In the Privy Council.

No. 24 of 1954.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

BETWEEN

ISMAIL MOHAMED CHOGLEY ... ... *Appellant*

AND

JAGAT SINGH BAINS ... ... *Respondent.*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE.

EXHIBITS.

LIST OF DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT PRINTED.

Description of Document	Date
IN THE SUPREME COURT OF KENYA	
Judge's Notes of Arguments	8th, 9th, 26th, 27th, 28th and 29th May, 1952
IN THE COURT OF APPEAL FOR EASTERN AFRICA	
President's Notes	2nd, 3rd, 4th May, 1953
Notice of Motion for Conditional Leave to Appeal to the Privy Council with Affidavit in Support...	15th May, 1953
Affidavit in Answer and Exhibit Thereto	16th June, 1953
Affidvait in Reply	18th June, 1953
Certificate as to Costs	24th June, 1953
President's Notes—Application for Leave to Appeal to Privy Council	3rd, 8th, 9th and 20th July, 1953
Judgment	20th July, 1953
Order granting Conditional Leave to Appeal to the Privy Council	20th July, 1953
Notice of Motion for Final Leave to Appeal with Affidavit and Exhibits in Support	15th February, 1954
Affidavit in Answer	19th March, 1954
Affidavit and Exhibit in Reply	22nd March, 1954
Judgment	9th April, 1954

In the Privy Council.

No. 24 of 1954.

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BETWEEN

ISMAIL MOHAMED CHOGLEY ... ... *Appellant*

AND

JAGAT SINGH BAINS ... ... *Respondent.*

RECORD OF PROCEEDINGS

No. 1.
Case for Landlord.

In the Rent Control Board at Nairobi.

No. 1. Case for Landlord, 4th February, 1950.

IN THE RENT CONTROL BOARD AT NAIROBI.

Proceedings under the Increase of Rent (Restrictions) Ordinance, 1949.

Case No. 88 of 1950.

JAGAT SINGH BAINS ... ... *Claimant*

versus

1. SIDI BALAL
2. ISMAIL MOHAMED CHOGLEY ... ... *Respondents.*

10 CASE FOR LANDLORD.

1.—The Claimant is a landlord normally residing and carrying on business at Nairobi but at present temporarily absent in India and his address for service in these proceedings is care of Messrs. Madan & Shah, Advocates, P.O. Box 944, Government Road, Nairobi.

2.—The First Respondent is a Baker and his present address to the best of the Claimant's knowledge information and belief is P.O. Masla,

In the Rent Control Board at Nairobi.

No. 1. Case for Landlord, 4th February, 1950— *continued.*

Tonsur, India. The Second Respondent is also a Baker at Nairobi aforesaid and his address for service is Plot No. 230/3, Race Course Road, Nairobi.

3.—The First Respondent was tenant to the Claimant of a bakery and shop on plot No. 230/3, Race Course Road, Nairobi at a monthly rental of Shs. 300/- exclusive of water and light and conservancy charges which tenancy has been duly determined.

4.—The First Respondent left Nairobi for India in or about October 1941 and he has not since that date returned to Nairobi or been in personal occupation of the said premises and the Second Respondent has since the said date occupied and continued to occupy the said premises and is still in occupation thereof.

5.—The Claimant in or about December 1946 instituted proceedings against the First and Second Respondents for recovery of possession of the said premises and thereafter in or about January 1949 the First Respondent sub-let or purported to sub-let the said premises to the Second Respondent without the consent and against the will of the Claimant.

6.—No payment has been made in respect of the premises by either Respondent in respect of rent or mesne profits for the whole of the period from the end of June 1946 and there is now due and owing to the Claimant for rent and/or mesne profits in respect of the said premises for the period from the end of June 1946 until the end of January 1950 the sum of Shs. 12,900/-.

7.—The Second Respondent owns a bakery at Nairobi in addition to the said Bakery which is run by him on the said Plot No. 230/3.

8.—By reason of the aforesaid the Claimant is entitled to an order for vacant possession of the said premises and it is reasonable that such order should be made.

WHEREFORE the Claimant claims an order :—

(1) Against both Respondents for recovery of possession of the said premises.

(2) Against both Respondents or such one or the other of them as may be liable in respect of the whole or any part thereof for payment of the said sum of Shs. 12900/- with further payment at the rate of Shs. 300/- per month or such higher rate as may be payable for rent or mesne profits from the end of January 1950.

(3) Costs.

Dated at Nairobi this 4th day of February, 1950.

(Sgd.) J. M. NAZARETH,
Madan & Shah,
Advocates for the Claimant.

Filed by J. M. NAZARETH,
Advocates, Govt. Road,
P.O. Box 944, Nairobi.

No. 2.

Second Respondent's Defence.

In the Rent Control Board at Nairobi.

No. 2. Second Respondent's Defence, 12th April, 1950.

1.—Paragraphs 1 and 2 of the case for the landlord are admitted.

2.—The First Respondent's contractual tenancy, was one from year to year, under Section 106 of the Indian Transfer of Property Act, 1882, and it was so held by a previous judgment between the parties hereto relating to the same premises, by the Court of Appeal for Eastern Africa, at Nairobi, in Civil Appeal No. 1 of 1949, and the parties are thereby estopped from contending to the contrary. The First Respondent's contractual tenancy, began on the 1st day of July, 1941, and was determined on the 1st day of July, 1949.

3.—It is admitted that the First Respondent was not in personal occupation of the premises on the 1st day of July, 1949, which is the material date for the purpose, and since the said date the First Respondent has no claim to protection as a statutory tenant or otherwise (the claim to protection before that being under the strength of the contract) and an order for possession binding only as against the First Respondent personally can be made by the Board, to take effect from such date as may be named by the Board.

4.—It is further admitted that the First Respondent is liable to the landlord, for all arrears of rent up to the 1st day of July, 1949, under his contract with the landlord, and for mesne profits since the said date up to the day named by the Board for termination of the First Respondent's interest, in confirmity with prayer No. 1 in the Claimant's Case.

5.—The Second Respondent was on the 25th day of January, 1949, under a written Lease duly constituted, a sub-tenant, under the First Respondent, from the 1st day of January, 1949 to the 1st day of July, 1949, and since the said date is protected as a sitting sub-tenant, and would become a direct tenant to the landlord, with effect from such date as the Board names for the termination of the First Respondent's interest in the tenancy, in accordance with the prayer contained in prayer No. (1) of the landlord's case, under and by virtue of Section 17 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940 (Consolidated Edition) under which the said relationship became complete, Section 16 (1) (i) of the Increase of Rent (Restriction) Ordinance, 1949, which became law on the 6th September, 1949, being applicable only to statutory tenants, and Section 28 of the latter Ordinance, being applicable to sub-lettings after the 6th September, 1949 by a contractual tenant, not restrained by contract from sub-letting.

6.—In the alternative, the Second Respondent says, the First Respondent remained in possession, by and through the Second Respondent,

In the Rent Control Board at Nairobi.

No. 2. Second Respondent's Defence, 12th April, 1950— *continued.*

as his lawful attorney, until the 15th day of April, 1946, with effect from which date the Second Respondent acquired the business of the First Respondent together with the premises on which the business was carried on, whereby the First Respondent accepted the Second Respondent (by an arrangement made in India by the First Respondent with one Sayid Ibrahim who gave evidence in previous Court proceedings but now is dead and unavailable, acting on behalf of the Second Respondent) as a sub-tenant, (in the alternative as an assignee) for such remainder of the term as was vested in him. Such sub-letting (in the alternative assignment was further validated (if such was necessary) and confirmed, by the landlord accepting the rent, with full knowledge of the facts duly disclosed to the landlord. In the further alternative, the landlord, with full knowledge of the facts, constituted the Second Respondent, as his direct tenant, by his act in accepting rent from him out of Second Respondent's own moneys on the 4th day of July, 1946, which rent the landlord has continued to retain despite any possible misapprehension which is not admitted, and may have existed originally.

7.—The Second Respondent would only become liable to pay rent from such date in future, as on which the First Respondent's interest is terminated by an Order of the Board for possession, whereby the Second Respondent is constituted a direct tenant to the landlord. The Second Respondent does not admit any privity of contract or estate as between the landlord and himself upon which the Second Respondent in law could be made liable for rent or mesne profits to the landlord.

8.—Nevertheless the Second Respondent has tendered rent since the 1st day of July, 1949, but the landlord has declined to accept the same at all.

9.—The Second Respondent has offered on moral grounds (without legal obligation to pay) all previous rents due by the First Respondent against the landlord calling a halt to the litigation and accepting the position in law as aforesaid, but the landlord has all along declined to accept the proposition or the rents on that basis.

10.—The short history of the previous litigation between the parties is as under :—

(a) Suit for possession was instituted on the 9th day of December, 1946, and an order for possession made against the two respondents by Dennison, Resident Magistrate, on the 15th May, 1947.

(b) Judgment of Dennison, R.M., was affirmed on appeal by Paget, J., Bourke, J., on 4th July, 1947.

(c) Judgment of Dennison, R.M., and Paget, J., Bourke, J., was set aside by the Court of Appeal for Eastern Africa on the 20th August, 1947, and re-trial ordered, with costs to the Second Respondent

throughout, save before Dennison, R.M., which costs each party was ordered to bear.

(d) Upon retrial, R. A. Campbell, R.M., again ordered possession against the two respondents on the 29th April, 1948.

(e) The order for possession against both respondents was set aside on appeal by de Lesting, J., on the 19th November, 1948, with costs before him and below.

(f) The decision of de Lestang, J., was affirmed on appeal by the Court of Appeal for Eastern Africa, on the 11th March, 1949, and costs against the landlord were awarded to the Second Respondent.

11.—The Second Respondent admits he owns a Bakery Premises, but states the same have been let and occupied since the first day of May, 1948, on which date they were passed for occupation.

12.—It is denied that a case for possession exists and none has been pleaded against the Second Respondent as a lawful sub-tenant, if it does (which is not admitted), it is denied that it is at all reasonable that such order should be made against the Second Respondent, having regard to any comparative hardship.

WHEREFORE the Second Respondent prays that he be declared a lawful sub-tenant, and a direct tenant from the relevant date, and liable only to pay rent from such latter date (which he is willing to pay) at Shs.300/- per month (no lawful notices having been given to raise the rent to the extent permitted by law), and that costs be awarded to the Second Respondent on the head of possession, as also on the head for monetary relief on the appropriate scale.

Dated at Nairobi this 12th day of April, 1950.

for D. N. & R. N. KHANNA

(Sgd.) D. N. KHANNA.
Advocates for the Second Respondent.

Filed by :—

D. N. & R. N. KHANNA,
Advocates,
Sheik Building,
Victoria Street,
P.O. Box 1197,
Nairobi.

In the Rent Control Board at Nairobi.

No. 3.

Proceedings.

Case No. 88 of 1950.

No. 3. Proceedings, 8th November, 1950.

JAGAT SINGH BAINS ... ... *Landlord (Claimant)*

versus

SIDI BILAL
ISMAIL MOHAMED CHOGLEY ... ... *Tenants (Respondents).*

Plot No. 230/3. Race Course Rd.

8th November, 1950.

Present :—Mr. F. ROBERTS (in Chair).
Mr. F. S. ECKERSLEY.
Mr. A. FIELDING.

NAZARETH for landlord.
KHANNA for sub-tenant.

Tenant absent served.

NAZARETH. Claim vide plaint.

Recovery of possession, arrears from 1.7.46 to 31.10.50 at 300/- a month. 52 months, Shs.15600/-.

KHANNA. R/I rented premises 1940–1941. Ran business for few months went to India 1941, gave P/A to R/2. R/2 paid rent and ran business to June, 1946. Landlord accepted rent. Then refused to accept rent.

We are lawful sub-tenants.

Rent tendered and refused.

NAZARETH. Opens.

Hands in history of case. Tenant R/I has sub-let premises without consent of landlord.

KHANNA. Claimant estopped by judgment of C. A. C. A. held that Sidi has a contractual tenancy (which is only determinable by six months notice Sec. 106 Tr. of Ppty. Act).

Sec. 108 lessee has complete right to sub-let.

Sec. 11 (1) (h) Old Ord and 16/1/i New Ord. do not prohibit sub-letting —they only deprive a tenant of his rights and protection. Ss. (b) of Sec. 16.

F. ROBERTS.

SECOND RESPONDENT'S EVIDENCE.

In the Rent Control Board at Nairobi.

Second Respondent's Evidence.

No. 4.

Maganlal Dayabhai Desai.

No. 4. Maganlal Dayabhai Desai, 8th November, 1950. Examination.

W/1. MAGANLAL DAYABHAI DESAI. Sworn.

Clerk to C.A.E., Africa.

I produce records as under :—

R.M.'s Civil Case 1663/46.
S/Ct. C.A. 14/47.
C.A.E.A. C.A.15/47.
S.Ct. C.A. 22/48.
C.A.E.A. C.A. 1/49.

(This w/s called out of turn by leave of Board. He was summoned by Respondent.)

F. ROBERTS.

CLAIMANT'S EVIDENCE.

Claimant's Evidence.

No. 5.

Petro Manasi Githenji.

No. 5. Petro Manasi Githenji, 8th November, 1950. Examination.

W/2. PETRO MANASI GITHENJI. Kikuyu. Sworn.

Clerk employed at present by Trivedi and Travadi. Formerly I was employed by Trivedi, Nazareth and Gautama. I remember posting original of this notice (Ex. (1)) on the outer door of the bakery on Plot 230/3 Race Course Rd., Nairobi, on 7th December, 1948, and a copy sent to I. M. Chogley by post (Ex. (2)).

Cross-examination.

XXD. I can't say if our office knew the address of Sidi Bilal in India.

F. ROBERTS.

In the Rent Control Board at Nairobi.

No. 6.

Thomas Lugano Kakamega.

Claimant's Evidence.

W/3. THOMAS LUGANO KAKAMEGA. Sworn.

No. 6. Thomas Lugano Kakamega, 8th November, 1950. Examination.

Clerk, Central Rent Control Board, Nairobi. I produce our office records (1) Outward Despatch Reg. which shows despatch on 13/3/50 to Sidi Bilal in India of a regd. package containing " Plaint letter." Plaint letter would be the same as in the file (marked X).

Record inspected and returned to office. Available if wanted at any time.

(2). P.O. receipt for reg. Air Mail letter No. 4831 dated 15/3/50.

(3). Postal form G.P.O. A.11 showing the posting of this letter.

Cross-examination.

XXD. Our record does not quote Case Number.

F. ROBERTS.

W/2. Continued. This letter has not been returned undelivered.

F. ROBERTS.

At this stage Court adjourns for interpreter.
Hg. 2/30 p.m. 22nd November, 1950.

F. ROBERTS.

8th November, 1950.

No. 7. Balbir Chhibber, 22nd November, 1950. Examination.

No. 7.

Balbir Chhibber.

22nd November, Board. Mr. F. ROBERTS.
Mr. F. ECKERSLEY.
Mr. A. FIELDING.

Mr. KIRPAL SINGH acted as interpreter only.

NAZARETH.
KHANNA.

W/4. BALBIR CHHIBBER. Sworn.

Clerk to Madan and Shah.

Advocates. On 3/4/50 in presence of Hesham Merali I posted a copy of a plaint on the door of the premises in this case. I also posted a letter from the R.C.B. on the door with it. I recognise X. as a copy of the letter and X1 as the copy of plaint I posted on the door. At the same premises on the next day I personally served Ismail Mohamed Chogley with a copy of the same plaint and letter and obtained his signature on a receipt.

Thereafter I have posted hearing notices on the outer door of the premises, addressed to Sidi Bilal. The last one was a hearing notice on 30/10/50 for hearing 8.11.50.

XXD. I don't remember exact date I served the plaint and letter. Service was reported by letter to R.C.B. I typed the letter. This is it, X2. I also drafted it.

I typed the plaint in this case. I have not posted a hearing notice to Sidi Bilal by post. I have not posted a hearing notice for to-day. I can't say who supplied the address of R/1 as put in plaint.

No. XXN.

F. ROBERTS.

No. 8.

Pyarali Gangji Mongdani.

W/5. PYARALI GANGJI MONGDANI. Sworn.

Clerk to Madan and Shah. On 15/11/50 I visited the premises in this case. I posted a hearing notice addressed to Sidi Bilal on the outer door. Jagat Singh and Ramoo Pirbhai were present. I prepared a certificate to this effect at the time. This is it. X3. I identify X4 as a copy of the notice.

F. ROBERTS.

W/3. THOMAS LUGANO. Recalled.

I posted original of X4 as addressed by regd. post. I produce the receipt, No. 7032, dated 11 Nov., 1950.

No XXN.

F. ROBERTS.

No. 9.

Jagat Singh Bains.

W/6. JAGAT SINGH BAINS. Sworn.

I am proprietor of J. S. Bains bar on Race Course Rd., Nairobi, and of Plot 230/3, Race Course Rd.

In building on 230/3, a bakery, R/2 carried on a bakery business under the name of Moslem Bakery.

In 1941 I let the bakery to Sidi Bilal at 300/- a month. There was a

In the Rent Control Board at Nairobi.

Claimant's Evidence.

No. 9. Jagat Singh Bains, 22nd November, 1950. Examination—*continued.*

written lease but it was held in Court of Appeal for E.A. to be void for want of registration.

Sidi Bilal paid rent at 300/- a month. He left for India, I think in 1942. He has not returned up to now. The 5 years of the lease came to an end in 1946, I applied to R.C.B. for consent to go to Court for possession of my premises against Sidi Bilal and Chogley. They gave it. In December, 1946, I filed the case for possession. R.M.'s Court Case 1663/46 I got an order for possession. Sidi Bilal did not enter an appce. or oppose the proceedings.

Only Chogley appeared. He filed an appeal to S/Ct. and it was dismissed. He appealed to C.A.E.A. and the case was remitted to R.M. for re-hearing. On 2nd hearing by R.M. I got an order for possession.

Immediately afterwards Chogley completed a new bakery of his own and let it on rent. Chogley appealed. S/Ct. allowed the appeal. I appealed to C.A.E.A. My appeal was dismissed.

On my behalf, notice to quit was given. Ex. (1).

Seven letters admitted by consent Ex. (3).

Chogley now occupies the premises and carried on business of bakery there. I have not had any rent since 1946 June.

Cross-examination.

XXD. Chogley has been engaged in running this bakery since 1946 since I started failing to get rent. From 1942–1946 Chogley tendered rent on behalf of Sidi Bilal. He said he had a P/A from Sidi.

Cheques were signed " pp Muslim Bakery " by Chogley. I can't remember if at times cheques were otherwise signed. I have had the bar for the last 4 years. It is in same building as bakery. For 5 years he ran the business while it was leased to Sidi Bilal. The lease expired in 1946 and then I refused to accept rent and Chogley was not my tenant. The lease was drafted privately by an advocate's clerk. I did not send it to Dave? to get stamped.

(Khanna questions w/s as to contents of lease).

(Disallowed—the C. of A. has held the lease inadmissible and I cannot allow evidence of what it contained to be given orally now).

I received this cheque Ex. (4). I think it must be for June rent. After that I refused to accept rent. I could not accept rent from a person who was not my tenant.

Lease expired on 30th June, 1946. This is last cheque I received for rent.

Rent was raised 5/- to 305/- on account of Increase in Site Value Tax. I can't remember when. I can't remember who I served with notice of increase—or if I sent it to Sidi Bilal in India.

In Aug., 1949, rent was tendered but returned under my advocate's advice. Ex. (5).

If I get these premises I want to run the bakery myself. I don't want to re-let them. I don't want possession to get Key-money. I want to start my own business. I have three properties in town—including this one.

It is not true that I agreed to take Chogley as a direct tenant if he paid rent 500/- and to give him a 5 years lease. I have never heard anything from Sidi Bilal since he left for India although I have written several times.

I did not write between 1941/2 and 1946. There was a 5 years lease—there was nothing to write about. I did not take my wife to visit the bakery in 1946. I don't know if Sidi and Chogley are related. I bought the plot in 1939 and built the bakery in 1940. I rented it to Sidi as soon as it was built.

I did not build the bakery specially to rent to Sidi. His own bakery is on Pumwani Rd. and it is let and he got 65,000/- Goodwill for it. I am not prepared to accept rent now. Chogley is not my tenant.

XXXD. Up to date lease expired I received cheque from time to time. I did not notice any difference in the method of signing. I can't read English. I can just write my own name.

F. ROBERTS.

Applicant's case.
Adjourned 28/12/50. 9.30 a.m.

F. ROBERTS.

R.C.B.

In the Rent Control Board at Nairobi.

Claimant's Evidence.

No. 9. Jagat Singh Bains 22nd November, 1950— *continued.* Re-examination.

SECOND RESPONDENT'S EVIDENCE.

No. 10.

Ismail Mohamed Chogley.

28.12.50. BOARD.

Mr. F. ROBERTS.
Mr. F. S. ECKERSLEY.
Mr. FIELDING.
Mr. NAZARETH and Mr. KHANNA.

Second Respondent's Evidence.

No. 10. Ismail Mohamed Chogley, 28th December, 1950. Examination.

W.7. ISMAIL MOHAMED CHOGLEY. Sworn.

I am the sub-tenant of this bakery from Sidi Bilal and carry on business in the name of the Muslim Bakery. Sidi first rented the bakery in 1941 from applicant. He gave me a P/A to run the business for him September, 1942. This was the first I had to do with it. I entered into a service agreement with him—I was to get wages.

I continued to run his business up to April, 1946. I paid the rent from the money of the business.

He went to India in September, 1942. In March, 1946, he wrote and told me he was not coming back. I wrote and asked him to transfer the business to my name. He transferred it to my name. He signed the forms to the R.B. Names in April, 1946, and sent them to me. I filed them with The Registration of Business Names.

Since April, 1946, I am sole registered proprietor of this business. I paid Sidi 5000/- for the transfer. Before the transfer I asked Applicant

In the Rent Control Board at Nairobi.

Second Respondent's Evidence.

No. 10. Ismail Mohamed Chogley, 28th December, 1950. Examination—*continued.*

if he had any objection to it. He said he had no objection so long as he got his rent.

In April, 1946, he agreed to give me a five years' Lease from July at 300/– the same rent as Sidi was paying. He didn't give the lease in July. He asked for 500/– rent before he'd give a lease. I didn't agree. Then he went to Rent Control.

On 4.7.46 I paid this cheque Ex. 4 for June, 1946, rent. It has been cashed. He has never tried to return this money to me. I signed the cheque as proprietor of Muslim Bakery.

Jagat Singh is a building contractor and he also has a bar in the same building as the bakery. He doesn't run the bar himself but often visits it.

Since Sidi Bilal went to India I've not ceased to be in charge of this business. Applicant has never run a bakery business. I produce judgment of C.A.E.A. in Civil Appeal 15/1947 (kept in file—not detached). After that judgment, case was retried by R.M. and a possession order given. On appeal, it was reversed. I produce the judgment C.A. 22/48, S/C of Kenya. C.A.E.A. upheld it.

I received notice to quit Ex. 1. It is dated 1.12.48. It determines the tenancy as from 1.7.49. After I received this notice, Sidi executed this document (Ex. 6 dated 25.1.49). On 2.8.49 I sent this cheque Ex. 5 for July, 1949, rent. It was refused. If I am forced to leave these premises I've nowhere else to go to conduct a bakery. He wants to get me out so that he can get " pugri " from somebody else. He came and told me that himself, that several people had made him offers. I built a bakery for myself and let it. I applied for possession to the Board. I was refused.

By Board. I built them in 1948.

Xn. continued. I would lose greatly if turned out.

Cross-examination.

Xxd. I got salary up to end of December, 1945. I helped myself from the money of the business. I remitted money to Sidi Bilal when he asked for it. I've never produced them in any of the proceedings. I was never asked for them.

No document of transfer of the business to me was ever made. I sold all my bread for cash. Maybe I've given on credit to somebody. Maybe there were debts due to bakery when transfer was made. There were no debts to the bakery when it was transferred. There was a talk re a lease with applicant.

I sent letters in 1942 complaining of trespass and assault by applicant. At that time he was not on good terms with me but he cooled down (" tunder ho-geer ") when I showed him the P.A.

I remember on 29.4.48 on 2nd trial before R.M. as order for possession was made.

A few days after this I completed my own bakery on Plot 2763/10 Nairobi and I got an occupation certificate for it. These were entirely new premises. I started the business in the new premises after order for possession was made by R.M. in second trial. I granted a lease of those premises from 1.6.48, and tenants paid rent from that date but never signed the

lease. I got 65,000/- goodwill for the business, when I'd run for about 2 months from April—May. Maybe occupation certificate was dated 3.5.50 but I was told it would be granted. When giving evidence before Magistrates in 2nd R.M.'s case, I said premises were not complete because I hadn't an occupation certificate, but they were complete and I'd been told by somebody in Municipal Authority that I could use them. There was nothing to stop me using my new premises except the lease. My P/A from Sidi is still not cancelled.

No rent has been accepted by Applicant for these premises, since end of June, 1946. I've offered it (see letters Ex. 7).

By Board. Sidi Bilal is in India. He is alive. I never told anybody he was dead.

Xxn. Cont'd. I've not had any communication from him since 1949. I wrote then and got an answer. I've not paid any rent to Sidi Bilal since 1949. I am related to Sidi Bilal. I never paid rent to Sidi Bilal. I paid it to Jagat Singh. I've received it back after Court Judgments. I've never at any time paid rent to Sidi Bilal.

Xxd. R. M. Campbell gave a stay of Execution of his possession Order. Jagat Singh tries to get it varied by Goffey R.M. and in S/Ct. but failed.

I'd have paid Jagat Singh if he would have accepted it.

(Sgd.) F. ROBERTS.

Respondent's Case.

(Sgd.) F. ROBERTS.

No. 11.

Chairman's Notes of Arguments.

Khanna. Landlord has taken advantage of superior finances to drag Respondent from Court to Court. Man of less courage than R. might have given up.

Burke, J., in *Motiram and Another* v. *Mahomed Haroum Ahmed*, Vol. 22, Kenya L.R. p. 14.

Sub-Tenancy lawful.

If Board found any breach of Sec. 16/1, Sec. 16/2 would apply—cannot think it reasonable for Board to make order.

IV. Megarry, p. 144.

III. Blundell 1949. p. 89. p. 106.

(Sgd.) F. ROBERTS.

Nazareth. Tenant has been relying on technicalities throughout.

1st case—failed owing to non-registration of lease.

In the Rent Control Board at Nairobi.

No. 11. Chairman's Notes of Arguments, 28th December, 1950— *continued.*

2nd case—Notice to Quit.

Re R., Appeal in 2nd series of cases held that he was a licensee. Could not be an assignee—because assignation requires to be in writing and registered. Sec. 54. I.T.P. Act.

Sub-tenancy ruled out. R. purported to pay rent in his own name to claimant. (cheque Ex. 4). If sub-tenancy, would have paid tenant and left tenant to settle with Landlord.

De Lestang, J., held that he was a licensee in judgment of Nov., 1948.

Proceedings for possession commenced with application to form a R.C.B. in September, 1946.

2nd R. alleges sub-letting January, 1949—Ex. 6.

R.1 left this country for good in October, 1942.

It is nowhere alleged that there was any consent in writing by landlord to assignment or sub-letting.

Re citations from Megarry—difference between law here and in England.

Sec. 16 (1) (i) Ordinance.

Consent in writing necessary. Waiver or other consent not valid.

Terms of s. section clear.

If assignment or subletting of these premises between 1.12.48 and 6.9.49 there must be consent in writing.

Sec. 11 (1) (h) Old Ordinance " consent " not necessarily in writing.

If landlord brings case within this section, he has occupation against tenant and occupier.

Present case is within Sec. 16 (1) (i).

Re *Motiram* case—

No notice to quit given when s.t. created.

Law changed since this case.

Sec. 16/6. Lawful s.t. not affected—if sub-letting before proceedings for recovery commenced. Special protection to s.t.'s against ordinary law (I.T.P. Act).

Even if Board holds lawful sub-letting, it took place after proceedings to eject commenced, and therefore s.t. not protected " Proceedings " does not only mean the proceedings in this case now being heard.

Sec. 23 (3) " subject to provisions of this ordinance."

Sec. 23 (3) is controlled by 16 (1) (i) and 16/6.

Sec. 28.

In this case s.t. alleged to have commenced in 1949. Ex. 6.

Megarry. p. 146. Footnote 49.

P. 148.

Proceedings for possession commenced when application made to Board or at very latest when suit filed—December, 1946.

Reasonableness—very doubtful if any question of reasonableness arises.

Sidi Bilal—not in possession—unprotected.

R/2 Chogley also not protected.

Gross misuse of Ordinance by Chogley.

Sidi Bilal left in 1942.

Chogley in possession since—purporting to be attorney at first, then as assignee, s.t. or licensee.

Conduct of R/2.

When 2nd possession order made in 1948, he had premises of his own ready—and collected 65,000/- premium. Had only been short time in premises—if at all—impossible he would have built up a goodwill of business worth 65,000/-.

Is it reasonable to protect such a person.

No rent for $4\frac{1}{2}$ years.

Letters Ex. 3.

Last letter no offer to pay.

R.2 wants to take full advantage of Sidi Bilal's absence in India to avoid paying rent. Admits he never paid Sidi Bilal any rent.

What kind of a s.t. is he ?

Whole position of one subterfuge. Had he been s.t. he would have paid tenant.

Pretence from beginning—advantage taken of technicalities 1935—*Philips* v. *Copping*, 1 K.B., p. 15.

No estoppel against a statute.

In S/Ct. waiver decided against Chogley, *re* cheque.

Chogley not a lawful s.t.

Even if he is, no consent in writing.

If he became s.t., he did so after commencement of proceedings.

Asks for order for possession against both Respondents—and order for rent against R/1, and thereafter 300/- a month up to possession. Rent to 31.1.50—12,900/- due.

(Signed) F. ROBERTS.
28.12.1950.

Decision reserved—(Signed) F. ROBERTS.

No. 12.

Judgment.

29th January, 1951.

Present :

Mr. F. ROBERTS, Mr. F. S. ECKERSLEY, and Mr. KIRPAL SINGH.

Judgment of Board read.

MADAN (for NAZARETH)
KHANNA

In this case, the applicant, owner of bakery premises in Nairobi, applies for possession against two persons, No. 1, an absent and

In the Rent Control Board at Nairobi.

No. 12. Judgment, 29th January, 1951— *continued.*

non-occupying tenant, and No. 2, the occupier, on the grounds of unlawful sub-letting, and for an order for arrears of rent which now amounts to 54 months at Shs. 300/– a month.

The case has twice been through the civil courts from the Resident Magistrate to the Court of Appeal for Eastern Africa. The position of the parties was clearly determined in the judgment in Civil Appeal 22 of 1948 dated 19th November, 1948, when de Lestang J., held that Sidi Bilal was a yearly tenant whose tenancy was determinable only by a six months' notice to quit, that his tenancy had not been determined and that Chogley was in possession of the premises by leave and licence of Sidi Bilal.

This was confirmed by the C.A.E.A. in Civil Appeal No. 1 of 1949, in a judgment dated 3rd April, 1949. It is thus clear that the present Respondent is in possession of these premises as a licensee of Sidi Bilal, the original tenant.

Sidi Bilal's tenancy has been determined by a notice to quit, dated 1st December, 1948, and operates from 1st July, 1949. In January, 1949 Ex. 6 was executed. It purports to be a sub-letting of the premises for a period of six months by Sidi Bilal to Chogley from 1st January, 1949. We fail to understand the precise purpose of this document, except it was to " promote " Chogley from a licensee (as found by de Lestang, J.) to a sub-tenant, with a view to giving him rights against the landlord which he would not possess as a licensee.

Ex. 6 mentions that the bakery shop and premises were verbally made over to Chogley with effect from 15th April 1946 but it does not allege that this making over of the premises was with the consent of the landlord, which was necessary under the former Rent Control Ordinance.

We do not consider it proved that the landlord ever gave his consent to any such " Making-over " or assignment. Nor is it alleged that he gave his consent to the sub-letting for six months and this was necessary to make the sub-letting legal. (Section 11 (h) of the former Ordinance, which was in force when the sub-letting took place).

An important point is that the present Rent Control Ordinance, Section 16 (1) (i) reads (giving grounds for possession) :

> " the tenant has, without the consent in writing of the landlord, " at any time between the 1st December 1941 or the prescribed " date, whichever is the later, and the commencement of this " Ordinance, assigned or sub-let x x x."

The date in this case would be 1st December, 1941, because it is later than the " prescribed date," which is 31st December, 1940. The former Ordinance mentioned only the " consent " of the landlord and did not require it to be in writing.

Mr. Nazareth suggest that this enactment is intentionally retrospective. He suggests that it intentionally stipulated " consent in writing," as distinct from verbal consent by waiver or any other form of consent.

Maxwell in his Interpretation of Statutes, 8th Ed., p. 5, says :

" As a general principle retrospective operation ought not " to be given to a statute unless the intention of the Legislature " that it should be so construed is expressed in plain and " unambiguous language ; because it manifestly shocks one's " sense of justice that an act legal at the time of doing it, should " be made unlawful by some new enactment (g). But if the " meaning is plain and obvious, the Act must be construed in " that sense though it may perhaps have been an oversight in the " framers of the Act (h).

" Our decision," says Lord Tenterden (i), " may, in this " particular case, operate to defeat the object of the Act ; but " it is better to abide by this consequence than to put upon it " a construction not warranted by the words of the Act, in order " to give effect to what we may suppose to have been the intention " of the Legislature."

" I cannot doubt," says Lord Campbell (k), " what the " intention of the Legislature was ; but that intention has not " been carried into effect by the language used . . . . It is far " better that we should abide by the words of a statute, than " seek to reform it according to the supposed intention."

" The Act," says Lord Abinger (l), " has practically had " a very pernicious effect not at all contemplated ; but we cannot " construe it according to that result."

In short, when the words admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature, and to construe them according to its own notions of what ought to have been enacted (m). Nothing could be more dangerous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views is, in truth, not to construe the Act, but to alter it (n). But the business of the interpreter is not to improve the statute ; it is, to expound it. The question for him is not what the Legislature meant, but what its language means (o) ; i.e. what the Act has said that it meant (p). To give a construction contrary to, or different from, that which the words import or can possibly import, is not to interpret law, but to make it, and judges are to remember that their office is *jus dicere*, not *jus dare* (q).

Also at p. 189 :

It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication (m).

To our minds, the construction of the wording of this Section appears very clearly in the terms thereof.

In the Rent Control Board at Nairobi.

No. 12. Judgment, 29th January, 1951— *continued.*

It prescribes (in the first part) two dates between which any sub-letting must have been approved in writing by the landlord to be lawful. The framers of the Ordinance knew very well that they were quoting dates long before the Ordinance came into force. We do not think anything could be clearer than this.

It intentionally rendered invalid any other kind of consent and put on the tenant who sub-let the obligation of getting consent in writing. The intention is not open to any other construction nor can we think any other construction was intended. We think it most likely—if not certain—that this provision was enacted in an endeavour to put an end to the terrible lying and counter-lying we have daily, before this Board where matters depend on verbal evidence and nothing is in writing, between people from whom we have a right to expect better.

The sub-letting agreement on which the sub-tenant appears to rely was made after he was termed a licensee in the Supreme Court judgment, and it was entered into years after the commencement of proceedings for recovery. It was made between the date of the Supreme Court judgment and the hearing of the appeal therefrom.

Also it was made after the notice to quit was given, and the notice to quit is the commencement of proceedings for possession. We find that the notices to quit was properly served.

Cases quoted in Blundell's Rent (Restrictions) (Cases 164, 420 and 618) make it clear that consent to sub-letting must be a consent properly and fully given by a landlord who knows what is happening regarding the sub-letting.

Perusal of Blundell's Cases 121, 434, 442, 486, 489, 716, 722, 743 and 769 are of great assistance to us in deciding this case. They make it perfectly clear that " unlawful sub-letting " is a ground for possession. Some of them speak of " subletting in breach of a covenant " ; but in this present case we have sub-letting in breach of the law.

De Lestang, J., made it perfectly clear that the acceptance of a cheque signed by Chogley (Ex. 4) which omitted the letters " p.p. " or some equivalent sign, did not constitute such an acceptance by the landlord as would amount to any acceptance by Chogley as a tenant. We look on the tender of such a cheque in such circumstances, as something in the nature of a trick.

There must be an order for possession against Sidi Bilal forthwith with Shs. 500/– costs. We have no doubt whatever that at most Chogley could only be an unlawful sub-tenant (and is perfectly well aware of it) perhaps having become one by Ex. 6 ; but this document was exectued after proceedings for recovery of the premises had been started and the sub-let began from a date after the commencement of the proceedings, so we do not think he is even a sub-tenant. We think he is still, as De Lestang, J., described him, a licensee ; and with the termination of the possession of Sidi Bilal, his license lapses. He must give vacant possession of the premises to applicant on or before 28th February, 1951 and pay Shs. 16,200 mesne profits to end of December, 1950 and Shs. 300/– a month mesne profits for January and February, 1951. Costs 1,000/–.

In giving him nearly 1½ months to hand over possession we do not concede Chogley the slightest right to be in the premises at all; but considering all the circumstances we do not think it unreasonable to allow him this time to wind up his business.

KHANNA. Stay of execution pending appeal.

KHANNA. } No objection to present Board hearing application for stay.
MADAN. }

KHANNA. Important legal issues. Stay should be granted. If not granted, irreparable damage may be inflicted on Respondent, and if Respondent wins appeal he probably could not be put back as now.

MADAN. Instructed to oppose stay.

Respondent has been in premises six years. Stay usually granted on terms.

Should not be granted if loser merely thinks he has good grounds for appeal.

Re alleged harm to respondent—he had his own and sub-let it.

Board has held he had no right in premises.

No terms offered for stay.

KHANNA. No terms such as payment of mesne profits etc., as Respondent not liable for them. Legal liability for rent is with Sidi Bilal as tenant. Chogley may be liable to Sidi Bilal. Harsh if stay on terms of payment.

(Sgd.) F. ROBERTS.

DECISION.

The Board is not impressed with the plea of possible hardship to the Respondent, especially in view of the fact that he built his own bakery which he chose to let at a substantial premium, while proceedings against him for possession of the Bakery in the present case were pending. Even if he did fail to obtain possession of his own Bakery from his tenant, but as legal points are involved, the Board will grant a stay of Execution providing the mesne profits and costs ordered against Chogley are paid into Court within seven days. If the money is paid there will be a Stay for 30 days pending the filing of an appeal and if no appeal is filed on the expiration of 30 days the Stay will lapse; if appeal filed the Stay will continue to be effective until its disposal.

(Sgd.) F. ROBERTS.
Acting Chairman.

29th January, 1951.

Certified a true copy.

(Sgd.) F. S. ECKERSLEY,
Secretary.

2nd February, 1951.

In the Supreme Court of Kenya.

No. 13.

Memorandum of Appeal.

No. 13. Memorandum of Appeal, 5th February, 1951.

SUPREME COURT CIVIL APPEAL.

No. 129 of 1951.

ISMAIL MOHAMED CHOGLEY ... ... *Appellant (Original Second Respondent)*

versus

JAGAT SINGH BAINS ... ... *Respondent (Original Claimant/Landlord).*

The Appellant above-named being aggrieved by the determination of the Rent Control Board in their case No. 88 of 1950, hereby appeals to the Supreme Court and puts forth the following grounds of appeal, among others, to the determination (a certified copy whereof accompanies this memorandum) appealed from, namely :—

1.—The Board was in error in regarding the *obiter dictum* of De Lestang J. in Civil Appeal No. 22 of 1948, as the *ratio decendantis*, and as such binding upon themselves and upon the parties, to the effect that the Appellant was in law no more than a licensee of Sidi Bilal.

2.—The Board was in error in regarding the *obiter* opinion of De Lestang J., in Civil Appeal No. 22 of 1948, as binding upon themselves and upon the parties, to the effect that the Appellant, though a *defacto* assignee of Sidi Bilal (then a contractual tenant without being in receipt of any notice to quit), was not *de jure* an assignee.

3.—The Board misconstrued the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940 (Consolidated Edition), and ignored the decisions of this Court thereon, in ruling that the said Ordinance required, the consent of the landlord, to the transmission by assignment of a contractual tenant's interest in the tenancy, and further in ruling as a consequence that the assignment with effect from 15th April, 1946 (found as a fact by De Lestang J., in Civil Appeal No. 22 of 1948, and binding upon the Board and the parties, and further proved by Ex. 6) was ineffective.

4.—The Board erred in holding that the six months' contractual interest of Sidi Bilal, could not be transmitted by sub-letting, under Ex. 6, without the consent of the landlord, and in so holding misconceived the effect of the Increase of Rent and Interest Restriction Ordinance, 1940 (Consolidated Edition), and in particular of Section 11 (1) (*h*) and in further thinking that the Appellant's interest from a licence (if it ever was that) could not thereby have been enlarged into a sub-tenancy.

5.—The Board erred in holding that Section 16 (1) (i) of the Increase of Rent (Restriction) Ordinance, 1949, applied to the assignment or the

sub-letting (later) each of which took place before the section was ever enacted.

6.—The Board erred in holding that Section 16 (1) (i) aforesaid, applied so as to affect relationships, which had already become complete and lawfully effective before the section ever became law.

7.—The Board erred in holding that Section 16 (1) (i) aforesaid applied at all to contractual tenants, or to any other than statutory tenants.

8.—The Board lost sight of the fact that Section 28 restrains contractual tenants (with certain exceptions) from assigning or sub-letting, only after the 1st day of September, 1949, but not before that date.

9.—The Board erred in thinking the proceedings, both bouts of which terminated in favour of the Appellant's in the Civil Courts were still extant, for the purposes of determining the commencement of the " proceedings " under Section 11 (4) of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance (Consolidated Edition), 1940, then in force or Section 16 (6) of the Increase of Rent (Restrictions) Ordinance, 1949, and erred in not confining the word " Proceedings " to those before the Board itself.

10.—The proceedings, the Board erred in failing to hold, began on the 4th of February, 1950, the date on which they were filed and registered with the Board, and erred in holding that they commenced on the 1st day of December, 1948, the date on which notice to quit was given, and further in ruling in effect that the mere giving a notice to quit barred a contractual tenant and *a fortiori* a statutory tenant after its expiry from creating sub-tenancies of any description whatsoever.

11.—There was no basis for awarding against the Appellant the payment of arrears of rent due from Sidi Bilal up to the 1st day of July, 1949, or indeed for awarding against the Appellant the statutory rent due from Sidi Bilal from the 1st day of July, 1949, until termination of his right to the premises by an order for ejectment, which was made to take effect from 28th February, 1951.

WHEREFORE the Appellant prays that this appeal be allowed and the order of the Board set aside with costs here and below.

DATED at Nairobi this 5th day of February, 1951.

For D. N. and R. N. KHANNA.

(Sgd.) D. N. KHANNA,
Advocates for the Appellant.

In the Supreme Court of Kenya.

No. 14.

Supplementary Memorandum of Appeal.

No. 14. Supplementary Memorandum of Appeal, 9th January, 1952.

12.—The beginning or the end of a year of the tenancy was not established by evidence, so as to show that the notice to quit had in fact determined the tenancy, and to invest the Board with jurisdiction to make an eviction order.

13.—The Board was differently constituted when the decision was read out, a new member who had taken no part in the earlier proceedings, purporting to be a party to the decision.

14.—The Chairman alone read out his own decision, and was the only one to sign it, the other members failed to vote in favour of or against the decision of the Chairman by a show of hands, in the presence of the parties, or otherwise at all, and failed to sign the decision, so as to make the same that of the Board.

Dated at Nairobi this 9th day of January, 1952.

for D. N. & R. N. KHANNA.

(Sgd.) D. N. KHANNA,
Advocates for the Appellant.

No. 15. Judgment, 9th June, 1952.

No. 15.

Judgment.

The landlord obtained an order from the Central Rent Control Board for the recovery of possession of a bakery premises he owns against the tenant, Sidi Bilal, and the Appellant in actual occupation. Admittedly the premises are within the increase of Rent (Restriction) Ordinance, 1949, which came into force on the 6th September, 1949.

The landlord first took steps to recover possession of the premises in December, 1946, and a detailed history of the protracted litigation between the parties is to be found in the judgment of Nihill, C.J. (as he then was) in Civil Appeal No. 1 of 1949, in the Court of Appeal for Eastern Africa. That was an appeal from the judgment of de Lestang, J., in Civil Appeal No. 22 of 1948 by which it was held (a) that Sidi Bilal was a yearly tenant whose tenancy was determinable only by a six months notice to quit, (b) that the tenancy had not been determined and (c) that the present Appellant Ismail Chogley, was in possession by leave and licence of Sidi Bilal. The landlord failed in his appeal questioning the conclusion that Sidi Bilal was his tenant; the decision in that appeal was given in April, 1949, but he did not await

the result before taking steps anew to recover possession of his premises. Acting upon the judgment of de Lestang, J., given on the 19th November, 1948, he served a notice to quit of the 1st December, 1948, determining the tenancy on the 1st July, 1949. The validity of that notice has for the first time been questioned on this appeal through argument based on ground 12 of the supplementary memorandum filed a year after the original memorandum of appeal was lodged. The submission is that the beginning or end of a year of the tenancy was not established by evidence, so as to show that the notice to quit had in fact determined the tenancy, and to invest the Board with jurisdiction to make an eviction order. The effrontery of this is at once apparent. By his written defence filed in the suit before the Board the Appellant expressly admitted that the tenancy—" began on the 1st July, 1941, and was determined on the 1st July, 1949." Again by the document Exhibit 6, put in evidence by the Appellant and relied upon as a sub-lease from Sidi Bilal to himself, it is set forth that the yearly tenancy commenced from the 1st July, 1941 ; and in testifying before the Board the Appellant himself stated that the notice determined the tenancy as from 1st July, 1949. I refer to *Popatlal Padamshi Shah* v. *Shah Meghji*, C.A. No. 32 of 1951 (C.A.E.A.).

While the period of this notice to quit was running and on the 25th January, 1949, the tenant Sidi Bilal and the Appellant executed the sub-lease Exhibit 6 for the purpose of making the Appellant the sub-tenant of the premises. This sub-letting was without the consent in writing or otherwise of the landlord ; there was no restrictive covenant against sub-letting without consent. The tenant has not been in occupation of the premises since October, 1941, and since that time they have been occupied by the Appellant. Throughout the litigation the fight has virtually been between the landlord and the Appellant.

In February, 1950, the landlord filed his application for recovery of possession with the Board. Sidi Bilal, whose tenancy had been duly determined, did not appear in the proceedings. The Appellant made the case that he was protected in possession as a lawful sub-tenant. The Board heard evidence and took notice of the judgment of de Lestang, J., in the prior proceedings, C.A. No. 22 of 1948, which was produced in evidence by the Appellant. Having considered the effect of the 1949 Ordinance, the tribunal came to the conclusion that " at most he (the Appellant) could only be an unlawful sub-tenant " and expressed the view—" We think he (the " Appellant) is still, as de Lestang, J., described him, a licensee ; and with " the termination of the possession (tenancy) of Sidi Bilal his licence " lapses." It was also concluded that the landlord had never accepted the Appellant as his tenant. The Board plainly considered it reasonable to make the order sought by the landlord and Ismail Chogley now appeals.

I propose to come at once to the substantial question in the case which is covered by the following grounds taken from the memorandum of appeal.

" 4. The Board erred in holding that the six months' con-
" tractual interest of Sidi Bilal, could not be transmitted by

In the Supreme Court of Kenya.

No. 15. Judgment, 19th June, 1952 — *continued.*

" sub-letting, under Ex. 6, without the consent of the landlord, " and in so holding misconceived the effect of the Increase of " Rent & Interest Restriction Ordinance, 1940 (Consolidated " Edition), and in particular of Section 11 (1) (h) and in further " thinking that the Appellant's interest from a licence (if it ever " was that) could not thereby have been enlarged into a sub- " tenancy.

" 5. The Board erred in holding that Section 16 (1) (i) of " the Increase of Rent (Restriction) Ordinance, 1949, applied to " the assignment or the sub-letting (later), each of which took " place before the section was ever enacted.

" 6. The Board erred in holding that Section 16 (1) (i) " aforesaid, applied so as to affect relationships, which had already " become complete and lawfully effective before the Section ever " became law.

" 7. The Board erred in holding that Section 16 (1) (i) " aforesaid applied at all to contractual tenants, or to any other " than statutory tenants.

" 8. The Board lost sight of the fact that Section 28 restrains " contractual tenants (with certain exceptions) from assigning or " sub-letting, only after the 1st day of September, 1949, but not " before that date."

Shortly, the Appellant's contention is simply this, that his interest in the premises was lawful in its inception having regard to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance 1940, in force up to the 6th September, 1949 (see s. 35 of the 1949 Ordinance), and also in view of the decision of this Court in *Motiram's* case, 22 K.L.R. pt. 2, 14. Section 16 (1) (i) of the 1949 Ordinance could not properly be read so as to have the effect retrospectively of withdrawing protection in possession from the Appellant; but in any case that section should be given the same favourable construction as was given to Section 11 (1) (h) of the 1940 Ordinance in *Motiram's* case.

Now Section 16 (1) (i) of the 1949 Ordinance differs substantially from the equivalent Section 11 (1) (h) of the 1940 Ordinance which was considered in *Motiram's* case. Whether I would have decided that case as I did had I been faced with the recent decision of the Court of Appeal in England in *Regional Properties Ltd.* v. *Frankenschwerth & Anor.* 1 All E.R. (1951) 178, is unlikely. But it fell to the Board in this case to apply the provisions of the new and differing Section 16 (1) (i) and in considering whether it did so correctly I do not hold myself bound by a decision concerning the effect of the earlier section in the circumstances of *Motiram's* case.

Section 16 (1) (i) of the 1949 Ordinance reads as follows:

" 16. (1) No order for the recovery of possession of any " premises to which this Ordinance applies, or for the ejectment " of a tenant therefrom shall be made unless—

" (i) the tenant has, without the consent in writing of the " landlord, at any time between the 1st day of December, " 1941, or the prescribed date, whichever is the later, and " the commencement of this Ordinance, assigned or sub- " let the whole of the premises or sub-let part of the " premises the remainder being already sub-let ; or, at " any time after the commencement of this Ordinance, " has, without the consent in writing of the landlord, " assigned, sub-let or parted with the possession of the " premises or any part thereof.

" A landlord who has obtained or is entitled to obtain " an ejectment order on this ground may at his option " either obtain a similar order against the occupier or " may regard such occupier as his tenant.

" For the purposes of this paragraph, if the tenant " is a private limited company or partnership the transfer, " without the consent of the landlord, of more than fifty " per centum of the total par value of the issued shares " of the company or the interest of the partners in the " partnership shall be deemed to be an assignment of the " premises ; "

At the time the Board came to adjudicate in the matter the second paragraph of the section read :—

" A landlord who wishes to obtain an ejectment order on this " ground may have the option of obtaining a similar order against " the occupier or having the occupier as his direct tenant."

That singularly inept piece of drafting was replaced as has been seen by an amending Ordinance No. 34 of 1951 which came into force in June 1951.

It is as well also to set out the sections relied upon in the argument for the Appellant :—

" 16. (6) An order against a tenant for the recovery of " possession of any premises or ejectment therefrom under the " provisions of this section shall not affect the right of any sub- " tenant, to whom the premises or any part thereof have been " lawfully sub-let before proceedings for recovery of possession or " ejectment were commenced, to retain possession under the " provisions of this section, or be in any way operative against " any such sub-tenant.

" 23. (3) Where the interest of a tenant of any premises is " determined, either as the result of an order for possession or " ejectment or for any other reason, any sub-tenant to whom the " premises or any part thereof have been lawfully sub-let shall, " subject to the provisions of this Ordinance, be deemed to become " the tenant of the landlord on the same terms as he would have " held from the tenant if the tenancy had continued.

In the Supreme Court of Kenya.

No. 15. Judgment, 9th June, 1952— *continued.*

" 28. Notwithstanding the absence of any covenant against " the assigning or sub-letting of any premises no tenant shall have " the right to assign, sub-let or part with the possession of such " premises or any part thereof without the written consent of the " landlord or, where such consent shall be unreasonably withheld, " without the consent of the Board.

" Provided that this section shall not apply to a tenant " holding a tenancy commencing after the commencement of this " Ordinance for a term exceeding one year or holding any tenancy " the unexpired residue whereof at the commencement of this " Ordinance exceeds one year."

Section 28 is referred to for the purposes of the argument as going to show that it was never intended that Section 16 (1) (i) should apply to a contractual tenant ; if Section 16 (1) (i) also applied where consent to an assignment or sub-letting was not required by the tenancy agreement then there would be no need for Section 28. Section 16 (6) and 23 (3) are relied upon as affording protection to the Appellant, and it is submitted that they are in flat contradiction to the provision contained in the second paragraph of Section 16 (1) (i) unless some restricted meaning inapplicable to the Appellant as a lawful sub-tenant, is given to the word " occupier."

Once one adopts, as I have now no doubt one must, the elementary principle of construction applied in *Regional Properties Ltd.* v. *Frankenschwerth & Anor.* (sup.), the effect of Section 16 (1) (i) is clear and there is no complication such as was introduced in *Motiram's* case having regard to the authorities therein considered. It is a matter of construction of simple words in the English language ; such words are to be taken as meaning what they say and are to be read in their ordinary sense. It follows, as in the *Regional Properties Ltd.*, case (1) that there is no reason for confining the words " the tenant " so as to mean the statutory tenant. The section covers, and is intended to cover, the case of an assignment or sub-letting by the contractual tenant before the contractual term comes to an end, and (2) no qualification is to be implied that the section only applies where consent to an assignment or sub-letting is required by the tenancy agreement. The presence of Section 28, which makes this doubly certain in respect of assignments and sub-lettings after the commencement of the Ordinance, provides no basis, in my opinion, for the contention that a construction to the opposite effect is properly to be accorded to the first part of the first paragraph of Section 16 (1) (i) (which is the provision applied in the instant case) namely :—

" 16 (1) No Order for the recovery of possession of any " premises to which this Ordinance applies, or for the ejectment " of a tenant therefrom, shall be made unless—

" (i) the tenant has, without the consent in writing of the " landlord, at any time between the first day of December " 1941, or the prescribed date, whichever is the later,

" and the commencement of this Ordinance, assigned " or sub-let the whole of the premises or sub-let " part of the premises the remainder being already " sub-let ; . . . ."

Those words seem perfectly simple and straightforward ; the part of the section just quoted is made in clear and express language retroactive in its application. Where the tenant has assigned or sublet the whole of the premises between the dates specified without the consent in writing of the landlord, there is no protection under the Ordinance.

Turning now to the facts of the case, we have it that there was a sub-letting of the whole premises by the contractual tenant Sidi Bilal to the Appellant in January 1949 (Exhibit 6) without the consent in any form of the landlord ; there was no covenant between the tenant and the landlord in restriction of rights of sub-letting. The Appellant still persists in contending that through an assignment in April, 1946, he then became a sub-tenant by virtue of a provision in the Indian statute applicable, and on this he seeks to attack the findings of the Board for the reasons put forward in grounds 1 to 3 of the memorandum of appeal. I do not think there is any substance in these grounds, but whether one takes the 15th April, 1946, or the 25th January, 1949, as the time of the sub-letting without a consent in writing of the landlord it still falls within the two material dates provided in the section, that is, the 1st December, 1941 (applicable in this case) and the 6th September, 1949, being the date of the commencement of the Ordinance.

The premises accordingly were not lawfully sub-let to the Appellant and he cannot rely upon Sections 16 (6) or 23 (3) for protection in possession. He is the " occupier " whom the landlord has never regarded or accepted as his direct tenant and the Board was entitled to make the order for recovery of possession against him.

Having come to that definite conclusion I do not consider it necessary to express an opinion upon the ruling regarding the alternative submission for the landlord under Section 16 (6) that the sub-letting on the 25th January, 1949, was not made " before proceedings for recovery of " possession or ejectment were commenced," so as to allow the Appellant successfully to avail of the provisions of the sub-section. A legal question is involved as to what is meant by " proceedings." The Board an wered the question in favour of the landlord, holding that the sub-letting was entered into " years after the commencement of proceedings for recovery " and also " after the notice to quit was given, and the notice to quit is the " commencement of proceedings for possession." As to this I have only been referred to the Rent Acts by R. E. Megarry, 6th Edn., p. 3, mentioning two Irish cases which are apparently queried, the reports of which are not available.

There are two further grounds of appeal also raised as afterthoughts through the supplementary memorandum. The first is that a member of the Board who had not taken part in the earlier proceedings sat when the decision was read out. There is no suggestion and nothing whatsoever

In the Supreme Court of Kenya.

No. 15. Judgment, 9th June, 1952— *continued.*

to show that this new member took any share in the actual adjudication. It is a rubbishy ground of appeal and merely indicates the desperate straits to which the Appellant must feel reduced. Then it is submitted that the decision was not that of the Board but of the Chairman who signed it. It is asserted that the other members failed to vote by a show of hands in the presence of the parties or at all and failed to sign the decision so as to make it the decision of the Board. The nonsense of all this is apparent. Section 4 of the Ordinance does not require a voting by show of hands of the members or that they should sign the determination. It is on record that " the judgment of the Board was read " and from the contents of the judgment it is clear on its face that it is a decision by the Chairman and the other two members forming the necessary quorum whose names appear on the record. The decision reached this Court under certification on record by the Secretary of the Board that it is the decision of the Board. There is nothing to suggest that the members of the Board concerned with the case and who heard the evidence and arguments did not concur in the decision in accordance with law ; on the contrary everything points the other way. If ever there was a case in which the well-known presumption, which appears not to be as well known as I thought it was, applies, it is this. Finally, I refer to *Karman* v. *Devraj*, C.A. No. 738 of 1951, in which the Appellant's advocate failed on similar grounds before Windham, J.

It is unfortunate, as I now realise, that I did not sustain Mr. Nazareth's objection to this belated supplementary memorandum of appeal being entertained at all ; my wish at the time was to see every aspect ventilated so that there might be an end once and for all to this protracted and costly litigation.

There remains the question in regard to the claim for rent at Shs. 300/- from the end of June, 1946. There is no dispute as to the amount of the monthly rent or the period of accumulation of rent due up to the end of February, 1951, on which date the order for vacant possession was to take effect. The Board has ordered that the Appellant should " pay " Shs. 16,200/- mesne profits to the end of December, 1950, and Shs. 300/- " a month mesne profits for January and February, 1951 "—a total of Shs. 16,800/-. It seems plain, and is not in dispute, that there is an error in this. The landlord has throughout looked to his tenant Sidi Bilal for payment of the arrears of rent. As was said by Nihill, C.J. in his judgment in the earlier proceedings on the appeal between the present parties (C.A. No. 1 of 1949)—

> " I concede that in the result the peculiar position is arrived " at that the First Defendant (Sidi Bilal) may become liable for " payment of rent in respect of premises which he has long since " vacated but the situation is one which has arisen as a result of " his own laches and his failure to comply with the law as regard " registration. Furthermore the Second Defendant (Ismail " Chogley) is in possession and he has always been anxious and " ready to pay rent. It is quite unreal therefore to suppose that

" the final result of this litigation is in some way or other going to " work disadvantage to the First Defendant (Sidi Bilal) who at " all times has shown a complete indifference to its outcome."

The Appellant appeals against the order for payment by him on the ground that the arrears are only payable by the tenant Sidi Bilal to his landlord. Mr. Nazareth for the landlord agrees that the order is wrong and submits that it is Sidi Bilal who is liable for the payment of rent; he informs that as a precaution he has entered an appeal against the order of the Board for payment; but he submits that in view of Rule 12 of the Rent (Restriction) (Enforcement of Determinations and Orders of the Board and Appeals from the Board's Determinations and Orders to the Supreme Court) Rules of Court 1950, and O. 41, R. 27 of the Civil Procedure (Revised) Rules, 1948, this Court is enabled to make the order which ought to have been made there being an obvious mistake by the Board having regard to its findings. But it is the duty of this Court to adjudicate on the questions raised as between the parties to this appeal. The tenant Sidi Bilal is not such a party and I am unable to read the rule as permitting an order for payment against him to be substituted. Such would be to the prejudice of a person who has had no notice and has not had the opportunity of being heard; In short, a person who is not a party to the present appellate proceedings.

The appeal against the order for recovery of possession fails and is dismissed. The order for payment of mesne profits by the Appellant is set aside.

(Sgd.) PAGET J. BOURKE.

9.6.52.

KHANNA ... ... *Appellant.*
GAUTAMA ... ... *Respondent.*

Judgment delivered.

P. J. BOURKE.

GAUTAMA: I ask costs of appeal, appeal really contested on question of recovery of possession. Other point regarding rent clear mistake of Board and that was at once conceded by us. All the arguments taken up with Appellants grounds against order recovery of possession.

KHANNA: You have a limited discretion. Two issues order for recovery possession.

JUDGE: As to which all this argument over 5 days took place.

KHANNA: And as to order for payment of arrears I had to appeal that order—S. 27 (2) Cap. 5. I must have half costs here and below. There is no option. Also I ask stay pending appeal—O. 41 rule 4 (3). Important questions.

GAUTAMA: You have a discretion and I have shown good reason. Very substantially, indeed wholly, Appellant has lost: Never disputed re rent—an obvious mistake by Board—Appellant raised long and involved arguments on recovery question and some rubbish grounds included as

In the Supreme Court of Kenya.

No. 15. Judgment, 9th June, 1952.—*continued.*

held. I should have costs—Stay should be refused as protracted proceedings—we have been kept out for years.

ORDER.

I accept the submission of the advocate for Respondent as disclosing sufficient good reasons why the Respondent should have the whole costs of this appeal. Accordingly the Respondent will have costs of this appeal. I do not interfere with the order for costs below.

I grant a stay for twenty-one days to enable an appeal to be lodged.

PAGET J. BOURKE.

9.6.52.

No. 16. Decree, 30th January, 1954.

No. 16.

Decree.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.

Civil Appeal No. 129 of 1951.

(Being an Appeal from a determination of the Rent Control Board Central Province Case No. 88 of 1950.)

SMAIL MOHAMED CHOGLEY ... ... *Appellant (Original 2nd Respondent.)*

versus

JAGAT SINGH BAINS ... ... *Respondent (Original Claimant).*

DECREE

THIS APPEAL coming on the 26th, 27th, 28th, and 29th days of May, 1952, for hearing and on the 9th day of June, 1952, for judgment before the Honourable Mr. Justice Bourke in the presence of Counsel for the Appellant and Counsel for the Respondent, IT WAS ORDERED on the said 9th day of June, 1952, (1) that the Appeal against the order for recovery of possession be dismissed, (2) that the order for payment of mesne profits by the Appellant be set aside, (3) that the Appellant do pay to the Respondent the sum of Shs. 4,670/33, being his taxed costs of the Appeal and (4) that a stay be granted for twenty-one days to enable an Appeal to be lodged.

GIVEN under my hand and the Seal of the Court at Nairobi this 30th day of January, 1954.

(Sgd.) DEPUTY REGISTRAR,
Supreme Court of Kenya.

In the Court of Appeal for Eastern Africa.

No. 17. Memorandum of Appeal, 12th June, 1952.

No. 17.

Memorandum of Appeal

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

Civil Appeal No. 57 of 1952.

(From Original Civil Appeal No. 129 of 1951 of Her Majesty's Supreme Court of Kenya at Nairobi.)

ISMAIL MOHAMED CHOGLEY ... ... *Appellant (Original Appellant)*

versus

JAGAT SINGH BAINS ... ... *Respondent. (Original Respondent.)*

MEMORANDUM OF APPEAL.

The Appellant above-named hereby appeals against the judgment delivered on the 9th day of June, 1952, by the Honourable Mr. Justice Paget J. Bourke, of the Supreme Court of Kenya, at Nairobi, and sets forth the following grounds of appeal, among others, to the judgment (a certified copy whereof accompanies this Memorandum) appealed from, namely :—

1. Section 16 (1) (i) of the increase of Rent (Restrictions) Ordinance (hereinafter called " the Ordinance ") was misconstrued,

(a) For it did not lay down or negative rights to assign or sub-let, conferred aliunde.

(b) For the right to assign or sub-let, *inter alia* the whole premises, is governed *before* 6th September, 1949, by Section 108 (j) of the Indian Transfer of Property Act, 1882.

(c) For the right to assign or sub-let the whole premises *after* 6th September, 1949, is governed by the aforesaid Section 108 (j) as modified by Section 28 of the Ordinance.

(d) For a person lawfully becomes a " sub-tenant " or a " person from time to time deriving title under the Original tenant " independently of Section 16 (1) (i) of the Ordinance.

(e) For a person who has acquired a contractual term as aforesaid, becomes a statutory " tenant " as defined under the Ordinance, automatically upon the termination of the contractual interest, quite apart from Section 16 (1) (i).

In the Court of Appeal for Eastern Africa.

No. 17. Memorandum of Appeal, 12th June, 1952— *continued.*

(f) For the persons mentioned in paragraph 1 (d) hereof become lawful sub-tenants under Section 16 (6) of the Ordinance, and direct tenants under Section 23 (3) of the Ordinance, upon an Order for possession being made against the original tenant.

(g) For the word " occupier " in Section 16 (1) (i) of the Ordinance, should have been so read as to cut down its wider meaning, and to give it a more limited meaning of a person having a lower status than that of the " original tenant " " assignee " or a " sub-tenant," so as to permit of consistency between the different sections of the Ordinance, and of the Ordinance being read as a whole, and subject to its scheme, having regard to the definitions of " tenant " as including " a sub-tenant and any person from time to time deriving title under the original tenant," " let " as including " sub-let," and " tenancy " as including " sub-tenancy " in Section 2, and to the provisions of Section 16 (6), 23 (3) and 28 of the Ordinance.

(h) For, if Section 16 (1) (i) intended to lay down what is or can be exclusively a lawful " assignment " or " sub-letting " of the entire premises (which it was not intended to do), it does so (if at all) generally and indirectly, and must as such be construed strictly and give in to particular provisions, namely Sections 2, 16 (6), 23 (3), and 28.

(i) For, if Section 16 (1) (i) is not a general provision, and is irreconcilable with Sections 16 (6), 23 (3), 28 and 35, it should give in to the latter provisions.

(j) For, despite aids to a priori construction, Section 16 (1) (i), if at all, a provision limiting the creation of lawful " assignments " and " sub-tenancies," was capable of two interpretations, and consequences of alternative interpretations should have been taken into account, so as to avoid a construction, involving interference with existing rights, or past and closed transactions, and rendering existing sub-leases of entire premises valid at the commencement of the Ordinance, invalid after its operation.

(k) For Section 35 of the Ordinance, which preserved existing sub-tenancies of the whole premises, as at the date of the Ordinance, was completely ignored.

(l) For a corresponding provision in the increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940 (Consolidated Edition), namely, Section 11 (1) (h) though not so extensive as Section 16 (1) (i) of the Ordinance, was held in *Motiram and Miss Mootasamy* v. *Mohamed Haron Ahmed*, 22 K.L.R. 14, as not laying down the law as to the right to make " assignments " or " sub-leases " of the entire premises, which was recognised as laid down elsewhere.

(m) For, Section 16 (1) (i) of the Ordinance was capable of applying to statutory tenants, and all contractual tenants, save those, not being prevented by the terms of their tenancies from assigning or sub-letting the entire premises, and having effected the assignment or sub-letting before the 6th September, 1949.

(n) For in the alternative and at the very lowest Section 16 (1) (i) is intended merely to lay down a ground for an eviction Order, subject to fulfilment of Section 16 (2) but not otherwise, against *inter alia* a lawful " assignee " or " sub-lessee " of the entire premises, who acquires a lawful title otherwise than in accordance with Section 16 (1) (i) of the Ordinance, and the " option " under the said Section, conferred upon the landlord, gives the landlord the chance of recovering possession, if he can satisfy the Board that under Section 16 (2) as between the landlord and such a person it is reasonable to make the order, but if the Board decides otherwise such a person as aforesaid continues to be protected.

2.—The sub-letting of the entire premises, having been accepted as being effected at the earliest on the 15th April, 1946, or at the latest on 25th January, 1949, the learned judge was in error, in concluding that :—

(a) Section 16 (1) (i) applied at all to the Appellant, or at the very least,

(b) that the Appellant's sub-tenancy was either unlawful, or not subject at least to the benefit of Section 16 (2) of the Ordinance,

(c) any enquiry at all was directed towards providing material for consideration of the application of Section 16 (2), or that the Board ever accepted that the Appellant could claim the benefit of Section 16 (2) (which was never considered or applied to the facts of the case).

3.—The decision arrived at a " meeting of the Board " was not one by " members present and voting " as an " open Court " in the presence of among others (if any) of the parties, and as such was not " in accordance with law," and the presumption to the contrary had been amply displaced.

4.—The order for costs was incompetent,

(a) in so far as the event of each issue, namely " possession " and " mesne profits," was distinct, and the " event " should have been regarded distributively and separately ;

(b) " good reason " likewise should have been separate and distributive, and the reasons accepted were not " good reasons " for awarding the costs of both issues to the Respondent, much less to deprive the Appellant of the costs on the issue on which he succeeded.

(c) in so far as the order for costs below was unjudicially refused to be varied, in the light of successes on the two independent issues.

In the Court of Appeal for Eastern Africa.

No. 17. Memorandum of Appeal, 12th June, 1952—*continued.*

WHEREFOR the Appellant prays that this appeal be allowed with costs here and in the Court below.

Dated at Nairobi this 12th day of June, 1952.

(Sgd.) D. N. KHANNA,
for D. N. & R. N. KHANNA,
Advocates for the Appellant.

Filed by :—
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To be served upon :—
Messrs. MADAN & SHAH,
Advocates for the Respondent,
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Filed this 12th day of June, 1952.

(Sgd.) M. D. DESAI,
Clerk,
H.M. Court of Appeal
for Eastern Africa.

No. 18. Judgment, 14th May, 1953.

No. 18.
Judgment.

WORLEY—Vice-President.

This is an appeal from a decision in appellate jurisdiction of a Judge of the Supreme Court of Kenya (Bourke J.) who upheld an order made by the Central Rent Board whereby the Appellant was required to surrender to the Respondent the possession of certain premises in Nairobi of which the Respondent is the owner and the Appellant is in actual occupation. The premises are admittedly business premises within the scope of the Increase of Rent (Restriction) Ordinance, 1949 (Ordinance No. 22 of 1949). This Ordinance, hereinafter referred to as the 1949 Ordinance, came into force on September 9th, 1949 and replaced the Increase of Rent and Mortgage (Restrictions) Ordinance, 1940 (Consolidated Edition), hereinafter referred to as the 1940 Ordinance.

So far as the Appellant at least was concerned the landlord's application was based on paragraph (i) of Section 16 (1) of the 1949 Ordinance and the short but deceptively simple question in this appeal is, what meaning is

to be given to the word " occupier " in the second sub-paragraph of that paragraph. Sub-sections (1) and (2) of Section 16, so far as material to this appeal, read at the time of adjudication by the Board, that is, on 29th January 1951 as follows :—

" 16. (1) No order for the recovery of possession of any " premises to which this ordinance applies, or for the ejectment " of a tenant therefrom shall be made unless—

" (i) the tenant has, without the consent in writing of the " landlord, at any time between the 1st day of December, " 1941, or the prescribed date, whichever is the later, " and the commencement of this Ordinance, assigned " or sub-let the whole of the premises or sub-let part of " the premises the remainder being already sub-let ; " or, at any time after the commencement of this " Ordinance, has, without the consent in writing of the " landlord, assigned, sub-let or parted with the possession " of the premises or any part thereof.

" A landlord who wishes to obtain an ejectment order " on this ground may have the option of obtaining a " similar order against the occupier or having the occupier " as his direct tenant.

" (2) In any case arising under subsection (1) of this section " no order for recovery of possession of premises shall be made " unless the Central Board . . . considers it reasonable to make " such an order."

The second sub-paragraph of paragraph (i), which I will call for convenience the " option clause," was obviously inaptly drafted and was repealed by Section 6 (a) of the Increase of Rent (Restriction) (Amendment No. 2) Ordinance 1951 (No. 34 of 1951) and re-enacted in the following terms :—

" A landlord who has obtained or is entitled to obtain an " ejectment order on this ground may at his option either obtain " a similar order against the occupier or may regard such occupier " as his tenant."

This amendment came into force on 8th June 1951 and it is only necessary to note here that it dispensed with the necessity of joining the tenant in an application for an order against an occupier (see E. A. C. A. Civil Appeal No. 118 of 1952 : *Trustees of Tayebi Club* v. *Pathak*).

Before I plunge into the questions of law raised on this appeal, I must necessarily set out as briefly as is consistent with clarity the history and material facts of this litigation which, as only too often in rent restriction cases, constitute a monument of futility and frustration. This is the third time that the struggle for possession of these premises has reached this Court and detailed accounts of the previous litigation will be found in the judgments of the learned President of the Court and of Edwards, C.J. Uganda in E.A.C.A. Civil Appeal No. 1 of 1949. It will suffice for my

In the Court of Appeal for Eastern Africa.

No. 18. Judgment, 14th May, 1953— *continued.*

present purposes to say that the result of those proceedings was that it was held that the Respondent-landlord had as his tenant one Sidi Bilal who held the suit premises on a yearly tenancy, and that the Appellant was in lawful possession of the premises as the licensee of Sidi Bilal. Sidi Bilal had however gone back to live in India in October 1941 leaving the Appellant in occupation; he has so far as is known never returned to Kenya and has certainly never taken any active interest in the litigation: the fight for possession has throughout been between the landlord and the Appellant.

The decision of this Court in Civil Appeal No. 1 of 1949 affirming a judgment of the Supreme Court of Kenya and finalising the respective status in law of the landlord, Sidi Bilal and the Appellant, was given on 11th April 1949 but the landlord did not await that decision before taking fresh steps to recover possession of his premises. Acting upon the judgment of the Supreme Court which was given on 19th November 1948, he served a notice to quit dated 1st December 1948 determining the tenancy of Sidi Bilal on 1st July 1949. A copy of the notice was also served on the Appellant in occupation of the premises.

The validity of the notice to quit is not now challenged and it is accepted that the contractual tenancy of Sidi Bilal has been lawfully determined.

On 4th February 1950, the landlord applied to the Central Rent Control Board for an order for recovery of possession citing both Sidi Bilal and the present Respondent as Respondents, basing his application upon the allegations—

(a) that Sidi Bilal, his tenant, had left Nairobi for India about October 1941 and had not since then been in personal occupation of the suit premises;

(b) that since that date the Second Respondent (present Appellant) had occupied and continued to occupy the suit premises;

(c) that after the landlord had in December 1946 instituted proceedings against the two Respondents for recovery of possession, Sidi Bilal had in January 1949 sub-let or purported to sub-let the suit premises to the Second Respondent without the consent of the landlord.

He also alleged that no rent had been paid since June 1946 and claimed Sh. 12,900 for rent and for mesne profits. Sidi Bilal did not appear and the Board in due course made an order against him for possession and costs. There has been no appeal from that order and Sidi Bilal, for all practical purposes, fades out of the picture.

The Second Respondent (present Appellant) entered a written "defence" in which he set up a claim to be protected as a duly constituted sub-tenant of Sidi Bilal by virtue of a written lease executed on 25th January 1949 creating a sub-tenancy from the 1st January to the 1st July 1949; and to become or to have become a direct tenant to the landlord as from the date of the termination of Sidi Bilal's interest in the tenancy, by virtue of the provisions of Section 17 (3) of the 1940 Ordinance (now Section 23 (3) of the 1949 Ordinance). He also set up an alternative

claim to have been accepted as sub-tenant by Sidi Bilal in 1946 but this was not persisted in nor argued on the appeal and need not be further considered.

Section 23 (3) is identical with the former Section 17 (3) and provides as follows :—

> " Where the interest of a tenant of any premises is determined, " either as the result of an order for possession or ejectment or for " any other reason, any sub-tenant to whom the premises or any " part thereof have been lawfully sub-let shall, subject to the " provisions of this Ordinance, be deemed to become the tenant " of the landlord on the same terms as he would have held from " the tenant if the tenancy had continued."

I may also set out here Section 16 (6) of the 1949 Ordinance, formerly enacted as Section 11 (4) of the 1940 Ordinance :

> " An order against a tenant for the recovery of possession of " any premises or ejectment therefrom under the provisions of " this section shall not affect the right of any sub-tenant, to whom " the premises or any part thereof have been lawfully sub-let " before proceedings for recovery of possession or ejectment were " commenced, to retain possession under the provisions of this " section, or be in any way operative against any such sub-tenant."

It will be convenient to note at this stage, in order to clear the ground, that the Appellant in his written defence offered to pay the landlord the arrears and other rent claimed and was ordered by the Board to do so but this part of the Board's order was set aside by the Supreme Court. The landlord has not cross-appealed on that question and so the question of the rent or mesne profits does not fall to be further considered in these proceedings.

The written lease referred to was executed by Sidi Bilal as head tenant and the Appellant as sub-tenant and recited, *inter alia*, that the former had a tenancy from year to year of the suit premises and sub-let or purported to sub-let, them to the sub-tenant from the 1st January 1949 up to and including the 1st July 1949 " determinable thereafter as the law shall permit." The rental reserved, Sh. 300 a month was the same as the rent payable by the head tenant to the landlord and was covenanted to be paid in arrears monthly " in the name of the head-tenant to the landlord." There are two significant facts to be noted in this agreement : firstly, that it was made during the currency of the valid notice to quit, and secondly that it purported to transfer to the Appellant the whole of the remainder of the term of Sidi Bilal's tenancy and reserved no rent or profit to him.

There was no restrictive covenant against subletting in Sidi Bilal's tenancy and the sub-letting (assuming it to be such for the moment) was therefore not a breach of the contract and was lawful at common law and under Section 108 (*j*) of the Indian Transfer of Property Act as applied to Kenya.

In the Court of Appeal for Eastern Africa.

No. 18. Judgment, 14th May, 1953— *continued.*

The Board however applied their minds to Section 11 (1) (*h*) of the 1940 Ordinance which was in force when the sub-lease was made and to the parallel Section 16 (1) (*i*) of the 1949 Ordinance in force when the landlord's application was filed and their determination made. The relevant words of this paragraph, with the appropriate dates inserted read :—

> " the tenant has, without the consent in writing of the landlord, " at any time between the 1st December 1941 . . . and the " 6th September 1949 assigned or sublet the whole of the " premises "

and the only difference between the two paragraphs which is material to my present purpose is that the 1940 Ordinance merely referred to " the consent of the landlord " whereas the 1949 Ordinance refers to " consent in writing." As I read the judgment of the Board they considered that Section 16 (1) (*i*) was intentionally made retrospective, and that, in any case, whether under the old Section 11 (1) (*h*) or under Section 16 (1) (*i*) a subletting of the whole premises made without the consent of the landlord (in writing under the current enactment) was " unlawful." They found as a fact that it had not been proved that the landlord had ever consented to any assignment or subletting or had ever accepted the Appellant as his tenant. They held therefore that, at best, the Appellant " could only be an unlawful " subtenant . . . perhaps having become one by Ex. 6 " (i.e., the written lease) : but they went on to hold that this document having been executed " after proceedings for recovery of the premises had been started and the " sublet began from a date after the commencement of the proceedings," the Appellant was not even a sub-tenant but was still a licensee of Sidi Bilal and that his licence lapsed with the termination of the interest of the latter. They therefore ordered him to give the landlord vacant possession within a period of about six weeks.

The grounds on which the Board based its conclusion that Ex. 6 was made " after the commencement of proceedings for possession " were I think twofold :—

(a) because it was made between the date of the Supreme Court judgment on the previous application and the determination of the appeal therefrom ; and

(b) because it was made during the currency of a valid notice to quit and the Board was of opinion that service of a notice to quit was the commencement of proceedings for possession.

It will be convenient to note at this stage in order further to clear the ground that the Board did not in its decision refer to the question of the reasonableness of making the order under Section 16 (2). Mr. Nazareth has however informed us that this aspect was argued before the Board and the Supreme Court and that as there was evidence relating to reasonableness, this Court should assume that the Board considered it. It does indeed appear that this factor was not entirely absent from the minds of the members of the Board for, when they were considering the Appellant's

application for a stay of the order for possession, they stated that " the " Board is not impressed with the plea of possible hardship to the " Respondent (i.e. the present Appellant) especially in view of the fact that " he built his own bakery which he chose to let at a substantial premium, " while proceedings against him for possession of the bakery in the present " case (i.e. the suit premises) were pending." However, Mr. Khanna has expressly abandoned any ground of appeal founded on the factor of reasonableness or hardship so this point need not be further considered.

I do not think it necessary to set out the grounds of the Appellant's memorandum of appeal to the Supreme Court or the arguments presented to that Court since they were, on the points now in issue, substantially the same as in this Court and will be considered carefully later in this judgment. It will suffice to say that the learned Judge on first appeal followed the decision and reasoning of the Court of Appeal in England in the case of *Regional Properties, Ltd.* v. *Frankenschwerth and Chapman* (1951 1 All E.R. 178). That case involved the construction of Schedule I para. (d) of the Rent and Mortgage Interest Restrictions (Amendment) Act 1933 (which substantially corresponds with Section 16 (1) (i) of the 1949 Ordinance). A contractual tenant, not prevented by the tenancy agreement from assigning the property let to him without the consent of the landlord, was given notice to quit and, three days before the notice expired, assigned the property for the remainder of the term, with the intention that the assignee could hold over as statutory tenant. The Court of Appeal in England held that the landlord was entitled to recover possession under Schedule I para. (d) as against both the tenant and the assignee, when the court considered it reasonable on the facts to make the order. Bourke, J., accordingly held :—

1. that there is no reason for confining the words " the tenant " in Section 16 (1) (i) so as to mean the statutory tenant and to exclude a contractual tenant,
2. that no qualification is to be implied to the effect that this paragraph only applies where the landlord's consent to an assignment or sub-letting is required by the tenancy agreement,
3. that where the tenant has assigned or sublet the whole of the premises between the dates specified without the consent in writing of the landlord there is no protection under the Ordinance. In other words that paragraph (i) is fully retrospective and retroactive.

Applying this construction of paragraph (i) to the facts of the instant case, the learned Judge concluded that, whether the Appellant relied on assignment in April, 1946, or a sub-letting in January, 1949, the premises were not lawfully sublet to the Appellant who accordingly could not rely upon either section 16 (6) or Section 23 (3) for protection of his possession. " He is the occupier whom the landlord has never regarded or accepted as his direct tenant."

In the Court of Appeal for Eastern Africa.

No. 18. Judgment, 14th May, 1953— *continued.*

Having come to this conclusion, the learned Judge thought it unnecessary to express any opinion upon the Board's ruling that the agreement of 25th January, 1949, was not made before proceedings for recovery of possession or ejectment were commenced.

Having further disposed of the other points argued before him he dismissed the appeal with costs to the Respondent, only, as has been said, setting aside the Board's order regarding payment of mesne profits.

After this long preamble I can now turn to the questions raised in the appeal to this Court. These seem to me to be seven in number and to be as follows :—

1. What is the effect of the document Ex. 6 ? Is it a sub-lease or an assignment ?
2. If it is a sub-lease, was it made before or after " proceedings for recovery of possession or ejectment were commenced " ?
3. If a sub-lease and made before the commencement of such proceedings, then were the suit premises thereby " lawfully sub-let " in the absence of consent of the landlord ?
4. Does Section 16 (1) (i) apply to a contractual tenancy or to a statutory tenancy or to both these descriptions of tenancy ?
5. Does Section 16 (1) (i), or to be more precise, the first limb of the first paragraph, have retrospective effect ?
6. Does the term " occupier " in the option clause include a person to whom the premises were lawfully sub-let within the meaning of Section 16 (6) ?
7. If a landlord opts to obtain an order under this paragraph against the " occupier," can he obtain such an order on the same grounds as he has, or might have, relied upon to secure an order against the tenant or must he make out a case, separate and distinct, against the occupier (subject however in either case to the consideration of reasonableness under Section 16 (2)).

I shall endeavour to deal with the arguments on these questions and to find an answer to each of them.

The first question is an important one because the case put forward for the Appellant was based largely on the special position enjoyed by a lawful sub-tenant by reason of the protection afforded him by Section 16 (6) and Section 23 (3) of the 1949 Ordinance, advantages which are not extended to an assignee ; and, although it might be going too far to say that Mr. Khanna conceded he would have no arguable case if the Appellant were held to be an assignee, yet he did at least concede that his case would in that event be much weaker and that the authority of the *Regional Properties* case (supra) would be against him. I am bound to say that I heartily wish that the agreement Ex. 6 could be construed as an assignment for that would render unnecessary much of the subsequent argument and avoid difficult questions of construction of the Ordinance ; but it seems to be well settled that under the relevant law applicable to Kenya, which is the Indian Transfer of Property Act, 1882 and having

regard to Section 105 and Section 108 (j) thereof, an underlease for the entire residue of the under lessor's term operates, in the absence of a contract to the contrary, as an underlease, and does not, as ordinarily under English law, constitute an assignment of the lease : see *Hunsraj* v. *Bejoy Lal Seal* 1930 L.R. 57 I.A. 110. I deem it unnecessary therefor to review the discussion whether Ex. 6 reserved a reversion to the lessor, for whether it did or did not it would in either case on the authority of the Privy Council decision cited operate as a sub-lease. Mr. Nazareth did, indeed, suggest that as the rent restriction legislation of Kenya was largely based on the English Rent Restriction Acts, the Court should give to the words " assignment " and " assign " the meaning that they would have in English law and he called in aid the judgment of Sheridan C.J. in *Patel* v. *Vyas* 1946 13 E.A.C.A. 15 at p. 16. I do not wish to question in any way that decision but it does not in my view assist us in the present case. The Legislature is presumed to know the existing law when it legislates and it would be quite unjustifiable to assume that the Legislature intended, by a side-wind as it were, or by implication, to repeal the above-mentioned sections of the Transfer of Property Act in so far as they relate to the assignment of premises which are within the operation of the rent restriction legislation and to substitute therefor the English law. It is common ground that there was nothing in the contract between Sidi Bilal and the Respondent to prohibit or restrict a sub-letting and that the 1940 Ordinance in force at the material date did not contain any provision corresponding to Section 28 of the 1949 Ordinance, which places restrictions on the right to assign or sub-let : the conclusion therefore must be that Ex. B. (*sic* 6) operated as a sub-lease.

I pass now to the second question : was the sub-lease made before or after proceedings for the recovery of possession or ejectment were commenced ? I have already set out the Board's conclusion on this question and their reasons and noted that the learned Judge on first appeal did not express any opinion on this point. The Board's view that service of the notice to quit was the commencement of proceedings for the purpose of Section 16 (6) and, by implication, of Section 23 (3) (which correspond respectively to Section 5 (5) and 15 (3) of the English Acts) finds support in two Irish cases cited in Megarry—The Rent Acts 6th Ed. 342. The correctness of these decisions is however questioned by the learned author of that text book who is an acknowledged authority on this legislation. Moreover, the reports are not available in this Territory and, for my part, I consider it would be very unwise to rely upon these decisions in these circumstances. I would prefer to adopt the view expressed by Hill J. in *The Espanoleto* 1920 L.R.P. 223 at p. 225 where he said with reference to the Maritime Conventions Act, 1911 : " It is an English statute, and in " English law it is well understood that proceedings are commenced by the " issue of a writ." See also *Dale* v. *Hatfield Chase Corporation* 1922 L.R. 2 K.B. 282 : per Bankes L.J. at p. 294. On this analogy, proceedings under the 1949 Ordinance are commenced when an application is made to the Board for possession or ejectment : it may be that under the 1940

In the Court of Appeal for Eastern Africa.

No. 18. Judgment, 14th May, 1953— *continued.*

Ordinance they were commenced by an application for the Board's consent under Section 4 (see *Amir bin Abdullah* v. *Adamji Abdulhussein* 12 E.A.C.A. 11) but, even if that be so, the notice to quit would I apprehend have to precede such application.

I find it more difficult to come to a conclusion on the other reason founded upon by the Board. As a matter of historical fact the Respondent began proceedings for the recovery of possession of the suit premises, either in September 1946 when he obtained the consent of the Board to do so under Section 4 of the 1940 Act or in December 1946 when he filed his application in the Magistrate's Court. These proceedings were finally rendered abortive by the decision of this Court, referred to above, in Civil Appeal No. 1 of 1949 delivered on 11th April 1949 and the present proceedings were commenced by an application to the Board filed on 4th February 1950. Mr. Khanna has contended that " proceedings " in the context must mean the current proceedings which are before the Court and cannot be held to include former proceedings which have proved abortive. Mr. Nazareth, on the other hand, has emphasized the generality of the words used and pointed out that the Legislature has not used the expression " the proceedings," which, he says, they would have done if Mr. Khanna's interpretation is correct. The intention, it is said, is that once the tenant has notice that the landlord wants possession he is warned not to sub-let and, should he do so after receiving such notice, the sub-tenant is not protected. As a general proposition that is in my view expressed too widely because, as I have said, I do not consider that service of a notice to quit is the commencement of proceedings. But I prefer to decide this question upon the special circumstances of this case, which are that when Ex. 6 was executed in January 1949 the original proceedings were still *sub judice*. At the time the sublease was made, it could not have afforded the sub-tenant any protection under Section 16 (6) : it must be presumed that both parties to the agreement or their legal advisers knew this, and it is not unfair to say that they were taking a chance on the decision of this Court being in their favour. The Appellant argues that the decision in his favour has conferred on the sub-lease retroactively a virtue and efficacy which it did not possess when it was made. On the whole and not without some hesitation, I have come to the conclusion that this contention is unsound. As I see it, the sub-lease was made after the commencement and during the currency of proceedings for recovery of possession and was and still is ineffectual to bring the sub-tenant within the scope of Section 16 (6). If I am right on this point it is sufficient to dispose of the appeal, but lest I should be in error and the matter be taken further, I fear I shall have to try to answer the remaining questions raised on the appeal.

I turn then to the third question which is whether, assuming Ex. B. (*sic* 6) to be a sub-lease executed before the commencement of proceedings to recover possession, did it effect a lawful sub-letting in the absence of the consent of the landlord ? It is not disputed that the Respondent-landlord never at any time consented to the sub-lease effected by Ex. 6 and it is

clear that the Board took the view that this absence of consent made the subletting unlawful. The learned Judge of the Supreme Court appears to have taken the same view. The matter is however not so simple as that. Considering for the moment the law as it stood under the 1940 Ordinance (when Section 11 (1) (h) was identical with paragraph (d) of the First Schedule to the Act of 1933), its effect is set out in the following passage in Megarry, op. cit., at p. 345, as follows :—

> " A sub-letting is not ' unlawful,' however merely because . . .
> " without contravening the terms of the tenancy, it was a
> " sub-letting of the whole of the premises made without the
> " consent of the landlord and so became one of the statutory
> " grounds upon which an order for possession can be made. In
> " such cases the sub-tenant will be protected, despite the order
> " for possession against the tenant."

The only available one of the authorities cited for the first sentence of this passage is *Motiram* v. *Ahmed* (1947) 22 (2) Kenya L.R. 14, a decision of Bourke, J. in the Supreme Court of Kenya. The authority cited for the second sentence is *Giddon* v. *Mills* (1925) L.R. 2 K.B. 713 at p. 725.

The point was however more recently considered by the Court of Appeal in England in the case of *Hyde* v. *Pimley & Ors.*, reported in 1952 2 All E.R. at p. 102. There the tenant had sublet the whole of the premises in breach of covenant but the landlord's application for possession made under the 1933 Act Schedule I para. (d) failed because it was held that the breach had been waived. But Mr. Megarry, counsel for the sub-tenants also put forward an argument based on Sections 5 (5) and 15 (3) of the English Acts to the effect that even if the underletting in question was " without the consent of the landlord " still, since the breach of contract had been waived, the premises could be regarded as " lawfully sublet " and that accordingly, though the landlord might be entitled to an order for possession against the tenant, he could obtain no such order against the sub-tenant. (It will be observed that this argument, if valid, would apply equally to a sub-letting made without contravening the terms of the contract of tenancy but without the actual consent of the landlord.) The Court of Appeal however left the point open, Sir Raymond Evershed M.R. who delivered the judgment of the Court saying, at p. 106 :—

> " The point is, in our judgment, one of considerable difficulty.
> " The language of s. 5 (5) and s. 15 (3) of the Act of 1920 fits ill
> " (it must be confessed) with the language of para. (d) of sched. I
> " to the Act of 1933. In *Dalrymple's Trustees* v. *Brown* it appears
> " (according to the report in Sessions Cases) that the point was
> " clearly put in argument to the Inner House, but there is no
> " reference to it in the judgments and, since the House dismissed
> " the appeal and affirmed the order for possession against both
> " tenant and sub-tenant, it must be assumed that Lord Normand
> " and his colleagues regarded s. 5 (5) and s. 15 (3) of the Act of
> " 1920 as not available to the sub-tenant, and the premises as

In the Court of Appeal for Eastern Africa.

No. 18. Judgment, 14th May, 1953— *continued.*

" not being ' lawfully sub-let ' within the meaning of those sections, " although there was no prohibition according to the general law " of Scotland against assignment or underletting on the tenant's " part. In the English case of *Roe* v. *Russel*, Eve, J., sitting in " the Court of Appeal, intimated his view (1928) 2 K.B. 141) " that an assignment or under-letting of the whole premises should " be regarded as ' unlawful ' for the purposes of the Act, whatever " the terms of the original contract, but the learned judge's " language in the context in which it appears may, perhaps, be " properly confined to the case of an assignment or under-letting " by the statutory tenant. We do not find it easy, on authority " or principle, to regard an assignment or under-letting of the " whole premises by a contractual tenant as being for any purposes " ' unlawful ' if by the terms of the contract there was no " restriction on the tenant's power to assign or underlet, or if, " the assignment or under-letting having been in breach of the " tenant's obligations, the breach had been afterwards waived " by the landlord. But it is, in the circumstances, unnecessary " for us to express any conclusion on the point, and we, therefore " say no more about it."

The question has been discussed in a number of other English cases, but I do not propose to burden this judgment by referring to any of these except *Norman* v. *Simpson*, 1946 L.R. 1 K.B. 158. That case did not involve the consideration of Sched. I para. (d) but the Court did have to construe the meaning of the expression " lawfully sub-let " in Section 15 (3) of the 1920 Act, and the majority of the Court (Morton & Scott, L.JJ.) held that " the most reasonable explanation of the sub-section was that " premises are in a state of being ' unlawfully sub-let ' within the sub-section " if the head lessor has a subsisting right of re-entry and are in a state of " being ' lawfully sub-let ' when the head lessor has no such right." They also held that the words " have been lawfully sub-let " refer to the time at which the head-tenancy determines, so that the sub-tenant will be within the protection of the sub-section if at that time the landlord has no right of re-entry (p. 162).

It seems to me therefore that the weight of authority favours the view that a sub-letting which is otherwise lawful does not become unlawful merely by reason of the absence of consent actual or implied of the landlord. But, as will appear when I come to consider the sixth question, I amof opinion that this view, even if correct, does not avail the Appellant in this case.

As regards the fourth question, Mr. Khanna suggested that in order to get a coherent and consistent construction of the statute it is necessary to limit the operation of Section 16 (1) (*i*) to cases of assignments or sub-lettings by a statutory tenant. As a matter of construction, it would be necessary, in order to reach this end, to read into the paragraph words which are not there, and if one looks to authority, it will I think be found unanimously opposed to this suggestion. It is now well settled both in

England and in Kenya that a statutory tenancy cannot be assigned ; see *Keeves* v. *Dean* 1924 L.R. K.B. 685 : *Jiwan* v. *Gohil* 1948 15 E.A.C.A. 38. As regards sub-letting, the Court of Appeal in England held in the *Regional Properties* case that the expression " tenant " in Schedule I para. (*d*) means or at least includes a contractual tenant, and I respectfully adopt the same construction for Section 16 (1) (*i*). In this connection I may briefly note, only to reject, Mr. Khanna's further suggestion that if this paragraph does cover contractual tenancies it can only have application where the consent of the landlord is expressly required either by the contract of letting or by the Ordinance. A similar argument was put forward and rejected in the *Regional Properties* case ; and again in *Hyde* v. *Pimley* (*supra*) the Master of the Rolls said at p. 104,

> " It is to be remembered that the paragraph applies in a case " where by the terms of the contract of letting no consent is " required at all."

The fifth question can admit of one answer only : The Board and the Supreme Court were both clearly right in holding that the first limb of the first clause of paragraph (i) is made retroactive by clear and express language. I will read it again to emphasize the point :

> " No order for the recovery of possession . . . shall be made " unless . . . the tenant has, without the consent in writing of " the landlord, at any time between the first day of December, " 1941, or the prescribed date, whichever is the later, and the " commencement of this Ordinance, assigned or sub-let the whole " of the premises or sub-let part of the premises the remainder " being sub-let."

Contrast this wording with the second limb immediately following which is equally clearly intended to have prospective effect only. There can be no doubt that the first limb was intended to enable and does enable a landlord to obtain a possession order in a case where the tenant had, between the prescribed dates, parted with possession of the entire premises even though, at the time when he did so, there was nothing either in the contract of letting or in law to prevent him doing so. Mr. Khanna suggested that paragraph (i) was enacted to quieten doubts as to the position of a statutory tenant who has gone out of occupation, but as Megarry points out (*op. cit.* p. 203–4) in some respects the provision is wider than the doctrine of "non-residence " founded on *Skinner* v. *Geary* 1931 2 K.B. 546 for, unlike that doctrine, the statutory provision applies even if the tenancy is contractual.

I come now to the sixth and crucial question which involves consideration of the scope of the " option clause." The question is whether the term " occupier " in this clause includes a lawful sub-tenant : using that term on the assumption that a sub-letting otherwise lawful does not become unlawful merely because of the absence of consent by the landlord.

The " option clause " is unique to the Kenya rent restriction legislation and was first enacted in the 1949 Ordinance. It has already been judicially

In the Court of Appeal for Eastern Africa.

No. 18. Judgment, 14th May, 1953— *continued.*

construed in the Supreme Court of the Colony. In Kenya Supreme Court Civil Case No. 151 of 1950 de Lestang J. said :—

> " There is an apparent conflict between paragraph 2 of this " section (i.e. the option clause) and Sections 16 (6) and 23 (3). " I have used the word apparent advisedly because, in my view, " when these provisions are read together it becomes fairly obvious " that paragraph 2 of Section 16 (1) (i) could not have been " intended to apply to a person who is in occupation under a " lawful assignment or a lawful sub-tenancy. The word ' occupier ' " in this paragraph must, in my judgment, be understood to mean " an occupier other than a lawful assignee or lawful sub-tenant."

Mr. Khanna has pressed us to accept this construction although he concedes that it necessitates restricting the *prima facie* meaning of the word " occupier." Or at least he said, even if we were not persuaded that a lawful assignee is excluded, we should exclude a lawful sub-tenant who has a special position by reason of Sections 16 (6) and 23(3).

In the judgment now appealed from Bourke J. did not have to consider this exact point because he found that the sub-letting was unlawful for lack of consent of the landlord : but I think it is implicit in his judgment that he would have accepted Mr. Nazareth's suggested definition of the word " occupier " as meaning and including any person who has come into occupation of the premises in any of the circumstances specified in the first clause of paragraph (i). I infer this from the passage where he says—

> " Once one adopts . . . the elementary principle of con- " struction applied in the *Regional Properties Ltd.* case, the effect " of Section 16 (1) (i) is clear and there is no complication such " as was introduced in *Motiram's* case having regard to the " authorities therein considered. It is a matter of construction of " simple words in the English language : such words are to be " taken as meaning what they say and are to be read in their " ordinary sense."

And again :—

> " Where the tenant has assigned or sub-let the whole of the " premises between the dates specified without the consent in " writing of the landlord, there is no protection under the " Ordinance."

Mr. Nazareth has suggested that the views expressed by these two learned Judges are not necessarily inconsistent : but I do not myself think they can be reconciled, for they seem to be based on opposing views of what is a " lawful " assignment or sub-letting. As I understand them, de Lestang J. did not consider that an assignment or sub-letting, otherwise lawful without consent, became unlawful for lack of consent by reason of paragraph (i), whereas Bourke J. did so hold.

de Lestang J. does not refer to any authority in his judgment which is,

I think, clearly in conflict with the decision in the *Regional Properties* case because he was dealing with an assignment. If the instant case were a case of an assignment without consent, I should have no difficulty in preferring the latter decision and holding that de Lestang J. was wrong.

Nor have I any doubt that the intention of the " option clause " in regard to sub-tenants was to remove any doubt which might exist as to the position of a sub-tenant on a sub-letting without consent and to make it clear that a person so occupying was in no better position than an assignee without consent, that is to say, in neither case could the occupier successfully resist an application under the Ordinance if the landlord chose to claim possession subject only to consideration of reasonableness. The only question to my mind is whether the legislature has effected that intention having regard to other provisions of the Ordinance which give a sub-tenant in some circumstances special protection : these are Sections 16 (6), 23 (3), 28 and 29.

I have already set out the first two of these, and have referred to their identity with corresponding provisions of the English Rent Acts. I find no conflict between these two provisions and paragraph (i). Their purpose and effect was explained by Evershed M.R. in the Court of Appeal in *Dudley Building Society* v. *Emerson* 1942 2 All E.R. 252, at p. 258, in the following passage.

> " It seems to me that these sub-sections are directed to " providing in clear terms that although, were it not for their " provisions, the title paramount of the superior landlord would " prevail, yet Parliament is intending that that title should not " prevail and that the subtenant's right to possession should be " preserved and therefore, the legislation goes on expressly to " provide that thereafter there shall be deemed to come into " existence a contractual relationship, or the equivalent of a " contractual relationship, which is carefully defined, between the " sub-tenant and the head landlord."

And see further for an explanation of their purpose and effect, the judgment of Rowlatt, J. in *Hylton* v. *Neal* (1921) 2 K.B. 438 at p. 448, 449.

Section 16 (6) itself presents no difficulty : it merely precludes the operation of the common law under which a judgment for possession is binding on the persons in fact in possession. " If judgment for possession " is given the bailiff . . . must take physical possession and turn out " whoever may be on the premises unless they are a sub-tenant entitled to " the protection of Section 5 "—per Greer, J. in *Giddon* v. *Mills* 1925 2 K.B. 713. It is for that reason no doubt that the head landlord has been permitted in the particular circumstances prescribed in paragraph (i) to apply for an order against the occupying sub-tenant and Section 16 (6) obviously has no application to such an order. I see no inconsistency or illogicality in this : if the legislature thought it right to protect a landlord against a head tenant who has assigned or sub-let the whole of the premises, they may well have thought it right to give the landlord the opportunity

In the Court of Appeal for Eastern Africa.

No. 18. Judgment, 14th May, 1953— *continued.*

to rid himself if he wished of the assignee or sub-tenant who has got into occupation without his consent. The following passage from the judgment of Evershed, M.R. in the Regional Properties case (supra, at p. 637) though referring to assignments, is equally applicable to the intention of the legislature with respect to sub-lettings :—

> " It is plain that during the term of the contract of tenancy " the tenant can assign or underlet without asking the landlord's " consent if there is no prohibition against this in the contract. " But what Parliament has said is that, whether or not the " landlord's consent to an assignment is made necessary under " the contract such consent to an assignment is still necessary " because it is fair that the Court should have power to make an " order for possession against an assignee who is unknown to and " not approved of by the landlord."

Nor does Section 23 (3) present any difficulty to my mind for the whole sub-section is to be read " subject to the provisions of this Ordinance." While therefore it defines the relationship between the landlord and a sub-tenant who remains in occupation under the cloak of section 16 (6) and against whom no order for possession has been made, it must be read subject to the provisions of paragraph (i) and has no application when an order has been made under that paragraph against the sub-tenant as occupier.

There is however a difficulty in reconciling Sections 28 and 29 with Section 16 (1) (i). These two sections read as follows :—

> " 28. Notwithstanding the absence of any covenant against " the assigning or sub-letting of any premises no tenant shall " have the right to assign, sub-let or part with the possession of " such premises or any part thereof without the written consent " of the landlord or, where such consent shall be unreasonably " withheld, without the consent of the Board :
>
> " Provided that this section shall not apply to a tenant " holding a tenancy commencing after the commencement of this " Ordinance for a term exceeding one year or holding any tenancy " the unexpired residue whereof at the commencement of this " Ordinance exceeds one year.
>
> " 29. (1) Notwithstanding anything contained in this " Ordinance, the tenant of any dwelling-house may—
>
> " (a) with the consent in writing of the landlord (which " consent shall not be unreasonably withheld) and with the consent " of the Board ; or
>
> " (b) in any case where, in the opinion of the Board the " consent of the landlord has been unreasonably withheld, with " the consent of the Board alone, sub-let for a period of not more " than six months (which period may with the consent of the " Board be extended for a further period of three months) any

" dwelling-house of which the tenant is in personal occupation ;
" and upon the expiration of the period for which such dwelling-
" house has been sub-let, the tenant shall be entitled to resume
" personal occupation of the dwelling-house."

Both sections appear to be unique to Kenya and were first enacted in the 1949 Ordinance. So far as I am aware the problem of construing these two sections with Section 16 (1) (i) has never come before the Courts of the Colony nor before this Court. So far as concerns Section 29 this is not surprising for it is generally agreed that this section is designed to protect the tenant in the special and rather limited class of case of his going on leave out of the Colony for a few months with the definite intention of returning and resuming his occupation here at the expiration of his leave. Section 28 however has a much wider scope and, in my view, was intended to be complementary to Section 16 (1) (i), the two sections together being intended to remedy the abuse by tenants of their right to sub-let and to give the landlord a partial veto over a sub-letting or assignment which may land him with an undesirable tenant protected by the Ordinance.

The difficulty of construction in the Ordinance arises, of course, from the omission from paragraph (i) of any provision for a case where the landlord has refused consent but the Board has given it under either section ; and also the omission of any exception for cases coming within the proviso to Section 28. It is not a difficulty which arises on the facts of the present case but is purely one of construction of the Ordinance as a whole.

I am tempted to say that in practice there is not likely to be any difficulty because one cannot imagine that the Board or the Court would ever consider it reasonable to make an order for possession where the Board itself had given consent to the sub-letting or assignment or where the case clearly fell within the proviso to Section 28. Indeed, an application for possession in these circumstances would seem to be so hopeless *ab initio* and so unlikely to be made that the question of construction will in all probability never come before the Courts. I am however aware that it is not permissible to shelve problems of construction by such an argument.

I am also tempted to say that in all probability the omission from Section 16 (1) (i) of exceptions to cover cases where the Board has given consent or which fall within the proviso to Section 28 has arisen *per incuriam* through careless drafting : but I am aware that in the case of *Commissioner of Stamps S.S.* v. *Oei Tjong Swan* 1933 A.C. 378, their Lordships of the Judicial Committee said, at p. 389, that they could lend no countenance to such a method of treating a statutory enactment.

I am anxious to say nothing which will hamper the Courts of Kenya in giving a consistent meaning to the apparently irreconcilable provisions of these sections. Whatever view is taken of the scope and intention of Section 16 (1) (i) some modification of its *prima facie* meaning must be made if effect is to be given to Sections 28 and 29. It may be that the correct rule of construction is that, since these two sections are later in order of place than Section 16 (1) (i) they override the earlier section whenever they conflict with it : see *Wood* v. *Riley* (1867) L.R. 3 C.P. 26

at p. 27, but I am aware too that this rule has been doubted: see Craies on Statute Law 5th Ed. p. 343 note (h). However that may be I do not think that any difficulty that may occur in reconciling these sections, would justify the Court in not giving effect to the plain meaning of Section 16 (1) (i) as applied to the facts of the present case. " Where the main object and " intention of a statute are clear it must not be reduced to a nullity by " the draftsman's unskilfulness or ignorance of law, except in the case of " necessity or the absolute intractibility of the language used "—*Salmon* v. *Dunscombe* (1886) L.R. 11 A.C. (Py. Co.) 627 at p. 634. In the case of Section 29, which is to have effect " notwithstanding anything contained in this Ordinance," there would seem to be no difficulty in holding that it overrides the earlier provisions of Section 16 (1) (i).

I can now deal very shortly with the seventh question, which is whether the landlord can obtain an order against the " occupier " on the same grounds as he has or might have relied upon in an application against his tenant ? The answer to this is clearly Yes and it is made abundantly plain by the latest amendment to the " option clause " which dispensed with the necessity of joining the tenant in an application for an order against an occupier.

If I understood Mr. Khanna aright, he argued that a separate cause must be made against the occupier, if a sub-tenant (or perhaps even if an assignee) because by definition such an occupier is a " tenant " and a landlord must always make out a substantive case against a tenant. The argument would entirely nullify the " option clause " and I cannot accept it. As Rowlatt J. said in *Lord Hylton* v. *Heal* 1921 2 K.B. 438 :—

> " the term tenant as used in the Act is *prima facie* a generic term
> " including the original tenant, a person deriving title under him,
> " a sub-tenant, or anyone else who comes under the definition, but
> " that is only used in that wide sense where the context does not
> " otherwise require."

This is a case where the context obviously requires a narrower meaning to be given to the word tenant, which can not, if paragraph (i) means anything at all, here include an assignee or subtenant who has come into occupation in any of the ways contemplated in that paragraph.

But of course it is equally clear that, in considering the question of whether it is reasonable to make an order against the occupier under Section 16 (2), the Board has to consider all the circumstances as they affect or relate to the landlord and the occupier, and it is not difficult to imagine cases in which it would be reasonable to make an order against the head-tenant but unreasonable to make it against the occupier.

My conclusions may therefore be summarized as follows :—

(i) The document Exhibit 6 is a sub-lease and was executed after proceedings for recovery of possession were commenced. The Appellant is not therefore a " lawful " sub-tenant within the meaning of Sections 16 (6) and 23 (3) and cannot therefore claim

any protection under these sections. Accordingly he is an " occupier " within the meaning of the option clause, i.e., Section 16 (1) (i), even assuming that that expression excludes a " lawful sub-tenant " as de Lestang J. thought.

(ii) But assuming that I am wrong in holding that the sub-lease was executed after proceedings for recovery of possession were commenced, and that the correct view is that the lease was antecedent to the proceedings: then the premises were, *prima facie*, lawfully sub-let within the meaning of Sections 16 (6) and 23 (3) and I think the weight of authority is that the sub-letting did not become unlawful merely on account of absence of consent by the owner.

(iii) But this does not avail the Appellant because in my view the expression " occupier " in the option clause includes " lawful " sub-tenant as well as " lawful " assignee and for the purposes of Section 16 (1) (i) a lawful sub-tenant is in no better position than the lawful assignee was held to be in the *Regional Properties* case.

(iv) In pursuing his optional remedy against the occupier, the landlord can rely upon the ground, namely the fact of sub-letting, assigning or parting with possession, as the case may be, which would found his case against his tenant: subject always, however, to consideration of reasonableness as affecting matters personal between the landlord and the occupier.

For these reasons therefore I am of opinion that the judgment appealed from was right and should be confirmed. I would dismiss this appeal with costs.

N. A. WORLEY,
Vice-President.

Nairobi.
14th May, 1953.

NIHILL—President.

I have had the advantage of reading the lengthy judgment of my learned brother the Vice-President and do not think that there is anything that I can usefully add. I agree with him that the judgment of the Supreme Court of Kenya in this difficult case was correct and that this Appeal must accordingly be dismissed with costs. An order will be made to this effect.

J. H. B. NIHILL,
President.

MAHON—Judge.

I concur with the order proposed.

G. M. MAHON,
Judge.

Nairobi.
14th May, 1953.

In the Court of Appeal for Eastern Africa.

No. 19.

Decree.

No. 19. Decree, 14th May, 1953.

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

Civil Appeal No. 57 of 1952.

(From original Judgment in Civil Appeal No. 129 of 1951 of H.M. Supreme Court of Kenya at Nairobi.)

ISMAIL MOHAMED CHOGLEY ... ... *Appellant (Original Appellant/Tenant)*

versus

JAGAT SINGH BAINS ... ... *Respondent (Original Respondent/Landlord).* 10

DECREE

THIS APPEAL coming on 14th May 1953 for hearing before Her Majesty's Court of Appeal for Eastern Africa in the presence of D. N. Khanna Esq., on the part of Appellant and of J. M. Nazareth Esq., on the part of Respondent It is ordered that the appeal be and is hereby dismissed with costs.

C. G. WRENSCH,
Registrar.

H.M. Court of Appeal for Eastern Africa. 20

Dated this 14th day of May, 1953.

Issued at Nairobi this 24th day of November 1953.

No. 20.

Order granting Final Leave.

In the Court of Appeal for Eastern Africa.

No. 20. Order granting Final Leave, 9th April, 1954.

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

Civil Appeal No. 57 of 1952.

(From original Civil Appeal No. 129 of 1951 of Her Majesty's Supreme Court of Kenya at Nairobi.)

ISMAIL MOHAMED CHOGLEY ... ... *Appellant*

versus

JAGAT SINGH BAINS ... ... *Respondent.*

ORDER.

UPON the application presented to this Court on the 15th day of February 1954 by Counsel for the above-named Appellant for final leave to appeal to Her Majesty in Council AND UPON READING the affidavit of DWARKA NATH KHANNA of Nairobi in the Colony of Kenya Advocate sworn on the 15th day of February 1954 in support thereof and the exhibits therein referred to and marked " DNK 1 " and " DNK 2 " the affidavit of JOHN MAXIMIAN NAZARETH of Nairobi aforesaid Advocate in reply sworn on the 19th day of March 1954 and further affidavit of the said DWARKA NATH KHANNA sworn on the 22nd day of March 1954 and an exhibit therein referred to and marked " DNK 1 " AND UPON HEARING Counsel for the Appellant and for the Respondent THIS COURT DOTH ORDER that the application for final leave to appeal to Her Majesty in Council be granted AND DOTH DIRECT that the record be despatched to England within fourteen days from the date hereof AND DOTH FURTHER ORDER that the costs of this application be costs in the cause.

DATED at Nairobi this 9th day of April, 1954.

C. G. WRENSCH,
Registrar,
H.M. Court of Appeal for Eastern Africa.

EXHIBITS.

No. 4. Cheque for 305/-, Second Respondent to Landlord, 4th July, 1946.

No. 4.—Cheque for 305/-, Second Respondent to Landlord.

Cheque.

No. T. 213462

Nairobi 4.7.1946.

NATIONAL BANK OF INDIA LIMITED
NAIROBI
Kenya Colony.

Pay JAGAT SINGH BAINS ~~or Bearer~~

Shillings—Three hundred and five only.
The Muslim Bakery

I. M. CHOGLEY
Proprietor.

Shs. 305/00.

Judgment, Civil Appeal No. 15 of 1947 20th August 1947.

Judgment, Civil Appeal No. 15 of 1947.

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.
SESSIONS HOLDEN AT MOMBASA.

Civil Appeal No. 15 of 1947.

(From original Decree in Civil Appeal No. 14 of 1947 of H.M. Supreme Court of Kenya at Nairobi.)

ISMAIL MOHAMED CHOGLEY ... ... *Appellant*

versus

JAGAT SINGH BAINS ... ... *Respondent.*

In our opinion this case must be sent back to the Resident Magistrate's Court in order that the real issues between the appellant and respondent may for the first time be pleaded and tried. The pleadings proceeded upon an entirely wrong basis, namely, that the agreement of 10th June 1941 was valid and binding upon the parties to it whereas as is now not seriously questioned, it was void for lack of registration. This error, due to the ineptitude of the legal advisers of both the appellant and the respondent in the Resident Magistrate's Court, is so fundamental that it is impossible to say that the real issues between the Appellant and the Respondent were either pleaded or tried in the Magistrate's Court, or what the result would have been if they had been pleaded and tried. That being so this Court in

our opinion has no option but to allow the appeal and order that the judgments of the Supreme Court and the Resident Magistrate's Court be set aside, including the orders as to costs.

In all the circumstances, we think that this case should be retried on a proper basis in the Magistrate's Court. It was the Appellant who first raised the point that the lease in question was invalid, but he did not raise it in his written statement of defence but in the first Appeal Court. We therefore strike out the written statement of defence and remit the case to the Magistrate's Court to enable the Appellant to file a fresh written statement of defence with liberty to either party to apply to the Magistrate for fixing of a time for the filing of such statement of defence or pleadings as may be necessary. The Magistrate will of course deal in the ordinary way with any application to amend the Plaint.

We allow the appellant the costs in the Supreme Court and in this Court, each party to pay his own costs in the Resident Magistrate's Court.

J. H. B. NIHILL.
G. GRAHAM PAUL.
D. EDWARDS.

20th August, 1947.

Judgment, Civil Appeal No. 22 of 1948.

SUPREME COURT CIVIL APPEAL NO. 22 OF 1948.

JUDGMENT:

This is an appeal from the judgment of the learned Resident Magistrate Nairobi (Mr. Campbell) ordering the Appellant and Sidi Bilal, his co-defendant in the Court below who has not appealed, to give up possession of certain premises belonging to the Respondent.

It is necessary for a proper understanding of this appeal to outline briefly the history and the facts of the case.

The Respondent was the owner of certain premises in Racecourse Road Nairobi part of which he used as a public bar. By an agreement in writing dated 10.6.41 he purported to lease to one Sidi Bilal another part of his premises consisting of a bakery and a shop for a period of five years from 1.7.41 at a monthly rental of Shs. 300. Sidi Bilal went into possession and paid the rent regularly when due which was accepted by the Respondent. In October 1942 Sidi Bilal went to India leaving the Appellant in charge of the bakery and shop under a duly constituted power of attorney. At all times Sidi Bilal carried on his business under the style of " The Muslim Bakery " and the Appellant continued to carry on the business under that name on behalf of Sidi Bilal, operating the banking account of the business, paying the rent by cheques drawn from that account and so forth. After his departure for India, however, Sidi Bilal never returned to Kenya and

Exhibits.

Judgment, Civil Appeal No. 22 of 1948, 19th November, 1948— *continued.*

in April 1946 sold his business to the Appellant. In June 1946 the Appellant closed the banking account of Sidi Bilal and opened an account for The Muslim Bakery in his own name. Until May 1946 the rent of the premises was always paid by cheques drawn by the Appellant as " p.p. The Muslim Bakery." Rent for May and June 1946 was, however, paid by cheques drawn by the Appellant as " Proprietor of the Muslim Bakery." The Respondent accepted all the payments of rent. In June 1946 he claimed possession of the premises from the Appellant on the ground that the alleged lease for five years had expired by effluxion of time. No notice to quit had been given. The Appellant, however, refused to vacate and the Respondent instituted proceedings against both Sidi Bilal and the Appellant for possession. Sidi Bilal left default and the suit was fought by the Appellant and Respondent on the basis that the lease was valid. In fact it was void for want of registration as required by Section 107 of the Indian Transfer of Property Act 1882. The Respondent obtained an order for possession against both Sidi Bilal and the Appellant against which the Appellant unsuccessfully appealed to the Supreme Court. He appealed a second time to the Court of Appeal for Eastern Africa. The Appellate Court allowed the appeal and ordered " that the judgments of the Supreme " Court and the Resident Magistrate's Court be set aside " but ordered a retrial. Sidi Bilal again left default at the retrial and the result was the same as in the original trial. It is from the judgment in the retrial that the Appellant now appeals.

It may be convenient at this stage to briefly outline the respective contentions of the parties before the Subordinate Court.

For the Respondent it was contended—

(a) that owing to the invalidity of the lease for want of registration Sidi Bilal was at all times a tenant at will whose tenancy was duly terminated by a demand for possession or by Sidi Bilal ceasing to occupy the premises and purporting to transfer his rights to Appellant ;

(b) that the Appellant in any case acquired no right under Sidi Bilal's tenancy either as a sub-tenant, assignee or licensee, and

(c) that in so far as the Appellant's right to occupy the premises rests on the legal interest of Sidi Bilal it disappeared after the judgment in the original trial from which Sidi Bilal did not appeal.

For the Appellant it was contended—

(a) that by the combined effect of Sections 106 and 107 of the Indian Transfer of Property Act the possession of Sidi Bilal under the void lease and the acceptance of rent by the Respondent a periodic monthly or yearly tenancy was created determinable only by notice to quit ;

(b) that the Appellant had a right to retain possession as attorney and/or licensee of Sidi Bilal so long as Sidi Bilal's tenancy was not determined ;

(c) that the Appellant had a right to retain possession of the premises

as a sub-lessee or assignee of the contractual term vested in Sidi Bilal and that if such sub-letting and assignment were not valid at their inception they were validated by the Respondent's acceptance of rent from the Appellant;

(d) that the Appellant became a direct sub-tenant of Respondent by acceptance of rent by the latter;

(e) that if the Appellant is a trespasser the Court has no jurisdiction to make the order for possession since the value of the premises exceeds the pecuniary jurisdiction of the Court.

The learned Magistrate in a careful judgment held that Sidi Bilal was a tenant at will whose tenancy had been effectively determined and he accordingly rejected the Appellant's contention that he was entitled to possession as attorney and/or licensee of Sidi Bilal. He held that Sidi Bilal had not sub-let or assigned his tenancy rights to the Appellant. He also found that there was no letting direct to Appellant by Respondent either expressly or by acceptance of rent. He also held that he had jurisdiction to try the suit by virtue of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance.

The same arguments as were put before the learned Magistrate have been addressed to me and I propose to deal with all of them *seriatim*.

The first and principal question is what was the nature of Sidi Bilal's tenancy. Was it a tenancy at will as decided by the learned Magistrate or a periodic tenancy ?

The facts are that under an alleged lease for five years which was void for want of registration under Section 107, Indian Transfer of Property Act, Sidi Bilal was put in possession of the premises and paid rent as agreed monthly for nearly five years which rent was accepted by the Respondent. Both parties were, however, at all times under the impression that the lease was a valid one and their actions were undoubtedly controlled by that belief. For the Appellant it is contended that the moment Sidi Bilal went into possession under the void lease he became a tenant at will and that by the acceptance of rent by the Respondent his tenancy was converted into a periodic tenancy from month to month or year to year by presumption of law in accordance with Section 106.

For the Respondent it is argued that entry into possession under a void lease creates at most a tenancy at will which is not a " lease " within the meaning of Sections 105 and 106, that before Section 106 can be called in aid there must be a valid lease, that the lease being void there was no valid lease and that possession with payment of rent did not create a valid lease because the rent was paid and accepted under a mistake, that is to say a common mistake that the lease was valid. Now there can be no doubt that acceptance of rent is not conclusive of the creation of a tenancy but merely evidence from which the creation of a tenancy may be inferred. Thus when the rent has been received under a mistake of fact it will not give rise to the presumption that a tenancy has been created but on the other hand the unexplained acceptance of rent would. It really boils down to this that in

Exhibits.

Judgment, Civil Appeal No. 22 of 1948, 19th November, 1948.— *continued.*

order to create a tenancy there must be a consensus, which in a proper case may be inferred from payment and acceptance of rent between the parties giving rise to the relation of landlord and tenant. *Ladies' Hosiery and Underwear, Ltd.* v. *Parker* (1930) 1 Ch. D 304. In the present case the Respondent always intended that Sidi Bilal should be his tenant and he accepted rent from him in that capacity. It is true that the parties intended a particular kind of tenancy but it is equally clear that they were *ad idem* that Sidi Bilal should occupy as a tenant as distinguished from a mere licensee at will. Therefore leaving aside for the moment the effect, if any, of the invalidity of the lease, the putting into possession of Sidi Bilal and the acceptance of rent would create a tenancy.

Does the invalidity of the lease have the effect of preventing the creation of any tenancy ? In the first edition of Mulla there is a short sentence at p. 535 which states in terms that " possession and payment of " rent under a lease void for want of registration under the Transfer of " Property Act creates no tenancy under this Act." No authority is quoted in support of this statement and it seems to me inconsistent with the following passage in the next paragraph—" a tenant in possession under a lease of a house for a term of years which was void for want of registration was described as a tenant at will. This is incorrect for the property being a house he was a monthly tenant, for he had been in possession and paying rent for ten years." It is also inconsistent with another passage at p. 524 which reads as follows :—

> " A tenancy at will implied from holding over, or from entry " under a void lease, becomes on payment of rent a tenancy from " year to year or from month to month."

It is significant that the first statement is not repeated in the second edition of Mulla which, however, contains the two other quotations which I have cited and further states at p. 593—" But if a tenant is in possession " under an unregistered lease and the landlord recognises his right by " acceptance of rent, there is a presumption of a lease under Section 106 " and a notice to quit before eviction is necessary." This is in a sentence the contention of the Appellant and after considering the authorities I agree with it. I cannot do better than adopt, in support of my view, the reasoning of Sanderson, C.J., in *Sheikh Akloo* v. *Sheikh Emaman* (1917) 44 Cal. 403. In that case there was an implied lease of immoveable property reserving a yearly rent and there was no registered instrument as required by Section 107 and the Court held that by the combined effect of Sections 106 and 107 it must be deemed to be a lease from month to month. The passage to which I wish to refer is at p. 410 and reads as follows :—

> " Now, in this case there is nothing to rebut the presumption " which I think ought to be drawn from the fact that the rent " was to be an annual rent. Therefore, the presumption ought " to be drawn that the tenancy was to be an annual tenancy ; and, " so far that conclusion at which I have arrived is in favour of the

" Appellant. Therefore, within the words of Section 106 of the " Transfer of Property Act, there would be a contract, namely, " such as I have described, a contract of tenancy between the " Plaintiff on the one hand and the Defendant on the other, and " an annual tenancy for which an annual rent of Rs. 15 was to be " paid, and, therefore, Section 106, if it stood by itself, would not " apply, because there would be a contract to the contrary. But " unfortunately for the Appellant, there is Section 107 which says " that such a contract as that, a contract such as I have described, " which reserves a yearly rent, can be made only by a registered " instrument, and inasmuch as there is no registered instrument " in this case, that contract must be treated as an invalid contract, " and as not existing. Therefore, I am forced to the conclusion " that this case does come within Section 106, because there is an " absence of a contract to the contrary, inasmuch as the contract " which was in fact made and was in fact held to exist by the " Court of first instance was not put into writing and was not " registered. Therefore, there being no contract to the contrary, " and insasmuch as this was a lease of immoveable property and " not for agricultural or manufacturing purposes but for some " other purpose, it must be deemed to be a lease from month to " month, terminable, on the part of either lessor or lessee, by " fifteen days' notice expiring with the end of a month of the " tenancy."

This case is in my view clear authority for the Appellant's contention and I cannot understand why it is not cited for that purpose by Mulla. There is further support for the Appellant's contention in two dicta of their Lordships of the Privy Council in *Ariff* v. *Jadunath Majumdar* (1931 58 L.R.I.A. 91 and *Ranee Sonet Kowar* v. *Mirza Himmut Bahador* (1876) 3 I.A. 92. In these cases tenants were in possession under lease or agreement of lease void under Section 107 and although the ratio decidendi of those cases are alien to the question for decision here yet the dicta which I am about to quote show that possession under a void lease may create a tenancy independently of the void agreement. The passage in the first case appears at p. 97 and reads as follows :—

" Now it is clear that the verbal agreement alone could confer " upon the Respondent no such right. By s. 107 of the Transfer " of Property Act, 1882, it is expressly enacted that ' a lease of " ' immovable property from year to year, or for any term exceed- " ' ing one year, or reserving a yearly rent, can be made only by " ' registered instrument. All other leases of immovable property " ' may be made either by an instrument or by oral agreement.' " This amounts to a statutory prohibition of the creation of such " a right as is claimed here by by the Respondent, otherwise than " by a registered instrument. No registered instrument exists, " therefore, the Respondent can have no such right as he claims

Exhibits.

Judgment, Civil Appeal No. 22 of 1948, 19th November, 1948—*continued.*

" unless he can establish it by some means operating independently " and in violation of the statute."

The other passage appears at p. 98 of the second report in these words :—

" The recognition of their interest (tenants) by the receipt " of rent from them would constitute some kind of tenancy " requiring to be determined by notice to quit or otherwise."

I have been referred by the Respondent's advocate to certain passages in Gour 6th Ed. pp. 1866 and 1869 as authority for the proposition that possession under an invalid lease can never give rise to a tenancy except a tenancy at will. There are sentences in those paragraphs which taken by themselves tend to support the Respondent's contention but reading the passages as a whole I do not think that they go as far as that. They seem to me to leave room for the creation of a tenancy notwithstanding the fact that the tenant went into possession under an invalid lease.

On the first question, therefore, I hold that the learned Magistrate was wrong to find that Sidi Bilal was a tenant at will. By being put into possession under a void lease and by paying rent for nearly five years he became, in my view, a tenant either from month to month or from year to year according to the purpose of the tenancy as prescribed by Section 106, determinable only with proper notice to quit. As no notice to quit whatsoever was given it is unnecessary for me to decide whether the tenancy was a monthly or yearly tenancy, as whatever the nature of the tenancy it has not been effectively determined.

Nevertheless I think I ought to express the view which I hold that to use premises as a bakery is to use them for manufacturing purposes and that consequently Sidi Bilal's tenancy was a yearly tenancy determinable by six months' notice.

The second question is what right in Sidi Bilal's tenancy did the Appellant acquire ? The learned Magistrate did not express any opinion as to whether the Appellant was holding as an attorney or licensee of Sidi Bilal but he held that there had been no transfer of Sidi Bilal's tenancy rights to the Appellant either by way of sub-letting or assignment.

The evidence shows that in April 1946 the Appellant acquired the whole business of Sidi Bilal. The business was that of a bakery which was being carried out on the premises let by the Respondent. According to the evidence there was no specific assignment of the tenancy but it must follow that as the premises were so much part and parcel of the business—indeed without the premises the business would not exist—it must have been intended by the parties that what was being transferred was not merely the bakery business but everything that went with it including the lease. I cannot for one moment think that the Appellant would have purchased a business without premises to carry it on. In my view, therefore, Sidi Bilal purported to assign the tenancy to the Appellant. I say purported advisedly because the transfer not being by a registered instrument was invalid by virtue of Section 54 Indian Transfer of Property Act.

The case of *Gaya Prasad* v. *Baij Nath* (1892) 14 All p. 176 though not directly in point supports this view, as also does Gour 6th Ed. at p. 1942, para. 3377 when he says that " an assignment like a lease must be registered." The learned Magistrate was, therefore, right in the conclusion he reached, though for different reasons, that there was no assignment of the tenancy to the Appellant. I also agree with him that there was no sub-letting. Indeed the views that I have expressed that Sidi Bilal purported to assign are inconsistent with the creation of a sub-tenancy. But since the Appellant went into possession with the leave and consent of Sidi Bilal his position was at least that of a licensee and his right to retain possession as a licensee of Sidi Bilal continues as long as Sidi Bilal's tenancy remains undetermined.

The third question is whether the Respondent accepted the Appellant as his tenant either by an express agreement or by acceptance of rent.

On this question I see no reason to disagree with the learned Magistrate's findings. He saw and heard the witnesses and has disbelieved the Appellant and his witness who testified that the Respondent had verbally agreed to accept the Appellant as a tenant. Although he made no reference to their demeanour in the reasons he gave for preferring the evidence of the Respondent to theirs it is impossible to say that the impression of veracity or otherwise which the witnesses must have made on the Magistrate did not affect his mind one way or the other. As regards the acceptance on two occasions of rent paid by the Appellant in his own name the Magistrate was in my view perfectly right to refuse to draw the inference that such acceptance created the relationship of landlord and tenant between Respondent and Appellant because it may very well be, and indeed it is highly probable, that the Respondent did not notice the difference in the mode of payment of the rent. I cannot also find any admission in the correspondence that the Respondent knew in April 1946 that Sidi Bilal had transferred everything to Appellant and that he accepted rent in the full knowledge that Appellant was occupying the premises in his own right.

The fourth question arises from the fact that Sidi Bilal did not appeal from the original judgment. It is, therefore, contended by Mr. Nazareth on behalf of the Respondent that the original judgment for possession against Sidi Bilal still stands and that in so far as the Appellant bases his right to possession on the leave and licence of Sidi Bilal he has no *locus standi* because by the original judgment Sidi Bilal has ceased to have any right to possession.

Whether the judgment against Sidi Bilal has been set aside or not depends on the true interpretation of the judgment of the Court of Appeal. This judgment ordered " that the judgments of the Supreme Court and " the Resident Magistrate's Court be set aside . . ." It further ordered a retrial.

Since the judgment of the Resident Magistrate's Court dealt with both Sidi Bilal and the Appellant it follows, I think, that the whole judgment was set aside and not merely the part of the judgment affecting the Appellant.

Exhibits.

Judgment, Civil Appeal No. 22 of 1948, 19th November, 1948— *continued.*

It is contended that the Court of Appeal has no power to set aside a judgment against a party who has not appealed. Whether it has such power or not is no concern of this Court which is bound to give effect to the decision of the Court of Appeal. It would, however, be relevant to decide whether the Court of Appeal intended to set aside the whole judgment because in the case of doubt it must be presumed to do what is within its power.

In my view Clause 2 of the Eastern African Court of Appeal Order in Council 1921 is couched in wide enough language to empower the Court of Appeal to set aside a judgment against which defendants though only some of them have appealed. I refer particularly to the following part of Clause 2. " The said court in the exercise of its appellate jurisdiction " shall have full power to determine any question and to pass any decree " judgment or order the determining or the passing of which may appear " necessary to the said court for the purpose of doing justice in the cause " or matter before it."

In the present case the Court of Appeal was of opinion that the pleadings had proceeded on an entirely wrong basis and that the real issues in the case had not been tried. For this reason it ordered a retrial and did not restrict the re-trial merely to the issues between the Appellant and Respondent. In fact it set aside the judgment of the Magistrate as a whole.

The last question is whether the learned Magistrate had jurisdiction to try this suit. It is conceded that the learned Magistrate would not have jurisdiction unless the suit came within the provisions of the Rent Restriction Ordinance but it is contended by the appellant that in order to bring the case within the provisions of the Rent Restriction Ordinance there must be the relationship of landlord and tenant between the parties and since the learned Magistrate found that the defendants were trespassers the suit did not come within the Ordinance. As I have found that there was a tenancy it is not necessary for me to decide this point but the question is really concluded by authority binding on this court *Tara Singh & Others* v. *Harnam Singh* XI E.A.C.A. 24. The identical point was taken in that case and it was argued that two things were necessary to give jurisdiction to the Subordinate Court to make an order for possession (*a*) that the Rent Restriction Ordinance applied to the premises, and (*b*) that the relationship between the plaintiff and defendant was that of landlord and tenant. The Court of Appeal refused to accept this argument and held that the jurisdiction of the Magistrate's Court depended not on the relationship of the parties but on whether the premises, the subject matter of the suit, came within the protection of the Ordinance or not. This, I think, appears clearly from the following passages from the judgments of Sheridan, C.J. and Whitley, C.J. at pages 26 and 27 respectively.

> Sheridan, C.J. " Considering the provisions of S. 2, defining " Court, section 20 (2) applying the Ordinance to certain dwelling- " houses, and section 11 referring to restrictions on the right to " possession, the intention of the legislature appears to be that in " all suits for possession, a First Class Magistrate has concurrent

" jurisdiction with the Supreme Court in the case of dwelling " houses to which the Ordinance has been applied."

Whitley, C.J. " The test as to jurisdiction is that set out " in Section 20 (2). If the dwelling house is one within that " sub-section the Court as defined in section 2 is given jurisdiction " to deal with the matter, and in my opinion it follows that that " court can, irrespective of the limitations as to jurisdiction in " the Courts Ordinance, either make or refuse an order for " possession."

The same principle, of course, applies *mutatis mutandis* to business premises to which the Ordinance applies.

To sum up I hold

(a) that Sidi Bilal was a yearly tenant whose tenancy was determinable only by a six months' notice to quit,
(b) that the tenancy has not been determined, and
(c) that the appellant is in possession by the leave and licence of Sidi Bilal.

This being the position the appeal succeeds and the judgment of the lower Court is set aside with costs here and in the lower court.

M. C. NAGEON DE LESTANG,
19.11.48.

No. 1.—Landlord's Solicitors to First Respondent.

1st December, 1948.

Mr. Sidi Bilal,
Plot No. 230/3,
Race Course Road,
Nairobi.

Dear Sir,

Re Plot No. 230/3 Race Course Road, Nairobi.

For and on behalf and on the instructions of Mr. Jagat Singh Bains, we hereby give you notice that the yearly tenancy (as held by the Supreme Court) of the Bakery and the shop situate on the above plot shall stand determined (if any tenancy exists) on the 1st July, 1949, or at the end of the year of the tenancy which will expire next after the end of six months from the date of the service of this notice.

Yours faithfully,
TRIVEDI, NAZARETH AND GAUTAMA,
Duly Authorised Agents for Jagat Singh Bains.

Extra copy for information of Mr. I. M. Chogley with an intimation that the notice was affixed on the premises on a particular day.

GKD/PMG.

Exhibits.

No. 2.—Letter, Landlord's Solicitors to Second Respondent.

No. 2. Letter, Landlord's Solicitors to Second Respondent, 7th December, 1948.

Trivedi Nazareth & Gautama,
Government Road,
Nairobi.

7th December, 1948.

Mr. I. M. Chogley,
Race Course Road,
Nairobi.

Dear Sir,

Plot No. 230/3, Race Course Road, Nairobi.

We have to inform you that on behalf of Mr. Jagat Singh Bains the owner of the above plot, we have to-day affixed " notice to quit " a copy whereof is enclosed herewith for your information because our client' tenant, Sidi Bilal, cannot be found and the premises affected are said to be occupied by you.

The notice was affixed at about 9.15 a.m. this morning (7th December, 1948) by our clerks Shukla and Githenji in the presence of several persons whose names it is not necessary to mention.

Yours faithfully,

TRIVEDI NAZARETH & GAUTAMA.
(Signed) J. H. NAZARETH.

GKD/PMG.

No. 6. Sub-Lease, 25th January, 1949.

No. 6.—Sub-Lease.

THIS SUB-LEASE is made the 25th day of January One Thousand nine hundred and forty-nine, BETWEEN SIDI BILAL of P.O. Janjira District Kolaba, Bombay, in the Union of India (hereinafter called the " head-tenant") of the one part, and ISMAIL MOHAMED CHOGLEY trading under the firm name or style of Muslim Bakery, of Nairobi, in the Colony of Kenya, East Africa, Merchant, Baker and Confectioner (hereinafter called the sub-tenant) of the other part.

WHEREAS the head-tenant to whom a purported lease of five years duration was granted, which said lease was held by the Courts of the Colony aforesaid to be void for want of registration, has had and now has in law (by implication under the provisions of Section 106 of the Transfer of Property Act, 1882, as applied to the Colony) a tenancy from year to year, of a bakery and shop in premises owned by one Jagat Singh Bains, of Nairobi aforesaid, standing on and forming part of buildings and premises on Plot No. 230/3, situate on Race Course Road, Nairobi aforesaid, commencing from the first day of July, One Thousand nine hundred and

forty one, the date upon which the head-tenant was put into possession as a tenant by the said Jagat Singh Bains.

AND WHEREAS the said Bakery and Shop premises were verbally made over to the sub-tenant, with effect from the 15th day of April, One Thousand nine hundred and forty six.

AND WHEREAS doubts have now arisen, as to what (if any) interest was then passed to the sub-tenant by the head-tenant in the aforesaid Bakery and shop.

WITNESSETH as follows :—

1.—The head-tenant hereby sub-lets up to the sub-tenant the aforesaid Bakery and shop premises on Plot No. 203/3, Race Course Road, Nairobi, which are held by the head-tenant under an implied Lease from year to year, commencing, from July 1st, One thousand nine hundred and forty-one from Jagat Singh Bains, the owner aforesaid

To HOLD up to the sub-tenant from 1st day of January One thousand nine hundred and forty-nine up to and including the 1st day of July, One thousand nine hundred and forty-nine, determinable thereafter as the law shall permit paying therefor during the said term the monthly rent of Shs. 300/- in arrears for every calendar month, in the name of the head-tenant, to the owner aforesaid, on the last day of each calendar month for which the rent shall fall due without any deduction in respect of light water, and conservancy charges, which shall be borne by the sub-tenant.

The sub-tenant hereby covenants with the head-tenant, to pay the reserved rent on the days and in manner aforesaid ;

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year herein before first written.

SIGNED by the said SIDI BILAL in the presence of :— } (Signed) SIDI BILAL FAUJDAR.

(Signed) P. KILLEDA.

SIGNED by the ISMAIL MOHAMED CHOGLEY in the presence of :— } (Signed) I. M. CHOGLEY.

R. H. KHANNA (Signed)
Advocate,
Nairobi.

Duly signed and attested before me this day 25th January 1949 by Sidi Bilal Faujdar of Murud. The executant is personally known to the undersigned.
Janjira Murud.
24.1.49.

(Signed) S. R. LEADHAM,
Magistrate First Class,
Janjira.

Sealed.

Exhibits.

No. 3A. Letter, Second Respondent's Solicitors to Landlord's Solicitors, 24th February, 1949.

No. 3A.—Letter, Second Respondent's Solicitors to Landlord's Solicitors.

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

Messrs. Trivedi Nazareth & Gautama,
Advocates,
Nairobi.

24th February, 1949.

Dear Sirs,

Plot No. 230/3 Race Course Road, Nairobi.

With reference to your letter No. 643/195 dated 7th December, 1948, addressed to Mr. I. M. Chogley we have to inform you that the shop premises in question have been sub-let to our client under and by virtue of an Instrument of Sub-Lease dated 25.1.49 and made between Sidi Bilal and our client.

Yours faithfully,
(Signed) D. N. & R. N. KHANNA.

No. 5A. Letter, Second Respondent's Solicitors to Landlord, 2nd August, 1949.

No. 5A.—Letter, Second Respondent's Solicitors to Landlord.

Mr. Jagat Singh Bains,
Bar Proprietor,
Race Course Road,
P.O. Box 998,
Nairobi.

2nd August, 1949.

Dear Sir,

We are instructed by our client Mr. I. M. Chogley the proprietor of The Muslim Bakery of Nairobi to send you his cheque for Shs. 300/– being rent of the Bakery for the month of July, 1949.

We shall be glad if you will please let us have a receipt in due course.

Yours faithfully,
(Signed) D. N. & R. N. KHANNA.

DNK/EKN.

Encl. Cheque for Shs. 300/–

No. 5C. Cheque for 300/-, Second Respondent to Landlord, 2nd August, 1949.

No. 5C.—Cheque for 300/-, Second Respondent to Landlord (enclosure to above Letter).

No. 588

2nd August, 1949.

National Bank of India Limited
Nairobi

Pay to Jagat Singh Bains

Shillings—Three hundred only.

THE MUSLIM BAKERY
(Signed) I. M. CHOGLEY,
Proprietor.

Shs. 305/00

No. 3B.—Letter, Landlord's Solicitors to Second Respondent's Solicitors. Exhibits.

No. 3B. Letter, Landlord's Solicitors to Second Respondent's Solicitors, 14th April, 1950.

Messrs. D. N. & R. N. Khanna,
Advocates,
Nairobi.

14th April, 1950.

Dear Sirs,

Re Rent Control Board Case No. 88 of 1950

Jagat Singh Bains vs. *Sidi Balal and Ismail Mohamed Chogley.*

With reference to paragraph 9 of the 2nd Respondent's Defence, we shall be obliged if you will let us know whether the 2nd Respondent or the 1st Respondent or both are prepared to pay the sum of Shs. 12900/– or any part thereof to our client unconditionally or if not unconditionally on what terms the said Respondents or either of them would be prepared to make the payment. We shall be glad if you will let us have your reply within the next 5 days.

We would also ask you to let us know at the same time whether the 2nd Respondent (Mr. I. M. Chogley) has any authority or any power of attorney to act on behalf of the 1st Respondent or if he has not any such power now if you will inform us up to when, if at all, he had any such authority or power of attorney to act on behalf of the 1st Respondent.

Yours faithfully,

N/B

(Signed) MADAN & SHAH.

No. 3C.—Letter, Second Respondent's Solicitors to Landlord's Solicitors.

No. 3c. Letter, Second Respondent's Solicitors to Landlord's Solicitors, 20th April, 1950.

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

20th April, 1950.

Messrs. Madan & Shah,
Advocates,
Nairobi.

Dear Sirs,

Re R. C. B. Case No. 88 of 1950

J. S. Bains v. *Sidi Balal and I. M. Chogley.*

Our client is away at Dar-es-Salaam and as soon as he comes back, we will put before him your letter No. 1532 of 14.4.50.

Yours faithfully,

DNK/EKN.

(Signed) D. N. & R. N. KHANNA.

Exhibits.

No. 3D.—Letter, Landlord's Solicitors to Second Respondent's Solicitors.

No. 3D. Letter, Landlord's Solicitors to Second Respondent's Solicitors, 22nd April, 1950.

22nd April, 1950.

MS/J/117/50/1757.

Messrs. D. N. & R. N. Khanna,
Advocates,
Nairobi.

Dear Sirs,

Re Rent Control Case No. 88 of 1950.

Jagat Singh v. *Sidi Balal and Ismail Mohamed Chogley.*

With reference to your letter of the 20th April, 1950, could you please let us know when your client, Mr. Chogley, is expected back.

At the time when your client was served by our clerk, he informed our clerk, Mr. Balbir, that Mr. Sidi Balal had died in India. Could you let us know if this is correct, and if so, please furnish us with particulars as to place and date of his death and who are the legal representatives of Mr. Sidi Balal.

Yours faithfully,
(Sgd.) MADAN & SHAH.

No. 3E. Letter, Second Respondent's Solicitors to Landlord's Solicitors, 26th April, 1950.

No. 3E.—Letter, Second Respondent's Solicitors to Landlord's Solicitors.

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

26th April, 1950.

Messrs. Madan & Shah,
Advocates,
Nairobi.

Dear Sirs,

Re Rent Control Case No. 88 of 1950.

J. S. Bains v. *S. Balal and I. M. Chogley.*

We have no information as to when Mr. Chogley will be back, but we think he would not be away for more than four to six weeks. No doubt he would call on us as soon as he returns to Nairobi.

The information required under paragraph 2 of your letter of 22nd instant, under reply, would then be sought from him.

Yours faithfully,
(Sgd.) D. N. & R. N. KHANNA.

DNK/EKN

No. 3F.—Letter, Landlord's Solicitors to Second Respondent's Solicitors.

Exhibits.

No. 3F. Letter, Landlord's Solicitors to Second Respondent's Solicitors, 2nd May, 1950.

Messrs. D. N. & R. N. Khanna,
Advocates,
Nairobi.

2nd May, 1950.

Dear Sirs,

Re Rent Control Case No. 88 of 1950.

J. S. Bains v. *Sidi Balal & I. M. Chogley.*

We are in receipt of your letter dated the 26th April, 1950

We feel it would be too long to wait four or six weeks for this information as that would very greatly delay the matter. You will no doubt be able to ascertain the address of Mr. Chogley and to write to him and obtain the information since there is a regular air mail service between Nairobi and Dar-es-Salaam.

We shall, therefore, be obliged if you would be good enough to write to Mr. Chogley and obtain the information referred to in the 2nd paragraph of your letter dated the 26th April and also if you would deal with the first paragraph of our letter dated the 14th April, 1950.

Otherwise we must assume after the next 7 days that Mr. Sidi Balal is alive and that Mr. Chogley has really no serious intention of paying the sum of Shs. 12900/– or any part thereof.

Yours faithfully,
(Sgd.) MADAN & SHAH.

N/B

No. 3G.—Letter, Second Respondent's Solicitors to Landlord's Solicitors

No. 3G. Letter, Second Respondent's Solicitors to Landlord's Solicitors, 2nd May, 1950.

D. N. & R. N. KHANNA,
P.O. Box 1197,
Nairobi.

Messrs. Madan & Shah,
Advocates,
Nairobi.

2nd May, 1950.

Dear Sirs,

Re Rent Control Board Case No. 88 of 1950

J. S. Bains v. *Sidi Bilal and I. M. Chogley*

We are not clear as to what your idea in the matter is. Surely you are not denying, that offers were made in the matter, to pay rent without admitting that our client was in any way legally responsible, merely to put

Exhibits.

No. 3G. Letter Second Respondent's Solicitors to Landlord's Solicitors, 2nd May, 1950—*continued.*

an end to this litigation, and this fact was mentioned to the last Court of Appeal, who have mentioned it in their judgment.

It does not now lie in your client's mouth to ask for it, having stood on his legal rights and lost.

If our client now chooses to stand on his legal rights he cannot be blamed.

Are you now trying to seek an answer with a view to seeking generosity from our client outside the law. Then your client must come with clean hands, and withdraw the litigation and pay costs.

We have not the address of our client, nor do we know whom to approach for the same, and we doubt if our client is literate enough to give us the desired information, in a language, known both to him and ourselves.

As to whether Mr. S. Balal is dead or not, it is for you to find out. No doubt we will elicit such information as our client has on the subject in due course.

If Mr. Balal is in fact dead (and our client also has said so), then we do not see that the Board would assume the contrary even if you choose to assume that he is alive.

Yours faithfully,

(Signed) D. N. & R. N. KHANNA.

No. 5B. Letter Landlord's Solicitors to Second Respondent's Solicitors, 6th August, 1951. (*sic* 1949).

No. 5B —Letter, Landlord's Solicitors to Second Respondent's Solicitors

Trivedi Nazareth & Gautama,
P.O. Box 1048,
Government Road,
Nairobi.

6th August, 1951. (*sic* 1949)

Messrs. D. N. & R. N. Khanna,
Advocates,
Nairobi.

Dear Sirs,

Re J. S. Bains and I. M. Chogley

We have been handed your letter dated 2nd August, 1949 written to our client Mr. J. S. Bains on behalf of Mr. I. M. Chogley.

Mr. I. M. Chogley is not our client's tenant and it is regretted that the said cheque cannot be accepted as rent from him. We accordingly return the cheque herewith.

It is intended to take proceedings for possession of the premises shortly.

Yours faithfully,

JMN/BRC TRIVEDI NAZARETH & GAUTAMA.

In the Privy Council.

No. 24 of 1954.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

BETWEEN

ISMAIL MOHAMED CHOGLEY *Appellant*

AND

JAGAT SINGH BAINS ... *Respondent.*

RECORD OF PROCEEDINGS

HERBERT OPPENHEIMER, NATHAN & VANDYK,
20, Copthall Avenue,
London Wall, E.C.2,
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6, Westminster Palace Gardens,
Victoria Street,
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Solicitors for the Respondent.

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