

~~11-2-62~~

Memorandum

(11/1962)

IN THE PRIVY COUNCIL

No. 71 of 1960

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

GOVINDJI POPATLAL (Defendant) Appellant

- and -

NATHOO VISANDJI (Plaintiff) Respondent

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON INSTITUTE OF ADVANCED LEGAL STUDIES 29 MAR 1963 25 RUSSELL SQUARE LONDON, W.C.1.

68160

T. L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Appellant.

KNAPP-FISHERS AND BLAKE & REDDEN,
31, Great Peter Street,
London, S.W.1.

Solicitors for the Respondent.

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N
GOVINDJI POPATLAL (Defendant) Appellant
- and -
NATHOO VISANDJI (Plaintiff) Respondent

RECORD OF PROCEEDINGS
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IN THE PRIVY COUNCIL

No. 71 of 1960

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

GOVINDJI POPATLAL (Defendant) Appellant

- and -

NATHOO VISANDJI (Plaintiff) Respondent

RECORD OF PROCEEDINGS

No. 1.

AMENDED PLAINT

In the Supreme Court of Kenya

No. 1.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO.363 of 1957

Amended Plaintiff.

NATHOO VISANDJEE Plaintiff

13th May, 1958.

versus

1. GOVINDJI POPATLAL and
2. THE STANDARD BANK OF SOUTH AFRICA LTD. Defendants

AMENDED PLAINT

20 1. The Plaintiff is a merchant ordinarily residing and working for gain at Nairobi and his address for service for the purposes of this suit is care of D.P. Khetani Esqr., Advocate, Hajee Mansion, Gulzaar Street, Post Office Box Number 7776, Nairobi.

30 2. The first named Defendant is an Indian Landowner and merchant ordinarily residing and working for gain at Nairobi and his address for service is care of G.R. Mandavia, Esqr., Advocate, Government Road, Nairobi. The second named Defendant is a Bank carrying on business at Nairobi and elsewhere and its address for service for the purposes of this suit is Delamere Avenue, Nairobi.

3. By a legal charge dated the 10th day of October, 1953, and registered in the Land Titles

In the Supreme
Court of Kenya

No. 1.

Amended Plaintiff.

13th May, 1958

- continued.

Registry (Inland District) at Nairobi as No.L.R.9955/4. One Hassanali Jamal Mohamed Manji, Sultanali Jamal Mohamed Manji, and Pyarali Jamal Mohamed Manji registered as proprietors as tenants-in-common in equal shares charged in favour of the Plaintiff ALL THAT piece of land situate in Nairobi Municipality (Bazaar) in the Nairobi District of the Colony of Kenya containing by measurement Nought decimal nought seven three four of an acre or thereabouts that is to say Land Reference Number 209/4339 which said piece of land with the dimensions and boundaries thereto is delineated on the plan annexed to the grant dated the 5th day of October 1953 (Registered as Number 9955/1 and more particularly on Land Survey Plan Number 52846 deposited in the Survey Record Office at Nairobi) together with all buildings and improvements being or erected thereon or thereafter to be erected thereon, which charge was for the better securing to the Plaintiff of the repayment by them of sum of Shs.200,000/- with interest thereon lent by the Plaintiff to them according to the terms and conditions recited in the said charge.

10

20

4. Under the terms of the said charge the said Hassanali Jamal Mohamed Manji were liable to pay interest at the rate of 12% per annum payable quarterly in advance on the first day of January, the first day of April, the first day of July, and the first day of October each year provided on punctual payment of interest quarterly in advance as aforesaid by them the rate of interest was to be paid at the reduced rate of 9% per annum.

30

5. Under Clause 3 of the said charge the said Chargors in addition to her obligations also agreed to insure against loss or damage by fire to the full insurable value which shall not be in any event less than the sum of Shs.200,000/- in an Insurance Company of repute and good standing to be approved of in writing by the Plaintiff in the joint names of the Plaintiff and the Chargors and deposit such insurance policy with the Plaintiff immediately after every such policy shall have been so effected and to pay punctually all premiums and money necessary for effecting and keeping up the said insurance when the same shall become due and to deliver forthwith the receipt for every such payment to the Plaintiff.

40

6. In Clause 8 of the said Charge it is specifically

provided that in the event of the Chargors making any default in the payment of interest or of the rents and outgoings or in performance or observance of any of the covenants or conditions therein contained or implied and on their part to be performed and observed it shall be lawful on the part of the Plaintiff to demand recover and enforce immediate payment of the said principal sum of Shs.200,000/- together with interest and all money that may be owing by them to the Plaintiff on this security which amount was otherwise on the full observance and performance of all conditions and covenants contained in the said Charge payable on or before the 31st day of October, 1957. The Plaintiff will rely at the time of hearing on the said Charge for full terms thereof.

In the Supreme
Court of Kenya

No. 1.

Amended Plaint.

13th May, 1958
- continued.

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7. On the 27th day of August, 1954 the said Sultanali Jamal Mohamed Manji sold and transferred his one-third undivided share in the said plot to one Jeshumati wife of Girdharlal Govindji Somaiya subject to the said Charge and registered in the Land Titles Registry (Inland District) Nairobi registered as L.R. 9951/10.

8. On the 30th November, 1956 the said Jashumati transferred her said one-third undivided share in the said plot to the first named Defendant subject to the said Charge and registered as No.I.R.9955/15 in Land Titles Registry (Inland District) Nairobi.

9. On or about 4th October, 1954 the said Pyarali Jamal Mohamed Manji sold and transferred his one-third undivided share in the said land to the first named Defendant subject to the said Charge and registered as No.I.R.9955/13 in Land Registry (Inland District) Nairobi.

10. On or about the 4th day of October 1954 the said Hassanali Jamal Mohamed Manji sold and transferred his said one-third undivided share in the said plot to the first named Defendant subject to the said Charge and registered as No.I.R.9955/12 in Land Registry (Inland District) Nairobi.

11. As stated in the preceding paragraphs the first named Defendant, thus, the sole proprietor of the whole of the said plot subject to the said Charge.

12. Under the terms of the said Charge the first named Defendant was liable to pay interest as stated

In the Supreme
Court of Kenya

No. 1.

Amended Plaintiff.

13th May, 1958

- continued.

in paragraph 4 of the Plaintiff and to insure against loss or damage by fire in addition to other obligations as stated in paragraph 5 of the Plaintiff.

13. In breach of Clause 2 of the said Charge the first named Defendant failed to pay interest on the said Shs.200,000/- for the first quarter which was payable in advance and which became due and payable by the first named Defendant to the Plaintiff on 1st January, 1957 and thereby committed breach of clause and/or obligation and/or covenant as stipulated in the said Charge. 10

14. In breach of Clause 3 of the said Charge the first named Defendant failed to insure against loss or damage by fire of the said premises as per specific terms contained therein and/or the first named Defendant failed to insure in the joint names of the Plaintiff and the first named Defendant in the Insurance Company approved by the Plaintiff as specified in the said clause and/or the first named Defendant failed to produce the receipt and/or deposit the Insurance Policy with the Plaintiff as required by the said clause under the said Charge. 20

15. The Plaintiff has demanded before filing of this suit repayment of the said loan of Shs.200,000/-, the sum of Shs.6,000/- for interest due on the first day of January, 1957 and Shs.814/50 being the amount of premium paid by the Plaintiff to the Insurance Company but, despite such demand, the first named Defendant has failed to pay the same or any part thereof. 30

15A.(1) On or about 2nd day of August 1956 the Plaintiff executed a Memorandum of Charge by Deposit of Title in respect of his interest in the said plot land Reference 209/4339 in favour of the Second Defendants to secure loans advanced or to be advanced to the Plaintiff by the Second Defendants and interest thereon which Charge was registered on the 2nd day of August 1956 in the Registry of Titles as No.9955/14. 40

(2) On the 1st day of January 1957 and at all times thereafter there was and has been no money or interest owing or due or any liability to the Second Defendants by the Plaintiff, all loans made to the Plaintiff by the Second Defendants and interest thereon having been fully paid and discharged

by the Plaintiff and accordingly the Second Defendants had as from not later than the 1st day of January 1957 and at all times thereafter no mortgage or charge on the said land or on the Plaintiff's interest therein and no right title or interest to or in the said land.

In the Supreme
Court of Kenya

—
No. 1.

Amended Plaintiff.

13th May, 1958
- continued.

10 (3) The Second Defendants accordingly on and before the 1st day of January 1957 and at all times thereafter were prepared on the Plaintiff's demand to execute a Discharge of their said Charge and such Discharge was duly executed on the 20th day of February 1958 and registered in the Registry of Titles on the 22nd day of February, 1958 as No.9955/16.

20 (4) The Second Defendants have been joined as proper or necessary parties to this suit and for the removal of any doubt and as they had in the Register of Titles on the day of the filing of this suit what appeared to be a charge or mortgage on or interest in the said land or in Plaintiff's interest therein though in fact and in law, there being no money owing or other liability to the Second Defendants secured at any time material to this suit. The Second Defendants had no such mortgage, charge or interest on or in the said land.

(5) No relief accordingly is sought by the Plaintiff against the Second Defendants.

16. The cause of action in this suit arose within the jurisdiction of this Honourable Court

30 The Plaintiff claims :-

(a) That the accounts be taken of what is due to the Plaintiff the First named Defendant for principal, interest, insurance and costs as at a date to be fixed by the Court and that amount shall carry interest at 12% per annum until realisation.

40 (b) That if the first named Defendant pays into Court the amount so found due to the Plaintiff on or before the said date, the Plaintiff do deliver to the first named Defendant or to such person as he appoints all documents in his possession or power relating to the said charged property and shall, if so required, re-transfer at the cost of the first named Defendant the said property to the first named Defendant or as he shall direct.

In the Supreme
Court of Kenya

No. 1.

Amended Plaintiff.

13th May, 1958

- continued.

- (c) That if the payment of the said sum be not made on or before such date as aforesaid the Charged property be sold and that the proceeds of the sale, after defraying all expenses of the said sale, be paid into Court and that the amount found due to the Plaintiff plus subsequent interest at the Charge rate and costs as may be allowed by the Court be paid to the Plaintiff and the balance, if any, paid to the first named Defendant. 10
- (d) That if the nett proceeds of the sale are insufficient to pay the amount so found due to the Plaintiff, and such subsequent interest and costs in full, the Plaintiff shall be at liberty to apply for a personal decree for the balance still outstanding together with costs and interest.
- (e) Such further and other relief as to this Honourable Court may deem fit. 20

DATED at Nairobi this 25th day of March, 1957.

Sgd. J.K. Winayak,
for KHETANI & WINAYAK
Advocates for the Plaintiff.

Filed by :-

Khetani & Winayak,
Advocates,
Duke House,
Duke Street,
P.O. Box 7776,
Nairobi. 30

To be served upon :-

Govindji Popatlal, Esqr.,
Mombasa House,
Stewart Street,
Nairobi.

Amended the 13th day of May, 1958 pursuant to the Order of the Court (the Honourable Mr. Justice Pelly Murphy) made on the 9th day of May, 1958. 40

Sgd. D.P. Khetani.
D.P. KHETANI
Advocate for the Plaintiff.

Filed by :-

D.P. Khetani,
Advocate,
Room No.27,
4th Floor, Kenya Chambers,
Victoria Street, Nairobi.

To be served upon :-

10 G.R. Mandavia, Esqr.,
Advocate,
Government Road, Nairobi
and
The Standard Bank of South Africa Ltd.,
Delamere Avenue, Nairobi.

In the Supreme
Court of Kenya

No. 1.
Amended Plaintiff.
13th May, 1958
- continued.

No. 2.

DEFENCE

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

CIVIL SUIT NO.363 of 1957

Nathoo Visandjee Plaintiff

20 versus

Govindji Popatlal Defendant

DEFENCE

THE DEFENDANT says that :-

1. The Plaintiff filed herein is misconceived and bad in law inasmuch as it discloses no cause of action against him.
 2. Without prejudice to the foregoing - he does not admit that the so-called 'legal' charge is legal or valid or conforms to the requirements of the law so as to create the security, as alleged in paragraph 3 of the plaintiff.
 3. In the further alternative, and without prejudice to the above - he does not admit being or having become liable to the Plaintiff either as alleged or otherwise as to matters pleaded in paragraphs 3 to 11 (both inclusive) of the Plaintiff, and will contend that in any case, the Plaintiff is bound by the terms of Clause 1 of the aforesaid so-called 'legal' charge (described in paragraph 3 of the Plaintiff), and will crave leave to refer to the said original document for its true terms and effect.
- 30
- 40

No. 2.
Defence.
23rd May, 1957.

In the Supreme
Court of Kenya

No. 2.

Defence.

23rd May, 1957
- continued.

4. With regard to its Clause 8, referred to in paragraph 6 of the Plaintiff, the Defendant does not admit that the Plaintiff has taken any requisite steps 'to demand recover and enforce' immediate payment of alleged principal, interest or other sums claimed in the Plaintiff or that the Plaintiff, has, by reason thereof, any cause of action herein.
5. Without prejudice to the foregoing - the Defendant admits the contents of paragraph 1 and 2 of the Plaintiff save that the Defendant's address for the purpose of this suit is care of G.R. Mandavia, Esq., Advocate, Africa House, Government Road, P.O. Box 759, Nairobi. 10
6. As to paragraphs 12, 13, 14 and 15 of the Plaintiff, the Defendant does not admit having incurred the alleged or any liability to the Plaintiff with regard to alleged matters of insurance or interest, and he denies the alleged or any claim or claims of the Plaintiff set out therein. 20
7. With regard to paragraph 16 of the Plaintiff, the Defendant denies the accrual to the Plaintiff of alleged or any cause of section either within or without the jurisdiction of this Honourable Court, and he does not admit that this Honourable Court has jurisdiction to grant any of the reliefs prayed for by the Plaintiff in this suit.

THEREFORE THE DEFENDANT PRAYS that the Plaintiff's suit herein be dismissed and that the Costs thereof be awarded to the Defendant. 30

DATED this 23rd day of May, 1957.

Sd. GOVINDJI POPATLAL
DEFENDANT

Filed by -

G.R. Mandavia,
Advocate for Defendant,
Nairobi.

No. 3.

REPLY TO DEFENCE

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 363 of 1957

Nathoo Visandjee

Plaintiff

versus

Govindji Popatlal

Defendant

In the Supreme
Court of Kenya

No. 3.

Reply to
Defence.

31st May, 1957.

REPLY TO DEFENCE

10 1. The Plaintiff joins issue with the Defendant on paragraphs 1, 2, 3, 4, 6 and 7 of the Defence.

20 2. With further reference to paragraph 3 of the Defence the Plaintiff states that the Defendant bought the property in question (land Reference No.209/4339) subject to the legal Charge and all conditions stipulations and covenants contained therein including all encumbrances leases etc. endorsed on the transfers. He further states that having given consent to the transfers and Defendant having paid interest up to and including 31st
30 December, 1956 on the principal amount from the respective dates of transfers in favour of the Defendant by the several persons as stated in paragraphs 3 to 11 of the Plaint as agreed under and by virtue of the legal Charge dated the 10th day of October, 1953, is estopped from denying his liability as to matters pleaded in the said paragraphs 3 to 11 (both inclusive) of the Plaint and further by complying with the terms and conditions thereof, the Defendant approbated and accepted the obligations created by the said legal Charge and to
40 all intents and purposes the Defendant considered and/or represented himself to be bound by the said legal Charge and the implications and consequence consisting therefrom.

DATED at Nairobi this 31st day of May, 1957.

Sgd.

for KHETANI & WINAYAK
ADVOCATES FOR THE PLAINTIFF.

Filed by:-

40 Khetani & Winayak,
Nairobi.

To be served upon:-

G.R. Mandavia, Esq.,
Nairobi.

In the Supreme
Court of Kenya

No. 4.

COURT NOTES

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 363 of 1957

No. 4.
Court Notes.
15th April,
1957.

Nathoo Visandjee

Plaintiff

versus

Govindji Popatlal

Defendant

15.4.57.

Defendant appears in person.

George Waddell,
Dy. Reg.

10

25th May, 1957.

25.5.57.

Defence filed by Mr.G.R.Mandavia, Advocate, Nairobi.

J. Chambers,
Dy. Reg.

31st May, 1957.

31.5.57.

Reply to Defence filed M/S Khetani and Winayak,
Advocates, Nairobi.J. Chambers,
Dy. Reg.

20

5th June, 1957.

5.6.57.

Salter for Plaintiff/Applicant.

Khetani with him.

Mandavia for Defendant/Respondent.

Order XL. Application to appoint Receiver of rents of building. Plaintiff is mortgagor since 10.10.53. Charge handed in for perusal. Mortgagors disposed of interest to Defendant. S.38 Cap.160. It is in dispute whether transferee Defendant is liable for debts of original 3 mortgagors Mortgage Deed has a clause for payment of rents to mortgagee. Rents Shs.3,000/- per month. Shs.6,814/50 due January 1955. Tillett v. Nixon, 1884, 25 Ch. 238.

30

Mandavia: Not just or convenient. Principle is to preserve property. Mischief must not be caused to Defendant. Indian Code of Civil Procedure. Rules of Supreme Court 1883 (and Book 1935 p.899).

(Mandavia does not offer any alternative form of security - in spite of suggestion that Court might accept payment of rents into Court). It is admitted that Defendant was formerly paying interest

40

after taking over mortgagor's interest. Mulla Transfer of Property Act 3rd Edition. 39 Indian Appeals p.7. Jamnadas v. Pandit Ram. Prytherch v. Williams (1889) 42 Ch.D. p.590. Mortgagor should not be given the expense of receivership. To appoint a receiver would be an abnormal exercise of Court's powers. Value of property is sufficient to cover about twice Plaintiff's claim.

In the Supreme Court of Kenya

No. 4.

Court Notes.

5th June, 1957
- continued.

Kinnaird v. Trollope (1888) 39 Ch.D. p.636.

10 Court: It is just and convenient to safeguard this property and to ensure that assets are not dissipated. I therefore make the order as prayed under Order XL Rule 1 for appointment of C.B. Mistri as Receiver. Costs reserved.

E.R. Harley, Ag.J.

Leave to Appeal.

E.R. Harley, Ag.J.

20 Application for stay pending formal application (Order XLI Rule 4(3)) allowed on condition that all rents due on April 1st 1957 and subsequent quarter days be paid into Court - amount due for April to be paid within 7 days from today and other payments of rent be paid into Court within 14 days after due date.

E.R. Harley, Ag.J.

Mandavia: May we pay Shs.9,000/- now and Shs.3,000/- on 1st July and subsequent quarter days.

30 Order: Order above in regard to payment of rents into Court will be considered satisfied provided Shs.9,000/- is paid into Court within 7 days from today and Shs.3,000/- is paid on or before 1st July and following quarter days.

E.R. Harley, Ag.J.

12.6.57.

12th June, 1957.

Shs.9,000/- paid into Court by the Defendant.

J. Chambers, Dy.Reg.

19.6.57.

19th June, 1957.

Mandavia for Applicant.

Khetani for Respondent.

40 Mandavia: Order VI Rule 8. Order VI Rule 17. Reply shows a new cause of action, by pleading estoppel. A new ground of claim.

In the Supreme
Court of Kenya

No. 4.

Court Notes.

19th June, 1957
- continued.

Court: I do not think that the reply constitutes a new ground of claim. It is doubtful whether estoppel ever has to be pleaded at all, but I do not think that raising such a ground prejudices or embarrasses the trial. The application is dismissed. Costs in the cause.

E.R. Harley, Ag.J.

6.7.57.

6th July, 1957.

Mr.D.P.Khetani is now acting for the Plaintiff in place of M/s Khetani and Winayak, Advocates, Nairobi.

10

J. Chambers,
Dy. Reg.

16th July, 1957.

16.7.57.

Khetani for Plaintiff.

Desai for Mandavia - Defendant.

By consent hearing fixed for 4th and 5th December, 1957, 10.30 a.m.

J. Chambers,
Dy. Reg.

20

23rd August,
1957.

23.8.57.

Khetani for Plaintiff.

Mandavia gave notice of his approval of the terms of the Order on 22.8.57. Order as drawn acceptable. Costs of this mention to Advocate for Plaintiff, i.e. Shs.15/-.

J. Chambers,
Dy. Reg.

Note: Case was mentioned before me because Mr. Khetani was unable despite several attempts to obtain Mandavia's approval of the draft order.

30

J. Chambers,
Dy. Reg.

15th November,
1957.

15.11.57.

Call over.

Khetani.

No appearance for Mandavia.

Case cannot be reached on 4th and 5th December. Taken out of the list. If C.C. 1300/56 is settled Mr. Khetani may renew his application for reinstating the case on the list.

40

J. Chambers,
Dy. Reg.

	11.12.57.	In the Supreme Court of Kenya
	Khetani.	No. 4.
	Question of a date of hearing urgent. 15.11.57 case was taken out of the list by the Court. Mention at the call over on 13.12.57, 2.30 p.m. Mr. Khetani to warn Mr. Mandavia.	Court Notes - continued.
	Dy.Reg.	11th December, 1957.
	13.12.57.	13th December, 1957.
10	Call over, 2.30 p.m.	
	Khetani.	
	Mandavia absent.	
	This case is not in the typed cause list which was prepared on 3.12.57. See last order.	
	Khetani reads letter he has received from Mandavia.	
	Mention before me on a suitable date. Notice to issue to both sides.	
	J. Chambers, Dy. Reg.	
20	18.12.57.	18th December, 1957.
	Khetani for Plaintiff.	
	Mandavia for Defendant.	
	Hearing fixed for 27th January 1958. To be called over 20th January 1958.	
	J. Chambers, Dy. Reg.	
30	3.1.58.	3rd January, 1958.
	Shillings 3,000/- deposited by Mr. G.R. Mandavia, Advocate, Nairobi.	
	J. Chambers, Dy. Reg.	
20.1.58.	Call over.	20th January, 1958.
	Parikh for Khetani.	
	No appearance for Mandavia.	
	Case fixed for 27.1.58 but will be taken subject to part-heard cases and a Judge being available to hear it.	
	B.R.Miles, J.	

In the Supreme
Court of Kenya

No.4.

Court Notes
- continued.

7th February,
1958.

20th February,
1958.

7.2.58.

Khetani for Plaintiff.

G.B. Desai for Mandavia - Defendant.

By consent, hearing fixed for 20.2.58, 10.30. 3rd
in list. Parties say the case should not occupy
more than half a day.

J. Chambers,
Dy. Reg.

20.2.58. 10.30 a.m.

Nazareth (with him Khetani) for Plaintiff.

10

Mandavia for Defendant.

Nazareth: Plaintiff. Defendant became sole owner of
property subject to a charge in favour of Plain-
tiff created by Defendant's predecessors in title.
When suit filed whole of property and interest had
become due. Paragraphs 4 and 6 of Plaintiff. Para-
graphs 13 and 15 of Plaintiff. Defence. Paragraph
6. Plaintiff is not seeking a personal decree.
Prayer (d) in Plaintiff will not be proceeded with.
Receiver was appointed on application of Plaintiff. 20
The Plaintiff (chargee) before the suit was filed
had charged his interest in favour of the Standard
Bank of South Africa. Standard Bank have signed a
discharge - not yet registered - it will be.

Counsel having failed to agree on issues I frame
the following -

1. Is the document of charge relied on by the
Plaintiff validly executed and registered.
2. Had the Plaintiff's right to bring the action
accrued when this suit was instituted. 30
3. Has the Plaintiff demanded payment so as to
acquire the right to sue.
4. Does the charge executed by the Plaintiff in
favour of the Standard Bank of South Africa Limited
affect his rights in the present proceedings.
5. What relief, if any, is the Plaintiff entitled
to.

Nazareth: In view of issue No.4, applies for ad-
journment with view to joining Standard Bank or
registering discharge. 40

Mandavia: No objection to adjournment on terms.

Order: Case adjourned. Costs of today to be
Defendant's in any event.

J.Pelly Murphy, J.

11.4.58.

Pay out Shs.36,000/- to Mr.D.P.Khetani, Advocate,
Nairobi.

J. Chambers,
Dy. Reg.

In the Supreme
Court of Kenya

No. 4.

Court Notes
- continued.

11th April, 1958

9th May, 1958.

9.5.58.

Nazareth (with him Khetani) for Applicant.

Mandavia for Defendant/Respondent.

10 Nazareth: Application to join Standard Bank of South Africa and to amend Plaint. Standard Bank appeared to have charged but charge not registered. Charge not then registered. Registered two days later.

Mandavia: Steps being taken by Plaintiff would highly prejudice Defendant's rights. Plaint filed on 25.3.57. Proposed amended Plaint, paragraph 15A shows cause of action in April 1958 (page 5). Submits:-

20 1. Would be highly prejudicial to allow Plaintiff to amend Plaint to defeat Defence available to Defendant today.

2. It is not permissible to bring in the Standard Bank as Defendants on averments made in Affidavit in support of motion. As to 1 - proposed paragraph 15A of Plaint - averments of facts which have happened since filing of suit. 15A(1) document of charge is on record - put in on 5.6.57. Governed by Registration of Titles Ordinance. Registered 9953/4. Cap.160. Section 67(3). Section 68 - charge by deposit may be discharged only.

30 At date of institution of these proceedings Standard Bank were only people who could have been Plaintiffs. Transfer of Property Act Section 58. Gour Vol. II (6th Edition) paragraph 1399, paragraph 1493. Amended Plaint paragraph 15A(3) - date 22.2.58. Civil Procedure Rules Order VIII Rule 16. Standard Bank should have been Plaintiff because they owed the entire interest. Amended Plaint paragraph 15A(4) - new case now made out did not exist in March 1957. National Provincial Bank v. Gaunt (1942) 2 All E.R. 112 at p.116. Transfer of Property Act, Section 85, Section 104. Rules of Court (Mortgage Suits) Kenya Vol.V page 506. Civil Procedure Ordinance Section 3, Section 89. Order 1 Rule 10 - would not object to mere joinder of Standard Bank but objects to amendment. Chitale - Code of Civil Procedure. Order 34 Rule 1, Rule 19 - effect of non-joinder.

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In the Supreme Court of Kenya

No. 4.

Court Notes.

9th May, 1958
- continued.

Nazareth: Rule empowers Court to add any necessary part to determine. Defendant had mortgaged his property to Plaintiff. Plaintiff in turn had executed an equitable mortgage in favour of Bank. Plaintiff had not surrendered his whole interest. Plaintiff had an interest in property. Plaintiff asked for sale of property. Is Defendant prejudiced? Are Plaintiffs bringing in a cause of action which he had not when suit instituted. Pleading of facts now sought to be put in Plaint (February 1958) cannot embarrass Defendant.

10

Order: I do not see how either the joinder prayed for or the amendment of the Plaint prayed for can embarrass or prejudice the Defendant. I consider that both are desirable so that the real issue in this case may be determined. I therefore make the order prayed for subject to the date of the amended Plaint being altered to the date of the original Plaint as is usual. Costs of this application reserved.

20

J. Pelly Murphy, J.

Mandavia: Applies for leave to appeal.

Order: I refuse leave to appeal.

J. Pelly Murphy, J.

1st April, 1958. 1.4.58.

Shs.18,000/- deposited by the Defendant, Govindji Papatlal.

J. Chambers,
Dy. Reg.

23rd May, 1958. 23.5.58.

Standard Bank of South Africa Limited, the 2nd Defendant, appears by M/S H.H. and Mathews, Advocates, Nairobi.

P. Heim, Dy. Reg.

30

11th June, 1958. 11.6.58.

Defence of the 2nd Defendants filed by M/S H.H. and Mathews, Advocates, Nairobi.

P. Heim, Dy. Reg.

16th June, 1958. 16.6.58.

Khetani.

Desai for Mandavia - Defendant.

Nausaria for H.H. and Mathews for Standard Bank of South Africa.

By consent, hearing fixed for 4.12.58 and 5.12.58, 10.30.

P. Heim, Dy. Reg.

40

14.11.58.

Call over.

Before Templeton, J.

Mr. Pattni for D.P. Khetani.

Case confirmed for December 4th and 5th.

S.L. Dhir,
Court Clerk.

In the Supreme
Court of Kenya

No. 4.

Court Notes
- continued.

14th November,
1958.

4.12.58.

Nazareth for Plaintiff with him Khetani.

10 Mandavia for Defendant No.1.

O'Connor for Defendant No.2.

4th December,
1958.

Nazareth: O'Connor against whose client no relief claimed, asks that question of his costs be dealt with first.

20 Nazareth: 2nd Defendant knew from Plaintiff that no relief has been claimed against him consequently unnecessary for him to come to Court at all. Hence Plaintiff should not receive costs. At time when suit filed there was on Registry of Titles a charge of which 2nd Defendant was registered owner. Suit filed in March 1957, but Plaintiff had returned to Defendant No.2 the full amount of debt secured by the charge. Existence of charge not disclosed before 1st hearing. Have just been instructed that Plaintiff had returned to Defendant No.2 the full amount of debt secured by the charge. Existence of charge not disclosed before 1st hearing. Have just been instructed that Plaintiff is prepared to pay

30 Shs.500/- to 2nd Defendant as agreed costs to 2nd Defendant without prejudice to his right to recover such sum from 1st Defendant if he succeeds in suit.

Mandavia: Have nothing to say.

O'Connor: Prepared to accept.

Order by consent: 1st Plaintiff to pay Shs.500/- to 2nd Defendant in respect of agreed costs. Plaintiff to have no recourse to 1st Defendant in respect of costs paid by Plaintiff to 2nd Defendant in event of Plaintiff being successful in this suit.

Henry Mayers, J.

40 O'Connor withdraws.

Nazareth: This is suit for sale of mortgage property. Only matter which might have caused difficulty was whether Plaintiff was entitled to personal

In the Supreme
Court of Kenya

No. 4.
Court Notes.
4th December,
1958
- continued.

decree against 1st Defendant in event of proceeds of sale proving insufficient to satisfy debt and costs. Not seeking a personal decree now.

Defence is extremely vague. On occasion of last hearing an attempt made to frame issues. Parties not having succeeded - Court framed issues (p.10 of record). Reads issues framed by Pelly Murphy J. 2nd issue would have been better framed "Is the Plaintiff's suit maintainable" because subsequently the Plaintiff was amended. 3rd issue should be better framed "If demand is necessary before right to payment accrues is necessary - has Plaintiff made such demand". Reason for denying this issue to be amended is that Plaintiff does not admit that any demand was necessary. 4th issue was not before Court at time when it was framed; in view of the amended Plaintiff the 4th issue should now be "Does the charge executed in favour of Standard Bank and the subsequent discharge thereof affect the right of Plaintiff in present proceedings". 5th issue is what relief is the Plaintiff entitled to. No need for asking this.

10

20

Mandavia: Defence is a general denial - do not object therefore to proposed amendments of issues.

Court: In the light of the observations of Mr. Nazareth and of the filing of the amended Plaintiff I hereby amend the issues framed by Pelly Murphy J. on 20.2.58 as follows :-

(a) By the deletion of the 2nd issue so framed and the substitution thereof of the following issue as the 2nd issue "Is the Plaintiff's suit maintainable".

30

(b) By the deletion of the 3rd issue so framed and the substitution of the following issues as the 3rd and 4th issues.

3. Is a demand for payment a condition precedent to the accrual to the Plaintiff of a right to sue.

4. If the answer to the question posed in issue 3 is in the affirmative, that the Plaintiff made such demand before the institution of the proceedings.

40

(c) By re-numbering the 4th and 5th issues so framed as to 5th and 6th issues.

(d) By substituting for the 5th issue so framed, as re-numbered, the following issue:

5. Does the charge executed in favour of Standard Bank of South Africa and the subsequent discharge thereof affect the right of the parties in the present proceedings.

Henry Mayers, J.
4.12.58.

In the Supreme
Court of Kenya

No. 4.

Court Notes.

4th December,
1958

- continued.

10 Nazareth continues: Originally land subject of this charge, belonged to several parties. They executed the charge. Subsequently they severally transferred their interests to 1st Defendant who himself was not made a party to the charge. Thereafter in July 1956 Plaintiff created an equitable charge over the land by deposit of documents with 2nd Defendant - this equitable charge was made on 7th August 1956. Amount due to 2nd Defendant was discharged on 28th November 1956. But by oversight no discharge was then executed. No further moneys have become payable to Defendant No.2 by Plaintiff. On discovery on 20.2.58 that charge in favour of Bank had never been discharged, proceedings were adjourned and on 25th February 1958 that charge was discharged. Leave then obtained to amend by joining Bank as 2nd Defendant. Amended Plaint filed. 2nd Defendant (Bank) filed defence - alleging repayment of all money in November 1956 and executed discharge on 20th February 1958. Desire to amend paragraph (15(a) of amended Plaint, 1) the date "2nd August" in that paragraph is wrong, should be "24th July 1956". 2) the date 30th October 1953 should be 2nd August 1956. 3) the number 9955/3 should be 9955/14.

20

30

Mandavia: Do not oppose.

Order: Leave to amend as prayed.

Henry Mayers, J.

40 Nazareth: As regards 1st issue do not know on what grounds registration of charge is challenged - but propose to put in document. Registration is conclusive under Registration of Titles Ordinance Cap. 160 S.32. As regards 2nd issue - do not know what defence contention is but Plaintiff submits that at material time no debt owing to 2nd Defendant and therefore 2nd Defendant had no right in the matter. Alternatively, even if Standard Bank had seemingly at commencement of proceedings the right of Bank even as equitable mortgagee not owner of charge. Hence Plaintiff had a right of action. The amendment of Plaint by joining 2nd Defendant cures any defect

In the Supreme
Court of Kenya

No. 4.

Court Notes.

4th December,
1958

- continued.

in original proceedings. As regards 3rd issue - no provision in charge for previous demand as it says if default, mortgagee may demand, sue for and recover. Alternatively if demand before action necessary, action itself the demand - vide provisions re pro notes. As regards issues 5 and 6 - there was nothing owing to Bank when suit brought and charge in favour of Bank has no effect. Paragraph (d) of prayer for relief - is abandoned but will of course ask for personal order for costs. 10

Plaintiff's
Evidence.

No. 5.

Nathoo
Visandjee.

Examination.

PLAINTIFF'S EVIDENCE

No. 5.

NATHOO VISANDJEE

NATHOO VISANDJEE sworn :-

Plaintiff. In 1953 I advanced Shs.200,000/- (Two hundred thousand) to 4 brothers named Manji. I produce the charge dated 10th October 1953 under which I lent the money - Exhibit 1. Exhibit 1 was duly registered in Registry of Titles. The borrowers handed to me this Certificate of Title, Exhibit 2. My charge is endorsed on Exhibit 2 as Memorial No.4 on 30th October 1953. Subsequent to registration of my charge, borrowers from time to time transferred their interest to other persons. The transfers are endorsed on Exhibit 2. Some of transfers are to debt in 1954. After interests of borrowers were paid to 1st Defendant, 1st Defendant paid interest to me through his Advocate Mr. Shah up to end of 1956 in accordance with the prescribed instalments. Interest was payable under the charge quarterly in advance. 1st Defendant paid quarterly in advance to end of 1956. Instalment fell due on 1st January 1957. Defendant did not pay that instalment. Charge also provided for insurance of property by borrower. In 1957 I had to insure property myself. 9th February 1957 the premium for insurance was unpaid. My advocates wrote to 1st Defendant the letter, a copy of which is now shown me, dated 9th February 1957. 20 30 40

Court: Has notice to produce been served?

Nazareth: Yes.

Copy letter tendered marked Exhibit 3.
(Mandavia does not object).

In the Supreme
Court of Kenya

Plaintiff's
Evidence.

No. 5.

Nathoo
Visandjee.

Examination
- continued.

I received no reply to Exhibit 3. Subsequently my advocate sent to 1st Defendant the two letters now shown me dated 11th February 1957 and 23rd February 1957 - tendered Exhibits 4 and 5. (Mandavia does not object). Before sending Exhibit 5 to 1st Defendant, I had paid the premium to Insurance Company. Premium was Shs.814/- cents.50. I produce them marked Exhibit 6. I received no reply to Exhibit 5. On 6th March 1957 I sent to 1st Defendant the letter now shown me tendered Exhibit 7. (Mandavia does not object). 1st Defendant paid nothing after my letter of 6th March, Exhibit 7. Suit filed on 25th March. At that date there was owing to me amount of insurance premium, interest which fell due 1st January 1957 and the principal sum. On 24th July 1956 I deposited my document of title with Standard Ba. - the charge in favour of Bank is shown on Exhibit 2 as Memorial 14. That charge was to secure money lent or to be lent to me by the Bank. I executed this usual Memorial of charge in respect of advance by Bank. All sums advanced to me by Bank were repaid by 28th November 1956. I borrowed nothing more from the Bank after 28th November 1956. I deposited my documents with Bank

Q. What you executed on 24th July was it a Memorial of charge by deposit of title deeds?

A. I executed the Memorial of charge by way of deposit of title deeds. This suit came on for hearing on 20th February 1958. On that date Bank executed a Memorial of discharge. That discharge is recorded on Exhibit 2 as Memorial No.16, dated 22nd February 1958. I have not been paid the principal of Shs.200,000/-. Have not been paid insurance premium which I paid. Have not been paid interest which fell due on 1st January 1957. In June 1957 I received interest paid through the Court. A receiver was appointed. After suit filed Defendant paid money into Court. Interest was paid on condition of staying appointment of receiver.

Cross-Examination: None.

In the Supreme Court of Kenya

No. 6.
COURT NOTES

No. 6.
Court Notes.
4th December, 1958.

Nazareth: Must ask for short adjournment to ask Bank to produce charge and discharge.

Mandavia: If they are in word form "I will concede them".

Nazareth: They are in form V and form V of Schedule to Registration of Titles Ordinance.

Mandavia: I admit them if they are a prepared form.

10

Court: I think that time will, in the long run, be saved by my adjourning now. Court will resume at 2.15.

Henry Mayers, J.

Plaintiff's Evidence.

No. 7.
FRANCO FERNANDEZ

No. 7.
Franco Fernandex.
Examination.

2.15. Appearance as before.

P.W.2. FRANCO FERNANDEZ, sworn :-

Clerk Land Registry. Have with me file re Title I.R. 995 re Plot 209/4339. Amongst documents in file is document No.14 which is Memorial of charge by deposit of title deeds. I produce it - tendered Exhibit 8. (Mandavia sees Exhibit 8).

20

Court: Subject to any objection which Mr.Mandavia may make I propose to return Exhibit 8 to Mr. Fernandez forthwith.

Mandavia: If Exhibit 8 is to be released as it is a public document, a certified copy should be placed in the Court file as Exhibit.

Nazareth: What is the only variation between Exhibit 8 and the printed charge in form V?

30

A. The insertion after the word charge of the words "our chargee's interest". In L.R. file already referred to there is document No.16. I produce it. It is a discharge of the charge created by Exhibit 8. It is in same form as form V under Registration of Titles Ordinance. I produce the discharge Exhibit 9. Exhibit 9 is registered in Registry of Titles as 9955/16. (Mandavia looks at Exhibit 9). Exhibit 8 is executed by Plaintiff.

40

Exhibit 9 is executed by Standard Bank of South Africa. I look at Memorial 16 and 14 on Exhibit 2. They are memorials of registration of Exhibits 8 and 9.

In the Supreme Court of Kenya

Plaintiff's Evidence.

Cross-Examined:

No.7.

10 I again look at Exhibit 2. Between Memorial 14 and 16 I find it is a transfer to Govindji Popatlal (Defendant) of 1/3 interest share. Memorial 12. Memorials 12 and 13 are also transfers to Defendant of 1/3 interest shares. I produce photostat copies of the transfers which are Memorials 12, 13 and 15 - tendered Exhibits A, B and C. (Memorials 12, 13 and 15 respectively dated 6.10.54, 6.10.54 and 5.12.56).

Franco Fernandez.

Examination - continued.

Cross-Examination.

No re-examination.

No. 8.

No. 8.

ROGER VYVE GEORGE GOODALE

Roger Vyve George Goodale.

P.W.3. ROGER VYVE GEORGE GOODALE, sworn :-

20 Clerk, Standard Bank of South Africa, Delamere Avenue Branch. I look at Exhibits 8 and 9. Exhibit 8 is a charge executed by Plaintiff in favour of Standard Bank - it was given for facilities re overdraft which we gave to Plaintiff. It was executed on 24th July 1956. Pursuant to charge overdraft facilities were given to Plaintiff. Plaintiff repaid all moneys advanced by Bank by 28th November 1956. Since then he has not been indebted to the Bank at all. Bank would, if asked, have signed a Memorial of discharge at any time subsequent to 28th November 1956. On 20th February 1958 Bank was asked to sign a Memorial of Discharge. Bank did so. Exhibit 9 is the Memorial of discharge. Between 28th November 1956 and 20th February 1958 no request was made for discharge.

Examination.

Cross-Examined :

30 I was in the Bank when Exhibit 8 was given. At that time arrangements were made for Plaintiff to have an overdraft. So far as I know those arrangements were never renewed. Those arrangements were brought to an end by the account being in credit again. So far as I know Bank never wrote to

Cross-Examination.

In the Supreme
Court of Kenya

Plaintiff's
Evidence.

No. 8.

Roger Vyve
George Goodale.

Cross-
Examination
- continued.

Re-Examination.

Plaintiff terminating those arrangements before 20th February 1958. Cannot say if original arrangements were in writing or not.

Re-Examined:

Once account came into credit I would order fresh arrangements to be made re any further overdraft. Reason why I say that, is that it is not practice of Bank to discharge a charge until we are asked to do so. If a customer desires fresh facilities for an overdraft I would order fresh arrangements to be made.

10

Case.

No. 9.

Court Notes.

4th December,
1958.

No. 9.

COURT NOTES

Mandavia: Defendant does not wish to lead any evidence.

Court to Mandavia: Put you to your election whether to call evidence or not.

Mandavia: Rely on Order XVII Rule 2(3). "I announce that defence does not propose to lead any evidence". Counsel for Plaintiff to address.

20

Court: Mr. Nazareth do you desire to say anything?

Nazareth: As defence has not indicated clearly where it stands I will have to address at length.

Court: I am not calling on you now to address Mr. Nazareth, I am merely enquiring whether you have anything to say in reply to Mr. Mandavia's submission.

Nazareth: Rule referred to by Mandavia has long been amended - have not amended copy here.

30

Court directs that an amended copy of Rules of Supreme Court be obtained from Library. Court Clerk returns with Library copy which he says he is informed contains recent amendments.

Court to Nazareth: The copy now handed to me contains no amendment to Rule (3).

Nazareth: (After reading Rule). Do not think I can dispute it, it is for me to address in view of terms of rule, but I thought it had been amended.

Court: Possibly you are thinking of a practice note re the application of the rule which was issued some time ago.

Mandavia: If rule has been amended I have no knowledge of it. The onus has always been on the Plaintiff to prove his case - time he should begin.

RULING.

The answer to Mr. Mandavia's contention that it is for the Plaintiff now to address the Court, is, I think, manifest for the careful consideration of the first 3 lines of Order XVII Rule 2(3). Those lines are "After the party beginning has produced his evidence then if the other party has not produced evidence and announces that he does not propose to produce evidence" the phraseology of this rule seems to me to establish beyond argument that its application is dependant on the concurrence of 3 distinct factors. These factors being :-

- 10 a) That the party beginning has produced his evidence, that is to say, the totality of the evidence upon which he intends to rely.
- 20 b) That the other party has not produced any evidence.
- c) That the other party announces that he does not propose to produce evidence.

The very fact that the rule makes provision for both b) and c) of the above factors, is indicative of the possibility that a party may have produced evidence before the time comes when he has the opportunity of announcing whether he does or does not intend to produce evidence. In this connection it should be observed that the rule refers to producing evidence, not to the calling of witnesses. A document when properly tendered in the course of proceedings is just as much evidence as is the oral testimony of witnesses. In the course of cross-examining Mr. Fernandez, Mr. Mandavia asked him if the file from which he, Mr. Fernandez, had previously extracted Exhibits 8 and 9 did not also contain certain other documents, to which Mr. Mandavia referred specifically. On Mr. Fernandez replying in the affirmative Mr. Mandavia asked him to produce them and tendered them as Exhibits A, B and C. Consequently in my view the defence has produced evidence and has thereby lost the right which otherwise they would have had under Order XVII Rule 2(3).

In the Supreme Court of Kenya

No. 9.

Court Notes.

4th December, 1958.

- continued.

In the Supreme Court of Kenya

No. 9.

Court Notes.

4th December, 1958

- continued.

The provisions of Order XXVI Rule 36 of the Rules of Supreme Court (England) differ too materially from the local rules to afford any assistance in the instant case. But authority for my conclusion can be found by the analogy of the position which prescribed in Criminal Proceedings prior to 1958 where the tendering of a document on behalf of an accused person who called no evidence, was clearly sufficient to confer on the Crown a right of reply - a position which was altered by a special provision in the Criminal Justice Act, 1948.

10

I therefore rule that it is for the defence now to address the Court.

Henry Mayers, J.

Mandavia: 6 issues. (1) Validity of Exhibit 1. Exhibit 1 purports to be charge under Registration of Titles Ordinance executed under S.46 of the Ordinance. Reads S.46. Form must be that shown as Form J1 or J2 of Schedule to Ordinance. Deed polls. Here Exhibit 1 goes far beyond forms J1 and J2 - provision for appointment of receiver etc. Under Law of Mortgages appointment of receiver out of Court is not contemplated. No form other than that provided as J1 and J2 can have effect under Registration of Titles Ordinance. Exhibit 2 makes it clear that land subject of the proceedings were duly registered under Registration of Titles Ordinance S.20 of Ordinance precludes charge of mortgage of land except in accordance with provisions of Ordinance. Suggested by Plaintiff that effect of registration is to render document valid. Mistake by Registrar not binding on Court. It is only where a charge has been executed in proper form and has been registered that it operates "to secure the property". Pass to 2nd defence.

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Court adjourns 3.53 p.m.

5th December, 1958.

5.12.58. Appearances as before.

Nazareth: Before Mandavia continues - Land Registry is desirous of return of witness Fernandez and his documents. Land Registry has therefore made available photostat copies of the Exhibits - can these be used instead of originals?

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Mandavia: Do not oppose, but Fernandez can certify copies.

Nazareth: Fernandez not authorised to certify.

Mandavia: Having compared photostat copies with original Exhibits I am prepared to consent to originals being released and these photostat copies being used for all purposes for which originals might be used - as if the photostat copies had been exhibited and tendered in evidence.

In the Supreme
Court of Kenya

—
No. 9.

Court Notes.

5th December,
1958

- continued.

Court to Mr. Fernandez: You may be released and may take with you the original Exhibits. Should necessity arise, the original Exhibits must be produced to this Court again.

10

Mandavia resumes his address: 2nd issue is, is suit maintainable. Defence contends not maintainable on 3 grounds a) no privity of contract either pleaded or proved between Plaintiff and Defendant. Hence Plaintiff cannot maintain this suit on breaches of express covenants in the charge, b) persons named in charge as borrowers are necessary parties, they should have been brought on record to meet allegation of breach of covenant,

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c) Plaintiff's interest as chargee under Exhibit 1 having been entirely vested in Standard Bank, Defendant No.2, until 20th February 1958, Plaintiff is not entitled to come to Court. Although even in amended Plaint there is claim for a personal decree, this has been abandoned at the Bar. Any conflict is to whether personal decree could be obtained against transferees of mortgage settled by - 39 I.P. p.7 Jamnadas v. Pandit Ram Ratan Pande at all. Reads MacNaughton's judgment p.9. Fundamental principal on which Jamnadas turned was that there was no privity of contract. Here Plaintiff seeks to enforce remedy for breach of contract. Paragraph 3 of Plaint. There has never been any novation from original borrowers and therefore Defendant cannot be sued here. In re Errington ex parte Mason (1894) 1 Q.B.D.11. As Defendant entered into no covenant to pay interest or to insure his failure to pay interest and to insure does not entitle Plaintiff to bring proceedings. Had Plaintiff alleged that original borrowers had not paid interest or insured, he could have contended that there was a breach. Kinnaird v. Trollope 39 Ch.D. 636. Suit should have been brought against original borrowers. Rights of contracting parties continue until novation. S.46 Registration of Titles Ordinance. Transfer of title are regulated by Part VI of Registration of Titles Ordinance. S.38 only relates to transfer of charge. Here land was transferred. Exhibits A, B and C have consent of

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In the Supreme Court of Kenya

No. 9.

Court Notes.

5th December, 1958

- continued.

Plaintiff pursuant to Clause 5 of Exhibit 1. The consent given by Plaintiff does not form part of Exhibits A, B and C. It does not make contract tripartite. If Plaintiff's signature were material, it would have to be attested under S.58 of Registration of Titles Ordinance. Exhibit 3 is letter where Plaintiff's Advocate contends that there has been a subrogation. Only provision for subrogation in charge is that created by S.92 of Indian Transfer of Property Act - that section does not apply to Kenya as it is post 1907. S.85 of the Indian Transfer of Property Act as it applies to Kenya (pre 1908) requires all persons having interest in property comprised in mortgage to be joined as parties. Clause 8 of Exhibit 1 - in event of borrowers making any default in payment of interest Covenants re interest and payment of loan do not run with land. What has been transferred to Defendant is property subject to a charge. Defendant not assignee of charge but of land. Strongest point for defence is that Exhibit 8 shows clearly that up to 20th February 1958 i.e. subject to commencement of this suit, he could not reconvey the land to Defendant if Defendant had paid off amount due. Some 11 months after institution of suit Plaintiff's entire interest was vested in Bank. Plaintiff seeks accounts, the accounting parties were the borrowers, they should have been sued. Defendant's liability is only to borrowers, not to the Plaintiff. Leggate v. Barrett 15 Ch. D. 306.

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20

30

Nazareth: Defendant's first contention is that charge is void because it was not in form of deed poll. Nothing in Ordinance requiring charge to be in form of deed poll. S.33 of Registration of Titles Ordinance requires instrument to conform in substance with form. Object of forms is to ensure certain minimum requirements are complied with. Registrar has accepted this form as in substance. Many instruments in form of that in this case. Charge may be valid even though it contains a covenant which is itself bad. As regards 2nd issue - maintainability of suit cases cited by defence are immaterial because it is conceded that no personal decree except as to costs can be sought. Here all that is asked is decree for sale and for costs. As regards suggestion that borrowers should be made parties - the answer is that they have no interest in the property. They have wholly parted

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with their Equity of Redemption. Old S.85 of Indian Transfer of Property Act lays down the necessary parties merely requires persons who have interest in property to be joined. Halsbury 2nd Edition 23, 435. Parties to proceedings in mortgage suits is set out. Essence of Plaintiff's position is that he seeks accounts so as to know how much is to be taken out of the property. He does not ask for account as between parties so that he can get a personal decree. No importance that borrowers not joined as all that is sought is to determine what is due to be paid out of proceeds of sale. Defence relied on Jamnadas' case that deals with privity of contract. Here there is no suggestion of personal decree. Our contention is that we had no right to tell the Defendant to insure or pay interest. We say that if the property is not insured or interest paid we have right to sell. Plaintiff is not relying on S.38 of Registration of Titles Ordinance. Defendant said "interest of original borrowers remains". In fact borrowers have no interest in property, they have parted with whole Equity of Redemption. Liability of borrowers may remain but that does not prevent Plaintiff having a right to sell. Defendants argued that Plaintiff had no cause of action because of charge in favour of Bank. Bank had only an equitable mortgage. S.67 of Land Registration Ordinance. Plaintiff had a legal mortgage or charge over borrower's land. Bank only had an equitable mortgage, not a transfer of Plaintiff's charge. Hence Plaintiff could bring his action without reference to Bank. As no money owing to Bank at time of institution of these proceedings no Court would have enforced the equitable mortgage at that time. Gower Transfer of Property Act 7th Edition Vol.II, article 1499. Essentials of equitable mortgage. 25th March 1957 was date of filing proceedings - at that time Bank had no right to demand sale of chargee's interest because there was nothing outstanding. Fisher v. Lightwood, Law of Mortgages 7th Edition p.15. Equitable mortgage can only be enforced under the Equitable Jurisdiction of Court. In India equitable mortgages are assimilated to simple mortgages under Transfer of Property Act - remedy is by sale. Mulla 3rd Edition 363, S.58. Papanna Rao v. Pratapa 23 Indian Appeals 22 (19 Madras 249).

Court adjourns 12.45.

50 Court resumes 2.19 p.m.

In the Supreme
Court of Kenya

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No. 9.

Court Notes.

4th December,
1958

- continued.

In the Supreme
Court of Kenya

No. 9.

Court Notes.

4th December,
1958

- continued.

Nazareth continues: In effect Plaintiff merely sub-mortgaged his rights under charge to Bank. He did not assign his rights to Bank. Consequently although Bank joined ex majore cautelam no real necessity to make Bank Defendant. Alternatively any defect cured when Bank added as Defendant. Kundanlal v. Faquirchand 1904, 27 Alla. 75. Any defect caused by non-joinder cured by joining the necessary party. Tikan Singh v. Thakkar Kishore 1878, 22 Alla. 188. Propriety of amounts claimed. S.67 of Indian Transfer of Property Act. Mulla 419 "Default of interest". S.72 - right to add insurance premiums to preamble. These proceedings seek to recover debt out of land. 10

Mandavia: At a previous stage costs of amendment were reserved. As regards reference to Hailsham p.465 article 684 that is not a commentary on S.84 of Indian Transfer of Property Act. Both Allahabad cases show that omission of a necessary party is a fatal defect. Here original borrowers have not been served. S.58 of Indian Transfer of Property Act defines mortgage. Authority in 23 Indian Appeals is not of much relevance. 20

C.A.V.

19th December,
1958.

19.12.58.

Winayak for Plaintiff.

Mandavia for Defendant.

Judgment delivered, dated and placed in file.

Henry Mayers, J.

Mandavia: Apply for Court to fix date for redemption. Defendant paying interest regularly. 30

Winayak: Oppose any period longer than 1 month - suit filed in March 1957. Interest has only been paid pursuant to order of Court.

Order: As the sum which the Defendant is ordered to pay by this judgment will amount to over £10,000, it is most unlikely that he could satisfy the judgment at short notice - for the past 18 months or more he has however been aware that he would be liable to repay the principal amount secured by the charge, unless he succeeded on technical grounds which are wholly devoid of any real merit. I therefore fix as the date for the redemption of the mortgage 15th April 1959. 40

Henry Mayers, J.

Nazareth: Pelly Murphy reserved costs of joining Bank for subsequent consideration. Bank joined as precaution because of manner in which proceedings were defended. Mortgagee usually receives cost of making and defending security.

In the Supreme Court of Kenya

No. 9.

Court Notes.

19th December, 1958

- continued.

Mandavia: As regards costs of amendment, Pelly Murphy J. was prepared to award Defendant costs.

10 Order: 1) As regards the costs of the amendment whereby Standard Bank of South Africa was added, it seems to me that when a Plaintiff ex majore cautelam chooses to add an additional party in the necessity for joinder of whom he has so little confidence, that at the commencement of the hearing he agrees to pay the costs of the party so added, the unsuccessful Defendant ought not to have to pay for the Plaintiff's error. Here the costs of the amendment adding Standard Bank will be the Defendant's.

20 As regards the number and status of Counsel properly employed in this suit, I have no hesitation in certifying that it was a matter which warranted the employment of both leading Counsel and junior Counsel and therefore certify accordingly.

Henry Mayers, J.

Nazareth: Order of Court of Appeal stayed appointment of receiver so long as interest was paid into Court. Seek a similar order now to prevent destruction of Property pending the redemption of mortgage.

30 Mandavia: Undertake that interest will continue to be paid.

Henry Mayers, J.

No. 10.

No.10.

JUDGMENT

Judgment.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 363 of 1957

19th December, 1958.

Nathoo Visandji

Plaintiff

versus

Govindji Popatlal

Defendant

In the Supreme
Court of Kenya

No.10.

Judgment.

19th December,
1958

- continued.

JUDGMENT

In this suit the Plaintiff seeks to enforce a legal charge over a parcel of land (hereinafter referred to as "the suit parcel"), known as L.R. No.209/4339, the title to which is registered under the Registration of Titles Ordinance, Cap.160 (hereinafter referred to as "the Ordinance") and the buildings standing thereon, created in his favour by the then registered proprietors of the suit parcel (hereinafter referred to as "the mortgagors"), by way of security for the repayment to the Plaintiff of the sum of Shs.200,000/- lent by him to the mortgagors together with the interest thereon and registered, or purported to have been registered, under the Ordinance on the 10th October, 1953.

10

The first Defendant (hereinafter referred to as "the Defendant") Govindji is the present registered proprietor of the suit parcel.

Of the second Defendant, the Standard Bank of South Africa, all that it is necessary to say is that having been joined as Defendants pursuant to leave to amend, they were at the hearing, for reasons hereinafter apparent, dismissed from the suit on the undertaking by the Plaintiff to pay to them an agreed sum by way of costs.

20

The relief claimed by the Plaintiff is subject to one qualification, that usually sought in suits of this nature, i.e. an order for an account to be taken and for such sum, if any, as may be found to be due to the Plaintiff on the taking of such account, to be paid to him by the Defendant on or before a day specified by the Court and if such sum is not so paid for the suit parcel to be sold and the proceeds of sale applied in satisfaction of the Plaintiff's claim and the costs and expenses incidental to its enforcement. The qualification already referred to is that although the plaint also contained the usual prayer for a personal decree to issue against the Defendant in the event of judgment being obtained against him and in the further event of the sale of the suit parcel pursuant to such judgment and the proceeds of such sale proving insufficient to satisfy the judgment, that prayer was at the hearing abandoned by Mr. Nazareth who appears for the Plaintiff.

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40

The grounds upon which the Plaintiff seeks to enforce the charge are that the principal sum has

become due and payable consequent upon the breach of covenants in the charge relating to the payment of interest and of insurance premiums in respect of the buildings upon the suit parcel.

In the Supreme
Court of Kenya

No.10.

Judgment.

19th December,
1958

- continued.

10 The written statement of defence of the Defendant infringes the fundamental principals upon which the modern system of pleading rests which is that a pleading should allege the material facts upon which the party, on whose behalf it is filed, relies as entitling him to the relief claimed or as disentitling his adversary to that relief as the case may be, in that in substance it merely puts in issue the material allegations in the 20 complaint and alleges that in point of law these proceedings are not maintainable and that the charge sought to be endorsed is invalid in terms so vague that although in the absence of argument I do not express a concluded opinion as to this, it appears to me by no means unlikely that had steps been taken to strike out the defence as embarrassing most, if not all of it, would have been so struck out.

Memorials endorsed upon the certificate of title to the suit parcel which was tendered in evidence by an officer of the Land Registry completely satisfied me as to each of the following matters:-

- 30 (a) that the charge in favour of the Plaintiffs was registered or purported to be registered on the 30th October, 1953,
- (b) that subsequent to the registration or purported registration of that charge the Defendant successively acquired on the 6th October, 1954, the 6th October, 1954 and on the 2nd August, 1956 the interests in the suit parcel which were immediately prior to such acquisitions vested in two of the mortgagors and in the successor in title to the third mortgagor and that by such acquisitions he is now the sole 40 registered proprietor of the suit parcel.

The charge was tendered in evidence as Exhibit 1. Clause 8 of Exhibit 1 in substance provides that the principal sum of Shs.200,000/- together with interest thereon, shall become payable "in the event of the borrowers" (a term which is by the preamble expressed to include their heirs executors, administrators and assigns) "making default in the payment of interest or outgoings".

In the Supreme
Court of Kenya

No.10.

Judgment.

19th December,
1958

- continued.

In the absence of any evidence to the contrary, I have no hesitation in accepting that of the Plaintiff, that the Defendant through his then advocate in fact paid interest upon the loan up to the year 1956 but has subsequent thereto failed to pay any interest and that in contravention of a provision contained in Clause 3 of the charge the Defendant has failed to keep the building upon the suit premises insured against loss or damage by fire.

10

Paragraph 4 of the written statement of defence alleges that :-

"The Defendant does not admit that the Plaintiff has taken any requisite steps to demand, recover, and enforce immediate payment of the principal"

This paragraph was manifestly intended to found an argument that such demand was by virtue of the provisions of Clause 8 of the charge a condition precedent to the institution of proceedings to enforce the charge. So far as is material Clause 8 of the charge is in the following terms:-

20

"That in the event of the borrowers making any default in the payment of interest it shall be lawful for, but not obligatory on the part of the lender to demand immediate payment of the said principal"

In my view this clause empowers the Plaintiff to demand payment of the principal but does not cast upon him an obligation to make any such demand before instituting proceedings. The matter is, however, not of any practical importance as there was tendered in evidence as Exhibit 7, a letter from the Plaintiff's advocates to the Defendant which, after referring to previous correspondence also tendered as Exhibits 4, 5 and 6, relating to the non-payment of interest and of insurance premiums by the Defendant, goes on in the following terms :-

30

"As you have not complied with the terms stated in the penultimate paragraph of our letter dated the 9th February, 1957 our client now calls upon you not only to pay the sum of Shs.6,000 and Shs.814/50 (sums which the Defendant had been required by Exhibits 4 and 5 to pay by way of interest and refund of an insurance premium paid by the Plaintiff) but also he demands from you the sum of Shs.200,000/-"

40

The first contention argued by Mr. Mandavia who appears for the defence, was that the purported registration of the charge was invalid because the charge itself does not comply with the provisions of Section 46 of the Ordinance. Section 46 is, so far as is material, in the following terms:-

In the Supreme
Court of Kenya

No.10.

Judgment.

19th December,
1958

- continued.

10 "Whenever any land is intended to be charged or made security in favour of any person other than by way of deposit of documents of title ... the proprietor ... shall execute a charge in the form J.1 or J.2 in the first Schedule ... such charge when registered shall (subject to any provisions to the contrary therein contained) render subject to the security thereof the same property as would have been affected by a legal mortgage ..."

20 Mr. Mandavia's argument is that the charge is not of the form specified as form J.1 or J.2 in the Schedule and can not, therefore, properly be registered.

The first respect in which the charge departs from the form in the Schedule is that it is an Indenture not a deed poll; it further departs from those forms in that it contains provisions which do not appear in those forms.

Section 33 of the Ordinance is, so far as is material, in the following terms :-

30 "A registrar shall not register any instrument purporting to transfer or otherwise deal with or affect any land unless such instrument be in accordance with the provisions hereafter, but any instrument in substance in conformity with the forms annexed hereto shall be sufficient".

Section 36 of the Interpretation and General Provisions Ordinance, 1956 (Ordinance 38 of 1956) provides :-

40 "Save as is otherwise expressly provided whenever any form is prescribed by any written law an instrument or document which purports to be in such form shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document or which is not calculated to mislead".

The instrument of charge tendered in evidence is so far as is immediately material, in the following terms:-

In the Supreme Court of Kenya

"The Registration of Titles Ordinance. Chapter 160 /Grant LR9955. Charge"

No.10. Judgment. 19th December, 1958 - continued.

On the face of it, it purports to be a charge under the Registration of Titles Ordinance. It seems to me, therefore, that by virtue of the provisions of Section 36 of the Interpretation Ordinance above referred to, it may be valid despite its departures from the form prescribed in the Schedule. The test to be applied in determining whether it is or is not valid, despite those departures, is in my view, does it or does it not contain everything which is material to be specified in a charge in the form prescribed. The matters material to be specified in the prescribed form would appear to be the name of the registered proprietor of the parcel sought to be charged, the description of the parcel sought to be charged, the amount of the sum lent in respect of which the charge is created, the identity of the lender of that sum, the date upon which that sum is to be repaid, the rate and times for the payment of interest upon the loan, and a formal charge of the land with the repayment of such principal sum and interest. All of these matters are fully covered by the instrument tendered in evidence. In my view, therefore, that instrument is in substantial compliance with the requirements of Section 46 of the Registration of Titles Ordinance and was validly registered.

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Mr. Mandavia's second contention was that the suit is not maintainable upon three distinct grounds.

30

First he argued that as privity of contract between the Plaintiff and the Defendant had never been alleged nor proved, the Plaintiff could not maintain the suit in respect of what he (Mr. Mandavia) termed "breaches of extraneous covenants". In support of this contention he urged that as the Defendant was not an assignee of the charge but of the land the subject of the charge, covenants in the charge did not run with the land and that the consents given pursuant to the provisions of the charge by the Plaintiff to the transfers by the mortgagors to the Defendant of their respective interests in the land, did not render the Defendant a party to the charge. In support of the general contention that the absence of privity of contract between the Plaintiff and the Defendant precluded the Plaintiff from maintaining these

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proceedings, be relied upon Jamna Das v. Pandit Ram Autar Pande, 39 Indian Appeals, 7. It seems to me that that case is the clearest possible authority for the proposition that the Plaintiff could not maintain a suit having as its object the obtaining of a personal decree against the Defendant. Here, however, the prayer for a personal decree has been abandoned. A Mortgagee has two distinct remedies for the recovery of the mortgage debt, that afforded by an action against the mortgagor personally and that by enforcement of the security vide Fisher and Lightwood Law of Mortgage, page 311. The former remedy would, prior to the abolition of "Forms of Action" in England have been a personal action while the latter would have been a real action. Now it is possible for both forms of relief to be obtained in the same action but none the less different principles apply in determining which form of relief may be appropriate or permissible in a particular case. An action to enforce the security is not, in my view, in any way affected by the absence of privity of contract which would be fatal to a claim for a personal decree as the latter is only applicable where there is a contractual obligation subsisting between the parties.

Mr. Mandavia further contended that the suit was not maintainable in the absence of the mortgagors who, he submitted, were necessary parties. In answer to this Mr. Nazareth pointed out that by the provisions of Section 85 of the Indian Transfer of Property Act, in its original form which still applies in Kenya, the only necessary parties to a mortgage suit are persons having an interest in the land the subject of the mortgage. As already observed, the Mortgagors have wholly parted with their respective interests in the land to the Defendant.

Finally, Mr. Mandavia argued that the proceedings were not maintainable because at the time of the institution of the suit the Plaintiff's entire interest in the property the subject of the charge had been vested in the Standard Bank of South Africa and remained so vested until the 28th February this year.

To understand this contention it is necessary to refer to certain evidence which has not hitherto been mentioned. According to the testimony of the Plaintiff which, having been wholly corroborated

In the Supreme
Court of Kenya

No.10.

Judgment.

19th December,
1958

- continued.

In the Supreme
Court of Kenya

No.10.

Judgment.

19th December,
1958

- continued.

by that of a clerk in the employ of the Standard Bank, I accept without reservation, in or about July, 1956 the Plaintiff requiring an overdraft from the Standard Bank created in favour of that bank an equitable charge over the suit parcel by deposit of title deeds. This charge was duly registered under the Land Registration Ordinance. The advance intended to be secured by the charge was repaid in November, 1956 since when the Plaintiff has owed nothing to the bank. By some oversight, however, no steps were taken to discharge the equitable charge until its continued existence came to light in the course of these proceedings. It seems to me that the Plaintiff cannot with accuracy be said to have parted with his rights under the legal charge to the bank and that in reality the creation of the equitable charge, although giving rise to rights in the bank against the Plaintiff, in no way diminished the rights as against the proprietor for the time being of the suit parcel which were conferred upon the Plaintiff by the creation of the legal charge.

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Moreover, as equity regards as done, what ought to have been done, it is clear that from the time when the debt secured by the equitable charge was repaid, rights purportedly created by that charge could not have been enforced in any legal proceedings and, therefore, that for practical purposes the equitable charge was, at the time of the commencement of these proceedings, spent.

30

For these reasons the answers to the issues originally framed by Pelly Murphy, J. as amended at the commencement of the hearing are as follows:-

Issue 1. Is the document of charge relied on by the Plaintiff validly executed and registered?

Answer: Yes.

Issue 2. Is the Plaintiff's suit maintainable?

Answer: Yes.

Issue 3. Is a demand for payment a condition precedent to the accrual to the Plaintiff of a right to sue?

40

Answer: No.

Issue 4. If the answer to the question in Issue 3 is in the affirmative did the Plaintiff make such demand before the institution

of the proceedings?

Answer: This issue does not arise in view of my conclusion as to Issue 3, but I have found as a fact that the Plaintiff did make a demand for payment in writing, through his advocates prior to the institution of the proceedings.

In the Supreme Court of Kenya

No.10.

Judgment.

19th December, 1958

- continued.

10

Issue 5. Does the charge executed by the Plaintiff in favour of the Standard Bank of South Africa affect his rights in the present proceedings?

Answer: No.

Issue 6. To what relief, if any, is the Plaintiff entitled?

Answer: A decree in the terms of paragraphs A, B and C of the prayer in his amended plaint.

20

For the foregoing reasons there will be judgment for the Plaintiff in the terms of paragraphs A, B and C of the prayer in his amended plaint with costs.

Henry Mayers,
Judge.
19.12.58.

Delivered in this Court the 19th day of December, 1958, in the presence of Nazareth for Plaintiff and Mandavia for Defendant.

Henry Mayers,
Judge.

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No. 11.

DECREE.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 363 of 1957

No.11.

Decree.

19th December, 1958.

Nathoo Visandjee

Plaintiff

versus

1. Govindji Popatlal and
2. The Standard Bank of South Africa Ltd.

Defendants

DECREE

CLAIM FOR:-

40

(a) Accounts to be taken of what is due to the

In the Supreme
Court of Kenya

No.11.

Decree.

19th December,
1958

- continued.

- Plaintiff by the first named Defendant for Principal, interest, insurance and costs as at a date to be fixed by the Court and that amount shall carry interest at 12% per annum until realisation.
- (b) An order if the first named Defendant pays into Court the amount so found due to the Plaintiff on or before the said date, the Plaintiff do deliver to the first named Defendant or to such person as he appoints all documents in his possession or power relating to the said charged property and shall, if so required, re-transfer at the cost of the first named Defendant the said property to the first named Defendant or as he shall direct. 10
- (c) An Order if the payment of the said sum be not made on or before such date as aforesaid the charged property be sold and that the proceeds of the sale, after defraying all expenses of the said sale, be paid into Court and that the amount found due to the Plaintiff plus subsequent interest at the charged rate and costs as may be allowed by Court be paid to the Plaintiff and the balance, if any, paid to the first named Defendant. 20
- (d) An Order if the nett proceeds of the sale are insufficient to pay the amount so found due to the Plaintiff, and such subsequent interest and costs in full, the Plaintiff shall be at liberty to apply for a personal Decree for the balance still outstanding together with costs and interest. 30
- (e) Such further and other relief as to this Honourable Court may deem fit.

THIS SUIT coming on the 20th February, 1958, 9th May, 1958, 4th December, 1958, 5th December, 1958, for hearing and on the 19th day of December, 1958 for judgment before the Honourable Mr. Justice Henry Mayers in the presence of Counsel for the Plaintiff and Counsel for the Defendant, IT IS ORDERED: 40

1. THAT the Accounts be taken of what is due to the Plaintiff by the first named Defendant for principal, interest, insurance and costs as at 15th April, 1959.
2. THAT if the first named Defendant pays into Court the amount so found due to the Plaintiff

on or before the said date, the Plaintiff do deliver to the first named Defendant or to such person as he appoints all documents in his possession or power relating to the said charged property and shall, if so required, re-transfer at the cost of the first named Defendant the said property to the first named Defendant or as he shall direct.

In the Supreme
Court of Kenya

No.11.

Decree.

19th December,
1958

- continued.

- 10 3. THAT if the payment of the said sum be not made on or before such date as aforesaid the charged property be sold and that the proceeds of the sale, after defraying all expenses of the said sale, be paid into Court and that the amount found due to the Plaintiff plus subsequent interest at the charged rate and costs as may be allowed by the Court be paid to the Plaintiff and the balance, if any, paid to the first named Defendant
- 20 4. THAT the first named Defendant do pay to the Plaintiff his costs of this suit to be taxed for the leading and junior Counsel and certified by the Taxing Master of this Court.
5. THAT the Plaintiff do pay to first named Defendant his costs for the hearing on the 20th day of February, 1958 and costs occasioned by the Plaintiff's application for amendment of Plaint heard on the 9th day of May, 1958.

GIVEN under my hand and the Seal of the Court at Nairobi this 19th day of December, 1958.

30 ISSUED on this 21st day of March, 1960.

Sgd. P. Heim.
DEPUTY REGISTRAR
SUPREME COURT OF KENYA.

I certify this is a true copy of the original.

Sgd. ? ?
Deputy Registrar,
H.M. Supreme Court of Kenya.

Date: 23.4.60.

In the Court of
Appeal for
Eastern Africa

No.12.

Memorandum of
Appeal.

5th June, 1959.

No. 12.

MEMORANDUM OF APPEAL

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

CIVIL APPEAL NO.41 of 1959

BETWEEN:- Govindji Popatlal Appellant
- and -
Nathoo Visandjee Respondent

(Appeal from Judgment/decreedecision of the
Supreme Court of Kenya at Nairobi (the Honour- 10
able Mr. Justice Mayers) dated the 19th day of
December, 1958, in its Civil Case Number 363
of 1957

Between

Nathoo Visandjee Plaintiff

- and -

Govindji Popatlal Defendant)

MEMORANDUM OF APPEAL

(Being an appeal from a decree/judgment
as of right) 20

GOVINDJI POPATLAL the Appellant above named, ap-
peals to Her Majesty's Court of Appeal for Eastern
Africa, against the whole of the decision above
mentioned, on the following grounds, viz:-

1. The learned trial Judge erred in law in hold-
ing that the Respondent's suit as framed and
filed was competent or maintainable in the
complete absence as a party, of the original 30
borrowers, who were the contracting parties to
the Charge (sued on, being Exhibit 1 in the
suit), and against whom only the Respondent
could have had any cause of action based on
any of the alleged breaches of the terms or
conditions thereof agreed thereby to be per-
formed and observed by them and them alone;
and he should therefore not have ordered ac-
counts to be taken, in their absence, between
the Respondent and the Appellant against whom 40
latter no personal decree could be passed in
law.

2. The learned trial Judge overlooked the fact that any payment by the Appellant to the Respondent could only have been made for the protection of the charged property, but the same did not raise any such privity between them as would accelerate the Respondent's right to claim or enforce the payment before the 31st day of October, 1957 fixed by the Instrument of the Charge, on account of the alleged non-performance by the Appellant of the conditions of the contract of Charge relating to insurance and interest.

10

3. The learned trial Judge erred in holding that the aforesaid original borrowers had at the material times to the suit no interest in the charged property and that therefore they were not necessary parties to the action under Section 85 of the Transfer of Property Act - since the original borrowers on account of their personal covenant to repay the principal amount with interest when legally due, had a right to redeem the charged property and should, as such, have been joined as Defendants to the suit - for their non-joinder was a denial of natural justice and fatal to the suit.

20

WHEREFORE THE APPELLANT PRAYS that this Appeal be allowed and that the aforesaid Judgment dated the 19th day of December, 1958, and the preliminary decree based thereon be set aside with Costs in this Honourable Court and in the Court below.

30

DATED this 5th day of June, 1959.

G.R. MANDAVIA,
ADVOCATE FOR THE APPELLANT.

To: The Honourable the Judges of Her Majesty's Court of Appeal for Eastern Africa:
And to - Messrs. Johar & Winayak, Advocates for the Respondent, City House, Victoria Street, P.O. Box 3261, Nairobi.

40

The address for service of the Appellant is -
c/o G.R. Mandavia, Advocate, Africa House,
Government Road, P.O. Box 759, Nairobi.

Filed this 6th day of June, 1959,
by G.R. Mandavia,
Advocate for the Appellant,
Nairobi.

REGISTRAR,
H.M. COURT OF APPEAL FOR
EASTERN AFRICA - NAIROBI

In the Court
of Appeal for
Eastern Africa

No.12.

Memorandum of
Appeal.

5th June, 1959
- continued.

In the Court
of Appeal for
Eastern Africa

No.13.

Additional
Ground of Appeal. 5th May, 1960.

No. 13.

ADDITIONAL GROUND OF APPEAL

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

CIVIL APPEAL NO. 41 of 1959

BETWEEN:- Govindji Popatlal Appellant
- and -
Nathoo Visandjee Respondent

Additional Ground of Appeal in the Appellant's Memorandum of Appeal herein, which the Appellant prays he should be permitted to include and argue: 10

1. THAT the Respondent has despite, Issue No. 1 having been framed and placed on record, by agreement of the parties, failed to prove his case, by non-compliance with the mandatory requirements of Section 68 et seq of the Indian Evidence Act, and omitting to prove the execution or attestation of the material instrument or instruments of charge, whereon his claim in the suit was founded. 20

DATED at Nairobi, this 5th day of May, 1960.

Sgd: G.R. Mandavia
ADVOCATE FOR THE APPELLANT.

No.14.

Notes of
Argument,
Forbes, Ag.
President.
5th May, 1960.

No. 14.

NOTES OF ARGUMENT OF FORBES, AG. PRESIDENT

5.5.60. Coram: Forbes, Ag.P.
10.30 a.m. Gould, J.A.
Windham, J.A.

Mandavia for Appellant
Nazareth Q.C. and Winayak for Respondent. 30
MANDAVIA:

Application to amend to include copy of decree. Agree costs of application should be Respondent's in any event.

ORDER:

Leave to amend granted accordingly. Costs of

application to be the Respondent's in any event.

Sgd: A.G.Forbes,
Ag.P.

In the Court
of Appeal for
Eastern Africa

MANDAVIA:

Additional ground I seek to put in (Handed up) was taken in lower court. When issues framed before Pelly Murphy, J. Then issues amended after amendment of plaint.

First issue: That issue never amended - r.

10 Finding on issue 1. Submit no evidence of execution having been proved.

Rule 62(2) of E.A.C.A.Rules. Would accept order giving Respondent opportunity to consider ground including order for costs or adjournment. If I do not take it now it will be lost to my client. Point had escaped me which is why it was omitted from Memorandum of Appeal. Memorandum of Appeal took long time in preparation. Onus on Plaintiff to prove execution and registration.

20 Prepared to submit to terms.

NAZARETH:

Oppose application.

Suggested confusion between two Judges. But it is the one issue mattered. Specifically dealt with by Judge. Not included in Memorandum of Appeal. Does not go to jurisdiction of Court. Will necessitate adjournment. Would not be prepared to go on now. Considerable delay already. Do not desire further delay. Not dealt with in final address. Ask that application be refused.

30

Adjourn to afternoon.

MANDAVIA:

Matter of amendment. Discretion in Rule 62. If point not taken would be great loss to Appellant. Is a substantial ground. No evidence of execution.

ORDER:

Mr.Mandavia to be allowed to argue the additional ground and Mr.Nazareth to be at liberty to seek an adjournment if he so desire before making his reply.

Sgd: A.G.Forbes, Ag.P.

MANDAVIA:

Additional ground. Submit would dispose of

No.14.

Notes of
Argument,
Forbes, Ag.
President.

5th May, 1960
- continued.

In the Court
of Appeal for
Eastern Africa

No.14.

Notes of
Argument,
Forbes, Ag.
President.

5th May, 1960
- continued.

whole appeal. Validity of charge was put in issue.

Defence page 7 of Record: Ground 2: When validity of document is put in issue under Section 68 of Indian Evidence Act, both validity and attestation must be proved. (S.68 read). Proviso in 1926 - Does not apply in Kenya. Section 71 - Alternative proof. Here submit no admission whatever by Defendant.

Section 58 of Registration of Titles Ordinance (Cap.160). Requires attestation. Section 58(2) - Official seal required. 10

P.68 of Record: Charge. At p. 75 Record of execution. This not an execution by a company within Section 58(2). Document requires to be registered because of S.46. Section 20 Land to be subject to Ordinance. Registration provided for in Part V and Part VI. Attestation of signatures required by S.58. My point is that the attestation of the instrument was not proved by an attesting witness as required by Section 68 of the Evidence Ordinance. 20

Refer:

Hira Bibi & Ors. v. Ram Hari Lal & Ors.
52 I.A.362. It was validity of document which was put in issue in this case. Unlike that case, there is here no admission. Mortgagor was not a party to suit. Other transfers were not executed by Defendant. It is original execution of which was put in issue. We were not competent to make any admission. Reliance put on registration alone. I will submit registration by itself cannot by itself cure defect in attestation and attestation should be proved even if document registered. In spite of registration, regular attestation must be proved. Without regular attestation document would be invalid. Not saying attestation was invalid, but that I do not know and it should have been proved. 30

Esso Petroleum Ltd. v. Southport Corporation 1955
3 A.E.R. 864 Rules of Pleading to be strictly observed. P.871 - Lord Radcliffe. 40

Here issue framed. Only evidence on question of execution - and registration - is given by one of Plaintiff's witnesses. P. 20 - Plaintiff's evidence. Submit that though at P.38 line 34 the Judge has answered the issue in affirmative, he relied solely on evidence of registration and not execution.

Submit execution has not been proved though in judgment there is reliance on effect of registration. Submit no admission by Defence either by pleadings or by evidence or by non cross-examination.

In the Court
of Appeal for
Eastern Africa

No.14.

Memorandum of Appeal:

Ground 1:

Submit whole of this mortgage suit is founded on two breaches by Appellant of two conditions:

- 10 (1) payment of interest
 (2) payment of insurance.

Notes of
Argument,
Forbes, Ag.
President.

5th May, 1960
- continued.

Though the Appellant was not a contracting party. Submit no privity of contract between the Appellant and the Respondent in regard to these conditions.

Benefit of contract is sometimes transferred. Appellant has entered into no contract under which he has undertaken the obligation of the agreement between the Respondent and the original borrowers. He has not received any consideration from the Respondent which would throw any obligation on him.

20

Judgment: Decision proceeds on basis that in the original charge "borrowers" included "assigns" by definition. Therefore held Appellant liable to terms with regard to interest and insurance - though not liable personally to pay the principal amount.

Will submit that despite of use of word "assigns" borrowers could not create contractual obligations on transferee of land. These obligations do not run with the land. Original borrowers not our agents. Use of word "assigns" is mere surplusage.

30

Mulla Transfer of Property Act - 3rd Ed. P.467

Original mortgagor remains liable.

Re Errington, Ex parte Mason (1894) 1 Q.B.11.

It is non-payment of interest which has been made the basis of this suit. Form of this action. Original borrower should have been there. He was the party in breach. Original borrower remains liable on original contract.

40 Kinnaird v. Trollope 39 C.D.636.

(NAZARETH: Do not dispute original borrower remains liable on personal covenant).

No subrogation of liabilities.

In the Court
of Appeal for
Eastern Africa

No.14.

Notes of
Argument,
Forbes, Ag.
President.

5th May, 1960
- continued.

Judge's decision is on basis that we were liable as assigns.

P. 68 Def. of borrowers. Page 32 of Record: line 47 - P.33 line 41, P.34 line 11, P.34 line 23.

Judge bases liability on definition of borrowers as including assigns.

P.36 last paragraph. At Page 33 relies on defence of borrower. Also relies on fact that because he gave consent to the transfers he was entitled to benefit of the covenant. Transfer is at pages 76 and 77

Signature to consent was not attested. Submit if this made it a contract between the three parties, then the document is invalid. It would be ineffective to convey any interest to my client.

Submit it is not a 3 party contract.

(NAZARETH: Never suggested it is a 3 party contract) All it could do was to render land subject to charge. Question is if no personal liability could there be a default. Breach by some other person. He should have been a party. He was the contracting party.

Submit that: (1) No rights acquired under mortgage as instrument invalid.

(2) Contractual obligations not thrown on the Appellant and breach of any obligation could not be the basis of this suit as framed.

As to necessity for joining the borrowers, we are governed by S.85 of Transfer of Property Act as originally enacted. Original borrowers were necessary parties. Indian decisions on unamended section. Will submit original borrowers had an interest as their personal liability remains.

Refer S.85 of Act. Mulla, Civil Procedure Code 10th Ed. P.977.O.34 r.1.: (12th Edition: Page 1079) 12th Ed. Page 1081. Parties to suit etc. Original mortgagor a necessary party. Seton 6th Ed. 1932. Original borrower still has an interest in seeing that there is a proper use of the mortgage property. Necessary that he should be before the Court for our benefit. Allegations can only be made against him.

Halsbury (2nd Ed.) Vol.23 P.465.

Moore v. Marton (1886) W.N.196.

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Interest has not ceased as his liability remains and his right to the property also. If sued can seek re transfer of property to him.

Kinnaird v. Trollope 39 C.D.636.

Adjourned to 2.30 p.m.

Sgd: A.G.F.

2.30 p.m. Bench and Bar as before.

MANDAVIA continues :-

Moore v. Morton.

10 Question of privity of contract:

Crow v. Rogers 93 E.R. 719.

Price v. Easton 110 E.R. 518.

Dunlop Motor Tyre Coy. v. Selfridge (1915)
A.C.847 at p.853.

Respondent must establish default of a person before he can have recourse to the property. Here whole pleadings revolve round breach by the Appellant. Not a cause of action on which the suit can be founded. S.46 of Cap.160.

20 Forms prescribed:

Signature to be in presence of

Must be read in context of S.58.

Stress word "Such" in second para. of S.46.

Means a charge executed in accordance with Ord. Fact of registration alone not sufficient. At end of evidence when witnesses for Plaintiff had given their evidence, the execution had not been proved.

30 S.67 of Evidence Act not displaced by any other law. So the Respondent has not proved his case. Even in the transfer which I was shown the necessary attestation is lacking. Only evidence is we paid interest and so adopted the contract (p.9).

Submit (a) No cause of action against Defendant.
(b) Plaintiff has failed to prove essential part of his case.

NAZARETH:

Additional ground of Appeal.

S.68 of Indian Evidence Act.

40 Deals with manner of proof of documents which

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require to be attested. Does not deal with invalidity of documents. Document was tendered in evidence by Plaintiff. P.20 of Record. No objection was taken to document when it was tendered, so it was admitted in evidence. Therefore falls within principle that if objection not taken to manner of proof waives the objection.

Woodroffe 9th Ed.135.

If objection had then been taken, we should have been able to call one of the attesting witnesses. We therefore were not given the opportunity. Appellant cannot raise it now. He did not even raise it in his final address. Relevance of evidence is different matter.

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P.C.Case cited: Evidence showed it was an unattested document and so not a mortgage. Lack of objection did not convert it into a mortgage. But here not open to challenge the evidence. It must be treated as properly put in.

P.137 of Woodroffe.

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My first answer therefore is that it is now too late to take point.

Second answer: 1st issue: Was that the document was an invalid document - not that it had not been executed by Mortgagor.

Case of Hira Bibi 52 I.A.362.

Headnote makes it clear mortgage was invalid. Case deals with validity, not with proof. Dealt with S.59 of Transfer of Property Act v. Judgment at p.364; 365 case irrelevant to S.68 of Evidence Act.

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Third answer: Document having been admitted in evidence since document had been registered - that not questioned - the document is conclusive.

I rely on S.32 of Registration of Titles Ordinance (Cap.160) On registration the land became liable as security. Torrens system is built upon security of title. If wrong registration has caused loss, remedy is recourse to fund through Registrar.

Therefore once there was registration, if that was to be attached, there should have been some action under S.62 of the Ordinance.

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S.23 of Ordinance: Duplicate certificate of Title has been put in evidence. Not open to Defendant to say charge invalid since there was registration of that charge.

Memo. of Appeal:

Ground 1: Main point that orders made could not be made in absence of Mortgagors. S.46 of Registration of Titles Ordinance, 2nd para. Effect of legal mortgage: to transfer property subject to equity of redemption. So here property passed subject to equity. There was then a transfer of the equity, so the original mortgagor left with no interest in property. When equity of redemption passes, the assignee becomes liable to indemnify the assignor.

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Halsbury 3rd Ed. Vol.27 p.358 para.673.

Admit covenant does not run with land. Covenant implied. Mortgagor could sue him for not carrying out the covenant. Parties to be before Court:

Normal rule is that parties are those against whom relief is claimed in absence of express provision.

S.85 of Transfer of Property Act is such provision.

20

Submit that section fully satisfied. Appellant must show Mortgagor had an interest in the property.

Prima facie he has parted with all his interest in property. Whole of authority is against Appellant.

Refer Mulla Civil Procedure Code 12th Ed. p.1082.

Ragho Vinayak v. Sheikh Daud (1888) 13 Bom.51 at p.53. If no interest in equity of redemption not a necessary party.

Trimbak v. Sakharam (1891) 16 Bom.599 at p.602 para.3. Nothing left after Mortgagor has parted with Equity of Redemption.

30

Refer

Shephard & Brown on Transfer of Property Act (5th Ed.) p.306 2nd para.

Gour Transfer of Property Act (5th Ed.) p.1434 para.2096.

Stress "subsisting title"

No authority to support Appellant in India. English authorities: Position is the same.

Halsbury 3rd Ed. Vol.27 p.377 para.716.

Moore v. Morton

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All authorities go in same direction.

Collins v. Shirley (1830) 39 E.R.245.

Case of insolvent Mortgagor.

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Rochfort v. Battersby, (1849) 2 H.L.C.388; 9 E.R.
1139. at p.1143 (p.398); p.1145 (p.403); p.1146
(p.405); p.1146 (p.406).

Strong case: submit shows that if no interest,
ought not to be joined. If not claiming a person-
al decree no right to join. Case resolved itself
into pure mortgage suit.

Kinnaird v. Trollope (1888) 39 Ch.D.636.

Submit that case supports me.

P.639: Rights only brought into existence by
suit. 10

P.642 - 643: Clear authority in my favour.

P.646: Order made.

Fisher & Lightwood 7th Ed. p.693; 698.

Assignee of equity of redemption stands in place
of mortgagor.

Since we gave up all claim to a personal de-
cree against Defendant, the suit simply became one
to recover payment out of Mortgage property. There-
fore once I complied with S.85, I was under no
obligation to bring in any other party. 20

Appellant has submitted that Judge proceeded
on basis that term borrower was defined to include
assignees. But Judge has not proceeded on that
basis. Does not find anywhere that Defendant was
liable to interest etc. P.32-3 of Record: sets out
position clearly. Position was that Mortgagor was
bound to pay interest etc. On failure repayment
of mortgage money was accelerated - Clause 8 of
Mortgage. Therefore money due from Defendant - 30
from whoever had the mortgage property.

Money was due out of property. We were asking for
sale of the property - not payment by Defendant.

In re Errington:

That case where transferee was not liable to
pay interest. Concede that such payment of
interest out of property.

Form of order: Defendant is interested in a/c as
the amount of interest to be paid out of proceeds
affects him. 40

Question of the Plaintiff:

Paras.12 & 13 were wrong. But can be seen from
plaint that interest had never been paid. Never
pleaded that payments had been made. No such

suggestion made. All we had to prove was that money had fallen due. We did that. Under Clause 8 whole principal had become payable. That mere matter of form.

Matter of substance was that money had fallen due. Had this been mortgage between Englishmen, mortgage could out of court had sold property.

Adjourned to 10.30 a.m. on 6.5.60.

A.G.FORBES, AG.P.

5.5.60.

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6.5.60.

10.30 a.m. Bench and Bar as before.

NAZARETH Q.C. continues:-

Additional ground:

Has been admitted as if on Memo.

But submit it is not a ground on which Defendants case was based in Supreme Court.

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P.26 of Record line 15 - It is an attack on the form in which charge was executed. An implied admission that it was executed. No suggestion that it had not been proved that it had been executed. Judge dealt with it on this basis - p.35 line 1. No objection taken to admissibility.

Refer Jiwa Hasham v. Zenab P.C. Appeal 29/1957. May be reported in (1960) 2 W.R.374.

In 3rd para. at p.2 of printed report. Similar considerations arise in present case. Document on face of it purports to be attested by an advocate.

Memo of Appeal:

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Argued case founded on transferee's liability to pay interest.

Allegations to this effect, but substance was that interest had not been paid. Clause 8 (p.71 of Record): Whole of principal became payable, together with interest. Payment could be enforced either by personal suit against Mortgagor and/or sale or foreclosure on property.

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Submit cannot be said this founded on transferee's liability. It was founded on fact that whole amount became due and payable.

Judge did not proceed on basis that Defendant was liable as assign, though he did refer to defence of "borrower".

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Transfer of interest of borrower - consent of Plaintiff no attestation - immaterial. We were seeking no relief against mortgagor - so not necessary to join him. Defendant could have called mortgagors if their evidence had been material. Submission that original mortgagors had interest because their original liability remained. But does not follow that they had any interest in the property. They had parted with that.

Mulla 12th Ed. p.1081.

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Passage is based on Mortgagor being owner of equity of redemption. Governing words: "equity of redemption". Mortgagor here had no interest in equity of redemption. Supports my argument. Same applies to passage cited from

Seton

Mortgagor would only be necessary party as a contracting party if seeking relief on the contract.

Cases cited: Crow v. Rogers; Price v. Easton; and Dunlop v. Selfridges; all irrelevant to instant case - no application to a mortgage. There is a difference between Contract Act and English Law, but in any case matter is irrelevant. Not suing on the covenant.

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Grounds of Appeal:

1. Suit an enforcement of security.
2. Date of payment became accelerated on non-fulfilment of a condition. Condition was proved to have been fulfilled.
3. Have dealt with this: fallacy: no right to redeem: Might have arisen if I had sued the Mortgagor: No interest in the property: Lost on transfer and never revived thereafter.

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Submit none of grounds of appeal made out. Ask for appeal to be dismissed with costs. Ask for Q.C. and junior's costs. Amount involved and gravity of case sufficient to justify 2 Counsel.

MANDAVIA (in reply):

Substantial ground: Avoided by reference to commentary on relevance of facts. Should have referred to commentaries on S.68 of Evidence Act.

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Woodroffe 9th Ed. p.555.

"Absence of objection is immaterial".

Admissibility not thing for me to object to. My objection is that Plaintiff has undertaken liability to prove document and has not done so. P.49.

Sarkar 8th Ed. 564.
(9th Ed. p.563)

Want of objection does not help. We are not dealing with relevancy - i.e. Ref.to p.136 of Woodroffe. P. 14 Issues framed.

10 Having had that issue in mind, Plaintiff had 2nd issue amended: p. 18 No ref. to 1st issue.

Jiwa Hasham case: Not same as this case. Here no evidence to support execution.

Registration: Submission that must be regarded as valid.

Refer Hogg Registration of Titles 1st Ed.145.

"Invalid instrument is not conclusive".

Plaintiff had undertaken to prove the instrument must prove it valid.

20 S.68 of Evidence Act has not been overridden. Once law require to be attested, then attestation must be proved.

S.23 - Final sentence.

Haji Abdul Reman (1917) A.C.209 at p.216.

Loke Yew v. Port Swettenham R.Coy (1913) A.C.491. Submit issue was accepted: But Plaintiff failed to lead evidence.

Refer Southport Corporation case: Bound by pleadings.

Other Grounds:

30 Does not lie in mouth of Plaintiff to say suit not based on our liability, but should be treated as if based on default of party not before Court. Allegations were made on specific basis. Estopped from alleging something else.

Southport Corporation case.

Costs:

No personal decree in Mortgage suit.

Two Counsel should not be necessary. Should not have been taken in lower Court.

40 Value of suit does not matter.

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Principle in Fisher. Costs should be less
than normal costs.

C.A.V.

(Sgd.) A.G.FORBES,
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JUDGMENT

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

CIVIL APPEAL NO. 41 of 1959

BETWEEN:- Govindji Popatlal Appellant

- and -

Nathoo Visandjee Respondent

(Appeal from a judgment/decreedecision of
the Supreme Court of Kenya at Nairobi (the
Hon. Mr. Justice Mayers) dated 19th December,
1958, in

Civil Case No.363 of 1957

Between

Nathoo Visandjee Plaintiff

- and -

Govindji Popatlal Defendant)

JUDGMENT OF WINDHAM J.A.

The Respondent successfully sued the Appellant
in the Supreme Court of Kenya for the enforcement
of a legal charge dated 10th October, 1953, here-
inafter referred to as "the charge", over a plot
of land, hereinafter called the "suit property",
the charge being by way of security for the repay-
ment of Sh.200,000/- (together with interest lent
by the Respondent to the then registered owners of
the suit property hereinafter referred to as the
"original mortgagors". The three mortgagors each
held a one-third undivided share in the suit pro-
perty. Between 1954 and 1956 the shares of all

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the original mortgagors in the suit property came, by registered transfers, into the ownership of the Appellant, who thus became sole owner of the property, subject to the charge.

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The Plaintiff, after alleging default on the Appellant's part in the payment of interest and in complying with obligations to insure, as stipulated in the charge, sought the usual relief upon a mortgage suit, namely the taking of an account, the payment by the Appellant, within a time to be fixed, of the amount found due to the Respondent upon the taking of the account, and in default the sale of the suit property. The Plaintiff also contained the usual prayer for a personal decree against the Appellant for any balance remaining due to the Respondent over and above the net proceeds of sale; but this prayer for a personal decree was abandoned by learned Counsel for the Respondent at the outset of the hearing.

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The written Statement of Defence was rightly castigated by the learned trial Judge as being drafted "in terms so vague that it appears to me by no means unlikely that had steps been taken to strike out the defence as embarrassing most, if not all of it, would have been so struck out". In it, default on the covenants in the charge was not specifically denied, but the validity of the charge was challenged in general terms, the Appellant pleading that "he does not admit that the so-called 'legal charge is legal or valid or conforms to the requirements of the law so as to create the security" The Appellant's liability to the Respondent was denied in terms equally evasive.

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The findings of fact of the learned trial judge which supported his granting of the relief sought by the Respondent are contained in the following passage from his judgment:-

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"The charge was tendered in evidence as Exhibit 1. Clause 8 of Exhibit 1 in substance provides that the principal sum of Shs.200,000/- together with interest thereon, shall become payable 'in the event of the borrowers' (a term which is by the preamble expressed to include their heirs executors administrators and assigns) 'making default in the payment of interest or outgoings'. In the absence of any evidence to the contrary, I have no hesitation in accepting that of the Plaintiff,

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that the Defendant through his then advocate in fact paid interest upon the loan up to the year 1956 but has subsequent thereto failed to pay any interest and that in contravention of a provision contained in Clause 3 of the charge the Defendant has failed to keep the building upon the suit premises insured against loss or damage by fire".

The Appellant, through his advocate, did not deny his failure to comply with the covenants in the charge, as distinct from his liability to comply with them. But his advocate raised a number of legal arguments to show that the charge was invalid or that the suit was not maintainable. None of these contentions were acceded to by the learned trial judge, and some of them have been abandoned upon appeal. With the latter I will not deal. To the contentions which have not been abandoned, and which are embodied in the memorandum of appeal, Appellant's Counsel has, by leave reluctantly granted by this Court, added a fresh ground of appeal, namely that "the Respondent has failed to prove his case, by non-compliance with the mandatory requirements of Section 68 et seq. of the Indian Evidence Act, and omitting to prove the execution or attestation of the material instrument or instruments of charge, whereon his claim in the suit was founded".

This contention was not raised specifically in the Court below, although it does fall within the general terms of one of the issues which were there framed by the Court, namely - "Is the document of charge relied on by the Plaintiff validly executed and registered?" The learned trial judge's finding on this issue, at the conclusion of his judgment, was "Yes". It is contended for the Appellant that, while this answer was right as regards the registration, it was wrong as regards the execution. Neither the execution nor the attestation was admitted by the Appellant on pleadings or in evidence.

The remaining grounds of appeal are in the following terms :-

"1. The learned trial Judge erred in law in holding that the Respondent's suit as framed and filed was competent or maintainable in the complete absence as a party, of the original borrowers, who were the contracting parties to the Charge (sued on, being Exhibit 1 in

the suit), and against whom only the Respondent could have had any cause of action based on any of the alleged breaches of the terms or conditions thereof agreed thereby to be performed and observed by them and them alone; and he should therefore not have ordered accounts to be taken, in their absence, between the Respondent and the Appellant against whom latter no personal decree could be passed in law.

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2. The learned trial judge overlooked the fact that any payment by the Appellant to the Respondent could only have been made for the protection of the charged property, but the same did not raise any such privity between them as would accelerate the Respondent's right to claim or enforce the payment before the 31st day of October, 1957 fixed by the Instrument of the Charge, on account of the alleged non-performance by the Appellant of the conditions of the contract of Charge relating to insurance and interest.

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3. The learned trial Judge erred in holding that the aforesaid original borrowers had at the material times to the suit no interest in the charged property and that therefore they were not necessary parties to the action under Section 85 of the Transfer of Property Act - since the original borrowers on account of their personal covenant to repay the principal amount with interest when legally due, had a right to redeem the charged property and should, as such, have been joined as Defendants to the suit - for their non-joinder was a denial of natural justice and fatal to the suit".

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I will consider first the ground of appeal added by leave of this court. It is founded on the requirements of Section 68 of the Indian Evidence Act, which reads as follows :-

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"68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence".

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A proviso to Section 68, which excepts from its operation registered documents (other than wills) unless their due execution has been specifically denied, and which would thus have afforded a complete answer to the Respondent's submission, was added by the Indian Legislature in 1926; but the text of the Indian Evidence Act operative in Kenya being the text as it stood in 1907 (vide Section 2 of the Indian Acts (Amendments) Ordinance, Cap.2), that proviso has no application.

The following facts, relevant to the submission with which I am dealing, are now common ground -

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(a) the charge is "a document required by law to be attested" by virtue of the requirements of Section 58 of the Registration of Titles Ordinance (Cap.160) because it is one which requires to be registered by virtue of Section 46 of that Ordinance;

(b) it was duly registered in the manner provided in Section 46;

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(c) it appears on the face of it to have been executed by the parties to it, and their signatures appear to have been attested by two witnesses, one of whom is described as a Nairobi advocate, who as such would be a person competent to attest under Section 58(1);

(d) neither of the attesting witnesses was called for the purpose of proving the execution, as required by section 68 of the Indian Evidence Act;

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(e) no evidence was adduced by either side as to whether either of the attesting witnesses was still "alive, and subject to the process of the court and capable of giving evidence".

On these facts I would incline with some hesitation to hold that, but for the operation of certain further provisions of the Registration of Titles Ordinance to which I will presently refer, the charge, upon which the Respondent's case was entirely founded, would have been inadmissible in evidence by reason of neither attesting witness having been called as required by Section 68 of the Indian Evidence Act. The requirements of the section are mandatory, and "cannot be relaxed except in circumstances provided for in the Act itself": vide Sarkar on Evidence, 10th Edition, at page 593, and the Indian decisions there cited.

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Even on this point, however, the Indian authorities (as so often) are in conflict; and at least one case, Ponnammal v. Kalithitha, 13 M.L.J. 143, decided in 1903 before the enactment of the proviso of 1926 to which I have earlier referred and which relaxed the strict rule, favours the Respondent. In that case, where a mortgage document had been tendered in evidence and an attesting witness was not called to prove execution as required by section 68, it was held that since no objection had been taken on that score in the court below, it must be taken to have been waived, and the objection could not be taken on appeal. And see also, in support of this same proposition, Bajinath Singh v. Brijraj Kuer A.I.R. (1922) Pat.514, at pages 523-4.

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But, quite apart from the lack of unanimity in the Indian decisions, I would add a further qualification to the strict interpretation of Section 68 in the majority of those decisions; namely that the requirements of that section, which relate only to mode of proof, may be overridden by specific and conflicting provisions of substantive law contained in some other enactment. And I here refer particularly to those of sections 1(2), 23 and 32 of the Registration of Titles Ordinance.

Section 1(2) lays down that - "Except so far as is expressly enacted to the contrary, no Ordinance in so far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Ordinance".

There is no such express provision in the Indian Evidence Act (as applied to Kenya) to the contrary; and the Registration of Titles Ordinance is moreover the later of the two enactments. Therefore, in the event of any inconsistency, the provisions of the latter Ordinance will prevail. In relation to the present case there are such inconsistencies between Section 68 of the Indian Evidence Act on the one hand and Sections 23 and 32 of the Registration of Titles Ordinance on the other.

Section 23 of that Ordinance provides:-

"23. The duplicate certificate of title issued by the registrar to any purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all

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courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of such proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. And a certified copy of any registered instrument, signed by the Registrar, and sealed with his seal of office, shall be received in evidence in the same manner as the original".

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In the present case the original of the charge, and a certificate of title endorsed with a memorial of the charge, both signed by the registrar and sealed with his seal of office, were duly produced in evidence. Section 32 of the same Ordinance provides:-

"32. No instrument, until registered in manner hereinbefore described, shall be effectual to pass any land or any interest therein, or render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the land specified in such instrument shall pass, or, as the case may be, shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument, or by this Ordinance declared to be implied in instruments of a like nature".

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The effect of these two sections of the Registration of Titles Ordinance, as I see it, is that, subject to the provisions regarding the rectification or setting aside of registrations contained in Parts XIII and XIV of the Ordinance, and to the exception of fraud or misrepresentation as set out in Section 23 itself, the registration under the Ordinance of a mortgage or charge on land, if duly proved, shall be accepted by the courts as conclusive of the validity of the document affecting it, including that which is a prerequisite of its validity, namely its due execution; and such proof of execution dispenses, to my mind, with the conflicting and more general requirements regarding proof of execution of certain documents laid down by Section 68 of the Indian Evidence Act. While registration does not afford irrefutable

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proof of due execution, it raises a presumption which can only be rebutted if lack of due execution is specifically pleaded and proved within the framework of the Ordinance. Any other conclusion would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, as the Registration of Titles Ordinance is upon the Torrens system of registration. For these reasons this ground of appeal must in my opinion fail.

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I turn now to the remaining grounds of appeal. Of these, the point most strenuously argued, both here and in the court below, and which is covered by paragraphs 1 and 3 of the Memorandum of Appeal, was that the suit was misconceived because the original mortgagors were not joined as Defendants. Counsel for the Appellant relied on the requirement in Section 85 of the Indian Transfer of Property Act, 1882, (as applied to Kenya) that in a mortgage suit all persons "having an interest in the land the subject of the mortgage" are necessary parties. He contended that the original mortgagors retained such an interest. He also pointed to the fact that the privity of contract lay between the Respondent and the mortgagors, and not between the Respondent and the Appellant, and to the trite rule of law that, in general, a person cannot sue, upon a contract, one who is not privy to it. This might have been a relevant proposition if the Respondent had been suing not only on the charge but on the personal covenants contained in it, liability upon which, as learned Counsel for the Respondent rightly conceded on the authority of such case as In re Errington (1894) 1 Q.B.11, did not pass to the Appellant when the mortgaged property came into his ownership but remained with the original mortgagors. But, as we have seen, the claim on the personal covenants was dropped, and the Respondent proceeded solely by way of enforcing his security against the suit property. The point therefore loses all relevance. Upon the assignment of their respective shares in the suit property the mortgagors parted with the only interest which they had until then retained in the "land the subject of the mortgage", namely their equity of redemption. The legal position, which would seem to afford the answer also to the rather obscurely worded ground 2 of the Memorandum of Appeal, is stated succinctly in the judgment of Stirling, J., in Kinnaird v. Trollope (1888) 39 Ch. D. 636, at page 642, in the following words:-

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- continued.

"I have now to inquire how the law stands where the mortgagor has parted with his interest in the mortgaged property. If, for example, the mortgagor has assigned absolutely his equity of redemption in the mortgaged property it was conceded in argument that so long as the mortgagee abstained from suing," (sc: the mortgagor) "the mortgagor cannot bring an action to redeem; and, further, that if the mortgagee chooses to assert his right to foreclose, the mortgagor is not a necessary party to the foreclosure action".

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Counsel for the Appellant has drawn our attention, however, to a defect in the plaint, in that it contains no specific allegation that the original mortgagors have defaulted on their covenants to pay interest and to insure the suit property, but only an allegation that the Appellant has defaulted. Since the obligation under those personal covenants remains that of the original mortgagors, and since only upon a failure by anyone to fulfil them does the Respondent's cause of action on the charge arise, it is contended that default merely on the Appellant's part cannot be a basis for the suit as framed, and that the Respondent is estopped from averring that the original mortgagors are not necessary parties to the action, or that the Respondents were not really being sued on the contract. With regard to this, I would hold as follows - First, although there is no specific allegation in the Plaint that the interest has not been paid, nor the insurance effected, by anyone, but only that the Appellant has failed to pay or effect them, the allegation is implicit in the Plaint, read as a whole, that they have not been paid or effected at all, whether by the Respondent or the original borrowers; for if they had been paid and effected by the latter, the Respondent could not and would not have sued to enforce the charge at all. Secondly, failure to plead default on the original borrowers' part was not specifically raised in the written Statement of Defence as a ground for the dismissal of the suit. If it had been, the Plaint might have been amended to that end, and the true issue between the parties, already implicit, made explicit. Nor, in answer to the Plaint's allegation of failure by the Appellant to pay interest or effect insurance, did the Statement of Defence allege or suggest that these had been paid or effected by anyone else.

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It merely did not admit liability on the Appellant's part. This court will not allow a party to take advantage of the results of the evasiveness of his own pleadings in such a way. Lastly, the Respondent in evidence, upon which he was not cross-examined, stated that on the date of filing the suit there was owing to him the said arrears of interest and the amount of the insurance premium which he had had to pay himself, thereby establishing that there had been no payment by anyone, and bringing Clause 3 of the charge into operation. This point accordingly fails.

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For these reasons I would dismiss this appeal with costs. I do not, however, think that the case is of such difficulty or complexity as to justify the engagement of two Counsel by the Respondent, and I would therefore decline to grant a certificate for the costs of two Counsel.

DATED at Nairobi this 10th day of June, 1960.

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R. WINDHAM
JUSTICE OF APPEAL

JUDGMENT OF FORBES, V.P.

I agree, and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

A.G. FORBES,
VICE-PRESIDENT.

JUDGMENT OF GOULD, J.A.

I also agree.

T.J. GOULD,
JUSTICE OF APPEAL.

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No. 16.

FORMAL ORDER

In Court This 10th day of June, 1960.
Before the Honourable the Vice President (Sir Alastair Forbes) the Honourable Mr. Justice Gould, a Justice of Appeal and the Honourable Mr. Justice Windham, a Justice of Appeal

ORDER

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THIS APPEAL coming on for hearing on the 5th and 6th days of May, 1960 AND UPON HEARING G.R. Mandavia Esquire of Counsel for the Appellant and

In the Court
of Appeal for
Eastern Africa

No.15.

Judgment.

10th June, 1960

- continued.

No.16.

Formal Order.

10th June, 1960.

In the Court
of Appeal for
Eastern Africa

No.16.

Formal Order.

10th June, 1960
- continued.

J.M.Nazareth Esquire of Her Majesty's Counsel and
J.K.Winayak Esquire for the Respondent it was ord-
ered that this appeal do stand for judgment and
upon the same coming for judgment this day IT IS
ORDERED that the appeal be and is hereby dismissed
with costs.

GIVEN under my hand and the Seal of the
Court at Nairobi, the 10th day of June, 1960.

F. HARLAND.
REGISTRAR.

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ISSUED at Nairobi this 11th day of July, 1960.

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

Raojibhai Patel,
for REGISTRAR.

11/7/1960.

No.17.

Order granting
Final Leave to
Appeal.

22nd November,
1960.

No. 17.

ORDER GRANTING FINAL LEAVE TO APPEAL

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

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CIVIL APPLICATION NO. 4 of 1960 (P.C.)

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

BETWEEN:- Govindji Popatlal Applicant

- and -

Nathoo Visandjee Respondent

(Intended Appeal from the final judgment of the
Court of Appeal for Eastern Africa Sessions hold-
en at Nairobi dated 10th June, 1960, in Civil
Appeal No.41 of 1959, and the Formal Order there-
on of the same date,

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Between

Govindji Popatlal Appellant

- and -

Nathoo Visanjee Respondent)

In Chambers This 22nd day of November, 1960
Before The Honourable Mr. Justice Gould, a Justice
of Appeal

O R D E R

UPON the application presented to this Court on the 16th day of November, 1960, by Counsel for the above-named Applicant for final leave to appeal to Her Majesty in Council AND UPON READING the Affidavit of HIMATIAL NARAN of Nairobi in the Colony of Kenya Litigation Clerk sworn on the 15th day of November, 1960, in support thereof and the Exhibits therein referred to and marked "HN1", "HN2" and "HN3" AND UPON HEARING Counsel for the Applicant and for the Respondent THIS COURT DOTH ORDER that the application for final leave to appeal to Her Majesty in Council be and is hereby granted AND DOTH DIRECT that the Record including this Order be despatched to England within fourteen days from the date of issue of this Order AND DOTH FURTHER ORDER that the costs of this application do abide the result of the appeal.

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GIVEN under my hand and the Seal of the Court at Nairobi this 22nd day of November, 1960.

REGISTRAR

H.M. COURT OF APPEAL FOR
EASTERN AFRICA.

ISSUED this 25th day of November, 1960.

In the Court
of Appeal for
Eastern Africa

No.17.

Order granting
Final Leave to
Appeal.

22nd November,
1960

- continued.

ExhibitsE X H I B I T S

1.

EXHIBIT 1. - CHARGE, HASSANALI J.M. MANJI & OTHERS
AND NATHOO VISANDJEE

Charge,
Hassanali, J.M.
Manji & Others
to
Nathoo Visandjee.
10th October,
1953.

Stamp Duty £ 25. 0. 0
Registration Fee £ 01. 0. 0
Copying Fees Shs. £ 00. 9. 0

COLONY AND PROTECTORATE OF KENYA
THE REGISTRATION OF TITLES ORDINANCE (CHAPTER 160)
GRANT NUMBER : I.R.9955
ANNUAL RENT : SHILLINGS 9,200/-
TERM : 49 YEARS FROM 1.6.1953

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C H A R G E

THIS INSTRUMENT OF CHARGE is made the 10th day of October One thousand nine hundred and fifty-three Between HASSANALI JAMAL MOHAMED MANJI, SULTANALI JAMAL MOHAMED MANJI and PYARALI JAMAL MOHAMED MANJI all of P.O.Box Number 1250 Nairobi in the Colony of Kenya (hereinafter called "the Borrowers" which expression shall where the context so admits include their and each of their heirs executors administrators and assigns) of the one part and NATHOO VISANDJEE of P.O.Box Number 5827 Nairobi aforesaid (hereinafter called "the Lender" which expression shall where the context so admits include his heirs executors administrators and assigns) of the other part WHEREAS the Borrowers are registered as Proprietors as tenants-in-common in equal shares (subject however to such charges leases and encumbrances as are notified by Memorandum endorsed hereon and to the annual rent of Shs.9,200/-) of ALL THAT piece of land situate in Nairobi Municipality (Bazaar) in the Nairobi District of the said Colony containing by admeasurement Nought decimal nought seven three five of an acre or thereabouts that is to say land Reference Number 209/4339 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the Plan annexed to the Grant dated the Fifth day of October One thousand nine hundred and fifty-three (registered as Number I.R. 9955/1 and more particularly on Land Survey Plan Number 52846 deposited in the Survey Records Office at Nairobi aforesaid AND WHEREAS the Lender has at the request of the Borrowers agreed to lend to them the Borrowers the sum of Shillings Two hundred thousand (Shs.200,000) upon having the repayment thereof with interest

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thereon at the rate and secured in manner herein-
 after appearing NOW THIS INSTRUMENT WITNESSETH
 that in pursuance of the said agreement and in
 consideration of the sum of Shillings Two hundred
 thousand (Shs.200,000/-) paid by the Lender to the
 Borrowers on or before the execution of these pre-
 sents (the receipt of which sum the Borrowers and
 each of them doth hereby acknowledge) the Borrow-
 ers and each of them doth hereby jointly and sev-
 erally covenant and agree with the Lender as
 follows :-

Exhibits

1.

Charge,
 Hassanali, J.M.
 Manji & Others
 to Nathoo
 Visandjee.

10th October,
 1953

- continued.

1. That the Borrowers shall repay to the Lender
 the said sum of Shillings Two hundred thousand
 (Shs.200,000/-) on or before the Thirty first day
 of October One thousand nine hundred and fifty-
 seven.

2. That the Borrowers will from the 16th day of
 October One thousand nine hundred and fifty-three
 and until the said Thirty-first day of October One
 thousand nine hundred and fifty-seven and there-
 after so long as the said sum of Shillings Two hun-
 dred thousand (Shs.200,000/-) or any portion there-
 of shall remain unpaid from time to time pay inter-
 est thereon at the rate of Twelve per centum per
 annum payable quarterly in advance on the First day
 of January, the First day of April, the First day
 of July and the First day of October each year the
 first of such payments to be due and payable on the
 First day of April One thousand nine hundred and
 fifty-four (the interest up to the Thirty-first day
 of March One thousand nine hundred and fifty-four
 having been already paid by the Borrowers to the
 Lender on or before the execution of these presents
 the receipt of which sum the Lender hereby acknow-
 ledges) PROVIDED HOWEVER that if the Borrowers
 shall be punctual in payment of interest quarterly
 in advance as aforesaid then the rate of interest
 shall be reduced and payable at the rate of nine
 per centum per annum.

3. That during the continuance of this security
 the Borrowers will keep the buildings which are at
 present erected or which may be in future on the
 said piece of land hereinabove described in good
 and substantial repair and condition and also in-
 sured against loss or damage by fire to the full
 insurable value thereof (which shall not be in any
 event less than the sum of Shillings two hundred
 thousand (Shs.200,000/-) in an insurance office of
 repute and good standing to be approved of in writing

Exhibits

1.

Charge,
Hassanali, J.M.
Manji & Others
to Nathoo
Visandjee.

10th October,
1953

- continued.

by the Lender in the joint names of the Borrowers and the Lender and will immediately after every such policy shall have been so effected or if the same shall at the time of the execution of these presents have been previously effected deposit the same with the Lender and will duly and punctually pay all premiums and moneys necessary for effecting and keeping up the said insurance when the same shall become due and will forthwith deliver the receipt for every such payment to the Lender and apply all moneys to be received by virtue of any such policy in making good any loss or damage which may so arise to the said premises or as the Lender may direct and that if default shall at any time be made by the Borrowers in repairing or keeping the said premises in repair or in effecting or keeping the said insurance as aforesaid or in depositing any such policy or delivering any such receipt as aforesaid it shall be lawful for but not obligatory on the Lender to insure and keep insured the said premises in any sum not exceeding the full value thereof or as the case may require to repair and keep in repair the same and to enter upon the said mortgaged premises for that purpose and that all moneys expended by the Chargee for either of such purpose together with interest thereon at the rate of twelve per centum per annum from time to time of the same having been expended shall on demand be repaid by the Borrowers to the Lender and until such payment shall be a charge upon the said premises

4. That the Borrowers will during the continuance of this security pay the said annual rent and other outgoings in respect of the said premises hereinabove described and buildings thereon as and when the same shall become due and will when requested by the Lender to do so produce to him the receipts for such payments and will perform and observe the covenants and conditions under which the said piece of land is held by them and will keep indemnified the Lender and his estate and effects from and against all actions claims and demands on account of the same.

5. That the Borrowers will not assign transfer sublet or part with the possession of the premises hereby charged or any part thereof without the consent in writing of the Lender first had and obtained.

6. That the Chargee or his agent or agents with

or without workmen and others shall at all reasonable times be entitled to enter into and upon the premises hereby charged with a view to examine and inspect the state of repair of the buildings.

10 7. That in the event of the Borrowers desiring to pay of to the Lender the said sum of Shillings Two hundred thousand (Shs.200,000/-) on the said Thirty-first day of October One thousand nine hundred and fifty-seven or at any time prior to that date then the Borrowers shall be entitled to do so by giving to the lender six months prior notice in writing to that effect or by paying to the Lender six months interest in lieu of such notice at the rate of nine per centum per annum.

20 8. That in the event of the Borrowers making any default in the payment of interest or of the rents and outgoings or in performance or observance of any of the covenants or agreements herein contained or implied and on their part to be performed and observed it shall be lawful for but not obligatory on the part of the Lender to demand recover and enforce immediate payment of the said principal sum of Shillings Two hundred thousand (Shs.200,000/-) together with interest and all moneys that may be owing by them to the Lender on this security.

30 9. For the better securing to the Chargee the repayment of the said sum of Shillings Two hundred thousand (Shs.200,000/-) and interest due and to become due and owing on the security of this Charge the Borrowers hereby charge all and singular the said piece of land herein above described and the buildings and improvements which are now or may at any time hereafter be erected and may be thereon in favour of the Lender with the payment to the Lender of the said principal sum of Shillings Two hundred thousand (Shs.200,000/-) and interest thereon at the rate aforesaid and also with all costs and expenses which may be incurred by the Lender in obtaining payment of the said principal sum of Shillings Two hundred thousand (Shs.200,000/-) and interest thereon or in maintaining defending or realising this security.

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10. That the Borrowers hereby irrevocably authorise the Lender during the continuance of this security to collect rents from the Tenants of the said premises and to apply the same for the following purposes that is to say primarily (a) towards payment of interest due to the Lender from time to time and (b) towards payment of annual ground rent,

Exhibits

1.

Charge,
Hassanali, J.M.
Manji & Others
to Nathoo
Visandjee.

10th October,
1953

- continued.

Exhibits

1.

Charge,
Hassanali, J.M.
Manji & Others
to Nathoo
Visandjee.

10th October,
1953

- continued.

unimproved site value tax and other charges in respect of the said piece of land and the buildings and thereafter the balance if any shall notwithstanding anything in these presents contained be paid in reduction of the said principal sum of Shillings Two hundred thousand (Shs.200,000/-) PROVIDED HOWEVER that the Lender shall be at liberty to authorise Messrs. Madan & Shah, Advocates to collect the said rents on his behalf upon payment of remuneration of five per centum on the amount of rents collected by them which remuneration shall be payable by the Borrowers and which shall be deducted from the receipt of rents as aforesaid.

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11. It is hereby expressly agreed by and between the parties hereto as follows:-

(a) That if the Lender shall be desirous of calling of the said principal sum of Shillings Two hundred thousand (Shs.200,000/-) or any portion thereof then remaining unpaid on the said Thirty-first day of October One thousand nine hundred and fifty-seven or at any time after that date for any other reason than the non-payment of interest or breach of the covenants or agreements herein contained or implied and to be performed and observed by the Borrowers then the Lender shall give to them the Borrowers three months notice in writing of his intention so to do.

20

(b) That upon the said principal sum of Shillings Two hundred thousand (Shs.200,000/-) together with interest as aforesaid and all other amounts that may be due hereafter having been fully paid and discharged the Lender will at any time thereafter upon the request of the Borrowers and at their cost release and discharge the said piece of land hereinabove described together with the buildings and improvements comprised in or subject to this charge in their favour or as directed by them.

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(c) If the Borrowers shall at any time make default in payment of interest on the days hereinbefore provided or shall fail to pay the said principal sum of Shillings Two hundred thousand (Shs.200,000/-) or any portion then remaining unpaid the Lender is hereby authorised to appoint such person or manager as he shall think fit to be a receiver or manager of the property hereby charged and

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may in like manner from time to time remove any receiver or manager so appointed and appoint another in his stead.

Exhibits

1.

Charge,
Hassanali, J.M.
Manji & Others
to Nathoo
Visandjee.

10th October,
1953

- continued.

- 10 (d) The Receiver or Manager so appointed shall be the agent of the Borrowers and the Borrowers shall be liable for his acts defaults and remuneration and he shall have authority and be entitled to exercise the powers hereinafter set forth in addition to and without limiting any general power conferred upon him by law:-

20 (i) To receive the rents and profits of the premises hereby charged from the present and future tenants or occupiers thereof and in the case of non-payment thereof to use all or any lawful remedies for recovering and obtaining payment of the sum and to do all things necessary and proper for recovering and receiving the same as fully and effectually as the Borrowers could do;

30 (ii) The Borrowers by these presents direct the present and future tenants and occupiers of the premises hereby charged to pay the said rents and profits of the said premises to the Receiver and Manager when appointed; the receipt of the Receiver and Manager shall be an effectual discharge to such tenants and occupiers for such rents and profits;

40 (iii) The Receiver and Manager is hereby authorised to make such allowances to and arrangements and compromises with such tenants and occupiers as he shall think fit and to give notice to quit take actions for ejectment and recovery of possession of any buildings or otherwise and to relet the premises or any part thereof from time to time to such persons and upon such terms and conditions as he may consider reasonable.

(iv) Generally to take possession of collect and get in all or any part of the property hereby charged and for that purpose to take proceedings in the name of the Borrowers or otherwise as may be deemed expedient;

(v) To sell or concur in selling or in letting or managing and to accept surrenders

Exhibits

1.

Charge,
Hassanali, J.M.
Manji & Others
to Nathoo
Visandjee.

10th October,
1953
- continued.

of tenancies and leases of all or any part of the premises hereby charged and generally on such terms and conditions as he shall think fit and to carry any such sale or letting into effect by assigning transferring leasing or letting in the name and on behalf of the Borrowers.

- (vi) To make and effect all repairs improvements and insurances and to make any arrangement or compromise which the Lender or the Receiver or Manager shall think expedient. 10
- (vii) To appoint managers servants and agents for any of the aforesaid purposes upon such terms as to remuneration or otherwise as the receiver and manager may determine;
- (viii) To do all such other things as may be considered to be incidental or conducive to any of the matters and powers aforesaid and which the receiver and manager may or can lawfully do as agent for the Borrowers. 20

12. All moneys received by any such Receiver and Manager shall be applied by him:-

FIRSTLY in payment of all ground rent rates taxes and outgoings whatsoever affecting the premises and the expenses of repairing and insuring the said premises; 30

SECONDLY in payment of all costs charges and expenses of and incidental to the appointment of the Receiver and Manager and the exercise by him of all or any of the powers aforesaid including the reasonable remuneration of the receiver and manager;

THIRDLY in or towards payment to the Lender of all interest unpaid in respect of this security;

FOURTHLY in or towards payment to the Lender of all principal moneys due and owing on this security; and 40

FIFTHLY any surplus shall be paid to the Borrowers.

13. That the Lender shall not nor shall any receiver or manager appointed by him by reason of the Lender or such Receiver and Manager entering into possession of the premises hereby charged or any

part thereof be liable to account as Mortgagee or Mortgagees in possession or for anything except actual receipts or be liable for any loss upon realisation or for any default or omission for which a Mortgagee in possession might be liable.

10 14. A purchaser or other person having dealings with the Lender or any Receiver and Manager appointed by him shall not be concerned to enquire whether the powers exercised or purported to be exercised have become exercisable or whether any moneys remain due and owing on this security or as to the propriety or regularity of such sale or other dealing or to see to the application or be responsible for the misapplication of any money paid to the Lender or the Receiver and Manager or otherwise as to the regularity of the proceedings.

20 15. All costs and expenses of and incidental to the preparation and completion of this charge including the stamp duty and registration fees and any other disbursements in connection therewith shall be borne by the Borrowers.

IN WITNESS whereof the parties hereto have hereunto subscribed their names the day and year first hereinabove written.

SIGNED by the said HASSANALI)
JAMAL MOHAMED MANJI in the) Sd. Hassanali Jamal.
presence of :-

Sd. H.V.Shah, Advocate, Nairobi.
Sd. Balbir Chhiber, Law Clerk, Nairobi.

30 SIGNED by the said SULTANALI)
JAMAL MOHAMED MANJI in the) Sd. Sultanali Jamal.
presence of :-

Sd. H.V.Shah, Advocate, Nairobi.
Sd. Balbir Chhiber, Law Clerk, Nairobi.

SIGNED by the said PYRALI)
JAMAL MOHAMED MANJI in the) Sd. Pyarali Jamal.
presence of :-

Sd. H.V.Shah, Advocate, Nairobi.
Sd. Balbir Chhiber, Law Clerk, Nairobi.

40 SIGNED by the said NATHOO)
VISANDJEE in the presence of:) Sd. N. Visandjee.

Sd. H.V.Shah, Advocate, Nairobi.
Sd. Balbir Chhiber, Law Clerk, Nairobi.

Exhibits

1.

Charge,
Hassanali, J.M.
Manji & Others
to Nathoo
Visandjee.

10th October,
1953

- continued.

ExhibitsMEMORANDUM OF CHARGES LEASES AND ENCUMBRANCES

1.

N I L

Charge,
Hassanali, J.M.
Manji & Others
to Nathoo
Visandjee.

LAND TITLES REGISTRY - COLONY OF KENYA
INLAND DISTRICT, NAIROBI - REGISTERED NO. I.R. 9955/4.
Presented 30.10.1953.
Time 2.20 p.m.

10th October,
1953
- continued.

Sd. ? ?

Registrar of Titles.

2.

EXHIBIT 2. - TRANSFER, JASHUMATI TO
GOVINDJI POPATLAL

10

Transfer,
Jashumati to
Govindji
Popatlal.

I.R. 9955/15	10245	Stamp Duty	£ 117.0.0.
		Registration	£ 1.0.0.
		Copying Fee	Shs. 4/-.

30th November,
1956.

COLONY AND PROTECTORATE OF KENYA
THE REGISTRATION OF TITLES ORDINANCE (Chapter 160)

GRANT NUMBER : I.R. 9955
ANNUAL RENT : SHS. 9200/-
TERM : 49 YEARS FROM 1.6.1953.

T R A N S F E R

I, JASHUMATI wife of GIRDHARILAL GOVINDJI SOM- 20
LIYA of Post Office Box Number 523 Nairobi in the
Colony of Kenya Married Woman being registered as
the Proprietress of one-third undivided share and
interest with GOVINDJI POPATLAL of Post Office Box
Number 5015 Nairobi aforesaid (subject however to
such charges leases and encumbrances as are noti-
fied by Memorandum endorsed hereon and to the annu-
al rent of Shillings Nine thousand two hundred) of
ALL THAT piece of land situate in Nairobi Munici- 30
pality (Bazaar) in the Nairobi District of the said
Colony containing by measurement Nought decimal
nought seven three five (0.0735) of an acre or
thereabouts that is to say Land Reference Number
209/4339 which said piece of land with the dimen-
sions abuttals and boundaries thereof is delineated
on the Plan annexed to the Grant dated the Fifth
day of October One thousand nine hundred and fifty-
three registered as Number I.R. 9955/1 and more
particularly on Land Survey Plan Number 52846 de- 40
posited in the Survey Records Office at Nairobi
aforesaid IN CONSIDERATION of the sum of Shillings

Fifty thousand (Shs.50,000/-) paid to me by the said GOVINDJI POPATLAL on or before the execution of these presents (the receipt of which sum I hereby acknowledge) DO HEREBY TRANSFER unto the said GOVINDJI POPATLAL ALL THAT my one-third undivided share and interest in the said piece of land together with the buildings and improvements erected and being thereon.

10 IN WITNESS whereof I have hereunto subscribed my name this Thirtieth day of November One thousand and nine hundred and fifty-six.

SIGNED by the said JASHUMATI) Sd. Jashumati
 wife of GIRDHARLAL GOVINDJI) Girdharlal
 SOMAIYA in the presence of:-) Govindji Somaiya.

Sd. C.M. Petani,
 Advocate, Box 1223,
 Nairobi.

MEMORANDUM OF CHARGES LEASES AND ENCUMBRANCES

20 1. Charge dated 10th day of October, 1953 in favour of Nathoo Visandjee to secure the payment of Shillings Two hundred thousand (Shs.200,000/-) and interest thereon registered as Number I.R.9955/4.

I hereby consent to the above Transfer.

Sd. N. Vissandjee.

EXHIBIT 3. - LETTER, KHETANI & WINAYAK TO GOVINDJI POPATLAL.

KHETANI & WINAYAK, ADVOCATES.

30 D.P. Khetani
 J.R. Winayak. Our Ref: 183/26/57.

Telephone: 21006.

9th February, 1957.

REGISTERED

Govindji Popatlal, Esq.,
 Mombasa House,
 Stewart Street, Nairobi.

Dear Sir,

Re: Nathoo Visandjee and yourself.

We are instructed by our client Mr. Nathoo Visandjee of this City to write to you as follows:-

40 We are informed that you are at present the

Exhibits

2.

Transfer,
 Jashumati to
 Govindji
 Popatlal.

30th November,
 1956

- continued.

3.

Letter, Khetani
 & Winayak to
 Govindji
 Popatlal.

9th February,
 1957.

Exhibits

3.

Letter, Khetani
& Winayak to
Govindji
Popatlal.

9th February,
1957

- continued.

registered owner of all that piece of land situate in Nairobi Municipality (Bazaar) in the Nairobi District of the Kenya Colony containing by measurement 0.0735 of an acre or thereabouts that is to say Land Reference No.209/4339 registered as No. I.R.9955/1 together with the buildings and erections thereon (hereinafter called the "Premises") which said premises are mortgaged and charged with our above-named client for the repayment of Shs.200,000/- together with interest and other amounts due thereon under an Instrument of Charge dated the 10th day of October One thousand nine hundred and fifty-three. Accordingly you have stepped into the shoes of the original chargees under the said Instrument of Charge whereby you are bound and liable for all the obligations covenants and stipulations contained in the said Instrument of Charge and you are subrogated to the obligations contained therein which obligations were otherwise prior to your purchase of the said premises binding and enforceable against the persons named as chargees in the said Instrument of Charge.

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20

We would refer you to clauses two and eight of the said Instrument of Charge in relation to your obligations for the payment of interest as stated therein and we demand from you the sum of Shs.6,000/-) being the interest on Shs.200,000/- for the first quarter at the rate of 12 per cent per annum which interest was payable on the first day of January, 1957, and which has not been received by our client as yet. As you have not made this payment punctually you have lost the concession contained in the proviso to clause two of the said Instrument of Charge.

30

We would refer you further to clause three of the said Instrument of Charge and we hereby write to ask you if you have renewed the Insurance against loss or damage by fire of the said premises which premises were insured by your predecessors with the Scottish Union & National Insurance Company up to and including the 1st day of December, 1956, under a policy No.50739 (SCU) in the sum of Shs.225,000/-).

40

Since our client has not received any Renewal Receipt after the one referred to in the immediately preceding paragraph hereof, he naturally assumes that you have not complied with the provisions of clause 3 of the said Instrument of Charge in that:-

- (a) you have not insured the buildings and erections at the said piece or a parcel of land with any Insurance Company because you have not obtained the approval of our client as required therein; or
- (b) you have insured the said premises with some Insurance Company not approved by our client and you have not as yet deposited the Insurance policy with our client.

Exhibits

3.

Letter, Khetani
& Winayak to
Govindji
Popatlal.

9th February,
1957

- continued.

10 In view of the paragraphs four and five hereof our client hereby calls upon you to submit the Insurance Policy for the current year in respect of the said premises against loss or damage by fire to the insurable value of Shs.300,000/- and failing to receive same within the time prescribed hereinafter our client will proceed to insure same with an Insurance Company of his own choice holding you responsible for the insurance premiums which he may have to pay with respect to same.

20 In conclusion we wish to inform you that unless the sum of Shs.6,000/- mentioned in paragraph three hereof and the Insurance Policy mentioned in paragraph six hereof are received in this office up to the 15th instant our instructions are to notify you:-

- (a) that our client will exercise his rights under clause 8 of the said Instrument of Charge, that is to say, he will call upon you to pay the whole principal sum of Shs.200,000/- together with interest and all other moneys due therein;
- 30 (b) that he would proceed to insure the said premises with an Insurance Company of his choice to the insurable value of Shs.300,000/- against loss or damage by fire and hold you responsible for the premiums under Clause 3 of the said Instruments of Charge.

40 For your information we would like to mention that our client considers and reckons the present day market value of the said premises to be not less than Shs.300,000/-.

Yours faithfully,
J.K.WINAYAK
For KHETANI & WINAYAK.

c.c.
Messrs. Javer Kassam & Sons Ltd.,
Victoria Street, Nairobi.

Exhibits

4.
Letter, Khetani
& Winayak to
Govindji
Popatlal.
11th February,
1957.

EXHIBIT 4. - LETTER, KHETANI & WINAYAK TO
GOVINDJI POPATLAL

KHETANI & WINAYAK, ADVOCATES. P.O. Box 2658,
1st Floor,
Duke House,
Duke Street,
Nairobi,
Kenya Colony.
D.P. Khetani
J.K. Winayak.
Telephone: 21006
Your Ref: 189/26/57. Our Ref:
11th February, 1957.
Govindji Popatlal, Esq.,
Mombasa House,
Stewart Street, Nairobi.

Dear Sir,

Re: Nathoo Visandjee and Yourself.

With reference to our letter dated the 9th instant we hereby inform you that there is a clerical error in the 4th paragraph of our letter aforesaid and should be grateful if you would substitute therein the year "1956" by the year "1955".

The error is regretted.

Yours faithfully,

J.K. WINAYAK

For KHETANI & WINAYAK.

c.c.

Messrs. Javer Kassam & Sons Ltd.,
Victoria Street, Nairobi.

5.

Letter, Khetani
& Winayak to
Govindji
Popatlal.
23rd February,
1957.

EXHIBIT 5. - LETTER, KHETANI & WINAYAK TO
GOVINDJI POPATLAL

KHETANI & WINAYAK, ADVOCATES P.O. Box 2658,
Nairobi.
D.P. Khetani
J.K. Winayak
23rd February, 1957.
249/26/57.

Mr. Govindji Popatlal,
Mombasa House, Nairobi.

Dear Sir,

Re: Nathoo Visandjee and Yourself

With further reference to our letters dated the 9th and 11th instant we write to inform you that since you have not produced any Insurance Policy up to and including the 15th instant as required in the penultimate paragraph of our letter dated the 9th instant our client has already insured

the premises with the Pioneer General Assurance Society Limited in the sum of Shs.325,000/- in accordance with paragraphs 4 and 5 of the Instrument of Charge and has paid the sum of Shs.814/50 in respect of premium and stamp duty thereof.

10 In the circumstances our instructions are to demand from you the sum of Shs.814/50. Unless this sum is received in this office on or before the 28th instant our instructions are to institute legal proceedings against you for recovery thereof without further notice.

Yours faithfully,
J.K.WINAYAK
For KHETANI & WINAYAK.

c.c.
The Pioneer General Assurance Society Ltd.,
Nairobi.

Exhibits

5.

Letter, Khetani & Winayak to Govindji Popatlal.

23rd February, 1957

- continued.

EXHIBIT 7. - LETTER, KHETANI & WINAYAK TO GOVINDJI POPATLAL

20 KHETANI & WINAYAK, ADVOCATES P.O. Box 2658,
26/57. Nairobi.
Govindji Popatlal, Esqre., 6th March, 1957.
Mombasa House, Nairobi.

7.

Letter, Khetani & Winayak to Govindji Popatlal.
6th March, 1957.

Dear Sir,

Re: Nathoo Visandjee and Yourself

We would draw your attention to our letters dated the 9th, 11th and 23rd February, 1957 in regard to this subject. Our instructions are to write to you as follows :-

30 As you have not complied with the terms stated in the penultimate paragraph of our letter dated the 9th February 1957 our client now calls upon you not only to pay the sum of Shs.6,000/- and Shs.814/50 but also he demands from you the sum of Shs.200,000/- and unless you pay all these sums on or before the 10th instant our instructions are to institute legal proceedings against you for the recovery thereof without further reference to you.

Yours faithfully,
For KHETANI & WINAYAK
J.K.WINAYAK.

40 Copy to:
Messrs. Javer Kassam & Sons Ltd.,
Victoria Street, Nairobi.

IN THE PRIVY COUNCIL

No. 71 of 1960

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

GOVINDJI POPATLAL (Defendant) Appellant

- and -

NATHOO VISANDJI (Plaintiff) Respondent

RECORD OF PROCEEDINGS

T. L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Appellant.

KNAPP-FISHERS AND BLAKE & REDDEN,
31, Great Peter Street,
London, S.W.1.

Solicitors for the Respondent.