intended to sell only the half-acre plot as she alleged. As to the value of the property, Mr. Flatt, a Chartered Land Agent and a Fellow of the Land Agents' Society, inspected it in February 1954. He said that the house was in an appalling state of repair and not habitable. There had been considerable destruction by white ants and dry rot and the building did not justify reinstatement. Its only value was as scrap

On demolition. In his opinion £5,350 was a fair value for the whole property at that time. The house and the half-acre plot on which it stood was not worth £5,000 or anything near it. He said that owing to Mau Mau activities there was no great demand for Asian houses at the beginning of 1954; it was a stalemate period, but after 1954 prices rose considerably. There seems no reason to question Mr. Flatt's valuation; his opinion of the house was confirmed by Mr. Connell, an architect, and by Mr. Graham, a building inspector employed by the Nairobi City Council. It must be remembered that the appellant lived at Mombasa, and it may well be that she was not aware of the dilapidated state of the house when she purchased the half share of the property in 1953, but became aware of it when she visited Nairobi in February 1954. That would explain her willingness to sell the property for Sh.100,000/- at that time. In my view, the strong probability is that the option was read over and fully explained to the appellant as alleged by the respondent.

I find it equally impossible to believe that the appellant signed the agreement in Mr. Ishani's office without its being read over to her, especially if it is accepted that the option was read over to her. Although Mr. Ishani substantially supported the appellant's evidence as to what occurred in his office, his testimony as a whole was so unsatisfactory and evasive, and, if true, showed such unprofessional conduct, that I think the learned Judge rightly rejected it in favour of the more probable account given by the respondent. Moreover, it seems to me unlikely at the least that, if the respondent's purpose was to defraud the appellant, he would have selected as his advocate to complete the transaction Mr. Ishani, who was the appellant's nephew and who had acted for her or her family in previous transactions.

It is apparent from the appellant's evidence that her intention when she signed the option was that she should get Sh.100,000/- cash. That was, no doubt, the reason why she asked for the insertion of the word "net". I do not think she could have believed that the mortgagees would have permitted her to sell one plot and the house and leave the mortgage on the remainder of the property. It is not unreasonable to conclude that she hoped to keep the whole of the Sh.100,000/-, and that the real

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reason why she tore up the agreement was because she was angry when she found that reference to the mortgage had been made in the agreement.

Taking all these factors into consideration, I think that on a balance of probabilities the evidence of the respondent should be accepted in preference to the evidence of the appellant and the other witnesses for the defence. Once the evidence of the respondent is accepted, the defences raised by the appellant must fail. The agreement which the respondent sought to enforce was undoubtedly a concluded contract. The allegations of fraud or misrepresentation, whether made in the defence or in the evidence, were not proved. The particulars of the fraud or misrepresentation alleged in the defence are contained in paragraph 4 which reads:

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"On or about the 18th day of February, 1954, the plaintiff verbally represented to the defendant that he had a prospective purchaser for the said portion of land and that in order to complete negotiations for the sale thereof it was necessary for the defendant to give him (the plaintiff) an option to purchase the same for Sh.100,000/- and he (the plaintiff) produced a document to the defendant written in the English language which he represented to be the said option."

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When asked whether the respondent said what was alleged in that paragraph, the appellant replied: "Nothing of the sort". In her evidence the appellant based her case plainly on fraud, though not the same type of fraud as alleged in the defence, and no question of common mistake could arise. Indeed, the appellant herself said that there was no misunderstanding, as the following extract from her evidence shows:

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Q. Will you carefully answer this question which I am going to put to you with a view to finding out exactly what your case is? Is it your case that you made a slip and told Mr. Harji that you wanted a hundred thousand for the two acres?

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A. No, no, Sir, I know everything. No slip.

has been committed by me. I know the rates, the land, I know all my debts and liabilities. I have to pay three thousand to one Gullam Hussein.

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Q. You are quite clear as to what you were saying to Mr. Harji?

A. No Sir, I have not committed that slip. It was all in my mind. I know everything.

10 Q. Did you use any words which could possibly have been misunderstood by Mr. Harji that you were really selling two acres?

A. No Sir. There is no question like any misunderstanding on his part.

Q. There was no room for misunderstanding your intention? You were quite explicit as to what you wanted to say?

A. That is so, there was no room for misunderstanding."

20 The defence of undue influence was abandoned at the trial. As to the allegation that the respondent and the appellant agreed to rescind the option and agreement of sale, Mr. O'Donovan did not attempt to argue that it had been established.

30 If the case is considered on the evidence of the appellant rather than on the mere form of the pleadings, it is clear that the only substantial defence on the facts was fraud. This is of importance when one considers the forceful and valid criticisms which counsel has raised concerning the respondent's evidence. It seems clear that, on a most material point his original evidence was deliberately untruthful, and if the case were to be decided on a mere balance of probabilities this would weigh very heavily against him. But the burden of establishing fraud lay on the appellant and was a heavy burden as it must always be. It could not be discharged merely by showing that the respondent was unreliable. In my view, that is all that the appellant succeeded in doing. Her own evidence and that of her witnesses was equally or more
40 unreliable and was not such as would support a finding of fraud.

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Finally, it was submitted that, if the contract is binding on the appellant, this is a case where specific performance should be refused and the respondent left to his legal rights; the remedy of specific performance is equitable and discretionary and the Court should not grant it where it would inflict great hardship. In my view no sufficient grounds have been shown for refusing specific performance. Inadequacy of price alone is not a sufficient ground, but in any event, the price was not proved to be inadequate. Although the appellant was not literate in English, she was not thereby prejudiced as both the option and agreement of sale were explained to her in her own language. It was suggested that the reference in the option to the sub-division might have caused the appellant to think that it related only to the house and that portion of the sub-divided plot on which it stood. That suggestion was never made by the appellant herself and it is negatived by her evidence.

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I would therefore dismiss the appeal with costs.

R.O. SINCLAIR

Vice - President.

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10 I have had the advantage of reading the judgment of the learned Vice-President. I agree entirely with his reasoning and his conclusions, and I should think it unnecessary to add anything to what he has said, were it not that the appeal raises an important question of law on which there appears to be no direct English or local authority - the question whether the suit would lie, having been filed before the date named for completion. On this I should like to add some remarks.

20 The objection is put in two ways. First, it is said that the cause of action in a suit for specific performance of a contract is not complete unless it is possible to plead and prove a breach of that contract. I would accept that in principle. Although in some cases equity will act quia timet, I am not aware that it normally does so in suits for specific performance. But in this case I think there was a breach of contract, committed, to be precise, either when the Appellant tore up one copy of the contract animo revocandi or when her Solicitors on the same day wrote a letter purporting to explain and justify her conduct. The letter alleged that "the whole transaction was fraudulent", and that has been the Appellant's own attitude ever since. I agree with the learned Vice-President that the Appellant has entirely failed to establish her allegation of fraud. We have, accordingly, before us a contract in itself valid, which the Appellant has refused to perform in accordance with its terms. The case is now therefore, in my view, one of repudiation of liability under a contract. At one stage it was a case of repudiation of the agreement as a whole on the ground that it was void - not, in this country, voidable - as having been induced by fraud. I think these distinctions may be of importance. If in fact there was a valid contract, and the Appellant alleged that there was none, and gave that as her ground for refusing to perform it, it was the clearest possible example of an act of renunciation. The effect of such an act has been considered at length in Heyman v. Darwins, Ltd., (1942) A.C.356. I would refer to the passage at p.373 cited by the learned Vice-President from the speech of Lord Macmillan, in which Lord Russell concurred, and also to the following

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passages from the speeches of Lord Wright and Lord Porter. Lord Wright said at p.379, -

"An anticipatory breach does not necessarily involve an actual intention to break the contract. Intention is to be judged by the party's conduct. The difference between repudiating a contract and repudiating liability under it must not be overlooked. It is thus necessary in every case in which the word repudiation is used to be clear in what sense it is being used."

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and almost immediately before that passage, on the same page,

"But perhaps the commonest application of the word 'repudiation' is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding of damages either for previous breaches or for the breach which constitutes the repudiation. That is only a particular form of contract-breaking and would generally under an ordinary arbitration clause involve a dispute under the contract like any other breach of contract".

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Lord Porter said at p.397,

"What, then is the effect of such repudiation if it be accepted. In such a case the injured party may sue on contract forthwith whether the time for performance is due or not, or, if he has wholly or partially performed his obligation, he may in certain cases neglect the contract and sue upon a quantum meruit. In the former case he is still acting under the contract. He requires to refer to its terms at least to ascertain the damage, and he may require to refer to them also if the repudiation of the contract is in issue".

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and again at p.399,

"To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that

the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded".

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I think the question whether an unjustified "repudiation" is in itself a breach of the contract was already sufficiently answered by the judgments in Hochster v. De La Tour, 2 E. & B. 678, 118 E.R. 922, and Frost v. Knight, L.R. 7 Ex. 111, but if any doubt remained thereafter it must have been resolved by Heyman v. Darwins Ltd. Whether the breach is actual or notional seems to me to matter not at all. It was at least sufficiently real to have assigned to it a "local habitation" as well as a name by the Privy Council in Martin V. Stout (1925) A.C. 359, at 368. There is a breach which suffices to complete the cause of action in question.

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The other point made for the Appellant is distinct, though related. It is said that, although repudiation, in the sense in which it occurred in this case, may constitute an actual or notional breach for the purpose of founding a cause of action for damages, it does so only by virtue of the "acceptance" of the Plaintiff, which itself has the effect of putting an end to the contract; and, if the Plaintiff by his own voluntary act so puts an end to the contract, he cannot thereafter specifically enforce it. It is implicit in this argument that, if he chose to await the date of completion and the Defendant then wrongfully refused to complete, the contract could be specifically enforced. The argument is attractive and gains force from many dicta of the Courts, in particular those of Lord Esher in Johnston v Milling, 16 Q.B.D. 460, to which the learned Vice-President has referred. It seems clear that the wording of S.39 of the Indian Contract Act is derived from this and similar sources. But the words "put an end to the contract" must be read in relation to

In the Court
of Appeal for
Eastern Africa

No.32.

Judgment of
Briggs, J.A.

15th March,
1957

- continued.

the circumstances, whether in a case such as Johnstone v. Milling or in the Indian statute, which deals only with common law remedies. In the context of a claim for damages the phrase is convenient and sufficiently accurate; but the House of Lords has not hesitated to say that it represents only one facet of the truth. When an action is brought by the party injured by a wrongful repudiation of the contract, he may bring it to enforce the contract as one still valid and binding. The whole basis of the decision in Heyman v Darwins Ltd., depends on that conception. It is true that their Lordships in that case distinguished between ordinary executory obligations under a contract and the special obligations of an arbitration clause, but by giving effect to that clause they unmistakably treated the contract as subsisting, though no longer to be performed wholly according to its terms. I cite two further passages from the speech of Lord Macmillan, both at p.374,

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"..... whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement".

20

"I am accordingly of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement".

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It seems impossible in face of this to contend that an "accepted repudiation" necessarily bars an action for specific performance.

I have attempted so far to discuss these matters in relation to English law, but I am fortified

by the Canadian cases of Roberto v Bumb, (1943) 2 D.L.R. and Roy v Klopfer Wholesale, etc. (1951) 3 D.L.R. 122, more particularly since the latter decision appears from the 1952 Current Law Year Book para. 655, to have been upheld both by the Court of Appeal of Ontario and the Supreme Court of Canada. Although we have not seen their judgments, the substantial point in issue was so narrow that it seems unlikely that the decisions went on another point. I agree, however, with the learned Vice-President that, with all respect to the learned Canadian Judges, I should not wish to follow all of their reasoning. As to Roberto's case, I think the cause of action was complete at the time when the suit was filed, since the contract had been broken by renunciation. As to Roy's case, I think the passage beginning with the word "Moreover" and continuing for two sentences, which the learned Vice-President has read, is unnecessary to the decision and contains some defective reasoning. But subject to these minor criticisms I agree with the reasoning and the conclusions. I am particularly impressed by the passages cited from Williston on Contracts and much regret that that great work is not available to me here. The particular difficulty, to which he refers, of the decree being made before the contracted date of completion, does not arise in this case, and did not arise in Roberto's case or Roy's case, so it is unnecessary to consider it. Finally, I am encouraged to find that Roy's case is treated as authoritative by the learned editor of Chitty on Contracts, (21st Ed. p.249, note (g)).

I am of opinion that the suit could properly be brought although the date of completion remained in futuro, and that the decree of specific performance was rightly made. I agree that the appeal should be dismissed with costs.

F.A.BRIGGS
JUSTICE OF APPEAL.

In the Court
of Appeal for
Eastern Africa

—
No.32.

Judgment of
Briggs, J.A.

15th March,
1957

- continued.

In the Court
of Appeal for
Eastern Africa

No. 33.

JUDGMENT OF CONNELL, J.

No.33.

Judgment of
Connell, J.

15th March,
1957.

I have had the advantage of reading the judgments of the learned Vice-President and of Briggs J.A. and am in entire agreement with both judgments.

I will add only that the case depends from one point of view to a great extent upon the question whether the learned Judge was justified in preferring the evidence of the Respondent to that of the Appellant. The Appellant was palpably indulging in falsehoods on a number of points and she obtained perjured evidence to support those falsehoods. The Respondent was also indulging in a falsehood when he stated in examination-in-chief and cross-examination that the Appellant had made no mention of intending to sell only half an acre. This "error" he corrected in re-examination in answer to a leading question. This falsehood however was a singularly purposeless falsehood because on the very same evening on which the transaction took place, viz. 19th February the Respondent had written through his advocate. "After signing the agreement it appears you changed your mind, putting forward the excuse that you were only selling the house and part of the land and not the whole of the 2.04 acres, and tore up the stamped and signed agreement and went away, declining to go through with the completion of the transaction". 10 20

In not wholly rejecting the evidence of the Respondent I agree that the learned Judge was correct though his analysis on that aspect left much to be desired. A useful test in the assessment of this type of evidence is laid down in Field's Introduction to the Law of Evidence, p.37, quoting Norton on Evidence: "The falsehood should be considered in weighing the evidence; and it may be so glaring as utterly to destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of a want of veracity on perhaps some very minor point". 30 40

In view of the letter above quoted I do not think the falsehood can be said to be so glaring as utterly to destroy confidence in the witness altogether.

I agree that the appeal should be dismissed with costs.

Nairobi,
15th March 1957.

C.P.CONNELL,
JUDGE.

375.

No. 34.

ORDER ON APPEAL

In the Court
of Appeal for
Eastern Africa

In Court this 15th day of March, 1957.

Before the Honourable the Vice-President
(Sir Ronald Sinclair)

the Honourable Mr. Justice Briggs,
a Justice of Appeal.

the Honourable Mr. Justice Connell, a
Judge of the Court.

No.34.

Order on Appeal.
15th March 1957.

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O R D E R

THIS APPEAL coming on for hearing this 1st day of February, 1957, and again on the 18th and 19th days of February, 1957, in the presence of B.O'Donovan, Esquire (J.K. Winayak Esquire, with him) of Counsel for the Appellant and D.N. Khanna, Esquire, of Counsel for the Respondent and UPON READING the record herein and UPON HEARING Counsel for both parties IT WAS ORDERED that this Appeal do stand over for judgment and upon the same coming up for judgment this day IT IS ORDERED that this Appeal be dismissed with costs including the costs previously reserved and the costs of obtaining photostat copies of Canadian decisions from abroad to be taxed by the Registrar of this Court and paid by the said Appellant to the said Respondent.

20

GIVEN under my hand and the Seal of the Court at Nairobi this 15th day of March, 1957.

F. HARLAND,
Registrar.

30

ISSUED this 29th day of March, 1957.

No. 35.

ORDER GRANTING FINAL LEAVE TO APPEAL

In Chambers this 7th day of December, 1957

Before the Honourable the Acting Vice-President
(Mr. Justice Briggs).

O R D E R

UPON the Application presented to this Court

No.35.

Order granting
final leave to
Appeal.

7th December,
1957.

In the Court
of Appeal for
Eastern Africa

—————
No.35.

Order granting
final leave to
Appeal.

7th December,
1957

- continued.

on the 2nd day of December, 1957 by the above-named Applicant for final leave to appeal to Her Majesty in Council AND UPON READING the Affidavit of her Advocate, D.P. Khetani, Esq., sworn on the 2nd day of December, 1957 in support thereof AND UPON HEARING the Advocates for the Applicant and the Respondent THIS COURT DOTH ORDER that the Application for 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 14 days from the date of this Order AND DOTH FURTHER ORDER that the costs of this Application do abide the result of the Appeal.

10

GIVEN under my hand and the Seal of the Court at Nairobi, the 7th day of December, 1957.

F. HARLAND.

Registrar.

ISSUED at Nairobi, the 9th day of December, 1957.

—————

E X H I B I T SExhibits

EXHIBIT "3"

"3"

STATEMENT OF ACCOUNT
(G.K.Ishani - Advocate)
(NOT COPIED)

Statement of
Account.
G.K. Ishani
(Advocate)
(Not copied)

EXHIBIT "A1"

"A1"

OPTION GIVEN BY KHATIJA JIWA HASHAM

Option given by
Khatija Jiwa
Hasham.
18th February,
1954.

10 Akd. Sgd. ? 3283
26.4.55 R. 10/-
3.30 ?
Nairobi
18.2.54
Mr.Haji C.Harji,
Nairobi.

Dear Sir,

Re my House on Slater Road
adjoining Mayfair Hotel, Nairobi.

In consideration of Shs.5/- five I hereby giving you option to purchase the above property for Shs.100,000/- net one hundred thousand.

20 The above property is over 2 two acres and sub-division is completed. ~~and Biron is already been put.~~ (sgd) ?

The house of above property will be given in vacant possession with all vacant land contain.
22nd (Sgd.) ?

This option is good up to 20th February 1954 up to 1 p.m. to you or to your nominis.

Yours sincerely,
Khatija Jiwa Hasham
in Gujarati
18.2.54.

Witness:
Amina V.Hasham

30 (On back) COLONY OF KENYA
CROWN LAND REGISTRY
NAIROBI
Registered at 3.30 p.m. on 26.4.55
Presentation volume Folio ?
No.
3283 B.2 137/127 B.XXXIII

Signed??
Registrar.

Exhibits

"A2"

Memorandum of
Agreement of
Sale

(Undated)

EXHIBIT "A2"MEMORANDUM OF AGREEMENT OF SALEMEMORANDUM OF AGREEMENT OF SALE OF PLOT
NO. 209/58/1 SLATTERS ROAD, NAIROBI.

Vendor:- Khatijabai Jiva Hasham P.O. Box 309,
Mombasa.

Purchaser:- Haji Gulamhussein Harji of P.O. Box
No. 977, Nairobi.

Property:- Plot No.209/58/1 measuring 2.04 acres
or thereabouts together with all the 10
buildings situate on Slatters Road,
Nairobi in complete vacant possession.

Purchase Price:- Shs.100,000/- (Shillings One hundred
thousand) payable in the following
manner -

Shs. 15,000/- to be paid in cash as a deposit on
or before the execution of these
presents (the receipt of which the
Vendor doth hereby acknowledge)

Shs. 85,000/- to be paid on presentation of docu- 20
ments of transfer which shall be ex-
ecuted by both the parties within six
months from the date of this Agree-
ment. The Purchaser shall arrange to
take over the present mortgage of
Shs.81,000/- on the said property of
The Diamond Jubilee Investment Trust
Limited, Mombasa or transfer the same
with the property to his nominee at
his own expense and pay the balance 30
sum of Shs.4,000/- on completion of
transfer.

OTHER CONDITIONS

- (1) The Vendor hereby gives complete vacant possession of all the buildings on the above property and the purchaser acknowledges the receipt of vacant possession duly received by him.
- (2) The Site Value Tax shall be apportioned between the parties. The Vendor to pay Site Value tax from 1.1.54 to 19.2.54 and the Purchaser to pay from 19.2.54 onwards. Same shall apply to apportion Insurance Fire 40

premium of the said property.

- (3) The Vendor undertakes to transfer the said property to the Purchaser or his nominee or nominees free from encumbrances.
- (4) The Vendor undertakes to pay all the dues owed on the said property up to and including 19.2.54 and give a clearance Certificate of the Municipality to the Purchaser or his nominee or nominees.

Exhibits

"A2"

Memorandum of Agreement of Sale.

(Undated)

- continued.

10

DATED AT NAIROBI this day of 1954.

Sgd. Khatijabai Jiwa Hasham
in Gujarati

Shs.1/- stamps.

EXHIBIT "A3"

CHEQUE

(See next page)

"A3"

Cheque.

19th February,
1954.

EXHIBIT "A5"

CHEQUE

(See next page)

"A5"

Cheque.

19th February,
1954.

No. EP62310 13 19.2.54

The Standard Bank of South Africa
(WITH WHICH IS INCORPORATED AFRICAN BANKING CORPORATION LIMITED
 UNINCORPORATED IN THE UNITED KINGDOM.)
 NAIROBI

Pay to the order of *Y. K. Ismail*
 Shillings *Fifteen thousand only*
Shgs. 15,000/- *Y. K. Ismail*

The Judge, Supreme Court of Kenya

666
A.S.
13th
1954

C. 666/54
A.S.

100

No. T 838626 8 Nairobi, 19 February 1954 100

National Bank of India Limited
INCORPORATED IN THE UNITED KINGDOM
 नेशनल बैंक ऑफ इंडिया लिमिटेड NAIROBI
(KENYA COLONY.)

Pay to the order of *Y. K. Ismail Esq.* or Bearer

Shillings *ten thousand only* - 10,000/-

Washam Bros Ltd
N. Guany, Director

COLONY OF KENYA
 The M. Supreme Court at Nairobi

Case No. *666* of *1954*
 A.S.

Put in by *Deft.*

This *13th* day of *May*, 1954

M. M. M. M.
 Judge, Supreme Court of Kenya

EXHIBIT "A6"ExhibitsAGREEMENT BETWEEN HARJI AND HASHAM BROTHERS

"A6"

Agreement
between Harji
and Hasham
Brothers.
(Undated).

THIS AGREEMENT is made the day of
One thousand nine hundred and fifty four BETWEEN
HAJI GULAMHUSSEIN HARJI of P.O. Box No. 977 of
Nairobi in the Colony of Kenya Estate Broker
(hereinafter called "the Vendor" which expression
shall where the context so admits include his ex-
ecutors administrators and assigns of the one part
10 and HASHAM BROS. LIMITED a limited liability Com-
pany whose registered office is situate at Kirparam
Building, Stewart Street, Nairobi (hereinafter
called "the Purchaser" which expression shall where
the context so admits include its successors and
assigns) of the other part WITNESSETH as follows:

1. The Vendor sells and the Purchaser buys the
whole of the Plot No.209/58/1 together with all the
buildings in vacant possession and the land measur-
ing about 2.04 acres situate on Slaters Road, next
20 to Mayfair Hotel, Nairobi in the sum of Shillings
One hundred and seven thousand (Shs. 107,000/-)
payable in the manner appearing hereunder:-

Shs.. 10,000/-	As part payment paid on or before execution of these presents (the receipt of which the Vendor doth hereby acknowledge)
" 97,000/-	to be paid on presentation of docu- ments of Transfer which must be completed by both sides within 6 months from the date of this Agree- ment. The Purchaser shall take 30 over the present mortgage of Shs. 81,000/- on the said property with the Diamond Jubilee Investment Trust Limited, Mombasa at his own expense and pay the balance of Shs.16,000/- to the Vendor when the documents of Transfer are ready
Shs.107,000/-	

2. The Vendor undertakes to give vacant posses-
40 sion on signing of these presents and the purchase
in consideration of these presents and payment of

Exhibits

"A6"

Agreement
between Harji
and Hasham
Brothers.
- continued.
(Undated).

Shs. 10,000/- out of the Purchase price to the Vendor hereby acknowledge receipt of vacant possession from the Vendor.

3. The Site value shall be apportioned. The Vendor to be responsible for site value from 1.1.1954 to 19.2.1954 and the Purchaser to be responsible to pay from 19.2.1954 and thereafter. Same proportion will apply to refund of premium of insurance of fire on the said property.

4. The Vendor undertakes to transfer the property in question free from encumbrances and also agrees to obtain a Clearance Certificate from the Municipality by paying all dues incurred on the said property up to and including 19th February, 1954.

10

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year hereinabove written.

SIGNED by the Vendor
in the presence of:-

SIGNED by the Purchaser
in the presence of:-

}
}
}

(Stamps 1/-)

20

Drawn By:- G.K. ISHANI,
Advocate
Nairobi.



EXHIBIT "A7"KHANNA'S LETTER TO DEFENDANTExhibits

"A7"

Khanna's letter
to Defendant.19th February,
1954.D.N. & R.N. Khanna,
Advocates.P.O. Box 1197,
NAIROBI.

Ref.No.Misc/H/54

19th February 1954

Mrs.Khatijabai Jiwa Hasham,
Nairobi.

Madam,

Re: Plot No.209/58/1 - Sclaters Road.

10 We have been consulted by Messrs. Hasham Bros.
Ltd., and Mr. Haji Gulamhussein Harji, in connec-
tion with the Agreements of Sale, made concerning
the above property.

20 It appears on the 18th February, 1954 you
gave a binding option to Mr. Haji Gulamhussein, ~~HARJI~~
originally valid up to the 20th February 1954, but
altered on the same day to 22nd February 1954 up
to 1 p.m. enabling him to agree to purchase the
said property for himself or his nominees the said
property at the price of Shs.100,000/-. The said
option recited the property as being over two
acres, and goes on to state that the sub-division
is complete. The said option was signed by you
on the 18th instant at about 9.45 a.m. and was wit-
nessed by Miss Amina Valli Hasham.

30 Mr. Haji Gulamhussein Harji informs us that
on the strength of the said option he arranged to
re-sell the said property to Messrs. Hasham Bros.
Ltd., at the price of Shs. 107,000/- at about
5 p.m. yesterday, hoping to exercise his option,
so as to be able to call for a conveyance from you.

The necessity for exercising the option was,
however, dispensed with, as it appears, a formal
agreement was signed between Mr. Haji Gulamhussein
Harji and yourself, at the offices of Mr. G.K.
Ishani, Advocate, today, the 19th instant in the

Exhibits

"A7"

Khanna's letter
to Defendant.19th February,
1954

- continued.

afternoon. A further agreement was, we are informed duly prepared for execution as between Mr. Haji Gulamhussein Harji and Messrs. Hasham Bros. Ltd., also at the offices of Mr. G.K. Ishani. A cheque for Shs.15,000/- payable under the agreement was also made out in our favour by Mr. Haji Gulamhussein Harji, the body of which cheque was filled up by Mr. G.K. Ishani. It appears the identity of the sub-purchaser was withheld from you although you seemed to know (Mr. Haji Gulamhussein Harji does not know how).

10

After signing the agreement it appears you changed your mind, putting forward the excuse that you were only selling the house and part of the land and not the whole of the 2.04 acres, and tore up the stamped and signed agreement and went away, declining to go through with the completion of the transaction.

The agreement is quite explicit on the extent of the land sold, and there is absolutely no justification for your trying to recede out of it, and should you persist in your refusal, we regret our instructions would leave us no alternative but to sue for specific performance.

20

It may be that you do not fully appreciate the legal consequences of your refusal to complete, and if that is so you would be well advised to consult your advocate/once.

at

Yours faithfully,

for D.N. & R.N. Khanna. Sgd. D.N. KHANNA.

384.

EXHIBIT "A8"

CAVEAT

L.T.R.No.7

COLONY AND PROTECTORATE OF KENYA

C A V E A T

FORBIDDING THE REGISTRATION OF ANY DEED AFFECTING
ANY LAND UNDER THE CROWN LANDS ORDINANCE
(CHAPTER 155). SECTION 143(1)

To the Registrar of Crown Lands,
Nairobi.

TAKE NOTICE that I HASHAM BROS. LIMITED of P.O.
BOX 1004, NAIROBI, claiming a Purchaser's interest
in Plot No.209/58/1 - 2.04 acres situated in the
District of NAIROBI in the Central Province and
registered in Volume N.17. Folio 92/ forbid the
registration of any deed or other instrument affe-
cting the said land (executed or about to be exe-
cuted by of until.)

DATED at Nairobi, the 20th day of February,
1954.

HASHAM BROS. LTD.,

???

Signature.

Exhibits

"A8"

Caveat.

20th February,
1954.

Exhibits

"A9"

Akram's letter
to Plaintiff.19th February,
1954.EXHIBIT "A9"AKRAM'S LETTER TO PLAINTIFF.S.M.AKRAM.
Advocate & Commissioner
for Oaths.P.O.BOX 846
NAIROBI.

19th February, 1954.

Ref.No.MISC/K/54.

Mr.Haji Ghulam Hussein,
Nairobi.

Dear Sir,

Re: Plot No.209/58/1 Sclater Road, Nairobi

10

I am instructed by Mrs. Khatijabai Jiwa Hassan the proprietress of the above plot to write you as follows -

That on the 17th February you visited my client and took a certain option of the property. My client told you that the above plot has been divided in four parts and that she is prepared to sell the fourth part with a house on for Shs.100,000/-. You agreed to sell this property whereupon you got her to sign a paper which was later witnessed by a girl in the house.

20

Today at about 1 p.m. you called upon my client and took her to Mr.G.K.Ishani to sign a certain document in relation to the sale of the said one fourth part of her above plot. You made her to sign an agreement when she told in presence of Mr.Ishani that she would like a loan on her balance of the property i.e. the other three parts from the Jubilee Insurance Co., Ltd. While she was signing the document Mr.Sultan read the duplicate copy and informed my client that the document purported to sell the whole property. My client tore the document when Mr.Ishani informed my client that there has been misunderstanding on your part which you admitted.

30

I am instructed to say that the whole transaction was fraudulent and she hereby cancels any paper signed by her in respect of the above property. Perhaps you would like to learn that my client bought this property for over £8,000.

40

Yours faithfully,
S.M.AKRAM.Copy to:
G.K.Ishani, Esq.,
Advocate, NAIROBI.

SMA/SMM.

P.S. Please return the key of the house to my
office.

EXHIBIT "A10"
KHANNA'S REPLY

Exhibits
"A10"

D.N. & R.N.KHANNA,
Advocates.

22nd February, 1954

Khanna's reply
to Akram's
letter,
(A9)

Ref.No.C.F.102.

S.N.Akram, Esq.,
Advocate,
NAIROBI.

22nd February,
1954.

Dear Sir,

10

Re: Plot No.209/58/1 Sclaters Road.

With reference to your letter Misc/K/54 of the 19th instant, to our client Mr.Haji Gulamhussein Harji, we refer you to our letter of the same date to your client, and delivered at 6.30 p.m. by way of an answer to your letter.

20

It would therefore suffice to say that our client does not accept the allegation in your letter to be accurate and in particular our client resents and emphatically refuses the charges of fraud.

There was no misunderstanding in the option signed by your client, or in the conversation which led up to the signing of the option, or indeed, in the instructions taken from her by Mr.Ishani over the agreement, which her own advocate explained to her, before she signed.

30

The property is not worth much more than Shs. 100,000/- our client, and Estate Agent, having been able to re-sell it only at Shs.107,000/-, nor would any Official Valuer value it at much more. The price at which your client may have bought it is irrelevant.

Please let us know if we should proceed to sue, or can we expect your client to complete.

Yours faithfully,

For D.N. & R.N. Khanna. Sgd. D.N.KHANNA.

Exhibits

"A11"

Akram's reply
to Khanna's
letter.
(A.7).

23rd February,
1954.

EXHIBIT "A.11"

AKRAM'S REPLY

S.M. Akram,
Advocate.

Ref.No.626/54.

Messrs.D.N. & R.N.Khanna,
Advocates,
Nairobi.

Dear Sirs,

Re: Plot No.209/58/1 Sclaters Road
Nairobi.

10

Mrs. Khatijabai Jiwa Hasham has handed me your
letter of 19th February 1954 with instruction to
reply as follows :-

She repeats whatever is stated in my letter of
19th addressed to your client Mr.Haji Gulam Hussein.
My client had no knowledge in any way that Messrs.
Hasham Bros. Ltd., are connected in this matter.

The writer would be grateful if you would
please send me a copy of the option in question -
charges will be paid.

20

Yours faithfully,

GS/SMM

Sgd. S.M. Akram.

"A12"

Madan & Shah's
letter to
Khanna.

26th February,
1954.

EXHIBIT "A12"

MADAN & SHAH'S LETTER TO KHANNA

In reply please quote No.662.

Messrs.D.N.& R.N.Khanna,
Advocates,
NAIROBI.

Dear Sirs,

Re: Mrs.Khatijabai Jiwa Hasham and
Haji Gulam Hussein

We have been handed copies of the correspondence

NAIROBI.

26th February, 1954

30

between Mr.S.M.Akram and yourselves in connection with the above and have been instructed by Mrs. Khatijabai Jiwa Hasham to act on her behalf.

It has been made clear in Mrs.Akram's letters that our client does not consider herself bound by the option signed by her on or about the 17th instant or by the documents signed by her on or about the 19th instant as her signatures were obtained by fraud.

Exhibits

"A12"

Madan & Shah's letter to Khanna.

26th February, 1954

- continued.

10 Our client has asked Mr.Haji Gulam Hussein to return the key of the premises which he obtained from her but he has not done so on one pretext or another. We shall be glad if the key is returned to us without delay.

Mr.Akram has also applied to you for a copy of the option to which our client's signature was obtained. If the same has not been sent to Mr. Akram, please send it to us and we shall pay the copying charges thereof.

20 Any action filed by your client will be defended at his risk as to costs and consequences.

Yours faithfully,

MADAN & SHAH.

Sgd. J.M.Nazareth.

EXHIBIT "A13"

KHANNA'S REPLY

D.N. and R.N. Khanna,
Advocates,
Sheikh Building,
Victoria Street,
NAIROBI.

18th May 1954.

"A13"

Khanna's reply to Madan & Shah's letter. (A.12)

18th May, 1954.

30

Messrs. Madan & Shah,
Advocates,
Nairobi.

Dear Sirs,

Re: Mrs. Khatijabai Jiwa Hasham
and Haji Gulam Hussein Harji

We have put your letter No.662 of the 26th of February last to Mr.Haji Gulamhussein Harji, who

Exhibits

"A13"

Khanna's reply
to Madan &
Shah's letter.
(A.12)

18th May, 1954
- continued.

has only recently attended upon as at a long interview, an earlier appointment not being possible, (after his return from Dar es Salaam and visits to and from Mombasa and other places) and have received instructions from him once again to refute the charge of fraud - made in the most vague fashion and without specifying the nature and character thereof, possibly deliberately so - and to refer you to the contents of our letter of the 22nd February last to Mr.S.M.Akram, Advocate, who was then acting for your client.

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We are sending you a copy of the option, the charge for which is Shs.2/- which we shall be glad to receive.

An action will now be filed, as soon as it is practicable for the writer to draw up the necessary papers.

Yours faithfully,

For D.N. & R.N. KHANNA (Sgd.) D.N.KHANNA)

"B"

Part Deed
Assignment
(Undated)

EXHIBIT "B"

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PART DEED ASSIGNMENT

DATED THE

DAY OF

GULAMHUSSEIN KARIM

- to -

KHATIJBABAI JIWA HASHAM

THE DIAMOND JUBILEE INVESTMENT TRUST LIMITED
ASSIGNMENT OF PLOT L.R. NO.209/58/1, NAIROBI
MADAN & SHAH,
ADVOCATES,
NAIROBI.

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THIS INDENTURE made the day of One
thousand nine hundred and fifty-four Between GULAM-
HUSSEIN KARIM of P.O.Box Number 1602 Nairobi in
the Colony of Kenya Merchant (hereinafter called
"the Vendor" which expression shall where the con-
text so admits include his heirs executors and
administrators and assigns) of the first part
KHATIJBABAI JIWA HASHAM widow of KASSAM SULEMAN

DAMJI of P.O. Box Number 309, Mombasa in the Colony and Protectorate of Kenya (hereinafter called "the Purchaser" which expression shall where the context so admits include her heirs executors administrators and assigns) of the second part and THE DIAMOND JUBILEE INVESTMENT TRUST LIMITED a limited liability company having its registered office situate at Dar-es-Salaam in the Tanganyika Territory (hereinafter called "the Company" which expression shall where the context so admits include its successors and assigns) of the third part

10 WHEREAS by an Indenture dated the Fifteenth day of March One thousand nine hundred and five (hereinafter called "the Lease") and made between Sir Donald Stewart, K.C.M.G., His then Majesty's Commissioner for the East Africa Protectorate of the one part and James Scott Elliott (therein described) of the other part ALL THAT piece or parcel of land situate on the Parklands Estate in the neighbourhood

20 of Nairobi in the said Protectorate (now the said Colony) comprising Four decimal one eight acres or thereabouts which said piece or parcel of land is more particularly delineated and described on the Plan annexed to the Lease and thereon bordered red was demised unto the said James Scott Elliott for a term of Twenty-five years from the First day of November One thousand nine hundred and four at the yearly rent of Rupees Fifteen (now Shillings Thirty) subject to the covenants and conditions therein

30 contained or implied and on the part of the Lessee therein to be performed and observed AND the said Lease contained a proviso for an extension of the said term for a further period of Twenty-five or Seventy-four years upon certain conditions therein particularly mentioned AND WHEREAS by divers mesne assignments acts in the law and events and ultimately by an Indenture dated the Fourteenth day of April One thousand nine hundred and Twenty-

40 one and made between Percy Frank Plunkett Chaplin, Lawrence Richard Morgan Chaplin and Clement Woodthorpe Chaplin (all therein described) of the one part and Elsie Deakin Nourse (therein described) of the other part for the consideration therein mentioned the said hereditaments and premises comprised in and demised by the Lease together with the buildings and improvements erected and being thereon became legally vested in the said Elsie Deakin Nourse for all the unexpired residue of the said

50 term of Twenty-five years and also for any further term which might thereafter be obtained thereof by

Exhibits

"B"

Part Deed
Assignment
- continued

(undated)

Exhibits
 "B"
 Part Deed
 Assignment
 - continued
 (undated)

virtue of the said proviso subject to the said rent covenants and conditions contained in or implied by the Lease and on the part of the Lessee therein to be performed and observed AND WHEREAS by an Indenture dated the Ninth day of June One thousand nine hundred and Twenty-one (registered in the Crown Lands Registry at Nairobi in Volume N 17 Folio 84/1) and made between the said Elsie Deakin Nourse of the one part and Constance Mary Leibbrandt (therein described) of the other part for the consideration therein mentioned ALL THAT piece or parcel of land comprising two decimal nought four acres or thereabouts situate in Parklands in the Nairobi District of the Ukamba Province of the said Colony being Re-Sub-division Number 1 of Sub-division Number 2 of Section Number XLIV of Portion Number 3 of Meridional District South A 37 (Land Office Number 209/58/1) which said piece or parcel of land is portion of the said hereditaments and premises comprised in and demised by the Lease and which is more particularly delineated and described on the Plan annexed to the Indenture now in recital and thereon bordered red was together with the buildings and improvements erected and being thereon assigned unto the said Constance Mary Liebbrandt for all the unexpired residue of the said term of Twenty-five years and also for any further term which might thereafter be obtained thereof by virtue of the said proviso subject to the apportioned yearly rent of Florins Seven and Cents Thirty and to the covenants and conditions contained in or implied by the Lease and on the part of the Lessee therein to be performed and observed so far as the same affected the premises hereby assigned AND WHEREAS by an Indenture dated the Eighteenth day of June One thousand nine hundred and thirty (hereinafter called "the Supplemental Lease") and made between His Late Most Gracious Majesty King George the Fifth of the one part and the said Constance Mary Leibbrandt of the other part the said hereditaments and premises comprised in and assigned by the hereinbefore recited Indenture of the Ninth day of June One thousand nine hundred and twenty-one being Land Office Number 209/58/1 together with the buildings and improvements erected and being thereon were demised unto the said Constance Mary Leibbrandt for a further term of Seventy-four years from the First day of November One thousand nine hundred and Twenty-nine subject to the yearly rent of Shillings

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Fourteen and Cents Sixty payable on the First day
 of January in every year and to the covenants and
 conditions contained in or implied by the Supple-
 mental Lease and on the part of the Lessee therein
 to be performed and observed AND WHEREAS by fur-
 ther divers mesne assignments acts in law and
 events and ultimately by an Indenture dated the
 Thirty-first day of May One thousand nine hundred
 and forty eight and made between Allah Ditta Qur-
 eshi son of Kher Mohamed Qureshi and Abdul Rahman
 Qureshi son of Kher Mohamed Qureshi (both therein
 described) of the one part and Hasham Jiwa, the
 Vendor and the Purchaser of the other part (regis-
 tered in the Crown Lands Registry at Nairobi in
 Volume N 17 Folio 92/23) for the consideration
 therein mentioned the said hereditaments and prem-
 ises comprised in and assigned by the hereinbefore
 recited Indenture of the Ninth day of June One
 thousand nine hundred and twenty-one together with
 all buildings and other improvements erected and
 being thereon were assigned unto the said Hasham
 Jiwa, the Vendor and the Purchaser as tenants-in-
 common in equal shares for all the residue then
 unexpired of the said term of Seventy-four years
 subject to the payment of the said yearly rent of
 Shillings Fourteen and Cents Sixty on the First day
 of January in every year and to the covenants and
 conditions contained in or implied by the Lease
 and the Supplemental Lease and on the part of the
 respective lessees therein to be performed and ob-
 served so far as the same affect the premises here-
 by assigned AND WHEREAS by an Indenture of Mort-
 gage (hereinafter called "the Principal Mortgage")
 dated the Thirty-first day of May One thousand
 nine hundred and forty-eight (registered in the
 Crown Lands Registry at Nairobi in Volume N 17
 Folio 92/14) and made between the said Hasham Jiwa,
 the Vendor and the Purchaser of the one part and
 the Company of the other part the said heredita-
 ments and premises comprised in and assigned by the
 hereinbefore recited Indenture of the Ninth day of
 June One thousand nine hundred and twenty one to-
 gether with the buildings and other improvements
 erected and being thereon were assigned unto the
 Company by way of Mortgage for securing payment to
 the Company of the principal sum of Shillings Ninety
 thousand (Shs.90,000/-) with interest thereon as
 therein expressed AND WHEREAS the said Hasham
 Jiwa, the Vendor and the Purchaser paid to the
 Company a sum of Shillings Nine thousand (Shs.9,000/-)

Exhibits

"B"

Part Deed
 Assignment
 - continued
 (undated)

Exhibits

"B"

Part Deed
Assignment
- continued

(undated).

on account of the said principal sum of Shillings Ninety thousand (Shs.90,000/-) and there is now as from the First day of November One thousand nine hundred and fifty owing to the Company a sum of Shillings Eighty-one thousand (Shs.81,000/-) on the security of the Principal Mortgage (as the Company hereby admits and acknowledges) AND WHEREAS by an Indenture dated the First day of June One thousand nine hundred and fifty-three (registered in the Crown Lands Registry at Nairobi in Volume N 17 Folio 92/25) and made between the said Hasham Jiwa of the first part the Purchaser of the second part and the Company of the third part for the consideration therein mentioned the said Hasham Jiwa assigned unto the Purchaser ALL THAT the one third undivided share and interest of the said Hasham Jiwa in the said piece or parcel of land hereinabove described being Land Reference Number 209/58/1 together with the buildings and improvements erected and being thereon for all the residue then unexpired of the said term of Seventy-four years granted by the Supplemental Lease subject to the payment of the said yearly rent of Shillings Fourteen and cents Sixty and to the covenants and conditions contained in or implied by the Lease and the Supplemental Lease and on the part of the respective lessees therein to be performed and observed so far as the same affected the premises thereby assigned AND SUBJECT ALSO to the payment of the said sum of Shillings Eighty-one thousand (Shs.81,000/-) due under and by virtue of the Principal Mortgage and to the terms thereof AND WHEREAS by an Indenture dated the First day of June One thousand nine hundred and fifty-three (registered in the Crown Lands Registry at Nairobi in Volume N 17 Folio 92/26) and made between the Purchaser of the first part the Vendor of the second part and the Company of the third part for the consideration therein mentioned the Purchaser assigned unto the Vendor ALL THAT her the Purchaser's one-sixth undivided share and interest in the said hereditaments and premises hereinabove described being Land Reference Number 209/58/1 together with the buildings and improvements erected and being thereon TO HOLD the same unto the Vendor for all the residue then unexpired of the said term of Seventy-four years granted by the Supplemental Lease so as to hold the same as tenants-in-common in equal shares with the Purchaser subject to the payment of the said yearly rent of Shillings

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Exhibits

"B"

Part Deed
Assignment
- continued

(Undated)

Fourteen and Cents Sixty and to the covenants and conditions contained in or implied by the Lease and the Supplemental Lease and on the part of the respective Lessees therein to be performed and observed so far as the same affected the premises thereby assigned AND SUBJECT ALSO to the payment of the said sum of Shillings Eighty-one thousand (Shs.81,000/-) due and owing under and by virtue of the Principal Mortgage and to the terms thereof AND WHEREAS by an Indenture dated the First day of June One thousand nine hundred and fifty-three (registered in the Crown Lands Registry at Nairobi in Volume N 17 Folio 92/27 and hereinafter called "the Supplemental Mortgage") and made between the Vendor and the Purchaser of the one part and the Company of the other part for the consideration therein mentioned the Company agreed not to call in the said sum of Shillings Eighty-one thousand (Shs.81,000/-) owing under the Principal Mortgage until the thirty-first day of December One thousand and nine hundred and fifty-four upon terms and conditions mentioned in the Supplemental Mortgage AND WHEREAS the said sum of Shillings Eighty-one thousand (Shs.81,000/-) still remains owing to the Company on the security of the Principal Mortgage and the Supplemental Mortgage but all interest thereon has been paid up to the date of these presents AND WHEREAS the Vendor has agreed with the Purchaser for the sale to her the Purchaser of ALL THAT the Vendor's one-half undivided share and interest in the said hereditaments and premises hereinabove described being Land Reference Number 209/58/1 for the price or sum of Shillings Fifty-five thousand (Shs.55,000/-) subject to the principal mortgage and the Supplemental Mortgage and the said sum of Shillings Eighty-one thousand (Shs.81,000/-) now remaining due and interest hereinafter to accrue due thereon which are to be borne paid by the Purchaser AND WHEREAS it has been agreed that the Company shall release the Vendor and that the Purchaser shall covenant in manner hereinafter appearing NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of Shillings Fifty-five thousand (Shs.55,000/-) paid by the Purchaser to the Vendor on or before the execution of these presents (the receipt of which sum the Vendor hereby acknowledges) and in consideration also of the release hereinafter contained by the Company the Vendor as Beneficial Owner HEREBY ASSIGNS unto the Purchaser ALL THAT the Vendor's

Exhibits

"B"

Part Deed
Assignment
- continued.

(Undated)

one-half undivided share and interest in the said hereditaments and premises hereinbefore described being Land Reference Number 209/58/1 together with the buildings and improvements erected and being thereon TO HOLD the same unto the Purchaser for all the residue now unexpired of the said term of seventy-four years granted by the Supplemental Lease Subject to the payment of the said yearly rent of Shillings Fourteen and Cents sixty payable on the First day of January in every year and to the covenants and conditions contained in or implied by the Lease and the Supplemental Lease and on the part of the respective Lessees therein to be performed and observed so far as the same affect the premises hereby assigned AND SUBJECT ALSO to the Principal Mortgage and the Supplemental Mortgage and the said sum of Shillings Eighty-one thousand (Shs.81,000/-) now owing on the security thereof and the interest to accrue due on such sum from the date hereof AND the Purchaser hereby covenants with the Vendor that she the Purchaser will henceforth during the continuance of the said term pay the said annual rent of Shillings Fourteen and Cents Sixty on the First day of January in every year AND will perform and observe the covenants and conditions contained in or implied by the Lease and the Supplemental Lease and which henceforth on the part of the respective Lessees therein to be performed and observed so far as the same affect the premises hereby assigned AND in consideration of the covenant on the part of the Purchaser hereinafter contained the Company hereby releases the Vendor from the said Mortgage debt of Shillings Eighty-one thousand (Shs.81,000/-) and interest thereon AND in consideration of the premises the Purchaser HEREBY COVENANTS with the Company for payment of the said sum of Shillings Eighty-one thousand (Shs.81,000/-) and the interest thereon from the date of these presents AND THAT she the Purchaser will duly perform and observe all the other covenants and conditions contained in or implied by the Principal Mortgage and the Supplemental Mortgage and on the part of the respective Borrowers or Mortgagors therein to be performed and observed.

IN WITNESS WHEREOF the Vendor and the Purchaser have hereunto set their hands and affixed their seals and the Company has caused its Common Seal to be affixed the day and year first hereinabove written.

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SIGNED SEALED AND DELIVERED by the)
 said Gulamhussein Karim in the)
 presence of :-

Seal

Exhibits

"B"

Part Deed
 Assignment
 - continued.

SIGNED SEALED AND DELIVERED by the)
 said Khatijabai Jiwa Hasham widow)
 of Kassam Suleman Damji in the)
 presence of :-

Seal

(Undated)

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THE COMMON SEAL of THE DIAMOND)
 JUBILEE INVESTMENT TRUST LIMITED)
 was hereunto affixed in the pres-)
 ence of :-

Seal

Sgd. DIRECTOR
 Sgd. DIRECTOR
 Sgd. SECRETARY.

EXHIBIT "C"

PLAN OF LAND APPROVED BY MUNICIPALITY

PHOTOGRAPHIC REDUCTION PLAN

(NOT COPIED)

"C"

Plan of Land
 approved by
 Municipality.

(Not copied)

EXHIBIT "D"

OFFER FROM HASSAM J. MERALI

23rd September, 1954.

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Mrs. Kassam Suleman Damji,
 Nairobi.

"D"

Offer from
 Hassam J. Merali
 23rd September,
 1954.

Dear Madam,

With reference to my conversation with your
 son Mr. Rajabali Kassam in connection with the sale
 of your property Plot No.58/2 located in Sclaters
 Road, Nairobi, I would like to inform you that I
 have now an interested party who is willing to con-
 sider the purchase of the said plot at approximate
 value of Shs.300,000/-.

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397.

Exhibits

"D"

Offer from
Hassam J.Merali
23rd September,
1954
- continued.

However, before final consideration is given to this business, I will be grateful if you would arrange to let me have an option for say one week commencing from 27th instant.

Yours faithfully,

HASSAM J.MERALI.
