Tanganyika ~~G1~~ G.2

Judgment 15/1958

IN THE PRIVY COUNCIL No. 5 of 1957

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

FOR EASTERN AFRICA

B E T W E E N:

1. ARIADNE TZAMBURAKIS)
2. NAFSIKA LAMBROU) ... Appellants

- and -

EFTICHIA RODOUSSAKIS ... Respondent

RECORD OF PROCEEDINGS

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

Solicitors for the Appellants

IN THE PRIVY COUNCIL No. 5 of 1957

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

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- and -

EFTICHIA RODOUSSAKIS Respondent

RECORD OF PROCEEDINGS

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DOCUMENT NOT TRANSMITTED TO THE PRIVY COUNCIL

Description of Document
Notes in the High Court of Tanga Civil Case file No.5/52 ranging from 25.4.52 to 2.10.54 regarding fixing of hearing dates, filing of pleadings, granting extensions, consent orders, amendment of pleadings etc. Evidence.

EXHIBITS NOT TRANSMITTED TO THE PRIVY COUNCIL

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7	Cheque for Shs. 465,000/-	22nd September, 1949
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	Account of Kerenge & Mulemua Sisal Estate	31st March 1947
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Exhibit No.	Description of Document	Date
20	Report on the accounts of Mr. N. Tzamburakis and Mrs. E. Rodoussakis	1st January 1949 to 21st September, 1949
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	Notice of Appeal	24th October 1955
21	Kerenge & Mulemua Sisal Estate - Cash Return	July, 1947
	Kerenge & Mulemua Sisal Estate - Statement	31st March 1948
22	Kerenge & Mulemua Sisal Estate - Cash Return	February 1949
23	Cheque for Shs. 272,391/-	23rd January 1950
24	Cheque for Shs. 25,567/-	9th . May 1950

IN THE PRIVY COUNCIL No. 5 of 1957

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

BETWEEN:- 1. ARIADNE TZAMBURAKIS)
2. NAFSIKA LAMBROU) Appellants

- and -

EFTICHIA RODOUSSAKIS Respondent

RECORD OF PROCEEDINGS

In the High Court of Tanganyika

No.1.

Plaint.

23rd July 1952.

No. 1.

PLAINT

CIVIL CASE NO. 5 of 1952

EFTICHIA RODOUSSAKIS ... Plaintiff

versus

1. THE ADMINISTRATOR GENERAL, Administrator pendente lite of the estate of Nico Tzamburakis, deceased)
2. ARIADNE TZAMBURAKIS, and) Defendants
3. NAFSIKA LAMBROU, Administrators of the estate of Nico Tzamburakis, deceased)

P L A I N T

The Plaintiff above named states as follows :-

1. The Plaintiff is a Greek married woman of Tanga. Her address for service is C/o W. P. Holder & Co., Advocates, Tanga.

2. Nico Tzamburakis, Greek of Tanga, died at Tanga on the 6th day of January, 1951.

3. The First Defendant was appointed administrator pendente lite of the estate of the above named

In the High Court of Tanganyika

No.1.

Plaint.

23rd July 1952 - continued.

deceased on the 27th day of March, 1952 by Her Majesty's High Court of Tanganyika in Civil Cause No. 8 of 1952.

4. The second and third defendants were appointed administrators of the estate aforesaid by Her Majesty's High Court of Tanganyika on the 20th May, 1952 in Probate and Administration Cause No. 21 of 1952. Their addresses for service are c/o Atkinson, Ainslie, Childs-Clarke & O'Donovan, Advocates, Dar-es-Salaam, and Mohamed Husain, Esq., Advocate, Tanga, respectively.

5. In or about 1932 the plaintiff and the deceased entered into partnership in the Kerenge-Mulemua Estate in the following proportions, viz. the plaintiff 30 per cent and the deceased 70 per cent.

Annexure "A"

6. On the 26th March, 1946 the plaintiff by Deed of Lease annexed marked "A" which the plaintiff prays be treated as part of the plaint, the plaintiff leases to the deceased her share in the partnership business excepting the capital assets for the purpose of which the aforesaid partnership continued.

7. The said lease terminated on the 31st March, 1949 whereupon the original terms of the partnership revived.

Annexure "B"

8. On the 14th day of July, 1949, the plaintiff leased to the deceased her share in the estate and partnership business at the rent and on the terms contained in the agreement annexed hereto and marked "B", which the plaintiff prays be treated as part of the plaint.

9. On or about the 11th October, 1949, the said estate was sold.

10. Since the commencement of the said partnership the plaintiff has not been supplied with partnership accounts or details of sisal production on the estate for any period nor has the plaintiff been paid the rent due under the lease aforesaid.

11. The cause of action arose within the jurisdiction of this Honourable Court and the plaintiff values the subject matter of the suit for purposes of Court fees at £40,000.

WHEREFORE the plaintiff prays:-

(a) Appointment of receiver of partnership assets.

(b) Partnership accounts including royalties.

(c) Rent for period from 14th July, 1949 to 11th October 1949.

(d) Interest at the rate of 6% per annum on all monies found to be due to the Plaintiff from the time when such monies became due to the date of institution of this suit, further to the date of the decree and thereafter to the date of payment.

(e) Costs of the suit.

(f) Any other relief this Honourable Court may deem fit.

(Sgd.) E. Rodoussakis,
PLAINTIFF.

WHAT is stated above is true to the best of my knowledge information and belief.

DATED the 23rd day of July, 1952.

(Sgd.) E. Rodoussakis,
PLAINTIFF.

Court Fees		Advocates' Costs.
On Plaint	Shs. 2000/-	To be taxed.
Service	4/-	
Exhibit	8/-	
Miscellaneous	-	
	2012/-	
Plus 1/3rd	671/-	
	Shs. 2683/-	
Fees		
Filing	Shs. 4/-	
Service	10/-	
	14/-	
Plus 1/3rd	5/-	
Total	Shs. 19/-	

Drawn & Filed by:-
W.P. HOLDER & CO.,
and
F. S. KHAMBALIA,
Advocates for Plaintiff.
TANGA.

Presented for filing this 23rd day of July, 1952.

(Sgd.) D. Kapadia,
Legal Clerk.

In the High Court of Tanganyika.

No.2.

Written Statement of Defence.

10th November, 1952.

No. 2.

WRITTEN STATEMENT OF DEFENCE

The defendants above-named state as follows:-

1. Paragraphs 1, 2, 3, 4 and 5 of the Plaint are admitted.

2. With reference to paragraph 6 of the plaint the defendants deny that by the said Deed of Lease the plaintiff leased to the deceased her share in the partnership business as alleged. The defendants state that by the said Lease the plaintiff leased to the deceased her share in the land and effects on the land as recited in the Lease. The defendants further state that the partnership dissolved by the termination of the said Lease on 31st March, 1946.

Annexure "A"

3. With reference to paragraph 7 of the Plaint the defendants deny that the partnership revived on 31st March, 1949.

4. The defendants deny the allegations made in paragraph 8 of the Plaint and state that by the said Deed of Lease the Plaintiff leased to the deceased her share in the land and effects on the said land.

Annexure "B"

5. With reference to the allegations made in paragraph 10 of the Plaint the defendants do not admit that pernership accounts were not supplied to the plaintiff and further state that the claim for partnership account is time-barred.

6. W ith further reference to paragraph 10 of the Plaint the defendants do not admit that the deceased did not pay any rent to the plaintiff and further say that the claim to rent under the Deed dated 26th March, 1946, is time-barred.

(Sgd.) Ariadne Tzamburakis
(Sgd.) Nafsika Lambrou
Defendants.

We hereby certify that what is stated above is true to the best of our knowledge, information and belief.

Dated this 10th day of November, 1952.

(Sgd.) Ariadne Tzamburakis
(Sgd.) Nafsika Lambrou
Defendants.

Drawn by Robson & O'Donovon
Advocates for the Defendants,
TANGA.

No. 3.

In the High Court of Tanganyika.

No. 3.

Amended Plaint.

27th July 1954.

AMENDED PLAINT

The Plaintiff, above-named, states as follows :-

1. The Plaintiff is a Greek married woman of Tanga. Her address for service is care of W.P. Holder & Co., Advocates, Tanga.

2. Nico Tzamburakis, Greek of Tanga, died at Tanga on the 6th day of January, 1951.

3. The first Defendant was appointed Administrator pendente lite of the Estate of the above-named deceased on the 27th day of March, 1952 by Her Majesty's High Court of Tanganyika in Civil Cause No. 8 of 1952. This suit was withdrawn against him by an Order made by this Honourable Court on 22nd August, 1952.

4. The Second and Third Defendants were appointed Administrators of the Estate aforesaid by Her Majesty's High Court of Tanganyika on the 20th May, 1952 in Probate and Administration Cause No.21 of 1952. Their addresses for service are care of Atkinson, Ainslie, Childs-Clarke & O'Donovan, Advocates, Dar-es-Salaam and Mohamed Husain, Esq., Advocate, Tanga, respectively.

5. On and before the 26th day of March 1946 the Plaintiff and the deceased were owners as tenants-in-common as to the Deceased 70/100th undivided share and as to the Plaintiff the 30/100th undivided share of ALL THAT sisal estate known as KERENCE-MULEMUA SISAL ESTATE (hereinafter called "the Sisal Estate") situated in Korogwe District in Tanganyika Territory together with all the buildings appurtenances and fixtures thereon.

6. By a Deed of Lease (hereinafter referred to as "the First Lease") dated the 26th March 1946 and registered at the Registry of Documents, Dar-es-Salaam on the 15th day of April, 1946 in Vol.N. E5, Folio No.822, Serial No.8533 the Plaintiff demised ALL THAT her 30/100th undivided share in the Sisal Estate unto the Deceased for a term of THREE (3) years from the 1st day of April, 1946 subject to the rent by way of royalty and to the covenants, terms and conditions contained in the First Lease, a copy whereof is annexed hereto and marked "A". Annexure "A".

In the High Court of Tanganyika.

No. 3.

Amended Plaint.

27th July 1954 - continued.

Annexure "B".

7. The First Lease terminated on the 31st day of March 1949 by effluxion of time.

8. By a Lease (hereinafter called "the Second Lease") dated the 14th day of July, 1949 the Plaintiff demised ALL THAT her 30/100th undivided share in the Sisal Estate unto the Deceased from the 1st day of July, 1949 until the 31st day of December, 1949 subject to rent and to the covenants, terms and conditions contained in the Second Lease, a copy whereof is annexed hereto and marked "B".

9. On or about the 11th October 1949 the Plaintiff and the Deceased agreed to sell and did sell the Sisal Estate and by mutual consent the Second Lease was terminated on that date.

10. The Plaintiff states that in spite of repeated demands the Deceased failed or neglected to render accounts of the total production of all sisal produced on the Sisal Estate, of the rent by way of royalty due on such total production and of the profits due on sale of machinery and other movables during the period covered by the First Lease and except for the amounts mentioned in the statement of Account annexed hereto and marked "C" the Deceased failed or neglected to pay to the Plaintiff any further moneys.

Annexure "C"

11. The Plaintiff further states that in spite of repeated demands the Deceased failed or neglected to render accounts of the profits made by the Sisal Estate during the period of commencing from 1st of April 1949 to 14th July 1949 and failed to pay any moneys to the Plaintiff on account of such profits.

12. The Second and Third Defendants have possessed themselves of the movable and immovable property of the Deceased and have failed to render the accounts referred to in Paragraphs 10 and 11 supra and have failed to pay to the Plaintiff the moneys that may be found due on taking such accounts.

13. The Plaintiff states that on taking the accounts referred to in Paragraphs 10 and 11 supra an amount exceeding Shgs. 800,000/- will be found due by the Estate of the Deceased to the Plaintiff.

The plaintiff, therefore, claims :-

(a) that an account (a) of all sisal produced on the Sisal Estate during the period covered by the First Lease namely from 1st April, 1946 to 31st March 1949 (b) of the rent by way of royalty due to the Plaintiff on such total production and (c) of the machinery and other movables sold or otherwise appropriated by the Deceased be taken and payment to the Plaintiff of the amount found due on taking such accounts;

(b) That an account may be taken of the profits made by the Sisal Estate during the period from 1st April, 1949 to 14th July 1949 and payment to the Plaintiff of the amount found due on taking of such accounts;

(c) That an account may be taken of the movable and immovable property of the Deceased and that the same may be administered under the decree of the Court;

(d) Costs of this suit;

(e) Any other or further relief as to this Honourable Court may deem just in the circumstances.

(Sgd.) E. RODOUSSAKIS,
Plaintiff.

What is stated above is true to the best of my knowledge information and belief.

Dated at Tanga, this 27th day of July, 1954.

(Sgd.) E. RODOUSSAKIS,
Plaintiff.

Drawn & Filed by:

MESSRS.GEORGE N.HOURY & CO.,
Advocates for the Plaintiff
Dar-es-Salaam.

TO BE SERVED ON :-
FRASER MURRAY ESQ.,
For and on behalf of Messrs.Robson and O'Donovan,
Advocates for Second and Third Defendants, Dar-es-Salaam.

Filed this 1st day of September 1954.

In the High Court of Tanganyika.

No. 4.

Annexure to Plaint.

Annexure "A"

Deed of Lease Eftichia George Tzamburakis to Nico Tzamburakis dated 26th March 1946.

No. 4.

ANNEXURE "A"

DEED OF LEASE EFTICHIA GEORGE TZAMBURAKIS to NICO TZAMBURAKIS dated 26th MARCH 1946

THIS DEED made the 26th day of March One thousand nine hundred and forty six Between EFTICHIA GEORGE TZAMBURAKIS Greek woman of Tanga (hereinafter called the "Landlord") of the one part and NICO TZAMBURAKIS Greek Planter of Korogwe (hereinafter called the "Tenant") of the other part

WHEREAS the Landlord is the owner of 30 equal undivided hundredth parts or shares in the hereditaments described in the schedule hereto and known as "KERENGE & MULEMUA SISAL ESTATE" and the said estate is complete with sisal factory, rails, trollies and all other machinery required for the proper running of a sisal estate AND WHEREAS the Landlord is desirous of giving a lease of her share in the said hereditaments to the Tenant on the terms hereinafter mentioned

NOW THIS DEED WITNESSETH as follows :-

1. The Landlord as to her share and interest hereby demises unto the Tenant ALL THOSE hereditaments described in the schedule hereto together with the sisal factory, machinery, trollies, railway lines and other chattels and effects now on the estate and forming part of sisal estate as running concern TO HOLD to the Tenant from the 1st day of April 1946 for the term of Three years Paying therefor during the said term a royalty of £3/- per ton on all grades of sisal and tow produced from the whole estate provided that if the price of all or any grade or grades of sisal shall be increased or decreased the royalty payable in respect of all sisal or the particular grade shall be increased or decreased by a sum of Shgs.2 and cents 66-1/3rd for every one pound (£1/-) increase or decrease of such price respectively. The said royalty shall be paid within 30 days of the sale of sisal.

2. The Tenant for himself and his assigns and to the interest that the obligations may continue throughout the term hereby created hereby covenants with the Landlord as follows :-

(a) To pay the royalties hereby reserved at the times and in the manner aforesaid.

(b) To use manage and work the machinery on the estate in a proper workmanlike and customary manner and as same is done by the Tenant.

(c) To carry out such further cultivation of sisal as may be deemed necessary by the Tenant.

3. The Landlord agrees to permit the Tenant on his paying the royalty hereby reserved and observing and performing the several agreements and stipulations on his part herein contained peaceably and quietly to hold and enjoy the demised premises in respect of her share and interest in the same during the tenancy hereby created without any lawful interruption by the Landlord or any person rightfully claiming under or in trust for her.

4. The Tenant agrees to put the Landlord in possession of the demised premises in respect of her share at the determination of the tenancy in good state of cultivation and the machinery and buildings in good and substantial repair.

5. It is agreed between and by the said parties hereto as follows :-

(a) The Tenant shall make full account of the running of estate by him till the 31st day of March 1946 and shall pay tc the Landlord such sum as may be found due to the Landlord on account of her share in the profits.

(b) If the Tenant shall find it necessary and for the benefit of the plantation to replace any machinery or to buy further machinery other than lorries the Landlord shall pay to the Tenant 30% of the price of such machinery.

(c) If the Tenant shall build further houses or buildings of a permanent nature for the senior staff on the estate or shall build permanent labour camps of brick or stones then the Landlord shall pay 30% of the expenses incurred in such construction works.

(d) The Tenant may at any time sell any old machinery and upon such sale he shall pay to the Landlord 30% of such machinery.

In the High Court of Tanganyika.

No. 4.

Annexure to Plaint.

Annexure "A"

Deed of Lease Eftichia George Tzamburakis to Nico Tzamburakis dated 26th March 1946 - continued.

(e) Of the six lorries on the plantation the Tenant may sell the four which are in a worse condition than others and on such sale he shall replace these lorries by at least two new lorries.

IN WITNESS WHEREOF the parties have hereunto set their hands the day month and the year first above written

THE SCHEDULE ABOVE REFERRED TO

1. ALL THAT piece or parcel of land approximately 1665 acres in extent situated at Korogwe in Tanganyika Territory and being Farm No. 219/1 and being part of E.P. Lot No. 984(a) together with the buildings, appurtenances and fixtures thereupon.

2. ALL THAT right of occupancy comprised in Certificate of Title No. 4728 over leasehold land situated in Korogwe District Tanganyika Territory together with the buildings and appurtenances thereupon.

SIGNED AND DELIVERED by the said EFTICHIA GEORGE TZAMBURAKIS this 26th day of MARCH 1946 in my presence, it having been first interpreted and explained to him when she appeared perfectly to understand its contents.

Sd. EFT TZAMBURAKIS

Sd. M.S. Desai
Advocate, Tanga.

SIGNED AND DELIVERED by the said NICO TZAMBURAKIS this 26th day of MARCH 1946 in my presence, it having been first interpreted and explained to him when he appeared perfectly to understand its contents.

Sd. N. TZAMBURAKIS

Sd. M.S. Desai
Advocate, Tanga.

Stamp Duty Shs. 390/-
Paid vide G.R.R.No.42889
Dated 11/4/46
Issued by S.A. Tanga.

No. 5.

In the High Court of Tanganyika.

No. 5.

Annexure to Plaint.

Annexure "B".

Indenture of Lease Eftichia George Tzamburakis to Nico Tzamburakis

14th July 1949.

ANNEXURE "B"

INDENTURE OF LEASE EFTICHIA GEORGE TZAMBURAKIS to NICO TZAMBURAKIS DATED 14th JULY, 1949

Drafted by:-
Sgd. M.Husain,
Advocate, TANGA.

THIS INDENTURE made the 14th day of July One thousand nine hundred and forty nine Between EFTICHIA GEORGE TZAMBURAKIS Greek woman of Tanga (hereinafter called the "Landlord") of the one part and NICO TZAMBURAKIS Greek Planter of Korogwe Tanganyika Territory (hereinafter called the "Tenant") of the other part

WHEREAS the Landlord and the Tenant are the owners of the hereditaments described in the Schedule hereto as tenant-in-common in the following shares namely the Landlord as to 30 equal one-hundredth undivided shares and the Tenant as to the remaining 70 equal one-hundredth shares AND WHEREAS the said hereditaments are known as "KERENGE & MULEMUA SISAL ESTATE" and the said estate is complete with sisal, factory, rails, trollies and all other machinery required for the proper running of a sisal estate AND WHEREAS the Landlord is desirous of giving a lease of her share in the said hereditaments to the Tenant on the terms hereinafter mentioned

NOW THIS INDENTURE WITNESSETH as follows :-

1. The Landlord as to her share and interest hereby demises unto the Tenant ALL THOSE hereditaments described in the Schedule hereto together with the sisal factory, machinery, trollies, railway lines and other chattels and effects now on the estate and forming part of the sisal estate as a running concern TO HOLD to the Tenant from the 1st day of July 1949 till the 31st day of December 1949 paying therefor during the said term the monthly rent of Eighteen thousand shillings (Shs. 18,000/-) payable in advance on the first day of every month the first payment to be made on the 1st day of July 1949 without any deductions whatsoever.

2. The Tenant for himself and his assigns and to

In the High Court of Tanganyika.

No. 5.

Annexure to Plaint.

Annexure "B".

Indenture of Lease Eftichia George Tzamburakis to Nico Tzamburakis

14th July 1949 - continued.

the interest that the obligations may continue throughout the term hereby created hereby covenants with the Landlord as follows :-

(a) To pay rent hereby reserved at the times and in the manner aforesaid

(b) To use manage and work the machinery on the estate in a proper workmanlike and customary manner and as same is done by the Tenant.

(c) To carry on the production of sisal in a good husbandlike manner according to the most approved method followed in the District and to keep the whole thereof in good heart and condition.

3. The Landlord agrees to permit the Tenant on his paying the rents hereby reserved and observing and performing the several agreements and stipulations on his part herein contained peaceably and quietly to hold and enjoy the demised premises in respect of her share and interest in the same during the tenancy hereby created without any lawful interruption by the Landlord or any person rightfully claiming under or in trust for her.

4. The Tenant agrees to put the Landlord in possession of the demised premises in respect of her share at the determination of the tenancy in good state of cultivation and the machinery and buildings in good and substantial repair.

5. It is hereby agreed between the parties as follows :-

(a) The costs of production and manufacture of sisal and the costs and expenses of cleaning and weeding of new and old sisal shall be borne entirely by the Tenant and the Landlord shall not be liable to contribute any sum or sums of money for the upkeep and cultivation of new or old sisal or for any additions or improvements to the hereditaments which the Tenant may effect on the Estate.

(b) The Tenant shall not be liable to account to the Landlord for the outgoings and receipts of moneys or for any profit or loss account in the running of the estate.

(c) If at any time during the continuance of this agreement the parties shall desire to sell the hereditaments hereby demised this agreement shall become void as from that date and the Tenant shall be liable to pay only a proportionate part of the rent and the Landlord shall refund to the Tenant a proportionate share of the rent in respect of the unexpired portion of the month.

IN WITNESS WHEREOF the parties have hereunto set their hands the day month and the year first above written

THE SCHEDULE ABOVE REFERRED TO

1. ALL THAT piece or parcel of land approximately 1665 acres in extent situated at Korogwe in Tanganyika Territory and being Farm No. 219/1 and being part of E.P.Lot No.984(a) together with the buildings, appurtenances and fixtures thereupon.

2. ALL THAT right of occupancy comprised in Certificate of Title No. 4728 over leasehold land situated in Korogwe District Tanganyika Territory together with buildings and appurtenances thereupon.

SIGNED AND DELIVERED by the said EFTICHIA GEORGE TZAMBURAKIS in Roman characters this 14th day of July 1949 in my presence it having been first interpreted and explained to her when she appeared perfectly to understand its contents:-) Sgd. N. TZAMBURAKIS

Sgd. M.S. Desai,
Advocate,
Tanga.

In the High Court of Tanganyika.

No. 5.

Annexure to Plaint.

Annexure "B"

Indenture of Lease Eftichia George Tzamburakis to Nico Tzamburakis

14th July 1949 - continued.

SIGNED AND DELIVERED by the said NICO TZAMBURAKIS who is able to read and write the language in which the above written document is written this 14th day of July 1949 in my presence :-

Sgd. E. RODOUSSAKIS

Sgd. M.S. Desai,
Advocate, Tanga.

Stamp Duty Shs. 540/-
Paid vide G.R.R.No.27399J
dated 15th July 1949
Issued by (Sgd.) ??
for MUNICIPAL SECRETARY
TANGA.

This is the Exhibit "B" referred to in the plaint in C.C.No.5 of 1952 in the District Registry at Tanga of H.M'S. High Court of Tanganyika

Tanga the 23rd day of July 1952.

Sgd. F.S. Khambalia

Advocate for the Plaintiff.

No. 6.

Annexure to Plaint.

Annexure "C".

Statement of Monies received by the Plaintiff from the Deceased.

No. 6.

ANNEXURE "C"

STATEMENT OF MONIES received by the Plaintiff from the Deceased referred to in Paragraph 10 of the Amended Plaint.

1947	Received	on	February	27th	Shs.	10,000.00
	"	"	June	18th		10,000.00
	"	"	July	28th		15,000.00
	"	"	November	4th		64,300.00
1948	"	"	April	1st		28,355.00
	"	"	May	3rd		20,000.00
	"	"	October	29th		22,830.00
1949	"	"	January	14th		15,000.00
					Shs.	185,685.00

This is Annexure "C" referred to in Paragraph 10 of the Amended Plaint herein.

(Sgd.) E. RODOUSSAKIS,
Plaintiff.

No. 7.

In the High Court of Tanganyika.

No. 7.

Amended written Statement of Defence.

22nd October, 1954.

AMENDED WRITTEN STATEMENT OF DEFENCE

The Second and Third Defendants above-named state as follows :-

1. Paragraphs 1, 2, 3, 4 and 5 of the Amended Plaint are admitted save that the address for service of the Defendants is care of Fraser Murray, Esq., Advocate, Dar-es-Salaam.

2. The Defendants will refer to the Deed of Lease referred to in paragraph 6 of the Plaint upon production thereof for its terms and legal effect. Subject to such production the Defendants will contend that the Amended Plaint filed herein introduces a new cause of action and that the Plaintiff's claim in paragraph 13(a) is time-barred.

3. The Defendants will refer to the Lease referred to in paragraph 8 of the Plaint upon production thereof for its full terms and legal effect. Subject to such production the Defendants will contend that the Amended Plaint introduces a new cause of action, that the same is time-barred, and that the Plaintiff having failed to claim any relief in respect of the Lease referred to in paragraph 8 of the Plaint is not entitled to any judgment thereon.

4. The Defendants will further contend that the claim for an account of profits during the period 1st April, 1949 to 14th July, 1949, introduces a new cause of action and that the same is time-barred.

5. The Defendants do not admit that the deceased did not make any payments to the Plaintiff except as alleged, or that he failed to account to the Plaintiff or to pay to the Plaintiff such moneys as were due on account of such profits and puts the Plaintiff to the proof thereof.

6. The Defendants admit that the deceased sold the sisal estate referred to in the Plaint but state that upon such sale he paid to the Plaintiff her share of the proceeds thereof.

7. The Defendants do not admit that the deceased failed to pay to the Plaintiff her share of the

In the High Court of Tanganyika.

proceeds of the sale of any machinery or other moveables and will contend that in any event the claim in relation thereto is time-barred.

No. 7.

Amended written Statement of Defence.

22nd October, 1954 - continued.

8. Save as is hereinbefore specifically admitted each and every allegation contained in the Plaint is denied as if each such allegation were set out seriatim and traverse.

WHEREFORE the Defendants pray that the Plaintiff's suit may be dismissed with costs.

(Sgd.) Robson & O'Donovan
Attorneys to Defendant.

Verification

We hereby state that what is stated above is true to the best of our information, knowledge and belief.

(Sgd.) B. O'Donovan,
An Attorney for Defendants.

Filed this 22nd day of October 1954

.....
Court Clerk.

Drawn by:-
B. O'DONOVAN,
Advocate, Nairobi.

Filed by:-
FRASER MURRAY,
Advocate, Dar-es-Salaam.

No. 8.

Argument by Plaintiff's Counsel on Preliminary Issues.

29th November 1954.

No. 8.

ARGUMENT BY PLAINTIFF'S COUNSEL ON PRELIMINARY ISSUES

29.11.54 Houry and Alderman for Plaintiff.
Harris and Robson for Defendant.

Houry: Two points for decision first.

(a) Is action time-bond?

(b) Should amended plaint be dismissed in point that it discloses a new case partner?

No. 9.

ARGUMENTS BY DEFENDANTS' COUNSEL ON PRELIMINARY ISSUES.

In the High Court of Tanganyika.

No. 9.

Arguments by Defendants' Counsel on Preliminary Issues.

29th November, 1954.

Harris: I agree that there should be preliminary issues.

b) plaint of 23.7.52 para. 10.

Prayer (a), (b) and (c).

Written Statement of 10.11.54 para. 1.

Cause of action in original plaint was an alleged failure of a position to render accounts.

Amended plaint: is for a claim under the leases, para. 5.

Prayer to amend plaint.

Rustomyi, 5th Evidence, Volume II 964.

Amended plaint is on to recover arrears of royalty.

Claim for arrears of royalty should be shown in form of an account. Not same as suing from an account.

Submit amended plaint as to first lease discloses an action for arrears of rent. So far as such lease is concerned, the word "rent" is used: Clause 1.

Amended plaint a cause of action between tenants in common - royalty is first lease - rent is second lease.

Original plaint alleges partnership -

Appointment of receiver asked for.

Cause of action quite different - the only for a partnership account.

Amended plaint is in connection with a tenancy in common.

If partner dies, particularly ends - if one of a tenancy in common dies that is not end of tenancy in common.

Second Account is unyielded, it is a lease: Claim render an unyielded for me.

Article 110 Indian Limitation Act.

Amended plaint filed 1.9.54.

In the High Court of Tanganyika.

No. 9.

Arguments by Defendants' Counsel on Preliminary Issues.

29th November, 1954 - continued.

If new cause of action it arose 1.9.54. P.964.

Cause of action amended plaint commences 1.9.54.

This is to grant lease.

First lease: 26.5.1946 - 31.3.49.

This is registered and that Act 116 applies. Decision in first lease was subject to a royalty which is rent and action for arrears of rent. 1.9.48 - 31.3.49. is only time with which we are concerned - remainder time-barred. Act 110 top 965.

We are not partner to first lease. Administrator should not be in ..... first, as a live tenant under a registered lease. Can an Administrator be regarded as an assignee?

We carried on since 20.5.54.

Grossly confirm with Act 116 applies to us. Will you hold that an ..... so far as registered lease is concerned that suit is time-barred? I'm not trying to hide behind Station - I have a matter of evidence to what we claim.

No.10.

Further Arguments of Plaintiff's Counsel on Preliminary Issues.

29th November, 1954.

No. 10.

FURTHER ARGUMENTS OF PLAINTIFF'S COUNSEL ON PRELIMINARY ISSUES

Houry. We claim no rent under second lease - we have been paid.

Date of amounts is date of first plaint and not of amended plaint: first plaint is dated 23.7.52.

New Cause of Action.

When we were instructed we wrote to O'Donovan, after discussing matter with him, and he agreed to an amendment of plaint.

Alderman wrote to O'Donovan and gave him a copy of amended plaint. O'Donovan agreed not to object to amended plaint. New Cause of action would have been original on application before court - but it was agreed to withhold necessarily of an application to Court.

P.6 r.7.

Submit no new cause of action.

No.10.

Further Arguments of Plaintiff's Counsel on Preliminary Issues.

29th November, 1954 - continued.

Original plaint-claim arises not of lease. Because we now claim it for arrears of rent - Hidden claimed for partnership accounts quite wrongly.

There was no partnership - we ask for money due under lease.

It is sought to take advantage of Holder's bail pleading: 1909 3 Bombay 644. Root of claim is what are we entitled to under that lease?

In circumstances in law we were tenants-in-common. Royalty: AIR 1916 P.C. 43 IA. 182.

Date is date of original plaint - 23.7.52. Submit claim not time-barred. Between end of first lease and beginning of second there was an interregnum for 3 months. These 3 months are not barred by limitation: prayer (b) refer to these three months.

Last paragraph was made (annexure C) 14.1.49. Period of prescription runs from last payment: Article 20 and 116.

Parties agreed to go to Arbitrator: limitation raise there. Why go to arbitrator if you rely on limitation?

Administrators are legal representative of deceased and we have agreed them any claim we made against deceased.

First lease - Stamp duty on 1,300 tons. We have paid £24,000 income tax in respect of three years.

No. 11.

No.11.

Further Arguments of Defendants' Counsel on Preliminary Issues.

29th November, 1954.

FURTHER ARGUMENTS OF DEFENDANTS' COUNSEL ON PRELIMINARY ISSUES

Harris: 33 Bombay 1909 p.644 and 646 bottom. We agreed not to oppose filing of amended - we never argued not to oppose pleadings on ground of new cause of action. Submit there a holding over which a registered lease Rustomje Vol.II 965 para 3, six or three years run from date of filing suit. Wrong if I did not raise points which I have.

(Sgd.) G.M. Mahon.
29/11/54.

Court: Ruling reserved.

(Sgd.) G.M. Magon.
29/11/54.

In the High Court of Tanganyika.

No.12.

Judge's Ruling on Preliminary Issues.

3rd December, 1954.

No. 12.

JUDGE'S RULING ON PRELIMINARY ISSUES.

The parties have agreed that two preliminary issues fall for decision: they are (a) whether the amended plaint should be dismissed on the ground that it discloses a new cause of action and (b) whether the action is time-barred.

As regards (a) it is perfectly correct, as learned Counsel for the Defendants has observed, that in the original plaint dated 23.7.52 the cause of action was stated to be the alleged failure of a partner to render partnership accounts while in the amended plaint the cause of action arises from alleged breaches of the two leases. It is conceded that the original plaint was wrongly founded on a partnership agreement. The fact that this error has been rectified in the amended plaint and a different form of relief asked for does not, however, in my view, mean that a new cause of action has been imported. It is difficult to hold that the Plaintiff has set up a new case; her attitude throughout has been that the deceased undertook to do certain things under the two leases and that he has failed to do these, in other words, that he has been guilty of breaches of contract and it is this, as I see it which was and still is the cause of action whether the plaintiff erroneously, as in the original plaint, sued on a non-existent partnership agreement or, as now in the amended plaint, she sues as a joint owner. In either case the cause of action remains the same although the relief asked for varies. Her aim in both plaints is to have an account taken for the period covered by both leases so that she may ascertain what amount, if any, is due to her. While I hesitate to comment, at this stage, on the apparent failure of the Defendants to render any account to the Plaintiff it does seem that had this been done the necessity of this already costly litigation might have been avoided.

Even if I am wrong in holding that the amended plaint does not disclose a new cause of action, it is not, I think, now open to the Defendants to take this point in view of the discussion held between the advocates which is evidenced by the letter, which has been handed in, written on 3rd August, 1954 by Mr. Alderman to Mr. O'Donovan. In that

letter, with which a copy of the amended plaint was enclosed, Mr. Alderman wrote that Mr.O'Donovan had agreed not to oppose the amendment and requested him if he still agreed to sign his consent and this he did.

In the High Court of Tanganyika.

No.12.

Judge's Ruling on Preliminary Issues.

3rd December, 1954 - continued.

As to (b) if I am correct that the plaint as amended discloses no new cause of action then this suit is clearly not time-barred under either Article 116 or 110 of the Indian Limitation Act 1908.

Both the preliminary issues are, therefore, answered in the negative. The costs of the hearing to date to be awarded to the Plaintiff in any event.

Sgd. G.M. Mahon,
Judge.

Dar-es-Salaam,
3rd December, 1954.

No. 13.

No.13.

JUDGMENT.

Judgment.

17th October, 1955.

COX C.J. - Proceedings in connection with this estate were commenced by the Plaintiff against the Administrator General who had been appointed Administrator pendente lite of the Estate of Nico Tzamburakis, deceased. That was in March 1952. In July 1952 the Plaintiff applied for a joinder as Defendants of Ariadne Tzamburakis and Nafsika Lambrou, Administratrices of the Estate of Nico Tzamburakis, deceased, and after that the Administrator General was discharged from the suit. But these proceedings before me are still entitled, even when the amended statement of claim was filed in September 1954, to include the Administrator General, but as he was discharged I have, to get the record correct, omitted him in the rubric of this judgment and referred only to the two existing defendants, giving them their proper sex.

2. This is a case brought by the Plaintiff, Eftichia Rodoussakis, against Ariadne Tzamburakis and Nafsika Lambrou, Administratrices of the Estate of Nico Tzamburakis, deceased, asking that she

In the High Court of Tanganyika.

No.13.

Judgment.

17th October, 1955 - continued.

should receive whatever may be due to her from the estate of the deceased in connection with her interest in a sisal estate known as Kerenge-Mulemua.

3. As stated above, the Administrator General was appointed Administrator pendents lite on the 27th March, 1952, in Civil Case No. 8 of 1952, and that suit was withdrawn against him by an Order of this Court on the 22nd August, 1952. In the meantime the second and third Defendants had been appointed Administratrices of the estate by this Court on the 20th May, 1952, in Probate and Administration Cause No. 21 of 1952.

Annexure "A"

Annexure "B"

4. The main part of this claim is based on an agreement entered into on the 26th March, 1946, for a term of three years from the 1st April, 1946. This agreement, which was a lease, expired on the 31st March, 1949, in the ordinary course of events, and a second lease was entered into on the 14th July, 1949, with effect from the 1st July, 1949, for a period of six months. This second lease did not run its full term as by agreement the sisal estate was sold in September/October, 1949. I propose to refer to these two leases as the first and second leases respectively.

5. The claim by the Plaintiff may be summarised briefly as a claim of the sum she should have received under the first lease, and for that purpose accounts are necessary, she having given credit for Shs. 185,685/- and no cents (though in fact the amount she received, according to her evidence, was 45 cents more), and secondly her share of the partnership in the estate as from the 1st April, 1949, to 1st July, 1949, being the period not covered by either the first or second leases. No claim is made in respect of the second lease as that provided for a rental of her interest in the sum of Shs. 18,000/- per month payable in advance, and she received such rent for three months and she also received her share of the purchase price when the estate was subsequently sold.

6. In 1931, or a year either side of that date, the Plaintiff and her brother Nico Tzamburakis leased an area of what was described as "forest" and developed it until it became this sisal estate. At the time the Plaintiff and her brother each had a 50% interest in the property. Her

percentage varied, being reduced at one time or another. It was at one stage reduced to 33% and at another to as little as 15%, as her brother said he was incurring expenditure in the development of the estate. This reduction in interest the plaintiff challenged, because she said the money for development was being obtained in the form of loans from different parties and, of course, redemption of the loans was made in accordance with the proportionate interest of the two partners, and as her brother was paid a monthly salary as manager he could not acquire greater interest that way, but, be that as it may, in 1946 the Plaintiff was registered as the owner of 30% undivided shares in the estate, and that is accepted as her share in the estate during the relevant periods covered by this action.

7. By 1946 the estate had improved very considerably and it must be greatly to the credit of Tzamburakis that he brought this estate in about fifteen years from nothing to the very flourishing condition in which it was, neither he himself nor his sister having any capital but the development being achieved by loans which were repaid. The Plaintiff says that at that time her husband was supporting her, she had no other property, and that her brother, who was managing and running the estate, was being paid a salary from the estate of £75 per month for that purpose. It appears that even in those days the relationship between the brother and sister in connection with the financial management of the estate was unsatisfactory, and according to the Plaintiff she received nothing from him between 1930 and 1946, and any claim she might have had is now statute-barred. She says she was always asking for some profits but her brother went on developing the estate as he thought fit and ignored her plea.

8. I have mentioned these earlier details in order to show that prior to the entering into of the lease for three years from 1st April, 1946, the relationship between the Plaintiff and her brother in connection with the financial side of the estate was not on a happy footing. Whether or not it was this bickering which caused her to enter into this lease was not stated, but by the terms of the lease, to which I shall refer later, she received as a royalty per ton on sisal produced a

Annexure "A"

In the High Court of Tanganyika.

No.13.

Judgment.

17th October, 1955 - continued.

figure which fluctuated according to the market value of the sisal, but she remained responsible for her 30% share of the costs of certain specified capital improvements on the estate, but this did not in fact resolve the cause for annoyance, as it was still necessary for accounts to be kept to show the amount of the royalty payable and her liability for her share of the capital improvements in accordance with the terms of the first lease.

9. It is, I regret, necessary to set forth this Deed in full, namely :-

Annexure "A".

"THIS DEED made the 26th day of March One thousand nine hundred and forty six Between EFTICHIA GEORGE TZAMBURAKIS Greek woman of Tanga (hereinafter called the "Landlord") of the one part and NICO TZAMBURAKIS Greek planter of Korogwe (hereinafter called the "Tenant") of the other part.

WHEREAS the Landlord is the owner of 30 equal undivided hundredth parts of shares in the hereditaments described in the Schedule hereto and known as "KERENGE & MULEMUA SISAL ESTATE" and the said estate is complete with sisal factory, rails, trollies and all other machinery required for the proper running of a sisal estate AND WHEREAS the Landlord is desirous of giving a lease of her share in the said hereditaments to the Tenant on the terms hereinafter mentioned.

NOW THIS DEED WITNESSETH as follows:-

1. The Landlord as to her share and interest hereby demises unto the Tenant ALL THOSE hereditaments described in the Schedule hereto together with the sisal factory, machinery, trollies, railway lines and other chattels and effects now on the estate and forming part of sisal estate as a running concern TO HOLD to the Tenant from the first day of April 1946 for the term of Three years paying therefor during the said term a royalty of £3/- per ton on all grades of sisal and tow produced from the whole estate provided that if the price of all or any grade or grades of sisal shall be increased or decreased the royalty payable in respect of all sisal or the particular grade shall be increased or decreased by a sum of Shs. 2 and cents 66-⅔

for every one pound (£1/-) increase or decrease of such price respectively. The said royalty shall be paid within 30 days of the sale of sisal.

2. The Tenant for himself and his assigns and to the interest that the obligations may continue throughout the term hereby created hereby covenants with the Landlord as follows :-

(a) To pay the royalties hereby reserved at the times and in the manner aforesaid.

(b) To use manage and work the machinery on the estate in a proper workmanlike and customary manner and as same is done by the Tenant.

(c) To carry out such further cultivation of sisal as may be deemed necessary by the Tenant.

3. The Landlord agrees to permit the Tenant on his paying the royalty hereby reserved and observing and performing the several agreements and stipulations on his part herein contained peaceably and quietly to hold and enjoy the demised premises in respect of her share and interest in the same during the tenancy hereby created without any lawful interruption by the Landlord or any person rightfully claiming under or in trust for her.

4. The Tenant agrees to put the Landlord in possession of the demised premises in respect of her share at the determination of the tenancy in good state of cultivation and the machinery and buildings in good and substantial repair.

5. It is agreed between and by the said parties hereto as follows :-

(a) The Tenant shall make full account of the running of the estate by him till the 31st day of March 1946 and shall pay to the Landlord such sum as may be found due to the Landlord on account of her share in the profits.

(b) If the Tenant shall find it necessary and for the benefit of the plantation to replace

In the High Court of Tanganyika.

No.13.

Judgment.

17th October, 1955 - continued.

Annexure "A" (continued)

any machinery or to buy further machinery other than lorries the Landlord shall pay to the Tenant 30% of the price of such machinery.

(c) If the Tenant shall build further houses or buildings of a permanent nature for the senior staff on the estate or shall build permanent labour camps of brick or stones then the Landlord shall pay 30% of the expenses incurred in such construction works.

(d) The Tenant may at any time sell any old machinery and upon such sale he shall pay to the Landlord 30% of such machinery.

(e) Of the six lorries on the plantation the Tenant may sell the four which are in a worse condition than others and on such sale he shall replace these lorries by at least two new lorries.

IN WITNESS whereof the parties have hereunto set their hands the day month and the year first above-written.

THE SCHEDULE ABOVE REFERRED TO

1. ALL THAT piece or parcel of land approximately 1665 acres in extent situated at Korogwe in Tanganyika Territory and being Farm No. 219/1 and being part of E.P. Lot No. 984 (a) together with the buildings, appurtenances and fixtures thereupon.

2. ALL THAT right of occupancy comprised in Certificate of Title No.4728 over leasehold land situated in Korogwe District Tanganyika Territory together with the buildings and appurtenances thereupon.

SIGNED AND DELIVERED by the said EFTICHIA GEORGE TZAMBURAKIS this 26th day of March, 1946 in my presence, it having been first interpreted and explained to her when she appeared perfectly to understand its contents:

(Sgd.) EF.TZAMBURAKIS

(Sgd.) M.S. Desai,
Advocate, Tanga.

SIGNED AND DELIVERED by the) said NICO TZAMBURAKIS this) 26th day of March, 1946 in) my presence, it having been) first interpreted and ex-) plained to him when he ap-) peared perfectly to under-) stand its contents :-) (Sgd.) N.ZAMBURAKIS.

(Sgd.) M.S. Desai, Advocate, Tanga."

In the High Court of Tanganyika.

No.13.

Judgment.

17th October, 1955 - continued.

10. The Plaintiff's case, putting it very briefly, is that she never received from her brother her share which she should have received under the first lease; that she was and is ready and willing to pay her proper share of the capital improvements under that lease; but that she expects to receive her royalties and the other sums due to her from the sale of previously existing partnership assets. The Plaintiff alleges, and I am satisfied that it is true, that during the whole of the tenancy of this first lease she had incessant quarrels with her brother whenever the subject of money and accounts under the lease arose, and, of course, the cause of their quarrel remained so long as there were outstanding and financial matters between the brother and sister under the first lease. Thus the only way in which this matter could be resolved would be by a settlement of account between the partners, which, of course, would require proper checking and auditing of the accounts. As I have said, it would appear that it was partially to get over this difficulty of accounts and accounting that the Plaintiff entered into the second lease whereby she agreed to accept a flat rental of Shs. 18,000/- a month for her interest in the estate and be done with any question of accounts.

Annexure "A"

Annexure "B"

11. When this case first came before me, that is to say, more than two and a half years after the two administratrices had been joined as defendants, the defendants informed the court that they were in possession of a most important document. This document, which had only been found as a result of Mr. Harris' personal efforts in examining the papers on one of the estates a few days before appearing before me, is in effect a settlement of accounts and discharge as between the brother and sister as on the 30th day of June 1949, it being dated the 14th July. This, it will be noted, is the same date as the day on which the second lease was executed in Tanga. The document is in the following terms :-

Annexure "B"

In the High Court of Tanganyika.

No.13.

Judgment.

17th October, 1955 - continued.

Exhibit I.

"WE, the undersigned EFTICHIA GEORGE TZAMBURAKIS and NICO TZAMBURAKIS both Greeks of Tanga, hereby confirm that all our accounts up to the 30th day of June, 1949 are settled and there is nothing due by either of us to the other.

IN WITNESS we have set out hands this 14th day of JULY 1949.

(Sgd.) N. TZAMBURAKIS.

Witness: (Sgd.(E. RODOUSSAKIS.

(Sgd.) George Papoudopolus.

/sh. 1/- stamp/"

12. The production of this document naturally came as a great surprise to everyone in court, but after some argument the Plaintiff's case proceeded. For certain reasons two other witnesses gave evidence before the Plaintiff, whose evidence was not given that day. The defence sought to prove the signature alleged to be that of the Plaintiff on the document by putting the document to the earlier witnesses called by the Plaintiff, and thereby it became a document that was tendered for the purpose of subsequently becoming an exhibit, and it thereupon came into the custody of the Court. Mr. Houry was supplied by the Defendants with a photostat copy of this document, and, from what the Court learned afterwards, it was put to his client during the adjournment which was then taken, and she, while admitting that it appeared to be her signature, would not be prepared to admit that she had signed that document because, as she said, she had no knowledge of it. As that was the position until shortly before the matter came before the Court again, the defence naturally had to take steps to prove the genuiness of the signature, and for that purpose the Court was asked to send the exhibit to Nairobi for expert examination there. That I refused to do, as the document was so important it obviously had to remain in the custody of the Court, but the defence were given facilities, after notice to the Plaintiff's advocates, for the examination of the document in Dar-es-Salaam. That was done, though, of course, it added somewhat to the expense to which the defence were put.

13. On the matter coming before the Court for hearing after an adjournment, the Court was informed that the Plaintiff did not earlier admit

that she had signed the document because she had no knowledge of signing a document in those terms, but Mr. Houry, who was able to decipher the signature of the witness (possibly from his knowledge of the people who were employed on that estate) informed the Plaintiff that the signature appeared to be that of a man Papoudopolus, and did she remember him. The Plaintiff then remembered that a man of that name was working on the estate at the relevant date, and she on her return to Tanga, where she lives, took steps to get in touch with him. It was not easy, but he was eventually traced to Nairobi, and she gave him the means of coming to Tanga to see her, which he did a few days before she gave evidence. At Tanga he reminded her of the circumstances under which the document was signed, and she then remembered the fact of signing a document which was written in English, which she cannot read or speak, and she did so after her brother had told her that it was a document she had to sign in connection with matters relating to income tax; that he would pay the income tax later as he had not got the money at the time. As she frequently signed documents put before her by her brother, she signed this. She now states that had she had any idea of its purport she would have refused to sign it, because its terms were not correct. She also said that she signed this at the end of a very stormy and distressing interview, and that the document was not prepared while she was there; it was ready waiting for her when she went to meet her brother by appointment.

14. The Plaintiff stated that she entered into the second lease at a monthly rental with her brother, executing it one afternoon in Tanga; that she executed it before Mr. Desai, an advocate of Tanga, who explained the substance of the document to her; that her brother Tzamburakis was present at the same time, but that he did not sign it in her presence. Now that second lease is in fact signed by the Plaintiff and her brother Tzamburakis, both before Mr. Desai, who also signed against each signature, although the parties signed in the wrong place, she signing where her brother should have signed, and he signing where she should have signed, as follows :-

Annexure "B"

In the High Court of Tanganyika.

No.13.

Judgment.

17th October, 1955 - continued.

"SIGNED AND DELIVERED by the said EFTICHIA GEORGE TZAMBURAKIS in Roman characters this 14th day of July 1949 in my presence it having been first interpreted and explained to her when she appeared perfectly to understand its contents

(Sgd.) N. ZAMBURAKIS

(Sgd.) M.S. Desai,
Advocate, Tanga.

SIGNED AND DELIVERED by the said NICO TZAMBURAKIS who is able to read and write the language in which the above written document is written this 14th day of July 1949 in my presence :-

(Sgd.) E.RODOUSSAKIS

(Sgd.) M.S. Desai,
Advocate, Tanga.

That error in place of signing does not materially affect the issue, and I mention it to show that it has not been overlooked. But the important point about this is that Mr. Desai signed as a witness to both these signatures, and it is stated that the signatures were impressed on the 14th day of July. Mrs. Rodoussakis says that after she signed she left, but her brother asked her to come out to the estate at Korogwe the next day, which she did, and, from what she subsequently remembered, it was on that visit the next day that she signed the document quoted in paragraph 11 above. It is not without interest to note that the document is also dated the 14th day of July, and it might strike one that, as that was a complete discharge and settlement of the accounts pending between the parties up to the date when this new second lease was entered into, it is a document which should have been executed at the same time and in the presence preferably of the same witness. However, while it bears the same date, it was, I am satisfied, executed the following day.

Exhibit I.

15. The details leading up to the execution of the document referred to in paragraph 11, I am satisfied, are as follows: On the 15th of July,

Exhibit I.

1949 the Plaintiff, in accordance with her brother's request of the afternoon before, went to the estate and there, following their invariable practice when she asked about outstanding accounts or wanted some money towards her share, a quarrel arose. It was a particularly violent quarrel, and she was reduced to tears, and in that condition she was asked by her brother to sign this particular document which was there ready for her signature on her arrival, and she signed it after she had received the explanation that it was a document relating to income tax as stated above. It is not clear at what stage Tzamburakis signed the document, but presumably it was before the Plaintiff signed. Tzamburakis called Papoudopolus from the neighbouring room to come and witness the signatures. Now Papoudopolus had been on the estate for several years and knew both the parties well. He came in, having heard the violent quarrel from his office next door, and he was told by Tzamburakis to witness their signatures. He saw the signatures there and, although he knew their signatures, he asked them formally whether they had both signed the document, and, being informed that they had, he then put his signature as a witness and left the room as quickly as he possibly could. He said that Tzamburakis was a man of whom he was always afraid, and there is no doubt that Tzamburakis was of a most domineering personality. The document, according to Papoudopolus, was then in the form produced in court, other than the fact that it did not have affixed to it the shilling stamp which is now affixed to it, and which bears the same date as the document, the 14th of July. Papoudopolus says the document was not explained to the Plaintiff in his presence, and that the sum total of his knowledge of the document is as I have stated above, and he also emphasised the fact that the document was not on the desk where one would expect it to be, but was on a table, already signed by both.

16. It appears that after Mr. Harris had found this document he set to work to trace Papoudopolus, and he did find him in Nairobi. He showed Papoudopolus the document, and Papoudopolus admitted that the signature was his, but he did not volunteer any further information, nor was he asked as to the time and place when and where and the circumstances under which the document came to be executed. His evidence in this respect in court came

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as a surprise to Mr. Harris.

17. In view of the other facts which have come to light in this case, I am quite satisfied that the Plaintiff's version of what happened that day, supported as it is by Papoudopolus' evidence, is correct, and that she signed this document without knowing its purport and being deceived as to its contents by her brother. In my opinion the document is valueless for the purpose for which it was originally intended.

18. The Plaintiff stresses that all the money she received from her brother was received by cheque, which cheques were invariably paid into her one and only banking account, that at Barclay's Bank, Tanga, and therefore the entries in that account represent the total amount she has received throughout the course of this tenancy. A list of those receipts was attached to the plaint filed on 1st September 1954, and are in sums of Shs.10,000/- Shs.10,000/-, Shs.15,000/-, Shs.64,300/- (this was paid after the Plaintiff had returned from a visit to Greece), Shs. 28,555/-, Shs.20,000/-, Shs. 22,830/-, and Shs. 15,000/-, the first four payments being made in February, June, July and November 1947, the next three in April, May and October 1948, and one in January 1949. The first lease expired on the 31st of March 1949. It will be observed that no payments at all were made during 1946, though the first lease was operating from the 1st of April 1946, that is to say, for nine months during that year, nor were any payments made during February or March 1949. The figures there given total Shs. 185,685/-, or £9,284. 5. 0.

19. Subsequently, Messrs. Bain & Company, Chartered Accountants at Tanga, who used to prepare Tzamburakis' income tax papers, also prepared the Plaintiff's for her from the accounts of the estate, and she then realised for the first time that she would have to pay in income tax a far greater sum than she had ever received in income. She protested about this, but was told, so she understood, that she would have to pay it because the books gave the proper figures, and, acting on what she also understood on advice, that if she did not pay the amount demanded she would be severely penalised, she paid the sums in question. She of course

had the money available for this, having received her share, about £100,000, of the purchase price paid for the estate when sold.

20. Apart from a technical defence which another Judge of this Court dismissed, the defence to the Plaintiff's claim is that she has received everything due to her from the estate under the lease, and that she has received full and accurate accounts. I have already touched on the allegations that the Plaintiff had not received her full share. As regards the accounts, it was proved quite clearly before me that proper accounts had never been rendered.

21. Very occasionally monthly accounts were given by Tzamburakis to the Plaintiff, but she says that these were incomplete and wrong, and sometimes she would not accept them, and although that might indicate that her brother did render her accounts I am quite satisfied that she did not receive proper accounts at all.

22. It was suggested that part of the foundation for this claim was the fact that Tzamburakis had married again and the Plaintiff disapproved of her brother's second wife. I do not believe that that had anything to do with the making of this claim though I have no doubt that it may have caused some friction in the domestic relationship between the brother and the sister because it appears that the brother, a widower at the age of 47, very quietly married a girl then six months younger than his daughter who was then 18, while his sister wished him to marry an older person. The bride and bridegroom went and remained abroad for a little over a year, the bridegroom dying a few days after they returned to Tanganyika.

23. After her brother's death, and in fact in some cases after the plaint was filed, the Plaintiff received from Messrs. Bain & Company certain accounts and these in truth are the only proper accounts she has ever received, but for her purpose and for the purposes of this case those accounts are quite useless. These accounts, prepared rather more in the form of a balance sheet, have been prepared from other accounts submitted by Tzamburakis monthly over the periods concerned. Some of these monthly accounts were produced and

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in each of them there was contained a statement of account the resulting figure of which it was alleged was paid in or placed to the Plaintiff's account; in any event it was alleged to be allocated in some form or another to the Plaintiff. That figure was arrived at after totalling certain other figures but in no single case does the figure of the amount paid to her or placed to the credit of her account correspond with the amount she had received by cheques from her brother and paid into the bank. As stated, she said everything she received from her brother was by cheque and all the cheques were paid into her account. Examination of these monthly statements did show one item which corresponded with an amount paid into the Plaintiff's account but the item in the monthly statements was an item amongst a series of others and the final figure which was the amount to be paid or credited to the Plaintiff cannot be traced. Nor, incidentally, save as I have just said, is it possible to work the other way and find a record in these monthly accounts of any of the actual sums which the Plaintiff admits were paid to her and deposited to the credit of her account.

24. What has just been stated is bad enough but the unsatisfactory nature of the accounts goes further than that because in those cases where one has been able to examine the monthly accounts submitted by Tzamburakis to the estate's accountants the amounts which the Plaintiff has been stated to have received are incorrect because even assuming that the figures given in these monthly accounts are in fact correct the detailed allocation does not comply with the terms of the lease. For example, items are charged against her for development for which she could not be charged and therefore even assuming that the figures are in fact correct the accounts in their result are obviously incorrect.

25. It appears that when these monthly accounts were sent to the estate's accountants as the accounts included the amounts alleged to have been received from the sale of sisal the accountants checked those figures with the price sisal was fetching at the time and the amounts, which from their knowledge and reference to the estate's exporting agents, they were able to satisfy themselves had actually been exported but no other

check was made and followed up. Never on any occasion was an examination pursued to finality to ascertain whether the Plaintiff had in fact received anything from her brother. Certainly no receipt of hers was ever seen or asked for and yet in one year alone, according to these accounts, she received about twice the amount that was paid into her bank account during the whole currency of the lease.

26. The balance sheets, therefore - and I describe these documents as such for the purposes of this case - are quite useless in that they have been compiled from accounts which are themselves inaccurate. So clear is this that Mr. Collis, a partner of the firm of Messrs. Bain & Company, stated in answer to the Court when speaking of a particular exhibit (No.15):-

> "Having now heard the argument in court it would appear that in statement No. 15 she has been charged with items she should not have been. If the figures given us were arrived at on the same lines and are reflected in the monthly statements then our accounts will reflect figures which were incorrect when given to us."

The accountants did on rare occasions send letters to the Plaintiff which she stated she has never received and certainly in those few cases where they asked specific questions of her there is no trace in their records of their having received replies. How is it that none of these letters was received? The inference which the Court is asked to draw is that because the letters were addressed to the Plaintiff at the estate office which was near Korogwe they had to pass through her brother's hands and as she was living at Tanga she never received them. In the light of what has been disclosed in this case I am very much inclined to believe that that inference is correct. In any event I believe the Plaintiff when she says she did not receive them.

27. Collis, who sat in court and heard much of the evidence, stated that in his opinion in the light of what he had since heard it might be possible to trace further particulars with Messrs. Dalgety & Company, the firm through whom Tzamburakis

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used to ship his sisal. It is also clear from the evidence that Tzamburakis used to use Messrs. Dalgety & Company as bankers, drawing on them, and it may well be that some of the information at present missing may be found amongst the records of that firm. In no single case was a receipt for any monthly payment produced signed by Mrs.Rodoussakis, and it was argued, surely, if she had been paid these large sums of money by her brother, a very astute business man, the receipts would have been in existence somewhere.

28. Collis also stated that from the accounts the Plaintiff had not received anything in respect of the period from when the first lease terminated and the second lease began, that is to say for the months of April, May and June, 1949. The Plaintiff is obviously entitled to her share in the estate over that period, and it would appear that her share in the estate over that period would have to be ascertained on the basis of the relationship existing between her and her brother prior to entering into this first lease, which became effective from the 1st of April, 1946; the Plaintiff may also, in my opinion, have to refund a proportion of the rent paid her in advance for the month of September 1949, that proportion which would be for the period of the month after the estate on sale had passed out of her brother's hands.

29. Collis also said, in answer to the Court:-

> "I would not like to give an opinion on whether after what I have heard the accounts referred to between these parties represent a correct statement of affairs."

and then, in answer to a direct question by the Court, he said :-

> "If what I have heard applied to an estate in which I was vitally interested, I would take some action to investigate it."

and in further answer, though I did not record it, he explained that the action he would take would be to call for proper accounts. Collis also said that on the documents which his firm had received more elaborate and detailed accounts could be prepared, showing the position under the first lease,

and he thought, as I have mentioned above, that it might be possible to get information from elsewhere.

30. Mr. Harris informed the Court that he personally had made very diligent search on the estates themselves and that that is how the document of the 14th July - signed by the Plaintiff and her brother - came to light, but he has been unable to find other documents which would assist the Court. I would like to take this opportunity of expressing my appreciation to Mr. Harris for the great diligence he exercised in bringing matters before this Court on behalf of the defence, and I am satisfied that it is not for want of trying on his part that he has not been able to assist the Court still more.

31. It will, in my opinion, probably be an extremely difficult task for accurate accounts now to be made up because the documents are apparently either non-existent, carefully hidden or misplaced, but the fact remains that the Plaintiff has not had proper accounts showing her share to which she was entitled under the lease. In fact the accounts which have been submitted show, even assuming that everything alleged to have been paid to her has in fact been paid, that she has been wrongly debited. The Plaintiff is entitled to proper accounts and the responsibility for rendering such accounts rests on the Defendants. Whether a diligent search by professionally trained officers will succeed in finding an answer to some of these questions in accounts elsewhere, or whether they may be able to deduce the answers from information which will become available to them but which is not at present before the Court, I have no knowledge, and it would appear that the only way this can be done is by appointing someone with sufficient authority to afford him an opportunity of finding the correct answers and if possible rendering the necessary accounts and in the meantime ensure the safe custody of sufficient of the assets of the deceased's estate to protect the interests of the Plaintiff. For reasons which I will state later, I am at present reluctant to go to the full extent apparently indicated as necessary due to the past conduct of the Defendants without first affording the administratrices an opportunity of themselves rendering the necessary accounts.

32. The Plaintiff claims :-

(1) that an account -

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(a) of all sisal produced on the sisal estate during the period covered by the first lease, that is to say from the 1st April, 1946, to the 31st March, 1949; and

(b) of the rent by way of royalty due to the Plaintiff on such total production; and

(c) of the machinery and other movables sold or otherwise appropriated by the deceased,

be taken and payment to the Plaintiff of the amount found due on taking such accounts,

(2) that an account be taken of the profits made by the sisal estate during the period from the 1st April, 1949, to the 14th July, 1949, and payment to the Plaintiff of the amount due on the taking of such accounts.

(3) that an account be taken of the movable and immovable property of the deceased and the same may be administered under the decree of the Court.

(4) Costs.

(5) Any other further relief.

33. It should be possible without much difficulty, from information in the hands of Messrs. Bain & Company and Messrs. Dalgety & Company, to ascertain the figures covered by sub-paragraphs (1) and (2) in paragraph 32 in so far as the tonnage and value of the sisal is concerned, and thus calculate the amount due to the Plaintiff by way of royalty.

It appears from one of the monthly accounts prepared by Tzamburakis and seen in court that the Plaintiff was credited with her 30% share of certain movables which were sold, and while that particular document is one of the accounts which contain items for which the Plaintiff is not liable it does give the amounts realised by the sale of certain of the items included in sub-paragraph(c) of sub-paragraph (1) of paragraph 32.

On the other hand, the Plaintiff will under

the first lease have to pay her 30% share of certain capital improvements made to the estate. Some of these figures may, in view of the apparent lack of documentary evidence, have to be calculated from estimated costs.

AND IT IS ORDERED -

That the Defendants do render the account as prayed by the Plaintiff and detailed in sub-paragraph (1) of paragraph 32.

34. As regards sub-paragraph (2) of paragraph 32, the answer to that would appear to be ascertainable on the basis of the partnership which existed between the brother and sister prior to the 1st day of April 1946, that is to say, on a 70% figure and 30% figure basis, but not inclusive of any profits for the month of July, 1949, as the Plaintiff had leased her share of the estate to her brother on the 14th of July 1949, for Shs. 18,000/- a month, with effect from the 1st day of July, 1949, and was paid the rent for the month of July.

AND IT IS ORDERED -

That the Defendants do render the account sought by the Plaintiff in the plaint and referred to in sub-paragraph (2) of paragraph 32 but qualified as set out immediately above.

35. As regards sub-paragraph (3) of paragraph 32, the total value of the amount claimed in this action is said for the purpose of court fees to be £40,000, and court fees on that amount have been paid. Now I do not suggest that in all cases whatever sum is claimed (especially in a case such as this where the Plaintiff cannot at this stage tell to what sum she is really entitled) is a proper sum on which to base security, but the fact remains that it is the duty of the administratrices of the estate to render the necessary accounts, and they have failed in that duty and have opposed the granting of any satisfactory accounts whatever to the Plaintiff, accounts to which she is entitled. That being so, it would not be inappropriate if the administratrices had the administration of the estate taken completely out of their hands and placed in the hands of someone who would endeavour

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Judgment.

17th October, 1955 - continued.

to obtain the necessary answers and supply the necessary accounts.

This Court must take judicial notice of its own orders, and I am aware that letters of administration were granted to the administratrices of this deceased's estate on the 25th day of June, 1952, and they have undertaken in accordance with the terms of the grant to file an inventory of the assets of the estate within six months of the date of the grant or within such further time as the Court may allow, and they have also entered into a bond in a sum exceeding twelve million shillings to comply with the terms of the grant. The administratrices have made no approach to this Court in any manner whatsoever in connection with the filing of the inventory, nor have they applied for an extension of time in which to file the inventory in spite of their undertaking and bond of over three years and three months ago.

It was mentioned in court, but not a propos of this particular question of inventories, that the administratrices were having difficulty with the Income Tax Commissioners, but while that may be reason for delaying the filing of accounts within twelve months of the date of the grant of letters of administration, namely, on or before the 24th day of June, 1953, or such further time as the Court may allow, it can hardly be used as an excuse for failing to file an inventory of the estate as it existed at the time of death.

It may be as well if I mention here in parenthesis that this practice of failing to render inventories and accounts is so prevalent that consideration is at present being given to providing an automatic penalty, payable personally by those to whom the grant has been given, and varying according to period of delay and value of the estate, for failure to render the inventory and accounts, unless an application for an extension of time has been filed in court prior to the date when the inventory or accounts should be filed in accordance with the terms of the grant and of the bond.

Be all that as it may, the Court is aware that the estate of the deceased was a very large and valuable estate, and thus it may possibly be a hardship to take away the administration of this

estate from the administratrices and vest it for administration in the hands of some other person under the decree of this Court as sought in the plaint, but I see no reason why the Plaintiff should not have her rights secured by some responsible and disinterested person exercising control over some part of, even if not over the whole of, the deceased's estate.

ACCORDINGLY, IT IS ORDERED -

That the administratrices within two months of today's date do transfer to the Administrator General the sum of £42,000 or such securities as will in the opinion of the Administrator General readily realise upon sale the sum of £42,000.

If such transfer is not effected within two months from today's date this Court will be prepared to consider, on the application of the Plaintiff or her representative, the placing of the administration of the whole estate of the deceased in the hands of the Administrator General, and for that purpose liberty to apply on this specific question is now granted to the Plaintiff so that in the event of the two administratrices failing to carry out this order the Court may be asked to make such order as it may then think fit.

Any costs or fees payable by or to the Administrator General's carrying out this part of this Judgment are to be paid in the first instance by the administratrices out of the estate, ultimately such costs to follow the event, namely, if any sum of money is due to the Plaintiff then these costs to be paid out of the estate. If no sum of money is due to the Plaintiff, then the Plaintiff to pay such costs.

36. Judgment is accordingly entered for the Plaintiff in accordance with the terms of paragraphs 33, 34 and 35 of this Judgment. As regards sub-paragraph (4) in paragraph 32, costs, the Plaintiff is entitled to her costs of these proceedings, because she is entitled to the accounts, which was the only point at issue. I should perhaps record that during the protracted period since proceedings were first started in this matter the Defendants were not deceived by the document of the 14th of July, 1949, because it only came to

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light a few days before the actual hearing and long after the hearing date was fixed. It certainly had nothing to do up to that stage with the refusal by the Defendants to agree to the provision of proper accounts.

37. As regards sub-paragraph (5) of paragraph 32, further and other relief, the Plaintiff or her representatives should have the right to move the Court in connection with this matter in any way which may seem advisable to her pending its determination. I propose, therefore, to give her general liberty to apply.

AND IT IS SO ORDERED ACCORDINGLY.

Delivered in Court at Dar-es-Salaam this 17th day of October, 1955.

(Sgd.) H. C. F. COX,
Chief Justice.

No.14.

Decree.

17th October, 1955.

No.14.

DECREE

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA
AT DAR ES SALAAM

CIVIL CASE NO. 5 of 1952

EFTICHIA RODOUSSAKIS — Plaintiff

versus

1. ARIADNE TZAMBURAKIS and
2. NAFSIKA LAMBROU, Administratrices of the Estate of Nico Tzamburakis, deceased — Defendants

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D E C R E E

The Plaintiff claims :-

(a) That an account (1) of all sisal produced on the KERENGE - MULEMUA SISAL ESTATE (hereinafter referred to as "the Sisal Estate") during the period covered by the First Lease namely from 1st April 1946 to 31st March, 1949.
(ii) of the rent by way of royalty due to the Plaintiff on such total production and

(iii) of the machinery and other movables sold or otherwise appropriated by the deceased

be taken and payment to the Plaintiff of the amount found due on taking such accounts;

(b) That an account may be taken of the profits made by the sisal estate during the period from 1st April, 1949 to 14th July, 1949 and payment to the Plaintiff of the amount found due on taking of such accounts;

(c) That an account may be taken of the movable and immovable property of the Deceased and that the same may be administered under the decree of the Court;

(d) Costs of this suit;

(e) Any other or further relief as to this Honourable Court may deem just in the circumstances.

This case coming on this day for final disposal before the Honourable the Chief Justice Sir Herbert Cox in the presence of G.N.Houry, Esquire Q.C., and W.J. Alderman, Esquire, advocates for the Plaintiff and J.P.G. Harris, Esquire, with B.J. Robson, Esquire, Advocates for the Defendants.

It is hereby ordered and decreed that :-

(1) That the Defendants do render the account as prayed by the Plaintiff and detailed in paragraph (a) above.

(2) That the Defendants do render the account sought by the Plaintiff in the plaint and referred to in paragraph (b) above, ascertainable on the basis of the partnership which existed between the brother (deceased) and sister (the Plaintiff) prior to the 1st day of April, 1946, that is to say, on a 70% figure and 30% figure basis, but not inclusive of any profits for the month of July, 1949.

(3) It is further ordered that the administratrices within two months of today's date do transfer to the Administrator General the

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Decree.

17th October, 1955 - continued.

sum of £42,000 or such securities as will in the opinion of the Administrator General readily realise upon sale the sum of £42,000.

If such transfer is not effected within two months from today's date this Court will be prepared to consider, on the application of the Plaintiff or her representative, the placing of the administration of the whole estate of the deceased in the hands of the Administrator General, and for that purpose liberty to apply on this specific question is now granted to the Plaintiff so that in the event of the two administratrices failing to carry out this order the Court may be asked to make such order as it may then think fit, and any costs or fees payable by or to the Administrator General under this order in connection with the Administrator General's carrying out this part of this judgment are to be paid in the first instance by the administratrices out of the estate, ultimately such costs to follow the event namely, if any sum of money is due to the Plaintiff then these costs to be paid out of the estate. If no sum of money is due to the Plaintiff, then the Plaintiff to pay such costs.

(4) The Defendants to pay to the Plaintiff the Taxed Costs of the suit including the costs of the decree when such costs are taxed by the Taxing Officer.

(5) The Plaintiff be and is hereby given general liberty to apply.

Given under my hand and the seal of the Court this 17th day of October, 1955.

Issued and signed 7.12.55.

H.R.F. Butterfield,
Registrar.

No. 15.

In the Court of Appeal for Eastern Africa

No.15.

Memorandum of Appeal.

23rd March, 1956.

MEMORANDUM OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBI
CIVIL APPEAL No.26 of 1956

Between: ARIADNE TZAMBURAKIS and
NAFSIKA LAMBROU, Administratrices
of the Estate of NICO TZAMBURAKIS
Deceased Appellants

- and -

EFTICHIA RODOUSSAKIS Respondent

(Appeal from judgment and decree) of Her Majesty's High Court of Tanganyika at Dar-es-Salaam (The Chief Justice) dated the 16th day of December 1955 in Civil Case No. 5 of 1952)

Between: EFTICHIA RODOUSSAKIS Plaintiff

- and -

ARIADNE TZAMBURAKIS and
NAFSIKA LAMBROU, Administratrices
of the Estate of NICO TZAMBURAKIS
Deceased Defendants

MEMORANDUM OF APPEAL

ARIADNE TZAMBURAKIS and NAFSIKA LAMBROU Administratrices of the Estate of NICO TZAMBURAKIS deceased, the Appellants above-named appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decision above-mentioned on the following grounds, namely :-

1. The Learned Chief Justice erred in law in failing to hold that a new cause of action was introduced for the first time in the amended plaint filed on the 10th day of August 1954.

2. The Learned Chief Justice erred in law in failing to hold that the claim made in the amended plaint was wholly or alternatively partly time-barred by virtue of the provisions of the Indian Limitation Act 1908.

3. Alternatively the Learned Chief Justice erred in failing to hold that the claim in the suit as framed originally was affected by the provisions of the Indian Limitation Act 1908.

In the Court of Appeal for Eastern Africa

No.15.

Memorandum of Appeal.

23rd March, 1956 - continued.

4. The Learned Chief Justice erred in failing to hold that the Respondent's claim was sufficiently answered by a receipt in full settlement bearing her signature which was produced at the hearing.

5. The Learned Chief Justice erred in upholding the contention of NON EST FACTUM in respect of the said receipt.

6. The Learned Chief Justice erred in not directing himself to the evidence of the Plaintiff that she first contended that her signature on the said receipt was a forgery and later admitted that it was genuine.

7. The judgment is against the weight of evidence.

8. The Learned Chief Justice erred in failing to grant to the Appellants the costs unnecessarily incurred in proving the Respondent's signature to the said receipt.

THE Appellants therefore pray that :-

(a) The judgment and decree of the Learned Chief Justice be set aside with costs.

(b) This appeal be allowed with costs.

DATED this 23rd day of March, 1956.

(Sgd.) ROBSON & O'DONOVAN,
Advocates for the Appellants.

To the Honourable the Judges of Her Majesty's Court of Appeal for Eastern Africa.

And to Messrs. George N. Houry & Co.,
Advocates for the Respondent,
P.O. Box 57,
Dar-es-Salaam, T.T.

The address for service of the Appellants is :-

Messrs. Robson & O'Donovan,
Advocates,
P.O. Box 5305,
Lullington House,
NAIROBI.

Filed the 23rd day of March, 1956.

(Sgd.) P.L. DOSAJ,
For Ag. Registrar of the Court of Appeal.

No. 16.

In the Court of Appeal for Eastern Africa

No.16.

Notes of Worley, P. on Hearing of Appeal.

27th June 1956.

NOTES OF WORLEY, P. ON HEARING OF APPEAL

Notes taken down by the Honourable President

CIVIL APPEAL NO.26 of 1956

O'DONOVAN

Deceased had 7/10: Respondent had 3/10: Brother and sister.

March 1946. Deceased leased Respondent's 3/10 share.

March 1949. Terminated by effluxion.

14.7.49. 2nd lease as from 1.7.49.

1.4.49 to 30.6.49 - no lease.

September 1949 estate sold.

January 1951. Deceased died.

Year before had married A1: A2 is his daughter.

R. made no claim for accounts until after death. 23.7.52.

p.57. Nature of original claim: plaint para. 5 et seq. - relief claimed appropriate only in partnership action.

Time barred Art.106 Limitation Act - 3 years from dissolution. i.e. she could only go back for accounts subsequent to 23.7.49.

Defence raised - W.S.D. para. 5, 10.11.52.

Amended plaint: 27.7.54.

Application for leave to amend made by letter to High Court. I consented by letter. I do not now say that leave should not have been given. But my consent did not rob the Appellants of any defence to the amended plaint. My submission is that the amended plaint introduced a new cause of action which was itself time-barred when amended plaint filed, but not when original plaint filed. I say that if wholly new cause introduced it does not date back.

Was new cause of action?

p.10. Paras. 5 - tenants in common: para. 6 more correctly pleads lease: para. 8 ditto.

p.11. - Relief claimed - (a) and (b) accounts.

(c) appropriate to administration suit: rejected. Claim for receiver of partnership assets and for

In the Court of Appeal for Eastern Africa.

No.16.

Notes of Worley, P. on Hearing of Appeal.

27th June 1956 - continued.

taking partnership accounts abandoned. Accounts (a) and (b) made for first time 1.9.54. - not alteration of original claim - abandonment and substitution. To new claim, Limitation Act.

Art. 110 applies - 3 years.

- arrears of rent: 3 years: from when due.

Art. 116 compensation for breach of contract registered: 6 years from time when begins to run on similar unregistered contract. I say this does not apply.

Art. 116 cannot apply to a number of reliefs which R has claimed and for which order made.

p.12. Even if claim (a)(b) is covered by 116, I say that (a)(a) and (a)(c) do not directly arise under registered contract. No breach of contract alleged - no wrongful conversion alleged. Claim for money received for R's use.

(Br: p. 133 (d) - claim under that)

O'D: That may be.

But anyway (b) is not covered by deed - claim is for profits as distinct from rent - even if it relates back to 23.7.52 it is time-barred.

Reverting to claim (a), none of it falls within Art. 116 because claim for account is not claim for compensation.

Rustomji 5th Ed. 996.

It is suit to enforce the claim.

Appellants are not parties to the lease.

Rustomji p.997: 4th Ed. 567.

Re intro. of new cause, see Rustomji 448 (4th Ed. 250). Distinction between amendment of original cause and introduction of new cause by amendment e.g. if entirely new claim for fraudulent conversion.

If Court holds Art. 116 applies to claim (a) but that operative date was 1.9.54 because it was a new cause of action then claims prior to 1.9.48 are barred.

If Art.116 does not apply then claims wholly barred.

No claim under 2nd lease, R having admitted she received everything due, see p.57: also 61 and 62.

p.196 Judgment: para. 32, claims.

p.197 Orders for accounts (a) and (b).

p. 204-5 Limitation point dealt with by Mahon J.

ll. 34-35 - the converse is the case.

p. 205 ll 16-19: reference to Art.110 is clearly an error. (Houry - ref. to Art. 110 relates to the three months April-July, 1949.)

Disposal of machinery - not in original plaint - substantially new matter.

Grounds 4 - 6 Exhibit I - p. 155.

Cox held in effect that R's signature obtained by fraud. Contrary to weight of evidence. Heavy burden on R. who alleged a trick - not mere balance of probabilities.

No sufficient critical examination of evidence.

Ask Court to examine original.

(a) date-stamp on stamp.

(b) typing same as on second lease.

Date 14th July - same as date of 2nd lease - question of accounts bound to arise.

Accounts settled up to 30.6.49 and 2nd lease operates from 1.7.49. Appellants are able to produce cheques etc., and account to R. from 1.7.49.

- admittedly no evidence of any large sum paid between 30.6 and 14.7 but there might have been waiver.

Appellant described in Exhibit 1 and in 2nd lease by her maiden name, though married in 1947. Indications are that both documents drawn up together as one would expect.

R. denied her signature: p.59 ll. 6 - 9. Appellants incurred expense in getting evidence to establish genuineness of the signature.

P.186 l.39 - inaccurate. She denied it was hers until faced with expert evidence. Then admitted it was her signature and said she thought it was needed for I.T. purposes. Did she enquire what document she was signing. If a trick, why get a witness and a stamp?

Court: Why wasn't it executed when lease was?

O'Donovan: Judge did not direct himself to degree of proof - delay between her first seeing document and her final position - she had just signed the lease - must have raised question of accounts.

Papondopulous knew English - could he have signed without knowing what it was about?

In the Court of Appeal for Eastern Africa.

No.16.

Notes of Worley, P. on Hearing of Appeal.

27th June 1956 - continued.

Judge failed to consider unjustified claim in original plaint. Sent deceased £2,000 when he asked. Her share of sale of estate paid her less £6,000 which she owed deceased.

Would she have accepted this if deceased owed her money. She never queried it with auditors in Tanga. Judge ignores all this.

Auditor's copies of accounts produced - apparently regularly sent to R - if she did not receive them, why didn't she go to the auditors. Collis said she never made complaint - why should she pay £15,000 income tax?

p.191. Judgment para.19. Evidence?

Respondent's conduct after 14.7.49 quite inconsistent with that of person with a claim.

Respondent's credibility affected if she signs any bit of paper for I.T. authorities - yet claims not to be bound by it.

Was there any misrepresentation as to document?

Chitty on Contracts 20th Ed. after 1198-9 - defence of "non est factum" inapplicable where there is no misrepresentation as to what document is and person signing does not ask what it is.

See p.44 - ll 10-20.

No evidence that deceased did not require it for I.T. purposes.

Finding of fact based on demeanour only.

Court: But Papa. supported her story as to violent quarrel.

O'Donovan Proper conclusion is that respondent did not establish fraud.

Ground 8

A should have had their costs - estate should not bear these.

2 p.m. BENCH AND BAR AS BEFORE

Houry in reply:

As to amendment and new cause of action.

1st plaint - I concede Plaintiff's position and claim misconceived. But real question in issue has always to be kept in mind.

O.6 r.17 Ind. C.P.C. - real question was rights of Respondent arising out of registered lease i.e. royalties by way of lease - para. 6 introduced the lease. Mulla, 12th Ed. Vol. I 595.

No new cause of action: root of controversy. Remains rights of parties under the lease. I agree claim is for account, but not partnership account.

Limitation - lease is registered and therefore comes within Art. 116. Rustomji 4th Ed. 565 - meaning of Article.

To Briggs I agree that under the Act wherever accounts are specially mentioned, period is 3 years. But I say this is registered contract. If not in Art. 116, claim is time-barred. If contract registered, whatever claim one has under it, period is 6 years.

In Allahabad, it has been decided that any claim in a registered lease comes within Art. 116.

Briggs - P.131 Lease - when did rent become payable?

Houry The accounts put in show that Dalgety's sold the sisal regularly. No likelihood of there being any arrears. Rustomji 4th Ed. 547 - Art. 116 "registered lease" - claim for rent is for 6 years. 5th Ed. 964. We are really claiming rent though we have to claim it in form of an account.

(NB 1916 44 Cal. 759 P.C. Tricomdas) See also "Suit for Royalty" 5th Ed. 964. p.1038 Art.120 "Suit for Accounts".

As to period April-July 1949, I say 6 years also applies, because it was tenant carrying over.

To Court: I concede we were asking for profits not rent or royalties. (1930 8 Ran.)

As to Exhibit 1:

Why was not receipt executed before and witnessed by the Tanga advocate? If Respondent knew she has signed this, why did she permit £6,000 to be deducted in respect of loan made in 1947.

Exhibit 4: Bank statement of Respondent's account.
- September 22nd, Shs. 465,000.
- October 14th, Shs. 1275000 = £ 87,000
plus 6,000
= 30% of sale price = £ 93,000

Evidence p.44 l. 28 - p.45 ll. 1-3.

Judgment para. 15.

In the Court of Appeal for Eastern Africa.

No.16.

Notes of Worley, P. on Hearing of Appeal.

27th June 1956 - continued.

£2,000 was chicken feed to these people. - sent to deceased in London? Exchange.

Dealings with accountants

Dalgety's sold sisal - deceased drew from them money needed to run estate. Deceased sent monthly statement to Bain & Co.

Pp. 134, 135, 141 - alleged payments in cash to Respondent - shewn in deceased's monthly cash returns. Not supported by any vouchers of any kind.

Respondent says only received Shs. 185,000.

Accountants were working for deceased and estate - later prepared I.T. return for Respondent.

E.A.C.A. Rules 1954 - Rule 78. If Appellants dissatisfied with Mahon's ruling they should have appealed at once and so saved costs. and expense of trial.

As to costs incurred to prove signature - nothing to say on this. O'Donovan in reply.

1. Suing for account. Order should in any case be for monies due from one party to another. May be sums payable by Respondent.

(Parties agree security given).

Plaint does not disclose cause of action founded on breach of contract. Not claim for compensation.

2. £6,000 totally unrelated to sisal accounts between parties and outside the settlement.

3. Appeal from preliminary issue - couly only have been by leave.

(Query, was not it a preliminary decree?)

Concede that if Court thinks attack on judgment unjustified, might affect costs even if limitation succeeds.

As to comment on Art. 110:

- where breach is alleged, i.e. actual non-payment of rent and suit for amount, which should have been paid, as compensation - that comes under Art. 116.

But here no breach alleged - because respondent cannot allege it - only claim for payment of what will be found due, if anything.

In suit for account, there could be nothing due to Plaintiff. Prayer for payment is formality.

Until it is established that something is due to Plaintiff, it is not shewn that there is breach.

Respondent's estimate of Shs. 800,000 ? for Court fees only.

Respondent offered to deposit sum to cover any sum found due from her.

Rustomji 5th Edition. 196.

C.A.V.

N.A. WORLEY,
President.

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No. 17.

NOTES OF SINCLAIR, V-P. on HEARING OF APPEAL

Notes taken down by the Honourable Vice President

CIVIL APPEAL No. 26 of 1956

O'DONOVAN

Brother and sister owned as tenants in common the sisal estate - deceased owned 7/10ths and respondent 3/10ths. Sister leased her share to deceased.

20

First lease terminated by effluxion of time. Short hiatus. Then further lease dated back to 1.7.49. Second lease of short duration as estate sold in September.

Deceased died in January, 1951. Married one of Appellants, Ariadne, who is younger than the sister.

Sister made no formal claim for accounts during deceased's lifetime embarked on litigation for accounts in July, 1952.

30

Basis of first plaint is in para. 2. - not supplied with partnership accounts.

Admission that Respondent received the rent claimed in first plaint. Filed in July, 1949. Suit for appointment of a receiver and partnership accounts.

In the Court of Appeal for Eastern Africa.

No.17.

Notes of Sinclair, V-P. on Hearing of Appeal.

27th June 1956 - continued.

That is time-barred by Article 106 of Limitation Act - 3 years from date of termination of partnership.

Could only go back to end of July, 1949, onwards.

Fact that claim was time-barred was raised in defence (pp. 8 & 9).

Some years later Respondent filed an amended plaint.

Amended plaint filed on 1st September, 1954.

Application made by letter for leave to file amended plaint. I consented in writing to the application on behalf of Appellants.

Amended plaint raises an entirely new cause of action. Leave to file might have been refused on that ground and I do not submit now that leave should not have been granted.

But by consenting Appellant did not abandon any defences she had to the action including the amended plaint. My complaint relates only to limitation.

Submit amended plaint does not date back to filing of original plaint.

Concede there was a claim on a cause of action as in original plaint. Substitution of different cause of action is not an amendment.

An extra cause of action may be introduced in addition to the original cause of action and it can hardly be said to date back to the date of the original plaint.

Complaint is that amended plaint introduced a new cause of action which was itself time-barred at time of filing of amended plaint.

Wholly new cause of action introduced.

Para. 5 of amended plaint in which it is now alleged they were tenants in common. The previous allegation of partnership is dropped.

Paras. 6, 7 & 8 correctly pleaded.

Prayer (c) (p.12) appropriate to an administration suit. It did not succeed and is immaterial to this appeal.

Negotiations for arbitration may have accounted for some of the long delay.

Claim now for accounts for rents by way of royalty and sale of movables under first lease and similar claim under second lease. But second lease dated from 1.7.49 not 1.4.49.

Claim made for the first time. Not an alteration of the original claim but an abandonment and a substitution of a new one.

Article 110 applies to new claim and 3 years from date when arrears became due.

Articles 116 applies to breach of contract - six years. But this article can have no possible application to quite a number of the reliefs claimed. But she has been given an order for an account. Claim for accounts 13(a) (a) & (b) may be argued this is a claim for rent under a registered lease but I do not concede it.

As to 13(c) this is not a claim arising directly from any registered instrument. Before Art. 116 can apply liability must arise directly out of the instrument. Not alleging a breach of the registered lease. Claim for accounts is not a claim for damages because the deceased broke the lease. More a claim for money had and received by deceased for her use (Court: But see Clause 5(d) of lease). Para. 5(d) is probably an answer to my submission.

Prayer (b) not covered by any instrument. (Court: Tenant holding over on terms of the original tenancy). Not claiming anything under the lease but profits. Holding over not pleaded. Profits not necessarily the same quantum as rent.

Article 116 does not apply to profits. Even if one relates back to original plaint (23.7.52) the respondent is out of time.

Claim for an account does not in any way fall within scope of Art. 116 - none of it. A claim for an account is not a claim for compensation.

Rustamji on Limitation, 5th Edition, Vol. II p.996. Account is a method of enforcing performance of a contract not compensation for a breach. Art. 110 must apply. Period therefore is three years and not six.

In the Court of Appeal for Eastern Africa.

No.17.

Notes of Sinclair, V-P. on Hearing of Appeal.

27th June 1956 - continued.

Present Appellants are not parties to the registered lease and Art. 116 only operates in relation to parties and not their assignees (Court: But these are the successors). Rustomji p.997. Do not attach much importance to this argument and put it forward for what it is worth. My two main points are:-

(1) Suit for an account cannot come within Art. 116.

(2) Introduction of a new cause of action.

(3) Non-applicability of Art. 116 in claim for profits.

Introduction of new cause of action - see Rustomji p.448 (section 22). (page 250 4th edition).

Where the amendment introduces a new cause of action, limitation does not date back to filing of original plaint.

If held Art.116 applies to first of accounts claimed in amended plaint i.e. the whole of (a) but held that the operative was 1.9.54, then the claim would be partially time-barred - everything before 1.9.48.

In any event my argument is valid in respect of relief (b).

Nothing arises under second lease as Plaintiff admits she has received everything - see p. 57, 61 (1.28). That fixes date of sale of estate at 22.9.49.

p.62. as to amounts received.

p.196. para. 32 - Chief Justice set out all the kinds of accounts the Plaintiff wants.

p.197 - the order.

Plaintiff obtained an order for all the accounts she asked for.

p.204 - do not support (a) in first para.

Cause of action differed although the relief asked for is similar.

Judge in error in saying claim not time-barred under Art. 110 as well as Art. 116.

Original plaint makes no mention of any sale of machinery. That is the introduction of substantially new matter.

Second part of my argument deals with Exhibit 1 at p. 155.

Chief Justice held that that was not an answer to claim as Respondent's signature was obtained by fraud.

Finding of fact but contrary to the weight of evidence.

Very heavy burden of proof on Respondent when she claimed her signature had been obtained by a trick. Should not be decided on a balance of probability. Chief Justice reached his conclusion without a critical examination of the evidence.

Original stamped with 1/- stamp and another date stamped on to 1/- stamp. Also typing of document shows typed with same typewriter as second lease. Not unreasonable inference that Exhibit 1 also drawn up in Solicitor's office as was the lease.

Date 14.7.49 is of the utmost significance as that is the date of the second lease.

Naturally question of accounts would arise when second lease considered.

Appellants were in a position to account from 1st July and Ex. 1 shows settled to 30th June. Correspondence of dates is significant. Respondent signs in her married name but described in her maiden name. Same mistake in lease. Can be inferred that Ex. 1 and second lease drawn up together.

Respondent at first said it was a forgery. p.59. Certain amount of expenditure incurred in endeavouring to establish the genuineness of the signature. But at trial for first time she said it was her signature. Chief Justice's remarks on this at p.186 not correct. She said it was not her signature at p.59. When compelled to admit her signature she came forward with another explanation. Chief Justice misdirected herself on the facts by taking unduly favourable view of her reaction.

She apparently did not enquire into the nature of the document she was signing. Correct she could not read English. Neither she nor witness remembers whether there was a date. Chief Justice should have considered delay between time she saw

In the Court of Appeal for Eastern Africa.

No.17.

Notes of Sinclair, V-P. on Hearing of Appeal.

27th June 1956 - continued.

the document and time when she finally said it was obtained by a trick.

They were then quarrelling about accounts and she had just signed a lease, is it believable that she would be taken in to sign a document of which she did not know the nature. Witness spoke English.

Chief Justice should have directed himself on point that here was woman who was content to claim rent to 11.9.49 from 14.7.49 but claim collapsed when cheques collapsed.

Also she remitted deceased £2,000 at time she was quarrelling with him. Also her share of sale price had £6,000 deducted from it, if deceased owed her money. Apparently he accepted the position and asked no one about the deduction. That is not the action of a woman who has quarrelled with her brother because he has not accounted to her.

Appellants dealing with a deceased estate. Accounts sent to her by a firm of auditors of repute. Never complained that she had not been paid.

(See p.191 para.19 as to income tax).

Conduct of R. after 1.7.49 is not consistent with that of a woman who has a claim for accounts before that date.

(1) She does not ask for accounts from the accountants.

(2) She cables her brother £2,000.

(3) She allows him to deduct £6,000.

(4) She said document is a forgery. Later changes this after considerable delay.

(5) Very high degree of proof required before any conclusion of fraud could be legitimately drawn.

No proper consideration by C.J. of those factors. Misdirection as to original attitude of R. to Ex.1.

Credibility affected if she is prepared to sign any bit of paper even if it is only for Income Tax purposes.

Chitty on Contracts 20th Edn. in Appendix between p.1198 and 1199 on defence of non est factum. No representation as to what document is.

Open to debate as to whether there was any

misrepresentation as to nature of the document. - p.44. No evidence that in fact the brother wanted the document for the Income Tax Department. Also p.57 l.29 (from Income Tax Department). No misrepresentation of any fact bearing on the character of the document.

Costs.

Unreasonable to deprive Appellants of their costs of proving Respondent's signature. Estate should not be unnecessarily mulcted of those costs.

Court adjourned to 2 p.m.

2.00 p.m. Bench and Bar as before.

Houry in reply:

Amendment of plaint and new cause of action.

My firm not responsible for original plaint. Agree pleadings did misconstrue the claim of the Plaintiff.

It is the real question in issue which must always be borne in mind and avoidance of multiplicity of actions.

O.6 r.17 is clear. Real questions in issue were rights of the Plaintiff arising out of the registered lease, i.e. royalties.

Right of parties under lease in controversy - see Clause 6 of original plaint.

No new cause of action. Root of controversy is rights of parties under the registered lease.

Claim is certainly for an account. It is not a partnership account which is claimed. Account for sisal produced to which we are entitled to royalty by way of rent.

Limitation.

As it is a registered lease, it is a registered contract, and therefore it is covered by Art. 116.

p.565, 4th Edn. Rustomji. Not disputed this is a registered lease. Limitation is therefore 6 years. p.561 Rustomji.

Claim must be time-barred if it does not come within Art.116.

Any claim whatever under a registered contract is 6 years limitation.

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No.17.

Notes of Sinclair, V-P. on Hearing of Appeal.

27th June 1956 - continued.

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Notes of Sinclair, V-P. on Hearing of Appeal.

27th June 1956 - continued.

Accounts put in by Bain & Co., show that the sisal was in fact sold from month to month. It is the rent by way of royalty we are asking for. No likelihood of there being any arrears.

p.964 Rustomji (5th Edn.) as to claims under registered leases p.547 (4th Edn.).

(Note: 1916 44 Cal. 759, P.C.).

Different considerations might apply to period April to July, 1949, but submit 6 year period applies. Concede that we asked for share of profits and not for royalty from tenant holding over - but small must go with the greater.

Exhibit 1.

Why was receipt not executed before same advocate as lease was?

If Ex. 1 was what it purported to be why did the Defendants deduct the £6,000. Common ground that deceased deducted the £6,000. She could not possibly have known such a settlement existed. Loan of £6,000 made in 1947.

Ex.4 (not in record) is Barclays Bank statement. (Copy handed in). Refer to items in Sept. and Oct. 1949 on credit side. 465,000/- and 1,275,000/- = £87,000 + £6,000 = £93,000 which is 30% of the sale price of the estate.

Clear that deceased deducted the £6,000 on a date subsequent to Ex.1. See p.44 (foot) as to £6,000. Deducted from proceeds of sale made in October 1949.

Paras. 15 and 16 of judgment justify the finding.

Deceased had been away in Egypt for a year.

The £2,000 - in those days this was chicken feed to sisal barons. It was sent to London.

Accounts.

Sisal produced by the deceased was sold to Dalgety & Co., at Tanga. Deceased drew such money as was required for the running of the estate from Dalgety & Co., Every month he sent a statement

or account to Bain & Co., See p.147 as illustration (Ex.21).

Cf. pp. 134 & 141.

Collis explains that these accounts made up from deceased's monthly accounts without any supporting documents or vouchers.

We had received only 185,000/- and much more due to come. How could she pay £15,000 income tax.

Exhaustive judgment.

Appeal should be dismissed.

Appellants, if dissatisfied with Mahon J's. order, they should have appealed at the time instead of incurring further expense. If Court against me this should be considered when awarding costs.

Costs of proving Ex. 1.

I was asked if I would admit Ex.1. We had to say we could not admit it. When matter came before us again we admitted it. It was after she saw Popadopolos that she remembered the incident.

O'Donovan in reply.

On facts pleaded it is quite conceivable that no money due to Plaintiff - might even show that money due by her.

If Court against me order should be for mutual accounts.

Houry:-

As to £42,000 it may be taken that security has been given.

O'Donovan:-

Plaint does not show any cause of action founded on breach.

Substantive relief asked for was for accounts - not compensation.

£6,000 - totally related to the sisal accounts and possibly outside ambit of the sisal accounts. It was a private loan unrelated to their normal business.

In the Court of Appeal for Eastern Africa.

No.17.

Notes of Sinclair, V-P. on Hearing of Appeal.

27th June 1956 - continued.

Art.116 - where cause of action is for breach of covenant to pay rent, and compensation sued for, that is within 116 as breach is alleged. That is the meaning of the commentary. No breach - no compensation. Cause of action not founded on a breach.

C.A.V.

R.O. SINCLAIR,
V-P.

No.18.

Notes of Briggs, J.A. on Hearing of Appeal.

27th June 1956.

No. 18.

NOTES OF BRIGGS, J.A. on HEARING OF APPEAL

Notes taken down by the Honourable
The Justice of Appeal

CIVIL APPEAL No.26 of 1956

O'DONOVAN

Facts.

7/10 & 3/10 Shares of estate as tenants in common.

March 1946. Lease to deceased, which terminated March 1949.

14.7.49, after short hiatus, second lease, operating from 1.7.49. 3 month period between 1.4.49 and 30.6.49, no agreement.

September 1949 estate was sold and proceeds divided.

January 1951 death of brother, having married 1st Appellant about a year before. 2nd Appellant is deceased's daughter.

Respondent never formally claimed accounts in deceased's lifetime. She sued in July, 1952.

1st plaint pp. 5-7 - alleges a partnership in the estate. Then in 1946 a lease of the share of the partnership business.

§§ 7 revival of partnership. §8 second lease of share of partnership business. Sale etc.

Complaint §§10. failure to supply partnership accounts.

Claim for receiver: partnership accounts including royalties. Suit on that basis barred by Art. 106 of Ind. Lim. Act after 3 years from the termination of the partnership. She would thus be entitled to nothing prior to the end of July 1949. This was raised in defence, §§ 5. Defence 10.11.52.

Amended plaint 1.9.54. Application was made to High Court by letter for leave to amend. I consented to the application by letter. New cause of action. Leave might have been refused. I cannot now object to that. But we did not abandon any defences. The defence of limitation is still open.

For that purpose, limitation must now be considered as from the date of filing the amended plaint, because the cause of action was new and was time-barred at the date when amended plaint was filed though not at the time of the original plaint.

As to the new cause of action.

§§ 5 amended plaint. Allegation re partnership is dropped. Tenancy in common alleged.

§§ 6. First lease more correctly pleaded.

§§ 7. Termination.

§§ 8. Second lease.

§§ 9. Sale - date is wrong.

§§ 10. Machinery etc. new.

Relief claimed.

1. (account of sisal during first lease.
   (account of rent.
   (account of movables appropriated by deceased.
2. account of profits for interim period.
3. Claim for general admin. - this failed.

There were negotiations from 1952-54 for arbitration.

Original claim, which was time-barred, is

In the Court of Appeal for Eastern Africa.

No.18.

Notes of Briggs, J.A. on Hearing of Appeal.

27th June 1956 - continued.

abandoned. This claim was first made on 1.9.54. Not an alteration of the original claim.

Limitation. I submit Art.110 applies to the new claim. "Arrears of rent. 3 years from the date when the arrears became due".

or Art. 116, as Respondents submit. "Six years registered contract. (from times as when arrears due).

But Art 116 does not apply to a good deal of the reliefs already granted. The relief must arise directly from the document.

Court: As to machinery, it does - p.133 §§ d.

O'Donovan: Perhaps.

But as to the interim period p.12 §§ (b)(b) this is clearly not under the document. Not claimed as rent under a tenancy presumed to continue. Even on July 1952 date, all out of time.

Again. I contend that no claim for accounts can in any case fall within Art.116. It is not a claim for compensation for breach of contract, but a method of enforcing a contract.

Rustomji 5th ed. Vol II 996.

If so, Art.110 applies and the period is 3 years.

These are not "parties".

ibid 997

New cause of action

ibid 448) 4th ed.250) Note 10.

Distinction between cases where there is or is not a fresh cause of action.

If Art.116 applies, but dates from 1.9.54(the amended plaint) then everything prior to 1.9.48 would be barred. Otherwise everything is barred, because all prior to 1.9.51, if 1.9.54 applies. The second lease is not in issue. Rent was paid on that and sale was 22.9.49. pp.57 & 61-2.

Critical date 30.6.49: first plaint 23.7.52 - more than 3 years.

Judgment 196, 197.

The question of limitation was dealt with by Mahon J. as a preliminary issue, p.204 & 205.

(Apparently a clear error? Miscalculation of date?)

Machinery is not mentioned in the original plaint. This is substantially new matter.

Exhibit 1. p.155.

Held to be non factum in that signature obtained by fraud. I attack this as contrary to weight of evidence.

Heavy onus on Respondent. Not balance of probability.

Chief Justice did not sufficiently examine the evidence.

Late discovery of document.

Date stamp. 14.7.49 was the date of the 2nd lease.

Document was typed on same machine as the 2nd lease. Presumably drawn up in lawyer's office.

Settlement was to 30.6.49, the day before the 2nd lease operates.

Misdescription of Respondent - she is described by her maiden name in Exhibit 1. and also in 2nd lease. Supports inference that they were drawn up together.

Respondent first denied her signature. p.59. Later admitted it.

Judgment p.186 is not correct.

Dishonest claim in first plaint for rent under 2nd lease.

Loan of £2,000 to brother after 2nd lease.

She owed £6,000 to deceased at time of sale and allowed it to be deducted from her share of the sale-proceeds.

Accounts were sent to her.

Her payment of large sums for income tax.

p.191.

Chitty 20th suppt. after 1198.

44 57.a.

Costs. Should have costs of the issue approving the signature.

In the Court of Appeal for Eastern Africa.

No.18.

Notes of Briggs, J.A. on Hearing of Appeal.

27th June 1956 - continued.

2 p.m. BENCH AND BAR AS BEFORE

Houry in reply.

My firm was not responsible for the first plaint. I admit the claim was misconstrued, but the real question in issue was always the same. Avoiding multiplicity.

O.6 r.17.

Real claim was a royalty by way of rent. What were the party's rights under the lease?

Draft amended plaint was submitted and agreed.

Question is still, right of parties under registered lease.

The account claimed is not a partnership account, but is a step towards ascertaining the rent.

Limitation

I submit Art. 116 covers this.

Rustomji 4th 565.

The general level of limitation is 6 years where the claim is on a registered lease.

I concede that my claim is formulated only as for accounts. Also that no Art. in the Act where accounts are expressly mentioned allows a period exceeding 3 years.

ibid 561.

If I am not within Art. 116 we must be time-barred.

Any claim under a registered contract is within Art. 116.

Under Art. 110.

547 5th ed. p. 964

Rent under registered lease are governed by 116 not 110.

The accounts claimed are not substantive relief but machinery ancillary to ascertain the substantial claim.

Different considerations may apply to the period April-June 1949. But I claim there was a continuation of the 'lease' - a tenancy under similar terms.

Court: You have claimed "profits", not rent.

Houry: Exhibit 1.

Why not executed in Tanga before Desai?

Papadopolos' evidence.

The £6,000 was lent in 1947.

If Exhibit 1 was genuine it took in that £6,000.

But Plaintiff paid the £6,000 back.

Exhibit 4, a bank statement of Barclay's Bank of Plaintiff's account shows. Last two items together £87,000 plus £6,000 = £93,000, which is 30% of the sale price of £310,000. This shows receipt by deceased of the £6,000.

p. 44 foot, 45. Judgment §§ 15,16. p.189.

Deceased had been away about a year and died almost immediately after his return.

The £2,000 remitted to London.

They say they have given us everything that was due, and supplied all proper accounts.

Relations between deceased and Bain & Co. and deceased and Dalgety & Co. Deceased sent a return to Bain & Co. monthly.

147

Last item "Mrs. E.A. Rodosakis 18,337.10". This is obviously a fake item.

141
compare 134.

Collis explains that these figures are made up from deceased's figures with no supporting vouchers.

On the deceased's own showing, we were owed so much that it is impossible that we should have signed Exhibit 1. (Of course deceased says the whole was paid). Judgment is correct.

On costs The Appellants, if dissatisfied with Mahon's ruling should have appealed then. Costs ever since, wasted - and very large.

Costs of proving signature. Reasonably incurred.

O'Donovan replies.

There may be nothing due under the lease owing to contra items.

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Notes of Briggs, J.A. on Hearing of Appeal.

27th June 1956 - continued.

If I fail generally, details of the decree may have to be amended to allow for this.

The possibility of a balance adverse to the Plaintiff, prevents this being suit for compensation and for breach.

5 ed. Art. 116.

The £6,000 deducted was so unrelated to the sisal accounts as fairly to be considered outside the settlement of the estate business.

As to appeal from Mahon's ruling.

s.2, s.104, s.105 of Ind. Civ. Proc. Code.

s.97.

Right not to appeal at that stage.

Costs.

C.A.V.
F.A. BRIGGS, J.A.

No.19.

Judgment.

18th July 1956.

No.19.

JUDGMENT

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

CIVIL APPEAL No.26 of 1956

1. ARIADNE TZAMBURAKIS)
2. NAFSIKA LAMBROU) Appellants

versus

EFTICHIA RODOUSSAKIS Respondent

(Appeal from judgment and decree of Her Majesty's High Court of Tanganyika at Dar-es-Salaam (Sir Herbert Cox, C.J.) dated 16th December, 1955

in

Civil Case No.5 of 1952

Between

Eftichia Rodoussakis ... Plaintiff

and

1. Ariadne Tzamburakis)
2. Nafsika Lambrou) Defendants)

JUDGMENT OF BRIGGS J.A.

This is an appeal from a decree of the High Court of Tanganyika. One Nico Tzamburakis now

deceased and his sister, the Respondent, were co-owners as tenants-in-common, having shares of 70/100 and 30/100 respectively, of a large sisal estate from about 1932 onwards. They developed the estate largely by raising loans and it became very prosperous. Unfortunately the deceased, who is said to have been domineering and autocratic, and his sister quarrelled continuously about the estate accounts and management. The deceased had always had de facto control, and in 1946 it was agreed that the Respondent should lease to him for three years her 30% share in consideration of a royalty on all sisal and tow produced. A lease was executed and duly registered. It was in operation from 1st April 1946 to 31st March 1949. There was then an interregnum of some three months during which the deceased remained de facto, though perhaps not de jure, in possession of the estate. On 14th July, 1949, the co-owners executed a new lease for three years to run from 1st July, 1949. Instead of a royalty this reserved a fixed money rent, which was duly paid. Soon afterwards, however, the estate was sold to a third party, the proceeds of sale were duly divided, and the second lease ceased to operate.

The Respondent complained that the deceased had not paid to her the sums properly due for royalty under the first lease, and raised various other minor claims, and in July 1952 she sued his widow and daughter, as his personal representatives. He died on 6th January, 1951. The plaint is dated 23rd July, 1952, but the date of filing does not appear from our records. The original plaint alleged a partnership in the estate prior to the first lease and a revival of the partnership during the "interregnum." The first lease was said to be a lease of the Respondent's share in the partnership, other than the capital assets, in respect of which the partnership was alleged to have continued. The relief asked was primarily a receiver and partnership accounts. A defence was filed in November, 1952. It contained general denials and a plea of limitation. Thereafter there were prolonged, but abortive, negotiations for settlement and arbitration proceedings.

On 10th August, 1954, an amended plaint was filed. The Respondent had changed her legal advisers and the new ones evidently took a different view of her legal position. After drafting the

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18th July 1956 - continued.

amended plaint, they submitted it to the appellants' advocate, who consented by letter to its being filed, and an order to that effect was made by consent on 10th August and confirmed by a note made by the Judge on 1st September, 1954. This is important, because it may well be that, if the matter had been contested, the amendment would have been disallowed. We are not, however, criticising the giving of consent; it seems probable that it may have been an agreed step in the abortive negotiations for settlement. As it is, we must regard the amended plaint as regularly and correctly filed. It alleges the initial co-ownership, the first lease, the "interregnum", the second lease, the sale, and failure by the deceased to render accounts of production of sisal, of rent, of profits on sale of machinery and other movables, and it gives credit for shs.185,685, paid in the years 1947, 1948 and 1949. It alleges that on taking the accounts some shs. 800,000 will be found due to the Respondent. The relief claimed is:-

> "(a) an account (a) of all sisal produced on the Sisal Estate during the period covered by the First Lease namely from 1st April, 1946, to 31st March, 1949, (b) of the rent by way of royalty due to the Plaintiff on such total production and (c) of the machinery and other movables sold or otherwise appropriated by the Deceased be taken and payment to the Plaintiff of the amount found due on taking such accounts;
>
> (b) that an account may be taken of the profits made by the Sisal Estate during the period from 1st April, 1949, to 14th July, 1949, and payment to the Plaintiff of the amount found due on taking of such accounts;
>
> (c) that an account may be taken of the movable and immovable property of the Deceased and that the same may be administered under the decree of the Court."

with costs and further or other relief. The amended defence objects that some of the relief claimed depends on a new cause or causes of action, relies on limitation, and contains general denials. The learned Chief Justice decreed accounts on the basis of paragraphs (a) and (b) above, but limiting the

latter so as to end at the 30th June, 1949, it having been conceded that all sums falling due after that date had been paid. He also ordered payment into Court of a sum of £42,000, or that security be given therefor. The personal representatives appeal.

Before the main hearing of the suit two issues were dealt with as preliminary points by Mahon J. They were :-

"(a) whether the amended plaint should be dismissed on the ground that it discloses a new cause of action, and
(b) whether the action is time-barred."

The learned Judge accepted the Respondent's submissions and on 3rd December, 1954, answered both these questions in the negative. These issues were accordingly never before the learned Chief Justice. The appellants filed no separate appeal, but the first three grounds of their memorandum on this appeal are as follows :-

"1. The Learned Chief Justice erred in law in failing to hold that a new cause of action was introduced for the first time in the amended plaint filed on the 10th day of August, 1954.

2. The Learned Chief Justice erred in law in failing to hold that the claim made in the amended plaint was wholly or alternatively partly time barred by virtue of the provisions of the Indian Limitation Act 1908.

3. Alternatively the Learned Chief Justice erred in failing to hold that the claim in the suit as framed originally was affected by the provisions of the Indian Limitation Act 1908."

This appears to be somewhat unfairly critical of the learned Chief Justice, since he never decided, nor could have decided, those matters at all; but the intention of the appellants was clearly, and was stated by their Counsel to be, to attack the decision of Mahon J. They claimed to be entitled to do this on the basis that it was an "order affecting the decision of the case" within the meaning of section 105(1) of the Code of Civil Procedure. If the decision of Mahon J. was in law an

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order, whether appealable or not appealable, this would no doubt be correct, for there is no doubt that his decision affected the final decision of the case on its merits. I think Mahon J. must have considered that it was an order, for his written grounds of decision are headed "Ruling". It may be, however, that it was not an order, but a preliminary decree. In that case appeal would be barred by section 97 of the Code. No formal decree or order based on the decision appears in the record and it is probable that none has ever been extracted. This might have barred an earlier appeal under section 97, but it cannot affect the question whether the appellants can appeal on these issues now. Mahon J. appears to have decided these issues under Order 14 rule 2. Order 15 rule 3 does not appear to be in point, and the questions raised were clearly questions of law. There is the highest authority for giving a wide interpretation to the powers of the Court authorising separate trial of severable issues. See Naresh Mohan v Brij Mohan, (1933) A.I.R.(P.C.) 43. In spite of a number of Bombay decisions noted in Mulla's Code of Civil Procedure, 12th ed. p.7., under the heading "Finding on issue", and in particular Chanmalswami v. Gungadharappa, (1915) 39 Bom. 339, I see no reason why this adjudication should not be a judgment giving rise to a preliminary decree. It is "an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to" the two special matters which were put forward for decision as preliminary issues. Mulla (p.381) and Chitaley (5th ed. p.1101) seem to agree that section 105(1) is intended to refer to interlocutory orders. In Gilbert v Endean, 9 Ch.D. 259, Cotton L.J. said, at p.263:

> " Those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in statu quo till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties."

The adjudication here was clearly not of that

nature. These were not merely interlocutory questions, but would otherwise have had to be decided as substantial issues on the hearing of the suit. The Bombay cases seem to lay some stress on the need for the "finding" to be "embodied in the judgment and decree". This is clearly impossible where different judges hear the preliminary issues and the remainder of the suit, as was quite properly done in this case. I think it may be that the dividing line is to be drawn where the issues are so far severable that they can properly be heard by different judges. I take it as clear that the types of preliminary decree expressly mentioned in the Code and Rules are not the only types that can be passed, that more preliminary decrees than one can be passed in a single suit: that a decree is still in law a decree even if it purports to be an order, and that an adjudication is either a decree or an order and cannot be both, or be split into component parts. On the last point, see Ahmed Musaji v Hashim Ebrahim, 42 Cal. 914 (P.C.) at p. 924. It has been expressly held that it is proper to decide a question of limitation as a preliminary issue under O.14 r.2 Hussain Bakhsh v. S. of S, (1935) 22 A.I.R. Lah. 982. Chitaley, 5th ed.2010, in citing Re Palmer's Application, 22 Ch.D.88, in his commentary on O.14 r.2., obviously contemplates that a decision under this rule may be a decree and may found an appeal. Speaking for myself, and excepting the special case of an application for rejection of a plaint, I am quite unable to see how it can properly be said that the same question answered on a preliminary issue will give rise, if answered in one sense, to an order, but, if answered in the opposite sense, to a decree. In view of the distinction drawn in the definition of "decree" between preliminary and final decrees, I think this construction is untenable. On the plain wording of the definition it is the nature of the question, not the nature of the answer, which decides whether a decree or an order results. The elaborate arguments to the contrary in Chanmalswami's case seem to be sufficiently answered by the opinion of the Privy Council in Naresh Mohan v. Brij Mohan, where they expressly approved on grounds of convenience the hearing of certain issues and deferment of the hearing of another, and approved by implication the embodiment of the adjudication on the earlier issues in a decree. I am of opinion that Chanmalswami's case, which was long antecedent

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in date to Naresh Mohan's case, is no longer authoritative. For these reasons I am of opinion that the grounds of appeal which seek to attack the judgment of Mahon J. are incompetent; but it is not unlikely that this case may go further, and, since I may be wrong, I think it desirable to give my views on the two points which he decided.

The first issue has two quite separate aspects and to some extent governs the second. On the question whether the amended plaint should have been struck out on the ground that it raised a new cause or causes of action, I agree with Mahon J. that, even if it did, no grounds could be shown for striking it out. It was filed by leave of the Court and the order giving leave was a consent order. In such a case I think the ordinary jurisdiction to disallow amendments of pleadings no longer exists. The other aspect is the effect of the amendment on limitation. The appellants contended before Mahon J. and before us that, even if the amended plaint stands, the fact that it raises new causes of action results in the effective date for purposes of limitation being the date of filing the amended plaint, and not, as it would ordinarily be, the date of filing the original plaint. Mahon J. held that no new causes of action were raised, and consequently the date of the original plaint was the operative one. It is clear that amendment as such does not ordinarily affect the date of limitation: it is also clear that amendment of a plaint to introduce a new cause of action should not be allowed, and that no amendment should be allowed if the Defendant would thereby be deprived of a defence of limitation: but Rustomji, 5th ed. 448, states that where a new cause of action is introduced on amendment time will run from the date of the application to amend. This seems both involved and contradictory, but most of the authorities cited appear to support it, though they are conflicting. The rule may be designed to allow the Court to remedy an earlier mistake. But I think that for the purpose of this suit a solution can be found. I think that in relation to both the right to amend and the date for limitation the "cause of action" should be regarded not in a technical, but in a common-sense and practical, way. The Court should ask itself, "What was the Plaintiff really complaining about in his first plaint?" and "Is he in substance complaining about

the same matters or different ones in the amended plaint?". If the substance of the complaint is the same, it matters not that the technical cause of action is different, nor that new branches of the complaint are developed. The amendment should be allowed and the date of limitation is unchanged. I think that this is substantially the reasoning underlying the decision of the Privy Council in Charan Das v Amir Khan (1920) 48 Cal. 110, 116. I think that, applying this principle, there was no change of the cause or causes of action in this case, since in substance the Respondent was always attempting to establish her right to her proper share of the revenue of the sisal estate, and that the effective date for purposes of limitation remained the date of filing the original plaint.

On the general question of limitation Mahon J. said only this,

> "As to (b) if I am correct that the plaint as amended discloses no new cause of action, then this suit is clearly not time-barred under either Article 116 or 110 of the Indian Limitation Act 1908."

The learned Judge does not clearly indicate which Article of the Act he considers to be applicable, and I think the question is somewhat difficult. If a six year period of limitation applies, the terminus would be at least some months after the inception of the first lease, and since accounts were ordered in respect of that period it seems that the Court did not act on that basis, unless, as Counsel suggested to us, there was a mere miscalculation. It was common ground that sales of sisal took place at frequent and regular intervals over the whole period of the first lease, so the rent by way of royalty fell into arrears in the same way. (I think Rangayya v Bobba, (1904) 27 Mad. 143. (P.C.) is distinguishable, in that the rents there fell to be determined by the Court.) I think the explanation may be that the learned Judge considered that some Article such as 89 or 106 applied, under which, if the account is claimed within the limitation period, it may be ordered to be taken in respect of transactions outside the limitation period as well as those within it. But, disregarding accounts of trustees under section 10, accounts of this kind appear to be only those

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between former partners or principal and agent. Where the suit is for an account based on a contractual relationship other than these I think Article 120 is prima facie applicable, and where it applies the accounts will only be ordered for a six year period before the plaint. The accounting party may, however, in some cases be held liable for the balance in his hands at the beginning of that period, and earlier accounts may be relevant as evidence to show that balance. There is the further question whether in this case the right to an account was ever denied, and if so, when; but I think the Respondent's case was that from, and even before, the inception of the first lease she was constantly demanding accounts, and the deceased consistently refused to furnish them.

I doubt, however, whether Article 120 applies in this case, at least as regards the period of the first lease. All the monies claimed in respect of that period are monies alleged to be due under the terms of the lease, which, as I have said, was registered. If it were not registered, I think the correct view would be that the claim was for monies due as rent under Article 110 or as compensation for the breach of a contract under Article 115. The tendency of the cases seems to be towards bringing under Article 116 almost any money claim arising from a registered contract. It is well settled that a suit for rent under a registered lease or contract is governed by Article 116, not Article 110, and that six years' arrears are recoverable, although the word "compensation" seems less than apt in this context. See Tricomdas v Gopinath, (1917) 44 Cal. 759 (P.C.). On the other hand suits for accounts which are within Article 89 or 106 cannot be brought under Article 116, although the contract is registered. It is said that such suits are "essentially" for accounts. I confess to some difficulty in distinguishing suits essentially for accounts from those where the account is a necessary preliminary step towards obtaining relief, but not of the essence of the action. I think, however, that there may be a distinction on these lines. In agency and partnership cases the question whether any money is payable by the Defendant to the Plaintiff is decided solely by the state of accounts between them. In this case there is a direct contractual obligation to pay monies and it is only for the purpose of

ascertaining the quantum that an account is necessary. The liability exists, as it were, independently of the account in a sense which does not obtain as between partners or principal and agent. See Hurrinath Rai v Krishna Kumar (1887) 14 Cal. 147 P.C. and Kothandapani v Sreemanavedan (1939) 57 Mad. 378. My conclusion is that this is not a suit essentially for accounts, but a suit for rent, and that Article 116 governs it. I think that Mahon J. should have held that the Respondent's claim was time barred in respect of all rent accrued due more than six years prior to the filing of the plaint. If Article 120 applies, the result would, I think, be the same. I think there would not be any question in this case of charging the deceased with earlier arrears as an initial balance. I understand that principle to apply only where the accounting party has received money which it is his duty to pay to another, and not where there is a simple contract debt of an amount ascertainable only by taking accounts. I have been dealing so far with the period of the first lease and the claims thereunder. I think all those claims are on the same footing. The claim with regard to machinery and movables depends on clauses 4 & 5 of the lease, just as the rent depends on clause 1. I now turn to the "interregnum".

It might have been thought that on the termination of the first lease by effluxion of time the deceased was holding over as tenant at will on the terms of the expired lease, but neither party so contends. One has accordingly the position of simple co-ownership with one co-owner enjoying de facto possession and receiving the profits of the land. In these circumstances I think the claim is "essentially for accounts". In the case of joint family property co-parceners have been held to be within Article 89. Asghar v Khurshed, (1902) 24 All. 27 (P.C.) But in that case the agency had been created by express acts and did not depend only on the relationship of co-parceners. It seems also that co-owners, where one alone receives the revenue due to both, may be within Article 89. See Chandra v Nobin, (1912) 40 Cal. 108 (reversed on another point sub nomine Nobin v Chandra, (1916) 44 Cal. 1. (P.C.)) In that case an express agency had been created and was held to continue as between the agent and the infant heirs of the deceased principal. It seems to be a question of fact

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whether agency exists or should be inferred from the circumstances. I think that in accordance with these authorities agency might possibly have been found to exist in this case, but there is no such finding. The inference that it existed is not of compelling strength, and I do not think we need find now that the deceased was the agent of the Respondent. If they were co-owners and nothing more, I think Article 120 applies, and the claim in respect of the interregnum would not be barred. In any event, as I have said, I think Mahon J's decision must stand for all purposes.

The only remaining issue on the appeal to us is one of fact and concerns a document to which I shall refer as Exhibit 1.

Exhibit 1 purports to be an agreement or memorandum executed on 14th July, 1949, by the deceased and the respondent and witnessed by one George Papoudopolus, the deceased's clerk, confirming that all accounts between the parties up to 30th June, 1949, had been settled and nothing was due by either to the other. This document was produced from the deceased's papers at the very last moment before trial, and the Respondent's first reaction to it was to deny that she had ever signed it. The signature was examined by handwriting experts and the witness Papoudopolus was found with some difficulty and a statement was taken from him. On the resumption of the trial the Respondent modified her attitude and gave evidence admitting her signature, but saying that essential misrepresentations as to the nature of the document had been fraudulently made to her by the deceased and that non erat factum. The learned Chief Justice so found and that finding is attacked by the Appellants. Exhibit 1 bears the same date as the second lease and operates up to the day before that lease came into effect. It appears to have been typed on the same typewriter as the second lease, and it contains the same curious error that the Respondent is referred to by her maiden name, although she had been married for some years. It is common ground that the second lease was prepared and executed in the office of Mr. Desai, an advocate, who witnessed it. All this goes far to prove that Mr. Desai drafted Exhibit 1, but in my opinion it does no more for the Appellants than that. Indeed I think it supports the Respondent's

story, for if there had been a genuine settlement of accounts at the time of execution of the second lease one would have expected Exhibit 1 also to be executed in Mr. Desai's office and before him. The Appellants contend that there was a heavy onus on the Respondent on this issue, which I accept as correct. They say that she should not be believed, because she made a dishonest claim for rent under the second lease in her original plaint. I think this is going much too far. It certainly did later appear that the deceased had paid the rent under the second lease - perhaps the only one of his obligations to the Respondent which he is shown to have met - but I think it by no means follows that her claim was made dishonestly. Her initial denial and subsequent admission of her signature on Exhibit 1 are relied on for the same purpose; but, assuming her contentions to be generally true, I think it is not surprising, and certainly not indicative of dishonesty, that she should say, "I never signed anything like that." In support of the probability of Exhibit 1 being genuine the Appellants point to the loan of £2,000 which the Respondent made to the deceased after the second lease when he was in London, but there are obvious reasons which might lead to this, even though earlier accounts remained unsettled. Finally, the Appellants point to large sums paid by the Respondent for income tax and say that she would not have been liable for them, and would not have paid them, unless she had received large sums as income from the estate. It is, however, in evidence that she protested strongly against these claims and only paid when advised by the deceased's accountant that she must. The accounts on which he gave that advice were shown to be almost certainly incorrect and based on false information supplied by the deceased. These arguments are wholly insufficient, either separately or cumulatively, to justify us in reversing the finding of the learned Chief Justice, but I am in any event of the same opinion as he was, that fraud was proved to conclusion against the deceased.

The Respondent made full disclosure of her financial position and I think it was clearly proved that she never received, either at the end of June, 1949, or earlier, the large sums apparently due to her. I think it was also proved that the deceased did not pay to her even such sums as he

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18th July 1956 - continued.

claimed to have paid. It was established that in 1947 he lent her £6,000 to start or run an hotel business. This was still outstanding on 30th June, 1949, and on the insistence of the deceased was repaid when the estate had been sold in September or October, 1949. This seems wholly inconsistent with Exhibit 1 being a valid and genuine document. The appellants say that the £6,000 loan was something so distinct from the estate accounts that it might well be excluded from the operation of Exhibit 1. I think not: Exhibit 1 does not purport to deal only with estate accounts or any other sort of accounts, but with a complete and general settlement of accounts. I agree on this issue with the reasoning and conclusions of the learned Chief Justice. I find that there was no settlement of the Respondent's claims in July, 1949, and that she was induced to sign Exhibit 1 in ignorance of its nature and by the fraud of the deceased.

We were asked to amend the decree in various minor respects, notably to provide for the position which would arise if on taking the accounts it were found that no money was due to the Respondent. I think this contingency extremely remote, and having regard to the conduct of the deceased I think the Respondent should still be entitled to her full costs of obtaining the decree for accounts. There is Privy Council authority for such an order. See Hurrinath Rai v Krishna Kumar Bakshi, (1887) 14 Cal. 147, 159. I do not make any exception as regards the costs of examining and proving the signature on Exhibit 1, for I do not think the initial denial of that signature was in the circumstances unreasonable. I would dismiss this appeal with costs.

F.A.BRIGGS,
JUSTICE OF APPEAL.

Worley, President.

JUDGMENT OF WORLEY P.

I also agree and cannot usefully add anything. An order will be made in the terms proposed in the judgment of the learned Justice of Appeal.

N. A. WORLEY,
PRESIDENT.

Sinclair, V-P.

JUDGMENT OF SINCLAIR V-P.

I have had the advantage of reading the judgment prepared by the learned Justice of Appeal and am in entire agreement with it and have nothing to add.

R.O. SINCLAIR,
VICE-PRESIDENT.

DAR-ES-SALAAM.
18th July, 1956.

No. 20.

ORDER DISMISSING APPEAL

In the Court of Appeal for Eastern Africa.

No.20.

Order dismissing Appeal.

18th July, 1956.

IN HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA
AT DAR ES SALAAM

CIVIL APPEAL No.26 of 1956

Between:

1. ARIADNE TZAMBURAKIS)
2. NAFSIKA LAMBROU) ... Appellants

- and -

EFTICHIA RODOUSSAKIS ... Respondent

(Appeal from a judgment and decree of Her Majesty's High Court of Tanganyika at Dar es Salaam (Sir Herbert Cox, C.J.) dated 16th December 1955 in

Civil Case No. 5 of 1952

Between:

Eftichia Rodoussakis ... Plaintiff

- and -

1. Ariadne Tzamburakis)
2. Nafsika Lambrou) ... Defendants)

In Court this 18th day of July, 1956

Before the Honourable the President (Sir Newnham Worley)
the Honourable the Vice-President (Sir Ronald Sinclair)
and the Honourable Mr. Justice Briggs, a Justice of Appeal.

O R D E R

THIS Appeal coming on for hearing on the 27th day of June, 1956, in the presence of B. O'Donovan Esquire and J.P.G. Harris Esquire, Advocates for the Appellants and G.N. Houry Esquire Q.C., Advocate for the Respondent it was ordered that this appeal do stand for judgment and upon the same coming for judgment this day IT IS ORDERED that the Appeal be dismissed with costs.

GIVEN under my hand and the Seal of the Court at Nairobi, the 18th day of July, 1956.

Sd. F. HARLAND,
Registrar.

Issued this 18th day of December, 1956.

In the Court of Appeal for Eastern Africa.

No.21.

Order granting Conditional Leave to Appeal to Her Majesty in Council.

12th October, 1956.

No. 21.

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

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

CIVIL APPLICATION No.7 of 1956

(In the matter of an intended appeal to Her Majesty in Council)

Between:

1. ARIADNE TZAMBURAKIS)
2. NAFSIKA LAMBROU) Applicants

- and -

EFTICHIA RODOUSSAKIS Respondent

(Application for conditional leave to appeal to Privy Council from a judgment and order of Her Majesty's Court of Appeal for Eastern Africa at Dar es Salaam dated 18th July 1956 in

Civil Appeal No.26 of 1956

Between:

Ariadne Tzamburakis & Another Appellants

- and -

Eftichia Rodoussakis Respondent

In Chambers this 12th day of October 1956.
Before the Honourable the Acting President
(Sir Ronald Sinclair)

O R D E R

UPON application made to this Court by Counsel for the above-named Applicants on the 13th day of September, 1956, for conditional leave to appeal to Her Majesty in Council under Section 3 of the East African (Appeals to Privy Council) Order in Council 1951 AND UPON HEARING Counsel for the Applicants and for the Respondent THIS COURT DOTH ORDER That the Applicants do have leave to appeal under paragraph (a) of Section 3 to Her Majesty in Council from the Judgment and Order above-mentioned subject to the following conditions

1. That the applicants do within thirty days from the date hereof enter into good and

sufficient security, to the satisfaction of the Registrar, in the sum of Shillings Ten thousand (a) for the due prosecution of the appeal (b) for payment of all costs becoming payable by them to the Respondent, in the event of (i) the applicants not obtaining an order granting them final leave to appeal or (ii) the appeal being dismissed for non-prosecution or (iii) the Privy Council ordering the applicants to pay the Respondent's costs of the appeal or any part of such cost;

2. That the applicant shall apply as soon as practicable to the Registrar of this Court for an appointment to settle the record and the Registrar shall thereupon settle the record with all convenient speed, and that the said record shall be prepared and shall be certified as ready within sixty days from the date hereof;

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

4. That if the record is prepared by the applicants, the Registrar of this Court shall on the time of settling of the record state the minimum time required by him for examination and verification of the record, and shall later examine and verify the same so as not to prejudice the applicants in the matter of preparation of the record within the said sixty days;

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

6. That the applicants shall have liberty to

In the Court of Appeal for Eastern Africa.

No.21.

Order granting Conditional Leave to Appeal to Her Majesty in Council.

12th October, 1956 - continued.

apply for extension of the times aforesaid for just cause;

7. That the applicants shall lodge their application for final leave to appeal within fourteen days from the date of the Registrar's certificate above-mentioned;

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

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the intended appeal.

GIVEN under my hand and the Seal of the Court at Nairobi, the 12th day of October, 1956.

(Sgd.) F. HARLAND,
Registrar.

ISSUED this 15th day of October, 1956.

No.22.

Order granting Final Leave to Appeal to Her Majesty in Council.

26th February, 1957.

No. 22.

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

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

CIVIL APPLICATION No.7 of 1956

(In the matter of an intended appeal to Her Majesty in Council)

Between:

1. ARIADNE TZAMBURAKIS)
2. NAFSIKA LAMBROU)

Applicants

- and -

EFTICHIA RODOUSSAKIS

Respondent

In the Court of Appeal for Eastern Africa.

No.22.

Order granting Final Leave to Appeal to Her Majesty in Council.

26th February, 1957 - continued.

(Intended appeal from the final judgment of the Court of Appeal for Eastern Africa sessions holden at Dar es Salaam, dated the 18th day of July, 1956, and the formal order thereon of the same date

in

Civil Appeal No.26 of 1956)

Between:

1. Ariadne Tzamburakis)
2. Nafsika Lambrou) Appellants

- and -

Eftichia Rodoussakis Respondent

In Chambers this 26th day of February, 1957. Before the Honourable the Vice-President (Sir Ronald Sinclair)

O R D E R

UPON the application presented to this Court on the 7th day of February 1957, by Counsel for the above-named Applicants for final leave to appeal to Her Majesty in Council AND UPON READING the affidavit of John Philip Gladstone Harris of Nairobi in the Colony of Kenya, Advocate, sworn on the 7th day of February 1957 in support thereof and the exhibits therein referred to and marked "JPGH.1" and "JPGH.2" AND UPON HEARING Counsel for the Applicants and in the absence of the Respondent duly served THIS COURT DOTH ORDER that the application for final leave to appeal to Her Majesty in Council be and is hereby granted AND DOTH DIRECT that the record, including this Order, be despatched to England within 14 days from the date of issue of this Order AND DOTH FURTHER ORDER that the costs of this application do abide the result of the appeal.

GIVEN under my hand and the Seal of the Court at Nairobi the 26th day of February 1957.

F. HARLAND,
Registrar.

H.M. Court of Appeal for Eastern Africa.

ISSUED this 26th day of February, 1957.

Exhibit

Defendants' Exhibit.

Exhibit 1.

Memorandum of Satisfaction Between Eftichia George Tzamburakis and Nico Tzamburakis

14th July 1949.

EXHIBIT 1.

WE, the undersigned EFTICHIA GEORGE TZAMBURAKIS and NICO TZAMBURAKIS both Greeks of Tanga, hereby confirm that all our accounts up to the 30th day of June, 1949 are settled and there is nothing due by either of us to the other.

IN WITNESS we have set our hands this 14th day of JULY 1949.

WITNESS:

signed (N. TZAMBURAKIS
(E. RODOUSSAKIS 10

One shilling stamp.

H.M.High Court of Tanganyika
Civil Case No. 5 of 1952
Exhibit No. 1.
Put in by Defendant
Sgd. H. Cox
Chief Justice.

IN THE PRIVY COUNCIL No. 5 of 1957

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

FOR EASTERN AFRICA

B E T W E E N:

1. ARIADNE TZAMBURAKIS)
2. NAFSIKA LAMBROU) ... Appellants

- and -

EFTICHIA RODOUSSAKIS ... Respondent

RECORD OF PROCEEDINGS

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

Solicitors for the Appellants.