~~GI 2 6 4~~ 25, 1963

IN THE PRIVY COUNCIL No.6 of 1962

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

FOR EASTERN AFRICA

B E T W E E N:

WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED (Defendants) Appellants

- and -

JAFFERALI & SONS LIMITED (Plaintiffs) Respondents

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
19 JUN 1964
25 RUSSELL SQUARE
LONDON, W.C.1.

RECORD OF PROCEEDINGS

74090

WALTONS, BRIGHT & CO.,
101, Leadenhall Street,
London, E.C.3.
Solicitors for the Appellants.

KNAPP-FISHERS & BLAKE & REDDEN,
31, Great Peter Street,
Westminster,
London, S.W.1.
Solicitors for the Respondents.

IN THE PRIVY COUNCIL No.6 of 1962

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT MOMBASA

B E T W E E N

WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED (Defendants) Appellants

- and -

JAFFERALI & SONS LIMITED (Plaintiffs) Respondents

RECORD OF PROCEEDINGS

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No.1

PLAINT.

In the Supreme Court of Kenya

No.1

Plaint. September 1959

IN HER MAJESTY'S SUPREME COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.1411 OF 1959

JAFFERALI & SONS LIMITED — PLAINTIFFS

Versus

THE WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA LIMITED — DEFENDANTS

P L A I N T

1. The Plaintiffs are a limited liability Company registered and carrying on their business at Nairobi and their address for service herein is C/O Messrs.Korde & Esmail Advocates, Cambrian Building, Government Road, Nairobi.

2. The Defendants are a limited liability company registered and carrying on their business at Nairobi and their address for service is Lugard House, Government Road, Nairobi.

3. The Defendants were formerly tenants of Nazarali Madatally, Gulamali Madatally and Jafferali Madatally in respect of premises situate on Factory Street, Nairobi for a term of five years commencing from the 1st day of July 1957. The said Jafferali Madatally is the Managing Director and principal shareholder of the Plaintiff Company.

4. Towards the end of 1957 the Defendants were desirous of vacating the said premises in Factory Street and of being released from their obligations to the said Nazaralli Madatally, Gulamalli Madatally and Jafferali Madatally under the lease between the said three persons and

the Defendants, and accordingly in consideration of a release being obtained by the Plaintiffs and granted at the Defendant's request to the Defendants from their obligations under the said lease in respect of the said premises in Factory Street and the Plaintiffs agreeing to give to the Defendants and the Defendants agreeing to take from the Plaintiffs in place of the lease of the Factory Street premises a lease in respect of the Plaintiffs' premises in Clarke Lane (hereinafter described) it was agreed between the Plaintiffs and the Defendants that the Plaintiffs should grant and the Defendants should take a lease, on the terms hereinafter mentioned of Plaintiffs' premises situate on Plot Number L.R. 209/1081, Clarke Lane, Nairobi.

5. It was accordingly agreed between the Plaintiffs and the Defendants at Nairobi in or about January 1958 that the Plaintiffs should grant and the Defendants should take a lease of the said premises situate on Plot No.209/1081, Clarke Lane, Nairobi (hereinafter called "the Clarke Lane premises") for a term of 3 years commencing on the 1st day of January 1958 at a rental of Shs. 2,250/- per month.

6. The Defendants were accordingly released from their obligations under the said lease in respect of the said Factory Street premises and entered into possession of the said Clarke Lane Premises and remained in occupation and paid rent in respect of the said Clarke Lane premises until the 30th day of June, 1958, when they quitted the said Clarke Lane Premises. The Defendants have wrongfully refused to execute or enter into any lease for the said term of 3 years and have wrongfully repudiated their obligations to take a lease in respect of the Clarke Lane Premises in accordance with the agreement mentioned in paragraph 5 above and they have refused to comply with their obligations under the said agreement.

7. By reason of the Defendants' repudiation and breach of the said agreement mentioned in paragraph 5 above the Plaintiffs have suffered damage.

PARTICULARS OF DAMAGE:

	Rent payable by Defendants under the agreement mentioned in paragraph 5 above from 1st July 1958 to end of December 1960: 30 months at 2250/- per month	Shs.67,500
Less	Rent payable by the tenants to whom the Plaintiffs have had to, and have let the Clarke Lane premises for a term of 3 years from 1st August 1959 at the best rent obtainable namely Shs.950/- per month: 17 months (from 1st August 1959 until end of December 1960) at Shs.950/- per month =	16,150/-
	Difference	Shs.51,350/-

The Plaintiffs accordingly claim the sum of Shs.51,350/-.

8. Demand for payment has been duly made and notice of intention to sue has been duly given but the Defendants refuse to make any payment.

9. The value of the subject matter of the suit is Shs.51,350/-.

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

WHEREFORE the Plaintiffs pray that Judgment against the Defendants for the said sum of Shs. 51,350/- with costs and interest at Court rates from the date of filing till payment in full and such further or other relief as to this Honourable Court may seem meet.

DATED at Nairobi this day of September, 1959.

KORDE ESMAIL
ADVOCATES FOR THE PLAINTIFFS.

Filed by:-
Messrs.Korde & Esmail,
Advocates,
Cambrian Building,
Government Road,Nairobi.

To be served upon:-
The Warehousing & Forwarding Co.(E.A.)Ltd.,
Lugard House,
Government Road, Nairobi.

In the Supreme Court of Kenya

No.2

Defence
14th October
1959

No. 2

DEFENCE

IN HER MAJESTY'S SUPREME COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.1411 OF 1959

JAFFERALI & SONS LIMITED PLAINTIFF

Versus

THE WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA LIMITED DEFENDANT

D E F E N C E

1. The Defendant admits paragraph 1 and 2 of the Plaint save that its address for service is care of Messrs. Atkinson, Cleasby & Company, Post Office Box 29, Ralli House, Prince Charles Street, Mombasa.

2. The Defendant does not admit paragraphs 3 and 4 of the Plaint save and except that the Defendant was at one time a tenant of premises situate in Factory Street and that the Defendant released the lease thereof to its landlords.

3. The Defendant admits that negotiations were entered into by it with the Plaintiff with reference to the premises in Clarke Lane but the Defendant denies that any concluded agreement of lease was ever concluded and the Defendant will (inter alia) allege that the only terms upon which the Plaintiff was willing to conclude a lease were set out in sundry correspondence interchanged between the Defendant and Messrs. Inamdar & Inamdar then acting as Advocates and Agents for the Plaintiff, and specifically in a letter of 24th April, 1958, addressed by the said firm of Advocates to the

Defendants and the Defendant states that such terms were not acceptable to the Defendant and that accordingly the Defendant after giving one month's notice of its intention in that behalf vacated the said premises on the 30th June 1959.

4. The Defendant denies paragraphs 5, 6 and 7 of the Plaint.

5. The Defendant will allege that the alleged agreement for lease was not registered as required by law and cannot in law be sued upon.

6. The Defendant admits that a demand for payment was made but denies liability to pay the said sum or any part thereof; the jurisdiction of this Honourable Court is admitted.

WHEREFORE the Defendant prays that the suit be dismissed with costs.

DATED at Mombasa this 14th day of October 1959.

ATKINSON, CLEASBY & COMPANY
ADVOCATES FOR THE DEFENDANT.

Filed by:-

Atkinson,Cleasby & Company,
Advocates,
P.O. Box 29,
Ralli House,
MOMBASA.

To:-

Messrs.Korde & Esmail,
Advocates,
Cambrian Building,
Government Road,
NAIROBI.

In the Supreme Court of Kenya

No.3

Proceedings before Hearing. 2nd October 1959

No.3

PROCEEDINGS BEFORE HEARING

IN HER MAJESTY'S SUPREME COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.1411 OF 1959

JAFFERALI & SONS LTD. PLAINTIFF

versus

THE WAREHOUSING AND FORWARDING CO., OF EAST AFRICA LIMITED DEFENDANT

2.10.59

Defendant appeared by Messrs.Atkinson,Cleasby & Co., Advocates, Mombasa.

P.HEIM
Dy. Reg.

14.10.59

Defence filed by Messrs.Atkinson, Cleasby & Co., Advocates Mombasa.

P.HEIM
Dy. Reg.

11.11.59

Mr.Esmail for Korde & Esmail, Advocates for the Plaintiff.

Mr.Varia for Atkinson, Cleasby & Co., Advocates for the Defendants.

By consent hearing date fixed for 2nd and 3rd May, 1960.

(3rd on the list).

P.HEIM
Dy. Reg.

8.4.60.

Call over.
Hearing confirmed for 2nd and 3rd May, 1960.

P.HEIM
Dy. Registrar.

2.5.60.

Nazareth Q.C. with Gama Rose for Plaintiffs.
Cleasby for Defendant.

Nazareth:-

Claim for damages for breach of agreement for lease. No lease executed. Question whether agreement concluded and if so whether binding for lack of registration.

Plaint.
Defence. Two defence: (1) no agreement, (2) not registered Plaintiff submit no requirement to register agreement for lease.

Suggested issues:-

1. Was any agreement for a lease of premises on Plot L.R.209/1081, Clarke Lane, Nairobi, concluded between parties? If so, for what term and at what rent?

2. If such agreement concluded, can it be sued upon notwithstanding the same is not registered?

3. If agreement concluded and can be sued upon what damages?

Cleasby:-

Agree to accept issues, except as to first. Insert "upon what conditions".

Agreed issues accepted subject to amendment requested by Mr.Cleasby.

Agreed correspondence handed in as Exhibit 1, including two documents, original lease and instrument of surrender (Nos.1 and 2).

Nazareth:-

Plaintiff says oral agreement reached in November or December, 1957.

Cleasby:-

Objects on basis of pleadings.

In the Supreme Court of Kenya

No.4

Opening Address by Mr.Nazareth Counsel for Plaintiff. 2nd May 1960

No.4

OPENING ADDRESS BY COUNSEL FOR PLAINTIFF

Nazareth:-

Covered by pleading. Late December, 1957, is in or about January, 1958.

Does not ask for amount. Stand by pleading.

Agreement arrived at end of December. Defendants to be released from lease of old premises and to take lease of new premises for a term of 3 years.

Refer to Exhibit 1, No.3 setting out offer. dated 3.12.57.

Reply of 9.1.58: No.4

Plaintiff says agreement reached in conversation between these letters, to let Clarke Lane premises for 3 years from 1.1.58 at Shs. 2,250/-.

In pursuance of agreement, possession given on 1.1.58.

If relevant, contents for lease need not be in writing.

Bennett v. Garvie (1917), 7 E.A.L.R.48. By implication no requirement that contract should be in writing.

If once definite offer accepted, subsequent correspondence and negotiations cannot affect it.

Mere reference to drawing up of contract or of intention to draw up formally does not prevent formation of binding contract.

Mere agreement to grant a lease does not require registration.

Measure of damage is difference in agreed and actual rent.

No.5

In the Supreme Court of Kenya

Plaintiffs Evidence

No.5

Jafferali Madatally 2nd May 1960 Examination.

EVIDENCE OF JAFFERALI MADATALLY

P.W.1. JAFFERALI MADATALLY, sworn:-

Examined Nazareth.

I am Managing Director, of Plaintiff Co. I have 2,101 shares, my wife has 100, and my brother 1 share, all fully paid. No other shareholders. I and my brother are Director of Madatally Suleman Verjee & Sons Ltd.,

Defendants were formerly tenants of Factory Street premises, of which owners are three brothers, myself, Nazaralli and Gulamalli in one-third shares. Factory Street premises let for 5 years from 1.7.57 at Shs. 4,500/- p.m. Lease is at Exhibit 1. No.1.

In November or December 1957 conversations took place between Nazaralli and Defendants. I was in Mombasa at the time. Nazarali got in touch with me. As a result Exhibit 1. No.3 was written to Madatally Suleman Verjee & Sons,Ltd.

I wrote Mr.Elliott of Defendant Co. on my return from Mombasa between 20th and 30th December, 1957. We reached an agreement that provided we gave a free vacation of Factory Street premises, Defendants were prepared to take a new lease of Clarke Lane premises for 3 years from 1.1.58 at Shs.2,250/-. There was no difference on any point.

I handed over possession of Clarke Lane premises towards end of December 1957, and gave them the keys. It was on 30th or 31st December.

I then wrote Exhibit 1, No.4 on 9.1.58.

I regarded everything as binding after my conversation in December. The period of 3 years was definitely agreed, and the other terms referred to in my letter of 9.1.58.

Exhibit 1. No.5 was received, and I wrote No.6 Before writing it I had a conversation

In the Supreme Court of Kenya

Plaintiffs Evidence

No.5

Jafferali Madatally
2nd May 1960
Examination continued

with Mr.Elliott, and referred to their letter of 3rd December. He finally agreed to a term of 3 years.

I was surprised to receive No.8. I was not prepared to alter the terms. I had no discussion with Defendant.

I instructed my Advocate to draw up the lease between 3rd and 17th February.

A document of surrender of Factory Street premises was executed by me on 17th May, 1958 (Exhibit 1. No.2).

On 29.5.58 two letters were received from Defendants giving notice to quit at end of June (Nos.16 and 17).

No.18, was sent in reply.

I made efforts to let the premises. I inserted advertisements in E.A.Standard and made efforts through Estate Agents. The best offer I received was from Hardware Stores for Shs.950/- from 1.8.59. I accepted this offer for a term of 3 years. I produce the lease (Exhibit 2.)

The best offer earlier was for Shs.700/-p.m. I did not accept it, because of the low rental.

When I accepted the offer from Hardware Stores, there was no prospect of a better rent being obtained.

I claim the damage set out in para.7 of the Plaint.

Cross-examination

Cross-examined by Cleasby:-

I see letter No.6. After writing it I instructed Messrs.Inamdar & Inamdar to prepare a lease. I see No.9.

I see No.15, from my Advocates to Defendants, and particularly the last paragraph. It was written by my Advocates to Defendants.

Defendants then wrote No.17.

Question:- Do you agree that negotiations for the terms of the lease broke down, because Defendant insisted on a comprehensive repair clause and your Advocate would not agree?

Answer:- I did not instruct my Advocates to break off the arrangement with Defendants.

When I entered into negotiation I anticipated that a formal lease would be drawn up. The lease of Factory Street premises and with Hardware Stores was formally drawn up. It was to be drawn up by my Advocates, Inamdar & Inamdar. I intended then to protect my interest and see that proper clauses were inserted. One of the clauses to be inserted was clause 2 (v). It was put in by my lawyer. The proviso to Clause 3 (ii) is also inserted for my benefit. In Cl.2 (vii) provisions are put in for my protection. It was understood that the premises were to be used as a Warehouse only. "It had been discussed whether Defendants could erect Offices in the warehouse." This was after they went into possession. Cl.2 (viii) was also inserted for my benefit.

There is no mention of the above terms in Exhibit 1 No.4, but they are included under 'usual conditions'.

In the letter of 25.1.58 I refer to my instructions to Inamdar & Inamdar. I returned at that time to Mombasa and handed over correspondence to my Advocates. Messrs. Inamdar & Inamdar did send a draft lease, on 17th February. Defendants objected to certain items of the draft. Certain objections were met by Messrs.Inamdar & Inamdar in No.13 of 18th March. I left all details to my Advocates. I did not discuss matter referred to in the letter with Messrs.Inamdar & Inamdar. I expected them to bring the draft lease as agreed and to explain its terms.

There was a dispute about leakage in the Factory Street premises. As soon as it was brought to our notice. We set to and attended to them immediately. Defendants also complained that water was seeping through the floor,

In the Supreme Court of Kenya

Plaintiffs Evidence

No.5

Jafferali Madatally
2nd May 1960
Cross-examination continued

causing damage to produce. Defendants had erected an office in the godown at their own expense. It was left in the godown when they vacated. They were happy to do so in view of the arrangement for a new lease.

I see Exhibit No.3 and particularly the last paragraph. As nothing was heard from Mr. Keir, we assumed the arrangement was accepted by him.

Re-examined by Nazareth.

1. I saw my Advocates between the 25th and 30th January 1958, and handed over the correspondence. I told them I had let the godown to them on the terms of the letter of 9th January, 1958 and that they should prepare a formal lease accordingly.

Re-examination

I did not instruct my Advocates to insist on any unusual conditions.

I did not see my Advocates again with regard to the terms of the lease. I should have accepted a lease setting out the terms contained in No.4 and other usual conditions.

I never discussed the condition of the lease with my Advocates.

No.6

Opening address by Counsel for Defendant
2nd May 1960

No. 6

OPENING ADDRESS BY COUNSEL FOR DEFENDANT

Case for Plaintiff

Cleasby Opens:-

1. Parties envisaged formal lease would be drawn up: letters 4, 5, 6.

If parties are negotiating and it is agreed that a lease shall be drawn up by Solicitor, no binding agreement until lease signed.

Berry v. Brighton and Sussex Building Society (1939)

3. All E.R.217: see at 220. Terms of draft lease had actually been approved: see at 218 F. Yet no enforceable contract.

Raingold v. Bromley (1931) 2. Ch.307.

On evidence, a Director of Plaintiff Co. has stated that it was clearly understood that a formal lease would be drawn up, and that instructions to draw up were given to his Solicitors, who in due course would submit to Defendant's Lawyers for approval. Borne out by correspondence see letter No.6.

Fact indistinguishable from cases cited.

2. So long as negotiations proceeding, not competent to draw a line and say "at this point there is a contract". All negotiations must be looked at. Plaintiff says concluded agreement for lease made orally in December, 1957, before correspondence exchanged.

Hussey v. Payne (1879) 4 App. Cas.311.

3. Plaintiff sues on oral agreement made in December, 1957. But Witness has not stated what the terms were. Agreement on rent and on date of commencement. Impossible to draw up an agreement with nothing more agreed. So long as one term in a contract remains undecided, whole contract is unconcluded.

N.C.B. v. Galby (1958) 1 All E.R.91 at 97 H.

If a clause is too vague to be enforceable contract not binding.

Bishop and Baxter Ltd. v. Anglo Eastern (1943) 2 All E.R. 598. See at 599 E.-F. See also case cited at 600 B-D.

If terms of lease not agreed upon, fact

In the Supreme Court of Kenya

No.6

Opening Address by Counsel for Defendant 2nd May 1960 continued

that Defendants had entered into possession. Entered not as trespasser, but as licensees. In this case parties had not 'in intention or appearance' reached agreement.

Last paragraph of letter No.15. Plaintiff's case is that Messrs.Inamdar & Inamdar had no authority to write it. In any case, at least one term of the lease was not agreed at that date. It was Plaintiff's own Solicitor who broke off negotiations; but not important because there was no Contract. Messrs.Inamdar & Inamdar, certainly had authority to negotiate lease.

Defendants Evidence

No.7

Norman Wilford Crombie Elliott 2nd May 1960 Examination

No.7

EVIDENCE OF NORMAN WILFORD CROMBIE ELLIOTT.

D.W.1. NORMAN WILFORD CROMBIE ELLIOTT. sworn:-

Examined by Cleasby.

I am a Director of Leslie & Anderson (E.A.) Ltd., Defendant Co. is a wholly-owned subsidiary of Leslie & Anderson but has its own board of Directors. Defendant Co. under general control administratively of Leslie & Anderson Defendant Co. are warehousing, storing and forwarding agents.

In 1959 Defendants had leased godown in Factory Street, from a partnership of which directors of Plaintiff Co. were Partners. There was some dispute about condition of godown. Agreed that lease should be surrendered, and it was surrendered.

There were conversations about alternative accommodation. Important point was that we could not continue in Factory Street. Mr. Jafferali did his best to assist us: but water seepage could not be remedied. In due course he offered Clarke Lane godown.

I see Exhibit 1. No.3. When I wrote this

letter it had been agreed that we could leave Factory Street godown and that we should be given occupation of Clarke Lane godown. The only terms agreed were date of occupation and rental. Negotiations were subject to approval of General Manager, Mr. Keir whose office is Mombasa. 'Nairobi' must be a typist's error.

There may have been discussions between 3rd December and 9th January. By 9th January Defendants had not agreed to a 3 year lease. Letter No.5, was written on my instructions.

Before letter No.6 was received I had had a discussion with Jafferali. I told him I would write to Mombasa. It was agreed that we should take a 3 years lease.

The next step was for the draft lease to be submitted. On the receipt of the draft, I disagreed with the provision for repairs. The draft provided for landlords to repair only roofing and timbers. I wished clause embracing all repairs except those due to tenants fault. If we were to erect an office, I wished some provision for reimbursement. These points were put to Messrs. Inamdar & Inamdar but not agreed to.

The lease was to be formally engrossed.

In Exhibit 1. No.4, I did not attach any significance to words 'usual conditions', as in leases for godown conditions vary considerably. In any case I was not worried as the draft would have to be submitted to Mombasa office which would submit it to Solicitors.

Before receiving Exhibit 1. No.15, we were anxious to continue negotiations as we wanted the godown.

Cross-examined by Nazareth:-

I rented other premises at Shs.1,500/-p.m. It is smaller by 1,000 square feet than Clarke Lane.

In the Supreme Court of Kenya

Defendants Evidence

No.7

Norman Wilford Crombie Elliott
2nd May 1960
Cross-examination continued

The Instrument of Surrender of Factory Street premises had been signed on 17th May, before notice was given in respect of Clarke Lane.

The surrender was part of the negotiations for new premises. We had already informed landlord that we should have to give up the premises. It was agreed that we should waive our claim for damages and landlord should waive claim for final rent. There were about 4½ years to run at a rent of Shs.4,500/- (referred to last para. but one). The matters were all mixed up. Plaintiffs had asked Shs. 2,400/- but accepted our offer of Shs.2,250/-.

Contracts made by Defendant Co. have to be confirmed by Leslie & Anderson. Defendant Co. can act on its own to a restricted degree. The lease would have been signed by Defendant Co. I am not a Director, but a Manager. Defendant Co. had legal authority to enter into a lease. I was acting on behalf of Defendant Co.

Possession of the godown was taken at end of December. There had been conversation with Jafferali between 20th-30th December. Letter No.4 was replied to by No.5. We had not agreed to a three years lease. It was not in my favour to agree to three years lease. I do not agree that a three years lease was agreed to. The discussions were amicable.

The draft lease provided for a term of three years. By that time confirmation had come from Mombasa for a three years lease. The Head Office of Defendant Co. is in Mombasa. I signed letter as manager of Nairobi branch. No letters have been signed by Mr.Keir. Plaintiffs were many times told (apart from letter No.3) that confirmation would be required from Mr.Keir.

Re-examined by Cleasby

Re-examination

(Refer to 3rd paragraph of Exhibit 1 No.3).

No.8

SUBMISSIONS AND ARGUMENTS BY COUNSEL FOR DEFENDANT AND PLAINTIFF.

In the Supreme Court of Kenya

No.8

Submissions and Arguments by Counsel for Defendant and Plaintiff 2nd May 1960

Cleasby for Defence:-

Plaintiff's case is that a concluded agreement was arrived at - orally, in writing or partly one and partly the other - in or about January, 1958.

Was it the intention to lease the premises on terms set out in para.5 of Plaint, or on those terms and others? Both parties contemplated formal lease. Negotiations continued until May. Plaintiff wishes to draw a line.

Hussey v. Horne-payne (sup.) p.316. 'You must not at one particular point draw a line. .....' See also at p.317.

(To Court:-

If all terms have been agreed, the words 'subject to contract' are not fatal to concluded agreement. But if parties agree that a lease shall be drawn up, no concluded agreement until all terms agreed.)

See also at foot of p.320: No completed agreement. In this case too, unsuccessful efforts to agree subsidiary terms.

See also at p.323 with regard to intention to be bound. Never alleged by Plaintiff that all terms agreed.

N.C.B v. Gally (sup.) at p.97.

BRITISH INDUSTRIES v. PATELEY PRESSINGS (1953) 1 All E.R. 94. No enforceable agreement.

Berry v. Brighton and Sussex Building Society (sup.) In this case draft lease to be submitted and negotiations. See also at p.319: acceptance 'subject to a lease to be drawn up by our client's solicitors'.

In the Supreme Court of Kenya

No.8

Submissions and Arguments by Counsel for Defendant and Plaintiff 2nd May 1960 continued

(Court:- Letter No.4 is not a 'conditional acceptance.' Correspondence up to letter No.7 is consistent with all terms having been agreed)

At one time in England 'usual covenants' were about land: also 'usual covenants of county' e.g. in Yorkshire. But never been applied in Kenya. No evidence what are usual conditions in Kenya.

Plaintiff had not pleaded a lease 'on usual conditions.'

(Court refers to editorial note in Bishop and Baxter Ltd. v. Anglo Eastern).

If parties come ad idem as to what were usual conditions, well and good. Case for Defendant that content of other conditions had never been considered, and subsequent correspondence shows that parties never ad idem as to subsidiary condition.

Evidence is that re godowns, there are no usual conditions. Expression 'usual conditions' too vague to be enforceable.

See Scammell v. Ouston (1941) A.C. 251.

If Plaintiff relies on 'usual conditions', must show that terms included in draft lease were the usual conditions.

Nazareth:-

English law different. Oral contract cannot be enforced except on part performance etc.

In Kenya agreement is good: but no transfer of land effective until lease executed and registered. Contract can be enforced by suit for damages or for specific performance.

Plaintiff says there was a binding oral agreement arrived at in late December. Essential terms settled - parties, premises, rent commencement and terms of lease. Also to contain usual conditions. Usual conditions to be determined by evidence or law: but no uncertainty.

See Halsbury (inf.) In Kenya assisted by T. of P. Act. See. S.107. Must be a registered lease.

Halsbury, Vol.23 (3rd ed.) p.442 on 'usual covenants'. What are usual conditions is a question of fact. S.108 contains usual conditions.

If Plaintiff sued for specific performance would set out agreed terms and 'usual conditions.'

Conditions would be settled in Chambers, subject to objection on ground that condition usual or not.

Plaintiff must show a binding contract (not creative of interest in land). Subsequently Defendant tried to alter terms but not agreed to by Plaintiffs. Unless new agreement arrived at, subsequent negotiations cannot put an end to contract already concluded.

Perry v. Suffields (1916) 2 Ch.187.

In this case, no terms discussed before 9.1.58 and not agreed upon. See specially at pages 191-2. Only authority to Inamdar & Inamdar to add 'usual terms.'

Reference to lease to be drawn up not conclusive against binding contract.

Bolton v. Lambert (1889) 41 Ch. Div. 295.

Not conditional acceptance. See per Bottom L.J. at 304 page.

Wylie v. Walpole (1870) 39 L.J. Ch.609 at 616-18.

3.5.60

Appearances as before.

Nazareth:-

Wylie v. Walpole is also reported in 22 L.T. 900.

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Various points of similarity. Draft lease to be prepared. New terms imported in draft. No points reserved for future consideration. In this case 'usual conditions' are a question of fact. Submit that prior agreement had been reached, whether in December or January, before Solicitors came in.

Lewis v. Brass 3 Q.B.D. 667 at 671.

In this case fact that possession given is an indication that 'parties were doing more than negotiating'.

If fresh term introduced, Defendant might have 'successfully objected'.

Rossitor v. Miller (1878) 3 App. Case 1124 at 1143 for Lord Hatherley and at 1151 for Lord Blackburn.

Are the parties newly in negotiation or have they agreed?

(Court:- Messrs.Inamdar & Inamdar did not at any point say that the contract had already been concluded.)

Solicitors had no authority to enter into a contract, if they did so, not binding on Plaintiffs.

Bornewell v. Jenkins (1878) 8 Ch. Div. 70, at 73.

Berry v. Brighton and Sussex Building Society (1939) 3 All E.R. 217 (Sup.)

Here the agreement was 'subject to a lease to be drawn up'.

See. per P.O.Lawrence L.J. at 219F. In the present case agreement was not conditional. Nothing left to future negotiations.

The words 'subject to lease' and 'subject to contract' presents a concluded agreement. No such words here.

Hussey v. Horne-Payne (1879) 4 App. Cas.311 (Sup). Not against Plaintiff.

N.C.B. v. Gally (1958) 1 All E.R. 91 (sup.)

No conflict: all conditions agreed.

Bishop and Baxter v. Anglo Eastern (1943) 2 All E.R. 598.

'War Clause' too vague. Many forms of war clause. Quite different from 'usual conditions'.

'Usual conditions'.

Halsbury 3rd ed. Vol. 24 p. 442. 'Question of fact': not matter for negotiation. Do the words 'usual conditions' prevent formation of agreement? Essential terms had been settled: see at p.440. Compare definition of 'lease' in Indian T. of P. Act s.105 and commentary in Mulla. Identical element, except (3) which is unnecessary in agreement for lease. S.108 lays down rights and liabilities of lessor and lessee. e.g. para (j): right to sub-lease. Either party could insist on inclusion. 'Usual conditions' are to be found in s.108.

Not correct to say. 'if parties envisage a lease, no concluded agreement until term agreed to'. If essential terms agreed, that is sufficient. See note (n) on p.440.

(Clarke on Contract Vol.8. pages 93 et seq.)

Eadie v. Addison (1882) 52 L.J. Ch. 80:47 L.T.543.

Chipperfield v. Carter (1895) 72 L.T.487. 'Subject to approval by Solicitor's did not prevent concluded agreement.

Correspondence.

Parties can rely partly on conversation, partly on letters: not so in England. Letter No.3 (between associated companies) makes it clear Defendants seeking to give up Factory Street godown. Offer of Defendants to pay £112.10.0. accepted.

No.4 proves beyond doubt that contract

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Submissions and Arguments by Counsel for Defendant and Plaintiff 2nd May 1960 continued

concluded. No. words 'subject to.'

No.5: no contradiction.

No.8: further request for 1 year and option. No further reference to matter. Included in draft lease as 3 years. Three years agreed to in December, 1957. Subsequent correspondence on authority has no effect: does not displace agreement already arrived at.

Last sentence of No.15. No instructions to Messrs.Inamdar & Inamdar except to draft a lease. No authority to put an end to relationship. In any case no release by consent. No such issue in the case. Big gap before next letter. In the meantime surrender effected on 17th May. Followed by purported month's notice. Takes full advantage of release, escaping obligation to pay double the rent.

Damages not contested.

Refer again to issue.

1. Terms and rent material to claim. Plaintiff did not plead 'usual conditions' because no claim for specific performance. Irrelevant.

2. Second issue not pressed by Defendant.

3. Damages.

Cleasby (by leaves):-

On 'usual conditions' authorities are that in England expression 'usual covenants and conditions' has clear meaning, and can be enforced in Courts.

Scammell v. Ouston (1941) 1 All E.R.14 at 29 and at 50. No usual hire-purchase terms.

Evidence given that there are no usual conditions in case of godown. Not challenged: no

other evidence.

(Nazareth:- not pleaded that contract void for uncertainty.)

If agreement merely referred to 'usual conditions' so vague that no concluded agreement.

Cases cited are that if parties have agreed certain consequences follow. But no application in this case: ---------- parties did not have in mind any conditions.

Incorrect and fallacious to suggest s.108 of T.P.A. supplies 'usual conditions'. S.108 applies if no conditions mentioned. Words can only have a meeting if everyone in Kenya knows that there are usual conditions. If not, too vague.

Not put to Defendant that notice given because release executed.

Nazareth asks Court to note that it is not open to Defendant to argue that because contract is made containing 'usual conditions' contract void. Court so notes without acceding to it.

C. A. V.

A. D. FARRELL
Judge.

3.6.60.

Gama Rose for Plaintiff.

Mabheche (for Cleasby) for Defendant.

Judgment read.

A. D. FARRELL
Judge.

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JUDGMENT

COLONY AND PROTECTORATE OF KENYA

IN HER MAJESTY'S SUPREME COURT AT NAIROBI

CIVIL CASE NO.1411 OF 1959

JAFFERALI AND SONS LIMITED PLAINTIFF

versus

THE WAREHOUSING & FORWARDING CO. OF EAST AFRICA LIMITED DEFENDANT

J U D G M E N T

The Plaintiff claim damages against the Defendants for breach of an alleged agreement for a lease. The only issue in the case is whether the parties ever entered into a concluded and binding agreement.

On the 1st July, 1957, the Defendants entered into a five year lease of certain warehouse property in Factory Street, Nairobi from Jafferali Madatally, the managing director of the Plaintiff Company and his two brothers. The Defendants used three godowns in the course of their business as warehousemen for the storage of produce, including coffee and other perishable goods. Owing to the damp caused by seepage of water, the premises proved unsuitable for this purpose, and toward the end of 1957 the Defendants were anxious to terminate their lease and find suitable alternative premises. Mr. Elliott, the Nairobi manager of the Defendants (whose head office is in Mombasa) entered into negotiations with Jafferali, and the latter on behalf of the Plaintiff Company offered to make available a godown in Clarke Lane, Nairobi. A meeting was held between Jafferali and Mr.Elliott on the 3rd December, 1957, at which the proposed

transaction was discussed, and in a letter summarising the discussion, Mr.Elliott offered on behalf of the Defendants to take a three year lease of the Clarke Lane premises at a rent of Shs.2,250/- per month provided that Jafferali could arrange to give free vacation of the Factory Street godowns. This offer was made expressly subject to the approval of the Defendants' General Manager, Mr.Keir.

Between the 20th and 30th December, 1957, further discussions took place between Mr. Elliott and Jafferali. There is a fundamental conflict of evidence between them as to the upshot of these discussions. Jafferali says that a binding agreement was entered into, under which the Defendants agreed to take a lease of the Clarke Lane premises for a period of three years commencing on the 1st January, 1958 at a monthly rental of Shs.2,250/-. Mr. Elliott says that the only terms agreed were the date of occupation and the rental, and that in any case the negotiations were subject to the approval of the General Manager, Mr. Keir. He denies that there was any agreement for a three years lease, or that he had authority to enter into such an agreement.

Whatever may have in fact been agreed, the Defendants were let into possession of the Clarke Lane premises from the 1st January, 1958, and on the 9th January Jafferali wrote to the Defendant Company the following letter:

" Re: GODOWN PLOT NO.L.R. 209/1081, CLARKE LANE.

In accordance with our mutual arrangement the above godown has been let to you on the following terms.....

(1) Monthly rental of the godown to be Shs.2250/- net payable by you to us in advance.

(2) The godown has been let to you upon three years lease commencing from 1st Jan. 1958.

(3) The lease will be prepared by our Solicitors at your expense.

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(4) Water, Light and Conservancy charges are payable by you.

and usual conditions

Kindly confirm so that we could proceed with preparing the lease.

" The possession of the godown has already been handed to you."

On the 13th January the following reply was sent by the Defendants on the instructions of Mr. Elliott:

" re: Godown Plot NO.L.R. 209/1081, Clarke Lane, NAIROBI.

Thank you for your letter of the 9th instant.

The terms as set out by you are agreed with the exception of No.2. We wish to have the lease for one year with an option of renewal.

Would you kindly forward to us a draft of the proposed lease as prepared by your solicitors so that we may examine it before signing.

Subsequently to the dispatch of this letter, a further meeting took place between Jafferali and Mr.Elliott. Jafferali says in evidence that he referred Mr.Elliott to the letter of the 3rd December, 1957, in which the Defendants had offered to take a three-year lease, and that he finally agreed to a three-year lease. Mr. Elliott says that he told Jafferali that he would refer to Mombasa, and it was eventually agreed that the lease should be for a period of three years, after confirmation to this effect had been received from Mombasa.

Jafferalli wrote again on the 25th January, 1958 as follows:

" RE: GODOWN PLOT NO. L.R. 209/1081, CLARKE LANE, NAIROBI.

We refer to your letter dated 13th

instant, in reply to ours of the 9th inst., and to subsequent interview with your Mr. Elliott, it is now agreed that you are renting the godown for a lease of three years from 1.1.58.

We are now proceeding to instruct our Solicitors to prepare a draft of lease and be sent to you for approval."

A reply was sent on the 3rd February, the first paragraph of which alone is material;

" RE: GODOWN PLOT NO. L.R. 209/1081
CLARKE LANE, NAIROBI

We are in receipt of your letter of the 25th instant and are disappointed that you appear unable to accede to our request for one year's lease with our option of extending for a further two years. May we ask you to kindly give this matter further consideration."

No reply was sent to this letter, and on the 17th February, the Plaintiff's Solicitors Messrs. Inamdar & Inamdar, submitted a draft lease to the Defendants for approval. The draft provided that the lease should be for a term of three years commencing on the 1st January 1958.

Then followed certain correspondence between the Plaintiffs' Solicitors and the Defendants as to various provisions in the draft lease. The Plaintiffs' Solicitors agreed to some of the Plaintiffs' suggestions but were unable to accept a proposal that the Defendants should not be liable for any repairs, except such as were occasioned by the abuse of the Lessee. Eventually the Plaintiffs' Solicitors sent the Defendants a letter dated the 24th April which concluded with the following paragraph:

" Beyond this our clients are not prepared to accede to your suggestions. Our clients are not desirous of undertaking nor do they seek to cast upon you obligations which are manifestly more onerous than would be the case in an ordinary lease - and this is nothing more than an ordinary lease. If, for

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instance, you must insist on a clause which renders our clients responsible for all repairs save only those directly attributable to abuse by you, our clients feel that no useful purpose can be served by a further continuance of the present relationship."

The Defendants replied by a letter of the 29th May of which the first two paragraphs read as follow :

" With reference to your letter of the 24th instant, the matter has been carefully considered and we can only agree with the last sentence of your letter "that no useful purpose can be served by a further continuance of the present relationship."

Kindly note therefore, that we hereby formally tender one months' notice of our intention to vacate the warehouse on the above- mentioned plot. We will vacate the premises on 30th June, 1958."

A similar notice was sent on the same date direct to the Plaintiffs.

Before the letter of the 29th May had been sent, an Instrument of Surrender in respect of the Factory Street premises had been executed on the 17th May, expressed to take effect as from the 31st December, 1957.

The Plaint in paragraph 5 sets up an agreement between the Plaintiffs and the Defendants, made "in or about January, 1958" for a lease of the Clarke Lane premises for a term of 3 years commencing on the 1st January, 1958 at a rental of Shs.2,250/- per month. It is not specified whether the agreement was oral or in writing. Mr.Cleasby for the Defendants objected that the facts as opened by Mr.Nazareth for the Plaintiffs suggested that the agreement (if any) was concluded not in January, 1958, but in the latter part of December, 1957. Mr.Nazareth declined to ask for any amendment and elected to stand or fall on the allegation as set out in his plaint on the ground that the description "in or about January 1958" was wide enough to cover an agreement concluded in the last days of December 1957.

If there was a concluded agreement for a term of 3 years, it was common ground that the Defendants had no right to give one month's notice of termination as they did, and that the Plaintiffs are entitled to damages. If there was no concluded agreement, the Defendants were in occupation as licensees or as tenants from month to month, and the notice was a valid one. As I have said, the only issue in the case is whether there was a concluded agreement, and this is an issue of pure fact to be decided in the light of the evidence of Jafferali and Mr. Elliot, and of the correspondence. Nevertheless, it was through the industry of Counsel of both sides referred to a large number of Authorities and before considering the evidence, it will be convenient to summarise the principles of law to be gathered from the decided cases in so far as they may be applicable to the circumstances of this case.

Those principles appear to be as follows:-

1. The statute of Frauds is not in force in the Colony: Bennett v. Garvie (1907), 7 E.A.L.R. 48. There is no requirement of law that an agreement for a lease should be in writing, and such an agreement may be proved by oral or written evidence or partly the one and partly the other. It may nevertheless be remarked that where there is a fundamental conflict in the oral evidence, the best evidence capable of being put forward by the party seeking to set up the agreement is a memorandum in writing setting out its essential terms and signed by the party to be charged. The absence of such a memorandum, though not fatal as a matter of law, may nevertheless in the absence of other satisfactory evidence, preclude the Plaintiff from establishing to the satisfaction of the Court that the alleged agreement was in fact concluded.

2. Mere reference to the fact that a formal lease is to be drawn up is not conclusive against the existence of a binding contract: Rossiter v. Miller (1878) 3 App. Cas.1124. See especially per Lord Blackburn at p.1151:

"The mere fact that the parties have expressly stipulated that there shall

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afterwards be a formal agreement prepared, embodying the terms which shall be signed by the parties does not, by itself, show that they continue merely in negotiations. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

See also per Lord Hatherley at pp.1142-1144. Other cases supporting this proposition, if any support is needed, are :

Bolton Partners v. Lambert (1888) 41 Ch.Div. 295.

Wylie v. Walpole (1870) 39 L.J. Ch.609. See specially per Stewart V.C. at p.671:

"the cardinal points were agreed to between the parties; and it is perfectly clear that there was no express reservation of any subject for future consideration."

Lewis v. Brass (1877) 3 Q.B.D. 667: see per Bramwell L.J. at p.671:

"It is possible that the formal contract would have contained terms not specially mentioned in the tender by the Defendant and in the letter from the Plaintiff's architect, for instance, as to the payment of the contract price by instalments or as to what part of the work was to be first commenced: but the Defendant might have successfully objected to the introduction of such terms, and the work would have been proceeded with upon the terms contained in the tender and in the letter".

Bornwell v. Jenkins (1878) 8 Ch. Div. 70.

3. Per contra, when the agreement is made "subject to the terms of lease" or "subject to a lease to be drawn upon by our client's solicitors" there is no concluded agreement.

Baingold v. Bromley (1931) 2 Ch. 307.

Berry v. Brighton and Sussex Building Society (1939) 3 All E.R. 217.

4. Subsequent negotiations cannot get rid of a concluded agreement.

Perry v. Suffields (1916) 2 Ch. 187. See especially per Cozens-Hardy, M.R. at pp.191-2, where he cites with approval a passage in the judgment of North J. in Bellamy vs. Debenham 45 Ch. Div. 481. concluding with the words:

> "When once it has been shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both get rid of the contract already arrived at."

5. If one term of an alleged agreement remains unsettled, there is no concluded agreement: and this is equally so if the term has been settled in words too vague to be capable of enforcement.

Hussey v. Horne-Payne (1879) 4 App. Cas. 311: See per Cairns L.C. at pp.320-1:

> "We have here the Appellant himself telling us that the two original letters, which if you took them alone without any knowledge of the other facts of the case, might lead you to think that they are represented and amounted to a complete and concluded agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that those efforts did not result in a settlement of those other terms. The consequence therefore of the whole is that it appears to me....that there was in point of fact no completed agreement between the parties."

Bishop and Baxter Ltd. v. Anglo Eastern Trading and Industrial Co.Ltd. (1943) 2 All E.R. 598 in which the words 'subject to war clause'

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were held to be too vague and uncertain, and that the parties were not ad idem and there was no binding contract.

Scammell v. Ouston (1941) 1 All E.R. 14, in which it was held that there was no concluded agreement since the expression "on hire-purchase terms" was too vague to be given any definite meaning.

British Industries v. Patley Pressings (1953) 1 All E.R. 94, in which it was held that the expression 'subject to force majeure conditions" was so vague and uncertain as to be incapable of any precise meaning, and there was no enforceable agreement.

The five propositions of law which I have so far set out are, I think, accepted by both parties, and the only dispute is as to their applicability to the facts of this case. The sixth, however, which I now come to, is put forward by Mr. Nazareth but not accepted by Mr. Cleasby. It is this:

6. The term "usual conditions" in relation to a lease is one capable of ascertainment.

In support of this proposition Mr. Nazareth cites Halsbury Laws of England, 3rd ed., vol.23, p.442:

> "An agreement for a lease should specify the covenants and provisoes which are to be inserted in the lease; if it does not do so, the parties can require the insertion in it of the usual and proper covenants and provisions. What they are is in each case a question of fact to be decided upon an examination of the leading books of precedents, or upon the evidence of conveyancers and others familiar with the practice generally, or with the practice in the particular district, or on the particular estate, having regard to the nature of the property, the place where it is situated, and the purpose for which the premises are to be used."

The case primarily relied on in support of the

above proposition is Hampshire v. Wicker (1878) 7 Ch. Div.555. The judgment in that case was delivered by Jessel M.R. and his dicta were considered in Flaxman v. Corbett (1930) 1. Ch. 672 by Maugham J. who suggested that the question what are usual covenants in leases of houses for residential occupation in London, if not elsewhere, requires re-consideration. He goes on to say, at p.678:

> "I think it right to express my opinion, after having heard and considered all the numerous authorities which have been cited to me, that the question whether particular covenants are usual covenants is a question of fact, and that the decision of the Court on that fact must depend upon the admissible evidence given before the Court in relation to that question".

In applying the principle to Lessees in Kenya, Mr. Nazareth suggests that prima facie the usual covenants are those set out in section 108 of the India Transfer Property Act.

Mr. Cleasby concedes that in England the expression "usual covenants" has a clear and ascertainable meaning, but argues that in Kenya circumstances vary so much that it is erroneous to suggest that there are any 'usual conditions.' The expression can only have a meaning if everyone in Kenya knows that there are 'usual conditions.' No evidence has been given in this case to show what are usual conditions, and the only evidence bearing on the point is that of Mr. Elliott who says that in leases of godowns conditions vary so much that there are no 'usual conditions'.

So far as this case is concerned the question is not whether some particular condition is usual, but whether the expression 'usual conditions' used in the letter of the 9th January, 1958 has a meaning capable of ascertainment. There was, therefore, no need for evidence to be led for the Plaintiffs to show what conditions are usual. The principle being well established in English Law that the expression 'usual covenants' has a meaning capable of ascertainment in the manner laid down in the

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authorities cited, prima facie the same principle is applicable here, and I should require more than a bare assertion by a non-expert witness to the effect that there are no usual conditions in East Africa to satisfy me that the principle is capable of being applied. There is nothing in the India Transfer of Property Act which would impliedly displace the principle, and it seems to me that just as in England if no covenants and provisoes are specified in the agreement the parties can require the insertion of the usual and proper covenants and provisoes (Halsbury loc cit and authorities cited at note (n), so here if no covenants are specified, the law implies the conditions set out in Section 108 of the India Transfer of Property Act, subject to any local usage to the contrary. If on the other hand, the agreement refers to 'usual covenants' or 'usual conditions,' it seems to me that section 108 of the India Act provided a convenient guide as to what is intended by usual covenants or conditions - since what the law implies may prima facie be regarded as usual - subject again to proof of local usage to the contrary.

Before leaving this topic it will be convenient at this point to mention the submission of Mr.Nazareth that it is not open to the Defendants on the pleading to argue that the contract is void for uncertainty as having been made by reference to 'usual conditions'. The defence is that there was no concluded agreement, and in my view that is wide enough to cover not only a submission that the parties never purported to enter into any agreement but also a submission that a term too vague and uncertain to be capable of enforcement. In either case the result would be that there was no binding contract, and that is exactly what the Defendants by their pleading allege.

In the light of the above principles I now turn to a consideration of the evidence. The Plaintiffs' case is that a concluded and binding agreement was arrived at orally in the last days of December, 1957: the Defendants' case is that the parties never passed beyond the stage of negotiations and that no concluded agreement was ever reached.

The direct evidence of the discussions that

took place between Jafferali and Mr.Elliott late in December, 1957, is inconclusive, consisting of an assertion by the one and a denial by the other. The probabilities also are evenly balanced for the Plaintiffs it may be argued that the possession given to the Defendants makes it rather more than less likely that a concluded agreement was first reached, though such possession is not exclusively referable to a three year term as alleged by the Plaintiffs; for the Defendants it may be argued that Mr.Elliott, having made it plain in his letter of the 3rd December that he had no authority to enter into a binding agreement without reference to the Defendants' general manager in Mombasa, would have been unlikely to do so on his own responsibility towards the end of the same month. In this connection it is to be noted that the Plaintiffs had been warned at the outset that Mr. Elliott did not have full authority as agent for the Defendants, and there is no evidence that anything was said to Jafferali that might have led him to believe that the position had changed. On the contrary, Mr.Elliott claims to have informed the Plaintiffs on a number of occasions that confirmation of any arrangement would be required from Mr.Keir: but as this claim was not put to Jafferali in cross-examination, its value as evidence is diminished.

In view of the conflict in the direct evidence, a decision is to be sought primarily from a consideration of the correspondence, and particularly of the letters dated respectively 9th January, 13th January, 25th January and 3rd February. These letters have been set out above and now call for careful examination.

The letter of the 9th January from Jafferali sets out shortly the heads of the agreement which in his view had been reached. It might be suggested that, as agreement is claimed to have been reached at latest by the 30th December, 1957, the memorandum is somewhat late: but the discussionswere recent enough to be fresh in the memory, and I have no doubt that the memorandum is honestly put forward as an account of what had been agreed. It is to be noted that the past tense is used: the godown

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"has been let". The reference to the preparation of a lease, in view of the authorities referred to earlier, is not to be taken as negativing a concluded agreement, and there is no suggestion that the agreement is 'subject to a lease to be' prepared. I have already dealt with the implication of the expression 'usual conditions' and held that it had a meaning capable of ascertainment. The Defendants are asked to confirm the arrangement as set out, and if they had done so in unequivocal terms I should have had no hesitation in holding that conclusive and binding agreement had been reached, and that all that remained was to draw it up in formal terms.

The Defendants' reply of the 13th January is short but significant. The material words are in the second paragraph:

> "The terms as set out by you are agreed with the exception of No.2. We wish to have the lease for one year with an option of renewal".

Disregarding for a moment the exception, the question is what meaning is to be given to the words 'the terms as set out by you are agreed". Prima Facie they should be taken as relating back to the words in the letter of the 9th January "the above godown has been let to you on the following terms." But the words are equally capable of meaning "the terms you propose are acceptable to us," that is, as having a future rather than a past reference, and in the light of the immediately following sentence the conclusion is inescapable that this was the intention. If the writer of the letter had intended to confirm that an agreement had been reached, but to question the correctness of one of the terms set out he might have been expected to say that what had been agreed was not a lease for three years, but a lease for one year with an option of renewal. He did not say, this, but used the words 'we wish to have a lease for one year." The question relates to an essential term of the agreement, and the language used suggests that the writer did not consider that any concluded agreement had been reached, at any rate on this point.

It is common ground that a further meeting took place between Jafferali and Mr. Elliott between the 13th and 25th January, but again there is a confict of evidence as to what passed at that meeting. Jafferali says that he referred to Mr. Elliott's letter on the 3rd December, and the latter finally agreed to a three-year lease. Mr. Elliott says he told Jafferali that he would write to Mombasa and "it was agreed that we should take a three-year lease." If confirmation had to be obtained from Mombasa, it could not have been obtained in the course of the same discussion in which Mr. Elliott said he would refer to Mombasa: and in cross-examination Mr. Elliott said that confirmation had been received by the time the draft lease was submitted, which was on the 17th February.

The pattern of the correspondence immediately ensuing on the meeting in January is very similar to that of the earliest correspondence. Jafferali wrote on the 25th January, saying 'it is now agreed that you are renting the godown for a lease of three years from 1.1.58,' and the Defendants replied on the 3rd February, saying "We are disappointed that you appear unable to accede to our request for one year's lease with out option of extending for a further consideration." In other words, Jafferali is saying that agreement had been reached, the Defendants that no agreement had been reached. The letters reflect the same conflict of evidence as has been disclosed by the evidence given in Court.

The further correspondence between the Plaintiffs' solicitors and the Defendants is not in my view of any great significance in relation to the issue which the Court has to decide. If there had been a concluded agreement, the fact that discussions continued as to the exact terms is not conclusive that the parties were still merely in negotiations: this is established by the authorities I have already cited. On the other hand, the fact that discussions continued is" a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not", to adopt the language of Lord Blackburn in Rossiter v. Miller (loc.cit.). I can find nothing in the letter of the Plaintiffs' solicitors

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No.9

Judgment 3rd June 1960 continued

from which it may be inferred that they regarded themselves as merely drawing up the terms of an already concluded agreement. Indeed, their letter of the 24th April, 1958 suggested the contrary and that they regarded themselves as free to break off the negotiations. I do not, however, attach any great importance to the opinion which the solicitors appear to have held, as there is nothing in their letter that could be construed as an admission binding the Plaintiffs and there is no leading in the defence that a binding agreement was arrived at but later rescinded by mutual consent. So far as the Defendants are concerned, the correspondence with the Solicitors is consistent with the attitude disclosed in their earlier correspondence that they continued merely in negotiations right up to the 29th May when they served the notices to quit.

The onus is on the Plaintiffs to satisfy the Court on the balance of probabilities that a binding and concluded agreement was arrived at between the parties as set out in the plaint. If the matter falls to be decided on the unsupported evidence of the witnesses, I should find the case not proved as I have no reason to prefer the word of one rather than of the other. If the balance is to be tilted in the Plaintiffs' favour, it can only be on the basis of the contemporary correspondence, and while there are letters written by Jafferali which lend support to the Plaintiffs' case, there are no letters on the other side which in any way amount to an admission against the Defendants and the correspondence on the Defendants' side is completely consistent with the Defendants' case as presented in evidence. My conclusion on the whole case is that the parties concerned in the discussions were never ad idem one believing quite honestly that an agreement had been finally reached, the other that the matter had never proceeded beyond the stage of negotiations. I accordingly hold that the Plaintiffs have failed to discharge the onus of proving that a binding agreement was ever concluded. The Plaintiffs' claim is accordingly dismissed and there will be judgment for the Defendants with costs. 3.6.60.

Sg. G.D.FARRELL
Judge.

No.10

DECREE

In the Supreme Court of Kenya

No.10

Decree
3rd Jure 1960
continued

IN HER MAJESTY'S SUPREME COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.1411 OF 1959

JAFFERALI & SONS LIMITED PLAINTIFF

Versus

THE WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED DEFENDANTS

D E C R E E

CLAIM for:- (a) Shs. 51,350/-
(b) Interest
(c) Costs.

THIS SUIT coming on the 2nd and 3rd days of May 1960 for hearing and on the 3rd day of June 1960 for judgment before the Honourable Mr. Justice Farrell in the presence of Counsel for the Plaintiff and Counsel for the Defendant

IT IS ORDERED :

1. That the Plaintiff's suit be dismissed;

2. That the Plaintiff do pay to the Defendant his costs of this suit to be taxed and certified by the Taxing Master of this Court.

GIVEN under my hand and seal of the Court at Nairobi this 3rd day of June, 1960.

ISSUED on this 29th day of July, 1960.

BY THE COURT

Sd.
DEPUTY REGISTRAR
SUPREME COURT OF KENYA.

In the Court of Appeal for Eastern Africa

No.11

Notice of Appeal 16th June 1960

No.11

NOTICE OF APPEAL

IN HER MAJESTY'S SUPREME COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.1411 OF 1959

JAFFERALI & SONS LIMITED PLAINTIFF

versus

THE WAREHOUSING & FORWARDING CO. OF EAST AFRICA LIMITED DEFENDANT

NOTICE OF APPEAL

TAKE NOTICE that Jafferali & Sons Limited the Plaintiff above-named being dissatisfied with the decisions of the Honourable Mr. Justice G.D.Farrel given herein at Nairobi on the 3rd day of June 1960 intends to appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the said decision.

Dated this 14th day of June 1960

(Sd.) I.T.Inamdar

Inamdar & Inamdar
Advocates for the Appellant.

To the Registrar of the Supreme Court of Kenya at Nairobi and to Messrs.Atkinson Cleasby & Co. Advocates for the Defendant, Ralli House, Prince Charles Street, Mombasa.

The address for service of the Appellant

is care of the Chambers of Messrs.Inamdar & Inamdar, Advocates, Court Chambers, P.O. BOX 483, Fort Jesus Road, MOMBASA.

NOTE:-

A Respondent served with the 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 purpose 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.

Filed the 16th day of June 1960 at Nairobi.

.....

Registrar.

Filed by:-

for Inamdar & Inamdar,
Advocates,
MOMBASA.
SL/.

In the Court of Appeal for Eastern Africa

No.12

Memorandum of Appeal 15th August 1960

No.12

MEMORANDUM OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

AT MOMBASA

CIVIL APPEAL NO.66 OF 1960

BETWEEN

JAFFERALI & SONS LIMITED APPELLANT

AND

THE FORWARDING & WAREHOUSING COMPANY OF EAST AFRICA LIMITED RESPONDENT

(Appeal from a Judgment and Decree of Her Majesty's Supreme Court of Kenya at Nairobi (The Honourable Mr. Justice Farrell) dated 3rd June 1960.

IN

CIVIL CASE NO.1411 of 1959

BETWEEN

JAFFERALI & SONS LIMITED PLAINTIFF

AND

THE WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED DEFENDANT)

MEMORANDUM OF APPEAL

JAFFERALI & SONS LIMITED 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. The learned Trial Judge misdirected himself in law and on the facts in coming to the conclusion which he expressed as follows :-

> "My conclusion on the whole case is that the parties concerned in the discussions were never ad idem, one believing quite honestly that an agreement had been finally reached, the other that the matter had never proceeded beyond the stage of negotiations. I accordingly hold that the Plaintiffs have failed to discharge the onus of proving that binding agreement was ever concluded."

2. The learned Trial Judge erred in law in failing to distinguish between primary facts and inferences of mixed law and fact.

3. The learned Trial Judge misdirected himself in law and on the facts in failing to recognise that the Defendant's contention that no agreement had been finally reached was an inference of mixed law and fact based upon the propositions:

> (i) that the agreement was void for uncertainty because of the reference contained therein to "usual conditions"
>
> (ii) that the agreement was subject to the terms of a formal lease which was never settled.
>
> (iii) that the agreement was conditional upon the approval of the Defendant's General Manager.

4. The learned Trial Judge misdirected himself on the facts in failing to hold that all essential terms of the agreement of lease had been settled with the approval of the Defendant's General Manager at the latest prior to the 17th February, 1958 and that the parties had not reserved expressly or by implication any other terms for further negotiations.

In the Court of Appeal for Eastern Africa

No.12

Memorandum of Appeal 15th August 1960 continued

5. The learned Trial Judge misdirected himself in law in failing to hold that the onus rested upon the Respondent, which it had failed to discharge, of showing, if such be the case, that its General Manager had not approved of the agreement.

WHEREFORE the Appellant prays that this appeal be allowed and the judgment or decree of the Supreme Court of Kenya be set aside with costs here and in the Court below.

Dated at Mombasa this 15th day of August 1960.

Sd. I.T.Inamdar
Inamdar & Inamdar,
Advocates for the Appellant
Sd. I.T.

To,
The Honourable the Judge of Her Majesty's Court of Appeal for Eastern Africa.

And To,

Messrs.Atkinson, Cleasby & Co.,
Advocates for the Respondent,
Ralli House,
Prince Charles Street,
MOMBASA.

The address for service of the Appellant is care of

Messrs.Inamdar & Inamdar,
Advocates,
Court Chambers,
P.O. Box 483,
Fort Jesus Road,
Mombasa.

Filed the 15th day of August 1960 at Mombasa.

Sd. C.H.GRANT
Ag.Dy.Registrar
H.M. Court of Appeal for Eastern Africa.

No.13

PRESIDENT AND JUDGES' NOTES

A.G.FORBES - VICE PRESIDENT

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes A.G.Forbes Vice President 12th July 1961

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

CIVIL APPEAL NO.66 of 1960

BETWEEN

JAFFERALI & SONS LIMITED APPELLANT

AND

THE WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED RESPONDENT

Notes of arguments by Forbes V-P.

12.7.61 Coram: Forbes V-P.
Crawshaw J.A.
Newbold J.A.

O'Donovan Q.C., I.F.Inamdar with him, for Appellant.

Cleasby for Respondent.

O'DONOVAN opens:-

Suit in Supreme Court claiming damages for breach of agreement for lease.

Short point: Does evidence establish a concluded agreement between parties.

Would put case slightly differently from way it was put in Supreme Court.

Counsel argued concluded agreement verbally in Dec. '57.

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes A.G.Forbes Vice President 12th July 1961 continued

Plaint claimed concluded agreement in or about January.

Submit that pleading can be supported on evidence.

Submit must have been agreement at latest in February.

Submit I'm not raising a new matter.

(1) Whole of evidence was before Court as to what happened in December, January & February.

(2) Matter covered in issues as framed.

Rely on -

Misa v Currie (1876) 1 A.C. 554 at page 559.
Thakur Sheo Singh v Rani Raghubans Kunwar (1905) 32 I.A. 203 at page 212.

Relevant issue (Page 12 of Record) is Issue No.1 - accepted at line 20.

Abdul Gafoor v. Nowhere Ali (1949) A.I.R. (Ass.) 17 at page 18 Col. 2 (10).

Am relying on an agreement which was finally reached verbally but evidence as to which in part consists of certain letters.

Submit open to me to so argue on pleadings, on evidence and on issues as framed.

Evidence: P.14: M/Director of Plaintiff Company.
line 10: Lease is Exhibit 1.
line 16: No.3.- Page 38 of Record from agreement of Defendant company.
P.39: Apparent that Defendant company desired to be released and held out offer of 3 year lease of Clarke Lane. Keir resides at Mombasa. Nairobi address is typographical error.

P.14 line 18:
Exhibit 4: Page 40 of Record.

P.14 line 28:
P.15: Exhibits Nos.5 and 6 - Pages 41 and 42

Submit ample documentary corroboration of P.W. 1's statement that term was 3 years-term mentioned in first letter of defendants. Letter No.5 represents afterthought. But subsequent meeting after which letter No.6 (P.42) written. Term now finally settled - only point of difference. Elliots evidence - Submit Page 42 is a correct statement of fact as to what was agreed in Jan.

Then No.8 (P.44) received-Surprised - Page 15. Noteworthy that No.8 does not contradict statement in No.6 that 3 year term had been agreed. No.8 surprising in view of Elliot's evidence that 3 year lease had been approved by Keir in Mombasa.

He admits he agreed to it at meeting confirmed by No.6. Does not explain No.8, but does not deny that term of 3 years was finally settled. Subsequent events:

Lease drawn up.
One term - 3 years duration - no objection to that clause.
Point taken about different matter - repairs.

On 17th May Defendants - had not terminated up to then they did not consider themselves bound - obtained release from Factory St. premises - Then gave notice to quit. Thereafter efforts to re-let, and in fact re-let at much lower rent.

P.15 - XXn. Page 16 et seq.
P.17 - Opening of case for Defendant.

Argued "usual conditions" still had to be agreed upon.

Hussey v Payne (1879) 4 A.C.311 referred to. In that case appeared to be complete offer and acceptance in two letters. But oral negotiations also proceedings at time regarding amounts and dates of instalments. Only decides parties still negotiating on other parts of agreement.

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes A.G.Forbes Vice President 12th July 1961 continued

If "usual conditions" is uncertain then of course no agreement.

P.19: Evidence of Elliott.
P.20: line 1-2: Not right as exhibit No.3 mentions 3 year term. Does say subject to Keir's approval.
P.20: Line 9-13: Rely strongly on this evidence. Submit Elliott means that certain terms offered. Demur on one point only. That determined. Completed preliminary negotiations. Lease then to be prepared. Case put forward by Elliott is same as that argued in law by Counsel.

i.e. There was agreement to take premises for 3 years from 1.1.58. Rent agreed.
But that not complete bargain as other terms not concluded. Usual conditions uncertain. Therefore no agreement and in any case had to be submitted to Solicitors. Not contested that term had been agreed.

P.21 line 3: Stress this: Old lease had 4½ years to run. Surrender obtained before rejection of Clarke Lane premises.
line 11-25: Submit that must refer to period 20th to 30th Dec. Otherwise does not make sense. Had said had agreed to 3 year lease. Even limited to December period, does not reconcile with offer in letter No.1.

P.21 line 26: I rely strongly on this.
P.22: Argument for Defendant.
P.23: "usual covenants" attached. Case put at line 10 "Not ad idem as to subsidiary conditions."

No word in argument as to confirmation G/Sec.

Can only be inferred - rightly in view of Elliotts' evidence - that not contended that only provisional agreement on main headings but subsidiary terms not agreed and negotiations on these broken down.

Refer Judgment - Page 70 et seq:
P.71: Ref. to letter No.3: But that letter proposes 3 year term.

Ref. to letter No.4: and
P.72: reply lines 30-34: Not quite what Elliott said but unimportant which version true. What is plain is that Elliott agreed to term of 3 years.

P.74 line 26 - Page 75.

Judge decided.
(a) This not case of contract subject to formal contract.
(b) 'Usual conditions' had ascertainable and certain meaning.

Submit they could have been settled by judge in Chambers.

This decided in Appellant's favour and no cross-appeal on them.

P.81 line 14 et seq.

P.82: Judge emphasizing point which can only be deemed to have been abandoned by Defence. Point worthless as in fact admitted there was confirmation.

P.83:
P.84 line 20; Submit misdirection: letter merely expresses disappointment - Evidence of Elliott.

P.85 line 17 et seq. Correspondence summarised:
P.86. Submit what judge decided was -

(1) Plaintiffs' director which he (Jafferali) believed to be true that an agreement had been concluded.

(2) Defendants manager which he also believed to be true that matter never beyond stage of negotiations.

(3) No reason to prefer one over other and so decision against Plaintiff on whom onus lay.

Submit this based on falacy: Failure to distinguish between primary facts and inferences of mixed law and fact.

Benmax v. Austin Motor (1953) A.C.370. If I

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes A.G.Forbes Vice President 12th July 1961 continued

can establish argument I can ask this Court to draw inferences from primary facts.

Failure to appreciate that Elliotts that nothing more than negotiations is not a statement of primary fact, but a statement of mixed law and inference of fact. Perfectly possible for both to believe honestly what they said and for one to be completely wrong.

Case for defence was that main heads agreed but not "usual conditions" and agreement subject to formal lease, and that manager must give approval. Latter not pressed as he did give approval. Submit crucial interview is that between Elliott and Jafferali as result of which Exhibit 6 was written. Last conflict removed.

Only two alternative constructions of Elliott's evidence.

(a) Agreed to 3 year lease.
(b) Agreed to 3 year lease subject to confirmation.

Confirmation came.

So immaterial which evidence accepted. Judge's finding on confirmation.

- P.72 line 28:
- P.81 line 28:- P.82.
- P.82 line 8.

Does not appear whether Judge believed statement by Elliott that he'd said on number of occasions that confirmation would be required from Mombasa.

- P.83 line 2: Appear impossible to reconcile that statement with a finding that approval of Keir a condition precedent and that condition precent and never been fulfilled.

- P.84 line 2-15: Reference to important meeting. Not clear what Elliott's evidence means, but at least it means that by time defendant's lease submitted the 3 year term had been agreed to by Mombasa.

Submit Judge wrong if he means not even a provisional agreement on essential points. That never part of defence case.

Submit it is virtually common ground that at some time before 17th February a 3 year term was agreed.

Even if one were to hold that Elliott agreed subject to approval of Keir - Judge has not so found - but even if so, the contingency in fact happened.

Submit failure of Judge to distinguish between inferences and primary facts allows the Court to form its own conclusion.

Submit -

(1) Obvious from Exhibit 5 that all terms of lease settled except term.
(2) Parties did not then or subsequently reserve any subject for further consideration.
(3) Therefore only necessary to show subsequent agreement on one reserved topic in order to establish Plaintiff's case.
(4) Submit that established by Elliott's evidence.

Does not matter what precise order of events was.

One has all essential terms proved by time draft lease submitted. Defence driven to argument which was in fact put forward - i.e. "usual conditions" uncertain.

If failed on that, and did fail on that, could only show some terms reserved. Did not show that.

There was a complete agreement on all terms before draft lease submitted. If that correct, agreement about subsidiary terms subsequently cannot get rid of it.

Perry v Suffields (1961) 2 Ch. 187 at page 191-2. Submit Plaintiff did prove a contract and therefore a breach and damage suffered.

CLEASBY -

Refer to last argument. Concede that once a definite agreement reached then any negotiations subsequent to that agreement are immaterial.

That referred to in Supreme Court.

Case put was that the final and binding agreement which could only be looked to was the oral agreement of Dec. Now argued that agreement to be looked at is one made at some indefinite time in January or early February. If there was a final and binding agreement no one seems to

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes A.G.Forbes Vice President 12th July 1961 continued

have reached it as negotiations continued till terminated by letter of Solicitors.

Primary facts - negotiations continued to end.

Question whether can argue point not taken below. More important than that. Submit fatal. Only one agreement alleged below - an oral agreement made in December - whole case fought on that basis.

Refer to Plaint - Page 6 para.5.

Page 3: Para.4. Submit that is substantial divergence between Plaint and memo of appeal. 10

Refer Page 13 - address of Nazareth - Counsel for Plaintiff. Page 13 line 2 et seq: Says relies on oral agreement in December, 1957. Elects to stand on that.

Page 18 line 12.

Page 23 line 30: Oral agreement in December relied on.

Page 22 line 3: That is case as pleaded. By that time case was obvious. 20

Page 14: Evidence of witness for Plaintiff - line 18 and line 28. Stress this. Not clear what letter referred to; but not exhibit 4 which was later.

(V-P) On whole passage is not letter referred to that of 9.1.58?)

Accept that.

Page 21: Cross-examination of Defendant's witness. Solely directed to get him to agree that 3 year lease was agreed to in December. 30

Adjourned to 2.30 P.M.

Sgd. A.G.F.

2.30.P.M. Bench and Bar as before.

CLEASBY: continues:

Submit positive election to rely on oral Contract in December. Now argued he can rely on quite a different contract. Would concede it is open to party to argue point not argued in Court below if all evidence before Court.

But submit that evidence as to second contract never led if it existed.

Witness for Plaintiff never alleges directly or indirectly that term was any other contract other than December oral contract.

No other contract put to Defendant witness. Refer Page 77 of Record line 28.

Hussey v. Horn (1879) 3 A.C. 311.

There were in evidence 2 letters interconnected inter se which in isolation indicate a concluded contract. But evidence that they were interchanged against a background of oral negotiations.

Attempt here to take correspondence and vague evidence of oral negotiations and say concluded agreement.

Pages 41 and 42: Letter 5 accepts conditions except for one set out in Letter 4.

Then vaguely say at some subsequent time agreed to 3 year term and therefore a concluded agreement.

Evidence of Elliott before Exh.6: said prior to that there must have been a conference....

But no evidence of crucial interview or what took place at it or where it took place before 25th January. Never put to either witness. Only evidence is at page 15: Witness refers to previous letter.

Evidence of Elliott: Page 21 line 18: Refers to oral agreement.
Page 20 line 5: That cannot be taken as meaning that at a discussion before 3rd Feb. Defendant had agreed a 3 year lease. Still under discussion on 3rd February.

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes A.G.Forbes Vice President 12th July 1961 continued

That all there is of "crucial" interview.

Evidence is that as late as 3rd February, still negotiating about term of lease.

Conflict between page 15 line 9/10 and page 43 last paragraph. These matters were not investigated, they were never gone into in the evidence. Our main case always been that the parties were still negotiating. Plaintiffs had to show that at certain time there was a concluded agreement.

(1) Parties expected a formal lease to be drawn up.
(2) Both were laymen.
(3) Not suggested anything formal about the agreement in December.
(4) Is it likely that man such as Elliott knowing lease was to be prepared by lawyer, would agree to all terms not subject to lease to be prepared by solicitors.

Refer to Page 16 line 5: Page 16 line 13.
Page 20 line 12: Page 20 line 21.

Both sides saying a formal lease must be drawn up.

(V-P: Did not judge find against you on reference to formal lease? Page 82).

Submit not. Page 83. Oral agreement not concluded. If it could be said on evidence the terms had been agreed in December then there would be a concluded contract. But terms were not agreed. Not Defendants' case that everything agreed but that terms subject to a formal lease. Defendants' case is that no binding agreement was made in December at all.

Plaintiffs only case is oral binding agreement for a lease made in December.

Judge held that at December discussion the Plaintiffs thought there was a concluded agreement and Defendants thought still negotiation. Does not decide on onus of proof. He makes a specific affirmative finding. Minds not ad idem.

Agree that if letter 3 accepted uneguivocally there would have been concluded agreement. No reference to drawing up of lease in that. But it was not.

Page 81 line 19. Judge purely concerned with whether oral agreement made in December. Reference at Page 82 line 30 is confined to letter of 19th January.

Now argued not that an agreement was concluded in December. That abandoned. Now arguing that a concluded agreement before February. But Judge solely concerned with whether a concluded oral agreement in December. Never an allegation in correspondence that an agreement had been arrived at in December.

Plaintiffs evidence at page 15 line 3. Does not allege concluded agreement. Defendant's case that contract subject to confirmation. Not Plaintiff's case. Plaintiff's case was that agreement had been concluded.

December agreement now abandoned. Conceded only negotiations in December. Now argued agreement concluded subsequently. i.e.

(1) Letter of 9th January.
(2) Acceptance of whole only one term.
(3) Acceptance of that term.

Issue then would be whether after 9th January there was an agreement concluded by correspondence and oral negotiation.

1st Issue set out at page 12 was not issue tried by the judge. At time framed I expected Plaintiff to put up argument now put up. But in fact Judge tried only the issue whether there was a concluded agreement in December.

Evidence was directed solely to that point. Cross-examination and Defendants' witnesses evidence directed to meet case put up.

Matter which would be of crucial importance is how, when and where agreement as to term was reached. Evidence could have been led to show that we made it clear that we wished to see formal lease and have it approved by our Solicitors.

If case now put up had to be considered it would be necessary to consider whether later agreement was subject to formal lease.

- Exhibit 5 2nd Para: Exhibit 6 2nd Para. Exhibit 7, 2nd Para. Exhibit 9, 2nd Para. Exhibit 12 and 13: Exhibit 14: Exhibit 15 last sentence: Negotiations broken off by Plaintiff's solicitors.

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes A.G.Forbes Vice President 12th July 1961 continued

Do not suggest court should consider correspondence and come to conclusion on it. But obvious we could have led evidence to show at that stage that agreement was subject to formal lease. No doubt reason Nazareth elected to argue agreement in December. Agree with judge that "usual conditions" are ascertainable in Kenya. But Elliott did not attach importance as he expected formal lease was to be approved by solicitors.

Word "approval" is equivocal. If binding agreement in Dec. immaterial what it means. But very material if no concluded agreement in December. Letters not seriously put to witnesses.

Submit appeal should be dismissed.

O'DONOVAN (In reply) -

Question of whether I should be permitted to put case. Was Nazareth put on election? Submit there was no election. Plaintiffs position in court below was that there was a concluded agreement reached in December and confirmed by letter of 9th January.

Defendants attempted to resile as to one term, but that was finally re-agreed. Defendant's case is no agreement in December, as 3 year term not agreed. It was subsequently agreed before 17th February but parties still in negotiation on subsidiary terms.

Judge unable to decide where truth lay.

Submit: therefore open to say that if Elliott wrong in saying still a term not agreed; at least all terms agreed by 17th February. Is he right or wrong on one point only. Are parties still in negotiation on subsidiary points in February.

Essential to lead evidence as to what was said

and written in January and February. Evidence as to this was put before court.

Page 82: Judge says correspondence required careful examination.

Page 84: Deals with interview in February.

This is a case where all evidence was in fact adduced as to what happened in January and February.

Defence's main point was that agreement was subject to formal lease. Evidence said Defence could have been produced was in fact vital to case he argued.

Submit argument is an obvious alternative. Argument if Judge unable to reach conclusion. Was anticipated, so Defendants not taken by surprise.

Thakur Singh case at page 212.

Elliott says he attached no importance to phrase "usual conditions". Question is was he right or wrong. Judge held against him.

Second paragraph of Exhibit 5 at page 41.

Submit meaning of that only relevant issue judge has decided - i.e. was contract subject to formal lease. If can be argued: Consistent with an unconditional acceptance. Merely checking of recording of terms of agreement. If phrase "usual conditions" has ascertainable meaning, it is blanket term which covers everything parties have not specifically set out.

C.A.V.

Sgd. A.G.Forbes
VICE PRESIDENT
12. 7. 61.

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes E. Crawshaw Judge of Appeal 12th July 1961

JUDGES NOTES.

E. CRAWSHAW - JUDGE OF APPEAL

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

CIVIL APPEAL NO.66 OF 1960

BETWEEN

JAFFERALI & SONS LIMITED APPELLANT

AND

THE WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA LIMITED RESPONDENT

Notes of arguments by Crawshaw J.A.

12.7.61 Coram: Forbes V-P.
Crawshaw J.A.
Newbold J.A.

O'DONOVAN Q.C., I.T.Inamadar with him, for Appellant.

CLEASBY for Respondent.

O'DONOVAN opens:-

Question is whether concluded agreement. Submits there was. In court below argued verbal agreement in December '57; plaint signed in or about month of January.

Submit pleading can be supported on evidence and at latest agreement early in February. This is not raising new matter because whole evidence before court, and anyway agreement is covered by issues framed. Entitled to argue point differently in circumstances:-

Misa v. Currie (1876) 1 A.C.554, 559.

Thakur Sheo Singh v. Ranj Raghubans Kunwar (1905) 32 Ind. App.203, 212

12. Issues -

Abdul Ghafur (1949) 36 A.I.R.(Assam) 17 p.18 2 column 10.

Rely on agreement finally reached verbally, but evidence in part in certain letters.

Evidence 14.

38,39. Respondent "preferred to offer you a 3-year lease," subject to approval by Keir. Copy sent to Keir - should have been addressed Mombasa and not Nairobi, but he received it anyway.

40

41 Submits corroboration of Jafferali's evidence that 3 year agreed, as it emanated from Respondent's letter of 3rd December. Submit reference to 1 year at 41 was after thought.

42 "It is now agreed". Submits this is correct statement of fact as to what was agreed in January.

15/6 & 44. - Jafferali surprised. 44 Does not contradict statement of fact in 42 that 3 years had been agreed. With Elliott agreed confirmation of 3 years.

Draft lease drawn including 3 years to which term no objection taken, but only to repairs.

Only after having successfully surrendered the Factory Street godown does Respondent give notice terminating Clarke Street premises.

17. Cleasby's arguments:-
(a) Formal lease
(b) "Usual conditions"

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes
E. Crawshaw
Judge of Appeal
12th July 1961
continued

18. Hussey v. Payne. Between written offer and acceptance there were oral negotiations on other aspects of bargain, and held not therefore ad idem.

Concedes that not all terms settled, no agreement.

19.

20/1 Not quite right, for Exhibit 3 also mentioned term of 3 years.

20/9-12 Very important. Admits that before 25th January 3 years had been agreed. Submits this concluded preliminary negotiations - next step was draft lease.

Elliott's case as presented by his Counsel was :-

It was agreed to take Clarke Road factory and rent and 3-year term were agreed, but certain matters outstanding such as repairs and "usual conditions" and preparation of formal lease.

21/3 Elliott admits "surrender was part of negotiations for new premises".

21/20 Elliott now denies there was a 3-year lease and, in view of his earlier evidence, this must refer to period between 20th and 30th December, but even then does not make much sense in view of Exhibit 3.

21/25 Elliott agrees that by terms of draft lease confirmation to 3 years had been received.

22/17 No word in defence summing up about confirmation from Mombasa - quite right, as had been obtained. What Cleasby was saying was that although agreement on main conditions, no one can say what the subsidiary conditions were, and these broke down on question of repairs.

JUDGMENT

In the Court of Appeal for Eastern Africa

No.13

President and Judges' Notes E. Crawshaw Judge of Appeal 12th July 1961 continued

72/28 Not quite what Elliott said. What is certain is that 3 years was agreed on confirmation, which was received.

Judge said not a case of conditional or formal contract and also held that "usual conditions" ascertainable. All findings on law in favour of Appellant.

81/13 Most important part of judgment is on evidence.

85/17 Judge says no conclusion can be reached from this subsequent correspondence.

Submit that Judge's decisions as follows on evidence

(a) Jafferali evidence honest in that believed a concluded agreement;

(b) Elliott equally believed his evidence true, and that no finality of agreement.

(c) that therefore no sufficient proof.

Submits this is fallacy in failure to distinguish primary facts from inference of mixed law and fact.

Benmax v. Austin Motor Co.Ltd. (1955) A.C.370.

Perfectly possible for both parties each to believe what they did, but one to be right and the other wrong.

Crucial interview was between Jafferali and Elliott as result of which Exhibit 6 written. Elliott's interpretation of that interview is either that he agreed the 3 year lease himself, or else that he did so subject to confirmation, which he obtained.

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continued

72/28)
81)
82/8)
83/2)

Judge does not say whether he believed statement by Elliott that on a number of occasions he said confirmation required from Mombasa.

83/2

This statement impossible to reconcile with finding that approval of Keir a condition precedent. This passage of the judgment, read with letter of 13th January, means that judge would have found for Appellant had it not been for the term of years. Term of years at least confirmed by 17th February on receipt of draft lease 84/14.

Even if correct (and judge does not go so far) that contract was contingent on confirmation - that confirmation was obtained and contingency disappeared.

Submit letters 4 and 5 agreed all essential terms except years, and this settled before draft received.

Argument failed that "unusual conditions" until ascertained left contract open.

The subsidiary conditions as to repairs etc. could have been got rid of on an originating summons or other way.

Perry v. Suffields (1916) 2 Ch. 187, 191-2.

CLEASBY:

When once definite agreement reached then subsequent negotiations as to other terms are of no effect. This argument was taken in court below, but the agreement then referred to as binding was an oral agreement entered into in December.

O'Donovan now bound to argue to an agreement made at some indefinite time in January or

February. If in fact there was a binding agreement then, no one seems to have realised it at that time, for Appellant's advocates later said "no one is continuing negotiations".

Point taken by O'Donovan not taken in court below. The whole case was fought on basis that oral agreement made before any correspondence passed.

Para.5 Plaint) Divergence between
) plaint and Memoran-
) dum of Appeal
Para.4 Memorandum)
of Appeal)

13/7 Nazareth does not ask for amendment. He elects to stand on oral agreement of '57.

18/12 Paras.2 and 3 - Cleasby's argument.

23/30 Nazareth again says "late December"

22/4 "Plaintiff's case is...."

14/18 No evidence what this letter was, but perhaps letter in January.

14/28 Everything as binding after conversation in December.

2.30 P.M. Bench and Bar as before.

CLEASBY continues :

O'Donovan seeks to rely on another, quite different, contract to the oral one - not agreed in court below but conveyed by plaint. Evidence and pleadings may be more important than legal argument.

Examined whole evidence of Jafferali, and he never alleged directly or indirectly that there was another contract, and it was never put to him. Evidence related solely to oral contract.

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77. Hussey v. Horne-Payne. Appellant now seeks to look at correspondence and very vague evidence of oral negotiations and say "there is the agreement". Take letters 4 and 5 in isolation and say that 5 accepts the obligation in 4 except for term of years, and that thereafter the 3 years agreed, and that there is the whole argument.

O'Donovan says "crucial" interview was one which there must have been prior to letter 6, when Respondent had abandoned the 1-year lease. But no evidence nor pleadings of any such conference.

42. Letter does not refer to previous agreement as to 3 years.

21/17) Elliott denied oral agreement
20/6) At 3rd February Elliott still asking for a 3-year lease.

20/11 "It was agreed...." This is admittedly vague, and Elliott was not questioned on it. Cannot say whether it refers to agreement after confirmation, and if so when, or to agreement subject to confirmation being obtained.

15/8 and letter 7 discrepancy

None of above matters were investigated because issue related to alleged December oral agreement. We do not know when the 3 year lease agreed to.

Defence case has always been that lease never got beyond negotiation, and it was for Appellant to prove when these concluded.

Respondents were laymen and expected formal lease. Unlikely that person such as Elliott would agree everything unless subject to formal agreement.

16/6 Jafferali said he expected formal lease and intended his advocates to protect his interests, and he then goes on to refer to what was to be inserted. 16/27 - Left all details to advocates.

20/12 Next step....

Both parties therefore contemplated formal lease. I do not say that agreement was subject to formal lease but that negotiations were still going on right to the end.

If subsidiary terms such as repairs and other clauses in draft not agreed on, then lease still subject to negotiations, even though major terms agreed.

Appellant's claim was oral agreement in December plus "usual conditions". If usual conditions ascertainable, then binding agreement and judge held that not subject to formal lease. Respondent's case is that there was binding agreement in December and so the judge held. Respondent refers to 3 years and also to general heads of agreement.

The letter of 9th January - No.4 - refers to oral discussions in December, which it is agreed there were. Letter No.5 also had in mind the December oral discussions. Submits in No.4 Appellant really did believe there had been a binding agreement, whereas there had not because of the length of lease. Even had Appellant replied to No.5 saying he agreed 1 year lease, submit still not a binding agreement, much would turn on preparation of a draft lease.

Exhibit 4 sets out alleged terms of December oral agreement.

81/19 Judge says evidence of oral agreement

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continued

in December is inconclusive. He then looked at No.4 and No.5 and says No.4 consistent with agreement, but that No.5 cannot be read as agreeing the terms made in December.

Understand Appellant now says this was a binding agreement before February.

It was never suggested in trial court by either party that there was a binding agreement in December dependant on confirmation from Mombasa. The Appellant said the contract was complete, which it would not have been, and Respondent said still under negotiation. Letter No.4 makes no reference to contingent approval.

Crucial point is whether judge justified in finding no binding contract in December, and O'Donovan now appears to rely on a later contract.

If no contract in December, then Appellant must prove, if it is open for him to do so, at this stage, that there was a binding agreement after December. One would expect this to be done by starting with No.4, then No.5 agreeing all except years, then years being agreed. Issue would then be different. Issue at p.12 was not in fact tried as such; it was tried on limited issue of December oral agreement. Respondent prejudiced by only case which was put to court and cross-examined accordingly. Immediately following issues Nazareth says at 13/2 "Plaintiff says oral agreement reached in November or December 1957." Evidence e.g. could have led evidence that lease would only have been agreed if allowed by solicitors; as for one thing premises then found to be leaking, as appears in evidence. See later correspondence.

59/31 suggests breaking off negotiations by Appellant

Suggests that reason Nazareth relied on oral December agreement was because Respondents later were adamant on not committing themselves without their approval; they had had trouble with leaking roof before in Factory Road godown.

Elliott did not object to "usual conditions" as he was relying on his lawyer's advice. Had there been an otherwise binding contract using these words, then they would have to be given a meaning, but the stage was still negotiation and the term "usual conditions" was one used between laymen for particularising by lawyers.

In Nos.4 and 5 taken in isolation, evidence would have had to be led to show the background.

If Appellant right in saying binding agreement in December, then no point in bringing evidence as to subsequent requirement of formal lease.

O'DONOVAN :

Nazareth not required to be put on his election as to how he conducted the case below.

Appellant case is binding agreement in December 1957 confirmed by letter No.4 Respondent then tried to resile point on length of term, which however he later abandoned.

Respondent's case no complete agreement in December as set up in No.4 as term of 3 years not agreed. That this term subsequently agreed to between 9th January and 17th February, but parties still in negotiation thereafter because of subsidiary matters.

Judge could not make up his mind where truth lay. Then open for Appellant

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to say take Elliott's evidence that he agreed all terms in No.4 except for the one term and settling of certain subsidiary matters.

It was therefore necessary to lead all evidence available right up to May. Judge does not limit himself to 31st December. He refers to interview in February. All evidence relevant and adduced.

Surprised at Cleasby saying he could have led further evidence. Respondent's main point was that agreement was subject to formal lease.

Cleasby's "obvious argument" that Appellants could have raised, was one he could therefore have anticipated.

As to Elliott binding Respondent without reference to lawyers, he himself said he attached little importance to "usual conditions".

Letter No.5, 3rd para: Submit its only importance is whether the agreement was to be subject to a formal lease, and on this the judge came to a finding, and not now open to Respondent to re-open it. A draft would be required to see it complied with and terms of agreement and the "usual conditions."

Submits "usual conditions" included all matters not otherwise specifically agreed.

Judgment reserved.

(signed) E.Crawshaw
J.A. 12/7/61.

9.8.61. Coram: Crawshaw J.A.

10.00 a.m. Akram for Appellants; V.Kapila for Respondent.

Judgments read by me in Court.

(signed) E.Crawshaw
J.A.

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President and Judges' Notes C.D.Newbold Judge of Appeal 12th July 1961

JUDGES NOTES

C.D.NEWBOLD - JUDGE OF APPEAL

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

CIVIL APPEAL NO.66 OF 1960

BETWEEN

JAFFERALI & SONS LIMITED APPELLANT

AND

THE WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA LIMITED RESPONDENT

Notes of arguments by Newbold, J.A.

12.7.61. Coram: Forbes V-P
Crawshaw J.A.
Newbold J.A.

O'Donovan Q.C., I.T.Inamdar with him, for Appellant.

Cleasby for Respondent.

O'DONOVAN opens:-

Does evidence establish a concluded agreement. I submit there was.

In court below submitted a concluded agreement verbally in December - I shall deal with it differently.

Plaintiff claims agreement in or about January - that pleading supported by evidence. At latest there must have been agreement in February.

Submit I can approach matters differently as all evidence before court.

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Misa v. Currie (1876) 1 A.C. 559 - no new matter.

Thakur v. Rani (1905) 32 I.A. 203 at 212 - issues wide enough.

Issues in this case - P.12.

Abdul Gafoor v. Ali (1949) 36 A.I.R. (Assam) 17 at p.18 - mew submission essentially involved in issue framed.

I rely on agreement finally reached verbally but evidence of which consists in part of certain letters - submit I can do so on pleadings, evidence and 1st issue.

P.14 - evidence of Plaintiff - letter of 3rd December at P.38 from Respondent. P.39 L.12 - offer of 3 years at £112 per month - subject to approval of General Manager.

P.14 - Plaintiff says reached agreement and wrote Exhibit 4.

P.40 - Letter from Plaintiff.

P.14 Plaintiff regarded matter as concluded.

P.15 - Subsequent letters.

P.41 - We wish to have lease for 1 year. It was Respondents in their original letter who mentioned 3 years. Either of 13th January or afterthought.

P.42 - Subsequent meeting and letter of 25th January written. Only question was 3 years and this settled afresh.

From Elliott's evidence this is a correct statement of what agreed in January.

P.15, L.5 - Surprised to receive letter of 3rd February.

P.44 - does not contradict statement that 3

years lease agreed. Elliott said question of 3-year lease referred to Mombasa and agreed - does not deny terms of 3 years settled.

Draft lease drawn up and submitted to Respondent - for 3 years - no objection to that but objection taken on repairs.

On 17th May formal surrender of Factory Street and having obtained then on 29th May gave notice to quit.

Premises vacated and relet at lower rent.

P.16 - no instruction to break off.

P.17 - for defence submitted a formal lease required. Also, if negotiations no contract; and as far as usual conditions these cannot be determined until after negotiations.

Hussey v. Payne (1879) 4 A.C. 311 - case when there appeared from letters to be concluded agreement but evidence was no concluded agreement in fact.

P.20 - evidence of Elliott not quite correct as letter of 3rd December states 3 years lease.

P.20, L.10 - before 25th January agreed that 3 year lease.

Submit Elliott agreed to 3 years and all essential terms.

Case for defence was that there was agreement for 3 years at agreed rental but this not a completed bargain and other terms such as repairs to be determined and that "usual conditions" did not set out matter with certainty - subsequent dispute as to repairs.

P.21, L.20 - if this makes sense it must refer to period from 20th - 30th December. Even then at variance with his letter of 3rd December.

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President and Judges' Notes C.D.Newbold Judge of Appeal 12th July 1961 continued

P.21, L.25 - confirmation from Mombasa.

P.23, L.20 - content of usual conditions was agreed - no certainty of usual conditions.

Defence was that though agreement on main headings, yet usual conditions not clear and parties broke down on subsidiary condition of repairs.

Judgment may not set out Elliott's evidence correctly but may be immaterial as certain that Mombasa agreed to 3 years.

Judge decided that this not a contract subject to lease. He also decided that usual conditions had meaning and no cross appeal.

P.81, L.14 - consideration of evidence. Judge seems to emphasise a point of no importance as confirmation received from Mombasa.

P.84, L.25 - this a misdirection - Elliott said term agreed.

Submit learned judge decided -

(1) Plaintiff gave evidence which he (Plaintiff) delivered;

(3) Respondent gave evidence which he (Respondent) believed to be true that no concluded agreement and therefore Plaintiff had not discharged onus.

Submit this a fallacy - future to distinguish between primary facts and inferences of mixed law and facts.

Benmax v. Austin (1955) A.C. 370

Learned judge failed to appreciate that Elliott's evidence of no concluded agreement was not primary fact but inferences of mixed law and fact of complicated matters.

Case for defence was (1) that though main points settled yet void for uncertainty
(2) lease subject to formal lease which not agreed
(3) subject to confirmation

from Mombasa - this later dropped as Mombasa confirmed.

Crucial interview was that which resulted in letter of 25th January (Exhibit 6). Either Elliott agreed to 3 years or he agreed to 3 years subject to confirmation which he obtained.

P.72 - confirmation from Mombasa
P.81-82 " " "
P.82 " " "

P.83, L.4 - this does not reconcile with confirmation from Mombasa not having been given. This can only mean that if confirmation given from Mombasa then a concluded agreement - in fact confirmation was given.

P.84,L.2 - meeting between 13th and 25th January.

Common ground that before draft lease sent 3 years agreed.

Submit this court free to examine matter independently.

Obvious from Exhibits 4 and 5 that all terms settled except for period - no other subject reserved for negotiation. Subsequently parties agreed on period with no subject reserved and therefore Appellant entitled to succeed.

There was complete agreement before draft lease submitted - subsequent argument cannot get rid of concluded agreement.

Perry v. Suffields (1916) 2 Ch. 187 at 191-192.

Submit Plaintiff proved a contract and a breach and suffered damage which not disputed.

CLEASBY:

Agree that if definite agreement reached then subsequent negotiations cannot affect the position

In court below it was submitted that agreement

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President and Judges' Notes C.D.Newbold Judge of Appeal 12th July 1961 continued

was concluded orally in December. Now the concluded agreement is stated to have been made some time in January or February.

If this was a binding agreement no one seems to have a appreciated it as negotiations continued until letter from Solicitors of 24th April.

Only one agreement alleged in court below - oral one in December.

Plaint, para: 5 - agreement about January.

Memo. of Appeal, ground 4 - reference to 27th February - this a divergence.

P.13 - Plaintiff claims agreement in December.
P.14,L.15 - this the case Def.was meeting
P.23,L.30 - Plaintiff claims agreement in December.
P.22,L.1 - I meant Plaintiff's case as pleaded.
P.14,L.20 - reference to December
" ,L.28 - contract binding in December
P.21,L.18 - conversation in December.

2.30 p.m. Bench and Bar as before.

CLEASBY continues:-

There was an election for oral contract in December. Now argued that Appellants rely on different contract - concedes open on appeal to argue matter covered in pleadings and on evidence below. In this case evidence of 2nd contract never led. No reference in Plaintiff's evidence to say contract other than December one. Never put to Defendant that any other contract.

Appellants now seek to refer to letters and a conversation and say there is agreement.

Appellant submits take Exhibits 4 and 5 and say all agreed except period - at subsequent time agreement of period.

The crucial interview was one before Exhibit 6 - but no evidence of what agreed at it or if it ever took place. P.15,L.1-5 - refers to letter of 3rd December. P.20, L.10 - this cannot mean that before the 3rd February Defendant agreed to 3-year period.

None of matters examined as examination and cross-examination directed to an oral agreement in December.

Our case always been that parties still negotiating.

As regards oral agreement in December both intended a formal lease - they were both laymen - is it likely that Defendant agreed everything without making it subject to a formal agreement. P.16,L.5 - Appellant intended a formal lease which would protect his interests - see reference to clauses. P.20,L.12 - draft lease was to be next step. P.20,L.20 - draft to be submitted to Mombasa.

If Defendant had agreed to terms in December then there would have been a completed agreement but Defendant was still negotiating.

If Appellant had accepted the proposal in Exhibit 5 there would have been no concluded agreement as it would then depend on lease being prepared.

Agree that if reply to Exhibit 4 had been an unequivocal reply then lease would not have been subject to terms of formal lease and phrase usual conditions would have covered the subsidiary points.

As Appellant now claims on a contract completed before end of February the judge was correct in saying that no completed contract in December, which was contract alleged before him.

If no completed contract in December Appellant would have to prove that agreement concluded subsequently.

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If obligation is that a contract spelled out from Exhibits 4 and 5 and a subsequent agreement on period of time then this a different issue from that tried by judge - the first issue set out at p.12 was not in fact the issue tried by judge. The evidence was not directed to this new issue. I did not seek to examine or cross-examine on this new issue.

There was evidence we could have led to show that in January or February we would only have accepted a lease subject to approval of lawyers.

Exhibit 15 - last sentence - this shows negotiations broken off by Appellant.

About 3rd February my clients had trouble with seepage and would have insisted on lease being subject to approval of lawyers.

I accept judge's findings that term usual conditions has a definite meaning in Kenya and that in absence of evidence of local usage it would be as set out in Section 808 of Transfer of Property Act.

O'DONOVAN:

Was Nazareth put on election - I submit there was no election - it was unnecessary.

Our position today is this:

There was a concluded oral agreement in December confirmed by Exhibit 4. Thereafter Defendants attempted to resile but contract was reaffirmed later in January.

Defendant's case is :-

There was no completed agreement in December as period not agreed. 3 years subsequently agreed between 9th January and 17th January but parties still in negotiation as subsidiary terms to be settled.

I submit it to open Appellant to say if Elliott wrong in saying subsidiary terms to be settled then on his own evidence there was an agreement by 17th February either affirmed or reaffirmed. In view of this it was most relevant to lead evidence of what happened in January, February and right to the end of May when notice to quit given. Learned judge does not confine himself to agreement in December - see p.84 of interview in February.

Surprised when Cleasby said could have led evidence about formal lease if he had known - in fact formal lease was in forefront of his case in court below. He has not been taken by surprise as he said he anticiated my argument in the court below.

Exhibit 5, last para: merely means that lease was not subject to formal lease being approved but merely to see if it contained what had been agreed. Also, if "usual conditions" has an ascertainable meaning as judge has held then it would be for the lawyer to see that those conditions had been inserted.

C.A.V.

(signed) C.D.Newbold
J.A.

12/7/61.

In the Court of Appeal for Eastern Africa

No.14

Judgment of E. Crawshaw Judge of Appeal 9th August 1961

JUDGMENT OF E.CRAWSHAW - JUDGE OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

AT NAIROBI

CIVIL APPEAL NO.66 OF 1960

JAFFERALI & SONS LIMITED APPELLANT

AND

THE WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED RESPONDENT

(Appeal from a judgment and decree of Her Majesty's Supreme Court of Kenya at Nairobi (Farrell J.) dated 3rd June, 1960.

in

Civil case No. 1411 of 1959

Between

Jafferali & Sons Limited Plaintiff

and

The Warehousing & Forwarding Company of East Africa Limited Defendants).

JUDGMENT OF CRAWSHAW J.A.

This is an appeal by the Plaintiff Company against a decision of the Supreme Court, Nairobi, dismissing with costs its claim for 51,350/- damages arising from repudiation by the Defendant Company/Respondent Company of a lease alleged to have been granted by the Plaintiff Company to the Respondent Company.

The facts are briefly as follows: On the

1st July, 1957, the Respondent Company leased from Jafferali Madatally, the managing Director of the Appellant Company, and his two brothers certain warehouse property in Factory Street, Nairobi, for a period of five years. The premises turned out to be damp and therefore unsuitable for the Respondent Company's purpose and towards the end of 1957 Mr.Elliott, on behalf of the Respondent Company, entered into negotiations with Mr. Jafferali for a surrender of the Factory Street warehouse and the leasing instead of a godown belonging to the Appellant Company in Clarke Lane, Nairobi. Mr.Elliott was a director of Leslie and Anderson (East Africa) Ltd. which he said had general control administratively over the Respondent Company which was a wholly owned subsidiary of Leslie and Anderson (East Africa) Ltd. It seems that Elliott was also a manager of the Nairobi branch of the Respondent Company, but that he did not have authority to conclude a binding agreement of lease without confirmation of the managing director of the Respondent Company.

On the 3rd December Elliott wrote to Messrs. Madatally Suleiman Verjee & Sons Ltd., of which company Jafferali was also a director, referring to discussions about the Clarke Lane go-down, in which he said, "We are, however, prepared to offer you a three year lease for your Clarke Lane godown at £112.10.0. per month provided you agree free vacation of Factory Street godowns. Kindly note the foregoing is subject to approval by the General Manager of Wafco, Mr.Keir and by copy of this letter Mr.Keir is requested to confirm our comment on the proposals contained in this letter." It seems that a copy of the letter was sent to Mr.Keir, and that "Wafco" is an abbreviation for the name of the Respondent Company.

Towards the end of December there were further discussions between Elliott and Jafferali, and possession of the Clarke Lane premises was given to the Respondent Company on the 1st January, 1958.

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No.14

Judgment of E. Crawshaw Judge of Appeal 9th August 1961 continued

On the 9th January, 1958, the Appellant Company wrote to the Respondent Company as follows:-

"Re: Godown Plot No.L.R.209/1081

Clarke Lane, Nairobi

In accordance with our mutual arrangement the above godown has been let to you on following terms .....

(1) Monthly rental of the godown to be Shs.2,250/- nett payable by you to us in advance.

(2) The godown has been let to you upon three years lease commencing from 1st Jan.1958.

(3) The lease will be prepared by our Solicitors at your expense.

(4) Water, Light and Conservancy charges are payable by you.

... and usual conditions.

Kindly confirm so that we could proceed with preparing the lease.

The possession of the godown has already been handed to you."

In reply the Respondent wrote on the 13th January as follows :-

"Thank you for your letter of the 9th instant.

The terms as set out by you are agreed, with the exception of No.2. We wish to have the lease for one year with an option of renewal.

Would you kindly forward to us a draft of the proposed lease as prepared by your solicitors so that we may examine it before signing."

It would seem that following this last letter there was a further conversation between Jafferali and Elliott. Jafferali referring to this said in evidence Elliott "finally agreed to term of three years", but it is not at all

clear when exactly he meant that this Agreement was arrived at. Referring to the same conversation Elliott said, "I told him I would write to Mombasa. It was agreed that we should take a 3 years lease". This the learned judge took to mean that confirmation would first have to be obtained from Mombasa. That confirmation was still required at that stage was not put to Jafferali in cross-examination, and his evidence does not suggest that he would have admitted it. Following this conversation the Appellant Company wrote to the Respondent Company on the 25th January as follows :-

> "We refer to your letter dated 13th inst., in reply to ours of the 9th instant and to subsequent interview with your Mr.Elliott, it is now agreed that you are renting the godown for a lease of three years from 1.1.58.
>
> We are now proceeding to instruct our Solicitors to prepare a draft of lease and be sent to you for approval."

On the 3rd February the Respondent company replied, paragraph 1 of the letter reading:-

> "We are in receipt of your letter of the 25th instant and are disappointed that you appear unable to accede to our request for one year's lease with our option of extending for a further two years. May we ask you to kindly give this matter further consideration."

In this letter the Respondent Company drew attention to the fact that the roof of the Clarke Lane godown was leaking.

Thereafter Jafferali instructed his lawyers to draft a lease and this was submitted to the Respondent Company for approval on the 17th February. The Respondent Company replied at some length on the 14th March, drawing attention to a number of matters in the draft with which it did not agree, but making no mention of the term of three years which was stipulated in the draft. Correspondence ensued on the matters raised by the Respondent

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Judgment of E. Crawshaw Judge of Appeal 9th August 1961 continued

Company (not including, as I say, the term of years), and on most of them the Appellant Company was prepared to meet the Respondent company. The only contentious matter which eventually remained related to repairs,and on the 24th April the Appellant Company's lawyers wrote a letter to the Respondent company which finished by saying:-

> "If, for instance, you must insist on a clause which renders our clients responsible for all repairs save only those directly attributable to abuse by you, our clients feel that no useful purpose can be served by a further continuance of the present relationship."

On the 29th May the Respondent Company replied to the Appellant company's Lawyers, paragraph 1 of the letter reading :-

> "With reference to your letter of 24th instant, the matter has been carefully considered and we can only agree with the last sentence of your letter that no useful purpose can be served by a further continuance of the present relationship."

It is to be observed that this letter refers to the Appellant Company's Lawyer's letter of the "24th instant". The learned judge appears to have accepted that the letter was written, as dated, on the 24th April, The apparent discrepancy was not I think commented on by either party nor mentioned by the learned judge. It is of interest only in so far as on the 17th May the parties executed a Deed of Surrender of the Factory Street premises, which might perhaps appear a little surprising if on the 24th April the appellant company was uncertain whether the lease of the Clarke Lane premises would be completed. On the 29th May the Respondent Company also sent to the Appellant Company formal written notice that it intended to vacate the premises on the 30th June. In referring to the letters of the 24th April and the 29th May the learned judge observed, "there is no pleading in the defence that a binding agreement was arrived at but later rescinded by mutual consent". Had there been an alternative plea that if a concluded agreement was found, these letters

constituted a mutual rescision of it, then an issue thereon would have been framed and the point argued; this however was not the case, and it does not fall to us to decide it.

The plaint alleged that in consideration of the Respondent Company being released from its obligations in respect of the Factory Street premises, "it was accordingly agreed between the Plaintiffs and the Defendants at Nairobi in or about January 1958 that the Plaintiffs should grant and the Defendants should take a lease" of the Clarke Lane premises, "for a term of three years commencing on the first day of January 1958 at a rental of Shs.2,250 per month." The damages claimed were assessed on the rent of the Clarke Lane premises lost to the Appellant Company through the alleged repudiation of the lease by the Respondent Company, after taking into account a lesser rent which the Appellant Company was able subsequently to obtain from other tenants. The quantum of damagesis not challenged.

Paragraph 3 of the written Statement of Defence reads as follows :-

> "3. The Defendant admits that negotiations were entered into by it with the Plaintiff with reference to the premises in Clarke Lane but the Defendant denies that any concluded agreement of lease was ever concluded and the Defendant will (inter alia) allege that the only terms upon which the Plaintiff was willing to conclude a lease were set out in sundry correspondence interchanged between the Defendant and Messrs.Inamdar & Inamdar then acting as Advocates and Agents for the Plaintiff, and specifically in a letter of 24th April, 1958, addressed by the said firm of Advocates to the Defendant and the Defendant states that such terms were not acceptable to the Defendant and that accordingly the Defendant after giving one month's notice of its intention in that behalf vacated the said premises on the 30th June, 1959."

The issues were framed as follows:-

In the Court of Appeal for Eastern Africa

No.14

Judgment of E. Crawshaw Judge of Appeal 9th August 1961 continued

"1. Was any agreement for a lease of premises on plot L.R.209/1081 Clarke Lane, Nairobi concluded between the parties? If so, for what term and at what rent and upon what conditions?

"2. If such agreement concluded, can it be sued upon notwithstanding the same is not registered?

3. If agreement concluded and can be sued upon what damages?"

As already stated, the quantum of damages is not in dispute; and the second issue does not appear to have been pressed by the Respondent company since no argument was addressed to the judge, or, for that matter, to this Court, upon it. The appeal is therefore not concerned with the second and third issues. In his judgment the learned judge said, "the only issue in the case is whether there was a concluded agreement, and this is an issue of pure fact to be decided in the light of the evidence of Jafferali and Mr.Elliott, and of the correspondence." Later, in his judgment, he said:-

> "The Plaintiffs' case is that a concluded and binding agreement was arrived at orally in the last days of December, 1957; the Defendants' case is that the parties never passed beyond the stage of negotiations and that no concluded agreement was ever reached.
>
> The direct evidence of the discussions that took place between Jafferali and Mr.Elliott late in December, 1957, is inconclusive, consisting of an assertion by the one and a denial by the other. The probabilities also are evenly balanced; for the Plaintiffs it may be argued that the possession given to the Defendants makes it rather more than less likely that a concluded agreement was first reached, though such possession is not exclusively referable to a three-year term as alleged by the Plaintiffs; for the Defendants it may be argued that Mr.Elliott, having made it plain in his letter of the 3rd December that he had no authority to enter into a

binding agreement without reference to the Defendants' general manager in Mombasa, would have been unlikely to do so on his own responsibility towards the end of the same month. In this connection it is to be noted that the Plaintiff had been warned at the outset that Mr. Elliott did not have full authority as agent for the Defendants, and there is no evidence that anything was said to Jafferali that might have led him to believe that the position had changed. On the contrary, Mr.Elliott claims to have informed the Plaintiffs on a number of occasions that confirmation of any arrangement would be required from Mr.Keir; but as this claim was not put to Jafferali in cross-examination, its value as evidence is diminished.

In view of the conflict in the direct evidence, a decision is to be sought primarily from a consideration of the correspondence, and particularly of the letters dated respectively 9th January, 15th January, 25th January, and 3rd February.

Referring to the letter of the 9th January, the learned judge held that the conclusion of the agreement was never dependant on the preparation of a formal instrument (although it was agreed that one should be drawn up), and such was not pleaded in the written Statement. Mr. Cleasby for the Respondent did not contest this but agreed that the correspondence which took place over the draft lease did show that in fact the negotiations as to terms were never finally completed. As to the use of the expression "usual conditions" in the letter of the 9th January, the learned judge held that it had a meaning capable of ascertainment and would not therefore invalidate the agreement on the ground of uncertainty. He expressed the view that Section 106 of the Indian Transfer of Property Act would be a guide as to what was intended by the expression; the Act applies to Kenya and prescribed, subject to express terms of the contract and local usage, the rights and liabilities of Lessors and Lessees. These findings of the learned judge have not been challenged by way of cross-appeal.

In the Court of Appeal for Eastern Africa

No.14

Judgment of E. Crawshaw Judge of Appeal 9th August 1961 continued

Still referring to the letter of the 9th January, the learned judge said:-

"The Defendants are asked to confirm the arrangement as set out, and if they had done so in unequivocal terms I should have had no hesitation in holding that conclusive and binding agreement had been reached, and that all that remained was to draw it up in formal terms.

The Defendant's reply of the 13th January is short but significant. The material words are in the second paragraph :

'The terms as set out by you are agreed with the exception of No.2 We wish to have the lease for one year with an option of renewal."

Disregarding for a moment the exception, the question is what meaning is to be given to the words 'the terms as set out by you are agreed.' Prima facie they should be taken as relating back to the words in the letter of the 9th January 'the above godown has been let to you on the following terms.' But the words are equally capable of meaning 'the terms you propose are acceptable to us', that is, as having a future rather than a past reference, and in the light of the immediately following sentence the conclusion is inescapable that this was the intention. If the writer of the letter had intended to confirm that an agreement had been reached, but to question the correctness of one of the terms set out he might have been expected to say that what had been agreed was not a lease for three years, but a lease for one year with an option of renewal. He did not say this, but used the words 'we wish to have a lease for one year'. The question relates to an essential term of the agreement, and the language used suggests that the writer did not consider that any concluded agreement had been reached, at any rate on this point."

It is clear, therefore that the learned judge's view was that up to the time the letter of the

13th January had been written the Respondent Company considered that no final agreement had been concluded, although the Appellant Company was of the opinion that it had. The learned judge went on to say : "The pattern of the correspondence immediately ensuing on the meeting in January (some time between the 13th and 25th) is very similar to that of the earlier correspondence" and "reflects the same conflict of evidence as has been disclosed by the evidence given in court." He said he had no reason to prefer the word of one witness to that of another and continued :-

> "....While there are letters written by Jafferali which lend support to the Plaintiffs' case there are no letters on the other side which in any way amount to an admission against the Defendants and the correspondence on the Defendants' side is completely consistent with the Defendants' case as presented in evidence. My conclusion on the whole case is that the parties concerned in the discussions were never ad idem, one believing quite honestly that an agreement had been finally reached, the other that the matter had never proceeded beyond the stage of negotiations. I accordingly hold that the Plaintiffs have failed to discharge the onus of proving that a binding agreement was ever concluded."

It is to be observed that the final words of this quotation are - "ever concluded," and reading the judgment as a whole it seems that the learned judge was not, in answering the first issue, exclusively considering the period prior to the end of December, 1957 or any other limited period, but the whole of the transactions up to the 29th May, 1958; though he may have been influenced by the way the Appellant Company's case was put.

Mr.Cleasby, however, has objected to the Appellant Company being now allowed to say that an agreement had been concluded later than December 1957, for it was the Appellant Company's case in the lower Court that it was

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Judgment of E. Crawshaw Judge of Appeal 9th August 1961 continued

concluded by an oral agreement made in December. As to this, Jafferali said in evidence, "I regarded everything as binding after my conversation in December. The period of three years was definitely agreed, and the other terms referred to in my letter of 9.1.58." Mr.Nazareth, who appeared for the Appellant Company in the lower court, argued the case on this basis, and part of his opening address before calling his witness appears in the Judge's notes as follows:-

"Nazareth:-

Plaintiff says oral agreement reached in November or December, 1957.

Cleasby:-

Objects on basis of pleadings.

Nazareth:-

Covered by pleading. Late December, 1957, is in or about January, 1958.

Does not ask for amendment. Stand by pleading.

Agreement arrived at end of December. Defendants to be released from lease of old premises and to take lease of new premises for a term of 3 years.

Refer to Exhibit 1, No.3 setting out offer, dated 3.12.57.

Reply of 9.1.58: No.4. Plaintiff says agreement reached in conversation between these letters, to let Clarke Lane premises for three years from 1.1.58 at Shs.2,250/-.

In pursuance of agreement, possession given on 1.1.58."

In his Memorandum of Appeal the Appellant Company is, however, less particular as to time, paragraph 4 thereof reading:-

"4. The learned trial judge misdirected himself on the facts in failing to hold

that all essential terms of the agreement of lease had been settled with the approval of the Defendants' General Manager at the latest prior to the 17th February, 1958, and that the parties had not reserved expressly or by implication any other terms for further negotiation."

In support of this ground of appeal Mr. O'Donovan, who has appeared for the Appellant Company in this appeal, submitted that the term of three years had been finally agreed before the 25th January, and that that is the meaning which should be given to the part of Elliott's evidence which reads, "Before letter No.6" (letter of 25th January) "was received I had had a discussion with Jafferali. I told him I would write to Mombasa. It was agreed that we should take a three year lease." As to this conversation, the learned judge said, "If confirmation had to be obtained from Mombasa, it could not have been obtained in the course of the same discussion in which Mr. Elliott said he would refer to Mombasa." The term of three years was at least agreed by the 17th February, on which date the draft lease was sent to the Respondent Company, for Elliott in cross-examination said, "The draft lease provided for a term of three years. By that time confirmation had come from Mombasa for a three years lease." It is not in evidence exactly when confirmation was received.

Mr. Cleasby submits that this later agreement now relied on by the Appellant Company is distinct from the December oral agreement relied on in the lower court. He says that as a result the case was fought exclusively on the issue whether there was a concluded agreement in December, and that he has been embarrassed by the new argument raised on appeal. For instance he says that his cross-examination of Jafferali was directed to the alleged December agreement, and that he could have led evidence to show that at a later date a lease would only have been agreed if the terms had first been approved by the Respondent Company's Solicitors, especially in view of the repairs which were required to the building.

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I think that had the Respondent Company been able to satisfy the learned judge that, whilst negotiations as to the length of the lease were still unconcluded, a new contentious term relating to repairs had been raised, then even though the length of term was subsequently agreed, the learned judge might have been justified in holding that so long as the condition as to repairs was outstanding there was no binding agreement. This is a matter which I shall return to shortly. As to his adducing evidence, Mr.Cleasby may have been misled by the way in which the Appellant Company's case was conducted in the lower court, but it is to be observed that the plaint says "in or about January 1958", and no better particulars were asked for. Also the first issue is in general terms as to time. Mr.O'Donovan has referred us to Misa v. Currie (1876) 39 A.C. 554 in which a point was taken on appeal which had not been argued in the court below, and the point was allowed as the Appellant was not seeking to introduce new matter which was not before the lower court. We were also referred to Thakur Sheo Singh v. Rani Raghubang Kumar (1905) 32 I.A. 203, at p.212 in which Sir Arthur Wilson, J.A. said :-

> "With regard to the case now presented on behalf of the Appellant, it was objected in the first place that this was a new case - that in the mutation proceedings the Defendant based his claim on other grounds; that in his written statement in this suit no sanad to Girwar is mentioned; and that no specific issue was settled as to such a sanad. And all this is true, but the issues as settled were sufficiently wide to cover the case now presented. And what is of more moment, from an early stage of the case down to the latest, all parties appear to have been alive to the importance of such a document if it was in fact granted, and if its contents could be ascertained."

Their lordships expressed themselves as satisfied in the particular circumstances of that case that the Respondents (the original Plaintiffs) had not been unfairly taken by surprise by the manner in which the case was then

presented and that there was no danger of injustice being done in disposing of the appeal on the ground then argued.

These cases are only helpful in so far as they illustrate that on appeal the facts can be presented to support an argument different from that taken in the lower court, and show general principles in deciding whether in any particular case it is proper to admit the new point to be taken. In the instant case as I have said, the learned judge's decision was not confined to the question whether there was a binding agreement in December, but was that no binding agreement "was ever concluded." In my opinion the learned judge was, on the pleadings and the issue, right in taking this broader view, in spite of the nature of Mr. Nazareth's submissions. Although in his address to the lower court Mr. Cleasby referred to Jafferali's evidence of a binding oral agreement in December, it would seem that Mr. Cleasby did also have in mind the pleadings, for he is recorded as commencing his final address by saying "Plaintiff's case is that a concluded agreement was arrived at - orally, in writing, or partly one and partly the other - in or about January 1958". It was the defence case that negotiations were continuing throughout, and any evidence produced by the defence to that effect would have been relevant. No new matter is now being relied on by Mr. O' Donovan which was not before the court below, and I think he is entitled to adopt a different approach to the evidence than that adopted at the trial.

What then is the position on the merits of the appeal? I think the key to the situation is to be found in the letters of the 9th and 13th January respectively, and that the learned judge was fully justified in implying that had the Respondent Company's letter of the 13th January contained no exception to the terms set out in the letter of the 9th he would have held that it would have concluded a binding agreement. This would have been so whether the letters were

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Judgment of E. Crawshaw Judge of Appeal 9th August 1961 continued

confirmation of a previously concluded oral agreement, or whether they were a formal offer and acceptance arising from previous negotiations.

With respect, I think where the learned judge went wrong was in not pausing to consider the effect, following these letters, of Elliott obtaining confirmation from the Respondent Company that it agreed the term of three years. At that time no other conditions of the lease were in disagreement. In its letter of the 3rd February the Respondent company had drawn the Appellant Company's attention to the fact that the roof was leaking and a door insecure, and asked for them to be attended to. I do not think it can be said however that this was written on the basis of introducing a new condition relating to repairs; it might perhaps have been thought by Respondent Company, rightly or wrongly, that under the "usual conditions" which were to be incorporated in the lease such repairs would be the obligation of the landlords. It was not until its letter of the 14th March that the Respondent Company, in commenting on the draft lease, first introduced specific terms relating to liability for repairs, a matter on which agreement was never subsequently reached.

Looking then at all that had happened prior to the draft lease being submitted to the Respondent Company, it can be said that all the terms which had been under negotiation, including the term of three years, had by then been agreed by the parties, and no condition not previously raised was in dispute. The case of Hussey v. Horne-Payne (1879) 4 A.C.311, was cited by the learned judge for the proposition that if one term of an alleged agreement remains unsettled there is no concluded agreement. There, reliance was placed on two letters which appeared to constitute a complete contract. Earl Cairns, L.C., at page 316, however said, "You must not at one particular time draw a line and say "We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond it", and later observed at page 320, "there were to be other terms which at that time had not been agreed upon." As I have said, in the instant case, when once the three-year term had been approved, there were no other terms then outstanding: it was not until later that the

question of liability for repairs was raised specifically. But there was then a concluded agreement on the point under the term "usual conditions".

In Perry v. Suffields (1916) 2 Ch.187, Hussey v. Horne-Payne was distinguished. In the former case there had been a bare offer and acceptance of purchase of freehold premises at a stated price. On a draft contract being submitted, objection was taken by the Purchaser to certain conditions, including time for completion and payment of deposit, and the Purchaser accordingly purported to call an end to the "negotiations", contending in the ensuing suit that the letters did not and were not intended to settle more than one term of the proposed purchase. Specific performance was ordered and upheld on appeal, Lord Cozens-Hardy, M.R. at page 192, approving a passage in Bellamy v. Debenham, 45 Ch.D.481, where it was said by North J, "In my opinion, the subsequent negotiations, first commenced on the new points after a complete contract in itself has been signed, cannot be regarded as constituting part of the negotiations going on at the time when it was signed." This is I think the position in the instant case. A specific condition as to repairs is not an essential elements of a lease; what are the essential element are set out in MULLA on the TRANSFER OF PROPERTY ACT, 4th Edn. at p.594. But in any event, as I have indicated, the agreement included "usual conditions", and Liability for repairs was ascertainable under that provision. As regards the draft lease, it cannot, I think be said, nor do I think it has been suggested, that the Appellant Company was seeking to introduce a new term by insisting on conditions as to repairs which, in the absence of specific agreement, were in any way unusually onerous on a lessee.

In the circumstance I think this appeal should be allowed, that the judgment and decree of the court below should be set aside, and that judgment should be entered for the Appellant Company, for Shs. 51,350 together with costs and interest as claimed in the plaint. As regards costs of the appeal, I think that although the learned Judge's finding

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Judgment of E. Crawshaw Judge of Appeal 9th August 1961 continued

was that no agreement was ever concluded, yet in coming to this conclusion he may well have been misled by the way the Appellant Company's case was put before him. Had the case been put to him on the basis it was argued before this court, his decision might well have been different. In the circumstances I would make no order as to the costs of the appeal.

Dated at Nairobi this 9th day of August, 1961.

E.D.W. CRAWSHAW

JUSTICE OF APPEAL.

No.15

Judgment of A.G.Forbes Vice-President 9th August 1961

No.15

JUDGMENT OF A.G.FORBES - VICE PRESIDENT.

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

CIVIL APPEAL NO.66 OF 1960

BETWEEN

JAFFERALI & SONS LTD. APPELLANT

and

THE WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA LIMITED RESPONDENT

(Appeal from judgment and decree of H.M. Supreme Court) of Kenya at Nairobi (Farrell,J.) dated 3rd June, 1960

in

Civil Case No.1411 of 1959

Between

Jafferali & Sons Ltd. Plaintiff

and

The Warehousing and Forwarding Company of East Africa Limited Defendant)

JUDGMENT OF FORBES V-P.

I have had the advantage of reading both the

judgments which have been delivered, and I agree that the proper inference to be drawn from the correspondence and the evidence of Mr. Elliott, the witness called by the Respondent Company, is that by 17th February, 1958, at latest there was a concluded agreement for a lease of the Clarke Lane premises; and that it was subsequent to the conclusion of the agreement that the Respondent Company started negotiations as to certain new terms including that of liability to repair. Liability to repair under the concluded agreement was covered by the phrase "usual conditions", and the Appellant Company was entitled to insist on the term as so agreed.

The matter that has troubled me is whether the Appellant Company should in this court be allowed to rely on such an agreement when its case as presented in the court below was that the agreement was an oral one concluded during December 1957. As stated in the other judgments, the pleadings and the issues framed in the Supreme Court were wide enough to cover an agreement concluded by February, 1958; and the learned judge appears to have considered, not merely whether an agreement was concluded in December, but whether an agreement was ever concluded. Nevertheless it must be considered whether Counsel's oral presentation of the case for the Appellant Company in the Supreme Court affected the evidence which was put before the Court. In Connecticut Fire Insurance Co. v. Kavanagh (1892) A.C., 473, in a passage cited and applied by the Privy Council in Perkowski v. Wellington Corporation (1958) 3 All E.R. 368, Lord Warson said, in relation to the raising of points of law for the first time in an Appellant Court;

> "But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

I stress the words "if fully investigated". In

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Judgment of A.G.Forbes Vice-President 9th August 1961 continued

the instant case Mr.Cleasby for the Respondent Company contended, in effect, that the evidence led was directed solely to the point whether or not an agreement was concluded in December, and that the facts in relation to the Appellant Company's case as now put forward have not been fully investigated. I have considered this submission carefully, and have come to the conclusion that it is not justified. The Respondent Company's case was that the parties never got beyond the stage of negotiations which were still continuing in April. Evidence was accordingly given of the correspondence between the parties and contacts between their representatives up to April and later. Looking at that evidence, it appears to me that the relevant matters were in fact fully investigated, and that all the available relevant evidence is before the court. I accordingly think the court can entertain the Appellant company's case on the footing on which it is now argued, and that the appeal should be allowed, though I think the change of ground must affect the costs of the appeal.

There will be an order in the terms proposed by Crawshaw J.A.

Dated at Nairobi this 9th day of August, 1961.

A. G. FORBES

VICE-PRESIDENT.

No.16

JUDGMENT OF C.D.NEWBOLD - JUDGE OF APPEAL

In the Court of Appeal for Eastern Africa

No.16

Judgment of C.D.Newbold Judge of Appeal 9th August, 1961

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

CIVIL APPEAL NO.66 OF 1960

BETWEEN

JAFFERALI & SONS LTD. APPELLANT

And

THE WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA LIMITED RESPONDENT.

(Appeal from Judgment and decree of H.M. Supreme Court of Kenya at Nairobi (Farrell, J.) dated 3rd June, 1960,

In

Civil Case No.1411 of 1959

Between

Jafferali & Sons Ltd., Plaintiff

And

The Warehousing and Forwarding Company of East Africa Limited Defendant)

JUDGMENT OF NEWBOLD J.A.

I have had the advantage of reading the judgment of the learned Justice of Appeal and I agree that the appeal should be allowed and with the order proposed. The learned judge of the Supreme Court held that the conclusion of the agreement was not subject to a lease

In the Court of Appeal for Eastern Africa

No.16

Judgment of C.D.Newbold Judge of Appeal 9th August, 1961 continued

being prepared and that the words "usual conditions" have a meaning capable of ascertainment: there has been no challenge of his judgment on these two points. It seems to me on the facts of this case that the only remaining ground on which the learned judge could have arrived at his decision that there was no concluded agreement was on the ground that the parties were not ad idem on the period of the lease. On this point there is no question of the evidence of one witness being preferred to another - indeed the learned judge stated that he had no reason to prefer the word of one rather than the other - and the matter can be determined by inferences from the correspondence and by the evidence of Mr.Elliott given on behalf of the Respondent. As was said by Viscount Simonds in Benmax v. Austin Motor Co.Ltd.(1955) A.C. 370 at p.374.

> "In a case like that under appeal where ..... the sole question is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an Appellant Court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge."

In my view it is open to this court in the circumstance of this case to form an independent opinion as to whether there was a concluded agreement.

Mr.Elliott stated in his evidence that the draft lease provided for a term of three years and by that time confirmation had come from Mombasa for a lease for that period. I understand this to mean that the period of three years had been agreed to by the Respondent on or before 17th February, 1958. As that was the last term of the agreement which had to be settled, then a concluded agreement must have been reached unless, before that term was settled, new terms, as for example, the liability to repair, were introduced into the negotiations. I can see no evidence that any new term for negotiation had introduced before the settlement of the outstanding question of the period of the

lease had been determined. I do not understand the learned judge to have arrived at his decision on the ground that new terms were being negotiated before the determination of the period of the lease, indeed he stated that the correspondence subsequent to the lease being forwarded was of no great significance in relation to the issue before the court. It is true that new terms were subsequently introduced, but if the agreement had already been concluded then the introduction of the new negotiations will not affect the position unless there is agreement for a new contract or a revision of the previous agreement. See Perry v. Suffields Ltd. (1916) 2 Ch. 187 and Bellamy v. Debenham (1890) 45 Ch. D. 481.

This being so, in my view there was a concluded agreement arrived at some time between 13th January, 1958, and 17th February, 1958, and the subsequent negotiations did not affect the position.

It only remains to consider whether it was open to the Appellant to put his case somewhat differently before this court than the case was put before the Supreme Court. Before the Supreme Court it was submitted that a concluded agreement had been reached some time in December 1957; before this court it was submitted, in accordance with a ground set out in the Memorandum of Appeal, that the concluded agreement was reached at the latest prior to 17th February, 1958. It is clear that the pleadings and the relevant issue are wide enough to bring in an agreement concluded in February, 1958. The evidence of the witnesses and the Exhibits related to all the relevant matters which took place during December 1957 and January and February 1958 and indeed thereafter. It was always the case for the Respondent that no concluded agreement was ever reached and that negotiations continued until April. In these circumstances I find some difficulty in seeing how the Respondent has been prejudiced or what other evidence would have been called had the submissions to the Supreme Court been the same as those to this court. In my view the case of Thakur Sheo Singh v. Rani Raghubans Kunyar (1905) 32 I.A.

In the Court of Appeal for Eastern Africa

No.16

Judgment of C.D.Newbold Judge of Appeal 9th August, 1961 continued

203 is authority for allowing the submissions made by Mr. O'Donovan to this court and for disposing of the appeal on those submissions.

Dated at Nairobi this 9th day of August, 1961.

C.D. NEWBOLD

No.17

No.17

Order 9th August 1961

O R D E R

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

CIVIL APPEAL NO.66 OF 1960

B E T W E E N

JAFFERALI & SONS LIMITED — APPELLANT

AND

THE WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED — RESPONDENT

(Appeal from a judgment and decree of Her Majesty's Supreme Court of Kenya at Nairobi (Farrell J.) dated 3rd June, 1960 in

Civil Case No.1411 of 1959

Between

Jafferali & Sons Limited — Plaintiff

and

The Warehousing & Forwarding Company of East Africa Limited — Defendants

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In Court: this 9th day of August, 1961

Before the Honourable the Vice-President (Sir Alastair Forbes) the Honourable Mr.Justice Crawshaw, a Justice of Appeal and the Honourable Mr. Justice Newbold a Justice of Appeal.

O R D E R

THIS APPEAL coming for final disposal on the

In the Court of Appeal for Eastern Africa

No.17

Order 9th August 1961 continued

9th day of August 1961 at Nairobi in the presence of B. O'Donovan Esquire Q.C. and I.T. Inamdar Esquire Advocates for the Appellants and R.P.Cleasby Esquire Advocate for the Respondent IT IS ORDERED

(a) That this appeal be and is hereby allowed;
(b) that the judgment and decree of the Court below be set aside;
(c) that judgment be entered for the Appellant Company for Shs.51,350/- together with costs and interest as claimed in the plaint; and
(d) that there be no order in regard to the costs of the Appeal.

GIVEN under my hand and the Seal of the Court at Nairobi this 9th day of August, 1961.

F. HARLAND
REGISTRAR.

ISSUED this 22nd day of September, 1961.

No.18

Order granting conditional leave to Appeal to the Privy Council 26th October 1961

No.18

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL.

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

CIVIL APPLICATION NO.16 of 1961 (P.C.)

(In the matter of an intended appeal to Privy Council)

B E T W E E N

THE WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA LIMITED — APPLICANT

AND

JAFFERALI & SONS LIMITED — RESPONDENT

(Intended appeal from the final judgment and formal order of H.M.Court of Appeal for Eastern Africa dated the 9th day of August, 1961 in Civil Appeal No.66 of 1960 Between Jafferali & Sons Limited — Appellant and The Warehousing & Forwarding Company of East Africa Limited — Respondent)

IN COURT THIS 26TH DAY OF OCTOBER, 1961.

BEFORE THE HONOURABLE MR.JUSTICE C.P.CONNELL.

O R D E R

UPON application made to this Court by

In the Court of Appeal for Eastern Africa

No.18

Order granting conditional leave to Appeal to the Privy Council 26th October 1961 continued

Counsel for the above-named Applicant on the 28th day of September, 1961 for conditional leave to appeal to Her Majesty in Council as a matter of right under sub-section (a) of Section 3 of the Eastern African (Appeals to Privy Council) Order in Council 1951 AND UPON HEARING Counsel for the Applicant and for the Respondent THIS COURT DOTH ORDER that the Applicant do have leave to appeal as a matter of right to Her Majesty in Council from the Judgment and Order above-mentioned subject to the following conditions :-

1. THAT the Applicant do within ninety days from the date hereof enter into good and sufficient security to the satisfaction of the Registrar of this Court, in the sum of Shillings Eight Thousand (Shs.8000/-) in the form of a Banker's Bond (1) for the due prosecution of the appeal and (2) for payment of all costs becoming payable to the Respondent, in the event of (i) the Applicant not obtaining an Order granting him final leave to appeal or (ii) the appeal being dismissed for non-prosecution or (iii) the Privy Council ordering the Applicant to pay the Respondent's costs of the Appeal (as the case may be).

(2) THAT the Applicant shall apply as soon as practicable to the Registrar of this Court, for an appointment to settle the record and the Registrar shall thereupon settle the record which shall be prepared and certified as ready within ninety days from the date hereof;

(3) THAT the Registrar, when settling the record shall state whether the Applicant or the Registrar shall prepare the record, and if the Registrar undertakes to prepare the same he shall do so accordingly, or if having so undertaken, he finds he cannot do or complete it, he shall pass on the same to the Applicant in such time as not to prejudice the Applicant in the matter of the preparation of the record within ninety days from the date hereof;

(4) THAT if the record is prepared by the Applicant, the Registrar of this Court shall

at the time of settling of record state the minimum time required by him for examination and verification of the record. and shall enter examine and verify the same so as not to prejudice the Applicant in the matter of the preparation of the record within the said ninety days;

(5) THAT the Registrar of this Court shall certify (if such be the case) that the record (other than the part of the record pertaining to final leave) is or was ready within the said period of ninety days;

(6) THAT the Applicant shall have liberty to apply for extension of the times aforesaid for just cause;

(7) THAT the Applicant shall lodge his application for final leave to appeal within fourteen days from the date of the Registrar's Certificate above-named;

(8) THAT the Applicant, if so required by the Registrar of this Court, shall engage to the satisfaction of the said Registrar, to pay for a typewritten copy of the record (if prepared by the Registrar) or for its verification by the Registrar, and for the costs of postage payable on transmission of the typewritten copy of the record officially to England, and shall if so required deposit in Court the estimated amount of such charges.

AND IT IS ALSO ORDERED:

THAT the costs of and incidental to this application be costs in the cause and be paid out to the Respondent in the event of the Applicant not obtaining an order granting it final leave to appeal or of the appeal being dismissed for non-prosecution.

DATED at Mombasa, this 26th day of October, 1961.

(Sd.) R.J. QUIN
AG. DEPUTY REGISTRAR,
H.M.COURT OF APPEAL FOR EASTERN AFRICA.

ISSUED this 7th day of December, 1961.

In the Court of Appeal for Eastern Africa

No.19

Order granting final leave to Appeal. 6th February 1962

No.19

ORDER GRANTING FINAL LEAVE TO APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

AT MOMBASA

CIVIL APPLICATION NO.16 OF 1961
P.C.

(In the matter of an Intended Appeal to the Privy Council)

BETWEEN

THE WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED — APPLICANT

AND

JAFFERALI & SONS LIMITED — RESPONDENT

(Intended Appeal from the final judgment and formal order of H.M.Court of Appeal for Eastern Africa dated 9-8-1961

in

Civil Appeal No.66 of 1960

Between

Jafferali & Sons Limited — Appellant

And

The Warehousing & Forwarding Company of East Africa Limited — Respondent)

IN COURT THIS 6TH DAY OF FEBRUARY, 1962

BEFORE THE HONOURABLE MR.JUSTICE C.P.CONNELL

O R D E R

UPON the application presented to this

In the Court of Appeal for Eastern Africa

No.19

Order granting final leave to Appeal. 6th February 1962 continued

Court on the 23rd day of January, 1962, by Counsel for the above-named Applicant for final leave to appeal to Her Majesty in Council AND UPON READING the affidavit of Kunjabihari Chhotalal Thakker sworn on the 23rd day of January, 1962 in support thereof and the exhibit therein referred to and marked "K.C.T.1." AND UPON HEARING Counsel for the Applicants and for the Respondents THIS COURT DOTH ORDER that the application for final leave to appeal to Her Majesty in Council be and is hereby granted AND DOTH FURTHER ORDER that the costs of this application be costs in the Privy Council Appeal.

DATED at Mombasa this 6th day of February, 1962.

By the Court,

R. J. QUIN
AG. DEPUTY REGISTRAR,
H.M.COURT OF APPEAL FOR
EASTERN AFRICA.

ISSUED this 7th day of February, 1962.

BTB

Exhibit

3

Copy letter from Leslie & Anderson (East Africa) Ltd. to Madatally, Suleiman Verjee & Sons Ltd. 3rd December 1957

E X H I B I T S

EXHIBIT 3

COPY LETTER FROM LESLIE & ANDERSON (EAST AFRICA) LTD. TO MADATALLY SULEIMAN VERJEE & SONS LTD.

LESLIE & ANDERSON (EAST AFRICA) LTD.

NAIROBI BRANCH
P.O. Box 1132.

Date 3rd December, 1957.

Messrs.Madatally Suleiman
Verjee & Sons Ltd.,
P.O.Box 12,
NAIROBI.

Dear Sirs,

Factory Street Godowns:

In confirmation of our meeting of even date, Mr.Nazareli Mr.Elliott, we detail hereunder your proposals and our reply in connection with our letter of the 29th November advising our intention to vacate the Factory Street godowns at the end of December 1957.

Mr.Nazarali proposed that in view of the short notice given, WAFCO should pay rental for three months on three godowns, being a sum of £405, when closure of the lease would be accepted and Wafco to occupy your Clarke Lane Godown on a three year lease at £120 per month. Mr. Nazarali pointed out that it may take sometime to negotiate a lease for Factory Street godowns with other interested parties and a payment of three months would reimburse for our vacating the premises and negotiating with other likely clients. Mr. Nazarali stated later during the meeting that he would accept six weeks rent.

The writer pointed out that Wafco had suffered a considerable loss during their occupancy of the godowns. An office had been constructed at a cost of £300 in No.1 godown as it was expected Wafco would operate from Factory Street for at least five years. The Office

Exhibit

3

Copy letter from Leslie & Anderson (East Africa) Ltd. to Madatally, Suleiman Verjee & Sons Ltd. 3rd December 1957 continued

was constructed as a more or less permanent building but in view of the unsatisfactory condition of the godowns, can now be considered a loss. On top of this, we have received serious claims for water damage to coffee resulting in clients refusing to risk storing any coffee, produce or perishable goods in the godowns. Our reputation as warehousemen had suffered considerably and as you are aware, due to this resistance, the godowns are practically empty. All the foregoing emanates from the unsatisfactory condition of the godowns and the writer stated he could not agree to any payment whatsoever in consideration of closure of the lease at the end of this month.

It was appreciated that you had attended immediately to telephone calls advising of water leakage and seepage, but despite your efforts, the godowns are not even at today's date, anything like waterproof. We maintain our contention that the godowns are not suitable for the purpose they were rented i.e. general storage.

In connection with the offer of your Clarke Lane godown we have in our hands the offer of a similar type godown at a rental of £100 per month which after negotiation, we could probably obtain £90. We are, however prepared to offer you a three year lease for your Clarke Lane godown at £ 2.10.0. per month provided you agree free vacation of Factory Street godowns.

Kindly note the foregoing is, subject to approval by the General Manager of Wafco, Mr.Keir and by copy of this letter Mr. Keir is requested to confirm our comment on the proposals contained in this letter.

Yours faithfully,
LESLIE & ANDERSON (EAST AFRICA) LTD.

Signed N.W.ELLIOTT

Manager.

c.c. J.H.Keir,Esq.,
Wafco, Mombasa.

Exhibit 4

Copy letter from Plaintiffs to Defendants 9th January 1958

EXHIBIT 4

COPY LETTER FROM PLAINTIFFS TO DEFENDANTS

JAFFERALI & SONS LIMITED,
P.O. BOX 12.
NAIROBI.

9th January, 1958.

Messrs.Warehousing & Forwarding
Co., of E.A.Ltd.,
P.O. Box 2449,
NAIROBI.

Dear Sirs,

Re: Godown Plot No.L.R.209/1081
Clarke Lane, Nairobi

In accordance with our mutual arrangement the above godown has been let to you on following terms .....

(1) Monthly rental of the godown to be Shs.2250/- nett payable by you to us in advance.

(2) The godown has been let to you upon three years lease commencing from 1st Jan. 1958.

(3) The lease will be prepared by our Solicitors at your expense.

(4) Water, Light and Conservancy charges are payable by you.

.....and usual conditions.

Kindly confirm so that we could proceed with preparing the lease.

The possession of the godown has already been handed to you.

Yours faithfully,
JAFFERALI & SONS LIMITED

..... Director.

EXHIBIT 5

Exhibit 5

Copy letter from Defendants to Plaintiffs 13th January 1958

COPY LETTER FROM DEFENDANTS TO PLAINTIFFS

THE WAREHOUSING & FORWARDING COMPANY
OF EAST AFRICA LIMITED
WAFCO.

NAIROBI BRANCH
P.O. BOX 2449.

Date 13th January, 1958.

Messrs.Jafferali & Sons Ltd.,
P.O.Box 12,
Nairobi.

Dear Sirs,

Re: Godown Plot No.L.R.209/1081
Clarke Lane, Nairobi.

Thank you for your letter of the 9th instant.

The terms as set out by you are agreed, with the exception of No.2. We wish to have the lease for one year with an option of renewal.

Would you kindly forward to us a draft of the proposed lease as prepared by your Solicitors so that we may examine it before signing.

Yours faithfully,
For The Warehousing & Forwarding Co.
E.A.Ltd.,
Signed
Manager.

EXHIBIT 6

Exhibit 6

Copy letter from Plaintiffs to Defendants 25th January 1958

COPY LETTER FROM PLAINTIFFS TO DEFENDANTS

JAFFERALI & SONS LIMITED,
P.O.BOX 12,
NAIROBI.

25th January, 1958.

Messrs.Warehousing & Forwarding Co.
E.A.Ltd.,
P.O.Box 2449,
NAIROBI.

Dear Sirs,

Re: Godown Plot No.L.R.209/1081
Clarke Lane, Nairobi.

We refer to your letter dated the 13th

Exhibit 6

Copy letter from Plaintiffs to Defendants 25th January 1958 continued

instant, in reply to ours of the 9th instant and to subsequent interview with your Mr.Elliott, it is now agreed that you are renting the godown for a lease of three years from 1.1.58.

We are now proceeding to instruct our Solicitors to prepare a draft of lease and be sent to you for approval.

Yours faithfully,
JAFFERALI & SONS LIMITED

Jafferali
Signed
..... Director.

Exhibit 7

Copy letter from Plaintiffs Advocates to Defendants 30th January 1958

EXHIBIT 7

COPY LETTER FROM PLAINTIFFS ADVOCATES TO DEFENDANTS.

INAMDAR & INAMDAR,
ADVOCATES,
MOMBASA.

P.O.Box 483
30th January, 1958.

Ref: No.IT/J2./149/58.

Messrs.Warehousing & Forwarding Co. of E.A.Ltd.,
P.O.Box 2449,
NAIROBI.

Dear Sirs,

Re: Plot No. L.R.209/1081
Nairobi

Our clients Messrs.Jafferali & Sons Ltd., have placed in our hands the correspondence exchanged between them and you in the matter of letting the godown premises on the above plot.

We are in the course of preparing the draft lease and shall shortly send you a copy for your approval.

Yours faithfully,

For Inamdar & Inamdar

Signed

Partner.

EXHIBIT 8

Exhibit 8

Copy letter from Defendants to Plaintiffs 3rd February 1958

COPY LETTER FROM DEFENDANTS TO PLAINTIFFS

THE WAREHOUSING AND FORWARDING COMPANY
OF EAST AFRICA LIMITED
WAFCO

NAIROBI BRANCH
P.O.Box 2449.

Date 3rd February, 1958.

Messrs.Jafferali & Sons Ltd.,
P.O.Box 12,
NAIROBI.

Dear Sirs,

Re: Godown Plot No.L.R.209/1081
Clarke Lane, Nairobi

We are in receipt of your letter of the 25th instant and are disappointed that you appear unable to accede to our request for one year's lease with our option of extending for a further two years. May we ask you to kindly give this matter further consideration.

May we take this opportunity of drawing your attention to the fact that the roof of the godown is leaking in at least two places and that one of the doors is insecure and requires attention. Will you please give these matters your earliest attention in view of the fact that we are storing valuable produce in the godown.

Yours faithfully,

for THE WAREHOUSING & FORWARDING CO. OF E.A.LTD.,

Signed

MANAGER.

Exhibit 9

Copy letter from Plaintiffs Advicates to Defendants 17th February 1958

EXHIBIT 9

COPY LETTER FROM PLAINTIFFS ADVOCATES TO DEFENDANTS

INAMDAR & INAMDAR
ADVOCATES,
P.O.BOX 483,
MOMBASA.

17th February, 1958

Ref: No. IT/273/J.2./58

Messrs.Warehousing & Forwarding Co., of East Africa Ltd.,
P.O.Box 2449,
NAIROBI.

Dear Sirs,

Re: Plot No.L.R.209/1081
NAIROBI

Further to our letter reference No.IT/J.2/149/58 of the 30th January, 1958, we enclose herewith two copies of the draft Lease and shall be grateful if you will approve the same and return one copy to us duly endorsed.

We shall proceed to engrossment of the Lease on receipt back of the draft duly approved.

Yours faithfully,

For Inamdar & Inamdar,

Signed

Partner.

AHP/.....

EXHIBIT 9A

Exhibit 9A

Draft of the proposed Lease between the Plaintiffs and Defendants

DRAFT OF THE PROPOSED LEASE BETWEEN THE PLAINTIFFS AND DEFENDANTS

Copy
Draft

THIS INDENTURE made the day of . One thousand nine hundred and fifty eight BETWEEN JAFFERALI & SONS LIMITED a Limited Liability Company incorporated in Kenya having its registered office at Mombasa (hereinafter referred to as the Lessor which term shall where the context so admits include its successors and assigns) of the one part AND WAREHOUSING AND FORWARDING COMPANY of (EAST AFRICA) LIMITED, a Limited Liability Company incorporated in and having its registered office at (hereinafter referred to as the Lessee which term shall where the context so admits include its successors and assigns) of the other part WHEREAS under and by virtue an Indenture dated the 10th day of April 1956 made between Jafferali Madatally (therein described as the Purchaser) of the other part and registered at the Crown Lands Registry Nairobi in Volume N 22 Folio 207/20 the Lessor is the registered owner as Lessee of ALL THAT piece or parcel of land situate in the Township of Nairobi in the Nairobi District of the Ukamba Province of the East Africa Protectorate (now the Colony of Kenya) comprising decimal one three seven of an acre or thereabouts known as Subdivision Number 11 Section Number 32 of Portion Number 3 of Meridional District $\frac{S.A.37}{G.II.d}$ which said piece or parcel of land is more particularly demarcated delineated and described on the Plan No. 3754 annexed to an Indenture dated 27th November 1913 registered in the Nairobi Registry as Number 226 of A.XIV 1914 and thereon bordered red AND WHEREAS the Lessor has agreed to sublease and the Lessee has agreed to take the godown premises standing on the piece or parcel of land above described on the terms and conditions hereinafter appearing.

Exhibit 9A

Draft of the proposed Lease between the Plaintiffs and Defendants continued

NOW THIS INDENTURE WITNESSETH as follows:-

1. In consideration of the rent hereinafter reserved and of the Lessee's covenants hereinafter contained the Lessor DOTH hereby SUB-DEMISE unto the Lessee ALL THAT warehouse (hereinafter called the demised premises) situate on the piece or parcel of land above described TO HOLD the same unto the Lessee for term of three years from the First day of January 1958 yielding and paying therefor during the said term the rental of Shs.2,250/- (Shillings Two thousand two hundred and fifty) payable in advance on the first day of each calendar month.

2. The Lessee DOTH HEREBY COVENANT with the Lessor as follows :-

(i) To pay the reserved rent on the days and in the manner aforesaid.

(ii) To pay and discharge all charges for water conservancy and electrical current during the term hereby created

(iii) To keep the demised and all additions thereto and the electrical wiring and the sanitary and water apparatus thereof and the boundary walls and fences and the drains thereof in good and tenantable repair and condition.

(iv) Not to make or permit to be made any alterations in or additions to the demised premises without the previous consent in writing of the Lessor or cut maim or injure or suffer to be cut maimed or injured any walls or timbers thereof;

(v) Three months before the expiration of the term hereby created to thoroughly cleanse and scour and to paint at its own cost the interior of the demised premises and of any additions thereto with two coats at least of good oil paint;

(vi) To permit the representatives of the Lessor and/or its agents with or without workmen or others at all reasonable times to enter upon the demised premises and to view the conditions thereof and upon notice being given by the

Exhibit 9A

Draft of the proposed Lease between the Plaintiffs and Defendants continued

Lessor, to repair in accordance therewith within ten days of the receipt thereof by the Lessee and in default to permit the Lessor to enter upon the demised premises and execute such repairs the cost whereof shall be a debt due from the Lessee and be forthwith recoverable by action.

(vii) Not to keep or permit to be kept on the demised premises any material of a dangerous or explosive nature or the keeping of which may contravene any statute or ordinance or local regulation or bye-law or constitute a nuisance to the Lessor or the occupiers of neighbouring property and not to carry on or permit to be carried on upon the demised premises any trade of a noxious or offensive nature not to permit the same premises as the residence or sleeping place of any person other than a caretaker but to use the demised premises only as a warehouse in connection with its normal business or such other trade or business as shall be approved in writing by the Lessor.

(viii) Not to assign sublet or part with the possession of the demised premises or any part thereof without first obtaining the written consent of the Lessor provided that such consent shall not be unreasonably withheld in the case of a respectable and responsible person.

(ix) To yield up the demised premises with the additions thereto at the determination of the tenancy in good and tenantable repair and condition in accordance with the covenants hereinbefore contained.

3. The Lessor HEREBY COVENANTS with the Lessee as follows :-

(i) To keep the roof and main timbers of the demised premises in good condition and repair ;

(ii) To pay and discharge all rates and taxes or other outgoings and assessments charges or levies in respect of the demised premises PROVIDED THAT during the term hereby granted if there be any increase or increases in such rates, taxes outgoings or assessments over the amount paid by the Lessor in the year 1958, such

Exhibit 9A

Draft of the proposed Lease between the Plaintiffs and Defendants continued

increase shall be payable by the Lessee on demand.

(iii) The Lessee paying the rent hereby reserved and observing and performing the several covenants and stipulations herein on its part contained shall peaceably hold and enjoy the demised premises during the term hereby granted without any interruption by the Lessor or any person rightfully claiming under it.

4. PROVIDED ALWAYS AND IT IS EXPRESSLY AND MUTUALLY AGREED as follows:-

(i) If the rent hereby reserved or any part thereof shall be unpaid for fifteen days after becoming payable thereof shall formally be demanded or not) or if any covenant on the Lessee's part herein contained shall not be performed or observed or if the Lessee shall be wound up or any person in whom for the time being the term hereby created shall be vested shall become bankrupt then and in any one of the said cases it shall be lawful for the Lessor at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to the right of action of the Lessor in respect of any breach of the Lessee's covenants herein contained.

(ii) Any notice required to be served hereunder shall be sufficiently served on the Lessee if left addressed to it on the demised premises.

IN WITNESS whereof the Lessor has hereunto set his hand and seal and the Lessee have caused its Common Seal to be hereunto affixed the day and year first above written.

Exhibit 10

Exhibit 10 — Copy letter from the Plaintiffs Advocates to Defendants 21st February 1958.

COPY LETTER FROM THE PLAINTIFFS ADVOCATES TO DEFENDANTS

INAMDAR & INAMDAR,
ADVOCATES,
MOMBASA.

21st February 1958.

Ref.No.IT/J.2/206/58

Messrs.Warehousing & Forwarding
Co. of E.A.Ltd.,
P.O. Box 2449,
NAIROBI.

Dear Sirs,

Re: Plot L.R.209/1081,NAIROBI

We trust you have by now received two copies of the draft lease under cover of our letter reference IT/273/J.2/58.

Our clients Messrs.Jafferali & Sons Ltd. have instructed us to point out that they have still not received the rent due to them in respect of the months of January and February 1958. The rent, as you no doubt are aware, is payable in advance on the 1st day of each month.

Will you therefore kindly let us have your cheque for two month's rent without delay?

Yours faithfully,
for Inamdar & Inamdar,

Signed

Partner.

c.c.
Messrs.Jafferali & Sons Ltd.,
MOMBASA.

Exhibit 11

Copy letter from Plaintiffs Advocates to Defendants 12th March 1958

EXHIBIT 11

COPY LETTER FROM PLAINTIFFS ADVOCATES TO DEFENDANTS

INAMDAR & INAMDAR,
ADVOCATES,
MOMBASA.

P.O. BOX 483
12th March 1958.

Ref. No.IT/J.2/423/58.

Messrs.Warehousing & Forwarding
Co. of E.A.Ltd.,
P.O.Box 2449,
Nairobi.

Dear Sirs,

Re: Plot No.L.R.209/1081, NAIROBI

We refer to our letter reference No.IT/273/J.2/58 of the 17th February 1958, and regret to have to point out that we have still not received the draft lease duly approved by you.

Our clients are anxious that this matter is finalised as soon as possible. We should therefore be grateful if you would let us have the draft lease at your earliest convenience.

Yours faithfully,
for Inamdar & Inamdar,

Partner.

AHP/..

Exhibit 12

Copy letter from Defendants to Plaintiffs Advocates 14th March 1958

EXHIBIT 12

COPY LETTER FROM DEFENDANTS TO PLAINTIFFS ADVOCATES

THE WAREHOUSING & FORWARDING COMPANY
OF EAST AFRICA LIMITED
WAFCO.

P.O.Box 2449,
NAIROBI
Date 14th March, 1958.

Messrs.Inamdar & Inamdar,
Advocates,
P.O.Box 483,
MOMBASA.

Dear Sirs,

Plot No.L.R.209/1081 NAIROBI

We are in receipt of your letter IT/J.3/423/58

Exhibit 12

Copy letter from Defendants to Plaintiffs Advocates 14th March 1958 continued

of the 12th instant and return herewith copy of draft lease with the following comments.

Clause 2 (ii) and (iii). There is no electric wiring installed in the premises and reference to payment for electric current and maintenance of electric wiring is not applicable. This should be deleted or amended to read "as and when electric current is installed".

Furthermore, the maintenance of boundary walls, drains, etc., are the responsibility of the Lessor, and reference to these items should be deleted from Clause 2 (iii) Clause 2 (v). We should point out that the interior of the premises was not painted upon our commencement of occupancy, and so far as we can judge never has been painted. We do not agree to paint the interior at our cost upon vacation of the premises.

Clause 2 (vi). The maintenance of buildings, and permanent fixtures is the responsibility of the Lessor, and we do not agree to have repairs done at our cost.

Clause 2 (i). The maintenance of roof and main timbers is the responsibility of the Lessor, and we do not agree to be responsible to maintain or repair.

Further to the above, we wish to have incorporated in the lease to the effect that if after due notice having been given to the Lessor, of inefficiency of the premises for the purpose intended (i.e. a warehouse for the storage of general goods) either through deterioration or causes beyond the control of the lessee, of the main building, and permanent fixture, etc., satisfactory repairs are not completed within a reasonable time, we will have the right to effect repairs ourselves, cost of same to be deducted from the rent.

Furthermore, if in the event that for the purpose of our business, we are compelled to effect improvements to the premises, such as cementing the floor, or installing electric light etc., we are of the opinion that lessor should bear a portion of the cost of such improvements. We suggest that proportion of liability for such improvement should be based

Exhibit 12

Copy letter from Defendants to Plaintiffs Advocates 14th March 1958 continued

upon the "life" of the premises before major renovation or rebuilding is necessary, and we suggest that this could be taken as 25 years. Therefore, our share of such improvements should be in the proportion of the time of present lease still to be run, is to, 25, 24 or 23 years, according to the time when (if any) such improvements are installed.

Will you kindly incorporate a Clause in the lease to this effect.

We look forward to your further news on this matter.

Yours faithfully,

THE WAREHOUSING & FORWARDING CO. (E.A.) LIMITED.

Signed

MANAGER.

AJS/MC.

Exhibit 13

Copy letter from Plaintiffs Advocates to Defendants 18th March 1958

EXHIBIT 13

COPY LETTER PLAINTIFFS ADVOCATES TO DEFENDANTS

INAMDAR & INAMDAR,
ADVOCATES,
P.O.BOX 483,
MOMBASA

Ref:No.IT/J.2/458/60

18th March, 1958

Messrs.Warehousing & Forwarding Co.
(E.A.) Ltd.
P.O.Box 2449,
NAIROBI.

Dear Sirs,

Re: Plot No.L.R.209/1081,NAIROBI.

We thank you for your letter dated 14th March 1958 which was duly referred by us to our clients.

Exhibit 13
Copy letter from Plaintiffs Advocates to Defendants 18th March 1958 continued

Our clients agree that the reference in the draft lease to payment for electrical current and maintenance of electrical wiring should be amended to read as you suggest. It is also agreed that the reference to boundary walls, drains, etc. should be deleted, though not for the same reasons as you state. We understand from our clients that there are no boundary walls or fences at the moment in existence, and there is very little likelihood of the same coming into existence in future. Instead therefore of undertaking any responsibility therefor our clients suggest that all reference to the same shall be deleted from the lease.

Your suggestion in regard to the painting of the premises at the time of vacating the same is accepted. This, you will observe, leaves unaffected your duty to thoroughly "cleanse and scour" the interior of the premises at the end of the term granted to you.

Our clients fail to understand your suggestions in regard to clause 2 (vi). That clause relates to our client's right to enter upon the premises and examine its condition. In the event of their finding that the premises have fallen into a state of disrepair (that is to say if they find that the interior of the demised premises or the sanitary or water apparatus is not in good and tenantable condition) then they can under this sub-clause serve you with a notice to repair the same within 10 days and in default to execute such repairs at your cost. This sub-clause therefore is a natural corrolary of and should be read together with Clause 2 sub-clause (iii), which appears on page 2 of the draft lease. We trust that in the light of this explanation you will agree that sub-clause (vi) should stand as it is.

The maintenance of the roof and main timbers is by the very terms of the lease the responsibility of the Lessor. No attempt is made to cast this responsibility on you.

Our clients do not agree with the suggestions contained in paragraphs 7 and 8 of your letter under reply. In terms of clause 3 sub-clause (i), our client's responsibility for

Exhibit 13

Copy letter from Plaintiffs Advocates to Defendants 18th March 1958 continued

repair extends only to the roof and the main timbers of the demised premises. Should these ever be in need of repairs, your right to have the same put in proper conditions is amply safeguarded by the lease and by the general law of the country. Our clients are not prepared to undertake any further responsibility than this, nor can our clients see their way to accepting the burden of paying a portion of the cost of any improvements that you may carry out to the premises for the purpose of your business. Indeed, it is not normal for a lessor to undertake this responsibility when the improvements are being made by the tenant solely for his own benefit.

Yours faithfully,
for Inamdar & Inamdar,

Signed

Partner.

AHP/....

Exhibit 14

Copy letter from Defendants to Plaintiffs Advocates 22nd March 1958

EXHIBIT 14

COPY LETTER DEFENDANTS TO PLAINTIFFS ADVOCATES

THE WAREHOUSING AND FORWARDING COMPANY
OF EAST AFRICA LIMITED
WAFCO.

P.O.BOX 2449,
NAIROBI.

Date 22nd March, 1958.

Messrs.Inamdar & Inamdar,
Advocates,
P.O.BOX 483,
MOMBASA.

Dear Sirs,

Re: Plot No.L.R.209/1081, NAIROBI

We have for acknowledgement your letter IT/J.2/458/58 of the 18th March and would comment as follows.

Exhibit 14
Copy letter from Defendants to Plaintiffs Advocates 22nd March 1958 continued

Clause 2 (vi). (Irrespective of what may be said in Clause 2 (iii) reads as though we would have to agree to the Lessor ordering any repairs to the "demised premises" which he thinks fit.

We have already advised you that in our opinion all repairs to premises and fixtures etc., are the responsibility of the Lessors, unless it can be proved that damage or deterioration has been caused by abuse of Lessee.

No survey was held upon our entering into occupancy and for all we know drains for instance maybe in a state of disrepair already and premises and other fixtures may be nearing the end of their "life".

We cannot agree to make any repairs whatsoever unless as stated above abuse is approved against us.

Furthermore, we must insist that a clause is incorporated to the effect that if due to causes beyond our control, deterioration or damage occurs, affecting the efficiency of the premises as a warehouse for the storage of general goods, we will have the right to execute repairs at the Lessor's expense if he fails to make good the damage or deterioration after reasonable notice.

We must have this clause inserted. Your clients are well aware of the loss we sustained when due to income of rain water due to a leaking roof, considerable damage was done to coffee in store.

We do not agree that any improvement made to the premises by us are for our sole benefit. It is obvious that such improvements would also be in the interest of the Lessor as improving and/or conserving his premises.

Yours faithfully,
for THE WAREHOUSING & FORWARDING CO. (E.A.) LTD.,

Manager.

AJS/MC.

Exhibit 15

Copy letter from Plaintiffs Advocates to Defendants 24th April 1958

EXHIBIT 15

COPY LETTER FROM PLAINTIFFS ADVOCATES TO DEFENDANTS

INAMDAR & INAMDAR,
ADVOCATES,
P.O.BOX 483,
MOMBASA.

Ref.No.IT/J.2./643/58. 24th April, 1958.

Messrs.Warehousing & Forwarding Co.
of (E.A.) Ltd.,
P.O.Box 2449,
Nairobi.

Dear Sirs,

Re: Plot NO.L.R.209/1081,NAIROBI.

We refer to your letter dated 22nd March, 1958.

Our clients are prepared to amend clause 2 (vi) to read as under:-

To permit the representatives of the Lessor and/or its agents with or without workmen or others at all reasonable times to enter upon the demised premises and to view the condition thereof and upon notice being given by the Lessor to carry out any repairs which are by the terms of this Indenture the responsibility of the Lessee to repair in accordance therewith within ten days of the receipt thereof by the Lessee and in default to permit the Lessor to enter upon the demised premises and execute such repairs the cost whereof shall be a debt due from the Lessee and be forthwith recoverable by action.

Beyond this our clients are not prepared to accede to your suggestions. Our clients are not desirous of undertaking nor do they seek to cast upon you obligations which are manifestly more onerous than would be the case in an ordinary lease and this is nothing more than an ordinary lease. If, for instance, you must insist on a clause which renders our clients responsible for

all repairs save only those directly attributable to abuse by you, our clients feel that no useful purpose can be served by a further continuance of the present relationship.

Yours faithfully,
for Inamdar & Inamdar

Partner

SL/.....

Exhibit 15
Copy letter from Plaintiffs Advocates to Defendants 24th April 1958 continued

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EXHIBIT 16

COPY LETTER FROM DEFENDANTS TO PLAINTIFFS

Exhibit 16
Copy letter from Defendants to Plaintiffs 29th May 1958

THE WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED
WAFCO.

P.O. BOX 2449
NAIROBI.

Date 29th May, 1958.

Messrs.Jafferali & Sons Limited,
P.O. Box 489,
MOMBASA.

Dear Sirs,

Plot No.L.R. 209/1081, Nairobi.

Kindly note that we hereby formally hand you one month's notice, effective as from 31st May, 1958 of our intention to vacate the Warehouse on the above-mentioned premises, presently rented from your goodselves.

The premises will be available for your occupancy after 30th June, 1958.

Yours faithfully,
for THE WAREHOUSING & FORWARDING CO.
OF E.A.LTD.,

Signed
MANAGER.

Exhibit 17

Copy letter from Defendants to Plaintiffs Advocates 29th May 1958

EXHIBIT 17

COPY LETTER FROM DEFENDANTS TO PLAINTIFFS ADVOCATES

THE WAREHOUSING & FORWARDING COMPANY
OF EAST AFRICA LIMITED
WAFCO.

P.O. BOX 2449,
NAIROBI.

Date 29th May, 1958.

Messrs.Inamdar & Inamdar,
Court Chambers,
Fort Jesus Road,
P.O. Box 483,
MOMBASA.

Dear Sirs,

Plot No.L.R.209/1081, Nairobi.

With reference to your letter of 24th instant, the matter has been carefully considered and we can only agree with the last sentance of your letter that no useful purpose can be served by a further continuance of the present relationship.

Kindly note therefore, that we hereby formally tender one month's notice of our intention to vacate the warehouse on the above-mentioned plot. We will vacate the premises on 30th June, 1958.

Copy of this letter is being addressed to Messrs.Jafferali & Sons Limited to notify them also of our intention to vacate the premises as at 30th June, 1958.

Yours faithfully,
for THE WAREHOUSING & FORWARDING CO.
(E.A.) LIMITED.
Signed

Manager.

C.C.Messrs.Jafferali & Sons Ltd.,
P.O.Box 489,
MOMBASA.

General Manager,
Wafco,
MOMBASA.

EXHIBIT 18

COPY LETTER FROM TRIVEDI AND TRAVADI TO DEFENDANTS

Exhibit 18

Copy letter from Trivedi and Travadi to Defendants 20th June, 1958

20th June, 1958

Messrs.Warehousing & Forwarding Co.
of (E.A.) Ltd.,
Lugard House,
Government Road,
NAIROBI.

Dear Sirs,

We have to inform you that we have been consulted by M/S. Jafferali & Sons Limited of Mombasa in regard to your letter of the 29th ultimo addressed to Messrs.Inamdar & Inamdar Advocates of Mombasa with a copy to them.

It appears that you had agreed to take a lease of the premises for a period of three years from the 1st January, 1958 at the monthly rent of Shs.2,250/- in consideration of the agreement by our clients and Messrs.Nazarali Madatally and his two brothers to release you from the lease of the latters' premises in Factory Street, Nairobi and that the possession of the premises was given to you on the 1st January, 1958, before a formal lease was executed.

It also appears from the correspondence that has already taken place between our clients, their advocates and yourselves that a draft lease was prepared and sent to you for comments and at a stage you abruptly gave a notice of the termination of the tenancy at the end of this month.

In the circumstances it appears that our clients have a good case against you for specific performance and or for damages for breach of contract by you to take the lease which was tendered to you.

Our clients will negotiate a lease for the

Exhibit 18

Copy letter from Trivedi and Travadi to Defendants 20th June, 1958 continued

balance of the period namely 30 months from 1st July next and ascertain what amount of damages they would suffer by such lease and we shall further communicate with you with regard to the amount of damages that our clients have suffered or are likely to suffer.

Yours faithfully,

Signed

for TRIVEDI & TRAVADI.

Exhibit 19

Copy letter from Defendants Advocates to Trivedi and Travadi 24th June 1958

EXHIBIT 19

COPY LETTER FROM DEFENDANTS ADVOCATES TO TRIVEDI AND TRAVADI

ATKINSON,CLEASBY & COMPANY,
ADVOCATES. P.O.BOX 29,
MOMBASA.

24th June, 1958

OUR REF: WAF.4/533

Messrs.Trivedi & Travadi,
Advocates,
P.O.Box 1048,
NAIROBI.

Dear Sirs,

Re: PLOT NO.L.R.209/1081,NAIROBI.

We have been instructed by our clients The Warehousing & Forwarding Co. of East Africa Limited to reply to your letter of 20th June.

We have to inform you that from a perusal of the correspondence, and specifically from Messrs.Inamdar & Inamdar's letter to our clients of 24th April, 1958, it is abundantly clear that the terms of the envisaged lease were never agreed upon. Such being the case we regret to inform you that our clients cannot entertain any claim for damages, and any proceedings that may be brought will be defended.

Yours faithfully,
for ATKINSON, CLEASBY & CO.

Signed
R. P. Cleasby.

RPC/BL.

EXHIBIT 20

COPY LETTER FROM THE DEFENDANTS TO TRIVEDI AND TRAVADI

Exhibit 20

Copy letter from Defendants to Trivedi and Travadi 25th June 1958

THE WAREHOUSING & FORWARDING COMPANY
OF EAST AFRICA LIMITED
WAFCO

P.O. BOX 2449

NAIROBI.

Date 25th June, 1958.

Messrs.Trivedi & Travadi,
P.O. Box 1048,
NAIROBI.

Dear Sirs,

Re: Plot NO.L.R.209/1081, NAIROBI

We acknowledge receipt of your letter of the 20th day of June, and have to inform you that, in our opinion the terms of the evisaged Lease were never agreed upon as is clearly shown from the correspondence and that, in consequence, if there was anytenancy at all, it was a tenancy from month to month.

We would refer you to our letter to Jafferali & Sons Limited of the 29th May in which one month's notice was given and we hereby repudiate liability to pay damages as claimed, or at all.

Yours faithfully,

For THE WAREHOUSING & FORWARDING
CO. OF E.A. LTD.,

Signed

MANAGER.

Exhibit 21

Copy letter from Messrs. Korde & Esmail to Defendants 23rd June 1959

EXHIBIT 21

COPY LETTER FROM MESSRS. KORDE & ESMAIL TO DEFENDANTS.

KORDE & ESMAIL,
ADVOCATES.

P.O. BOX 11021,
NAIROBI.

OUR REFERENCE: 1266/4/59. Date 23rd June,1959.

Messrs.Warehousing & Forwarding Co.
of (E.A.) Ltd.,
P.O. Box 2449,
Nairobi.

Dear Sirs,

Re: Godown at Plot NO.1081
Clarke Lane.

We are instructed by our clients Messrs. Jafferali & Sons Limited of Mombasa, to refer to a letter of June 1958 written to you on their behalf by Messrs.Trivedi & Travadi, Advocates, in which they claim that our clients had a good case against you for specific performance and/or damages for breach of contract by you to take the lease which was tendered to you.

Our clients have been endeavouring to let the premises to any suitable tenants available on the best terms they could obtain since it appears clear that you were quite determined not to take the lease. They have unfortunately not been successful in finding any tenants in spite of advertisements inserted in the newspapers, and every effort made by them to find such tenants.

The best offer they have been able to obtain is from a party who seeks a five-year lease with a five-year option at a rent of Shs.600/- per month only. That you will appreciate is a very low rent having regard to the rent which you agreed to pay. There is as you know a large supply of premises and it is difficult to find suitable tenants willing to take the premises on satisfactory terms. Our clients are naturally reluctant to tie themselves for a period of five years which may, if the option is exercised by the tenants, become ten years at a rent as low as Shs.600/- per month.

Exhibit 21 — Copy letter from Messrs. Korde & Esmail to Defendants 23rd June 1959 continued

We shall be glad to know if you can suggest any tenants who are prepared to take the premises on better terms than the terms which have been offered to our clients.

We would add that the advertisements that were inserted both in 1958 and 1959 did not receive any response.

Our clients desire now to institute legal proceedings against you and unless you are able to suggest suitable tenants to whom the premises can be let, they propose to institute legal proceedings against you for damages claiming an amount at the rate of Shs.2,250/- per month for the balance of the period, namely 30 months from the 1st July 1958 when you vacated the premises.

Yours faithfully,
Signed
KORDE & ESMAIL.

SE/ESM.

Exhibit 22 — Copy letter from Defendants to Messrs. Korde & Esmail 8th July 1959.

EXHIBIT 22

COPY LETTER FROM DEFENDANTS TO MESSRS. KORDE & ESMAIL.

THE WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED
WAFCO

P.O. BOX 2449,
NAIROBI
Date 8th July 1959.

OUR REF: LAB/FPG.

Messrs.Korde & Esmail,
Advocates,
Cambrian Building,
Government Road,
NAIROBI.

Dear Sirs,

Re: Godown at Plot No.1081 Clarke Lane.

We have to acknowledge your letter dated 23rd June, Ref:1266/4/59, and wish to advise you that we have nothing further to say in this matter following our letter of the 25th June, 1958, addressed to Messrs. Trivedi & Travadi.

Yours faithfully,
for The Warehousing & Forwarding Co.
(E.A.) Limited.
Signed
L.A.BEDFORD.

Exhibit 23

Copy letter from Messrs. Korde & Esmail to Defendants 19th August 1959

EXHIBIT 23

COPY LETTER FROM MESSRS. KORDE & ESMAIL TO DEFENDANTS

KORDE & ESMAIL,
ADVOCATES.

P.O.BOX 11021
NAIROBI.

OUR REFERENCE 1891/212/59. 19th August, 1959.

Registered Post.

The Manager,
The Warehousing & Forwarding
Co. of (E.A.) Ltd.,
P.O.Box 2449,
Nairobi.

Dear Sirs,

Re: Plot NO.L.R.209/1081,NAIROBI.

We are instructed by our client Messrs. Jafferali & Sons Limited to write to you as follows :-

We hereby give you notice that our client has now succeeded in securing a tenant for the above premises at monthly rental of Shs.950/- for a term of 3 years commencing from 1st August 1959. This tenancy has been secured after considerable effort on the part of our client.

We are also instructed to proceed forthwith with the institution of a suit to recover damages from you that have been suffered by our client as a result of your breach of the tenancy agreement.

Yours faithfully,

Signed

KORDE & ESMAIL.

MG/ESM.

EXHIBIT 24

Exhibit 24

COPY LETTER FROM DEFENDANTS TO MESSRS.KORDE & ESMAIL

Copy letter from Defendants to Messrs. Korde & Esmail 20th August 1959

THE WAREHOUSING & FORWARDING COMPANY
OF EAST AFRICA LIMITED
WAFCO.

P.O. BOX 2449,
NAIROBI.

Date August 20th 1959.

Messrs.Korde & Esmail,
P.O.Box 11021
NAIROBI.

Dear Sirs,

Re: PLOT NO.L.R. 209/1081,NAIROBI

We thank you for your letter ref: 189/212/59 of August 19th on the headed subject from which we are pleased to learn your client Jafferali & Sons Ltd., have after considerable effort, secured a tenant for the above premises. We would also mention that the figure of Shs.950/- being the monthly rental, is most interesting when compared with Shs.2,250/- as charged during our occupancy of the same premises.

We note you have been instructed to proceed with the institution of a suit to recover damages, and have no comment on this action.

Yours faithfully,
for THE WAREHOUSING & FORWARDING
COMPANY OF E.A.LIMITED

Signed

N.W.ELLIOT.

Exhibit 25

Copy letter from Messrs. Korde & Esmail to the Defendants. 9th September 1959

EXHIBIT 25

COPY LETTER FROM MESSRS.KORDE & ESMAIL TO THE DEFENDANTS

KORDE & ESMAIL
ADVOCATES

P.O.BOX 11021,
NAIROBI.

9th September, 1959.

OUR REF:2059/302/59.

The Manager,
The Warehousing and Forwarding
Company of E.A.Ltd.,
P.O.Box 2449,
NAIROBI

Dear Sir,

Re: Plot No.L.R.209/1081, Nairobi.

We have been instructed by Messrs.Jafferali & Sons Limited to demand from you the sum of Shs.51,350/- being the damages suffered by our client as a result of a breach of the tenancy agreement in respect of the above Plot.

Unless the above sum is paid within the next seven days, we are instructed to file proceedings forthwith.

Yours faithfully,

Signed

Korde & Esmail.

Exhibit 1

Lease between Nazaralli Madatally, Gulamalli Madatally and Jafferali Madatally (1) and Defendants (2) 10th September 1957

EXHIBIT 1

LEASE BETWEEN NAZARALI MADATALLY, GULAMALLI MADATALLY AND JAFFERALI MADATALLY (1) and DEFENDANTS (2)

COLONY AND PROTECTORATE OF KENYA
REGISTRY OF TITLES
TITLE NO. I.R.6247

WE, NAZARALLI MADATALLY, GULAMALLI MADATALLY and JAFFERALI MADATALLY all of Nairobi in the Colony of Kenya Merchants (hereinafter called the

Exhibit

1

Lease between Nazaralli Madatally, Gulamalli Madatally and Jafferali Madatally (1) and Defendants (2) 10th September 1957 continued

Lessors which expression shall include our executors administrators and assigns where the context so admits) being registered as proprietors as tenants in common in equal shares (subject to such charges and encumbrances as are notified by Memorandum written hereon to the special conditions contained in the determinationed Grant and to the annual rent of Shillings One thousand and eight) of ALL THAT piece of land situate in the Nairobi Municipality in the Nairobi District of the Colony of Kenya containing by measurement nought decimal five one six five of an acre more or less that is to say Land Reference Number 209/2775 of Meridional District South A 37 being G II d the premises comprised in a Grant dated the sixth day of December One thousand nine hundred and forty-four (registered in the Registry of Titles at Nairobi as Number I.R. 6247/1) which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed to the said Grant and more particularly on Land Survey Plan Number 40031 deposited in the Survey Records Office at Nairobi DO HEREBY LEASE to WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA LIMITED a limited liability Company having its registered office at Nairobi aforesaid (hereinafter called the Company which expression shall include its successors and assigns where the context so admits) ALL AND SINGULAR the said plot of land No.209/2775 together with the godown premises being five days erected thereon and numbered 1,2,3,4, and 5 on the plan registered in the Registry of Documents at Nairobi in Volume B 2 Folio 148/259 to be held by the Company as tenant for the space of five years from the First day of July One thousand nine hundred and fifty seven at the monthly rent of Shillings Four thousand five hundred payable in advance on or before the fifth day of each calendar month SUBJECT to the following modifications:-

1. The Company will during the said term pay the rent hereby reserved at the times and in the manner aforesaid.

2. The Company will during the said term pay all the water and lighting rates sanitary and other charges of what nature and kind soever

Exhibit

1

Lease between Nazaralli Madatally, Gulamalli Madatally and Jafferali Madatally (1) and Defendants (2) 10th September 1957 continued

which now are or may at any time hereafter during the said term be assessed or imposed on the premises hereby demised or any part thereof or on the Landlord or Tenant in respect thereof by the Government of the said Colony or any Municipal Township local other authority the Head rent payable to the Government of the said Colony the rate payable under the local Government Valuation and Rating Ordinance or any Ordinance amending or replacing the same and any siding charges payable to the East African Railways and Harbours only excepted PROVIDED ALWAYS that if during any year of the said term the rate payable under the local Government Valuation and Rating Ordinance or any Ordinance amending or replacing the same in respect of the premises hereby demised shall be increased beyond the amount payable in respect of the year One thousand nine hundred and fifty seven the Company will on demand pay to the Lessors the amount of such increase and so in proportion for any less period than a year.

3. Subject to the provision of Clause 10 hereof the Company will during the said term keep the interior of the said premises including all doors windows and landlords' fixtures lavatories and bath rooms in the same good and tenantable repair and condition as they now are fair wear and tear and damage by fire only excepted and will at the expiration or sooner determination of the said term quietly yield up the said premises with the Landlord's fixtures which now are or at any time during the said term may be thereon in such good and tenantable state of repair and condition as the same ought to be in having regard to the foregoing provisions of this clause and with all locks keys and fastenings complete.

4. It shall be lawful for the Lessors or their agent with or without workmen at all reasonable times to enter the said premises and execute structural or other repairs on their own account or view the state of repair and condition of the said premises and of all defects and wants of reparation then and there found and which the Company shall be liable to make good under the provisions hereinbefore contained to give or leave at the registered office of the Company

notice in writing to the Company and the Company will within a period of one calendar month after such notice or sooner if requisite repair and make good the same according to such notice and the provisions in that behalf hereinbefore contained.

5. The Company will not make or permit to be made any alterations in or addition to the said premises or erect any fixtures therein or drive nails screws bolts or wedges in the floors walls or ceilings thereof without the consent in writing of the Lessors first had and obtained which consent shall not be unreasonably withheld.

6. The Company will not without the previous consent in writing of the Lessors carry on or permit upon the said premises or any part thereof any trade or business or do or suffer any other thing which may render any increased or extra premium payable for the insurance on the said premises against loss or damage by fire or which may make void or voidable any policy of such insurance now held by the Lessors in respect of such premises but the use of the said premises for the purpose of a warehouse or godown shall not be deemed a breach of this provision.

7. The Company will not during the said term transfer sublet or part with the possession of the said premises or any part thereof without the consent in writing of

(a) the East African Railway & Harbours Administration and

(b) the Lessors first had and obtained but such latter consent shall not be unreasonably withheld.

AND it is hereby agreed and declared that upon any breach by the Company of the foregoing provisions of this clause it shall be lawful for the Lessors to re-enter upon the premises hereby demised and thereupon the terms hereby created shall determine absolutely.

8. If the said rent or any part thereof shall be in arrear for the space of seven days after

Exhibit 1

Lease between Nazaralli Madatally, Gulamalli Madatally and Jafferali Madatally (1) and Defendants (2) 10th September 1957 continued

the fifth day of any calendar month for which the same is due as aforesaid whether the same shall have been legally demanded or not or if there shall be any breach non-performance or non-observance by the Company of any of the conditions restrictions or stipulations herein contained or implied and on its part to be performed and observed or if the Company shall enter into liquidation whether compulsory or voluntary (not being a voluntary liquidation merely for the purpose of reconstruction) or if any assignee of the Company not being a company shall become bankrupt or enter into any agreement or make any arrangement with or for the benefit of his or their creditors for liquidation of his or their debts by composition or otherwise then and in any such case it shall and may be lawful for the Lessors at any time thereafter to enter into and upon the said demised premises or any part thereof in the name of the whole and the same to have again repossess and enjoy as in their former estate anything therein contained to the contary in any wise notwithstanding without prejudice to any right of action or remedy of the Lessors in respect of any antecedent breach of any of the covenants by the Company hereinbefore contained.

9. The Lessors will at all times during the said term pay the Head Rent payable in respect of the said premises and also (subject to Clause 2 hereof) the rate payable under the local Government Valuation and Rating Ordinance or any ordinance amending or replacing the same and will also pay all siding charges in respect thereof assessed by the East African Railways and Harbours.

10. The Lessors will at all times during the said term

(a) Keep the said premises insured against loss or damage by fire

(b) Keep the main walls roof of the said premises in good repair and condition

11. If at any time the said premises or any part thereof shall be rendered unfit for occupation in consequence of fire the Lessors will

until such premises shall be rendered fit for occupation allow to the Company a total or proportionate abatement of the rent hereby reserved as the case may be but the Company shall not have any such right of determination of the lease hereby granted as is contemplated by Section 108 (e) of the Indian Transfer of Property Act 1882.

12. The Company paying the rent hereby reserved and performing and observing the conditions restrictions and stipulations herein contained or implied and on its part to be performed and observed shall and may peaceably and quietly possess and enjoy the said premises during the term hereby granted without any interruption from or by the Lessors or any person lawfully claiming from or under them.

13. If the Company shall be desirous of surrendering two bays number and two by delivering vacant possession on the First day of January next but not otherwise the Lessors shall accept the partial surrender at the costs of the Company and thereupon a proportionate reduction of the rent will be made and the tenants covenants herein contained shall apply as if the said two bays were not included in this demise.

The Company hereby accepts this lease subject to the conditions restrictions and stipulations above set forth or referred to.

IN WITNESS whereof the Lessors have hereunto set their hands and the Company has caused its Common Seal to be hereunto affixed this Tenth day of September One Thousand nine hundred and fifty seven.

SIGNED by the said NAZARALLI MADATALLY in presence of:-

Exhibit 1

Lease between Nazaralli Madatally, Gulamalli Madatally and Jafferali Madatally (1) and Defendants (2) 10th September 1957 continued

SIGNED by the said GULAMALLI MADATALLY in the presence of:-

SIGNED by the said JAFFERALLI MADATALLY in the presence of:-

SEALED with the Common Seal of the Company in the presence of:-

Director

Secretary

MEMORANDUM OF CHARGES AND ENCUMBRANCES

Memorandum of Charge with The Bank of India Ltd. registered as No.I.R. 6247/16.

East African Railways and Harbours hereby consents to the foregoing lease.

Dated the 13th day of September One thousand nine hundred and fifty seven.

EXHIBIT 2

Exhibit

2

COPY DEED OF SURRENDER BETWEEN DEFENDANTS (1) and NAZARALLI MADATALLY, GULAMALLI MADATALLY and JAFFERALI MADATALLY (2)

Copy Deed of Surrender between Defendants (1) and Nazaralli Madatally, Gulamalli Madatally and Jafferali Madatally (2)

17th May 1958

COLONY AND PROTECTORATE OF KENYA
REGISTRY OF TITLES
TITLE NO. I.R.6247

THIS INSTRUMENT OF SURRENDER OF LEASE is made the Seventeenth day of May One thousand nine hundred and fifty eight BETWEEN WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA LIMITED a limited liability Company having its registered office at Mombasa in the Colony of Kenya (hereinafter called the Lessee) of the one part and NAZARALLI MADATALLY, GULAMALLI MADATALLY and JAFFERALI MADATALLY all of Nairobi aforesaid (hereinafter called the Lessors) of the other part WHEREAS this Instrument is intended to be SUPPLEMENTAL to a lease dated the Tenth day of September One thousand nine hundred and fifty seven made between the Lessors of the one part and the Lessee of the other part and registered in the Registry of Title at Nairobi aforesaid as No.I.R. 6247/18:

AND WHEREAS the Lessors have at the request of the Lessee and by mutual consent of the parties hereto agreed to accept the Surrender of the said lease NOW THIS INSTRUMENT WITNESSETH as follows :-

1. In pursuance of the said agreement the Lessee HEREBY SURRENDERS to the Lessors ALL AND SINGULAR the term of years granted by the said Lease to the intent that the term of years granted by the said Lease may merge and be extinguished in the reversion expectant thereon and operate as a complete surrender of the said Lease as from the Thirty first day of December One thousand nine hundred and fifty seven under the registration of Titles Ordinance.

Exhibit 2

Copy Deed of Surrender between Defendants (1) and Nazaralli Madatally, Gulamalli Madatally and Jafferali Madatally (2) 17th May 1958 continued

2. The Lessors HEREBY RELEASE the Lessee from all liability claims and demands in respect of all breaches of any of the covenants contained in the said lease.

IN WITNESS whereof the Lessee has caused its Common Seal to be hereunto affixed and the Lessors have hereunto subscribed their names the day and year first herein written.

THE COMMON SEAL of WAREHOUSING AND FORWARDING COMPANY EAST AFRICA LIMITED was hereunto affixed in the presence of:-

SIGNED by the said NAZARALLI MADATALLY in the presence of:-

SIGNED by the said GULAMALLI MADATALLY in the presence of:-

SIGNED by the said JAFFERALI MADATALLY in the presence of :-

IN THE PRIVY COUNCIL No.6 of 1962

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

FOR EASTERN AFRICA

B E T W E E N:

WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED (Defendants) Appellants

- and -

JAFFERALI & SONS LIMITED (Plaintiffs) Respondents

RECORD OF PROCEEDINGS

WALTONS, BRIGHT & CO.,
101, Leadenhall Street,
London, E.C.3.
Solicitors for the Appellants.

KNAPP-FISHERS & BLAKE & REDDEN,
31, Great Peter Street,
Westminster,
London, S.W.1.
Solicitors for the Respondents.