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Judgment  
8, 1964

IN THE PRIVY COUNCIL

No. 26 of 1961

ON APPEAL  
FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N

JOHN KHALIL KHAWAM & COMPANY  
(JOHN KHALIL KHAWAM trading as)  
(Plaintiffs) Appellants

- and -

K. CHELLARAM & SONS (NIG.) LIMITED  
(Defendants) Respondents

*(and cross appeal consolidated.)*

R E C O R D    O F    P R O C E E D I N G S

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
22 JUN 1965  
25 RUSSELL SQUARE  
LONDON, W.C.1.

78536

HAISEY, LIGHTLY & HEMSLEY,  
32, St. James's Place,  
London, S.W.1.  
Solicitors for the Appellants.

IN THE PRIVY COUNCILNo. 26 of 1961

ON APPEAL  
FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N

JOHN KHALIL KHAWAM & COMPANY  
(trading as JOHN KHALIL KHAWAM)  
(Plaintiffs) Appellants

- and -

K. CHELLARAM & SONS (NIG.) LTD.  
(Defendants) Respondents  
*(and Cross-Appeal Respondents)*

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B	Artist's Sketch	Original document	
B1	Artist's Sketch	Original document	
C	Piece of cloth with design as is annexed to Exhibit "A"	In original	
D	Piece of cloth formerly attached to Affidavit of Joseph Ayanda	In original	
E	Invoice No.7140	6th December 1956	Not copied
F	Letter Plaintiffs to Defendants	26th November 1957	88
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H	Letter H.O. Davies to Adedeji Okubadejo	28th November 1957	91
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L	Counter sketch from Japan numbered 7140	Original document	
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X	Cloth cutting admitted for identification	In original	
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O	Confirmation Note No.7818 (amended)	1st June 1957	95
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Q	Letter A. Lapade Obisesan to Defendants	24th November 1957	97
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15.	Affidavit of John Graham Bentley in support of Motion for final leave to appeal to Privy Council	2nd September 1960
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18.	Courts' Notes on settling Record of Appeal	21st September 1960
19.	Affidavit of Malcolm Mitchell Murray in support of application for leave to vary security	26th November 1960
20.	Courts' Notes on hearing of application to vary security	11th January 1961

IN THE PRIVY COUNCIL

No. 26 of 1961

ON APPEAL  
FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N

JOHN KHALIL KHAWAM & COMPANY  
(trading as JOHN KHALIL KHAWAM)  
(Plaintiffs) Appellants

- and -

K. CHELLARAM & SONS (NIG.) LIMITED  
(Defendants) Respondents

*(a) Cross - Appeal (unintended)*

RECORD OF PROCEEDINGS

No. 1

PARTICULARS OF CLAIM

IN THE HIGH COURT OF LAGOS

B E T W E E N :

JOHN KHALIL KHAWAM AND COMPANY  
(JOHN KHALIL KHAWAM trading as) Plaintiff

- and -

CHELLARAM AND SONS (NIGERIA) LTD. Defendants

In the  
High Court of  
Lagos

No. 1

Particulars  
of Claim.  
30th November,  
1957.

20 The plaintiff claims from the Defendant Company:-

1. An injunction restraining the defendant Company its servants or agents from importing or causing to be imported into Nigeria selling or exposing or causing to be sold or exposed for sale any textile piece goods bearing the Plaintiff's Registered Design No.459477 also registered in Japan as New Design 7140 or an obvious or colourable imitation thereof.

2. £50,000 damages for the infringement by the Defendant Company of the Plaintiff's said Registered



In the  
High Court of  
Lagos

Design or an account of sales of all piece goods to which the said design or an obvious or colourable imitation thereof shall have been applied and of the profit made thereon.

No. 1

Particulars  
of Claim.

30th November,  
1957

3. Delivery up for public destruction of all textile piece goods to which the said design or an obvious or colourable imitation thereof shall have been applied that are in the possession or under the control of the Defendant Company its servants or agents.

10

- continued.

4. Cost.

Dated at Ibadan this 30th day of November, 1957.

(Sgd.) A. Okubadejo.  
Solicitor for the Plaintiff.

Plaintiff's address:- 81, Lebanon Street, Ibadan or  
c/o His Solicitor, Adeji Okubadejo,  
Co-operative Bank Building,  
Ibadan.

Defendants' address:- Marina, Lagos.

Summs. £43. 1. -  
Ser.     - 2. 1  
Mlg.     - 3. -

20

£43. 6. 1d Pd. on CR. D403977 of 3/12/57  
(Intd. H.J.W.)

No. 2

No. 2

Writ of  
Summons.

WRIT OF SUMMONS

3rd December,  
1957.

IN THE HIGH COURT OF LAGOS

U 012263

CIVIL SUMMONS

Suit No. 10/302 of 1957

30

B E T W E E N :

JOHN KHALIL KHAWAM & CO. etc.     Plaintiff

- and -

MESSRS. K. CHELLARAM & SONS (NIGERIA) LTD.  
Defendants

TO Messrs. K. Chellaram & Sons (Nigeria) Limited  
of Marina, Lagos.

In the  
High Court of  
Lagos

No. 2

You are hereby commanded in Her Majesty's name  
to attend this court at High Court, Lagos on Monday  
the 13th day of January, 1958, at 9 o'clock in the  
forenoon to answer a suit by John Khalil Khawam &  
Co. etc. of 81, Lebanon Street, Ibadan against you.

Writ of  
Summons.

3rd December,  
1957.

The plaintiff's claim is as per particulars  
attached.

- continued.

10 Issued at Lagos the 3rd day of December, 1957.

(Sgd.) A.R. DICKSON

J U D G E. (Intd.) HJW.

Summons £43. 1. -  
Service -. 2. -  
Mileage -. 3. -

£43. 6. 1 Pd on CR. No. D403977

TAKE NOTICE:- That if you fail to attend at the  
hearing of the suit or at any continuation or ad-  
journment thereof, the Court may allow the Plaintiff  
to proceed to Judgment and execution.

20

No. 3

No. 3

STATEMENT OF CLAIM

Statement of  
Claim.

IN THE HIGH COURT OF LAGOS

Suit No. LD/302/1957

21st January,  
1958.

B E T W E E N :

JOHN KHALIL KHAWAM trading as  
JOHN KHALIL KHAWAM AND COMPANY Plaintiffs

- and -

MESSRS. K. CHELLARAM & SONS (NIGERIA)  
LTD. Defendants

30

STATEMENT OF CLAIM

1. The Plaintiff trades in the name of JOHN  
KHALIL AND COMPANY at 81, Lebanon Street, Ibadan.

In the  
High Court of  
Lagos

            
No. 3

Statement of  
Claim.

21st January,  
1958

- continued.

2. The plaintiff is a Trader and an Importer of Textile piece goods.

3. The defendant Company carries on business in Lagos and elsewhere in Nigeria as General Merchants and as Importers and exporters and engage in the selling of textile goods.

4. On the 4th day of January, 1957, the plaintiff registered in his name a design for textile piece goods under the United Kingdom Registered Designs Act 1949 at the Manchester Branch of the Designs Registry of the Patent Office as registered number 459477. 10

5. Since the date of registration of his said registered design the plaintiff has imported into Nigeria in four consignments about 10,000 pieces of textile goods bearing the said registered design, and has sold such goods in Ibadan and Lagos at an average price of Fifty Shillings (50) for each piece.

6. In or about the month of November, 1957, the plaintiff's customers complained to him that they could not pay him the sum of Fifty Shillings (50s.) for each piece of the said goods as they could buy similar goods from the Defendant Company at Lagos at a price of Thirty nine Shillings (39s.) for each piece (wholesale). 20

7. In or about the month of November, 1957, the plaintiff's customers bought from the Defendant Company in Lagos a case of 50 pieces of textile goods at the price of Thirty nine Shillings (39s.) for each piece and produced such goods to the Plaintiff for his inspection, which goods were an obvious or colourable imitation of the Plaintiff's registered design printed on inferior quality cloth with inferior dyes. 30

8. The plaintiff bought from his customers at the price of Thirty nine shillings (39s.) for each piece two pieces of the said inferior goods purchased by a customer from the Defendant Company.

9. The defendant company has imported into Nigeria a large quantity of textile goods which are an obvious or colourable imitation of the plaintiff's registered design which goods are printed on inferior quality cloth with inferior dyes. 40

10. In consequence of sales by the Defendant Company of the said inferior goods the plaintiff has had to reduce his sale price of goods bearing his registered design to Forty three Shillings (43s.) for each piece (wholesale).

In the  
High Court of  
Lagos

            
No. 3

11. The sale by the defendant Company of goods imported by it bearing an obvious or colourable design printed on inferior quality cloth with inferior dyes has caused loss of reputation and damage to the plaintiff.

Statement of  
Claim.

21st January,  
1958

-- continued.

PARTICULARS OF DAMAGES

Loss of profit on 9841 pieces of 7140  
Registered Design at 15s. a piece on  
one year's sales £7,280.15.-

The design is registered for 5 years from  
4.1.57 with two options to renew of 5 years  
each, i.e. a total period of 15 years.

Loss of profit for 5 years £36,913.15.-

General damages ... 13,096. 5.-

20 Total damages ... £50,000. --

The plaintiff therefore claims according to his  
Writ of Summons.

Dated at Lagos this 21st day of January, 1958.

(Sgd.) James E. David

" A. Okubadejo

Plaintiff's Solicitors.

Plaintiff's address: c/o Messrs. J.C. David &  
Moore  
Catholic Mission Street,  
Lagos

30

And

Adedeji Okubadejo  
Co-operative Bank Building,  
P.O. Box 405, Ibadan.

Defendants' address:- c/o Chief H.O. Davies,  
128/130, Broad Street,  
Lagos.

In the  
High Court of  
Lagos

No. 4

NOTICE OF COUNTER-CLAIM

No. 4

IN THE HIGH COURT OF LAGOS

Suit No. LD/302/1957

Notice of  
Counter-Claim.  
3rd February,  
1958.

B E T W E E N

JOHN KHALIL KHAWAM  
(Trading as JOHN KHALIL & COMPANY) Plaintiffs

- and -

M/s K. CHELLARAM & SONS (NIG.) LTD. Defendants  
(By Original Action)

And

10

MESSRS. K. CHELLARAM & SONS (NIG.)  
LTD. Plaintiffs

- and -

JOHN KHALIL KHAWAM  
(Trading as JOHN KHALIL & COMPANY) Defendants

NOTICE OF COUNTER-CLAIM

TAKE NOTICE that the Defendant intends at the  
Hearing of this action to set up a Counter-Claim  
against the Plaintiff's demand, the particulars of  
which are stated hereunder:-

20

PARTICULARS OF COUNTER-CLAIM:-

The defendant says that his interests have  
been prejudicially affected by the registration by  
the Plaintiffs in the United Kingdom of the Design  
No.459477 under the Registered Designs Act 1949 and  
Counter-Claims for a declaration that exclusive  
privileges and rights in the said design have not  
been acquired in Nigeria by the Plaintiff under the  
provisions of the United Kingdom Designs (Protec-  
tion) Ordinance Cap.221 on the following grounds:-

30

(a) That the Plaintiff is not the Proprietor  
of the said design.

(b) That the said design was not "new or  
original" at the time when the Plaintiff  
applied to have it registered and

(c) That the design is an open design, and merely a variant of a design commonly used in the trade and known in Japan, where it is manufactured as Cotton Crimped African-Prints No.7818.

In the High Court of Lagos

No. 4

Dated at Lagos this 3rd day of February, 1958.

Notice of Counter-Claim.

3rd February, 1958

- continued.

(Sgd.) A.O. Bickersteth  
ARTHUR O. BICKERSTETH  
Defendant's Solicitor  
(By Original Action)  
128/130, Broad Street,  
Lagos.

10

On Notice to:-

1. Registrar, High Court,  
Race Course Road, Lagos.
2. The Defendants, c/o Their Solicitor,  
M/s. David & Moore,  
13, Catholic Mission Street,  
Lagos.

20 Filing Notice 3/6  
C/Claim £5.5.-  
Ser. -4.2  
Mlg. -5.1  
£5.17.9d Pd. on CR.D532677 of 7/2/58.  
(Intd.) H.J.W.

No. 5

No. 5

STATEMENT OF DEFENCE

Statement of Defence.

IN THE HIGH COURT OF LAGOS Suit No.LD.302/1957

3rd February, 1958.

B E T W E E N

30

JOHN KHALIL KHAWAM  
(Trading as JOHN KHALIL & COMPANY) Plaintiffs

- and -

M/s. K. CHELLARAM & SONS (NIG.) LTD.  
Defendants

STATEMENT OF DEFENCE

1. Save as is hereinafter expressly admitted

In the  
High Court of  
Lagos  
          

No. 5

Statement of  
Defence.

3rd February,  
1958.

- continued.

the defendant denies each and every allegation of fact in the Plaintiffs' Statement of Claim as if those allegations were set out seriatim and specifically traversed.

2. The defendant does not deny paragraphs 1, 2 and 3 of the Plaintiffs' Statement of Claim.

3. The defendant says that it only knows of the facts stated in paragraph 4 of the Statement of Claim since these proceedings commenced and that before then he was not aware that the Plaintiffs claimed such registration. 10

4. The defendant is not in a position to admit or deny the allegations in paragraphs 5, 6, 7 and 8 of the Statement of Claim, but denies that it sold its materials at 39/- per piece.

5. With reference to paragraphs 7 and 9 the Defendant denies that the materials sold by it was an imitation of the Plaintiffs' design.

6. With reference to paragraph 9 of the Statement of Claim, the defendant says that it imported into Nigeria from Japan 880 pieces only of the materials out of which 530 pieces have been sold, leaving 350 pieces in hand. 20

7. The defendant says that the cost of the said materials landed Lagos was 31/9 a piece and that it sold for 38/- a piece.

8. The defendant denies paragraphs 10 and 11 of the Statement of Claim and the particulars of damages given therein.

9. The defendant says that the said materials are known as cotton crimped African prints No.7818 and are an open design in Japan where they are manufactured and sold, and are subject to no restrictions and can be printed by anybody and that the Plaintiffs' design is merely a variant of the design commonly used in the trade. 30

10. The defendant denies that the said design was registered in Japan and says that if it was so registered it could only have been registered as an open design. 40

11. The defendant says that the Plaintiff did nothing to bring the fact of the registration in

Manchester to the notice of Manufacturers or dealers in Japan, where the materials are in open manufacture.

In the  
High Court of  
Lagos

No. 5

Statement of  
Defence.

3rd February,  
1958

- continued.

10 12. The defendant says further that the plaintiff did nothing whatsoever to warn the public of Nigeria that the said design had been registered in Manchester under the Registered Designs Act 1949 or under any other Act, nor did he indicate the fact on the pieces offered by him for sale, to the public, nor print thereon the registration number.

13. The defendant says that the said design is, in view of paragraphs 9 and 10 and because (a) the plaintiff is not the Proprietor of the said design and (b) the design is not new or original, is not one that can be registered under the Registered Designs Act 1949 and that the registration by the Plaintiff is not valid.

14. The Defendant therefore contends:-

- 20 (a) That the plaintiff's registration in Japan, if any, confers no exclusive right to manufacture, print or sell the said design which is an open design
- (b) That in view of sub-paragraph (a) the design is not a registerable design under the Registered Designs Act 1949 and that the registration procured by the plaintiff there is void and removable from the register.
- 30 (c) That in view of paragraphs 10 - 13 above, the defendant is an innocent Importer without notice of the Plaintiff's registration.
- (d) That the plaintiff is not entitled to any of the reliefs claimed in the Writ of Summons.

15. The defendant has lodged with the Registrar, High Court, Lagos, a Notice of a Counter-Claim.

DATED at Lagos this 3rd day of February, 1958.

(Sgd.) A.O. Bickersteth  
Defendant's Solicitor  
128/130, Broad St.,  
Lagos.



In the  
High Court of  
Lagos

No. 6

PARTICULARS OF COUNTER-CLAIM

No. 6

IN THE HIGH COURT OF LAGOS

Suit No.LD/302/1957

Particulars of  
Counter-Claim.

22nd March,  
1958.

B E T W E E N

JOHN KHALIL KHAWAM  
(Trading as JOHN KHALIL & COMPANY) Plaintiffs

- and -

M/s. K. CHELLARAM & SONS (NIG.) LTD.  
Defendants

And

JOHN KHALIL KHAWAM  
(Trading as John Khalil & Company) Defendant

10

(By Counter Claim)

PARTICULARS OF COUNTER-CLAIM

1. The Plaintiff's Counter-Claim is for a de-  
claration that exclusive privileges and rights in  
Design No.45977 registered in the United Kingdom  
under the Registered Designs Act 1949 have not been  
acquired in Nigeria by the Plaintiff under the  
Provisions of the United Kingdom Designs (Protec-  
tion) Ordinance Cap.221.

20

2. The defendant says that the Plaintiff is not  
the proprietor of the said design which is of the  
Category of cotton crimped African prints No.7818  
and is an open design in Japan where it is manu-  
factured and sold and is subject to no restrictions  
and can be printed by anybody.

3. The plaintiff's design is merely a variant  
of the design commonly used in the trade and known  
in Japan as Cotton Crimped African Prints No.7818.

4. That the said design was not new or original  
at the time when the Plaintiff applied to have it  
registered in Manchester.

30

5. The plaintiff registered its Design in

Manchester after it has been declared an open design in Japan.

DATED at Lagos this 22nd day of March, 1958.

(Sgd.) A.O. Bickersteth  
ARTHUR O. BICKERSTETH  
Defendant's Solicitor  
(By Original Action)  
128/130, Broad Street, Lagos.

10 The Defendants, C/o Their Solicitor,  
Messrs. David & Moore,  
13, Catholic Mission Street,  
Lagos.

In the  
High Court of  
Lagos

No. 6

Particulars of  
Counter-Claim.

22nd March,  
1958

- continued.

No. 7

REPLY TO PARTICULARS OF COUNTER-CLAIM

IN THE HIGH COURT OF LAGOS

Suit No. LD/302/1957

B E T W E E N :

JOHN KHALIL KHAWAM  
(Trading as JOHN KHALIL & COMPANY) Plaintiffs

- and -

20 MESSRS. K. CHELLARAM & SONS (NIG.) LTD.  
Defendants

And

JOHN KHALIL KHAWAM  
(Trading as JOHN KHALIL & COMPANY) Defendant  
(By Counter-Claim)

REPLY TO PARTICULARS OF COUNTER-CLAIM

30 SAVE and EXCEPT as is hereinafter expressly  
admitted the defendant (By Counter-Claim) denies  
each and every allegation of fact contained in the  
Plaintiffs' Particulars of Counter-Claim as if each  
and every such allegation were separately taken and  
specifically traversed.

1. The defendant (By Counter-Claim) denies

No. 7

Reply to  
Particulars of  
Counterclaim.

2nd April, 1958.

In the  
High Court of  
Lagos

No. 7

Reply to  
Particulars of  
Counterclaim.

2nd April, 1958

- continued.

paragraphs 1, 2, 3, 4 and 5 of the Plaintiff's (By Counter-Claim) particulars of Counter-Claim and puts them to strict proof thereof.

2. The defendant (By Counter-Claim) avers that exclusive privileges and rights in Design No.459477 registered in the United Kingdom under the Registered Designs Act 1949 have been acquired in Nigeria by him under the Provisions of the United Kingdom Designs (Protections) Ordinance Cap.221.

3. The Defendant (By Counter-Claim) avers that he is the proprietor of Design No.459477, by Certificate of Registration of Design registered in Manchester on the 4th day of January, 1957, the copyright in which design subsists for 5 years from the 4th of January, 1957 with two further periods of five years each.

4. The defendant (By Counter-Claim) avers that the said design No.459477 was at the time of its registration new and original.

5. The Defendant (By Counter-Claim) avers that in or about the month of August, 1956 he sent his new and original design to Goshu Company Limited Osaka in Japan for the express purpose of having the said design printed for registration in the Designs Registry in Manchester.

Dated at Ibadan this second day of April, 1958.

(Sgd.) James E. David

" A. Okubadejo  
Solicitors for the  
Defendant  
(By Counter-Claim)

The Plaintiffs' (By Counter-Claim) Address:-  
c/o Their Solicitor,  
A.O. Bickersteth, Esq.,  
128/130, Broad Street,  
Lagos.

The Defendant's (By Counter-Claim) Address:-  
c/o His Solicitors,  
M/S. David & Moore,  
13, Catholic Mission Street,  
Lagos.

And A.O. Okubadejo, Esq.,  
P.O. Box 405,  
Co-operative Bank Building,  
New Court Road, Ibadan.

Filing 3/6d  
Ser. 2/1d  
Mlg. 3/-

8/7d Pd. on CR.No.D.533499 of 2/4/58  
(Intd.) ?

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JUDGE'S NOTES OF PROCEEDINGS

IN THE HIGH COURT OF LAGOS

WEDNESDAY THE 10TH DAY OF DECEMBER, 1958

BEFORE THE HONOURABLE

MR. JUSTICE COKER,

JUDGE

Suit No. LD/302/57

B E T W E E N :

10 JOHN KHALIL KHAWAM & CO. etc. Plaintiffs

- and -

M/S. K. CHELLARAM & SONS (NIG.) LTD.  
Defendants

BERNSTEIN (Sotire & Miss Grant with him) for Plaintiffs.

BICKERSTETH for Defendants, H.O. Davies leading him.

20 BERNSTEIN opens his case: Action is for breach of infringement of a registered design. Registration No. 7 and design is 459477. Known in this country as United Kingdom designs Protection Ordinance Cap. 221 (Volume 6) Page 345 Refers to Sec. 2. Then turns to the registered design Act 1949 Sec. 7. as to effect of registration. My case is that there is an infringement. Refers to defence and points out Section 3 of Cap. 221 and Section 91 of the Act of 1949. Refers also to Section 4 Sub-section 1 of Cap.221. Asks for paragraph 4 of the particulars of counter-claim to be struck out as it does not contain particulars of his averment that the design was not new or original. Refers patents for inventions by T.A. Blarco & White second Ed. Page 297 headed (Particulars of Objection.) Refers to Order 53A Rules 7, 10 and 11. Order 53F Rule 3(2).  
30

RULING: I will not at this stage strike out this pleading as in my view it is clearly within the right of the plaintiffs to have applied for an Order for further and better particulars to be filed. This, the plaintiffs have not done, besides,

In the High Court of Lagos

No. 8

Judge's Notes of Proceedings.

10th December, 1958.

In the  
High Court of  
Lagos

the paragraph sought to be struck out is ex-facies satisfactory and whatsoever particulars are required should have been specifically asked for. This application is therefore refused.

No. 8

Judge's Notes  
of Proceedings.

10th December,  
1958

- continued.

Bernstein asks for ruling on this point that once the plaintiffs produce the Certificate of registration the defendant under a general demand cannot seek to challenge the evidence by showing in any other way that my client is not the registered Proprietor as his pleadings is merely a general traverse. He therefore abandons this application and now calls:-

10

Plaintiffs'  
Evidence

No. 9

No. 9

EVIDENCE OF JOHN KHALIL KHAWAM

John Khalil  
Khawam.

Examination.

JOHN KHALIL KHAWAM: Sworn on Bible states in English: My name is John Khalil Khawam. I live at 81, Lebanon Street Ibadan. I am an Importer of and Trader in Textiles. I am a Lebanese. I trade under in the name of John Khalil Khawam and Co. I have been in Textile business in Nigeria for about 21 years. I sell textiles. I sell different kinds of textiles. I import the textiles mainly from Japan. I sell both wholesale and Retail. I have interested myself in the question of designs. I use my own ideas for the creation of the designs. I have been registering the designs I create. I started registering my designs since 1956. I had no designs before 1956 whether registered or not. The cloths I was selling before 1956 had designs on them I started to make designs in 1956.

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I have registered in all about thirty designs. I produce my Certificate of the Designs Registered by me, and relating to this case. The cloth is attached to it. I tender it. Tendered. No objection. Admitted and marked Exhibit "A". I created the designs registered in Exhibit A. I registered it in Manchester. I got Gilbert McCaul to register it in Manchester on my behalf. I supply them with a Shipping Sample of the cloth. I first got out a rough sketch of the design myself and handed it over to my Artist. The name of my Artist is Lameed Ayodele Aroyewun. I see this two sketch designs. My artist gave these two to me after he dealt with my sketch. I produce this. Tendered.

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DAVIES Objects, there is nothing in evidence to show that he was the designer. There is nothing in the pleadings to show that sketches were made. The defendants had no previous notice of the sketches. There is nothing to identify the sketches with the subject matter of this case.

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No. 9

John Khalil  
Khawam.  
Examination  
- continued.

10 RULING: As I understand this objection, it is based on the grounds that evidence has not been pleaded to show that the plaintiffs originated this sketch. The objection, however, overlooks the provisions of Order 32 Rule 15 R.S.C. which gives the plaintiffs the right even if not pleaded of denying in his evidence allegations contained in the counter-claim as to whether or not the Designs is new or original. Besides, this evidence is necessary to support the Plaintiff's case that he is the owner of this registered design, a fact which has been pleaded and put in issue. I will therefore, over-rule this objection. The objection is over-ruled and the sketches are admitted and marked Exhibits "B" and "B1".

30 Exhibits B and B1 represent the designs in this case. My Artist or Architect got all the details represented in the Exhibits B and B1 from me. I gave my own rough sketch to my Architect. I paid the Artist £7.10.- for the job. I handed the sketches of Exhibit B and B1 to Mr. Wignall of Gilbert McCaul and Co. Ltd. The first importation of cloth of the designs was on the 20th January, 1957. I produce one piece of the cloth with design in Exhibit "A" which I imported to Nigeria; Tendered. No objection. Admitted and marked Exhibit "C". It was manufactured in Japan and I imported it from Japan. I also sent a sketch of the design to the Manufacturers in Japan to enable them to make Exhibit "C". I sold the cloth Exhibit C in both Ibadan and Lagos. I sell in Lagos through a cousin of mine. He is a Mr. Alfred Younis. I did not hear of any sales of this cloth other than from me.

40 I know one Pamisi Awo Fadeju. He came to see me during the month of November, 1957. He brought something with him to see me. It was a piece of cloth now Exhibited to an Affidavit in Court. (Bernstein asks leave to withdraw and tender formerly the material exhibited to Affidavit for Motion for Interim Injunction. Leave granted).

WITNESS: I see the small piece now shown to me

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No. 9

John Khalil  
Khawam.

Examination

- continued.

(identifies piece attached to Affidavit of Joseph Ayanda. Folorunsho). Fadeju brought this to me on the occasion of his visit. He brought a whole piece from which I cut the one small suit exhibited to the affidavit of Folorunsho. I now produce the piece which he brought to me. Tendered. No objection. Admitted and marked Exhibit "D". I now say that Awofadeju brought two pieces of Exhibit D and I bought the two pieces from him. I paid 39/- for each of the two pieces I bought from him. He told me where he bought them from. After he left, I started to make my own inquiry. I found that the defendants were selling my cloths of my registered Designs.

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I look at both Exhibits C and B together. Looking at them, the designs are the same on both Exhibits. I refer to the representations and setting on my own design Exhibit C they are the same on Exhibit D. The predominating colour in both is blue. On the first occasion, of my import, I imported about 1,000 pieces of 10 yards each into the country. Between January and December, 1957, I imported about 9841 pieces of 10 yards each. I sold at 50/- (£2.10.-) a piece Wholesale. I later sold same by Retail. I had sold for 55/- or 53/- (per piece) but the average was 50/- per piece.

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Mr. Awofadeju complained to me that he could get the same at a cheaper price. Other customers complained about the price too. My sales fell and so I had to reduce my price first to 43/- a piece then 34/- per piece. I still have about 500 pieces of Exhibit "C" left. The complaint was that the colours on Exhibit D (defendant) fade when washed and so the people refuse to buy my own. Exhibit D is inferior in quality and dye to my own designs Exhibit C. When I sell at 50/- I made average profit of 15/- on each piece of cloth sold. When I sold at 34/- I was losing on the cloth. I claim £36,913.15. - for loss of profit for 5 years on the basis of importation of 9841 pieces every year. I claim general damages of £13,096.5.- for the two further periods of 5 years in respect of whom I am entitled to protection. I have been unable to repeat my orders for Exhibit C and so could not enjoy the benefits of my registration. The total amount of damages claimed by me is £50,000.-.-d. I have got the high standing price of 50/- a piece because the designs is new.

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Cross-examined.

I know what is called "Adire Cloth" (Cotton crimped African Print) I deny that Adire cloth is common in Nigeria. I know Adire cloth are made by African women dyers. I now say that they are common in Nigeria. I do not know that traders in this country take Adire Cloths and send it Japan to copy. I have never sold any cloths similar in design to Adire Cloth. When I made the designs on Exhibits B and Bl I had never seen anything like it before. I just invented it. I asked that Exhibit C be crimped. I have sold crimped cotton before, but not of this design. The Artist handed over Exhibits B and Bl to me. I have not handed them back to him since. I gave Exhibits B and Bl to my Agent; Gilbert McCaul Ltd. The Artist has not got back Exhibit B and Bl from me. I asked that Exhibit B and Bl be sent to Gosho & Co. Ltd., Osaka, Japan for the purpose of getting one design printed on crimped cloth. This was during August, 1956. The first consignment of the cloth was shipped from Japan on the 6th of December, 1956. I have the Invoices covering the consignment here. I produce the Invoice. Tendered. No objection. Admitted and marked Exhibit "E". I see the No.7140 on Exhibit "E". That is the number of my sketch. That number is allocated to us by Gosho Co. Ltd. I received from Gosho Co. Ltd. a Counter-Sketch bearing that number. That is with my Agent Gilbert McCaul Ltd. It was sent to them by Gosho Co. Ltd. as the Order was made through them. I do not know that in Japan the number 7140 represents an open design. (N.B. Davies asks for leave to extract certificate exhibited to affidavit of Ladharam dated 15/1/58). Leave granted.

Witness: I see the copy of Certificate now shown to me. I have received letters from Gosho Co. Ltd. I see the letter (copy) now shown to me.

Q. When you received letters from Gosho Co. Ltd. was it usually signed by Chief of Cotton piece Goods Department?

A. I do not take notice.

Q. Look at signature on this document, is it similar to signature on the letters you receive?

A. I do not take notice of the signature. I do not know that on the 8/9/56 the design was recorded as common design.

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John Khalil  
Khawam.

Cross-  
examination.



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John Khalil  
Khawam.

Cross-  
examination  
- continued.

I do not know that in Japan, designs are registered with Japan Textile Colour Design Centre. I did not find out in Japan whether anyone would go into the market and buy this design. I enquired but was told by McCaul & Co. Ltd. that nothing will be registered in Japan. As soon as I receive the shipping samples, I decided to register it in Manchester. This was about December, 1956. I still say that the design is my own idea. I created it. There was no design similar to this design in the market when I made my own.

10

I see the cutting now shown to me. I have seen it about one year ago. I produce it. Tendered, only for identification. Admitted as Idn. X. I saw Idn. X after my own design came into Nigeria. Idn. X is also cotton crimped African Print. I see many kinds of copies of my design after my own importation. I deny that 7001 is the number of my design. It is No.7140. The first consignment arrived in this country in January, 1957. I do not know the exact date. I do not put any other indication of registration on Exhibit C because I have already put my name on it. When the goods were first manufactured, I had not got the registration number of the design.

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My brother might have instructed Mr. Obisesan Barrister-at-Law to write to the defendants. I did not instruct Obisesan. When I knew of the letter I wrote another letter. I did not employ Mr. Obisesan to write on my behalf.

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I first discovered that the defendants were selling Exhibit D in November, 1957. Before then, I did not know that anyone else apart from me was selling. It was a surprise to me. The second consignment arrive in April, 1957 for 1,982 pieces. The third consignment for 1,980 pieces arrive in June, 1957. The fourth for 2,000 pieces arrived in July, 1957. The 5th consignment for 1897 pieces arrived in October, 1957. I cannot say how much of Exhibit C I had in stock in November, 1957. When I first knew the defendants were selling Exhibit D, I did not check my stock. Up till today, I have not checked my stock. I think that Awofadeju saw me after the 20th of November, 1957, but in November, 1957. He saw me between the 20th of November and the 30th of November, 1957.

40

I see the letter now shown to me I wrote it to

the defendants. I produce it. Tendered. No objection. Admitted and marked Exhibit "F". When I wrote Exhibit F I had already seen my own Lawyer, Mr. Okubadejo. I was told by my brother that Mr. Obisesan had written a letter. The lawyer brought a copy of the letter to the office and gave it to my brother. My brother showed me the letter. I see the letter now shown to me. It is the one that I saw the copy of. I produce it for identification. Tendered for identification. Admitted and marked "Iden.XI". I see the letter now shown to me it is the one Mr. Okubadejo wrote on my behalf. I produce it. Tendered. No objection - Admitted and marked Exhibit "G". I see the letter now shown to me. It is the reply to Mr. Okubadejo. I produce it. Tendered. No objection. Admitted and marked Exhibit H. I see the letter now shown to me. It was written at my instance by Mr. Okubadejo to Mr. Davies. I produce it. Tendered. No objection. Admitted and marked Exhibit "J".

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Plaintiffs'  
Evidence

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No. 9

John Khalil  
Khawam.

Cross-  
examination  
- continued.

At this stage further Cross examination is adjourned till tomorrow the 11/12/58 at 9 a.m.

H.O. DAVIES: Appeals for case to be adjourned as he is appearing in the Assizes tomorrow in the case of R. Vs. Oke and his junior is going to the Court at Ekot Ekpene.

BERNSTEIN: Opposes the application for adjournment. This was not intimated to me before now.

RULING: As I stated in my ruling as regards the adjournment asked for by the defendants, had it been opposed I would have refused it. This matter has had to displace another matter which I had had to adjourn till next year in order to make room on these dates agreed upon by Counsel I do not see any reason why same arrangements would not have been made by the defence to see that this case proceeds on the dates fixed for the hearing. I will not grant any adjournment on same case and hearing will proceed tomorrow as originally fixed by consent.

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(Sgd.) G.B.A. COKER.

In the  
High Court of  
Lagos

THURSDAY THE 11TH DAY OF DECEMBER, 1958  
Suit No. LD/302/57

Appearances as before.

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Bickersteth absent.

No. 9

JOHN KHALIL KHAWAM: Re-called and resworn on the Bible States in answer to further Cross-examination by Davies:

John Khalil  
Khawam.

I made the calculation I described yesterday before I instructed Mr. Okubadejo.

Cross-  
examination  
- continued.

Re-examined:

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Re-examination.

The number of my sketch with the Japanese Manufacturers is 7140. I see the letter now shown to me. It relates to the number of sketch. I produce it. Tendered. No objection. Admitted and marked Exhibit "K". The letter is from the Goshic Company, Japan. I confirm that the Counter sketch from Japan is also numbered 7140. I produce a counter sketch bearing the number 7140. Tendered. No objection. Admitted and marked Exhibit "L". I see the other copies of the Counter Sketch now shown to me. It is the second Sketch. I produce it. Tendered. No objection. Admitted and marked Exhibit Ll.

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I see Exhibits L and Ll. The number on Exhibit Ll is 7140/2. The design which I eventually registered is 7140/2 are shown in Exhibit Ll. The design Exhibit Ll was a revision of that in Exhibit L in Exhibit Ll, the lines are thicker and smaller. They were copies of my own sketch. I see the invoice Exhibit E. I see the number 7001 thereon. It contains two different orders. One lot is No. 7140 and the other lot is No. 7001.

30

I imported cotton from Japan since 1953. The cloth of other registered designs of mine which I sell are not different from the cloth concerned in this case. All these designs are known as African Cotton Crimped print. I know the word "Adire". Adire is native cloth tied and dyed. Exhibit C is not called "Adire".

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No. 10

EVIDENCE OF ISALIAH PAMISI AWOFADEJU.In the  
High Court of  
LagosPlaintiffs'  
Evidence

No. 10

Isaiah Pamisi  
Awofadeju.

Examination.

10 ISALIAH PAMISI AWOFADEJU: Sworn on Bible states in Yoruba: My name is Isaiah Pamisi Awofadeju. I live at NW2"330 Ori-Eru, Ibadan. I am a trader. I know Mr. Khawam. I trade in textile and have a shop. I know the defendant company. I buy cloths from them as well as from the plaintiffs. I remember some time ago, I went to the Plaintiff and complain about some cloth I bought. I use to buy Exhibit "C" among others, from the plaintiffs. This was about 3 years ago. I bought at £2.10.- per piece (Wholesale price by the case). I also bought goods from the defendants I went to the defendants' shop at Ereko. I saw Exhibit D on the defendants' counter. I found that it was like the one (Exhibit C) that I bought before from the plaintiffs. I bought Exhibit "D" from the defendants. I bought Exhibit D at the rate of £1.18.- per piece (Whole-

20 sale price per case) I bought two cases from the defendants as I saw it was very cheap. In one case there are 50 pieces. I went to defendants' shop in November, 1957.

30 In the same month of November, I went to the Plaintiff. I told him he was cheating me as I found at £1.18.- the cloth I was buying from him at £2.10.- I took part of Exhibit D with me when I went to the plaintiff. The plaintiff said I was lying and that no one else could order for or import any cloth similar to Exhibit C. I then produced a piece of Exhibit D. He asked me to sell two pieces to him I sold two pieces to him at £1.19.- each. I was reselling at £2 per piece. I was selling both Exhibits C & D at £2 per piece. I was selling Exhibit C at a loss. The buyers were paying the same price for both. At first when I brought Exhibit D I did not suspect anything, later,

40 I found that Exhibit D was fading on the shelf in my shop. £2.10.- a piece is the high price. I said the price was high because when I bought Exhibit C for £2.10.- I use to sell for £3. But when Exhibit D came into the market, I could only sell both Exhibits C and D for £2. Exhibit C did not fade at all. The dye is superior in quality.

Cross-examined.Cross-  
examination.

I have been trading in Textiles for the past eighteen (18 years). I know "Adire" (Tie and Dye)

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No. 10

Isaiiah Pamisi  
Awofadeju.

Cross-  
examination  
- continued.

cloths. I know "Adire" cloth represents the native way of putting dye on cloths; even my wives make it. After sometime the Europeans started to import that type of design. I first saw European designs of "Adire" about four years ago. I do not know about design, and only bought cloths in the market. I see Exhibit C. I call it "Adire Oyinbo" (That is, tie and dye cloths made by European). There are different colours, but I never saw the kind of Exhibit C before I bought it from the Plaintiff. I never saw Iden. X before. I had seen it before, but I never bought out of it. I always go round the shops. The cloths which I call "Adire Oyinbo" had been in the market for some years now. There are different kinds of it, but I do not buy it. Iden.X is also a type of "Adire Oyinbo". I see the piece material now shown to me. I bought the type from the defendants too. I bought for £1.18.- I produce it for identification. Admitted as Exhibit X2. I deny that the only difference between Exhibit C and other types of "Adire Oyinbo" i.e. Exhibit D is the colour. There is the difference of colour. The cloth is also different as Exhibit C is of superior cloth. I traded in African Crimped Cotton since the past four years.

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Re-examination. Re-examined.

I do not import cloths before. I have never designed any cloths before.

No. 11

No. 11

EVIDENCE OF LAMEED AYINDE AROYEWUN:

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Lameed Ayinde  
Aroyewun.

Examination.

LAMEED AYINDE AROYEWUN: Sworn on Koran states in Yoruba. My name is Lameed Ayinde Aroyewun. I live at NW2/160, Amunigun Street, Ibadan. I am an Artist. I know the plaintiff Mr. Khawan. I did many jobs for him as an Artist. I made several designs for cloths for him. I look at Exhibits B and Bl. I made both of them. The Plaintiff brought a sketch which he gave me. This was sometime 1956. It was from the sketch that I produced Exhibits B and Bl. He paid me for my work. After finishing Exhibit B and Bl. I showed a rough sketch to plaintiffs. He compared them all and as he was satisfied with Exhibits B and Bl I destroyed my

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sketch. The plaintiff paid me £7.10.- I handed Exhibits B and Bl to the plaintiff. I went round the market myself to look at various designs on cloths and other things. This is in the interest of my work. I did not see Exhibits B and Bl anywhere else before.

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Evidence

No. 11

Cross-examined.

10 I see Exhibit B. There are some things written at the back of Exhibit B. I wrote the words "Adire Eleko" appearing on the back of Exhibit B. I did not write anything else. I wrote "Adire Eleko" at the back of Exhibit B because such type of cloth is produced at Abeokuta where white cloth is "tied and dyed". In the cloth is tied bits of "Pap" (Solidified) I now say that "Adire Eleko" is not tied at all. It is made with starch and solidified Pap (Eko).

Lameed Ayinde  
Aroyewun.

Examination  
- continued.

Cross-  
examination.

20 I have been an Artist since I was at School in 1933. Europeans have never copied the type of Exhibit before. I do not know that Europeans copy "Adires" and then import them into this country. I only made my designs from the sketches given me. I do not invent designs myself. I wrote the words "Adire Eleko" to ensure it resembles the "Adire Eleko" and this is how they made "Adire Eleko". It was after I completed Exhibit B that I discovered it resembles "Adire Eleko". I had seen "Adire Eleko" before, but not this kind or design. This is a different kind of the types of "Adire Eleko" that I have seen before. It has never existed before. The sketch I made is new. Both the drawing and the colour I had never seen in the market before.

30 I see Iden. X. I do not know anything about it. I did not draw Iden.X. I have never seen it before. I cannot say that Iden.X. is "Adire Eleko". Iden.X is different from Exhibit C. The colours are almost the same. The patterns in Iden. X and Exhibit C are different. They are similar. I say Iden.X is not Adire Eleko because "Adire Eleko" is not made in the way or character of Iden. X. Those who made "Adire Eleko" do not make it in the pattern or design of Iden. X. They make cloth of the pattern of Exhibit C, but not of Iden.X. The configuration in Iden.X is different from that in Exhibit C. Those who make Adire Eleko cannot make the three Zig-Zag lines contained in Exhibit C.

40

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They can make two such lines, but definitely not three.

Plaintiffs' Evidence

I cannot say whether the cloth in Iden.X and Exhibit C are the same. Both contain white, blue and black. The colours are the same but one is deeper than the other. The designs are different. The patterns do not look alike.

No. 11

Iameed Ayinde Aroyewun.

In the interest of my work, I go round the market to look at various designs. If I had seen Iden. X afar off, I would go near it as it appears to look like my own. When I got near, I would see the difference. In the market, the design is known as "Federal". I do not know that it is called "Cotton Crimped" African Print.

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Cross-examination - continued.

Re-examination.

Re-examined.

I wrote the words "Adire Eleko" at the back.

No. 12

No. 12

Frederick Wegner.

EVIDENCE OF FREDERICK WEGNER

Examination.

FREDERICK WEGNER: Sworn on Bible, states in English: My name is Frederick Wegner. I live at No.17, Jibowu Street, Yaba. I am the Representative in Lagos of M/s. Gilbert McCaul & Co. Ltd. The Office is at No.36, Idumagbo Avenue, Lagos. My Company dealt with registration of a design by the Plaintiffs. I see Exhibits B and Bl. They were the two sketches I received from the plaintiffs. I received them from Mr. Khawam in August, 1956. We registered the design in Manchester on behalf of the Plaintiffs Exhibit B was the first sketch. I received from Mr. Khawam. Later on he gave me Exhibit Bl. I registered Exhibit Bl and not Exhibit B. My Company asked the supplier in Japan, that is to say the Goshu Co. Ltd. to produce a counter sketch and later on we asked them to produce a sample cutting. They gave us two counter sketches. Exhibit L was the first Counter sketch we received based on the sketch Exhibit B later we received counter sketch Exhibit Ll, based on the original sketch Exhibit Bl. Mr. Khawam first gave me Exhibit B. I sent this immediately to Japan but later Mr. Khawam brought Exhibit Bl to me. I sent Bl to Japan and then I got Exhibit Ll from the Company in Japan.

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As a result of my discussion with Mr. Khawam I placed an order with The Goshō Co. Ltd. in Osaka, Japan for African Crimped Cotton Prints of the design in Exhibit Ll. I asked that the designs Ll be printed on the goods I ordered. I received a sample cutting of the cloth, and forwarded it to my head office in London, with a request that the design be registered on behalf of the plaintiffs in Manchester.

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Lagos

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Evidence

No. 12

10 I see the numbers at the back of the Exhibits L and Ll. Exhibit L shows the number 7140. Exhibit Ll shows the number 7140/2. These numbers were given by Goshō Co. in Japan and they represent the design number of the Plaintiffs with the company.

Frederick  
Wegner.

Examination  
- continued

20 My company are Manufacturers' Representatives and Confirming Houses. We deal in African Cotton Crimped Print manufactured in Japan. I first came to this country in 1937 and I have been in the Textile trade since then. I have heard of "Adire Cloth". Exhibit C is called "Adire Cloth". Originally "Adire Cloth" was printed locally, but this kind of cloth is called by the natives "Adire". The word "Adire" does not refer to the design but to the type of cloth which is being used for the native dress. I would include the design in the expression "Adire". The design in Exhibit C is not a Native Design. A design in order to get a market must be one which is liked by the natives. The design in Exhibit C is a good design. It has a great effect on the selling value of the goods. It could be  
30 sold at good profit.

40 The features of the design in Exhibit C are the light blue stripes and the narrow white stripes with black patterns inside. The stripes are run as black zig zag lines on white background. Next to these is a wide black stripe on which are printed stars and circles. Then there is a blue stripe which is featured several times. The colour is not part of the feature. The configuration of the lines and patterns constitute the features of this particular design. The most distinctive features of the designs are the rosettes shown over the black background. The stars and the zig zag lines are also parts of the distinctive features of the design. Before I ordered it out for the plaintiffs I had never seen the design of the type of Exhibit C before. I have seen exactly the same design in the market about a year after the first importation of Exhibit C. I see Exhibit D, the design on Exhibit D



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Plaintiffs'  
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No. 12

Frederick  
Wegner.

Examination  
- continued.

Cross-  
examination.

is the same as Exhibit C, but the colours on Exhibit D are lighter which may be due to fading. I see both Exhibit C and Exhibit D together. It is rather hard to compare qualities without instruments, but feeling with my hand, I can say right away that Exhibit D is of an inferior quality to Exhibit C. And the colour especially, the light blue colours in Exhibit D are not as the colours in Exhibit C. The price of 50/- a piece for Exhibit C is a fair price and as I know the cost price, I know there is a margin of profit on this price. The quality of the design is responsible for the price of 50/- a piece at which the cloth is sold. The design is liked by the Natives who are prepared to pay higher price for the design like this.

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Cross-examined

A confirming House extends credit facilities to importers and is a side line to Manufacturers' representation. In this business, my company represented Gosho Co. I see the letter now shown to me. It is from my principals, Gosho Co. Ltd. I see Exhibit K. I have seen the signature on it before. It resembles the signature on the other letter now shown to me. I produce it for identification. Tendered for identification. Admitted as Iden.X3. In Iden.X3, Gosho Co. said design No.7140 is an open design. Being open Design, I know from experience that there are very many designs, of "Adire Cloth" made in Japan as well as in Nigeria. It is impossible to register any design. The Japanese Suppliers quite often explained that the Design Centre in Japan refuses to accept the registration of the various designs submitted for registration by the Design Centre in Japan are called "Open or Common Designs". That is the reason why my customers applied for registration in Manchester to be safe guarded against the copying of their Designs.

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"Adire Cloth" is also known as Cotton Crimped African Print. Any design of "Adire Cloth" can be bought in the open market as it is not registerable there. By any design I mean those which are declared "open". In Japan, certain design are registered and is protected by Japanese Law. Every Importer knows and ought to know that before ordering out a new design, it is his duty to enquire from Manchester whether or not the design has been previously registered. Even though, it is an Open Design in Japan, the Importer still has to do his

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duty if he is importing the goods into Nigeria. I would advise an Importer to take a Sample cutting and send it to the Manchester Registry to make enquiry as to whether or not it has been previously registered. I am not quite sure whether a man having registered a design must publish it. I do not know the law dealing with registration of designs.

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10. I forwarded Exhibit B to Japan on the 22/8/56. I received an acknowledgment of the receipt of Exhibit B on 8/9/56 with a letter dated 31/8/56. With a letter dated 13/9/56, the Gosho Co. forwarded to me Exhibit L. On the 5/10/56, the Gosho Co. forwarded to me Exhibit Ll. I placed the first order on the 10/9/56 but not for the revised sketch only to secure the price after approval of the revised sketch. We later cabled instructions to the Gosho Co. to supply 2,000 pieces according to the design Exhibit Ll. The cablegram was sent. On the 29/9/56 my order for the revised designs was accepted by  
20 Gosho Co., it was for 4,000 pieces.

Frederick  
Wegner.

Cross-  
examination  
- continued.

30 The position was like this. On 10/9/56 the plaintiff ordered from the Gosho Co. 4000 pieces of the design 7001. In the meantime, the design B1 came through and we gave instructions to Gosho Co. to print 2,000 pieces of that order with the design Exhibit B1. and the balance to be still in design 7001. The price in Japan for cotton crimped African Print is the same. Later he got the other Orders at lower prices because the prices fell in Japan.  
i.e. half cheaper per yard. He paid for a piece in Japan the price of 25/- per piece CIF Lagos. The words CIF means delivered at Lagos without duty. I placed order for Exhibit Ll on the 10/12/56 for 2,000 pieces, on the 24/1/57 for 4,000 pieces, on the 17/9/56 for 1,000 pieces. I forwarded the sample I sent for registration to our London Office on the 3/12/56. The first consignment of these goods arrived here about the 20/1/57. I see Exhibit  
40 "E". It is an invoice and Custom Form. I deny that design No.7001 and 7140 are the same. There is no difference to the Manufacturers as regards the price. We tried later to get the Gosho Co. to register in Japan, but they were unable to do so. I advised the registration in Manchester as the goods were being imported into Nigeria.

I see Iden.X and X2. Both are cotton crimped African Print. I see Exhibit C. The features in Exhibit C and Iden. X are quite different but Iden. X shows an attempt to copy Exhibit C. It is possible

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No. 12

for Exhibit C to have copied Iden.X, but being in the market everyday I saw Iden. X in the market only at a later day, i.e. after Exhibit C came into the market. I have never had anything to do with Iden X2 before. I have not got anything similar to Iden. X2 in my file. There is a large variety of cotton crimped African Prints. My duty is to help the Plaintiffs to register Exhibit C in Japan.

Frederick Wegner.

Re-examined.

Cross-examination - continued. Re-examination.

I said the price paid for 7001 and 7140 in Japan are the same. Nevertheless, the selling prices in Nigeria are different. The difference is because the design in Exhibit C is much more liked in Nigeria than the one in 7001.

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Case for Plaintiff.

Case is adjourned by consent to the 3rd, 4th, 5th and 6th February, 1959 for further hearing.

(Sgd.) G.B.A. COKER.

Defendants' Evidence

No. 13

EVIDENCE OF NARAINDAS LADHARAM

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No. 13

Naraindas Ladharam. Examination.

NARAINDAS LADHARAM: Affirming states in English: My name is Naraindas Ladharam. I live at 54, Marina, Lagos. I am the Textile Manager to the defendant Company. I have been with K. Chellaram since 1936. I have been textile Manager since 8 years ago. Cotton crimped African Print is originated from the African "tie and dye" process. This is common in the market here and was known for several years. Foreign merchants usually obtained the "tie and dye" designs, copied them, and sent them to oversea markets for manufacture. Sometimes the merchants send them to Japan. In Japan, the designs are copied and reproduced on cloths.

30

I know the particular design No. 7140 in question here. It is an open design in Japan which any merchant can order. The defendants did order some time in 1957 the said design. Before 1957, we had ordered similar designs in 1956, and in 1955. I see the cuttings (Idens.X and X2) now shown to me.

The defendants did order them in 1955 and 1956 under design No.7140. I now tender them. Tendered. No objection. Admitted and marked Exhibits M and N1. We bought after it was offered to us. Exhibits M and N1 are Designs No.7140.

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Lagos

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Defendants'  
Evidence

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No. 13

Naraindas  
Iadharam.

Examination  
- continued.

10 I see Exhibit D. It is one of the pieces of cloth the defendants sell. Sometime in 1957, the defendants were offered by the Gosho Co. of Japan through our office in Japan, cloth of the Design No.7140 R. We accepted the offer and placed some orders. Exhibit D is one of the pieces of cloth of the Design No.7140 R. We ordered for 380 pieces of 10 yards each of 36" wide. I have the Invoices concerning the order with me. I produce it. Tendered. No objection. Admitted and marked Exhibits N and N1. I see the documents now shown to me. They are the confirmation documents of the order for Design No.7140 R. I produce them. Tendered. No objection. Admitted and marked  
20 Exhibits O and O1. The goods arrived on 11th November, 1957. The goods are Exhibit D. The goods were cleared on the 18th November, 1957. We cleared on that date 63 cases containing five different designs, one of them being No.7140 R Exhibit D. These were 13 cases. 17 of these cases contain 15 pieces each and one case contains 30 pieces making a total of 880 pieces of the Design No.7140 R.

30 We have an Invoice Department separately which works in conjunction with the Shipping Department. When a ship arrives in Lagos, the Shipping Department are called upon to get the manifest from the shipping Company and the cargo brought by the boat. The particulars of the manifest are entered into the Manifest Book and after this the cargo is cleared from the Customs. Waybills are prepared by our Customs Clerks and handed over to the lorry drivers who clear the goods from the customs. The Manifest Book is kept by a Clerk in the Shipping Department, he is under a different section. I also  
40 supervise the Shipping Department. The Book, is generally under my control. I produce the Book. Tendered.

BERNSTEIN objects: We want the manifest from which the entries in the book are made; they constitute the best evidence.

DAVIES: This being tendered to show what goods were received by the defendant. Book is kept by the defendant.

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Evidence

No. 13

Naraindas  
Ladharam.

Examination  
- continued.

COURT: There is evidence to the effect that the book now sought to be tendered is kept by a clerk in the Shipping Section, which is generally under the supervision of the witness. The witness also states that he is in control of the book. As I understand the objection of counsel, it is this, that as the entries in the book are extracted from the manifests, such manifest should be produced. I take the view that it is not here sought to prove the contents of the manifest and all the witness could do in the circumstances is to produce the best admissible evidence of his own business activities. In these circumstances I will overrule the objection, and admit the Book. The Book is hereby admitted and marked Exhibit P.

10

WITNESS continues: I see Exhibit N. It is a General Invoice. I see Exhibit N1. It is the Specification of the goods covered by the Invoice Exhibit N. We cleared the goods on the 18/11/57 and sold them at our Depot No.1 shop at Ereko Street, Lagos. We sold about 500 pieces. We now have the balance in our custody at present. I did not know that the plaintiffs were selling a similar design or same design.

20

We later received a letter from the Plaintiff's Solicitors about the Design. I see the letter now shown to me. We received it from Plaintiffs' Solicitors. I produce it. Tendered. No objection. Admitted and marked Exhibit Q. We later received the two letters now shown to me. These are Exhibits F and G. After receiving Exhibits Q, F and G, we wrote a letter to our office in Japan. We later received a reply from our office in Japan. It was a cablegram. I also received this letter from our office in Japan. I produce them. Tendered.

30

BERNSTEIN Objects: The telegram and the letter have nothing to do with us. They are res inter alias acta.

DAVIES: We made enquiries after receiving letters from plaintiffs' solicitors. Davies refers to Section 90(2) of Evidence Ordinance Cap.63.

40

BERNSTEIN: States Section 90 of Cap.63 does not assist the witness. Refer to 90(3) and states proceedings are anticipated. Says when both the telegram and the letter were written action had been instituted.

DAVIES submits that Section 90 is applicable. The writers in Japan are not interested parties. The certificate enclosed came from Japan Textile Colour Design Centre. It is dated 17/12/57 and letter is dated the 18/12/57. The telegram was dated on 17/12/57.

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Naraindas  
Ladharam.

Examination  
- continued.

10 COURT: The documents which are now sought to be  
tendered are dated the 17th December and the 18th  
December, 1957. The writ in this action was signed  
by Dickson J. on the 3/12/57. In his evidence the  
witness did state that the defendants wrote to their  
Office in Japan and what it is now proposed to pro-  
duce are the replies from "Our Office in Japan". At  
this stage, I am not concerned with the titles or  
designation under which the letter or indeed the  
telegram had emanated. I go by the evidence before  
me and in my view these documents now sought to be  
produced are Statements by parties interested and  
are therefore sought by the provisions of Section  
20 90(3) of the Evidence Ordinance Cap.63. In my view,  
if the documents are to be admitted at all, they  
could only be so admitted by the provisions con-  
tained in that section of the Evidence Ordinance  
only. I may also point out that Section 90(5)  
gives the Court a discretion to reject such state-  
ments even if all statutory requirements are com-  
plied with but it would be in the interest of  
justice so to refuse it. I consider it improper to  
admit as evidence at this stage such a document al-  
ready made after the institution of proceedings in  
30 this case and apparently bearing on the subject  
matter of this dispute. The objection is therefore  
upheld and the documents are rejected.

WITNESS continues: I made enquiries in Japan. As  
a result of the enquiries, the defendants received  
a certificate from Japan. This is the certificate.  
I produce it. Tendered. No objection. Admitted  
and marked Exhibit R.

40 I now see Exhibit C. I first saw Exhibit C in  
Court in this case. To me, Exhibit C is not a new  
design. It is no more than a copied design from the  
African "tie and dye" prints. I now compare Exhib-  
its C and M. They are both similar. I see Exhibit  
C and Exhibit D. They are the same design.

I do not know the relationship between Man-  
chester and Japan. If we had known that the plain-  
tiffs had registered the design - Exhibit C, we

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Naraindas  
Ladharam.

Examination  
- continued.

would not have imported it. We would not in any case have ordered it if we knew that Khawam & Co. had registered it even though we know it was an open design.

The defendants have sold Cotton Crimped African Prints for many years.

Note: At this stage, Mr. Bernstein for the Plaintiffs states that the Plaintiffs are admitting that the defendants had before this particular design in issue in this case, been ordering and selling cotton crimped African prints without reference to any particular design for many years. 10

At this stage case is adjourned till tomorrow morning for Cross-examination of the witness and further hearing of the case.

Case adjourned till 4/2/59.

(Sgd.) G.B.A. Coker.  
3/2/59.

Cross-  
examination.

Cross-examined.

WEDNESDAY THE 4TH DAY OF FEBRUARY, 1959

Suit No. LD/302/57.

John Khalil Khawam & Co. V. K. Chellaram Sons.

Bernstein (with him David, Okubadejo and Miss Grant) for Plaintiffs.

H.O. Davies Q.C. (Osibogun with him) for Defendants.

NARAINDAS LADHARAM: recalled into the box and re-sworn by affirmation states in English in answer to cross-examination by Bernstein:-

I am the Textile Manager of the Defendants. I do not describe myself so because this is a textile case. This is a textile case. I remember I gave evidence a few days ago before Mr. Justice Bellamy. I then described myself as an Office Manager. The case before Bellamy J. was not a textile case. I have been with the defendants since 1936. Originally it was called K. Chellaram & Sons. It became incorporated only in 1947. There are about twenty persons employed by the defendants in Lagos. I work in the Office. The defendants have an office in Manchester. We also have an office in India. 30 40

We also have an office in Japan. We have stores in most of the important centres in Nigeria. All our shops sell imported goods. They indent the goods. All the Indents are booked from Lagos.

In the  
High Court of  
Lagos

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The defendants have a special section of their establishment dealing with the indents. I cannot say how long the Manchester office had been established. I have known of the Manchester office since 1949 or 1950. We do not have an interchange of personnel between Lagos and our other branches or offices overseas. I am not a director, just a paid employee. I was an honorary director for some time. I ceased to be such a director from December, 1958. I am shortly going away on leave and therefore I have been relieved of my office. I swore to an affidavit in this case. I do not remember the actual date in December, 1958 that I ceased to be a director. I cannot say when in December it was before Christmas. On the 21st December, 1958, I swore to an affidavit and described myself as a director. I denied I was a director because at present I am not a director.

Naraindas  
Ladharam.

Cross-  
examination  
- continued.

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I was in Court throughout the proceedings. I heard Mr. Khawan, the plaintiff testifying that the idea for this design came out of his head. I cannot say whether or not Mr. Khawan invented the design. We now admit that the plaintiffs are the registered proprietors of the design in dispute. I am representing the defendants company. I am the person in charge or control of this matter and this case from the beginning. The defendants have never registered any designs in Manchester. The defendants have never registered any designs in Nigeria or Japan. I am the person who would register any design for the defendants if they propose to register one. I was Office Manager. I ceased to be an Office Manager about eight years ago. It is part of my case here that the design in issue was an open design in Japan. I thought I would sell this design in Nigeria because it is an open design in Japan. I cannot say whether or not the defendants have been concerned in another infringement case.

I have seen people doing the "tie and dye" cloths (Adire cloth). It is a native method of putting the design on the cloth. The plain cloth is tied in small knots with strings. The tying is done in different ways according to the design contemplated. The material is then dyed. I have



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Naraindas  
Ladharam.

Cross-  
examination  
- continued.

never seen the complete process. I do not know what is put inside before they tie the cloth. I do not know whether or not it will be simple for the defendants to investigate in Manchester whether or not a design was registered there. All designs are open in Japan and especially the "tie and dye" designs. We sold Exhibit D at 38/1 a piece. I see Exhibits C and M1. They are not similar. I see Exhibit M. I also see Exhibit C. They are similar. I say they are similar, because if you hold them at a distance, they both look alike. When however one goes nearer, they both look different one from the other.

10

I say that the design in dispute here is not a new design. I cannot now produce the other designs which I claim to be similar with or identical to this. There are several in the market. I can only produce Exhibits M and M1. I say this design is not original because it has been copied from the native "tie and dye" designs. I have never seen any native design exactly like the one in question here. I have only seen similar ones. The design we ordered for was No. 714OR.

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I see Exhibits L and L1. I did not hear the evidence that counter sketches of Exhibit B and B1 were made in Japan. Exhibit L bears at the back the No.7140 and Exhibit L1 bears at the back the No.7140/2. The No.7140 is assigned to the cotton crimped African print. The letter R. signifies only a variant of it. I do not agree that 714OR means "7140 Revised". Exhibit D came from our Japan office. They were offered by Goshu Co. to our office in Japan. They were purchased by our Japan office and sent over here. We received the Confirmation Notes in Lagos. Our office in Japan is the buying centre for all our branches. We order for goods from Japan. Goshu Co. offered about five different designs to our Japan office. Our Japan office wrote us about them and we ordered for the goods.

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I saw Exhibit C for the first time in this Court. I did not know that the design belonged to the Plaintiffs. I did not know that plaintiffs were selling Exhibit C from January, 1957. The offer to us by the Goshu Co. was in May or June, 1957. I do not agree that a design is a very important part of the material. From the selling point of view, the design sometimes has an importance at other times the design is not important. In

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this particular case, from the selling part of view, the design is not very important. We never saw the design in point before we ordered for it from Japan. We do not give consideration to whether or not a particular design is being sold or made by any other trader.

Re-examined.

10 I now know that plaintiff is the proprietor of the design in issue. I only know this since this case.

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No. 13

Naraindas  
Iadharam.

Cross-  
examination  
- continued.

Re-examination.

No. 14

EVIDENCE OF ROBERT ASTON HOLGATE

20 ROBERT ASTON HOLGATE: Sworn on Bible, states in English: My name is Robert Aston Holgate. I live at No.11, Thompson Avenue, Ikoyi. I am a senior research officer, Federal Institute of Industrial Research. I am in charge of textile technology. Since I came to Nigeria I have been in charge of the textile training centres through the Regions. I do all the laboratory tests on textiles.

No. 14

Robert Aston  
Holgate.

Examination.

30 I now see Exhibit C. It is crimped cotton cloth. On first examination, I should say it has been roller printed with a design within another design. The design has typical motifs which are common to those employed in Nigerian Adire cloths. The colours, especially the dark indigo are again typical of adire cloths. The design is a variation of an old theme. I have never seen this particular design before. I have seen many designs similar to this. If someone said he sat down and thought out this design I would say he is speaking the truth. The design is a variation of an old theme. - The old African Adire print. In Exhibit C, the Herring-bone stripes, the stars and the repetition of circles can be found separately in many adire cloths.

40 I see Exhibit M. I also see Exhibit C. They are both similar. They have the same basic idea. Exhibit M is also a variant of an old theme. If someone said he though out Exhibit M I will believe him.

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Lagos

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Evidence

No. 14

Robert Aston  
Holgate.

Cross-  
examination.

Cross-examined.

I have heard of the Registered Designs Act 1949. In my researches I am concerned with the manufacture of cloth. I deal with the chemical and scientific side of the manufacture. It is in that way and also through research that I come to know about adire cloths. I myself did a survey of the adire dying industry. I manufacture adire cloth in my own laboratory. We are concerned with the manufacture of the adire cloths. I was never concerned with the buying or the selling of these goods. I have never before in a court been concerned with giving evidence in a case of infringement of registered design. In Exhibit C the arrangement of the motifs is original. I have never seen the same arrangement before. From that point of view I would say the design was new and original. In that respect Exhibit C is different from Exhibit M.

10

I saw Exhibit C for the first time yesterday. I see Exhibit M for the first time this morning. That was the only opportunity I had of looking at Exhibits C and M. I'm a Master of Technical Science, Victoria University, Manchester, Associate of Manchester College of Technology, Associate of the Technical Institute.

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Re-examination.

Re-examined.

I deal in my laboratory with textile complaints from all over the country and we deal with between 150-200 cases every year. We also act as arbitrators.

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No. 15

No. 15

Daniel Akin  
Noble.

EVIDENCE OF DANIEL AKIN NOBLE

Examination.

DANIEL AKIN NOBLE: Sworn on Bible, states in Yoruba. My name is Daniel Akin Noble. I live at No.80, Obadina Street, Lagos. I am a trader. I trade in textiles. I see Exhibit C. I have seen the type before. I bought it before; we used it in our society. The Society is called "Ondo Egbe Ibile" (Ondo Aborigines Society). We used it as Aso Ebi (family dress). We bought at Ibadan. We bought it at Ibadan in 1956 - during the Christmas season and in the month of December 1956. I am

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sure of this and I was not the only person who bought out of this. We bought it from the market at Oke Agbeni in Ibadan. That was the only occasion I bought it. We used it at Ibadan. Some women who saw the cloth on us and liked it came down with us to Lagos to purchase the same cloth. We could not get the cloth to buy again at Ibadan and so we came to Lagos. We bought it at Ereko from the shop of Chellaram. We paid in Lagos 38/- per piece. At Ibadan we paid £2.10.- a piece. I think the Ibadan stuff is better than the one in Lagos.

In the  
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Lagos

Defendants'  
Evidence

No. 15

Daniel Akin  
Noble.

Examination  
- continued.

Cross-examined.

I have been in trade for about 20 years now. We bought in Ibadan in December, 1956 and in Lagos during the month of February, 1957. I am sure I bought from Chellaram shop in February, 1957. We bought 18 pieces from Chellaram. Each piece contains 10 yards. We bought the first lot at Ibadan in December, 1956. The women who came down with me never said they did not see the type before; they just liked it. At Ibadan I bought from a woman Hawker. We met her in a shop. I have not seen the woman hawker again. The woman had a shop but the goods were placed on a stall. Oke Ogbeni is in Ibadan. From the woman we bought 50 pieces. I have never seen the designs in Exhibit C before I bought from the woman. She did not have as many as 50 pieces with her. She collected other pieces from other traders so as to make up the number. She had about 30 pieces with her on the stall. I did not consider 50/- a piece too high for the cloth. We liked it. We thought that Chellaram stuff is inferior to the one we bought at Ibadan.

Cross-  
examination.

I knew only sometime this week that I was going to give evidence in this case. I knew this on Monday last. Many other members of the society also wore it. There were 25 member of our society. I am sure we used the cloth for Christmas 1956. We danced all over the place.

Re-examined.

Re-examination.

I was sure we bought in Lagos in February, 1957.

Case for Defence closed.

At this stage case is adjourned till 5/2/59 at 10 a.m. for addresses.

(Sgd.) G.B.A. COKER.  
4/2/59.

In the  
High Court of  
Lagos

No. 16

DEFENDANTS' COUNSEL'S FINAL SPEECH

No. 16

THURSDAY THE 5TH DAY OF FEBRUARY, 1959.

Suit No. LD/302/57.

Defendants'  
Counsel's  
Final Speech.

John K. Khawam & Co. vs. K. Chellaram & Sons.

5th February,  
1959.

Appearances as before: Parties present.

H.O. DAVIES Q.C. addresses Court on behalf of Defendants. Action is speculative as history of infringement of designs shown. Court to protect honest traders. Traders cannot use the law in their own ways to enrich themselves. Refers to facts - 10  
 Has the plaintiffs suffered any loss. I will rely on the proved and/or admitted facts of the case.  
 (1) Defendants cleared their goods on the 18/11/57 and sales started soon after (2) Awofadeju saw Plaintiff on the 20/11/57 with Exhibit C. On 24/11/57 Barrister Obisesan wrote Exhibit Q. Plaintiffs knew immediately defendants goods were exposed for sale. Later on the 26/11/57 another letter Exhibit F was written by plaintiff enclosing another letter from Solicitor Exhibit G with two 20  
 attachments. Exhibit Q asked for £10,000 and Exhibit F asked for £50,000.

This refers to plaintiff's affidavit of 30/11/57. (Paragraph 6). Refers to counter-affidavit of 21/12/57 by Mr. Ladharam paragraphs 13, 14 and 15. We had only 4 bales left on 27/11/57 when we got the letter Exhibit F. I as solicitor to defendants then wrote Exhibit H. The letter Exhibit H did not tell the plaintiffs that we were stopping the sale. I then received letter Exhibit J. After Exhibit J we came to Court. Writ was filed on 30/11/57. Plaintiff's states he ordered 10,800 pieces of Exhibit C of 10 yards each. The defendants ordered 880 pieces of which they still have 200 pieces. A case like this requires "Good Faith" on both sides. Plaintiff cannot say how much he had left of Exhibit C. We have not gone one step further than we were on the 27/11/57. Our stand is that there is no infringement and that does not 40  
 affect damages. View of Court after service of Motion must depend upon the background of the case. Refers to Cap.221 (Vol.6) Section 4(1). Any party can come to Court under that Section. We were not

aware of the rights of the plaintiffs and even now we do not recognise those rights. Refers to evidence of the plaintiff. How he came by figures. Refers to affidavit of one Polonsho dated 19/12/57. This person was not called as a witness. The fact of this case is this - The case came here on 30/11/57. No loss has been proved by the plaintiff. He is only entitled to nominal damages.

In the  
High Court of  
Lagos

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No. 16

Defendants'  
Counsel's  
Final Speech.

5th February,  
1959

- continued.

10 Action for infringement is an action for trespass on the case and is protected by Statute. Damages are the gist of the action. Refers to Cap. 221. Conduct of defendants is such that they acted reasonably. The real test as to whether defendants are or are not innocent purchasers is the attitude of their office in Japan and not the witness in Court or the people in Lagos. The defendants are entitled to the protection granted by Section 3 of Cap. 221.

20 We are not wrong to have challenged the validity of the Plaintiff's design. Plaintiffs have suffered no loss. Refers to evidence of Holgate - he said this a variant of an old theme and there are thousands of adire cloth in the market. Refers to Registered Design Act 1949 Section 7, also Section 1(2). We have produced Exhibit M. It is a variant of Exhibit C. They are both variants of Adire design which had been in circulation.

30 Then comes the question of publication. Any design published in United Kingdom or Nigeria is not registerable and if registered, registration is invalid. Plaintiff said first consignment arrived in January, 1957. His Invoice is Exhibit E. On Exhibit E there is a mark that document was received at B.B.W.A. Ibadan on 17/12/56. And a note that the Bill of Lading was dated 31/10/56. Exhibit E shows that goods arrived here in December, 1956 - Publication should be presumed. Refers to Russel Clerk: Copyright and Industrial Designs. P.168.

40 Will say therefore that the design had been published. Refers to Barker v. Associated Manufacturers (1933) 15 R.P.C. No.10 case. There was publication to the artist and to Mr. Wegner one of plaintiff's witnesses. Refers to evidence of Mr. Wegner - He only wants his commission - he is not bound to secrecy. He placed order with Gosho Co. on the basis of Exhibit Ll. Refers to Russel Clerk: Copyright & Industrial Designs P.171 Wegner was asked not only to help to register, but also to

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Defendants'  
Counsel's  
Final Speech.  
5th February,  
1959  
- continued.

order the goods. The relation between the plain-  
tiffs and Mr. Wegner renders the registration  
invalid. Refers also to United Telephone Co. vs.  
Harrison Cox-Walker & Co. (1882) 21 Ch. D.720.

Khawam claims to be the originator of the  
design. He placed an order with a firm in Japan -  
Gosho Co. treated the design as open. Plaintiffs  
are importers of goods which anyone can buy in  
Japan.

At this stage case is adjourned till tomorrow  
6/2/59 for address by Plaintiff's counsel.

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(Sgd.) G.B.A. COKER  
5/2/59.

No. 17

Plaintiffs'  
Counsel's  
Final Speech.  
6th February,  
1959.

No. 17

PLAINTIFFS' COUNSEL'S FINAL SPEECH

FRIDAY THE 6TH DAY OF FEBRUARY, 1959.

Suit No. LD/302/57

John Khalil Khawam & Co. v. K. Chellaram & Sons.

Bernstein (Okubadejo with him) for Plaintiffs.

Bickersteth for Defendants.

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BERNSTEIN addresses for Plaintiffs.

This is not a speculative action and we are not  
taking advantage of the misfortune of the defendants.  
Case is very plain. It is one of brigandage - a  
case of pinching somebody else's idea. I shall deal  
with the question of proprietorship, the publica-  
tion, the defence and lastly damages. A common  
( ? ) in this case is the Gosho Co. in Japan. The  
defendants are a world wide concern. Refers to evi-  
dence of plaintiff. It was the Gosho Co. that  
brought the design to the Japan office of the de-  
fendants. See Exhibits O and O1 (dated 1/6/57).  
Mr. Wegner not challenged about the points raised  
by defence counsel in his address. Gosho Co. allo-  
cated the No.7140 to our design see Exhibit K dated  
19/5/58. Our monopoly exists in Nigeria. Defend-  
ants were reckless and irresponsible. The defendant

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said to him the design was not important and that he never saw our design until he saw it in Court. Mr. Ladharam is no more than a stooge. Attitude of defendants during the course of the case and indeed, the way they defended the case should also be considered. Davies stated the defence stand is that this is an open design in Japan. Because the design is open in Japan, that does not give the defendants any justification for selling the cloths in Nigeria. Mr. Ladharam also said they never investigated the design from Manchester.

10

Notice to the defendants refers to Section 3 of Cap.221. They had reasonable means of knowing about our design. The defendants printed the design on an inferior cloth. They killed the market for us. Mr. Wegner said it was a good design. When the defendants put Exhibit D into the market, the price of our own Exhibit C fell and later it became unsellable. The defendants took a chance and then they came here and talked about Japanese open design. Exhibit C and Exhibit O1 are only confirmation. Refers to cross-examination of Plaintiff by defence Counsel where different numbers were suggested for the design. Refers to evidence of Mr. Holgate, Defence witness.

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The figure of £7980 appears in the pleadings. Refers to calculation given in evidence by the plaintiffs - about damages, Court is entitled to take into consideration the fact that plaintiffs are entitled to protection for a total of 15 years. Court should work on the basis of £5,000 every year for five years and £25,000 would be a figure to work upon. We accept Obisesan's letter despite Exhibit F. The damages he claimed however was an understatement of the position.

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As regards publication, the law is clear. There must be publication to somebody not in any legal or equitable relationship to the proprietor.

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The defendants were completely indifferent. Defendants saw Exhibit D for the first time only in this Court. They never bothered at all. Plaintiffs have made out their case and they are entitled to damages and the other reliefs claimed. Plaintiff is now ruined with his design and the defendants must pay heavily to atone for it. Judgment reserved till 16/2/59.

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Plaintiffs'  
Counsel's  
Final Speech.

6th February,  
1959

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(Sgd.) G.B.A. COKER  
6/2/59.

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No. 18

J U D G M E N T

No. 18

IN THE HIGH COURT OF LAGOS

Judgment.

MONDAY THE 16TH DAY OF FEBRUARY, 1959

16th February,  
1959.

BEFORE THE HONOURABLE  
MR. JUSTICE COKER,  
JUDGE

Suit No.ID/302/1957

JOHN KHALIL KHAWAM  
(Trading as John Khalil Khawam & Co.)  
Plaintiffs

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Vs.

MESSRS. K. CHELLARAM & SONS (NIGERIA)  
LIMITED  
Defendants

J U D G M E N T

By the Writ of Summons herein the plaintiffs claim against the defendants as follows :-

1. An injunction restraining the defendant Company its servants or agents from importing or causing to be imported into Nigeria, selling or exposing or causing to be sold or exposed for sale, any textile piece goods bearing the plaintiffs' Registered Design No.459477 also registered in Japan as New Design 7140 or an obvious or colourable imitation thereof. 20
2. £50,000 damages for the infringement by the defendant Company of the plaintiff's said Registered Design or an account of sales of all piece goods to which the said design or an obvious or colourable imitation thereof shall have been applied and of the profit made thereon. 30
3. Delivery up for public destruction of all textile piece goods to which the said design or an obvious or colourable imitation thereof shall have been applied that are in the

possession or under the control of the defendant Company its servants or agents.

4. Costs.

Pleadings were ordered and filed. By Notice dated the 3rd day of February, 1958, the defendants did set up a counter-claim against the plaintiffs claiming (or rather counter-claiming) as follows:-

- (a) That the plaintiff is not the proprietor of the said design.
- 10 (b) That the said design was not "new or original" at the time when the plaintiff applied to have it registered; and
- (c) That the design is an open design and merely a variant of a design commonly used in the trade and known in Japan, where it is manufactured, as Cotton Crimped African Prints No.7818.

20 On this Counter-claim, pleadings were similarly ordered and filed. There was an interlocutory application for injunction against the defendants, but no order was in fact made on that application, as the undertaking given by the Counsel for the defendants to the effect that they would not sell or expose for sale cloths on which the design was printed was on the 16th day of January, 1958 extended by the Court until the determination of the case.

30 John Khalil Khawam, a Lebanese trader in, and importer of, textiles testified to the effect that he carried on business under the business name of John Khalil Khawam & Co. He had been trading in textiles for some time now and since 1956 he had registered in all about thirty designs. In respect of the design in question in this case, he had registered same and he produced the Certificate of Registration No.459477 of the 4th January, 1957 issued by the Manchester Branch of the Design Registry of the Patent Office in Manchester pursuant to the provisions of the Registered Design Act 1949. This certificate was admitted as Exhibit A.

40 He had entrusted the business of the registration to the Company of Gilbert McGaul & Co. Ltd. He first produced a rough sketch of the design himself. This he handed over to an Artist, by name Aroyewun,

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to whom he had paid £7.10.- and the artist in turn reproduced the rough sketch and produced other sketches which were produced and admitted as Exhibits B and Bl. The sketches Exhibits B and Bl were handed over by him to the Company of Gilbert McGaul & Co. Ltd. of Lagos, through whom he placed an order for cloths bearing the design from Japan. Such cloth bearing the design did arrive in Nigeria, the first importation being about the end of January, 1957. A piece sample of the cloth with the design was produced and admitted as Exhibit C. He sold Exhibit C in Lagos and Ibadan at the price of approximately 50/- (fifty shillings) a piece of 10 yards.

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His sales apparently went on smoothly until sometime in the month of November, 1957 when one Owifadeju called on him at his office and showed him two pieces of cloth of ten yards each with a design that looked like his own. Awofadeju had told him certain things as a result of which he bought the two pieces of cloth from him at 39/- (thirty nine shillings) each. From these he had cut out a small cutting which was attached to the affidavit of Folorunso in support of the application for interlocutory injunction in this case. One of the pieces he had bought from Awofadeju was produced and admitted as Exhibit D. To him both Exhibit C and Exhibit D bear the same design. On the first occasion of his import in January, 1957, the plaintiff had imported about 1000 pieces, and between January and December, 1957 he had imported about 9841 pieces of 10 yards each.

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His own sales fell and he had to reduce the price first to 43/- a piece and later to 34/- per piece. He further testified that the colour on Exhibit D do fade when washed as Exhibit D is inferior to his own Exhibit C in quality and dye. At a price of 50/- per piece he was making a profit of fifteen shillings (15/-) on each piece. At the price of 34/- per piece he was selling at a loss. He further testified that he was claiming damages as shown in his pleadings both for loss of profit, and also for his inability to make further orders for the cloth even though he had a monopoly for the use of the design for virtually fifteen (15) years in all

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Under cross-examination, the witness admitted that Adire (crimped) cloths are common in Nigeria

but stated that he invented the design on Exhibit C at a time when he had never seen anything like it in the market in this country. He asked that Exhibits B and Bl be sent to the Goshu Co. Ltd. of Japan for manufacture. He produced an Invoice together with some shipping documents in connection with a shipment of the same cloth. This was admitted as Exhibit M. Witness denies a suggestion put to him that in Japan the No.7140 represents an open design. He had registered the design in Manchester as soon as he received the shipping sample. He had seen Exhibit M only after his own design was introduced into the market.

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On the instructions of his brother whilst he was away, one Barrister Obisesan of Ibadan had written a letter to the defendants (Exhibit Q.). He later wrote to the defendants purporting to cancel that letter (Exhibit F). His Solicitor Mr. Okubadejo then wrote a letter to the defendants complaining of the infringement, and claiming damages as well as other reliefs (Exhibit G). He produced the letter of reply to his own Solicitor from the Solicitor to the defendants (Exhibit H). This was replied to by his own Solicitor (Exhibit J). He produced a letter written to him by the Goshu Company Ltd. of Japan referring to his design as No.7140. This letter dated the 19th May, 1958 was admitted as Exhibit K. He also produced Counter-sketches made in Japan of his design before the final printing of same on the cloth material. These were admitted in evidence as Exhibits L and Ll.

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The witness Awofadeju testified that he bought Exhibit C from the plaintiffs for 50/- per piece (wholesale price per case). Sometime in November, 1957, he bought two cases of Exhibit D from the defendants' store at Ereko Street, Lagos at the price of 38/- per piece (wholesale price per case). He resold both Exhibit C and D at the price of £2 per piece, the former at a loss. He later discovered that the dye of Exhibit D is inferior in quality to that of Exhibit C. He had known of African Adire cloths for years, but was aware of the imitation of the type of cloth by European manufacturers only about four years ago. He bought the Adire cloth Exhibit M from the defendants.

Ayinde Aroyewun testified that as an artist, he produced Exhibit B and Bl for the plaintiff, who had previously handed to him his own rough sketch,

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and from which he had made up Exhibits B and Bl. He had destroyed the rough sketch originally handed to him by the plaintiff. He had never seen any design like Exhibit B and/or Exhibit Bl before. He admitted under cross-examination that the cloth known as Adire eleko (crimped cotton) was popularly produced in places like Abeokuta and that such cloths are usually "tied and dyed" because the material is first tied up in small knots according to the design and then dyed and when the knots are released the design and the colours then appear. He was certain the design he made was new although similar in appearance to the design on Exhibit M.

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The last witness for the plaintiff was Frederick Wegner of the Company of Gilbert J. McGaul & Co. Ltd. of Lagos. He had received Exhibits B and Bl from Mr. Khawam in August, 1956 with instructions to place order for cloths of the design and also to register the design. He first received Exhibit B and later Exhibit Bl sent both to Japan to the Goshō Company Ltd. to produce samples of the design. He first sent Exhibit B and received Exhibit L from Japan and as he later sent Exhibit Bl he received Exhibit Ll from Japan. The numbers 7140 and 7140 - 2 on the back of Exhibits L and Ll were written there by the Goshō Company, Ltd., of Japan and they represent the number of the Plaintiff's design. He had placed an order for cloth of the design of Exhibit Ll with the Goshō Company of Japan on behalf of the plaintiff. He received a sample cutting of the printed material from Japan. This he forwarded to his home office in London with instructions for the registration of the design in Manchester. He was aware that Adire cloths were printed locally, but the word "adire" does not refer to the design but to the type of cloth which is being used for native dress. Before ordering out Exhibit C for the plaintiffs he had never seen any cloth of the type of design in the market, but he had since seen Exhibit D which is exactly the same design as Exhibit C. He thought the design in Exhibit C is a very good one for the price of 50/- a piece at which it was being sold originally. He thought it was the duty of every importer before ordering out a particular design to make searches in Manchester to make sure that such design was not registered in Manchester, even though the design is an 'open' one in Japan. He had placed orders for cloth of the design Exhibit Ll on the 10th December, 1956, 24th January, 1957 and the 17th September,

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1957; the first consignment of the goods Exhibit C arrived in Nigeria about the 20th January, 1957. He had tried on behalf of the plaintiffs to get the same design registered in Japan, but he was unable to do so.

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10 Naranindas Ladharam described as the Textile Manager of the defendants testified to the effect that he was familiar with the African "tie and dye" cloths popularly known as Adire cloths. Sometimes these designs are sent to Japan where they are copied and reproduced on cloths. He knew the design No.7140 in question here and it was an open design in Japan. The defendants did order Exhibits M and III from Japan, in 1955 and in 1956. Some time about the middle of 1957, the defendants were offered by the Gosho Company Ltd. of Japan through their office in Japan, cloth of the type of Exhibit D. The defendants accepted the offer and placed an order for 800 pieces under the design No.7140 R. He produced the covering Invoice and Shipping documents covering the order and these were admitted as Exhibits N and NI. He also produced confirmation Notes covering the orders and these were admitted as Exhibits O and OI. The goods arrived on the 11th November, 1957 and were cleared from the Customs on the 18th November, 1957. He also produced the defendants' manifest book which shows the relevant entry of the order. This was admitted as Exhibit P. Of the quantity ordered, the defendants sold about 500 pieces and the balance is still in the possession of the defendants.

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40 The witness further testified that whilst they were selling Exhibit D, they received the letter Exhibit Q from a Solicitor acting on behalf of the plaintiffs. He had made enquiries from Japan about the design as a result of which he had obtained the Certificate Exhibit R from the Japan Textile Colour Design Centre. Exhibits C and D are the same design, but Exhibit C is not a new design. It is no more than a design copied from the African "tie and dye" design. The defendants have offices in Manchester, India, Japan and Nigeria. The Manchester office had been known to the witness since 1949 or 1950. The defendants have never registered any design in Manchester, Japan or Nigeria. It is however part of his case that the design in question was an open one in Japan which anyone could sell elsewhere. All designs are open in Japan and Exhibits J, C and M are to him, similar. The defendants sold Exhibit D

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at 38/- per piece. Although he is certain that the design in issue in the case is not new or original as having been copied from the African "tie and dye" design, yet he was unable to produce any other design which was the same as Exhibit C. He had seen the number 7140 at the back of Exhibits L and Ll. The defendants' office in Japan is the buying centre for all the other branches or offices. He saw Exhibit C for the first time in Court in the case.

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Robert Aston Holgate, Senior Research Officer, Federal Institute of Industrial Research testified to the effect that the design on Exhibit C has typical "motifs" which are common to those employed in Nigerian Adire cloths and to this extent it is a variation of an old theme. He would believe anyone telling him that he invented the design. In Exhibit C, the herringbone stripes, the stars and the repetition of circles can be found separately in many Adire Cloths. In Exhibit C, the arrangement of the motifs is original and he had never seen such an arrangement before.

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The last witness for the defence, Daniel Akin Noble, had bought Exhibit C from the plaintiffs before Christmas 1956 and Exhibit D from the defendants in February, 1957. He paid 50/- for a piece at Ibadan and 38/- for a piece in Lagos. He thought the Lagos material was inferior to the one he had bought at Ibadan.

By para. 4 of the Statement of Claim and indeed in the evidence of Mr. Khawam, the plaintiff did claim that he was the registered proprietor of the design in question. The certificate issued to the plaintiff by the Manchester Branch of the Design Registry of the Patent Office is Exhibit A. That certificate had a cutting attached to it of the cloth on which the design was printed. The design (or reproductions of it) was also contained in Exhibit Bl, C and Ll. By paragraphs 9, 10 and 13 of the **Statement** of Defence, by the counterclaim and also in the evidence of Mr. Ladharan the defendants countered this by stating that

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- (1) the plaintiff is not the registered proprietor of the design;
- (2) the design was not new or original in that
  - (a) the design is an open one common to the trade and in particular in the manufacture of cotton crimped African prints

in Japan and (b) there has been prior publication of the design, and this renders the registration of the design, if any, void and of no effect.

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As to whether or not the plaintiff was the registered proprietor of the design there can be no question. He was so registered and he has produced his certificate Exhibit A. By the provisions of Section 18 (1) of the Registered Designs Act 1949, a certificate is granted by the Registrar in the prescribed form to the registered proprietor. The certificate Exhibit A is in form No.D.R. No.1 in the Third Schedule to the Designs Rules 1949 made by the Board of Trade pursuant to powers conferred on the Board by the Registered Designs Act 1949.

The design in question is a simple one. It consists of a beaded line running along the middle of a plain background leaving about  $1\frac{1}{2}$  inches on both sides of it. This is then followed by a panel of about four inches wide divided into two sections each of approximately 2 inches wide. The top section consists further of a set of rosettes about  $\frac{3}{4}$ " in diameter followed below by a number of stars in contrast colour to the background. Some small circles are also inserted between the set of rosettes. The bottom half of the panel consists of a multiple representation of three zig-zag lines one following the other in the configuration of an inverted "Z". In the finished material Exhibit C, the design is reproduced horizontally as many times as the width of the material permits. The plaintiff claims to be the originator of the design. Such was his evidence and that of his artist who also produced Exhibits B and B1 for him. The defendants however say that the design was an open one commonly used by Africans with respect to the manufacture of "tie and dye" cloth popularly known in this country as "Adire cloths". The artist Aroyewun of course did say that it is not possible for the native Africans to have reproduced the three zig-zag lines forming the base of the design. The witness Holgate did say that the design is a variation of an old theme, but that the combination of the different parts of the design was new. In support of their contention, the defendants have produced Exhibits M and M1, but all the witnesses for the defence admitted that they had never seen any design exactly like Exhibit B1 before. There is no evidence with regards to the time of the introduction of Exhibit M now, the design registerable under the Act, is one



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that is "New or original" (See Section 1 (2)) and by Section 1(3) a design is expressed as meaning "features of shape, configuration, pattern or ornament applied to an article by any industrial process or means ....." It is not clear whether the words "new or original" in the act are meant to be alternative, but in my view, the term "original" will apply to a design which no previous designer had created for any purpose and the term "new" will apply to a design which is not in this sense original, but was newly and for the first time applied to the particular kind of article. Novelty may consist not in the idea itself, but in the way in which the idea is to be rendered applicable to some special subject matter. In Harrison vs. Taylor 157 E.R. 1064, the plaintiffs brought an action against the defendants for infringing their copyright in a design known as Honeycomb Pattern. The design consisted of a combination of the large and small honeycombs so as to form a large honeycombs stripe on a small honeycomb ground. The large and the small honeycombs were not new, but they had never been used in combination before. The plaintiffs had registered their design and other fabrics had been woven with a similar combination as a large and small pattern. The defendants resisted the action on the grounds inter alia that the design was not new or original. The Court of Exchequer Chamber consisting of seven judges, reversing the judgment of the Court of Exchequer, unanimously held that the design was a new and original design.

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Cockburn C.J. said at P.1066:-

"..... the Court of Exchequer seems to have dealt with the subject upon the assumption that there was analogy between copyright in a design and a patent for an invention .... That leads to the question, is it in its present shape, viz. the combination of large and small patterns, a new design. That is a matter of which anybody may satisfy himself by looking at it. There is a new combination, which is in substance a new design."

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In the same case, Byles J. observed at p.1067:-

"The Court of Exchequer seems to have drawn a distinction between a new design and a variety of an old design. But the word design imports "configuration" a difference in the proportionate size of the parts of a pattern may be a

variation; and where the size of the pattern is alternately varied on different parts of the same fabric, that alteration is manifestly a new combination and a new design. If this is a question for the jury, it has been rightly decided. If it is a question of law whether the combination constitutes a new design, I think it does."

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10 I take the view that whether or not the design is new or original is a matter for the eye. The eye must be able in order to ground a right of action to discover in the design an exercise of intellectual activity which produces a design which no man has ever made or which even if familiar to the trade, has never been so applied to the substance to which it is intended to apply the design. A design is considered with reference to the subject matter to which it is applied or intended to be applied. The evidence here reveals that not a

20 single witness has ever seen a design like Exhibit B1 before. There is a contention that the design is an open one in the market especially in the market in Japan, but apart from Exhibit M, no other design has been shown to me which negatives the novelty of the design now in issue. Of Exhibit M, I say shortly that the plaintiff said he saw it only after his own had come into the market and there is no evidence to the contrary. Now Exhibit

30 M has been produced to show that Adire cloths, of which Exhibit M1 is a type, is common to the trade and had been known amongst African native dyers as "tie and dye" design. In my view, this is a misconceived construction of the actual position. The phrase "tie and dye" (the English translation of Adire i.e. Adi - re) refers to the process by which the type of cloth is finished and certainly not to the design. This is demonstrated by a comparison of Exhibits C, N and M1. They are all species of Adire cloths, yet the designs on them are different.

40 I take the view that where a design is already in existence and all that the plaintiff proves is a slight variation of such design, such a plaintiff is not entitled to the benefit of registration. Looking at the design in Exhibit B1 apart from the cloth on which it was placed may create a suggestion; but I am satisfied that the proper test is to look at the design in connection with the material to which it has been applied. Can it be said then

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that looking at Exhibit C, the design printed on it has ever been anticipated? I answer that question in the negative and in my view the evidence points the same way. A design must be considered not only from the ornamentation, but also with reference to the outlines. In the present case, no specimen design has even been tendered to show that any one of the characters combined in Exhibit B1 had been separately represented before. Even if that were so shown, the combination itself in my view, does present to the eye a new design. See In Re Rollason's Design (1897) 14 11 L.R. 71. This case must be distinguished from the case of Dover Ltd. Vs. Nurnberger Celluloid woven Fabrick Gabruder Wolff (1910) 2 Ch. D.25 where the point in issue was the application of familiar characters as a design to a bicycle handle. In this case, all the contention of the defendants is that Adire cloths are popularly known in the market. Such contention of course affects the process and not the designs on the various types or patterns of Adire cloth.

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I hold therefore that the design in Exhibit B1 reproduced on Exhibit L1 is a new and original design and is therefore properly registered under the Registered Designs Act 1949.

Nor is the novelty or the originality of the design in any way affected by the fact that it is an open design in Japan. The Registered Designs Act 1949 protects registered designs in the United Kingdom and the United Kingdom Designs (Protection) Ordinance Cap. 221 (Section 2) extends the same protection to this country. Neither of these two laws are intended to apply in Japan. When goods manufactured under legally permissible conditions in Japan are imported into the United Kingdom or indeed into this country, any person who then deals with the imported commodity is bound so to deal with same in accordance with the law of the land. In my judgment therefore even if the design in question were an open one in Japan, that fact would not affect this case one way or the other. But there is more in the matter. All that the evidence establishes is that in Japan crimped cotton African Prints are recorded or recognised as an open design OM No. 36023. The certificate from the Japan Textile Colour Design Centre Exhibit R produced by the defendants clearly shows that the particular design is not registered anywhere in Japan, but is classified as one category of the crimped cotton African

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Prints generally referred to as open Design OM No.36023. Even then, the Gosho Company Ltd., the manufacturers did give the design a particular number i.e. No.7140 to identify it. This is confirmed by the numbers inserted at the back of Exhibits L and Ll and the letter to the plaintiff Exhibit K. It is significant that when the same design was sold by the same company to the defendants the number given to it was 714OR. I take the view that the position in Japan is that all crimped cotton African prints are regarded as open designs in which no right of registration for exclusive copyright exists and this is borne out by the fact that the plaintiff tried, but failed, to obtain a registration of his design in Japan. In my view therefore the plea that the design is an open one in Japan does not avail the defendants.

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The defendants have also contended and this is also in the address of counsel for the defendants that there has been a prior publication of the design. The facts relied on for this consists in the evidence of the plaintiff to the effect that after inventing the design, he gave the sketch to the artist who later produced Exhibits B and Bl, that he later handed Exhibit B and Bl to Mr. Wegner of Gilbert J. McGaul who later sent it (1) to the Gosho Company Ltd. who produced Exhibit L and Ll and (2) to their Head office in London for registration. Sec.1(2) of the Registered Designs Act 1949 prohibits the registration of a design if it has been previously registered or published in the United Kingdom. Section 4(2) of the United Kingdom Designs (Protection) Ordinance Cap.221 makes similar provisions in respect of prior publication in Nigeria.

The matter of prior publication of a design is dealt with by Section 6(1) of the Registered Designs Act 1949, which justifies prior publication by reasons of :-

- (a) The disclosure of the design by the proprietor to any other person in such circumstances as would make it contrary to good faith for that other person to use or publish the design;
- (b) The disclosure of the design in breach of good faith by any person other than the proprietor of the design; or

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(c) In the case of a new or original textile  
.. design intended for registration the  
.. acceptance of a first and confidential  
order for goods bearing the design.

The question of prior publication is essentially one of fact. There is no question here as to the manufacturers, as they were and are in Japan. With regards to the artist and the Company Gilbert J. McGaul, I think one should go strictly by the facts of this case. The question is whether disclosure to these persons were in such circumstances of confidence, that they could not unless in breach of good faith disclose the design to another person. As Bowen L.J. observed in the case of Humpherson vs. Syer 4 R.P.D. 407 at page 413:-

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"..... has this information been communicated to any member of the public who was free in law or equity to use it as he pleased. Was Widmer a person to whom this communication had been made in a manner which left him free both in law and equity to do what he liked with the information ..... You must take all the circumstances of the case and ask yourself whether there was any confidential relation established between the two persons - whether it was an implied term of the employment that the information should be kept by the shopman to himself, or whether he might afterwards, without any breach of good faith, use the matter and use it as he desire."

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See also per Kekewich J. Obiter in Blank vs. Footman Pretty & Co. (1888) 39 Ch. D. 678 at 680. This is the position in law and the test is in the nature of the relationship. Applying this test to the facts of this case, I have no doubt in my mind that there had not been any prior publication of the design in issue which would avoid its registration under the Act. Such publication as there was is justified by law.

In my judgment therefore the plaintiff is the registered proprietor of the design in Exhibit B1 by virtue of Exhibit A and that design is properly registered and is not affected by any prior publication thereof.

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All parties herein have agreed that the designs on Exhibit C (plaintiff's goods) and Exhibit D

(defendants' goods) are identical. Indeed such fact was admitted by the defendants. It follows therefore that the case for injunction, delivery up for destruction and/or on account is made out.

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10 As regards the claim for damages, the considerations are of course different. By the provisions of Section 9 of the Act of 1949 damages shall not be awarded against a defendant who proves that at the date of the infringement he was not aware and had no reasonable ground for supposing that the Designs (Protection) Ordinance Cap. 221 provides similarly that damages may not be awarded against a defendant who proves that at the date of the infringement he was not aware nor had any reasonable means of making himself aware of the existence of the registration of the design. In both cases the onus is upon the defendant to prove ignorance or lack of means of knowledge, of the registration of the design. Apart from the evidence of Mr. Ladharam to the effect that he did not know that the design of the plaintiffs was registered, there is hardly any direct evidence on this point. I have therefore to consider all the relevant circumstances of this case.

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To start with, I accept the evidence that Exhibit D is printed with inferior dye on an inferior material. Such is the evidence of the plaintiff as well as the evidence of the witness Noble called by the defendants. The defendants did say that Exhibit D was offered to them in the middle of 1957 by the Gosho Company Ltd. through their office in Japan. The Gosho Company Ltd. were the manufacturers for the plaintiff. The defendant did not make any search or searches at Manchester to know whether or not the design was registered there; in fact it is the evidence that the defendants were not in the habit of making searches for registered designs. There is no doubt that if the defendants had so made a search, the registration by plaintiffs would have been discovered. There is no other evidence to support that of Mr. Ladharam to the effect that it was the Gosho Company Ltd. that "offered" the cloths to the defendants. The cloth Exhibit D is sold by the defendants in pieces contained on paper wrappers printed inter alia with the following words:- Specially made for K. Chellarams & Sons (Nigeria) Ltd., Lagos Design No.714OR".

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If as the defendants contended crimped cotton

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- continued.

African prints are recorded in Japan as open Design OM.No.36023, why then did this design bear the special No.714OR? The defendants never inquired why was this cloth marked "Specially made for K. Chellaram & Sons" and why was it printed with inferior dye and on inferior material? If the Gosho Company Ltd. were offering some of the stocks of the plaintiffs to the defendants, they would in all probability have offered identically the same stuff in identically the same quality. I reject the evidence that it was the Gosho Company Ltd. that offered Exhibit D to the defendants and indeed such evidence is not consistent with the terms of the confirmation notes Exhibits O and O1. The witness Ladharam carried this position to its logical conclusion when he made the alarming suggestion that the defendants did not even see the design before they ordered for it. I will not, and do not, believe such evidence. I take the view that either the defendants are completely reckless or that their office in Japan having seen the designs of the plaintiffs after the manufacture of Exhibit C, decided to and did order for actual reproduction of the plaintiffs' design on cheaper material with inferior dye and with the avowed purpose of wrecking the market for the plaintiff. This is borne out by the attitude of the defendants to the situation which arose after their receipt of letters Exhibits F, G and Q, indeed the defendants' representative stated in the witness box that he was seeing Exhibit C for the first time in Court. This is also demonstrated by the way in which the defendants had fought this case throughout. During his address to me I asked Counsel for the defence to let me know his stand whether he was an innocent infringer or he was contesting the validity of the registration. Counsel told me that he was contesting the validity of the registration. In my view therefore the defendants have not proved that although they were unaware of the plaintiffs' registration, they had no reasonable means of ascertaining such fact, they had failed or neglected to make the necessary investigation which a prudent man of business in the same circumstances would have made. If a refusal or neglect to make such a search, (especially in the case of a company, with a branch in Manchester) would excuse a defendant under Section 9 of the Act, the inevitable consequence is that registration does not afford any protection at all and a smart infringer would have sold as much of the infringing material as he could and ruined

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the market for the registered proprietor, before an order for injunction is obtained and if then he had no stocks left of the infringing material, he would avoid any liabilities. Such is not the intention or indeed the words of the Act. In my judgment therefore the plaintiffs are entitled to damages against the defendants.

In the  
High Court of  
Lagos

-----  
No. 18

Judgment.

16th February,  
1959

- continued.

10 It is true that the plaintiff had had to re-  
duce the price of his cloth twice and finally he  
had to close down. There is however no evidence  
before me of how much the plaintiff actually lost  
in the transaction. The claim for special damages  
therefore fails. I now come to the item of general  
damages. I do not take into consideration the fact  
that the plaintiff is entitled to two renewals of  
the period of copyright of five years each, as these  
renewals are in any case subject to some conditions  
described by Section 8(2) of the Act. The defend-  
ants ordered out 880 pieces of Exhibit D and had  
20 sold about 500 pieces. These goods were cleared by  
the defendants from the Customs on the 18th Novem-  
ber, 1957 and on the 21st December, 1957 when Mr.  
Ladharam swore to an Affidavit in connection with  
the motion for interlocutory injunction, the 500  
pieces had been sold. The plaintiffs ordered in  
all about 10,981 pieces from January to the end of  
1957 and had only a few pieces left at the time of  
this action. It is clear that cloth of the design  
had a phenomenal sale and a very good market. The  
30 defendants impress me as rather callous and in-  
different to the result of their action. I have  
carefully considered all the circumstances of this  
case and will fix the general damages in this case  
at £2000.--. (two thousand pounds only) taking  
still a lenient view of the conduct of the defend-  
ants and in particular the fact that I do not know  
exactly how much the plaintiffs had lost. But I do  
certainly take into consideration the fact that  
this is a commercial case, the Issues involved in  
40 which strike at the very foundation of commercial  
or trading activities.

The defendants have failed to show any grounds why the registration of the plaintiff should be cancelled either in this country or in the United Kingdom and my findings as well disposes of the counter-claim of the defendants which is hereby dismissed. The result is that I give judgment in this case in favour of the plaintiffs as follows:-

1. I order an injunction against the defendant



In the  
High Court of  
Lagos

No. 18

Judgment.

16th February,  
1959

- continued.

Company, restraining the Company, its servants and/or agents from importing or causing to be imported into Nigeria, from selling or exposing or causing to be sold or expressed for sale any textile piece goods bearing the plaintiffs' Registered Design No.459477.

- 2. The defendants shall pay to the plaintiffs the sum of £2000 damages for the infringement by them of the plaintiffs' said registered design.
- 3. The defendants shall deliver up to the plaintiffs within seven days hereof all cloths of the design in question at the moment in their custody or under their control for such cloths to be destroyed.
- 4. The defendants shall also pay the costs of this action to be taxed.

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(Sgd.) G.B.A. COKER.  
JUDGE.

In the Federal  
Supreme Court  
of Nigeria

No. 19

Plaintiffs'  
Notice of  
Appeal.

27th February,  
1959.

No. 19

PLAINTIFFS' NOTICE OF APPEAL

IN THE FEDERAL SUPREME COURT OF NIGERIA

Suit No.ID/302/57.

NOTICE OF APPEAL:

BETWEEN:

JOHN KHALIL KHAWAM (Trading as John Khalil Khawam and Company)	Plaintiffs/ <u>Appellants</u>
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- and -

K. CHELLARAM & SONS (NIGERIA) LTD.	Defendants/ <u>Respondents</u>
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TAKE NOTICE that the plaintiffs being dissatisfied with that part of the Judgment more particularly stated in paragraph 2 of the High Court of Lagos contained in the Judgment of Coker J.

and dated the 16th February, 1959 doth hereby appeal to the Federal Supreme Court of Nigeria upon the grounds set out in paragraph 3 and will at the hearing seek the relief set out in paragraph 4.

In the Federal  
Supreme Court  
of Nigeria

No. 19

AND the Appellants further state that the Names and Addresses of the persons directly affected by the Appeal are those set out in paragraph 5.

Plaintiffs'  
Notice of  
Appeal.

2. Part of decision of Lower Court complained of: Award of damages.

27th February,  
1959

10 3. Grounds of Appeal:

- continued.

1. The learned trial Judge failed to give effect to the evidence as proved and found by him as to the loss sustained by the appellants actually and prospectively and further erred as to the effect in regard thereto to be given to the appellants rights as provided by the Provisions of the Registered Designs Act 1949 of the United Kingdom.

20 2. The damages awarded by the learned trial Judge were inadequate and insufficient having regard to the facts proved in evidence and as found by him and the monopoly rights to which the Appellants were entitled as provided by the Provisions of the said United Act.

3. The Appellants will file further or additional grounds of Appeal as soon as the Record of the Appeal is duly received by them.

Dated at Lagos this 27th day of February, 1959.

30 4. Relief sought from the Federal Supreme Court of Nigeria: Increase of damages.

5. Persons directly affected by the Appeal:

Name:

K. Chellaram & Sons  
(Nig.) Ltd.

54, Marina Street,  
Lagos: Or  
c/o Their Solicitor,  
A.O. Bickersteth,  
128/130, Broad Street,  
Lagos.

Dated at Lagos 27th day of February, 1959.

40

(Sgd.) E.A. Peter Thoms

DAVID & MOORE

APPELLANTS' SOLICITORS.

In the Federal  
Supreme Court  
of Nigeria

No. 20

DEFENDANTS' NOTICE OF APPEAL

No. 20

IN THE FEDERAL SUPREME COURT OF NIGERIA

Suit No. LD/302/57

Defendants'  
Notice of  
Appeal.

NOTICE & GROUNDS OF APPEAL

9th March,  
1959.

BETWEEN:

JOHN KHALIL KHAWAM (Trading as John Khalil Khawam & Company	Plaintiffs/ <u>Respondents</u>
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- and -

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K. CHELLARAM & SONS (NIG.) LTD.	Defendants/ <u>Appellants</u>
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TAKE NOTICE that the Defendant being dis-  
satisfied with the judgment of the High Court of  
Lagos contained in the judgment of Justice G.B.A.  
Coker dated the 16th day of February, 1959, doth  
hereby appeal to the Federal Supreme Court of  
Nigeria upon the grounds set out in paragraph 3 and  
will at the hearing seek the relief set out in  
paragraph 4.

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AND THE APPELLANT further states that the  
names and addresses of the persons directly affect-  
ed by the Appeal are those set out in paragraph 5.

2. Part of decision of Lower Court complained  
of: WHOLE.

3. Grounds of Appeal:

(1) That the learned trial Judge misdirected  
himself on the evidence before him in  
holding that the design was new or  
original.

30

(2) That the learned trial Judge misdirected  
himself on the evidence in holding that  
the defendant was not an innocent in-  
fringer.

(3) That the learned trial Judge erred in  
law in awarding general damages against

the defendant being an innocent infringer.

(4) In the alternative the damages awarded against the defendant were excessive.

4. Relief sought from the Federal Supreme Court of Nigeria:-

That the judgment of the High Court be set aside and in the alternative damages awarded be reduced to nominal damages.

5. Persons directly affected by the Appeal:-

In the Federal Supreme Court of Nigeria

No. 20

Defendants' Notice of Appeal.

9th March, 1959

- continued.

10

Name:

Address

JOHN KHALIL KHAWAM  
(Trading as John Khalil  
Khawam & Company)

81, Lebanon St., Ibadan  
OR  
c/o Their Solicitors,  
David & Moore,  
13, Catholic Mission St.,  
Lagos.

Dated at Lagos this 9th day of March, 1959.

(Sgd.) A.O. Bickersteth.

No. 21

No. 21

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PLAINTIFFS' FURTHER GROUNDS OF APPEAL

IN THE FEDERAL SUPREME COURT OF NIGERIA

Suit No. LD/302/57

F.S.C. 125/1959

Plaintiffs' Further Grounds of Appeal.

11th November, 1959.

BETWEEN:

JOHN KHALIL KHAWAM  
(Trading as John Khalil Khawam  
and Company)

Plaintiffs/Appellants

- and -

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K. CHELIARAM & SONS (NIGERIA)  
LIMITED

Defendants/Respondents

FURTHER GROUNDS OF APPEAL:

1. That learned trial Judge in holding, that

In the Federal  
Supreme Court  
of Nigeria

No. 21

Plaintiffs'  
Further  
Grounds of  
Appeal.

11th November,  
1959

- continued.

there was no evidence before him of how the Appellants actually lost in the transaction, and that the claim for special damages therefore failed, and furthermore in stating that "taking still a lenient view of the conduct of the defendants and in particular the fact that he did not know how much the Appellants had lost", misdirected himself and erred in law. He so misdirected himself and erred in law in that:-

(a) He misapplied the law regarding special and general damages and consequently made an erroneous assessment of the damages awarding to the Appellants' a sum as damages less than he should have done, and he has also wrongly disregarded the fact that the Appellants would have been entitled to two renewals of their monopoly rights of the period of 5 years in their registered design of 5 years each under the Registered Designs, Act 1949 of the United Kingdom. 10

(b) He wrongly separated what is a single and undivided claim for damages by the Appellants for the loss they suffered into a claim for (1) Special damages and (2) general damages. 20

(c) He assessed the damages awarded by him as if they consisted of two separate claims therefor the one being for special damages and the other for general damages.

2. Upon the facts admitted or proved and as found by the learned trial Judge and the law applicable thereto the damages awarded by the trial Judge were wholly inadequate and insufficient. 30

3. Persons directly affected by the Appeal:-

Name

K. CHELLARAM & SONS 54, Marina Street, Lagos or  
(NIGERIA) LTD. c/o their Solicitors,  
A.O. Bickersteth Esq.,  
128/130 Broad Street, Lagos.

DAVID & MOORE,  
PLAINTIFFS/APPELLANTS' SOLICITORS.

DATED at Lagos this 11th day of November, 1959. 40

No. 22

COURT'S NOTES ON APPEAL

IN THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

THURSDAY THE 10TH DAY OF DECEMBER, 1959

BEFORE THEIR LORDSHIPS

SIR ADEPOKUNBO ADEMOLA

CHIEF JUSTICE OF THE  
FEDERATION

LIONEL BRETT

FEDERAL JUSTICE

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LOUIS NWACHUKWU MBANEFO

FEDERAL JUSTICE

FSC.125/1959

JOHN KHALIL KHAWAM & CO. etc. Plaintiff/Appellant

- v -

K. CHELLARAM & SONS (NIG.) LTD. Defendant/Respondent

Appeal and cross appeal from judgment of Coker, J. at Lagos dated 16/2/59.

Bernstein (Moore with him) for appellants and responding in cross appeal.

20

Bickersteth for Respondent and also arguing for appellant in the cross appeal.

Bernstein argues:-

Appeal is on amount of damages awarded. Argument will be on the principles to be followed in awarding damages. Loss of profit to the appellant extended at £7,280.15.0. There are other losses - see p. 5 of the Record. The learned trial Judge has disregarded the loss of profit and loss under the Act.

30

Evidence given about price of the goods was not challenged at all.

Distinction between special damages and general damages. Refers to Cap.221 Laws of Nigeria Vol.VI at p.345: United Kingdom Design (Protection) Ordinance.

In the Federal  
Supreme Court  
of Nigeria

No. 22  
Court's Notes  
on Appeal.

10th and 11th  
December 1959  
and 8th March,  
1960.

In the Federal  
Supreme Court  
of Nigeria

No. 22

Court's Notes  
on Appeal.

10th and 11th  
December, 1959  
and 8th March,  
1960

- continued.

Refers to Registered Design Act 1949 which applies in this matter. Sec.7(1) of the Act also Sec.8 and see the Design Rules, 1949 (1949 No.2368 as amended by 1955 No.116) Fees on application at p.12 of the First Schedule, item 8 & 9 and item 8 & 9 in the first schedule in 1955 No.116.

No evidence of challenge that in this particular market the design would be unsaleable or valueless after 5 years. Evidence given by plaintiff about this is at page 16 beginning at line 15 of the Record.

10

Proof of actual loss in Patent Cases.

Dunlop Pneumatic Tyre Ltd. v. Puncture Proof Pneumatic Tyre Ltd: 15 R.P.C. 405.

Court of Appeal Report in 16 R.P.C. 209 at p.211 bottom page; and at p.216 (Collins L.J.)

Submit all plaintiff need do is to establish his rights to damages by the wrong doing of the defendant. Damage need not be proved specifically.

Also Leeds Forge Co. Ltd. v. Deightons Patent Flue Co. Ltd. 25. R.P.C. 209; see Swinfen-Eady J. at p.212 from line 40 etc. also page 215 line 19 etc. On special and general damages, see Ratcliffe v. Evans (1892) 2 Q.B.D. 524, at pp.528 & 529 from bottom of page 528. Counsel agreed it would be matter of evidence to show generally for how long a design goes on selling, at a phenominal rate etc.

20

Claim is for profit to be made for 5 years at £36,903.15.0 at rate of £7,280.15.0 a year. Again on special and general damages, counsel refers to Stroms Bruks Aktie Bolag v. Hutchinson (1905) L.R. A.C. 515 at 525 last paragraph. In the present case, as in above, plaintiff in claiming ordinary damages ascertained and limited by the special circumstances of the case.

30

Submitted the learned Judge went astray here on matter of damages.

The learned trial Judge has not taken into consideration the fact that plaintiff is entitled to two renewals of his design: 5 years each. No damages have been awarded in respect of these renewals

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although they are now useless to the plaintiff since his design has been infringed.

Submit damages for 1st year shou'd be £5,000. This is suggested to be the loss for the first year. Suggest, a declining figure of £500 a year; say about £15,000 for the first five years. Suggests £15,000 for the next 10 years.

On Damages generally.

10 See copyright and Industrial Design by Russel - Clarke: at p.208.

Patents for Inventions; by T.A. Blanco-White 2nd Edition at page 309.

Refers to Meters Ltd. v. Metropolitan Gas Meters Ltd. 28 R.P.C.157.

Bickersteth for Respondent and also counter appeal argues on

Damages awarded:

Estimate of Damages: not on right principle; not based on Evidence.

20 Measure of Damages: Refers to Russel Clarke - on Copyright & Industrial Design at page 208. Refers to page 18 of the Record line 31 et seq.

Nothing before the trial Judge to show how much the appellant lost: no evidence supplied by the appellant. Court will notice that the defendant had been stopped selling these goods. Refers to judgment at page 57 lines 31 to 41 of the Record.

30 Renewal periods: Refers to Sec.8(2) Registered Design Act 1949. Application can be made at any time.

No evidence or basis for calculation of loss per year Re measure of Damages to be awarded, see United Horseshoe and Nail Co. Ltd. v. John Stewart & Co.; (1888) 13 A.C.401 referred to at p.208 of Russel Clarke (above), and the same principle was followed in Meters Ltd. v. Metropolitan Gas Meters Ltd. (supra).

Submit in the present case, only nominal damages should have been awarded.

In the Federal  
Supreme Court  
of Nigeria

No. 22

Court's Notes  
on Appeal.

10th and 11th  
December, 1959  
and 8th March,  
1960

- continued.



In the Federal  
Supreme Court  
of Nigeria

No. 22

Court's Notes  
on Appeal.

10th and 11th  
December, 1959  
and 8th March,  
1960  
- continued.

Special & General damages: Error by the Judge is one of terminology; he was led into it by the plaintiff at p.6 of the Record - Statement of Claim.

Adjourned till 11/12/59.

(Sgd.) A. Ade. Ademola.  
CHIEF JUSTICE OF THE FEDERATION.

FRIDAY THE 11TH DAY OF DECEMBER, 1959

Case continues.

Same appearances.

10

Mr. Bickersteth continues to argue the appeal.

Abandons ground 1.

Argues grounds 2 & 3 together.

Refers to Sec.9 of the Registered Design Act, 1949 and Sec.3 of the United Kingdom Design (Protection) Ordinance Cap.221.

Submits that these two statutory tests set out at p. 54 of the Record were not taken cognisance of by the learned trial Judge.

Submit it would be sufficient for the defendant to rely on either sec.9 of the English Act or Sec.3 of the Local Ordinance.

20

The defendants are claiming protection of these.

Refers to page 34 line 32: The Court is to remember that Gosho Co. mentioned there is the same company which made plaintiffs design.

Court. What about page 34 line 47 does that not show negligence?

Counsel. Refers to page 56 lines 10 to 26 particularly lines 18 to 26 submit there was no time. Evidence was led to show that the defendant's office in Japan or in England saw the plaintiff's design and decided to order it. It is submitted that was not the plaintiffs case at anytime. Submit learned Judge was wrong in his assumption.

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Refers to page 40 lines 30 to 32 where plaintiff's counsel himself in addressing the Court made it

clear that Gosho Co. brought the design to the Japan office of the defendants.

Contrast the English Act and the Local Ordinance "Reasonable means" and "reasonable grounds". Earlier English Act was "reasonable means", the 1949 Act changed it to "reasonable grounds". In Nigeria it is still "Reasonable means".

10 Refers to: Wingerman v. F.W. Berk & Co. Ltd. 1925, Ch. D.116. Claiming protection under the English Act. Further, submits that since registration of the design was refused in Japan, the defendant was in a position to assume it could not be registered in U.K.

In Reply to Court:

Agreed that the fact that registration of a design is refused in the country of manufacture does not mean registration must be refused in other countries.

Bernstein replies:

20 Replying on grounds 2 and 3 argued together, says the protection under the Nigeria Law, - United Kingdom Designs (Protections) Ordinance, should apply and not the U.K. Act. There is no conflict between the two but it is the Local Ordinance which prevails.

30 It should have been evident to the defendant on the number on the design that it was registered. And in any case, the defendants did nothing, although, they had every means of finding out with them big organisation in the United Kingdom.

Court does not wish to hear Mr. Bernstein any more on "quantum of damages".

Judgment Reserved.

(Sgd.) A. Ade. Ademola.  
C.J.F.

In the Federal  
Supreme Court  
of Nigeria

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No. 22

Court's Notes  
on Appeal.

10th and 11th  
December, 1959  
and 8th March,  
1960

- continued.

In the Federal  
Supreme Court  
of Nigeria

IN THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

No. 22

TUESDAY THE 8TH DAY OF MARCH, 1960

BEFORE THEIR LORDSHIPS

Court's Notes  
on Appeal.

SIR ADETOKUNBO ADEMOLA

CHIEF JUSTICE OF THE  
FEDERATION

10th and 11th  
December, 1959  
and 8th March,  
1960

LICHEL BRETT

FEDERAL JUSTICE

PERCIVAL CYRIL HUBBARD

AG. FEDERAL JUSTICE.

- continued

FSC.125/1959

JOHN KHALIL KHAWAM & CO. LTD.  
Plaintiffs/Appellants/Respondents

10

Vs.

K. CHELLARAM & SONS (NIG.) LTD.  
Defendants/Respondents/Appellants

Judgment read by the Hon: C.J.F.

ORDER: Cross appeal dismissed, Appeal allowed by  
varying damages awarded in favour of the plaintiffs  
as follows:-

£2000 general damages as awarded by the learned trial  
Judge:

20

£500 damages for the two 5 years period of renewal.

Total £2,500. Costs to the appellants on the two  
appeals assessed at 80 guineas.

(Sgd.) A. Ade. Ademola.  
CHIEF JUSTICE OF THE FEDERATION.

No. 23

JUDGMENT of SIR ADETOKUNBO ADEMOLA,  
Federal Chief Justice

In the Federal  
Supreme Court  
of Nigeria

No. 23

IN THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

ON TUESDAY THE 8TH DAY OF MARCH, 1960

BEFORE THEIR LORDSHIPS

SIR ADETOKUNBO ADEMOLA

CHIEF JUSTICE OF THE  
FEDERATION

10 LOUIS NWACHUKWU MBANEFO

CHIEF JUSTICE,  
EASTERN REGION.

LIONEL BRETT

FEDERAL JUSTICE.

Judgment of  
Sir Adetokunbo  
Ademola,  
Federal Chief  
Justice.

8th March,  
1960.

F.S.C.125/1959

BETWEEN:

JOHN KHALIL KHAWAM & COMPANY  
(John Khalil Khawam trading as)

Plaintiffs/  
Appellants  
Respondents

- and -

20 K. CHELLARAM & SONS (NIG.) LTD.

Defendants/  
Respondents  
Appellants

J U D G M E N T

ADEMOLA, F.C.J.: The plaintiff in the case in the High Court of Lagos has appealed to this Court against the amount of £2,000 damages awarded him in a claim by him for £50,000 damages for the infringement by the defendant company of his Registered Design on textile piece goods bearing his Registered Design No. 459477. The defendant company also filed a cross-appeal against the judgment of the learned trial Judge. The relief sought in the cross-appeal is that the judgment of the learned trial Judge be set aside or in the alternative that damages awarded be reduced to nominal damages.

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In the Federal  
Supreme Court  
of Nigeria

—  
No. 23

Judgment of  
Sir Adetokunbo  
Ademola,  
Federal Chief  
Justice.

8th March,  
1960

- continued.

The plaintiff appellant is a trader in textile goods and an importer of textile goods from Japan and other countries. The defendant respondent, a big trading house in Nigeria, trades in various goods including textile goods and is also an importer of goods from Japan and other countries. The plaintiff, among other designs, designed a pattern from the African "tie and dye" design, with typical "motifs" common to the Nigeria "adire" cloths designed with herringbone stripes, stars and repetition of circles peculiar to many "adire" cloths but with peculiar arrangements of the motifs which made it original.

10

The plaintiff having made this design, on the 4th January, 1957, registered it in the Manchester Branch of the Design Registry of the Patent Office in Manchester in accordance with the provisions of the Registered Design Act 1949 and obtained a certificate granting him a monopoly of the design for 5 years with a right of renewal for another 10 years.

20

During the month of January, 1957, he imported into Nigeria from Japan 1,000 pieces of the material which he sold at 50/- a piece of ten yards making a profit of 15/- per piece. By the end of that year he had imported 9841 pieces in all. About the month of November, 1957, the defendant respondent company had imported into Nigeria cloth of a similar design but inferior in quality which was selling at 38/- per piece. The plaintiff appellant was forced to drop his selling price from 50/- to 43/- per piece and later to 34/- per piece to compete with the intruder into his market. The defendant respondent company asserting, as it did, that the design is an open design in Japan, placed on order with Gosho Company, the same company in Japan which printed the plaintiff appellant's design, the same design on inferior materials. The goods were shipped to Nigeria and sold at a wholesale price of 38/- per piece of ten yards.

30

The plaintiff appellant as the registered proprietor of the design promptly called the attention of the defendant respondent company to the infringement of his design and later instituted an action in the High Court of Lagos for an injunction to restrain the defendant respondent from selling the particular textile goods; he claimed damages for the infringement and also claimed the delivery up of the goods with the defendant respondent company

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for destruction. Judgment was entered in his favour in terms of the writ but with £2,000 damages.

The plaintiff is dissatisfied with the damages awarded in his favour and has passed. The ground of appeal argued is mainly directed on principles to be followed in awarding damages.

On the other hand, the defendant respondent company filed a cross appeal and the grounds of appeal filed and argued are as follows:-

- 10 (1) That the learned trial Judge misdirected himself on the evidence before him in holding that the design was new or original.
- (2) That the learned trial Judge misdirected himself on the evidence in holding that the defendant was not an innocent infringer.
- (3) That the learned trial Judge erred in law in awarding general damages against the defendant being an innocent infringer.
- 20 (4) In the alternative the damages awarded against the defendant were excessive.

It seems convenient, and I shall deal first with the cross appeal.

30 Mr. Bickersteth, arguing the cross appeal, abandoned the first ground. Arguing the 2nd and 3rd grounds together, he submitted that although the learned trial Judge in his judgment referred to section 9 of the Registered Design Act 1949 and also to section 3 of the United Kingdom Design (Protection) Ordinance, Cap.221, he failed, however, to apply the statutory tests that it would be sufficient for the defendant to rely on either side Section 9 of the English Act or Section 3 of the Local Ordinance. Section 9(1) of the Registered Design Act 1949 reads:-

- 40 "9. (1) In proceedings for the infringement of copyright in a registered design damages shall not be allowed against a defendant who proves that at the date of the infringement he was not aware, and had no reasonable ground for supposing, that the design was registered; and a person shall not be deemed to

In the Federal  
Supreme Court  
of Nigeria

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No. 23

Judgment of  
Sir Adetokunbo  
Ademola,  
Federal Chief  
Justice.

8th March,  
1960  
- continued.

In the Federal  
Supreme Court  
of Nigeria

No. 23

Judgment of  
Sir Adetokunbo  
Ademola,  
Federal Chief  
Justice.

8th March,  
1960

- continued.

have been aware or to have had reasonable grounds for supposing as aforesaid by reason only of the marking of an article with the word "registered" or any abbreviation thereof, or any word or words expressing or implying that the design applied to the article has been registered; unless the number of the design accompanied the word or words or the abbreviation in question."

and section 3 of the United Kingdom Designs (Protection) Ordinance, Cap.221, reads:-

1.0

"3. The registered proprietor of a design shall not be entitled to receive any damages in respect of any infringement of copyright in a design from any defendant who proves that at the date of the infringement he was not aware nor had any reasonable means of making himself aware of the existence of the registration of the design."

20

Mr. Bickersteth argued that either of these statutory provisions granted protection to the defendant in this case, and that the learned Judge was wrong in his assumption that the defendant must have seen the plaintiff's design and decided to order it since it was clear that Gosho Company brought the design to the Japan Office of the defendant and it was an open design in Japan.

It appears to me that for the defendant to claim the protection afforded by either the English Act or the local Ordinance, he must satisfy the Court that he had no reasonable means of finding out whether or not the design had been registered. It was argued that protection is claimed under the English Act.

30

The wording of the English Act refers to "reasonable grounds", the local Ordinance states "reasonable means". There is to my mind, no conflict between the two; if there is, it is clear that the local Ordinance will prevail. The earlier English Act spoke of "reasonable means" but it was amended to read "reasonable grounds". In Nigeria "reasonable means" is still the criterion; this may be due to the fact that the registration has to be carried out in the United Kingdom. Whatever it is, it hardly affects this case where the defendants did nothing although they had every means of finding

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out from the Design Registry in Manchester whether or not this particular design, which incidentally carries a number, has been registered.

In the Federal  
Supreme Court  
of Nigeria

No. 23

The submission that since the registration of the design was refused in Japan was enough for the defendant to assume that the design could not be registered in the United Kingdom, I reject without further comments.

Judgment of  
Sir Adetokunbo  
Ademola,  
Federal Chief  
Justice.

10 The findings of the learned trial Judge that the defendants have failed or neglected to make necessary investigation which a prudent company having a branch in Manchester would have made in the circumstances and cannot therefore claim any protection as an innocent purchaser are, in my view, justified by the evidence before him, and these two grounds of the cross appeal must fail.

8th March,  
1960  
- continued.

20 There remains grounds 3 and 4. On the cross appeal, Mr. Bickersteth argued that the estimates of damages was not based on the right principle and was not based on evidence. It was submitted that there was no evidence before the Judge to show categorically how much the plaintiff lost; nor was there evidence or basis for calculation of loss per year.

The argument on these two grounds of the cross appeal were met by Mr. Bernstein's arguments on the quantum of damages awarded. His argument in the main was on the principles of which the amount of damages is to be computed.

30 On the quantum of damages, the learned trial Judge said :-

40 "It is true that the plaintiff had had to reduce the price of his cloth twice and finally he had to close down. There is however no evidence before me of how the plaintiff actually lost in the transaction. The claim for special damages therefore fails. I now come to the items of general damages. I do not come to the consideration the fact that the plaintiff is entitled to two renewals of the period of copyright of five years each, as these renewals are in any case subject to some conditions described by section 8(2) of the Act.

X X X X X



In the Federal  
Supreme Court  
of Nigeria

No. 23

Judgment of  
Sir Adetokunbo  
Ademola,  
Federal Chief  
Justice.

8th March,  
1960

- continued.

"The plaintiffs ordered in all about 10,981 pieces from January to the end of 1957 and had only a few pieces left at the time of the action. It is clear that cloth of the design had a phenomenal sale and very good market. The defendants impress me as rather callous and indifferent to the result of their action. I have considered all the circumstances of this case and I will fix the general damages in this case of at £2,000 taking still a lenient view of the conduct of the defendants and in particular the fact that I do not know exactly how much the plaintiffs lost."

10

Added to those, is the fact that the defendants sold within a month 500 pieces of the 880 pieces which arrived for them from Japan.

The first question I have asked myself is whether the learned Judge has proceeded on an erroneous principle in his assessment of damages. I am of the opinion he has. What has to be ascertained is the pecuniary loss the plaintiff has sustained by the wrongful acts done to them by the defendants; the plaintiffs are entitled to be compensated for the injuries they have suffered by reason of the wrongful act of the defendants.

20

In the case Pneumatic Tyre Company Ltd. v. The Puncture Proof Pneumatic Tyre Company Ltd., 15 R.P.C. 403 at p.406, Willis, J. said:-

"As far as the case permits the amount of loss must be proved; but if it can be proved that the necessary consequence of an injurious act is to damage the reputation of the patented article or process, as to interfere with the general and extended use, very substantial damages might be received, though it might be impossible to put a figure on the loss."

30

As the learned trial Judge in the present appeal found, the plaintiffs have suffered considerable loss and damage. By reason of the defendants infringement, he had to reduce his price and cloth which was sold at 50/- per piece at a profit of 15/- on the piece was reduced first to 43/- and later to 34/-, thus selling at a loss. Subsequently, he had to close down and the anticipated profits for 10 years of renewal for which he held a copyright was lost to him. The learned Judge said he

40

did not take this into consideration in awarding damages; it would appear, however, that he took into consideration the fact that the defendants sold 500 pieces of their cloth in one month, which was also a loss of profit to the plaintiffs. At that time from the evidence of the plaintiff's witness, J.K. Khawam, a total of 1,897 pieces of cloth had arrived for the plaintiffs in addition to what they had left at the time for sale. These were all sold at reduced prices of 43/- and later at 34/- per piece.

10

In considering measure of damages, Swinfen Eady, J., in the case Leeds Forge Company Ltd. v. Deighton's Patent Flue Company 25 R.P.C., 209 at p.212 put the matter as follows:-

20

30

40

"In considering the question of the amount of damages, it must be borne in mind that the measure of damage is the loss which the plaintiffs have actually sustained as the natural and direct consequence of the defendants' acts; consequently, the damages will be the estimated loss of profit incurred by the plaintiffs by reason of the sale by the defendants of articles which infringe plaintiffs' patent, whether such loss of profit in respect of any flue is attributable to diminished profit obtained on articles manufactured by the plaintiffs or to the plaintiffs having lost all profits by reason of the defendants having made the articles. The burden is upon the plaintiffs to prove the damage they have sustained, and they can only recover upon the facts proved. What the plaintiffs actually claim is the amount of profit they would have made if they had sold, at their original prices, all the flues they did sell, and all the infringing flues sold by the defendants, after giving credit for the profit they actually made on the flues estimating the damages in a case of this kind, fair and just allowances must be made and many matters must be taken into consideration. Mathematical accuracy is absolutely impossible."

The evidence before the learned trial Judge conclusively established that about 2,000 pieces of the cloth imported by the plaintiffs were, after the defendants' infringement, sold at a reduced profit of 7/- per piece for a time and later at an

In the Federal  
Supreme Court  
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Judgment of  
Sir Adetokunbo  
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Justice.

8th March,  
1960  
- continued.

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of Nigeria

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No. 23

Judgment of  
Sir Adetokunbo  
Ademola,  
Federal Chief  
Justice.

8th March,  
1960

- continued.

actual loss of 1/- per piece until the plaintiffs had to close down. This amounts to roughly a loss of an amount between £1,000 to £1,300: added to this was the loss 15/- profit per piece on the 500 pieces sold by the defendants. This resulted in a loss of a total of £375. It would appear that taking all these into consideration the learned Judge has arrived at the figure of £2,000 which, in my view, appears, on the evidence before him, a fair assessment. But the copyright had another four years to run; then the plaintiffs are entitled to two renewals of 5 years each of their copyright. I would estimate the damages for the two 5 year period of renewal (10 years) at £500.

10

In conclusion, I reject the submission made by Counsel in the cross appeal that the plaintiffs are only entitled to nominal damages. I would therefore dismiss the damages awarded in favour of the plaintiffs as follows:-

£2,000 general damages as awarded by the learned trial Judge: £500 damages for the two 5 year period of renewal. Total: £2,500.

20

Costs to the appellants on the two appeals assessed at 80 guineas.

(Sgd.) A. Ade. Ademola  
CHIEF JUSTICE OF THE FEDERATION.

I concur. (Sgd.) L. N. Mbanefo.  
CHIEF JUSTICE, EASTERN REGION.

Mr. S.M. Bernstein (Mr. O. Moore with him) for appellants.

30

Mr. A.O. Bickersteth for respondents.

No. 24

No. 24

Judgment of  
Lionel Brett,  
Federal  
Justice.

JUDGMENT of LIONEL BRETT, Federal Justice.

(Chief Justice of the Federation delivered principal judgment).

8th March,  
1960.

I agree with the order proposed, but I should like to say a further word about the recovery of

damages in an action of this nature in Nigeria. Section 2 and 3 of the United Kingdom Designs (Protection) Ordinance (hereinafter referred to as the Ordinance) read as follows:-

In the Federal  
Supreme Court  
of Nigeria

-----  
No. 24

Judgment of  
Lionel Brett,  
Federal  
Justice.

8th March,  
1960  
- continued.

10 "2. Subject to the provisions of this Ordinance the registered proprietor of any design registered in the United Kingdom under the Patent and Designs Acts, 1907 to 1932, or any Act amending or substituted for those Acts shall enjoy in Nigeria the like privileges and rights as though the certificate of registration in the United Kingdom had been issued with an extension to Nigeria.

20 3. The registered proprietor of a design shall be entitled to recover any damages in respect of any infringement of copyright in a design from any defendant who proves that at the date of the infringement he was not aware nor had any reasonable means of making himself aware of the existence of the registration of the design:

Provided that nothing in this section shall affect any proceedings for an injunction."

30 It is agreed that the Registered Design Act, 1949, (hereinafter referred to as the Act) is an Act substituted for the Patents and Designs Acts, 1907 to 1932, and sections 2 and 3 of the Ordinance thus give Khawam the same privileges and rights in respect of his registered design as if the certificate of registration in the United Kingdom had been issued with an extension to Nigeria, but do not entitle him to recover damages from a defendant who proves the matters referred to in Section 3. What then, is the effect of Section 9 of the Act, which exempts an innocent infringer from liability for damages if he proves certain matters which are different from, but not inconsistent with, those set out in Section 3 of the Ordinance? If it is to be regarded as abating the privileges and rights conferred by registration, then in Nigeria it will afford a defence to a claim for damages additional to that afforded by Section 3 of the Ordinance. The right given by registration under the Act, is set out in general terms in Section 7 of the Act. It is there described basically as an exclusive right to

40

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Supreme Court  
of Nigeria

No. 24

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Lionel Brett,  
Federal  
Justice.

8th March,  
1960

- continued.

make or deal in various ways with any article in respect of which the design is registered. Neither that section nor any other lays down expressly what remedies for infringement of the right are to be available, but, as I have already said, Section 9 exempts an innocent infringer from liability for damages, while not affecting the power of the Court to grant an injunction.

When the Ordinance was enacted in 1936, Section 33 of the Patents and Design Act, 1907, contained provision in relation to patents similar to that contained in Section 3 of the Ordinance, but the corresponding provision relating to designs in Section 54(1)(b) of the Act was as follows:-

10

"54(1) Before delivery on sale of any articles to which a registered design has been applied, the proprietor shall -

.....  
(b) cause each such article to be marked with the prescribed mark, or with the prescribed words or figures, denoting that the design is registered; and if he fails to do so the proprietor shall not be entitled to recover any penalty or damages in respect of any infringement of his copyright in the design, unless he shows that he took all proper steps to ensure the marking of the article, or unless he shows that the infringement took place after the person guilty thereof knew, or had received notice of the existence of the copyright in the design."

20

30

If this applied in Nigeria, it is hard to see what room there could be for the application of Section 3 of the Ordinance, and I conclude that it was not intended that it should apply. This indicates that the expression "privileges and rights" in Section 2 of the Ordinance does not introduce the provisions of the U.K. Acts restricting the remedies for the breach of the basic rights, and I therefore conclude that a defence under Section 9 of the 1949 Act is not available in Nigeria.

40

Even if I am mistaken in this, I agree that a defence has not been made out either under the Ordinance or the Act. Chellarams have certainly

not proved that they had no reasonable means of making themselves aware of the existence of the registration of the design. They have an office in Manchester, and it has not been suggested that they could not have had a search made in the Manchester Registry, or that a search made in           revealed the existence of the registration. As to whether they have proved that they had no reasonable ground for supposing that the design had been registered, the evidence of their chief witness as to fact, Naraindas Ladharam, justified the finding of Coker, J., that "either the defendants are completely reckless or their office in Japan having seen the designs of the plaintiffs after the manufacture of Exhibit C decided to and did order for actual reproduction of the plaintiffs' design on cheaper material with inferior dye and with the avowed purpose of wrecking the market for the plaintiff". They have not, on either alternative, established a defence under Section 9 of the Act.

As regards the quantum of damages, I agree that Coker, J., applied a wrong principle in refusing to allow anything for the right of renewing the copyright for a further ten years. Even on the basis adopted by Coker, J., it may well be that other Judges would have awarded a larger sum, but I cannot say that on the evidence he made any other manifest error in principle. The Court may take judicial cognisance of the fact that fashions change in textile designs as in most other things, and no attempt was made to give any evidence of the life of a successful design in cotton piece-goods. I support the variation proposed.

(Sgd.) L. Brett.

FEDERAL JUSTICE.

In the Federal  
Supreme Court  
of Nigeria

—  
No. 24

Judgment of  
Lionel Brett,  
Federal  
Justice.

8th March,  
1960  
- continued.

In the Federal  
Supreme Court  
of Nigeria

No. 25

ORDER ON APPEAL

No. 25

IN THE FEDERAL SUPREME COURT OF NIGERIA

HOIDEN AT LAGOS

Order on  
Appeal.

8th March,  
1960.

Suit No. ID/302/1957  
F.S.C.125/1959

ON APPEAL AND CROSS APPEAL  
FROM THE JUDGMENT OF THE  
HIGH COURT OF LAGOS

BETWEEN:

10

JOHN KHALIL KHAWAM & COMPANY  
(John Khalil Khawam trading as)  
Plaintiffs/Applts./Respondents

- and -

K. CHELLARAM & SONS  
Defendants/Respondts./Appellants

(Sgd.) A. Ade Ademola  
CHIEF JUSTICE OF THE  
FEDERATION.

Tuesday the 8th day of March, 1960

UPON READING the Record of Appeal herein, and  
upon hearing Mr. S.N. Bernstein, Mr. O. Moore with  
him, of Counsel for the Appellants and Mr. A. O.  
Bickersteth of Counsel for the Respondents.

20

IT IS ORDERED -

1. that the case appeal be dismissed;
2. that the appeal be allowed by varying  
damages awarded in favour of the Plain-  
tiffs as follows:-
  1. \$2,000 general damages as awarded by  
the learned trial Judge;
  2. \$500 damages for the two 5 year period  
of renewal; and
  3. that the Respondents do pay to the  
Appellants costs in this Court assessed  
at 80 guineas.

30

(Sgd.) S.A. Samuel  
AG. CHIEF REGISTRAR.

No. 26

In the Federal  
Supreme Court  
of Nigeria

PLAINTIFFS' MOTION ON NOTICE

IN THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

F.S.C.125/1959

No. 26

Plaintiffs'  
Motion on  
Notice.

16th April,  
1960.

BETWEEN:

JOHN KHALIL KHAWAM AND COMPANY  
(John Khalil Khawam trading as)  
Plaintiff/Appellant

10

- and -

K. CHELLARAM & SONS (NIG.) LTD.  
Defendant/Respondent

MOTION ON NOTICE:

Pursuant to The Nigeria (Appeal to Privy Council)  
Order-in-Council, 1955

20

TAKE NOTICE that this Honourable Court will be moved on Monday the 23rd day of May, 1960 at the hour of 9 o'clock in the forenoon or soon thereafter as Counsel can be heard of the above-named applicant for an Order granting the applicant conditional leave of appeal to Her Majesty in Council against the judgment of the Federal Supreme Court of Nigeria delivered on the 8th day of March, 1960, and for such further or other Orders as this Honourable Court may deem fit to make in the circumstances.

Dated at Lagos, this 16th day of April, 1960.

(Sgd.) Irving & Bonnar

30

Messrs. Irving & Bonnar  
Applicant's Solicitors,  
11/17, Tinubu Street,  
Lagos.

Respondent's Address:-  
54, Marina,  
Lagos.

Mrs. N. Isikalu for the Applt.  
Mr. A.K.I. Nakanju holding brief for  
H.O. Davis.



In the Federal  
Supreme Court  
of Nigeria

No. 27

ORDER FOR CONDITIONAL LEAVE TO APPEAL TO  
PRIVY COUNCIL

No. 27

IN THE FEDERAL SUPREME COURT OF NIGERIA

Order for  
Conditional  
Leave to  
Appeal to  
Privy Council.

HOIDEN AT LAGOS

Suit No. ID/502/1957  
F.S.C.125/1959.

23rd May, 1960.

(L.S.)

APPLICATION for an Order  
for conditional Leave to  
appeal to Privy Council

10

BETWEEN:

JOHN KHALIL KHAWAM & COMPANY  
(John Khalil Khawam trading as)

Appellants

- and -

K. CHELLIARAM & SONS (NIG.) LTD.

Respondents

(Sgd.) A. Ade-Ademola  
CHIEF JUSTICE OF THE  
FEDERATION.

Monday the 23rd day of May, 1960.

UPON READING the Application herein and the  
Affidavit sworn to on the 16th day of April, 1960,  
filed on behalf of the Appellants, and after hear-  
ing Mrs.N. Isikalu of counsel for the Appellants  
and Mr. A.K.I. Makanju, holding Chief H.O. Davis'  
brief, of counsel for the Respondents:

20

IT IS ORDERED that the Appellants be at  
liberty to appeal to Her Majesty in Council from  
the judgment of this Court dated the 8th day of  
March, 1960, upon fulfilment within 3 months from  
the date hereof of the following conditions, namely:-

30

1. that the Appellants do enter into good and  
sufficient security to the satisfaction of  
the Court in the sum of £500 for the due  
prosecution of the appeal and the payment of  
all such costs as may become payable to the  
Respondents in the event of the Appellant's  
not obtaining an order granting them final  
leave to appeal, or of the appeal being

dismissed for non-prosecution, or of Her Majesty in Council ordering the Appellants to pay the Respondents' costs of the appeal (as the case may be);

In the Federal Supreme Court of Nigeria

No. 27

2. that the Appellants do deposit in Court the sum of £50 for the preparation of the record of appeal and do take all necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England:

Order for Conditional Leave to Appeal to Privy Council.

10

AND THAT the costs of this application, to be taxed, shall abide the result of the appeal to Her Majesty in Council.

23rd May, 1960  
- continued.

(Sgd.) S.A. Samuel  
AG. CHIEF REGISTRAR.

No. 28

No. 28

PLAINTIFFS' MOTION FOR FINAL LEAVE TO APPEAL TO PRIVY COUNCIL

Plaintiffs' Motion for final leave to appeal to Privy Council.

IN THE FEDERAL SUPREME COURT OF NIGERIA

25th August, 1960.

20

HOLDEN AT LAGOS

H.C.Appeal No.ID/302/57/FSC.125/59

BETWEEN:

JOHN K. KHAVAM & COMPANY Appellants

- and -

K. CHELLARAM & SONS (NIG.) LIMITED Respondents

MOTION ON NOTICE

TAKE NOTICE that the Court will be moved on Tuesday the 6th day of September, 1960 at 9 o'clock in the forenoon or so soon thereafter as Counsel can be heard by Counsel for the Appellants granting them Final leave to appeal to Her Majesty in Council or for such other Order or Orders as may be just.

30

Dated the 25th day of August, 1960.

(Sgd.) Irving & Bonnar  
Appellants Solicitors,  
11/17, Tinubu Street,  
Lagos.

For Service on the Defendant/Respondent.  
54, Marina, Lagos.

In the Federal  
Supreme Court  
of Nigeria

No. 29

ORDER FOR FINAL LEAVE TO APPEAL TO  
PRIVY COUNCIL

No. 29

IN THE FEDERAL SUPREME COURT OF NIGERIA

Order for  
final leave to  
Appeal to  
Privy Council.

HOIDEN AT LAGOS

6th September,  
1960.

Suit No. ID/302/57  
F.S.C.125/1959

(L.S.) APPLICATION for an order  
for final leave to appeal  
to Privy Council

10

BETWEEN:

JOHN KHALIL KHAWAM & CO.  
(trading as John Khalil Khawam) Applicant

- and -

K. CHELLARAM & SONS (NIG.) LTD. Respondent

(Sgd.) A. Ade. Ademola  
CHIEF JUSTICE OF THE  
FEDERATION.

Tuesday the 6th day of September, 1960

UPON READING the Application herein and the  
affidavit of the Applicant sworn to on the 2nd day  
of September, 1960, and after hearing Miss M. Grant  
(holding Mr. J.G. Bentley's brief) of counsel for  
the Applicant and Chief H.O. Davis Q.C., of counsel  
for the respondent:

20

IT IS ORDERED that final leave be granted to  
appeal to Privy Council.

(Sgd.) G.O. Sowemimo  
CHIEF REGISTRAR.

No. 30

PLAINTIFFS' MOTION FOR LEAVE TO VARY SECURITY

IN THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

H.C.Appeal No.ID/302/57  
F.S.C.No.125/1959

BETWEEN:

JOHN KHALIL KHAWAM & COMPANY Appellants

- and -

10 K. CHELLARAI & SONS (NIG.) LIMITED Respondents

MOTION ON NOTICE:

TAKE NOTICE that the Court will be moved on Wednesday the 11th day of January, 1961 at 9 o'clock in the forenoon or so soon thereafter as Counsel can be heard for the Appellants for an Order granting leave to vary the security provided by the Appellants upon leave being granted to appeal to Her Majesty in Council and for such other Order as may be just.

20 Dated the 25th day of November, 1960.

(Sgd.) Irving & Bonnar

APPELLANTS' SOLICITORS,  
11/17, Tinubu Street,  
Lagos.

For Service on the Respondents:

54, Marina,  
Lagos.

In the Federal  
Supreme Court  
of Nigeria

No. 30

Plaintiffs'  
Motion for  
leave to vary  
security.

25th November,  
1960.

In the Federal  
Supreme Court  
of Nigeria

No. 31

ORDER ON MOTION TO VARY SECURITY

No. 31

IN THE FEDERAL SUPREME COURT OF NIGERIA

Order on  
Motion to vary  
security.

HOLDEN AT LAGOS

11th January,  
1961.

Suit No. LD/302/1957  
F.S.C.No.125/1959

APPLICATION for an order granting  
leave to vary the security provided  
by the Appellants.

BETWEEN:

10

JOHN KHALIL KHAWAM & COMPANY

Applicants

- and -

K. CHELLARAM & SONS (NIG.) LIMITED Respondents

(Sgd.) L. Brett  
FEDERAL JUSTICE.

Wednesday the 11th day of January, 1961

UPON READING the Application herein and the  
Affidavit sworn to on the 26th day of November,  
1960, and after hearing Miss A. Maja of counsel for  
the Applicants and Mr. A.O. Bickersteth of counsel  
for the Respondents:

20

IT IS ORDERED that this application be dis-  
missed with 2 guineas costs.

(Sgd.) S.A. Samuel.  
for CHIEF REGISTRAR.

EXHIBITS

Exhibits

Exhibit A. - CERTIFICATE OF REGISTRATION of Design  
No. 459477 from Manchester Patent  
Office.

A.

Certificate of  
Registration of  
Design No.459477  
from Manchester  
Patent Office.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND  
AND THE ISLE OF MAN

4th January,  
1957.

(L.S.)

D. R. No. 1

REGISTERED DESIGNS ACT, 1949

CERTIFICATE OF REGISTRATION OF DESIGN

10

Number of Registration  
459477

This is to certify that, in pursuance of and  
subject to the provisions of the Registered Designs  
Act, 1949, the Design, of which a representation is  
annexed, has been registered in the name of

JOHN KHALIL KHAWAM TRADING AS JOHN KHALIL KHAWAM  
AND COMPANY

20

as of the 4th day of January, 1957.  
in respect of the application of such Design to  
Cotton piece goods.

J. L. GIRLING.  
Registrar.

Subject to the provisions of the Act and Rules  
copyright in this Design will subsist for five  
years from the above-mentioned date, and may be  
extended for further periods, each of five years.

The Manchester Branch of the Designs of the Patent  
Office

30

51, Regent House, Cannon Street,  
Manchester 4.

Exhibits

Exhibit F. - LETTER, Plaintiffs to Defendants.

F.

Letter,  
Plaintiffs to  
Defendants.

JOHN KHALIL KHAWAM  
ANTHONY KHAWAM

J.K. KHAWAM & COMPANY  
81, Lebanon Street, P.O. Box  
383, Ibadan.

26th November,  
1957.

26th November, 1957.

The Manager,  
Messrs. K. Chellaram & Sons (Nigeria) Limited,  
Marina, Lagos.

Dear Sir,

Infringement of my registered design No.459477

10

I refer to a letter dated the 24th of November, 1957, addressed to you by A. Lapade Obisesan, Barrister-at-Law, of Ile Aperin, Ibadan, delivered to you in Lagos on Monday the 25th of November, and to inform you that the said letter was written and delivered to you without my authority, knowledge or consent.

Mr. Obisesan is not acting for me in the above matter and he wrote without my authority. I therefore ask you to disregard his letter of the 24th of November, 1957.

20

My Solicitor in the above matter is Adedeji Okubadejo, of Co-operative Bank Building, Ibadan, from whom a letter is enclosed.

(Sgd.) J.K. Khawam

Your faithfully

C.G.A. LAPADE OBISESAN, Ile Aperin, P.O. BOX 192,  
Ibadan.

-----

Exhibit G. - LETTER, Adedeji Obubadejo to Defendants.

Exhibits

G.

ADEDEJI OKUBADEJO                      Co-operative Bank Building,  
Barrister-at-Law,                      P.O. Box 405  
Solicitor & Advocate of the              IBADAN, NIGERIA.  
Supreme Court of Nigeria.  
Telephone No.451 and 479.              26th November, 1957.

Letter, Adedeji  
Okubadejo to  
Defendants.  
26th November,  
1957.

Dear Sirs,

Infringement of registered design.

10 I have been instructed by Mr John Khalil  
Khawam trading as Messrs. John Khalil Khawam and  
Company to inform you that he is the proprietor of  
registered design No.459477 which is also register-  
ed in Japan as New Design 7140, and which is ident-  
ical to that on textile goods that you are marketing  
under the No. 714OR.

Your design 714OR is an obvious infringement  
of my client's registered design.

I must therefore ask that within the next 48  
hours:-

20 You execute the attached undertaking not to  
import or cause to be imported into Nigeria, sell  
or expose for sale, or cause to be sold, any tex-  
tile goods bearing my client's Registered design  
Nos.459477 and/or 7140 or an obvious or colourable  
imitation thereof,

You submit an account of all the sales and the pro-  
fits made by you and also a list of all goods

No.714OR that you have in stock and en route to  
Nigeria.

30 You pay to my client the sum of £50,000 damages,

You agree to publish in the Daily Times Newspaper  
an advertisement in the attached terms admitting  
the infringement and to pay the costs to such ad-  
vertisement

6. You pay my legal costs in this matter, which,  
if settled within the next 48 hours will not exceed  
twenty five guineas.



Exhibits

G.

Unless you do these things in the course of the next 48 hours, I shall immediately file a writ claiming

Letter, Adedeji Okubadejo to Defendants.  
26th November, 1957.  
- continued.

(a) An injunction restraining you, your servants, and agents from importing or causing to be imported into Nigeria, selling or exposing or causing to be sold or exposing for sale any textile goods bearing Registered Design Nos.459477 and/or 7140 and/or 7140R, the property of Mr. John Khalil Khawam trading as John Khalil Khawam and Company;

10

(b) Damages for the infringement by you of Mr. Khawam's registered design or an account of sales of all piece goods to which the said design or an obvious or colourable imitation thereof shall have been applied and of the profit made thereon;

(c) Delivery up for public destruction of all textile piece goods to which the said design or an obvious or colourable imitation thereof shall have been applied that are in the possession or under the control of yourselves, your servants or agents.

20

(d) Costs.

Yours faithfully,

(Sgd.) A. Okubadejo.

UNDERTAKING

We, MESSRS. K. CHELLARAM AND SONS LIMITED of Marina, Lagos, undertake not to import or cause to be imported into Nigeria, to sell or expose or cause to be sold, or expose for sale, any textile piece goods bearing Mr. John Khalil Khawam and Company's Registered Design No.459477 - New Design 7140 in Japan - or any goods which are an obvious or colourable imitation thereof.

30

ADVERTISEMENT for insertion in THE DAILY TIMES NEWSPAPER

We, MESSRS. K. CHELLARAM AND SONS LIMITED of Marina, Lagos admit that we have infringed Registered Design No.459477 - New Design 7140 in Japan - the property of Mr. John Khalil Khawam trading as

40

John Khalil Khawam and Company of 81, Lebanon Street, Ibadan, and we express our sincere regret for such infringement and have undertaken not to import or cause to be imported into Nigeria, or sell or expose or cause to be sold, or expose for sale, any textile piece goods bearing such registered marks or any goods which are an obvious or colourable imitation thereof.

Exhibits

G.

Letter, Adedeji Okubadejo to Defendants.

26th November, 1957

- continued.

10 Exhibit H. -- LETTER, H.O. Davies to Adedeji Okubadejo.

H.

Chief H.O. DAVIES, B. Com.  
(Lond.)  
Solicitor and Advocate  
of the Supreme Courts of  
Nigeria and the Ghana  
Notary Public.

OLA CHAMBERS,  
128/130, Broad St.  
Lagos, Nigeria  
West Africa.

28th November, 1957.

Letter, H.O. Davies to Adedeji Okubadejo.

28th November, 1957.

Please Quote:

Telephone: 23061

20 A. Okubadejo, Esq.,  
Barrister-at-Law,  
Co-operative Bank Building,  
P.O. Box 405,  
IBADAN.

Sir,

K. Chellaram & Sons (Nigeria) Ltd.,  
Alleged infringement of Trade Mark.

30 Your letter dated November 26, 1957 on the above subject, has been passed on to me by my client, K. Chellaram & Sons (Nigeria) Limited for necessary action.

At the moment, no one except your clients (and perhaps your goodself) has seen the design which they claim to have been infringed. Perhaps you will be good enough to send a sizeable cutting to me for expert comparison with my client's materials.

Until we have had the opportunity of such comparison and of an investigation into the whole

Exhibits

H.

matter, you can hardly expect my client to do any of the various things you listed in your letter under reference.

Letter, H.O.  
Davies to  
Adedeji  
Okubadejo.  
28th November,  
1957  
- continued.

Yours sincerely,  
(Sgd.) A.O. Bickersteth

for H.O. DAVIES  
Solicitor to K. Chellaram & Sons (Nig.) Ltd.

Hod/Bimpe

J.

Exhibit J. - LETTER, Adedeji Okubadejo to  
H.O. Davies

10

Letter, Adedeji  
Okubadejo to  
H.O. Davies.  
3rd December,  
1957.

ADEDEJI OKUBADEJO Co-operative Bank Building  
Barrister-at-Law P.O. Box 405  
Solicitor & Advocate of IBADAN, NIGERIA.  
the Supreme Court of  
Nigeria. 3rd December, 1957.  
Telephone No.451 and 479.

Dear Sir,

Mr. John Khalil Khawam trading as J.K. Khawam  
and Company: Infringement of his registered  
design by Messrs. K. Chellaram and Sons  
(Nigeria) Limited.

20

Thank you for your letter of the 28th November,  
1957, received by me at 4.15 p.m. this afternoon, in  
which you wish to see a "sizeable cutting" for ex-  
pert comparison with your client's material.

A cutting of sufficient size to identify that  
it is exactly the same design is attached to papers  
which have been filed in Court. If the Writ has not  
already been served on your clients, it will be  
served shortly, together with a specimen of the  
material.

30

Yours faithfully,  
(Sgd.) A. Okubadejo.

H.O. DAVIES Esq.,  
Ola Chambers,  
128/130, Broad Street,  
Lagos.

Exhibit K. - LETTER, The Gosho Company Limited  
to Plaintiffs

Exhibits

K

THE GOSHO COMPANY LTD.  
EXPORTERS-IMPORTERS AND WHOLESALERS  
C.P.O. Box 35  
No 11, 1-chome, Yokobou,  
Higashiku, Osaka.

Letter, The  
Gosho Company  
Limited to  
Plaintiffs.

Osaka 19th May, 1958.

19th May, 1958.

Our Ref. No.D-2673

10 Messrs. John Khalil Khawam & Co.,  
81, Lebanon Street,  
P.O. Box 383,  
Ibadan, Nigeria.

Dear Sirs,

Your letter of 3rd inst. We have received  
your letter dated 3rd inst., the contents of which  
have been carefully noted. We have also received  
a letter from Messrs. Gilbert J. McGaul & Co.,  
Lagos regarding your design No.7140.

20 We are very sorry that we are not in a position  
to submit to you or to any party any kind of certi-  
fying paper such as asked by you this time, as we  
ourselves do not want to have ourselves involved in  
any kind of court troubles.

We regret our inability of meeting with your  
request.

Yours faithfully,

The Gosho Co., Ltd.,

(Sgd.) -?

for Chief of Cotton Piece Goods  
Dept.

30 KY:MT.

cc.M/s G.J.McGaul, London  
-"- Hamburg  
-"- Lagos  
Gosho, London,  
Gosho, Hamburg.

Exhibits

Exhibit X3. - LETTER, The Gosho Company Ltd.  
to Defendants

X3.

Letter, The  
Gosho Company  
Ltd. to  
Defendants.  
26th February,  
1958.

THE GOSHO COMPANY LTD.  
EXPORTERS-IMPORTERS AND WHOLESALERS  
C.P.O. Box 35  
No. 11, 1-chome, Yokobou,  
Higashi-ku, Osaka.

Our Ref.No.D2696

Osaka 26th Feb., '58.

Messrs. Kishinchand Chellaram,  
Osaka, Japan.

10

Dear Sirs,

OM-36023; We beg to advise you that the design in dispute had been recorded as common design under No. OM-36023 on 8th September, 1956 by the Japan Colour Design Centre, which record is prior to the registration by Manchester Register.

We furthermore beg to inform you that no such arrangement is made between Manchester Register and the Japan Design Centre that the designs registered in Manchester are automatically forwarded to Japan for preventing the possible infringement.

20

Yours faithfully,

THE GOSHO CO., LTD.

(Sgd.) ?

for Chief of Cotton Price Goods.

YY/YK

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Exhibit O. - CONFIRMATION NOTE No.7818 (Amended)Exhibits

KISHINGHAND CHELLARAM

(Proprietors: CHELLSONS (N. AFRICA) LTD.)

GENERAL EXPORTERS &amp; IMPORTERS

No.40, 2 CHOME. MINAMI-HONMACHI, HIGASHIKU

P.O. BOX HIGASHI 46

OSAKA (JAPAN) 1st June, 1957.

O.

Confirmation  
Note No.7818  
(Amended)

1st June, 1957.

CONFIRMATION NOTE NO. 7818 (AMENDED)

Messrs. K. Chellaram &amp; Sons (Nigeria) Ltd. Lagos.

10 Dear Sirs,

We have the pleasure to confirm your esteemed order as hereunder:

COMMODITY: Cotton Crimped African Prints 40" X 10  
yds No.2210

QUALITY: 5 designs

QUANTITY: 38,000 yds.

PRICE: @ 27 per yd F.O.B.

DELIVERY: August '57

DESTINATION: Lagos

20 PACKING: Usual Export Case Packing.

AMOUNT: US.10, 260.00 (3,664-5-8)

PAYMENT: By Irrevocable Letter of Credit

Remarks:

Telegrams Exchanged (Yours: 27-5-57 via Hongkong  
(Ours:

Yours faithfully,

KISHINCHAND CHELLARAM

(PROPS: CHELLSONS (N. AFRICA) LTD.)

(Sgd.) ?

30 TERMS

1. Quantity:- Rejected Quantity will not be replaced.
  2. Grade:- A and B Grade same price.
  3. Payment:- Confirmed irrevocable banks letter of credit to be established immediately
  4. Delivery:- Not responsible for Late or Non
  5. All Contracts Subject to FORCE MAJEURE clause
  6. If you find herein anything not in order, please let us know immediately, if necessary, by cable.
-

ExhibitsExhibit 01. - CONFIRMATION NOTE (Original)

01.  
Confirmation  
Note  
(Original)  
1st June, 1957.

KISHINGHAND CHELLARAM  
(Proprietors: CHELLSONS (N. AFRICA) LTD.)  
GENERAL EXPORTERS & IMPORTERS  
No.40, 2-CHOME, MINAMI-HONMACHI, HIGASHIKU.  
P.O. BOX HIGASHI 46  
OSAKA (JAPAN) 1st June 1957.

## CONFIRMATION NOTE NO. 7818

Messrs. K. Chellaram & Sons (Nigeria) Ltd., Lagos.

Dear Sirs,

10

We have the pleasure to confirm your esteemed order as hereunder:

COMMODITY: Cotton Crimped African Prints 40" x 10  
yds.  
QUALITY: No.2210  
QUANTITY: 50,000 yds.  
PRICE: \$0 27 per yd F.O.B.  
DELIVER August '57  
DESTINATION: Lagos  
PACKING: Usual Export Case Packing.  
AMOUNT: US\$13,500.00 (£4,821-8-7)  
PAYMENT: By Irrevocable Letter of Credit  
REMARKS:  
Telegrams Exchanged ( Yours: 27-5-57 (Via Hongkong)  
( Ours:

20

Yours faithfully,  
KISCHINCHAND CHELLARAM  
(PROPS: CHELLSONS (N. AFRICA)  
LTD.  
(Sgd.) ?

30

TERMS

1. Quantity:- Rejected Quantity will not be replaced
2. Grade:- A and B Grade same price
3. Payment:- Confirmed irrevocable Banks letter of credit to be established immediately
4. Delivery:- Not responsible for Late or Non-Delivery due to unavoidable circumstances.
5. All Contracts Subject to FORCE MAJEURE clause
6. If you find herein anything not in order, please let us know immediately, if necessary, by cable.

40

Exhibit Q. - LETTER, A. Lapade Obisesan to  
Defendants

Exhibits

Q.

A. LAPADE OBISESAN  
SOLICITOR OF THE SUPREME COURT OF NIGERIA.

Letter,  
A. Lapade  
Obisesan to  
Defendants.  
24th November,  
1957.

A. Lapade Obisesan  
Barrister-at-Law

Ile Aperin,  
c/o P.O. Box 192,  
IBADAN.

Our Ref. ALO/  
Your Ref.

24th November, 1957.

10 The Manager,  
K. Chellaram & Sons (Nig.) Ltd.,  
Marina,  
Lagos.

Sir,

Design No. 714OR C/H 7818

20 It has just come to my client's notice (Messrs.  
J.K. Khawam & Company, Ibadan) that you have put  
into circulation a certain kind of texture under  
Registered design No.714OR C/H 7818 with the in-  
scription "Specially made for K. Chellaram & Sons  
(Nig.) Ltd. Lagos "Superior Quality Cotton Crimped  
Sheer Sucker 40 X 10 yds. Made in Japan Design  
No.714OR from my clients.

I am to inform you that my clients Messrs.J.K.  
Khawam & Co., of Ibadan are the registered owner of  
the design above referred to. You have taken upon  
yourself to use this design without any permission  
or consent from my clients.

30 TAKE NOTICE THEREFORE that if you fail to  
stop any further circulation of the said goods and  
withdraw those already in circulation within FORTY-  
EIGHT HOURS from the receipt of this letter, my  
instruction is to take a court action against you.

40 I am also asked to call on you to pay compensa-  
tion to my clients estimated at £10,000 being dam-  
age suffered by my clients as a result of your  
infringement of their design and also the loss  
caused by such circulation of an inferior imitation  
of my clients design at a cheaper price which has  
been detrimental to my client's trade.



Exhibits

Q.

Letter,  
A. Lapade  
Obisesan to  
Defendants.  
24th November,  
1957  
-- continued.

PLEASE note that unless I hear from you within  
FORTY-EIGHT HOURS of the receipt of this letter, I  
shall have no alternative but to institute action  
immediately against you without further notice from  
me.

Please, treat this matter with the utmost  
urgency as you must realise that passing off of  
goods is a heineous offence.

Yours faithfully,

(Sgd.) A. Lapade Obisesan  
A. LAPADE OBISESAN BL.,  
SOLICITOR.

10

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IN THE PRIVY COUNCIL

No. 26 of 1961

ON APPEAL  
FROM THE FEDERAL SUPREME COURT OF NIGERIA

---

B E T W E E N

JOHN KHALIL KHAWAM & COMPANY  
(JOHN KHALIL KHAWAM trading as)  
(Plaintiffs) Appellants

- and -

K. CHELLARAM & SONS (NIG.) LIMITED  
(Defendants) Respondents  
*(and Cross-Appeal Consolidated)*

R E C O R D    O F    P R O C E E D I N G S

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HALSEY, LIGHTLY & HEMSLEY,  
32, St. James's Place,  
London, S.W.1.  
Solicitors for the Appellants.