

RC
GIT 62

Judgment
36, 1965

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 38 of 1964

ON APPEAL

FROM THE COURT OF APPEAL FOR
EASTERN AFRICA AT NAIROBI

B E T W E E N :

1. DEVKUNVERBEN widow of
POPATLAL KARMAN
2. MEGHJI KARMAN MALDE
3. DEVCHAND KARMAN MALDE and
4. NANDLAL POPATLAL MALDE in
their capacity as the
Executors of the Estate of
POPATLAL KARMAN deceased
and
5. MEGHJI KARMAN and
6. DEVCHAND KARMAN trading
as POPATLAL KARMAN and
COMPANY

APPELLANTS

and

AHAMED DIN BUTT S/O
MOHAMED BUX BUTT

RESPONDENT

RECORD OF PROCEEDINGS

HATCHETT JONES & CO.,
90, Fenchurch Street,
London E.C.3.

Solicitors for the Appellants.

M. KEAN,
44, Welbeck Street,
London W.1.

Solicitors for the Respondent.

~~P.L.~~
~~G.I.G.2~~

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 FEB 1966
25 LINCOLN SQUARE,
LONDON, W.C.1.

30975

(i)

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 38 of 1964

ON APPEAL

FROM THE COURT OF APPEAL FOR
EASTERN AFRICA AT NAIROBI

B E T W E E N :

1. DEVKUNVERBEN widow of
POPATLAL KARMAN
2. MEGHJI KARMAN MALDE
3. DEVCHAND KARMAN MALDE and
4. NANDIAL POPATLAL MALDE in
their Capacity as the
Executors of the Estate of
POPATLAL KARMAN deceased
and
5. MEGHJI KARMAN and
6. DEVCHAND KARMAN trading
as POPATLAL KARMAN and
COMPANY

Appellants

and

AHAMED DIN BUTT S/O
MOHAMED BUX BUTT

Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Documents	Date	Page
	<u>In the Supreme Court of Kenya at Nairobi</u>		
1.	Plaint	28th November 1960	1
2.	Defence	24th March 1961	2
3.	Court Notes	12th November 1962	9
	<u>Plaintiffs Evidence</u>		
4.	Meghji Kurman Malde	12th 13th 14th November 1962	12
	" " "	14th November 1962	23

(ii)

No.	Description of Documents	Date	Page
5.	Tilak Raj Johar	14th November 1962	26
6.	Wachira Aram Githanga	14th November 1962	27
7.	Devjan Karman Malde	14th November 1962	28
8.	Dribhuban Gurdhan Bakrania	14th November 1962	29
9.	Sayed Mohamed Allahadad	14th November 1962	31
10.	Court Notes	14th November 1962	38
11.	Meghji Kurman Malde (Recalled)	14th November 1962	38
12.	Court Notes	14th November 1962	39
	<u>Defendants Evidence</u>		
13.	Ahmed Din S/O Mohamed Bux Butt	16th November 1962 and 17th December 1962	40 44
	<u>Counsels Addresses</u>		
14.	(a) Sirley for Defendant	17th December 1962	48
	(b) Khanna for Plaintiffs	17th and 18th December 1962	50
15.	Judgment	11th February 1963	52
16.	Decree	11th February 1963	63
17.	Notice of Appeal	19th February 1963	65
	<u>In the Court of Appeal for Eastern Africa at Nairobi</u>		
18.	Memorandum of Appeal	18th April 1963	67
19.	Notes taken by Mr. Justice Crawshaw J.A.	4th to 9th March 1964	73
20.	Notes taken by the Hon. the Vice President, Sir Trevor Gould	4th to 9th March 1964	84
21.	Notes taken by the Hon. Sir Samuel Quashie-Idun, P.	4th to 9th March 1964	100

(iii)

No.	Description of Documents	Date		Page
22.	Judgment of Sir Trevor Gould	26th March	1964	106
23.	Judgment of Sir Samuel Quashie-Idun	26th March	1964	121
24.	Judgment of Mr. Justice Crawshaw	26th March	1964	122
25.	Order of the Court of Appeal	26th March	1964	123
26.	Order giving final leave to appeal to the Judicial Committee of the Privy Council	30th July	1964	124

E X H I B I T S

Exhibit Mark	Description PLAINTIFFS EXHIBITS	Date		Page
1.	Guarantee	15th August	1956	138
2.	Guarantee	19th February	1957	140
3.	Equitable Mortgage	15th August	1956	139
4.	Plaintiffs Statement of Account	31st July	1956	133
5.	Letter Defendant to Plaintiffs	27th July	1956	132
6.	Letter A.M. Khan to Plaintiffs	27th July	1956	132
7.	TITLE DEED RE: PLOT NO. 1113 Eastleigh Section 3 Nairobi	2nd April	1947	126
8.	Bundle of Correspondence (12 letters)	17th June to 26th November	1960	143

Exhibit Mark	Description PLAINTIFFS EXHIBITS	Date	Page
9.	Acknowledgment of Debt by Kajiado European Stores	25th February 1958	142
10.	Another Statement of Account by Plaintiffs	21st March 1957	141
11.	Partnership agreement of Kajiado European Stores	14th July 1956	130
12.	Agreement for Sale of Business of Kajiado European Stores	Undated	152
13.	Equitable Mortgage by Defendant in favour of Barclays Bank	27th July 1951	128
14.	Agreement for Sale re Plot No. 209/2751, Nairobi	8th March 1956	129
<u>DEFENDANTS EXHIBITS</u>			
"A"	Specimen of A.M. Khan's alleged signature	Undated	155
"B"	Memo - Plaintiffs to Station Master, Kajiado	4th November 1958	142

In the Supreme Court of Kenya at Nairobi

No. 1.

Plaint

28th November, 1960.

Continued.

5. MEGHJI KARMAN and	}	::: PLAINTIFFS.
6. DEVCHANG KARMAN trading as POPATLAL KARMAN & COMPANY, Merchants, c/o Veljee Devshi & Bakrania, Advocates, Market Mansion, Bazaar Street, P.O.Box 5087, Nairobi.		

v e r s u s

10

AHAMED DIN BUTT s/o MOHAMED BUX BUTT c/o Messrs. Sirley & Kean, Advocates, Government Road, NAIROBI.	}	::: DEFENDANT.

P L A I N T

1. Popatlal Karman late of Nairobi died on the 19th day of October 1957 having made his Will on the 15th day of September 1955 and appointed the first-four named Plaintiffs his Executors and Trustees. 20

2. The said first-four named Plaintiffs proved the Will on the 19th day of August 1958 in Her Majesty's Supreme Court of Kenya at Nairobi forth its Probate and Administration Cause Number 53 of 1958.

3. The first-four named Plaintiffs are suing in their capacity as the Executors of the estate of late Popatlal Karman Deceased who was a partner at all material dates with the remaining Plaintiffs in the firm of Popatlal Karman & Company. 30

4. Under a Guarantee in writing dated the 15th day of August 1956, given by the Defendant to the Plaintiffs whereby:

(a) In consideration of the Plaintiffs agreeing to supply sugar on credit to one Sayed Omar and Brothers of Kajiado in the Colony of Kenya the Defendant agreed to be answerable and responsible 40

to the Plaintiffs for the due payment by the said Sayed Omar and Brothers of Kajiado for all such sugar which the Plaintiffs may from time to time supply to the said Sayed Omar and Brothers but subject to the limitation that the Defendant's liability under the Guarantee shall not at any time exceed the sum of Shillings Thirty thousand (Shs.30,000/-).

In the Supreme
Court of Kenya
at Nairobi

No. 1.

Plaint

28th November,
1960.

Continued.

- 10 (b) The Defendant agreed that the aforesaid agreement should be a continuing guarantee to the Plaintiffs for all debts whatsoever and whensoever contracted by the said Sayed Omar and Brothers of Kajiado with the Plaintiffs in respect of sugar supplied to them subject always to the above limitation.
- 20 (c) In consideration aforesaid and for better securing the said Guarantee of Shs.30,000/- the Defendant agreed to mortgage by way of Equitable Mortgage in favour of the Plaintiffs ALL THAT piece or parcel of land known as Plot Number 1113, Section III, Eastleigh, Nairobi, together with the buildings thereon.
- 30 (d) The Plaintiffs would be at liberty without notice to the Defendant at any time and without in any way discharging the Defendant from any liability thereunder to grant time or other indulgences to the said Sayed Omar and Brothers of Kajiado and to accept payment from them in cash or by means of negotiable instruments and to treat the Defendant in all respects as though he was jointly and severally liable with the said Sayed Omar and Brothers of Kajiado to the Plaintiffs instead of being merely surety for them.
- 40 5. Under a supplemental Guarantee in writing dated the 19th day of January 1957, given by the Defendant to the Plaintiffs whereby:
- (a) In consideration of the Plaintiffs agreeing to supply the said Sayed Omar and Brothers of Kajiado and Kajiado European Stores of Kajiado with sugar and any other goods the Defendant agreed to be answerable and responsible to the Plaintiffs for all such

In the Supreme
Court of Kenya
at Nairobi

No. 1.

Plaint

28th November,
1960.

Continued.

sugar and any other goods as the Plaintiffs may from time to time supply to the said Sayed Omar and Brothers of Kajiado and the said Kajiado European Stores to the extent of Shs.45,000/- instead of Shs.30,000/- as mentioned in the Guarantee dated the 15th day of August 1956.

(b) In consideration aforesaid the Defendant agreed to mortgage his aforesaid property being Plot Number 1113 more fully described in the Guarantee dated the 15th August 1956, for the sum of Shs.45,000/- instead of Shs.30,000/-.

10

(c) The Guarantee dated the 15th day of August 1956, should thenceforth be read and construed as if the sum of Shs.45,000/- and the name of Kajiado European Stores were substituted.

6. By a Memorandum of Equitable Mortgage by deposit of documents executed in the form prescribed by law, by both parties to this suit on the 15th day of August 1956, and registered in the Crown Lands Registry at Nairobi on the 20th August 1956, in Volume N 28 Folio 176/7 the Defendant and the Plaintiffs respectively acknowledged having deposited and having received the documents of title in respect of the property mortgaged as and by way of mortgage.

20

7. The Plaintiffs duly sold and delivered goods to the said Sayed Omar and Brothers of Kajiado and the Kajiado European Stores of Kajiado for a total sum of Shs.41,054/33, which still remains unpaid.

30

8. There is now due to the Plaintiffs on the security of the said Guarantees and the Equitable Mortgage:

(a). The sum of Shs.41,054/33 as aforesaid for goods; and

(b). The sum of Shs.11,903/60 for interest thereon computed from 1st January 1958 down to and including the 31st day of October 1960, and accordingly the aggregate sum due is Shs.52,957/93.

40

9. The Plaintiffs duly demanded payment of the aforesaid aggregate sum of Shs.52,957/93 from the Defendant but the Defendant has refused and/or neglected to pay the same, or any part thereof.

In the Supreme
Court of Kenya
at Nairobi

No. 1.

10. The cause of action in this suit has arisen at Nairobi within the jurisdiction of this Honourable Court.

Plaint

28th November,
1960.

The Plaintiffs accordingly pray for:-

- 10 (a). An order that the Defendant do pay to the Plaintiffs the sum of Shs.45,000/- under the said Guarantees and the said Equitable Mortgage;
- (b). Interest on the said sum of Shs.45,000/- at the rate of 8% p.a. from the date of filing of this suit to the date of judgment and thereafter on the decretal amount at 6% p.a. until payment in full;
- 20 (c). Costs of this suit, together with interest thereon at 6% p.a. from the date of judgment until payment in full;
- (d). An account be directed to be taken by the Registrar of what is due to the Plaintiffs under the terms of the aforesaid Guarantees.
- 30 (e). And upon the Defendant paying into Court what shall be certified as due to the Plaintiffs as aforesaid on or before a day named the Plaintiffs be directed to deliver up to the Defendant or to such person as he appoints all documents in the possession or power of them relating to the premises charged or mortgaged and if so required at the cost and expense of the Defendant and against payment of their costs charges and expenses execute a discharge of the property charged or mortgaged so as to release the same from the mortgage.
- 40 (f). In default of payment as aforesaid sale of the premises charged or mortgaged be decreed, and
- (g). That if the nett proceeds of the sale

Continued.

In the Supreme Court of Kenya at Nairobi

No. 1.

Plaint

28th November, 1960.

Continued.

are insufficient to pay such amount and such subsequent interest and costs in full, the Plaintiffs be at liberty to apply for a personal decree of the amount of the balance.

DATED AT NAIROBI this 28th day of November 1960.

Sd. T.G. Bakrania.
for VELJEE DEVSHI & BAKRANIA,
ADVOCATES FOR THE PLAINTIFFS.

No. 2.

Defence

24th March, 1961.

NO. 2.

DEFENCE

10

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2127 OF 1960.

- 1. DEVKUNVERBEN widow of POPATLAL KARMAN,
- 2. MEGHJI KARMAN MALDE,
- 3. DEVCHAND KARMAN MALDE and
- 4. NANDLAL POPATLAL MALDE, in their capacity as the Executors of the Estate of POPATLAL KARMAN, Deceased, and
- 5. MEGHJI KARMAN and
- 6. DEVCHANG KARMAN trading as POPATLAL KARMAN & COMPANY, Merchants, c/o Veljee Devshi & Bakrania, Advocates, Market Mansion, Bazaar Street, P.O. Box 5087, Nairobi

:::: PLAINTIFFS.

20

30

v e r s u s

AHAMED DIN BUTT s/o MOHAMED BUX BUTT)
c/o Messrs. Sirley & Kean, Advocates) DEFENDANT.
Government Road, NAIROBI.)

DEFENCE

In the Supreme
Court of Kenya
at Nairobi

No. 2.

Defence

24th March,
1961.

Continued.

1. The Defendant states that his address for service now is care of Sirley & Kean, Advocates, Princes' House, Government Road, Nairobi.

2. The Defendant cannot read or write English except for being able to sign his own name in English script.

3. The Defendant denies that he gave the guarantees in writing dated the 15th August, 1956, or the 19th January, 1957, or the Memorandum of Equitable Mortgage referred to in the Plaintiff. The Defendant will admit that the signatures on the said guarantees and on the said Memorandum of Equitable Mortgage are the signatures of the Defendant, but will maintain that he the Defendant was not aware of the contents or nature of the said documents. When the Defendant signed the said documents he did so on a misrepresentation made by one KHAN that the Defendant was signing documents in connection with the purchase of a property by the Defendant which was being handled by Mr. O'Beirne, the Employer of the said KHAN.

4. The guarantees and Equitable Mortgage sued upon were obtained by means of the misrepresentation aforesaid by the said KHAN which misrepresentation was made by the said KHAN as agent for the Plaintiffs and/or with the knowledge and consent of the Plaintiffs and/or the person through whom the Plaintiffs, suing in a representative capacity, claim.

5. Further or in the alternative the said guarantees and the said Equitable Mortgage were obtained by means of keeping silence as to material circumstances and are, therefore, invalid.

6. The material circumstances about which silence was kept are:-

- (a) The nature of the documents which the Defendant was called upon to sign.
- (b) That Kajiado European Stores had no licence to purchase sugar.
- (c) That Kajiado European Stores was at

In the Supreme Court of Kenya at Nairobi

No. 2.

Defence
24th March, 1961.
Continued.

the date of the supplementary guarantee not in existence or in the alternative not registered under the provisions of the Registration of Business Names Ordinance.

7. Further or in the alternative and without prejudice to the foregoing, the Defendant will maintain that as a result of the terms of the guarantee of the 19th day of January, 1957, he is under no liability in respect of sugar supplied on credit to Sayid Omer & Brothers subsequent to the 19th day of January, 1957. 10

8. The Defendant denies that the Plaintiffs are entitled to claim against him under the guarantee or at all in respect of commission on sugar or in respect of interest.

9. Further or in the alternative and without prejudice to the foregoing, the Defendant denies that the Plaintiffs supplied the alleged or any goods to Sayid Omer & Brothers or Kajiado European Stores or that they did so (if at all) under the alleged guarantees or in accordance with the terms thereof. 20

10. Further or in the alternative and without prejudice to the foregoing the Defendant says that Kajiado European Stores had no licence to purchase sugar and accordingly no action can be maintained by the Plaintiffs against the Defendant arising out of the alleged guarantee covering supplies of sugar to Kajiado European Stores, as any such guarantee is vitiated by illegality. 30

11. Save as expressly admitted herein the Defendant denies every allegation contained in the Plaint as though the same were expressly set out herein and denied seriatim.

WHEREFORE the Defendant prays that this action against him may be dismissed with costs.

DATED at NAIROBI this 24th day of March 1961.

Sd. ? Kean.
SIRLEY & KEAN.
ADVOCATES FOR THE DEFENDANT.

COURT NOTES

In the Supreme
Court of Kenya
at Nairobi

IN HER MAJESTY'S SUPREME COURT OF KENYA AT
NAIROBI

No. 3.

Court Notes.

CIVIL CASE NUMBER 2127 OF 1960.

12th November,
1962.

- | | | |
|----|---|-------------------|
| 10 | 1. DEVKUNVERBEN widow of
POPATLAL KARMAN,
2. MEGHJI KARMAN MALDE,
3. DEVCHAND KARMAN MALDE And
4. NANDIAL POPATLAL MALDE,
in their capacity as the
Executors of the Estate
of POPATLAL KARMAN,
Deceased, and
5. MEGHJI KARMAN and
DEVCHAND KARMAN
trading as POPATLAL KARMAN
& COMPANY, Merchants,
c/o Veljee Devshi & Bakrania,
Advocates, Market Mansion,
Bazaar Street, P.O. Box 5087,
<u>NAIROBI.</u> | } :::: PLAINTIFFS |
|----|---|-------------------|

v e r s u s

AHAMED DIN BUTT s/o MOHAMED BUX BUTT ::DEFENDANT
c/o Messrs. Sirley & Kean, Advocates,
Government Road, NAIROBI.

COURT NOTES

12.11.62.

Before Goudie, J.

30 Khanna for Plaintiffs with Bakrania.
Sirley for Defendant.

Khanna

Suing on guarantees and equitable mortgage.
45,000/- on guarantee. Issue of misrepresentation
by Khan. Not agent for plaintiffs. Silence of
material factors in guarantee. Indian Contract
Act "keeping silence" means fraudulent silence
when duty to speak.

In the Supreme Court of Kenya at Nairobi

Illegality. Plaintiffs not parties to illegality.

Defendant for four years never raised questions of misrepresentation.

No. 3.
Court Notes.
12th November, 1962.
Continued.

Letters	17. 6.60	} Equitable Mortgage	
	6. 7.60		
	18. 7.60		Valid consideration for mortgage.
	18. 8.60		No consideration. Why consideration shown?
	1. 9.60		Details
	14. 9.60		Denial of guarantee.
	4.11.60		
	8.11.60		
	26.11.60		Details of guarantee.

Nothing in pleadings to show how Khan agent of plaintiffs. Hamilton v. Watson (1845) 8 E.R.1339. Strictly not entitled to receive information other than as requested. Concealment. S.142 and 143 I.E.A. Balkrishna v. N. Kirtikar & Others (1891) I.L.R. Vol. XV 585.

Final clause of supplemental guarantee contains obvious error. Contradiction of intention. Possible to correct obvious error. Barratt v. Wyatt, E.R. 54, 961. As to the construction.

Lord Arlington v. Merricke 85 E.R. 1281, last para. p.1226.

Duty of disclosure: Owen v. Homan (1851) 42 E.R. 307.

Khanna. I have drafted six issues and Mr. Sirley twelve and we cannot agree on the issues. 30

Court: I can easily see generally what are the broad issues but in a case of this complexity one can try to settle a few broad issues or go into detail and multiply the issues. If counsel has no objection I think this is a case in which if it is helpful to settle issues then I think they can best be listed by me before I proceed to consider the evidence in my judgment after hearing 40

the evidence. If, however, counsel would prefer issues to be settled now, then I must adjourn for an hour or so possibly and try to settle issues from the issues submitted by counsel but which they are unable to agree. Both counsel state that issues so far as they are concerned may be settled later.

In the Supreme
Court of Kenya
at Nairobi

No. 3.

Court Notes.

12th November,
1962.

Continued.

Khanna.

10

A great deal paid for goods and only ultimate balance which is subject of suit on guarantee. No pleading directed to anything other than 52,000/- in issue. S.60 Indian Contract Act. Registration of Business Names Ordinance. Particular section not affected. Unregistered firm cannot escape liability for own debts - why cannot sue.

20

Onus. Important for defendant to start and evidence of plaintiff should be reserved on one or two issues on which onus rests on plaintiff until later.

Hearing issues. Misrepresentation and fraudulent concealment and necessary for defendant to show this and also consent or knowledge of plaintiffs agency. Guarantee speaks for itself. O. XVII, r.3.

Often no reserve on small specific issues. I wish to reserve evidence on which issues on which onus on defendant but will produce evidence on which issues on me.

30

Sirley.

Guarantees denied. Plaintiff must prove guarantees. Para. 3 Defence, and sum due. Only signatures admitted.

Para. 7 Defence. Onus on plaintiff to show who is liable under guarantees. Guarantees not exhibited even yet.

Khanna. Signatures on documents admitted.

RULING.

Ruling

40

In my view O. XVII, R.5 does not affect the usual onus of proof but merely confers an additional right on "the party beginning" with regard to certain matters on which the onus rests on the other side.

Although the signatures on the guarantees

In the Supreme Court of Kenya at Nairobi

are admitted their purport and the binding nature of the same against specific parties is denied. They are in my view part of the plaintiffs' case and he must produce them and call evidence to show generally the circumstances in which they came to be executed.

No. 3.

Court Notes.

I rule that the plaintiff must commence.

12th November, 1962.

W.H. Goudie, J.

Continued.

Plaintiffs Evidence

NO. 4.

PLAINTIFFS EVIDENCE

10

No. 4.

MEGHJI KURMAN MALDE.

MEGHJI KURMAN MALDE

12.11.62

12th, 13th, and 14th November, 1962.

Coram as above.

2.15 p.m.

Examination

P.W.1. MEGHJI KURMAN MALDE, sworn:

One of plaintiffs. Knew firm of Sayed Omar & Bros. Shs. 53,000/- odd due. Shs.41,054/33 is unpaid balance owing to plaintiffs, Shs.11,903/60 due for interest. Total due Shs. 52,957/93. Goods supplied in pursuance of guarantees dated 15.8.56 and 19.1.57 and Equitable Mortgage dated 15.8.56. 20

Exhibits 1 - 4

I produce the Guarantees Exhibits 1 and 2 and Equitable Mortgage, Exhibit 3. I also produce Statement of Account, Exhibit 4, which I have extracted from our books.

In 1956 and 1957 there were three main agents for distribution of sugar in Kenya: 1. Messrs. Mehta Africa Ltd. 2. Messrs. Muljibhai Madhavani Ltd. 3. Kanji Naranji Ltd. Sub-agents for Kajiado District were the plaintiffs. Some time in latter part of 1956 Kajiado European Stores commenced business. Sayed Omar & Bros. has existed for quite a long time. In 1955 they made a composition in bankruptcy and I was appointed 30

by the Official Trustee as trustee in the bankruptcy. During 1956 we supplied sugar to Sayed Omar & Bros. up to end of 1956.

In the Supreme Court of Kenya at Nairobi

Plaintiffs Evidence

No. 4.

MEGHJI KURMAN MALDE

12th, 13th and 14th November 1962.

Examination continued.

10 I know Sayed Mohomed Allahadad and Abdul Khan. I was told by Khan and Allahadad that they were partners in the firm of Kajiado European Stores. Khan is now dead. Allahadad is still alive. I was not prepared to supply this firm with sugar without the Guarantee, Exhibit 1, and Mortgage, Exhibit 3. Some time in mid-July, 1956, Mr. Khan and Mr. Allahadad came to my shop regarding the supplying of sugar. I told them I have no objection provided I have cash payment or some security. Form of security not discussed at that time.

20 A few days later Mr. Khan came to my shop and told me that he had arranged with a friend of his who would give security of certain property and personally, both. When he brought the proposal I said I would like to see property to see if sufficient security. Mr. Khan and I went to see the property in Eastleigh. I saw it and was satisfied. He told me it belonged to one of his friends called Mr. Ahmad Din Butt. I was told he had place of business in Landies Road. I did not see the defendant at all. It was not mention what kind of personal security. I did not wish to find out if defendant's willing to give security.

30 I received letter dated 27.7.56 which has a signature on it. Exhibit 5.

Exhibit 5

I wanted to know if Mr. Ahamed Din Butt willing to give security, so Mr. Khan sent me a letter which I thought was signed by Mr. Ahamed Din.

40 I have seen defendant's signature on Exhibits 1, 2 and 3. It looks to me to be defendant's signature. At same time I received letter Exhibit 6. I knew signature of Khan and it seems to be his signature. At same time I got title deeds of Eastleigh property. Sent by messenger. I passed on the Deeds to my advocates. This is a photostat copy which is what he sent me. Exhibit 7. Khan did not go to my advocates. Exhibits 1 and 3 made on my instructions. Limit Shs. 30,000/- and referred to supply of sugar to Sayed Omar & Bros.

Exhibit 6

Exhibit 7

In the Supreme
Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 4.

MEGHJI KURMAN
MALDE

12th, 13th
and 14th
November 1962.

Examination
continued.

They also wanted a supply (Alladad and Khan) in name of Kajiado European Stores. I told them that some new guaranty could be given to me. Mr. Khan suggested that instead of new guarantee if I asked Mr. Ahamed Din if he would agree to give existing guarantee in name of Sayed Omar Bros. to be converted into joint name of Sayed Omar Bros. and Kajiado European Stores and also amount to be increased to Shs.45,000/-. Mr. Khan told me that Mr. Ahamed Din had agreed to cover other goods also as well as sugar. I instructed my lawyers to prepare Exhibit 2. I have never supplied goods to Kajiado Provision Stores. After 17.1.57 until October, 1957, all sugar went to Kajiado European Stores. I received payment by cheque and cash. I got cheques from Kajiado European Stores. After Exhibits 1, 2 and 3 prepared my advocate handed these documents to me. I passed them to Mr. Khan. I got Exhibits 1 and 3 from my advocate and handed to Mr. Khan in my shop. After obtaining signatures to documents Mr. Khan brought the documents back to me. I passed them to my advocate. I was not present when Exhibits 1 and 3 signed by defendant. I have no knowledge of what said by Khan to defendant at time of signing. I never told him what to say or not to say. When Exhibit 2 ready I took it from the advocates and sent it with a chit by messenger to Mr. Khan. It was later personally delivered back to me by Mr. Khan. Defendant has never made any enquiries about the documents from me.

We have a sugar account and on payment we allocated payments to consignees in date order. No instructions as to how we were to allocate payments. Since execution of Exhibits 1, 2 and 3 no communication from defendant about his title deeds or these documents.

Exhibit 8

Correspondence put in by consent. Exhibit 8. 17.6.60 first conversation. 40

I knew nothing of purchase of property by Mr. Khan in which Mr. O'Beirne acted as advocate. I have no knowledge whether or not Kajiado European Stores registered or not.

Shs.52,957/93 owed by Kajiado European Stores for goods and sugar supplied under guarantees.

Arrangement made in presence of Khan and Allahdad that we would supply sugar at F.O.R. Kajiado. Cost price plus Shs.1/50 our profit per bag. Total profit 3/- per bag and European Stores was to take 1/50 profit balance per bag. Profit of 3/- per bag laid down by Government under Price Control Regulations.

In the Supreme Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 4.

MEGHJI KURMAN
MALDE

12th, 13th
and 14th
November 1962

Examination
continued.

10 The European Stores had to pay for one lot before a further lot was supplied - in full. If not paid before next delivery 9% per annum interest agreed. Profit and interest charged on abovebasis. I have chekced the figures. All sugar collected at Kajiado. Rested in our name Popatlal Karman & Company. Released on our instructions to Station Master to deliver to Kajiado European Stores. No goods supplied to my knowledge to Sayed Omar & Bros. after 17th July, 1957. Nothing received of Shs.52,957/93. Ask
20 for judgment on prayer in plaint and liberty to bid at sale of mortgaged property. Not aware of particular licence required for sugar. We were sole sub-agents for Kajiado District but I do not know who took sugar from Kajiado European Stores.

Cross-examined:

Cross-
Examination

30 No licence required for sub-agents. I saw no trading licence in name of Kajiado European Stores. I had no business to find out. A trading licence is required to trade. We cannot ask all customers to produce their licences. I was not concerned to find out if trading licence. I wanted a written guarantee. I was not prepared to trust Mr. Khan's word.

Exhibits 5 and 6 appear to be in the same handwriting. I never saw signature of defendant before making Exhibit 5. I could only trust Mr. Khan for defendant's signature. I presumed it was defendant's signature. I could not say if date seems to be in defendant's handwriting in Exhibit 6.

40 I could not definitely say if defendant signed the letters. Exhibits 5 and 6 look to be defendant's handwriting. I cannot swear that the signatures in Exhibits 5 and 6 are in handwriting of defendant.

Sirley:

I object to admissibility of Exhibits

In the Supreme Court of Kenya at Nairobi

Plaintiffs Evidence

No. 4.

MEGHJI KURMAN MALDE

12th, 13th and 14th November 1962.

By Court

Cross-Examination (contd)

5 and 6 and say they should be excluded.

Khanna:

Cannot object to admissibility. Admitted.

Court:

Documents admitted and evidence can only now go as to weight to be attached to documents.

W.H. Goudie.

I am familiar with Mr. Khan's signature - in cheques signed by Mr. Khan in name of Kajiado European Stores. I have seen a number of signatures similar to those of Mr. Khan. I say it is his signature. I have not seen his hand-writing before - only signature. I never had letters from him. I think I never saw a letter written by Mr. Khan. I only received photostat copy of title deed. I never saw the original title deeds of property. I say signatures on Exhibits 3 and 5 look to be similar. I do not know how Kajiado Provision Stores came to be named on Exhibit 2. I have never myself heard of Kajiado Provisions Stores. I never realised mistake in document. I only knew about this to-day. I think I have seen Guarantee drawn by advocate. I do not know if drawn by Mr. Khan and typed in Mr. O'Beirne's office. I do not know when typed.

10

20

Exhibits 1 and 2 given to me by my advocate. I did not read them before giving them to Mr. Khan for signature or when returned by Mr. Khan. I trusted my advocate to do what I asked. I passed envelope to Mr. Khan. An envelope containing documents to be signed by defendant. I do not remember reading court case about defendant or that he was in prison on day he is supposed to have written Exhibit 5.

30

I checked Exhibit 4. No item of interest mentioned. Interest not charged as we do not know when we shall be paid. Interest due as soon as one delivery made. I do not charge interest until payment unless otherwise arranged.

40

According to letter defendant liable for supply of sugar prior to 15th August, 1956. The

guarantee was an assurance. The letter is a gentleman's agreement. I consider Exhibit 5 sufficient guarantee for gentleman and business man. I hold defendant liable from 27th July, 1956. Prior to 27.7.56 debit in our books to Sayed Omar Bros. I did not inform defendant that firm bankrupt. I have never met him. It was his business.

In the Supreme
Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 4.

10 Ceased to supply after October 1957. I never wrote to alleged surety until Messrs. Sirley & Kean wrote to me.

MEGHJI KURMAN
MALDE

13.11.62.

12th, 13th and
14th November,
1962.

Coram as above.

Cross-
Examination
continued.

P.W.1. recalled and re-sworn:

20 I have 'not necessarily' issued statements of account to Kajiado European Stores. We do not keep duplicates of statements of account. We have Invoice Books. I cannot produce a single statement of account relating to Kajiado European Stores or Sayed Omar & Bros. We have never submitted an invoice for sugar. We supplied sugar to Sayed Omar to Kajiado European Stores. We did not sell it. It remained our property. I cannot say if I never sold it whether money due for sugar.

13th November,
1962.

30 Exhibit 4. I produce Invoice No. 381. It is not made out to Kajiado European Stores. Invoice by Messrs. Mehta & Sons to Popatlal Karman. Nothing on Invoice to show it refers to Sayed Omar Bros. or Kajiado European Stores. Likewise Invoice No. 339. Nothing to suggest they received these goods. I cannot produce a single Invoice showing sale to Sayed Omar Bros. or European Stores as shown in Exhibit 4. I have another Invoice to Kajiado European Stores. The amount is there. Invoice 531 is to Mehta Bros. They wanted an Invoice as a proof to the D.C. that they had authority to sell sugar in that District. All Invoice references in Exhibit 4
40 are between Mehta and Karman. Because I did not sell goods to either of firms I did not make an Invoice to them.

In the Guarantee by "supply" I did not mean actual "sale". I only "supplied" goods - did not sell them. We gave them Invoices for

In the Supreme
Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 4.

MEGHJI KURMAN
MALDE

12th, 13th and
14th November,
1962.

Cross-
Examination
continued.

other goods. Sayed Omar and European Stores were supplied goods, none was actually sold. For small items they wanted prices so I gave them Invoices to show them the prices they would be charged. I did not sell goods to Sayed Omar Bros. and Kajiado European Stores. The goods always remained ours. They were only our agents. We had the sugar insured which was laying at the Kajiado European Stores. The claim is not for goods sold and delivered. I did supply goods on credit. It was a credit when I let them have the goods. We do make out Invoices for actual sales. We also sell goods to customers on our behalf but we make Invoices to show prices charged but accept goods back if not sold.

10

I was not actually selling the goods but sending them to the two firms as our agents for distribution and sale. On 25.5.60 I received a cheque for 1,000/-. I do not know whose cheque it was, but it was received from A.N. Khan. I have a record of a cheque dated 5.11.56. 8,000/- from Kajiado European Stores. It does not say whose cheque. I could not say if I ever saw a cheque made out in name of European Stores. If you say no account in that name in any bank I could not deny it. I never received any letter from them. I have not seen the name on any cheque or letter-head myself. I have myself never seen anything to show there was such a firm - only what I was told. I was owed money by Sayed Omar before statement Exhibit 4 started but not in account as no connection with this transaction. The account only deals with sugar and goods supplied under the Guarantee. I am claiming under the letter and not under the Guarantee for the first consignment.

20

30

I could not recognise the signature of the chit Exhibit A (for identification). I could not recognise it as Mr. Khan's usual signature. I say that the signature in Exhibit 5 is that of Mr. Khan. I see no similarity between the signatures on Exhibit 5 and Exhibit A.

40

A bag of sugar costs 123/-. 1/50 is a little over 1%. I never received payment for first delivery before receipt of second delivery. They did not have to lose if paying 9% interest. Profit was 1%. They must have been losing in sugar. Sugar a monopoly business and attracted other business. I did not demand payment by letter.

No payments after May 1960 by Kajiado European Stores on their account. I myself did not make a claim. My younger brother might have done so.

In the Supreme Court of Kenya
at Nairobi

Plaintiffs
Evidence

I think Mr. Khan died in June 1960. The last payment I received was in May 1960. I thought payment was coming so did not make demand.

No. 4.

MAGHJI KURMAN
MALDE

12th, 13th and
14th November,
1962.

Cross-
Examination
continued.

I am not now trustee in bankruptcy. All the balance and interest is due from Kajiado European Stores and not Sayed Omar at all.

I put Sayed Omar as this was the account which was running since 1956 July. Nothing due from Sayed Omar Bros.

Payment for 1956 Account paid. Account treated as one since it was opened.

I have no separate account for Sayed Omar Bros. since July 1956. Since that date I have only "Sugar A/C No. 3". No Dr. against Kajiado European Stores. I have nothing in books to show Kajiado European Stores liable nor any invoice.

In books there is an account with Kajiado European Stores opened on 15th June, 1956. Due to us from them on 31st December, 1960, was Shs.41,054/33. No mention of Sayed Omar. Shs.41,054/33 is a balance carried forward. At end of 1959 amount was Shs.44,054/33. In 1960 I received 3,000/- in reduction. In 1959 I received no payments. We demanded payment. I did not say anything to surety. Ex.8(3) received. No previous correspondence to me. There was some letter before that date but I cannot remember the details.

I think Mr. Khan died 12th or 14th June, 1960. He might have died a bit later. I do not remember giving any instructions to my advocates to reply. I saw letter of 6th July (3). I might have handed it to my advocates. I instructed my advocates.

Letter (4) is correct. It does not refer to Guarantee. Defendant having signed it is thought he knew about it.

I remember letter (5).

I do not know why delay in informing

In the Supreme Court of Kenya at Nairobi

Plaintiffs Evidence

No. 4.

MAGHJI KURMAN MALDE

12th, 13th and 14th November, 1962.

Cross-Examination continued.

guarantor. Maybe I was out of Nairobi.

I do not think Sayed Omar & Bros. now in existence as a firm. I am in touch with Mr. Allahadad. I did ask him to pay. I have been in touch with him since 1960. In 1960 I asked him to pay and in 1961. Not since case filed - case in progress.

I am not enemy of Mr. Allahadad. I did not ask him to come and give evidence. I did ask him after my advocates suggested I should. He did not tell me he would not give evidence for me. I spoke to him in 1960 - a few months after the case filed. No business dealings with him since case filed. I have seen him about three times since case filed. About the Scheme of Composition. I ceased to be a trustee in 1958. I then was appointed to Committee of Inspection. Settlement not fixed. I do not know position as not told by Official Receiver.

10

I made no claim against Sayed Omar Bros. in 1958 for amount now claimed. I never made a claim for amount claimed from Sayed Omar Bros. I am not now claiming anything against Sayed Omar Bros.

20

I had no such claim when plaint filed except interest.

The interest is on the amount shown in the statement Ex.4. up to January 1957 almost all supplied to Sayed Omar Bros.

Sayed Omar Bros. owed me Shs.58,000/- in January 1957. I cannot show this in the books. There is a Sugar A/C. All receipts are in Sugar A/C No. 3. The receipts are not shown in Kajiado Stores A/C. There is no debit or credit in this A/C. The 41,000/- was a balance. I have no delivery note signed by K.E. Stores. I have no receipts. I have written proof of delivery of sugar. I produce Invoice 2309 of 25.3.57. Not a sale. Invoice and debit. For 20 printed material 80/-. They took this from our shop. 2344 of 3.4.57. Goods not said not to be sold.

30

40

Invoices to firms when goods actually sold. No distinction on invoice. I never sold anything to Kajiado Stores or to Sayed Bros. during this period. Ex. 4. is not an exact copy of anything in our books. It is made out from books. The

The invoices are now shown to these two specific firms. I have not got balance sheets for 1957/60. I will bring them.

In the Supreme Court of Kenya
at Nairobi

I cannot remember if letter of demand written by self or advocates to either of these firms. They have returned some goods to me during this period.

Plaintiffs
Evidence

No. 4.

10 Ex.4. 25.3.57. "By goods returned". This refers to 5 woollen blankets and grey sheeting. These goods are not contained in Invoice 2256. I did supply goods not shown in statement. Not shown as did not refer to this Guarantee. I have no invoice.

MAGHJI KURMAN
MALDE

12th, 13th and
14th November,
1962.

I was told at end of 1956 that business of Sayed Omar Bros. was to be closed and Kajiado European Stores only to continue. No sugar supplied to K.E. Stores in 1956 or to Sayed Omar shown in books.

Cross-
Examination
continued.

20 At 31.12.56 Kajiado European Stores owed us according to books, 4,261/80 for goods other than sugar.

The account does not represent dealings with Kajiado European Stores for the period. Up to end of 1956 Guarantee only to Sayed Omar.

480/- does not represent goods supplied under Guarantee. The credit should not be in the account.

30 The 4,261/80 Dr. is _____ carried over into 1957. The 4,261/80 paid is 4917/80 paid on 21.3.57. It is shown in books. The book does not show what the payment was for. It is possible that 4917/80 not in settlement of 4261/80.

The guarantee started in 1956. At end of 1956 4261/80 due. Purchases from us should show in statement of account. Credits are shown in Statement of Account.

7.2.57. no credit for 1000/- in Statement of Account.

40 8.7.57. no credit for 1700/- in Statement of Account.

According to books in 1958 I received from

In the Supreme
Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 4.

MAGHJI KURMAN
MALDE

12th, 13th and
14th November,
1962.

Cross-
Examination
continued.

Kajiado Provision Stores:-

3000/- on 3.9.58.
4000/- on 30.9.58.
3000/- on 30.10.58.

This is in Kajiado European Stores Account.
There is nothing else shown as received from
Kajiado European Stores in this Account.

From July 1958 with consent of two partners
the debit on Sugar Account was transferred to
Kajiado European Stores Account Shs.54,054/33 odd. 10
This is wrong.

This was money they had collected for us
from sale of sugar and failed to pay us.

I agree that I am really claiming for
money paid and received by Kajiado European Stores
for sale of goods including sugar on my behalf -
my goods.

I can produce the Ledger Accounts for
Sayed Omar Bros. and for Kajiado European Stores
from 15th August 1956 until 31st December, 1960. 20

Sirley

I ask for adjournment of case to enable
accounts to be certified as accounts do not
reflect the position shown by Ex.4.

Khanna

I appose application. Endeavouring to
obtain adjournment because not able to continue
tomorrow.

Sirley

I have made arrangements for tomorrow. 30

Khanna

Could have inspected all the books before
this. O.X. r.18. Order for Inspection. If
adjournment granted costs should be taxed and paid
by the defendant in any event.

By Court

ORDER

I can see no necessity whatsoever for an
adjournment in this case. I suggest that the books
be returned to Mr. Sirley tonight and he can take
any instructions he wishes from his client before 40
the hearing tomorrow morning. Certified true

copies of the accounts with Kajiado European Stores and Sayed Omar Bros. for the relevant period should then be prepared and put in by the witness at a later stage.

The case will continue on cross-examination of other matters not affecting these accounts and the Court will resume the hearing tomorrow morning insofar as cross-examination on Accounts is concerned.

W.H. GOUDIE

10 14.11.62.

Coram as above.

P.W.1. recalled and resworn:-

In Cash book on date 30.11.56. I see entry Shs.10,000/- from Kajiado European Stores.

I cannot see a credit for 10,000/- for this receipt. It is a cash entry. The 10,000/- is not credited because the cheque was returned. This is shown in books.

20

In ledger at page 567 in Sugar Account is shown 10,000/- credit Cash Book entry p.28. Debit on same date. My accountants must have left out the later debit and credit in Ex.4. Ex.4 prepared by my accountants. I checked the entries in Ex.4 with my books. I noticed the missing contra entry.

30

In Ex.4 there is an entry of 13th March an entry for an unpaid cheque. Next entry is cash entry. I did not re-present the cheque. They must have taken back the cheque. The 10,000/- is different. It was received on 27th November. It was credited on 27.11. It was returned unpaid on 30th November and on same day cash was paid. The cheque should have been shown in the account, Ex.4., as unpaid.

There is no entry in books of delivery of sugar to Sayed Omar & Bros. from 15th June onwards. No delivery note. No debit against Sayed Omar in respect of transfer to European Stores of the sugar account.

In the Supreme Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 4.

MAGHJI KURMAN
MALDE

12th, 13th and
14th November,
1962.

14th November,
1962.

Cross-
Examination
continued.

In the Supreme Court of Kenya at Nairobi

Plaintiffs Evidence

No. 4.

MAGHJI KURMAN MALDE

12th, 13th and 14th November, 1962.

Cross-Examination continued.

Re-Examination

According to books Sayed Omar never owed us any money for sugar.

Balance Sheet for December 1956. No list of sundry creditors supplied by accountants. Any amount due from Sayed Omar Bros. would be included. I have a list of sundry creditors for 1957. No item in respect of Sayed Omar. Nothing shown as due from Sayed Omar. Nothing carried over from 1956. No account of Sayed Omar Bros. According to the books nothing due at end of 1956 or in 1957 from Sayed Omar Bros. I mean nothing due by the name. It is included in Sugar Account.

10

Re-examined

Ex. 8. Letter 1st September 1960. Last para. Interest not objected to by Kajiado European Stores. I saw cheques drawn by Khan but not by Kajiado European Stores. The whole amount I am claiming is due from Kajiado European Stores.

Balance in Ex.4 is Shs.58,854/33 at 31.12.57. The signature on this letter Ex.9 looks to be the signature of Mr. Khan. I did not myself obtain this. I think my brother obtained it. None of the goods representing this amount have ever been returned in sugar or goods.

20

Ex.4. The word "statement" does not appear in our books. The words "To Messrs.Sayed Omar & Bros. and Kajiado European Stores,Kajiado" are not in books nor are words "In a/c with P.K. & Co. Nbi".

"Sugar Account" is in books.

30

All the entries are to be found in our books exactly as copied here.

Outside this case I have another account in our books against Kajiado European Stores.This statement was prepared by my Accountants in my presence. I have checked entries with books.

Mr. Sirley asks for permission to cross-examine on circumstances in which document (Ex.10 for identification) prepared.

Exhibit 10

Cross-Examination

Cross-examined.

40

I checked typed copy with books.

The other written document I am looking at is not connected with Ex.10.

In the Supreme Court of Kenya at Nairobi

By Court

Plaintiffs Evidence

I have checked Ex.10 with the Statement which my Accountant prepared.

No. 4.

I can produce statement he prepared if not destroyed. I have not checked Ex.10 with the entries in the books.

MAGHJI KURMAN MAIDE

Court

12th,13th and 14th November, 1962.

10 Ex.10 is excluded in evidence but witness can be taken through each entry and it can then be treated as proved.

By Court

Witness goes through each entry in detail which comprises Ex.10 and this is admitted in evidence.

Sirley

No objection to document being put in in this way.

20 The account of Kajiado European Stores is thus "squared off".

Mr. Sirley is allowed to cross-examine on Ex.10.

Cross-Examination

Cross-Examination (contd)

The goods shown as supplied on 7th February 1957 was after guarantee started to operate.

I do not know arrangement of partners as regards K. European Stores old and new accounts.

No balance in books on 21st March 1957. The account continues.

In January 1957 Guarantee had started. I do not know how February entry.

30 There is an entry on 25th March and another entry and a further entry and yet a further entry. These entries do not appear on Exhibit 10.

It is true entry of account but only up to 21st March 1957. Not ruled off or balanced at that date.

No interest charged.

In the Supreme
Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 4.

MAGHJI KURMAN
MALDE

12th, 13th and
14th November,
1962.

Re-Examined.

Re-examined

On account outside guarantee no interest payable. Interest payable under guarantee. I never gave Kajiado European Stores the actual amount of interest due under the guarantees.

W.H. GOUDIE.

No. 5.

TILAK RAJ
JOHAR

14th November,
1962.

Examination

NO. 5.

PLAINTIFFS EVIDENCE

TILAK RAJ JOHAR

P.W. 2. TILAK RAJ JOHAR sworn:-

10

Advocate. Partner in firm Winayak, Johar & Co. Admitted to practice in Kenya in June 1955. Pupilage in 1954. I could not say the date. I was pupil to Mr. M.J. Morgan. He had a clerk named ABDUL KHAN. I had seen his signature and his handwriting.

I made out this Partnership Agreement Ex.11. on instructions of Mr. Khan. Partnership commenced 19th June 1956. Date 19th June 1956 is in my handwriting. My signature in attestation clause. Khan's signature in my presence. My signature in attestation clause and signature on right is that of ALLAHADAD.

20

Ex. 5 appears to be handwriting of Mr. Khan from date to word "Two". Following date does not appear to be that of Khan.

Ex. 6. The whole document appears to be in handwriting of Mr. Khan.

Ex. 9. appears to be in handwriting of Mr. Khan.

30

Cross-examined

Ex. A is not in handwriting of Mr. Khan. I never saw Mr. Khan's signature like this. He signed in small writing "A.M. Khan". I have never seen a document signed like this. I see no similarity in letter "a" on Exhibits 5, 9 as compared with Exhibit A.

I have met AHMED DIN but do not know his signature.

10

Similarity between handwriting in Exhibits 5 & 9. I believe them to be the same handwriting. Similar K. in Kajiado to K. in Karman. Word Kajiado over stamp may have been written by another hand. I cannot say.

I know MEGHJIBHAI KARMAN MALDE. He was the owner of Kajiado European Stores.

I cannot say whether it is likely I saw or did not see the document dated 19th June 1956.

20

I do not know whether if credit in Mr. Malde's books it would be his own property.

Re-examined

I have never seen Mr. Malde. Mr. Khan a lawyer's clerk for a considerable number of years.

No. 6.

PLAINTIFFS EVIDENCEWACHIRA ARAM GITHANGA

P.W.3. WACHIRA ARAM GITHANGA, Christian, sworn:-

30

Station Master E.A.R. & H. stationed at Kajiado since May 1962. I am in charge of Records at the station. I have looked for records in connection with sugar railed to POPATLAL KARMAN. Records kept for one year only - sometimes two. I have not traced any records. I could find one letter of authority from Popatlal Karman & Co. in 1958. Not relevant.

Cross-examined

This letter is taken from my records - Ex.B.
W. H. GOUDIE.

In the Supreme
Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 5.

TILAK RAJ
JOHAR

14th November,
1962.

Cross-
Examination

Re-Examination

No. 6.

WACHIRA ARAM
GITHANGA

14th November,
1962.

Examination

Cross-
Examination
Exhibit B

In the Supreme
Court of Kenya
at Nairobi

No. 7.

PLAINTIFFS EVIDENCE

Plaintiffs
Evidence

DEVJAN KARMAN MALDE

No. 7.

P.W.4. DEVJAN KARMAN MALDE, sworn:-

DEVJAN KARMAN
MALDE

14th November,
1962.

Examination

Partner in firm of Popatlal. I knew the late Mr. ABDUL KHAN who died two years ago and SAYED AHAMED ALLAHADAD and THE KAJIADO EUROPEAN STORES. Partners in this firm were SAYED MOHOMED ALLAHADAD and ABDUL MAJID KHAN. My firm supplied Stores goods and sugar and other goods in 1956 and 1957.

10

This letter was signed by Mr. Khan in my presence. He signed in my shop in Bazaar Street, Nairobi. Self and my Accountant present. I do not remember who else. Khan and Sayed Mahomed present. We produced our accounts before signature. Both partners signed after they had checked the Accounts. I think it was in the morning so far as my knowledge goes.

I cannot remember payments on 25.2.58 but can refer to my books, and from them I can say on that day Shs.2,800/- paid. After Ex.9 signed payment made - I cannot say whether in the morning or afternoon.

20

Cross-
Examination

Cross-examined

Demand for goods sold to Kajiado European Stores. Money due for sale of goods. I would be surprised if told no sale of goods. P.W.1. My brother would be wrong if he said no sale to Stores. I do not know why he should be wrong. We gave sugar on consignment. (Note: There appears some confusion in interpretation of "sale" and "supply").

30

We did not sell anything. We gave them goods on consignment and then we get money when they sell. No question of credit. We did not give credit. I rarely look at account books. My brother told me a written agreement. I do not recall having seen it. My brother would be correct if he said no agreement in writing. If he said no agreement in writing then it is wrong.

40

By Court

By Court

My brother told me that agreement but not

what sort of agreement or its effect. It was to do with goods sold to Kajiado European Stores.

In the Supreme Court of Kenya at Nairobi

Re-examined

By supplying goods on consignment I meant we used to give goods to Store and written down in book and when we got money we credited the amount. Payment in cheques and cash later. My brother arranged the terms of supplying to Stores. I do not recall if I was present or not.

Plaintiffs Evidence

No. 7.

DEVJAN KARMAN MALDE

10

W.H. GOUDIE.

14th November, 1962.

Re-Examination

No. 8.

No. 8.

PLAINTIFFS EVIDENCE

DRIBHUBAN GURDHAN BAKRANIA

DRIBHUBAN GURDHAN BAKRANIA

P.W.5. DRIBHUBAN GURDHAN BAKRANIA, sworn:-

14th November, 1962.

Advocate and partner in firm of Velji Devji & Bakrania. Admitted in Kenya on 17th September 1953. Acting for plaintiff since 1954 I believe. I know P.W.1. very well.

Examination

20

Exhibits 1 and 3 drawn by me. Instructions given by P.W.1. I think he was alone. I handed over documents when drawn to P.W.1. They were returned to me by P.W.1. They came back signed by Ahmed Din. I had them stamped and Ex.3 registered at Law Office. Stamps embossed bear date 21st August 1956.

Date on Exhibit 1 in my handwriting. I put date in on day I received back from P.W.1. Same applies to Exhibit 3.

30

I drew up Exhibit 1 on instructions of P.W.1. He was alone as I remember. I returned document to P.W.1. and it came back to me with signature of AHMED DIN and witness. Stamp is dated. Recital in accordance with my instructions. I did not suggest words "hereinafter called the Principal". All in accordance with my instructions.

Kajiado Provision Stores not mentioned in

In the Supreme
Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 8.

DRIBHUBAN
GURDHAN
BAKRANIA

14th November,
1962.

Examination
continued.

first instructions. I think that I must have put Provision Stores from handwritten draft. I have no explanation as to how it came into my draft. Not instructed about K. Provision Stores. I have not got my handwritten draft.

The typing is that of my office typewriter in Exhibits 1 and 2 and 3.

Exhibits 5 and 6 came into my custody when I was instructed to prepare Exhibit 1.

I have not checked if firm called Kajiado Provision Stores. I would not be surprised if there was such a firm with Mr. ALLAHADAD as partner. 10

Not possible that P.W.l. gave me name of Provision Stores. It might be a coincidence but not surprising. As far as I can see Exhibits 1 and 2 on same typewriter. I cannot be sure.

I do not know when Exhibit 1 signed. I normally date that at date of receipt. I think I was informed by P.W.l. that documents signed on 15th. I could have put a wrong date. One should put a description of witness but none given and I do not know who it was. 20

I do not know when Exhibit 2 signed. Not signed in my presence. I put the dates he signed - the date I got the documents. P.W.l. told me the day of signature. I could not say if AHMED DIN in presence. In Exhibit 1 I refer to "hereinafter called the principals".

I cannot say whether or not mistake in my verbal instructions. I have lost my notes taken at time. I do not know when Ex. 3 signed. 30

Ex. 2 stamped on 2nd February 1957.

Not conversant with Mr. Khan's handwriting but I have seen it. I cannot say who wrote Exhibits 5 and 6.

I know nothing of agreement for sale between P.W.l. and ALLAHADAD.

Partnership Agreement in file of Kajiado European Stores lying in my office since 1956. We had no file in our office in name of KAJIADO EUROPEAN STORES. In this particular case I did not 40

look at documents after returned to me. I cannot say if recital in Ex.1 correct or not.

Witness in Exhibits 1 and 2 is I think a Mr. Bussart according to my clerk. I cannot deny it if you say M.L. Bussart.

No Re-examination.

W.H. GOUDIE.

In the Supreme Court of Kenya at Nairobi

Plaintiffs Evidence

No. 8.

DRIBHUBAN GURDHAN BAKRANIA

14th November, 1962.

Examination continued.

No. 9.

SAYED MOHAMED ALLAHADAD

14th November, 1962.

Examination

Exhibit 11.

No. 9.

PLAINTIFFS EVIDENCE

10

SAYED MOHAMED ALLAHADAD

P.W.6. SAYED MOHAMED ALLAHADAD, sworn:-

Partner in firm of Sayed Omar & Bros. I became partner in 1926. Not now in existence. Partner in Kajiado European Stores. Exhibit 11 is the partnership deed. I recognise my signature and that of ABDUL MAJID KHAN whose signature I recognise. I have seen his signature on other occasions. Mr. Khan is dead. He died in June 1960 I think.

20

Kajiado European Stores started in July 1956. 40 years in Kajiado.

No firm called Kajiado European Stores before we started it. I was an active partner and so was Khan. I knew POPATLAL & CO. - for 25 years.

30

SAYED OMAR & BROS. did take supplies of sugar from POPATLAL since 1955. Between July 1956 and December 1956 they took supplies of sugar from POPATLAL. Kajiado European Stores took supplies of sugar since January 1957. The European Stores was closed and stopped buying sugar in October 1957. They were not trading after October 1957.

In the Supreme
Court of Kenya
at Nairobi

Allowed to make 3/- per bag on supplying
of sugar. We got 1/50 and people we supplied
1/50. Profit controlled by Government.

Plaintiffs
Evidence

We had a security between us and the money
we got from sale we had to pay over to Mr. Papatlal.
We used to give the money after a few days or a
week.

No. 9.

SAYED MOHAMED
ALLAHADAD

We got 300 bags per month and if not paid
for one month we used to pay interest at 9%.

14th November,
1962.

Examination
continued.

When we started European Stores and Mr. Khan
taken into partnership we went to shop of Mr.
Papatlal and Mr. Meghji told us that as far as
sugar concerned he wanted cash and if no cash then
he wanted a security. We told him we could give
him answer later. Mr. Khan told me he had a deed
and after 3 days we went to Mr. Papatlal's shop.
I did not know in whose name deed was. Khan gave
deed to Meghjibhai and M. said he wanted to see
the property.

10

I never saw the security documents. Sayed
Omar & Bros. ceased business in 1954. - I think
in November.

20

From January 1957 sugar taken by European
Stores. Also took other goods.

Khan and I used to check books to find amount
owing to plaintiffs. I think 41,054/33 and 11,000/-
correct. I do not know interest but I think total
in region of 50,000/-.

I recognise Khan's signature in Exhibit 9.
(Witness reads Exhibit 9 in English and reads it
reasonably well).

30

Mr. Meghjibhai telephoned Khan and told us
so much outstanding and if not paid he would take
action against me. Khan agreed and paper brought
and Khan signed it. I do not know when written.
I did not see Khan sign. I know it is his signa-
ture.

In Sayed Omar & Bros. 3 partners but when
business split then I became the sole partner and
was sole partner for about 13 months - May 1955
to June 1956. Kajiado European Stores a distinct
firm from Sayed Omar Bros. Different premises.
When Kajiado Stores ceased I started Malindi Stores

40

with an Arab, Khan, Keshavji Hemraj and one Patel. This carried on until Khan died when we closed this business.

In the Supreme Court of Kenya at Nairobi

Plaintiffs Evidence

No. 9.

SAYED MOHAMED ALLAHADAD

14th November, 1962.

Examination continued.

10 Firm called Kajiado Provision Stores and it was branch of Omar Bros. and registered. I was sole proprietor. It started in May 1955 when we dissolved partnership of Sayed Omar. Before 1955 it was doing business but was rented out to someone whose name I have forgotten. I cannot remember his name. I could give it tomorrow. During 1956 and 1957 Kajiado Provision Stores had dealings with Papatlal in Sugar and other things. It was a branch of Sayed Omar Bros. It does not owe any money.

I did not know Ahmed Din.

Witness recalled and resworn

Examined

20 Kajiado Provision Stores is a branch of Sayed Omar & Bros. There were three partners, Sayed Mohamed, Sayed Ibrahim. Later I was the sole partner left. Kajiado Provision Stores registered under the three above partners' names. In 1961 the registration was altered to my name as sole proprietor. No. I took over the business but the registration remained in name of the three partners originally registered. Business started in 1952. Still existing but now under the name of Sheriff Provision Stores. The Kajiado Provision Stores lasted until June 1956. In 1956
30 we changed the name to Kajiado European Stores.

Kajiado European Stores was a continuation of Kajiado Provision Stores under another name. We took supplies of sugar. Exhibit 11 relates to partnership of business previously Kajiado Provision Stores and name altered to Kajiado European Stores.

Khan told me about the mortgage.

40 In 1956 or 1957 Sayed Omar & Bros. did not have a bank account. Kajiado European Stores had a bank a/c. from when the European Stores started in 1956 until 1957 when the shop closed down. We used a rubber stamp on Kajiado European Stores cheques and Khan used to sign.

In the Supreme
Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 9.

SAYED MOHAMED
ALLAHADAD

14th November,
1962.

Examination
continued.

Cross-
Examination

In October 1957 we were asked to pay up what Kajiado European Stores owed to the plaintiff. (Witness replies as follows not in reply to question. All the stock were sold and matter settled with other people).

We paid some but some was left.

As we wanted to close business we sold stock and paid our other creditors.

The sugar which came in was of Sayed Omar and the European Stores was kept separately and separate insurance taken out by Popatlal Karman.

10

Cross- Examined

Sayed Omar Bros. closed in 1954. Reopened in 1955 and closed in 1956 June.

After June 1956 Sayed Omar & Bros. ceased but business continued in name of Kajiado European Stores.

In 1955 Sayed Omar closed and I carried on the business under the name of Sayed Provision Stores until 1956. Business not closed. Registered in name of Sayed Omar Bros.

20

I did myself register the name of Kajiado Provision Stores as a firm name. It was registered in 1950 by Abdul Rashid Mir. In 1952 we registered it in the name of 3 partners. I bought the business in 1952. Sayed Provision Stores carried on in name of the three partners from 1952 and never changed into any other name. My elder brother knows all about the registration. I have no idea about the registration of Kajiado Provision Stores. It was part of Sayed Omar & Bros. It only had one account. In 1954 Sayed Omar & Bros. ceased business and only Kajiado Provision Stores carried on business.

30

In 1954 Sayed Omar & Bros, ceased to trade. Kajiado Provision Stores also closed.

In 1955 three partners opened KAJIADO PROVISION STORES and board other shop as Sayed Omar Bros. The same business opened in different name at same place. Kajiado Provision Stores in separate building from Sayed Omar in 1952. In 1953 Sayed Omar burnt down. When we reopened

40

Kajiado Provision Stores in 1955 we reopened in original building of Kajiado Provision Stores. In 1955 we traded under name of Kajiado Provision Stores and continued to do so until 1956. At that time the business was mixed. I do not think we have any books for Sayed Omar Bros. in 1956. I have for Kajiado Provision Stores. I do not know what is written. I do not remember if we have one for Sayed Omar Bros.

In the Supreme Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 9.

SAYED MOHAMED
ALLAHADAD

14th November,
1962.

Cross-
Examination
continued.

10 From 1955 in all business dealings we were using the name of Kajiado Provision Stores. We had to use the name of Sayed Omar Bros. until June 1956 when we opened up Kajiado European Stores. We used both names until end of June 1956 and after this we used name of Kajiado European Stores. Until December 1956 the name of Sayed Omar continued. I made a mistake if I said we did not use name of Provision Stores or Sayed Omar Bros. after June 1956. There was no Balance Sheet for Sayed Omar Bros. in 1956 as we transferred business to Kajiado Provision Stores in 1955. From end of 1955 not trading in name of Sayed Omar Bros. but in name of Kajiado Provision Stores. Goods delivered in name of Sayed Omar & Bros. as partners the same. The sugar was delivered to Provision Stores in name of Sayed Omar.

30 After 1955 sugar was not sold by Kajiado Provision Stores. I sold the sugar under the name of Popatlal Karman. I was personally responsible for sale of sugar and to hand over to M/S Popatlal Karman & Co. Up to June 1956 my responsibility after that Khan took over. I was acting purely individually and not as an agent for a firm.

40 Khan and I used to sell under the name of Sayed Omar & Bros. Khan not a partner. Khan or I gave money to the plaintiffs. We used to spend the money to buy skins etc. We used to give him interest. We used to debit interest. Plaintiffs did not agree to our using their money but we told them if they didn't get their money they would get interest. No profit from sugar but profit on hides and skins. We did not commit any offence because the owners knew we were using money to buy skins. In our books I do not remember how much owed to Popatlal. I could tell from books at Kajiado. I have no documents or written evidence of any kind to show what is owing from any firm in which I am interested to Popatlal & Co. I cannot now check

In the Supreme
Court of Kenya
at Nairobi

with my records whether this statement is correct or not. We did not check.

Plaintiffs
Evidence

Exhibit 11 was translated to me by advocates. It says Khan bought business from Malde. This is the mistake of the writer.

No. 9.

SAYED MOHAMED
ALLAHADAD

14th November,
1962.

Cross-
Examination
continued.

It is not true that Khan bought the business and took me into partnership later. If it is written in agreement it is true. The agreement is correct. I was the owner of business from whom did Malde buy the business?

10

I was not a partner with Khan before 14th May 1956. He agreed verbally before this. I started doing deals with him from 15th June 1956.

Khan eventually agreed to get a guarantee. He did not say what property he was getting. I did not tell anyone Khan had said he would get his wife as a surety. You did certainly summon me as a witness. I did say to you that Khan had said he would get his wife as a surety in a different matter. In connection with another guarantee.

20

Exhibit 9. I do not know where signed. I was present when signed. No, I was not present when signed. I was present when accounts being checked but not when Ex.9 signed. Had I been there I could have signed it. Khan signed as proprietor. He was a partner. Stock belonged to European Stores which was sold.

He returned unsold stock to Mr. Malde in 1956 about Shs.2,000/-. We did not get any goods in 1957 on invoice. We did get some in 1956 and some in 1957. We got some in 1956 and returned some in 1957. If invoice says on 25th March 1957 goods received to value of Shs.2,240/80 then this must be true. Some goods returned in 1956 and some in 1957. It is a long time ago and some things I do not remember.

30

I do not know whether Khan's signature on Exhibit A. I owe plaintiff money to end of 1956 but not thereafter. About Shs.33,000/-. It is "joined" with this case. The stock and things we had I gave to European Stores.

40

Re-Examination

Re-examined

Business of Sayed Omar & Bros. in two

places from the start.

From 1926 to 1953 there were 20/25 shops in the whole district. Sayed Omar & Bros. was same shop. This shop was burnt down.

On 2nd December 1950 Kajiado Provision Stores started and registered by ABDUL RASHID MIR. About 700 feet from the old shop.

10 In March 1952 I bought the business of Kajiado Provision Stores from ABDUL GAFAR. Partners of Kajiado Provision Stores were then the three partners.

In 1953 when business burnt down we shifted business of Sayed Omar Bros. into Kajiado Provision Stores.

The two businesses then operated from the same premises from 1953 until 1954. In 1954 petition filed in bankruptcy by the three partners on all the businesses.

20 In May 1955 we re-started the business. We made a composition of 70%.

Goods received from Sayed Omar & Bros. Was their responsibility to account for these goods.

When Khan and I joined each other Khan was the more active in the business.

Sugar being received in name of Sayed Omar & Bros. in 1956 because the Government sent it in that name.

30 I do not write and did not write our books. Clerk wrote books. I inspected the books once a month. I cannot carry in my head all the entries. I spoke to another person about Khan guaranteeing through his wife in 1960. I do not know what it was about as it was not my concern.

I cannot from memory state exact dates goods taken in 1956 or 1957 or dates of returns.

From 1957 onwards European Stores were the debtors, myself and Khan.

In the Supreme
Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 9.

SAYED MOHAMED
ALLAHADAD

14th November,
1962.

Re-Examination
continued.

W.H. GOUDIE.

In the Supreme
Court of Kenya
at Nairobi

No. 10.

COURT NOTES

No. 10.
COURT NOTES.
14th November,
1962.

Khanna

Apply to recall P.W.1. to put in agree-
ment referred to in Exhibit 11 which has since
been discovered.

Sirley

The agreement could have been produced
earlier. Object until known why not produced
earlier.

10

Khanna

Found in Mr. O'Beirne's file opened in
name of Kajiado European Stores and found in
offices of Velji Devji. No knowledge of existence
in office until yesterday. Search made when the
question arose yesterday. Tried to contact
attesting witness Mr. Bickerton Williams. Mr.
O'Beirne away in South Africa - gone to practice.

Effect will be to prove business changes
in hands of Sayed Omar and then the trustee sold
business to Abdul Majid Khan.

20

Sirley

Not proper for the advocate for plaintiff
to produce this now through his own witness and
without attesting witnesses.

Ruling

Now that the document is known to be in
existence and capable of production I think it
should be produced. The weight to be attached to
it and its authenticity without attesting witnesses
being present to prove execution are matters for
argument. Let the witness be recalled to produce
the document.

30

W.H. GOUDIE, J.

Plaintiffs
Evidence
No.11.
MEGHJI KURMAN
MALDE
(Recalled)
14th November,
1962.
Exhibit 12

No. 11.

PLAINTIFFS EVIDENCE

MEGHJI KURMAN MALDE (RECALLED)

P.W.1. recalled and resworn:

I produce an Agreement, Exhibit 12 for

identification. I recognise my signature on right of p.4. Words "Trustee Sayed Omar Bros." in my hand-writing. I signed in presence of Mr. Bickerton Williams. Signature below mine is of A.M. Khan. I saw him sign in my presence and that of Mr. Bickerton Williams. On page 5 I recognise signature as that of Sayed Mohamed Allahadad. I do not know Mr. O'Beirne's signature.

Cross-examined

10 Agreement not dated. This is not the original document. Page 2 is carbon copy only. I definitely signed on two copies - on this and on another which was the original. I can swear that each page is wording of the document which I executed. I would not say that the actual pages are the pages which are in the document which I signed. Any original pages might be transposed with a carbon copy. Two signatories have not signed on page 4. Mr. Allahadad was present at
20 time I signed. I have never seen completed document signed by Allahadad. The original was sealed. I signed one document which was sealed and one which was clipped. On top page I see three holes and one clip mark. Document is produced as for file copy. It might have been filed afterwards. On the second page are four pin holes. I now say also four holes on first page. I might have initialled amendments on page 3. I
30 could have initialled amendments. I have not done so. "End" day means "last" day. Mr. Khan was not known to me to be a partner of Sayed Omar Bros. I was a trustee. I did not check that Kajiado European Stores existed in 1955. I sold a business and did not know whether it existed or not. Maybe it did not exist. The Agreement did not go through. The deal never went through. I received the first 10,000/- but had to return it to Mr. Khan. I have not seen the documents. I am now looking at before.
40 Q. Can you recognise the initials on page 1 of the document or not? A. No, I cannot.

W.H.GOULDIE, J.

No. 12.

COURT NOTES

Plaintiff's case except for certified copies of accounts as directed.
Defendant. Two points only.

In the Supreme Court of Kenya
at Nairobi

Plaintiffs
Evidence

No. 11.

MEGHJI KURMAN
MALDE
(Recalled)

14th November,
1962.

Examination
continued.

No. 12.

COURT NOTES

14th November,
1962.

In the Supreme Court of Kenya at Nairobi

No. 12.

COURT NOTES

14th November, 1962.

Continued.

1. Defendant never did sign a Guarantee as alleged in plaint. Exhibits 1, 2, 3 represented to me documents relating to other matters. Cannot speak or read English. Deny signing chit Exhibit 5. No mention of such a document in pleadings or correspondence.

Carlisle & Cumberland Banking v. Bess
(1911) K.B.D. Vol. 1, p.489.

Halsbury, Vol.10, s.82, note G. No intention to contract.

2. Evidence whether there was a genuine mistake. Nothing due from principals Kajiado Provision Stores. 10

3. Principal's liability to plaintiff - Only concerned with accounts.

Defendant's Evidence

No.13.

AHMED DIN S/O
MOHAMED BUX
BUTT

16th November and 17th December, 1962.

Examination

No. 13.

DEFENDANT'S EVIDENCE

AHMED DIN S/O MOHAMED BUX BUTT

16.11.62.

Coram as above.

D.W.1. AHMED DIN s/o MOHAMED BUX BUTT, sworn: 20

Defendant. I sell motor car spares. In business in Kenya for 25 years. I do not speak English and cannot read it. In 1956 my advocate was Mr. O'Beirne and his clerk was Mr. Majid Khan now dead. He died I think in 1960. In 1956 I instructed Mr. O'Beirne to carry out transfer of houses I had bought from Mr. Gian Singh for 190,000/-. I had to pay 90,000/- in cash. I was charged by police with criminal offence and Mr. O'Beirne defended me. I could not talk directly with Mr. O'Beirne. I spoke to him through his clerk Mr. Majid Khan. I paid 40,000/- and before I had paid the next instalment I went to prison. In July, 1956, released on bail pending appeal. Whilst in jail Mr. Khan came to see me about the Gian Singh property. He told me to pay the 50,000/-. I was not able to do so. I paid 50,000/- in cash and a "lease" on the house - 30

the papers on the plot at Section 3 Eastleigh which I live in. I gave the title deeds to Mr. Khan. He asked me to sign some documents. He came to where I worked. There were two papers. I do not know in what language papers written. He told me it was about Gian Singh. He said I had to pay 50,000/- and 50,000/- was left and I had to sign papers for 30,000/-. I had given 50,000/- cash and I had to give another 15,000/- cash. I can read the numbers. Mr. Khan showed me a figure of 30,000/-. There was a long and a short paper. I identify my signature on Exhibit 1; I signed it in my shop in Nairobi. Mr. Khan there alone with me. The signature on the left-hand side was not there when I signed it and I do not know whose signature it is. The signature on left of Exhibit 3 not there when I signed it nor any of the signatures below.

10

20

30

40

They told me it was a guarantee of Gian Singh. I did not know Popatlal Karman & Co. Never asked to sign a guarantee for Sayed Omar & Bros. or for Kajiado Provision or European Stores. I have never signed a guarantee for any of these firms to my knowledge and would not have signed one if asked. I never knew a man called Sayed Allahadad. I used to go to Mr. Khan as he was an advocate's clerk and I did not know English. I had no dealings with him apart from in his position as clerk of Mr. O'Beirne. He never asked me to guarantee firms.

Appeal dismissed and I returned to prison on 21st August, 1956. I was not able to pay any more money to Gian Singh. Mr. Khan visited me whilst in prison saying what was to be done about the 50,000/- outstanding. He brought documents to me. He told me it was about Gian Singh. He said figure was 45,000/-. He said 15,000/- was about the cash outstanding amount and 35,000/- was the amount outstanding on the guarantee. 5,000/- was cash.

I recognise my signature on Exhibit 2. Signed in prison. Nobody else present. No other signatures affixed when I signed. Not told guarantee of firms and would not have signed guarantee for credit. I first knew about the guarantee of firms when I went to advocate - after Mr. Khan died when I went to find papers. I went to my advocate, Mr. O'Beirne first. I did not get the papers. Then I went to another

In the Supreme
Court of Kenya
at Nairobi

Defendant's
Evidence

No. 13.

AHMED DIN S/O
MOHAMED BUX
BUTT

16th November
and 17th
December, 1962.

Examination
continued.

In the Supreme
Court of Kenya
at Nairobi

Defendant's
Evidence

No. 13.

AHMED DIN S/O
MOHAMED BUX
BUTT

16th November
and 17th
December, 1962.

Examination
continued.

advocate, Mr. Sirley, who told me about the alleged guarantee. I then instructed Mr. Sirley to find out about it. Mr. Gian Singh in India.

I only saw Exhibit 5 when case going on in Court. It is not my signature. I have never signed on such a piece of paper. I cannot read what is written. I have never written a letter to Popatlal Karman & Co. I never wrote a letter like this or suggested he keep my title deeds for 10,000/-. I did not agree this with Mr. Khan. I did not ask Popatlal to do anything about a mortgage. I do not understand it. I know it can be investigated by hand-writing expert. The signature seems to agree but it is not mine. I have never been asked to guarantee firms.

10

I got first demand to pay after I had been to Mr. Sirley to find out what all this was about. When told money claimed by brother in Kajiado I sent my son and subsequently I met Mr. Allahadad. He could tell me nothing about the alleged guarantees. He said he knew nothing. He said Mr. Khan knew.

20

Cross-
Examination

Cross-examined

I have been to prison three or four times for receiving stolen property. Not long terms. The last sentence was 2 years and a fine of 2,000/-. Other cases were about opium. I went to prison for six months, for the previous occasion one year. Last imprisonment connected with my business of scrap dealer. One year was for stolen property; two dishonesty offences and one for opium. I have a yard for scrap. I also sell new spares which I keep in a store in yard. If a European comes to buy scrap I speak to him in Swahili. I have only ever owned two properties. I have owned them. Gian Singh's is the third.

30

190,000/-. One of the others was 170,000/- offered to me. I offered to sell third now for 50,000/-. I was offered 140,000/- for my spares.

Written Agreement for sale of property. In English. I signed it. It was signed before the opposite party. Mr. O'Beirne drew it up. Agreement may be with Mr. O'Beirne. Terms set out in writing. I will produce it if available. Only 40,000/- in bank to pay towards purchase. I was going to risk a mortgage on plot 1113 Eastleigh

40

for balance. I did give title deeds to Khan to prepare a guarantee to Gian Singh.

In the Supreme
Court of Kenya
at Nairobi

Agreement specified payments to be made from time to time. I understand the word "instalment". I took overdraft from Barclay's Bank on papers I gave to them. I do not know what an Equitable Mortgage is. The bank does not do it like Exhibit 3. They make their own document and have it signed. When the advocates come to me they bring me a paper like Exhibit 3. I am not familiar with document like Exhibit 3. I have never signed such a type of paper. I have not seen this type of paper. If I have seen it I must have seen it in advocate's office. This document I am now shown is not similar. One has a red stamp and one a blue. The document I am now shown is signed with my signature. I do not remember signing it for bank overdraft. I have only once borrowed on equitable mortgage.

Defendant's
Evidence

No. 13.

AHMED DIN S/O
MOHAMED BUX
BUTT

16th November
and 17th
December, 1962.

Cross-
Examination
continued.

20 Plots Pumwani Road, Racecourse Road and Eastleigh. I did borrow money from bank in 1951 from Barclay's Bank on Racecourse Road property. I put two plot to take the money. I do not know what equitable mortgage is. I only borrowed once from the bank. It is my signature on Exhibit 13.

Exhibit 1 bears my signature. I did not sign in presence of Mr. Besset - not in office of Mr. O'Beirne. I have not noticed a woman receptionist in Mr. O'Beirne's office.

30 I knew Exhibit 1 was for 30,000/-. I could read the figures. I was told it was a guarantee. Exhibits 1 and 3 were both tendered and signed at the same time. When given Exhibit 3 I was not told it was a mortgage. He told me nothing about Exhibit 3 - nothing. I asked him why I had to sign and he said it was about Gian Singh. I asked him about Exhibit 1. I did not ask about Exhibit 3.

40 I knew Exhibit 2 was for 45,000/-. I knew it was a guarantee. I did not sign it in presence of a woman. I asked Khan for what purpose he had brought Exhibit 2. He told me it was about Gian Singh. I did not know for what purpose it was signed.

16.11.62 - 2.15 p.m.

Adjourned to date to be fixed in Registry.

In the Supreme Court of Kenya at Nairobi

Provisional date 17th December, 1962, subject to completion of Criminal Sessions and availability of advocates. If 17th not possible then nearest date to 17th December before Court Vacation.

Defendant's Evidence

No. 13.

W.H. GOUDIE, J.

AHMED DIN S/O MOHAMED BUX BUTT

17.12.62.

Coram as above.

16th November and 17th December, 1962.

AHMED DIN s/o MOHAMED BUX, recalled and re-sworn:

17th December 1962.

I know Exhibit 1 Guarantee was for 30,000/-. 10 I signed it with that knowledge. All that Khan told me was that Gian Singh had got him round the neck and if he did not pay we should have to. I was never told what the document was although it bears my signature. He told me the document was for Gian Singh. He said it was difficult for me to understand all this.

Cross-Examination continued.

(Note. Witness is asked repeatedly whether he asked what document was and he repeatedly evades the question).

20

I did not know what Exhibits 1 and 3 were. I did not know one was a mortgage. The advocate's clerk was helping me and he asked me to sign, so I did so. I did not ask him. I did not see what Exhibit 3 was. Am illiterate person - cannot see what it is. I saw Exhibit 3 on the day in question.

(Witness repeatedly refuses to answer whether or not he realised on that day there were any figures on this document).

He did not show me any figures in the document on that day. I had not handed over deeds of my property to Khan before then. These papers were given to office of O'Beirne and dealt with mortgage of my Racecourse Road property. I did not know that I was being asked to sign on that day. My signature was obtained in Exhibit 2 in prison. I did not know what contents of document were. He said it was to keep Gian Singh quiet as he was pressing for his money. He told me if I signed

30

on the document then the mortgage which was being arranged would be complete. He did not tell me the amount. I knew I owed him 45,000/- and that the document related to that. When I signed Exhibit 2 I thought it was a document for mortgage. I was in prison under difficulty and would not know what document was. I thought it was in connection with the money I owed and if I did not sign I would lose my claim. It is not my signature on Exhibit 5. I handed over deeds to O'Beirn's office on same day as I withdrew documents from bank and same day Racecourse property was mortgaged. Not given receipt and did not ask for one as he was my advocate. I handed deeds to such mortgage on Eastleigh property and money would be given to Gian Singh. He told me nobody prepared to take Eastleigh property (on mortgage). I was in prison so could not ask him for return of documents. He told me nobody would advance money on Eastleigh property whilst in prison. I was content to leave my documents with advocate. It was only because Gian Singh would not keep quiet that Racecourse property sold. Gian Singh - I do not know his attitude. It was up to my advocate to ask him.

In the Supreme Court of Kenya
at Nairobi

Defendant's Evidence

No. 13.

AHMED DIN S/O
MOHAMED BUX
BUTT

16th November
and 17th
December 1962.

Cross-
Examination
continued.

(Note. The witness repeatedly refuses to answer what he thought at this time).

My signature is on Exhibit 14. I had paid 40,000/- . I had to pay 90,000/- before and the other 100,000/- by instalments. Agreement made on 8th March, 1956. After paying 90,000/- mortgage was to be made in respect of the balance. I saw Gian Singh before I went to prison. He said he would take guarantee from me - because I had the Racecourse property. He told me I should mortgage the Racecourse property in respect of the balance. He was prepared to take the mortgage on Eastleigh property with my personal guarantee. I came out of prison in April or May, 1958. Whilst I was in prison Khan used to get me the information. He came to see me the day I went to prison - on 21st August, 1956. He saw me in Court on that day. I had already signed Exhibits 1 and 3 on that day. I asked him if he had received these papers and he said he had not received them yet. He gave me the impression he executed them. I did enter into fresh agreement with Gian Singh for purchase of property. He said he had been in touch with my advocate. I saw Gian Singh in 1960. He had been

In the Supreme
Court of Kenya
at Nairobi

Defendant's
Evidence

No. 13.

AHMED DIN S/O
MOHAMED BUX
BUTT

16th November
and 17th
December, 1962.

Cross-
Examination
continued.

to India.

Balance left from sale of Eastleigh property and I added 50,000/- and advocate paid on my building also 20,000/-. I first found out Exhibits 1, 2 and 3 had not gone to Gian Singh in 1960. I cannot say the date.

Q. Was it before you instructed Mr. Sirley in this case?

(Note. Witness thinks deeply for about two minutes before answering).

10

Gian Singh told me he had not received documents and suggested I saw my advocate, which I did. I think Khan still alive but it was just a matter of a few days. I did not write accusing Khan of fraud.

Before going to Mr. Sirley I did not know I had been deceived. I told Mr. Sirley that they were not willing to give me the documents. I told him I had only signed papers for Gian Singh and asked him to find out the documents. Received letter of 17th September, 1960. I did not know mortgage on Eastleigh property. Mr. Sirley told me and in whose favour made. I told him I was unaware of that - letter in accordance with my instructions. I have not made up this story about Gian Singh. He is still alive. I first discovered the documents were different from what I thought. I had signed them when I went to Mr. Sirley's office. I cannot answer for my advocate's letters.

20

30

Defence, para.3.

I thought documents related to Gian Singh. Khan did not tell me documents in connection with a purchase. I had already taken the property and had to arrange a mortgage for that.

Para.4.

I do not know if Khan agent the plaintiff or not. I should have been told more about the documents and contents read over to me and explained. I was not in a position to insist. I know Khan dead before instructing Mr. Sirley. I had been to Mr. O'Beirne's office to find out position regarding my papers. I did not know papers in existence or I would have reported to C.I.D. Only after Mr.

40

Sirley had investigated did I find the papers were then where they should not have been.

In the Supreme Court of Kenya at Nairobi

Exhibit 7 withdrawn from Bank by me when Khan accompanied me to Bank and he took it to his office. I went to O'Beirne in 1959/60 because I heard he was a good advocate. I did not know Khan for 30 years - only when I went to O'Beirne. He acted as interpreter. I do not know why O'Beirne could not find papers. I did not give guarantee and mortgage to assist Khan.

Defendant's Evidence

No. 13.

AHMED DIN S/O
MOHAMED BUX
BUTT

10

Re-examined

16th November and 17th December, 1962.

I did instruct Mr. Sirley to write to O'Beirne.

Q. Did you read the letter I had written?

Cross-Examination continued.

Objection by Khanna if O'Beirne not called.

Objection

This was at same time as I instructed you to write about the other matter.

(Khanna - objection).

Ruling.

Ruling

20

I rule that the question is admissible what instructions were given by witness to Mr. Sirley (if he can remember and that memory can be relied upon) but there is no evidence of what action was taken.

W.H. Goudie, J.

Re-examination continued

Re-examination continued

30:

Papers regarding the three properties were with O'Beirne. I did not then know Khan had done anything wrong. Mr. Sirley told me this after I had given him instructions to write. Mr. Sirley did tell me reply received from Mr. O'Beirne. It was after this Mr. Sirley told me Khan had done wrong. I had no reason to help Mr. Khan, and he never asked me to stand surety for him. Never asked to sign guarantee on mortgage in this matter. Should not have signed such papers.

Defence case.

W.H. Goudie, J.

In the Supreme
Court of Kenya
at Nairobi

No. 14.

COUNSELS ADDRESSES

No. 14.

(a) SIRLEY FOR DEFENDANT

Counsels'
Addresses

Sirley

Case depends on Exhibits 1, 3, 4. Exhibit 5 first produced at this hearing.

(a) SIRLEY
for Defendant.

Plaintiff never met defendant and does not know signature and could not know who wrote it.

17th December,
1962.

Not pleaded.

10

No hand-writing expert produced by plaintiff to contradict denial of defendants signature. Defendant never said he could sign except in English.

Why first produced in this Court.

Put up story later plaintiff and deceased Khan.

Plaintiff never met defendant when going to inspect property.

Why no mention of guarantees, etc. since 1958?

20

Only when action threatened does suggestion of guarantee arise.

Refers correspondence. No delivery of goods? Conversion?

Exhibit 14. Support defendant's story that he thought documents referred to Gian Singh transaction.

2. If guarantees valid.

Exhibit 3 refers to Kajiado Provision Stores. At first plaintiff said no Kajiado Provision Stores. Now said to be mistake. There was a registered business. Subsequently said trustee of Kajiado Provision Stores and later that the agreement cancelled.

30

Inferences.

Guarantee drawn in name of Kajiado Pro-

vision Stores as Kajiado European Stores now exist.

Plaintiff's witness said Kajiado Provision Stores supplied.

Not penny due from Kajiado Provision Stores to plaintiff.

Plaintiff's own witness, P.W.1. said this likewise.

Nothing due from Sayed Omar.

10 3. Is it possible to say what due from Kajiado European Stores even.

"Sugar on credit."

No sugar ever supplied on credit.

Impossible to guarantee illegality.

Supplied credit "for all such sugar and any other goods".

No satisfactory accounts. Statement. Exhibit 4 is a lie.

Invoices not between the parties.

20 No corresponding entries in books of plaintiff.

"Sugar account".

Other firms buying and distributing sugar in same area.

No accounts produced.

Why Sayed Omar: believe no liability.

First entry is 31.7.56. Before Guarantee.

? To bring up figure to 45,000/- maximum amount of guarantee.

30 Exhibit 5, 23.7.56. Would this persuade him to supply 33,000/- worth of goods?

Why no account between selves and debtors.

In the Supreme Court of Kenya at Nairobi

No. 14.

Counsels' Addresses

(a) SIRLEY for Defendant.

17th December, 1962.

Continued.

In the Supreme Court of Kenya at Nairobi

No. 14.

Counsel's Addresses

(a) SIRLEY for Defendant.

17th December, 1962.

Continued.

(b) KHANNA for Plaintiffs

17th and 18th December 1962.

Sayed Omar prepared to tell any lie.

No effort to obtain money from Sayed Omar - principal and debtor.

Interest. Where is guarantee. Interest must be agreed upon. How calculated?

(b) KHANNA FOR PLAINTIFFS

Khanna.

Exhibit 1. Guarantee in respect of Sayed Omar & Bros.

"Due payment" covers interest. Supply to them. 10

Not necessary to be contract for out and out sale.

Not concerned with Exhibit 1 as showing anything due from Sayed Omar Bros.

Exhibits 2 adds another firm. It is a principal guarantee.

This is an additional guarantee on its own and supplemental to Exhibit 1.

Good guarantee in Clause 1 quite independent. 20

Alleged misrepresentation does not bear out para. 3 of Defence.

Defendant himself admitted no idea of misrepresentation until Mr. Sirley suggested it.

Defendant knew that Guarantee and Mortgage and no defence that he thought different party.

- He did not try to find out what mortgage was -no misrepresentation.

Exhibit 5. No duty on plaintiffs to check authenticity. 30

Evidence of forgery does not affect case.

Para. 4 Defence. No evidence to show that plaintiffs party to any fraud.

If true story defendants would have known of fraud very much earlier on. Trumped up story not brought in correspondence or defence.

In the Supreme Court of Kenya at Nairobi

Accounts.

Not primary evidence, only corroboration.

No. 14.

Exhibit 9.

Counsels' Addresses

Kajiado Provision Stores was standing in the place of Sayed Omar & Bros.

(b) KHANNA for Plaintiffs

Exhibit 4, p.4. Exit not shown in Exhibit 9.

17th and 18th December 1962.

10 Kajiado European Stores is the one who owes money in present action.

continued.

Supplies before date of guarantee.

Suing for balance.

18.12.62.

18th December, 1962.

Coram: Goudie, J.
Sheikh for Sirley.
Khanna.

20 Person effecting transactions must give evidence that he did supply. Documentary evidence shows a sum owing at end of 1957. Nothing to deny indebtedness.

Admission. Exhibit 9 dated 25.2.58. Not disputed. Plaintiffs, Khan and Allahadad.

S. 34 Indian Evidence Act. Not alone sufficient to produce books.

Sayed Omar's account cleared.

No invoice as not out and out sale.

30 Right of creditor to appropriate first payments against unguaranteed sums. S.60 Indian Contract Act.

The plaintiff may exercise right of appropriation in box.

You must necessarily have rejected the first two items on face of the account.

Defendants evidence does not tally with

In the Supreme Court of Kenya at Nairobi

Defence or with Exhibit 14.

Absurd to suggest that guarantee would be taken from debtor.

No. 14.

Counsels' Addresses

Corroboration of allegations against deceased person necessary. O'Beirne not called. Gian Singh not called and no evidence of a condition. No report to C.I.D.

(b) KHANNA for Plaintiffs

Demeanour of defendant.

17th and 18th December 1962.

No attesting witness necessary to guarantee. No denial in pleading of guarantee.

10

continued.

Guarantee speaks for itself and person in whose favour made not put on enquiry as to the genuineness of document.

Composition of Kajiado European Stores not relevant.

Interest.

Sufficiently proved. Not disputed in Defence as regards calculation of interest.

Item 5 not argued.

Not even any suggestion of fraud as regards mortgage.

20

Certificate for two counsel asked.

C.A.V.

No. 15.

No.15.
JUDGMENT

Judgment

11th February, 1963.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2127 OF 1960

1. DEVKUNVERBEN widow of POPATLAL KARMAN
2. MEGHJI KARMAN MALDE,
3. DEVCHAND KARMAN MALDE and
4. NANDLAL POPATLAL MALDE, in their capacity as the Executors of the Estate of POPATLAL KARMAN deceased AND
5. MEGHJI KARMAN and
6. DEVCHAND KARMAN trading as "POPATLAL KARMAN & COMPANY, Merchants PLAINTIFFS

30

VERSUS

AHAMED DIN BUTT s/o MOHAMED BUX BUTT.... DEFENDANT.

J U D G M E N T

In the Supreme
Court of Kenya
at Nairobi

No. 15.

JUDGMENT

11th February,
1963.

Continued.

10 There are six plaintiffs to this suit of which the two last named are suing as partners and the four first named as representatives of the Estate of a deceased partner in the firm of Popatlal Karman & Company, Merchants. They are suing the defendant in his personal capacity for Shs.45,000/-, interest and costs and for an account to be taken and for monies found to be due to them on such account arising out of a written guarantee (Exhibit 1) and a supplemental written guarantee (Exhibit 2). They are also suing for the said sum of Shs.45,000/- or, in default of payment of such sum being made with interest and costs, for sale of the property charged under an Equitable Mortgage (Exhibit 3) and for a personal decree for any balance outstanding after such sale as aforesaid.

20 The defendant in his written Statement of Defence admits that the signatures on all these documents (Exhibit 1, 2 and 3) are his signatures but denies liability under either of the guarantees or under the Equitable Mortgage on the grounds following namely:-

30 (a) Fraudulent misrepresentation at the time of the signing of the three said documents by one Khan, now deceased, that the documents related to the purchase of a property by the defendant which was being handled by an advocate, Mr. O'Beirne, the employer of the said Khan and that at the time of such misrepresentations the said Khan was acting "as agent for the plaintiffs and/or with the knowledge and consent of the plaintiffs and/or the person through whom the plaintiffs, suing in a representative capacity, claim."

40 (b) Further, or in the alternative, the said three documents were obtained by means of keeping silence as to material circumstances.

(c) Further, or in the alternative and without prejudice the defendant disputes any liability under the supplemental Guarantee (Exhibit 2) in respect of sugar supplied on credit to Sayed Omar

In the Supreme
Court of Kenya
at Nairobi

& Brothers, one of the alleged principal debtors, subsequent to the date of the said Supplemental Guarantee.

No. 15.

(d) The defendant denies any liability for commission or interest.

JUDGMENT

11th February,
1963.

Continued.

(e) Further, or in the alternative and without prejudice, the defendant denies that the plaintiffs supplied the alleged or any goods to the principal debtors (Sayed Omar & Brothers or Kajiado European Stores) or under the terms of the said guarantees. 10

(f) Further, or in the alternative and without prejudice, the defendant maintains that the said two guarantees are vitiated by illegality inasmuch as Kajiado European Stores, the second of the two alleged principal debtors, had no licence to purchase sugar.

I have considered it advisable to set out rather fully the prayers in the Plaint and the grounds of avoidance of liability in the defence because the learned Counsel engaged were entirely unable at the commencement of this action to come anywhere near agreement as to the issues and rather than, as I then thought, waste time on framing issues it was agreed that if I thought it advisable I should frame issues before I come to the operative part of my judgment. With the benefit of hindsight I now consider that an hour or more spent in framing the issues before hearing any evidence would have been time well spent as I think it would have simplified the evidence and avoided evidence being adduced which was outside the pleadings. However, having made my own task more difficult it is now necessary for me to set out what I consider to be the issues in this case. In so doing I intend to try to avoid including those issues which are in my view incidental only and, although I shall try to take account of all details in the evidence, I propose to set out what seem to me to be the broad issues only. 20 30 40

Issues:-

1. What sum, if any, is due and remains unpaid to the plaintiffs for sugar and other goods supplied to anyone who was a principal debtor under the said two written Guarantees (Exhibit 1 & 2) and for whom the defendant, in the

absence of fraudulent misrepresentation, concealment or other special circumstances, would be liable to the plaintiffs?

In the Supreme
Court of Kenya
at Nairobi

2. Was there any, and if so what, fraudulent misrepresentation by Khan, and, if established, in what capacity did he make the misrepresentation and how does it affect any liability of the defendant?

No. 15.

JUDGMENT

11th February,
1963.

10 3. Did Khan keep silent as to any material circumstances concerning the said two Guarantees or Equitable Mortgage or concerning the transactions generally which he was under a duty to disclose and if he failed to make any necessary disclosure how does this affect the liability, if any, of the defendant under all or any of the said documents?

Continued.

20 4. Did Sayed Omar & Brothers incur any liability to the plaintiffs after the date of the Supplemental Guarantee (Exhibit 2) i.e. 19th January 1957, and if so to what extent, if any, is the defendant so liable?

30 5. Has it been established that a licence is necessary to deal in sugar and that Kajiado European Stores had no such licence and if so is the Supplemental Guarantee (Exhibit 2) vitiated as regards any liability of the defendant which might otherwise have been incurred in respect of any debt due from Kajiado European Stores?

In using the term "principal debtors" in these issues I have used it for the sake of convenience only and I have not lost sight of the fact that by Clause (4) of Exhibit 1 the defendant was jointly and severally liable with the firm to whom sugar and other goods were supplied and not a mere surety should the plaintiffs choose so to regard him.

40 In my view by far the most difficult part of this case is to decide what actual financial liability if any has been shown to have been incurred by Sayed Omar and Brothers and or Kajiado European Stores whom I have called the "principal debtors". This is due to the extreme confusion in the evidence with regard to the dates of the formation, composition and dissolution of these

In the Supreme
Court of Kenya
at Nairobi

No. 15.

JUDGMENT

11th February,
1963.

Continued.

firms and of another firm Kajiado Provision Stores mentioned in the final paragraph of Exhibit 2. The difficulty is increased by the fact that the sums said to have become due from each firm are admittedly shown, if at all, only in a composite "Sugar Account" and not as debits against the firms individually and that the signature on an alleged acknowledgement of the debt due from Kajiado European Stores on Exhibit 9, supposed to be that of Khan, is disputed; he is now dead, and no handwriting expert has been called to make a comparison of this signature with signatures admitted to be his on other documents. Although, therefore, it might be considered illogical to consider the question of avoidance of liability before prima facie liability has been first established, I have decided to leave the first issue until last. In so doing I shall leave what I consider to be the issue, the answer to which must necessarily be the most doubtful, and answer all the other issues, whatever I decide on the first issue, and this may be of advantage to any possible appellate Court.

10

20

I propose to dispose first of the fifth issue. I can find nothing in the evidence to show conclusively what licence, if any, is necessary to deal in sugar, that Kajiado European Stores lacked any necessary licence, what effect any failure to obtain a licence has on transactions involving sugar or that the plaintiffs were any party to, or knew of, the failure of the firm to get a licence if one was necessary. Dealing with the fourth issue it is proved, and Mr. Khanna in closing admitted, that nothing is due from Sayed Omar & Brothers and that "the account is cleared". There is nothing to show that any liability was incurred by this firm after the 19th January 1957, and I find in the negative.

30

I will now deal with the second and third issues together since they seem to me to be interdependent. It is of necessity extremely difficult to decide whether or not a deceased person was guilty of fraudulent misrepresentation or fraudulent silence on material circumstances of which it was his duty to speak. Bearing in mind that it is for the defendant to satisfy me that the balance of probabilities favours such a view and that no evidence has been adduced from Mr. O'Beirne or the attesting witness or Gian Singh, I think it follows that the real issue is how much reliance

40

50

In the Supreme
Court of Kenya
at Nairobi

No. 15.

JUDGMENT

11th February,
1963.

Continued.

I feel I can properly place on the evidence of the defendant. Unfortunately, like all the other non-professional witnesses in this case I considered his evidence to be utterly unreliable and much more concerned with painting a picture favourable to his own case than with any strict regard for the truth. It does not, of course, follow that he is to be disbelieved for this reason alone, but he admitted having gone to prison on a number of occasions for dishonesty offences although his evidence was contradictory with regard to the precise number. The defendant was anything but straightforward in cross-examination and the record shows how contradictory, evasive, and on occasions utterly stubborn he was in refusing to answer vital questions as to his beliefs and state of mind at the time he signed the documents concerned. I was by no means convinced on the defendant's evidence that he was ever told by Khan that he was signing documents concerned with the purchase of a property or that there was any misrepresentation. I accept it as unproved, but as a possibility, that Khan may not have told the defendant in detail just what the documents were, and that he may, even possibly have misled the defendant as to the contents of the documents, but in my view there is no sufficiently reliable evidence on which I could properly hold that a specific misrepresentation was made by Khan to the defendant which induced him to sign the documents. In so deciding I have had regard not only to the defendant's worth as a witness of truth but to various other factors. First, the specific misrepresentation alleged in Paragraph 3 of the Defence is not in substance the same as the misrepresentation attempted to be proved in evidence. Secondly, the defendant was eventually driven into admitting, although he repeatedly tried to withdraw from such admissions, that he did know he was signing guarantees and a mortgage albeit as he says for a different purpose, in favour of a different party, and in respect of a different property. Thirdly it is necessary to produce corroboration of allegations against a deceased person and I can find no corroboration of these allegations against Khan. Fourthly, it seems to me that the Gian Singh story had been produced as an afterthought. There was nothing in the correspondence and nothing in the written statement of defence to this effect, and the misrepresentation alleged in the latter document

In the Supreme
Court of Kenya
at Nairobi

No. 15.

JUDGMENT

11th February,
1963.

Continued.

was merely of a general nature that the defendant was led to believe that he was signing "documents" in connection with an unspecified purchase. I do not believe that Exhibit 5 is a forgery and this bears out the plaintiffs' version to some extent that the defendant intended to deposit the deeds of his Eastleigh property with them as a temporary security and that he agreed to sign other necessary documents later. Even if I am wrong, and the signature on Exhibit 5 is a forgery, there is, as I see it, no proof that the plaintiffs must have known it was a forgery. Moreover, even if there was misrepresentation as alleged in the written statement of Defence, or otherwise, the defendant has not, as I see it, started to prove that the deceased Khan was acting "as agent for the plaintiffs, and/or with the knowledge and consent of the plaintiffs, and/or the person through whom the plaintiffs, suing in a representative capacity, claim".

10

20

Many of the same arguments apply in my view in considering whether it is proved that the deceased Khan kept silent on material circumstances on which there was a duty to speak. I do not consider that Paragraph 6(a)(b) or (c) of the written Statement of Defence have been established, and in any case since no nexus has been proved between Khan and the plaintiffs in this connection, I do not consider any failure to disclose by the plaintiffs has been established. I therefore answer the second and third issues negatively. It remains now to consider the first, which as I have said, is really the major issue, the onus of which rests on the plaintiffs.

30

Before it is possible to decide this issue it is necessary to consider the meaning of the three documents (Exhibits 1, 2 and 3). Exhibit 1 is quite clear and is a guarantee by the defendant for payment for sugar supplied to Sayed Omar and Brothers to a limit of Shs.30,000/-. Exhibit 3 is likewise clear and is a deposit of the title deeds of the Eastleigh property by the defendant with the plaintiffs by way of Equitable Mortgage as a supplemental security to this guarantee. Exhibit 2, the supplemental guarantee, is by no means so clear. This guarantee is stated to be supplemental to Exhibit 1 to which it refers as the "Principal Guarantee" and states that the defendant in consideration of the plaintiffs agreeing to supply Sayed Omar & Brothers and

40

50

Kajiado European Stores with sugar and any other goods agrees to be answerable to the plaintiffs for the payment "by the said Principals for all such sugar and any other goods as the plaintiffs may from time to time supply to them to the extent of Shs.45,000/- instead of Shs.30,000/- as mentioned in the Principal Guarantee". The immediate difficulty is to determine what is meant by the words "the said Principals". In other words, did the defendant guarantee Sayed Omar & Brothers who were, "hereinafter called "the Principals" in Exhibit 1 or was he guaranteeing both Sayed Omar & Brothers and Kajiado European Stores who were not specifically described as "the Principals" in Exhibit 2? The position is then further confused so far as Exhibit 2 is concerned, in the last paragraph which reads:

"And the said Principal Guarantee shall 'Thenceforth' (sic) be read and construed as if the sum of Shs.45,000/- and the name of Kajiado Provision Stores were substituted in the Principal Guarantee."

I think one's immediate reaction, without knowing anything of the formation, composition or dissolution of any of these firms, would be to say that Exhibit 2 was just badly drafted and that it was at least tolerably clear that the defendant intended to guarantee Kajiado European Stores in addition to Sayed Omar & Brothers, that they were hence-forward to be regarded as the "Principals" and that the name of Kajiado Provision Stores was merely a clerical error and was intended to read Kajiado European Stores.

The evidence shows however that whilst the second plaintiff (Malde) professed never to have heard of a firm called Kajiado Provision Stores the witness Allahadad (PW.6) who was a partner in the firm of Sayed Omar & Brothers not only knew of such a firm but said that he was the sole proprietor and that it was a branch of Sayed Omar & Brothers. He further said that Kajiado European Stores was a continuation of Kajiado Provision Stores under another name and that it is now doing business under the name of Sheriff Provision Stores. This witness said he also started another firm called Malindi Stores when Kajiado Provision Stores ceased to function, but whether this was before the European Stores took over or was trading concurrently with it, or whether it had connection with

In the Supreme Court of Kenya
at Nairobi

No. 15.

JUDGMENT

11th February,
1963.

Continued.

In the Supreme
Court of Kenya
at Nairobi

Sayed Omar & Brothers and/or Kajiado Provision
and/or European Stores, I have found it impossible
to answer.

No. 15.

JUDGMENT

11th February,
1963.

Continued.

The contradictions, confusion, and compli-
cations are in some small measure shown by the
following extract from the evidence of Allahadad
(P.W.6.).

"From 1955 in all business dealings we were
using the name of Kajiado Provision Stores.
We had to use the name of Sayed Omar &
Brothers until June 1956 when we opened up
Kajiado European Stores. We used both
names until end of June 1956 and after this
we used name of Kajiado European Stores.
Until December 1956 the name of Sayed Omar
continued. I made a mistake if I said we
did not use name of Provision Stores or
Sayed Omar after June 1956 Goods
delivered in name of Sayed Omar & Brothers
as partners the same. The sugar was
delivered to Provision Stores in name of
Sayed Omar After 1955 sugar
was not sold by Provision Stores but I sold
it under the name of Popatlal Karman &
Company Plaintiffs did not
agree to our using their money but we told
them if they didn't get their money they
would get interest".

10

20

The second plaintiff (Malde) at one stage
entered into an agreement (Exhibit 12) as trustee
(apparently in bankruptcy) of the firm of Sayed
Omar & Brothers agreeing to sell Kajiado European
Stores to Khan for Shs.82,500/- but, hardly
surprisingly, the sale did not go through as this
witness now admits "I sold a business and did not
know whether it existed or not. Maybe it did not
exist I received the first Shs.10,000/-
but had to return it to Khan".

30

In the face of this type of evidence I think
it is impossible to say, as Mr. Khanna suggested
in opening, that the words, "Kajiado Provision
Stores" in the last paragraph of Exhibit 2 was
obviously meant to read Kajiado European Stores,
nor do I think that it is possible to say that the
words were not a mistake but were meant to be
substituted for Sayed Omar & Brothers in Exhibit
1, as I understood him to contend in closing. In
my view it would be almost, if not entirely,

40

impossible to say what is the proper construction to be placed on Exhibit 2. Fortunately, however, I do not think this affects the issue greatly since in my view whether the defendant agreed to guarantee Sayed Omar & Brothers, and/or Kajiado Provision Stores and/or Kajiado European Stores, the plaintiffs have entirely failed to show that the Shs.45,000/- claimed, or any other sum, is now due to them from any of these firms and that the firms are still in existence under any of these names, although the latter factor might not have been fatal to an action on the guarantee against the guarantor.

10

20

30

40

In-so-far as Sayed Omar & Brothers is concerned it is agreed that their account is cleared and nothing due. In-so-far as the Kajiado Provision Stores is concerned it is no part of the plaintiffs' case that anything is due from this firm. In-so-far as Kajiado European Stores is concerned, there is not a single witness who is able to produce a single invoice, statement, or entry in any books against this specific firm. The so-called statement, Exhibit 4, although addressed to Messrs. Sayed Omar and Brothers and Kajiado European Stores as being "In account with" the plaintiffs, is merely extract from a composite so-called "Sugar Account", it has been shown to contain omissions, and the invoices are all to third parties as I understand the position. There is an alleged acknowledgement of indebtedness by deceased person purporting to have signed as proprietor of Kajiado European Stores in February 1958 but the signature is disputed and there is no evidence of anyone who saw him sign. The mere fact that this balance corresponds with the balance as at that date in the "Sugar Account" is not in itself sufficient to satisfy me either that Shs.45,000/- or any sum remains due now from this firm to the plaintiffs.

50

My own view is that the business dealings of Sayed Omar Brothers, Kajiado Provision Stores, and Kajiado European Stores and others are, on the evidence, inextricably mixed up and it is not for this Court to unravel them for the plaintiffs to enable them to establish their claim, particularly when I suspect, as I do in this case, that there have not been a series of separate transactions by separate firms, but that in many cases the same persons have been trading under different trade names at different times and even

In the Supreme
Court of Kenya
at Nairobi

No. 15.

JUDGMENT

11th February,
1963.

Continued.

In the Supreme Court of Kenya at Nairobi

No. 15.

JUDGMENT

11th February, 1963.

Continued.

at the same time as and how it suited them for their own private purposes, and there would be no reasonable possibility of the guarantor knowing whether he was rendering himself liable for genuine transactions of a specific firm or guaranteeing the transactions of a number of different firms, some of whom were not envisaged by him. I even note that Allahadad effected sugar transactions in the name of the Plaintiffs, and in my view it is not beyond the realms of possibility that some of the items in Exhibit 4 may include such transactions, although I am not saying this is proved or that the plaintiffs are proved to have known of any such possibility.

10

The plaint is dismissed with costs. I certify that in my opinion that is a case in which it was proper to engage two Counsel.

W. H. Goudie, J.
11.2.63.

No. 16.

Decree

11th February, 1963.

No. 16.

DECREE

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2127 OF 1960.

- 1. DEVKUNVERBEN widow of POPATLAL KARMAN,
- 2. MEGHJI KARMAN MALDE,
- 3. DEVCHAND KARMAN MALDE and
- 4. NANDLAL POPATLAL MALDE, in their capacity as the Executors of the Estate of POPATLAL KARMAN, Deceased, and
- 5. MEGHJI KARMAN and
- 6. DEVCHAND KARMAN trading as POPATLAL KARMAN & COMPANY.

::: PLAINTIFFS

30

v e r s u s

AHAMED DIN BUTT s/o MOHAMED BUX BUTT :: DEFENDANT.

D E C R E E

In the Supreme
Court of Kenya
at Nairobi

CLAIM FOR:

No. 16.

DECREE

11th February,
1963.

Continued.

10. (a) An order that the Defendant do pay to the Plaintiffs the sum of Shs.45,000/- under the said guarantees and the said Equitable Mortgage;
- (b) Interest on the said sum of Shs.45,000/- at the rate of 8% p.a. from the date of filing of this suit to the date of judgment and thereafter on the decretal amount at 6% p.a. until payment in full;
- (c) Costs of this suit, together with interest thereon at 6% p.a. from the date of judgment until payment in full;
- (d) An account be directed to be taken by the Registrar of what is due to the Plaintiffs under the terms of the aforesaid Guarantees;
- 20 (e) And upon the Defendant paying into Court what shall be certified as due to the Plaintiffs as aforesaid on or before a day named the Plaintiffs be directed to deliver up to the Defendant or to such person as he appoints all documents in the possession or power of them relating to the premises charged or mortgaged and if so required at the cost and expense of the Defendant and against payment of their costs charges and expenses execute a discharge of the property charged or mortgaged so as to release the same from the mortgage;
- 30 (f) In default of payment as aforesaid sale of the premises charged or mortgaged be decreed, and
- (g) That if the nett proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the Plaintiffs be at liberty to apply for a personal decree of the amount of the balance.
- 40

THIS SUIT coming on the 12th, 13th,

In the Supreme
Court of Kenya
at Nairobi

No. 16.

DECREE

11th February,
1963.

Continued.

14th, 16th November 1962, 17th and 18th December, 1962, for hearing and on the 11th day of February, 1963, for judgment before the Honourable Mr. Justice Goudie in the presence of Counsel for the Plaintiffs and Counsel for the Defendant, IT IS ORDERED:

1. That the Plaintiffs' suit be and is hereby dismissed with costs.
2. That the Plaintiffs do jointly and/or severally pay to the Defendant his costs of this suit to be taxed and certified by the Taxing Master of this Court.
3. That this is a case in which it was proper to engage two Counsels.

10

GIVEN under my hand and the Seal of the Court at Nairobi this 11th day of February, 1963.

ISSUED this 28th day of March 1963.

BY THE COURT

sd. M.F. Patel.
DEPUTY REGISTRAR,
SUPREME COURT OF KENYA.

20

I certify this is a true copy of the original.

sd. M.F. Patel.
DEPUTY REGISTRAR,
H.M. SUPREME COURT OF KENYA.

Date: 29/3/63.

No. 17.

NOTICE OF APPEAL

In the Supreme
Court of Kenya
at Nairobi

IN HER MAJESTY'S SUPREME COURT OF KENYA AT
NAIROBI

No. 17.

CIVIL CASE NUMBER 2127 OF 1960

NOTICE OF
APPEAL

19th February,
1963.

- | | | | |
|----|---|---|-----------------|
| 10 | 1. DEVKUNVERBEN widow of
POPATIAL KARMAN,
2. MEGHJI KARMAN MALDE,
3. DEVCHAND KARMAN MALDE and
4. NANDIAL POPATIAL MALDE,
in their capacity as the
Executors of the Estate
of POPATIAL KARMAN
Deceased, and
5. MEGHJI KARMAN and
6. DEVCHAND KARMAN
trading as POPATIAL KARMAN
& COMPANY. | } | ::: P LAINTIFFS |
|----|---|---|-----------------|

v e r s u s

20 AHAMED DIN BUTT s/o MOHAMED BUX BUTT :: DEFENDANT

NOTICE OF APPEAL

TAKE NOTICE that the Plaintiffs above-named being dissatisfied with the decision of the Honourable Mr. Justice Goudie given herein at Nairobi on the 11th day of February 1963, intend to appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the said decision.

DATED AT NAIROBI this 19th day of February, 1963.

30

sd. T.G. Bakrania,
for VELJEE DEVSHI & BAKRANIA,
ADVOCATES FOR THE APPELLANTS.

To,
The Registrar,
Supreme Court of Kenya,
Nairobi.

and to:

In the Supreme
Court of Kenya
at Nairobi

Messrs. B. Sirley & Co.,
Advocates for the Defendant/Respondent,
Nairobi.

No. 17.

NOTICE OF
APPEAL

19th February,
1963.

Continued.

The address for service of
the Appellants is:

c/o VELJEE DEVSHI & BAKRANIA,
Advocates,
Market Mansion,
Bazaar Street,
P.O. Box 5087,
NAIROBI.

10

.....

Note:- A respondent served with this Notice is
required within Fourteen days after such
service to file in these proceedings and
serve on the Appellants a notice of his
address for service for the purposes of
the intended appeal, and within a further
Fourteen days to serve a copy thereof on
every other respondent named in this
notice who has filed notice of an address
for service. In the event of non-
compliance, the Appellants may proceed
ex-parte.

20

FILED AT NAIROBI, this 19th day of February 1963.

Sd. M.F. Patel.
DEPUTY REGISTRAR,
SUPREME COURT OF KENYA

Drawn and filed by:
VELJEE DEVSHI & BAKRANIA,
Advocates,
Nairobi.

30

nvp.

MEMORANDUM OF APPEAL

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

CIVIL APPEAL NUMBER 30 OF 1963.

BETWEEN

In the Court
of Appeal for
Eastern Africa
at Nairobi

No. 18.

MEMORANDUM OF
APPEAL

18th April,
1963.

10 1. DEVKUN VERBEN widow of
POPATLAL KARMAN, }
2. MEGHJI KARMAN MALDE, }
3. DEVCHAND KARMAN MALDE and }
4. NANDLAL POPATLAL MALDE, }
in their capacity as the }
Executors of the Estate }
of POPATLAL KARMAN, }
Deceased, and }
5. MEGHJI KARMAN and }
6. DEVCHAND KARMAN }
trading as POPATLAL KARMAN }
& COMPANY. }
::::: APPELLANTS

20 and

AHAMED DIN BUTT s/o MOHAMED BUX BUTT : RESPONDENT

(An Appeal from Judgment and Decree of the Supreme
Court of Kenya at Nairobi (Mr. Justice Goudie)
dated the 11th day of February 1963

in

Civil Case Number 2127 of 1960

Between

30 1. DEVKUNVERBEN widow of
POPATLAL KARMAN, }
2. MEGHJI KARMAN MALDE, }
3. DEVCHAND KARMAN MALDE and }
4. NANDLAL POPATLAL MALDE, }
in their capacity as the }
Executors of the Estate }
of POPATLAL KARMAN, }
Deceased, and }
5. MEGHJI KARMAN and }
6. DEVCHAND KARMAN }
trading as POPATLAL KARMAN }
40 & COMPANY. }
::::: Plaintiffs

and

AHAMED DIN BUTT s/o MOHAMED BUX BUTT : Defendant)

In the Court
of Appeal for
Eastern Africa
at Nairobi

MEMORANDUM OF APPEAL

No. 18.

MEMORANDUM OF
APPEAL

18th April,
1963.

The Appellants, (1) Devkunverben widow of Popatlal Karman, (2) Meghji Karman Malde, (3) Devchand Karman Malde, and (4) Nandlal Popatlal Malde, in their capacity as the Executors of the Estate of Popatlal Karman, Deceased, and (5) Meghji Karman and (6) Devchand Karman, appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decision above mentioned on the following principal grounds of appeal, namely:-

10

Continued.

1. The findings that the amount due under the guarantees, or that it was so due by Kajiado European Stores had not been proved, or that it was insufficient to have proved that it was so due under a composite account by Sayed Omer & Brothers and/or Kajiado European Stores was insufficient, were all erroneous.

2. In view of the statement in the judgment, "Dealing with the fourth issue it is proved, and Mr. Khanna in closing admitted, that nothing is due from Sayed Omer & Brothers and that 'the account is cleared'. There is nothing to show that any liability was incurred by this firm after the 19th January 1957, and I find in the negative", the learned judge overlooked the necessary corollary was that liability was solely incurred by Kajiado European Stores, on and after the 19th January 1957, and inevitably for the balance that remain unpaid of such liability in the sum claimed.

20

30

3. There was no evidence that Exhibit 4, or the "Sugar Account" in the books, contained any alleged dealings with Kajiado Provision Stores and all uncontradicted sworn testimony was the other way, and it was a misdirection to have been influenced by the speculations and conjectures imported into the judgment as under:-

(a) "When I suspect, as I do in this case, that there have not been a series of separate transactions by separate firms, but that in many cases the same persons have been trading under different trade names at different times and even at the same time as and how it suited them for their own private purposes, and there would be

40

no reasonable possibility of the guarantor knowing whether he was rendering himself for genuine transactions of a specific firm or guaranteeing the transactions of a number of different firms, some of whom were not envisaged by him."

In the Court
of Appeal for
Eastern Africa
at Nairobi

No. 18.

MEMORANDUM OF
APPEAL

18th April,
1963.

Continued.

10 (b) "In my view it is not beyond the realms of possibility that some of the items in Exhibit 4 may include such transactions (viz. transactions effected by Allaha-

20 dad or those with Kajiado Provision Stores), although I am not saying this is proved or that the Plaintiffs are proved to have known of any such possibility."

4. The learned judge erred in holding "In my view it would be almost, if not entirely, impossible to say what is the proper construction to be placed on Exhibit 2".

5. The approach of the learned trial judge contained errors and much mis-apprehension or mistaken emphasis, and in particular the following:-

- 30 (a) It was overlooked the guarantee of 19th January 1957, clearly covered due payment by Sayed Omer & Brothers and/or Kajiado European Stores, and the final clause did not undermine that clear construction.
- 40 (b) On the terms of the said guarantee, and on the pleadings, it was not appreciated, it was unnecessary to have proved either exclusively from the books, or by other evidence, how much was due from each of the principal debtors, and it was not appreciated the Respondent's liability was unaffected by whether supplies were to one or the other or both of those two firms.
- (c) That Sayed Omer & Brothers and Kijiado European Stores were not legal entities, but were abbreviations for the real persons cloaked thereby, and if same persons were trading under the said two names (as found), it was still more

In the Court
of Appeal for
Eastern Africa
at Nairobi

No. 18.

MEMORANDUM OF
APPEAL

18th April,
1963.

Continued.

purposeless to prove which of the two firms owed what.

- (d) The uncontradicted primary evidence in the case was relegated into insignificance, and the evidence of books, secondary and insufficient without the former (not appreciated by the learned trial judge) was given undue prominence.
- (e) Exhibit 9 was a clear admission, and it was made way back in 1958, afforded by itself conclusive proof, was overlooked. 10
- (f) Exhibit A was put in only for identification, and was never ultimately proved, should have been excluded, and it was overlooked there was no basis for any dispute as regards the signature to Exhibit 9.
- (g) There was a misdirection as regards proof of signature on Exhibit 9 in that it was held not proved, in the absence of expert testimony to carry out comparisons, and in that further effect of evidence of witnesses who had seen the deceased (Abdul Majid Khan) sign or who knew his signature, were ignored, and in that further no attempt at comparison or finding thereby afforded was made by the learned judge. 20
- (h) The direct uncontradicted evidence of witnesses called for the Appellants on the points, (1) that the amount unpaid was Shs.41,054/33 (2) that it was for supplies of sugar and other goods (3) that although earlier was to Sayed Omer & Brothers and/or Kajiado European Stores was on and after the 19th January 1957 or thereabouts solely to Kajiado European Stores (4) under the terms of supply interest was chargeable at a specified rate after a stipulated period, as part of the sum due for supplies, and (5) the terms of the supply were that as consignees the principal debtors must account for proceeds of sale, if such commodities were sold, or if not returned at full price less agreed commission plus interest. 30 40

- (i) The nature of the "sales" or "supplies" to the principal debtors were not appreciated, nor the failure as such to produce invoices.
- (j) The absence of individual debits in the books did not, it was overlooked, destroy the effect of the other evidence in the case or whittle down its effect, or in particular that of Exhibit 9.
- 10 (k) The submission of the Appellant's Counsel, and evidence of P.W.1, Meghji Karman Malde, that payments received and credited in Exhibit 4, taken with the evidence to the effect that supplies on and after the 19th January 1957, went exclusively to Kajiado European Stores (as it happened) showed the amount as solely due from Kajiado European Stores did not destroy or whittle down the effect of Exhibit 9 or direct testimony on the part of the Appellants, or require proof (which existed except by direct entries in books) of individual indebtedness.
- 20
- (l) It was overlooked that it was a mis-direction to have been influenced by the abortive sale of the "business" of Sayed Omer & Brothers in bankruptcy during June 1956, or to have allowed the said sale to confuse the position of supplies to Sayed Omer & Brothers (under composition and not in bankruptcy) from July 1956 onwards or to Kajiado European Stores on or after the 19th January 1957.
- 30

In the Court
of Appeal for
Eastern Africa
at Nairobi

No. 18.

MEMORANDUM OF
APPEAL

18th April,
1963

Continued.

WHEREFORE the above-named Appellants pray that a decree be passed in terms of the prayers in the Plaint, inclusive of liberty to the Appellants to bid at the sale of the mortgaged property, with costs of two Counsel in each of the Courts - here and below.

40 DATED AT NAIROBI this 18th day of April 1963.

Sd.
For VELJEE DEVSHI & BAKRANIA,
ADVOCATES FOR THE APPELLANTS.

In the Court
of Appeal for
Eastern Africa
at Nairobi

To: The Honourable the Judges of
Her Majesty's Court of Appeal
for Eastern Africa,

No. 18.

and to: Messrs. B. Sirley & Company,
Advocates for the Respondent,
Nairobi.

MEMORANDUM OF
APPEAL

18th April,
1963.

Drawn by:

KHANNA & COMPANY,
Advocates,
Nairobi.

Continued.

10

Filed by:

VELJEE DEVSHI & BAKRANIA,
Advocates,
Nairobi.

The address for service
of the Appellants is:

c/o VELJEE DEVSHI & BAKRANIA,
Advocates,
Market Mansion,
Bazaar Street,
P.O. Box 5087,
NAIROBI.

20

FILED this 18th day of April, 1963 at
Nairobi.

Sd.
for REGISTRAR.
COURT OF APPEAL FOR EASTERN AFRICA,
NAIROBI.

/nvp.

No. 19

Notes taken by Mr. Justice Crawshaw J.A.

IN THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

In the Court
of Appeal for
Eastern Africa
at Nairobi

No. 19

CORAM: QUASHIE-IDUN, P: GOULD, V-P: CRAWSHAW, J.A.

Notes taken
by Mr. Justice
Crawshaw J.A.

4th - 9th
March 1964

CIVIL APPEAL NO.30 of 1963

BETWEEN

- 1. DEKUNVERBERN widow of POPATLAL KARMAN)
- 2. MEGHJI KARMAN MALDE)
- 3. DEVCHAND KARMAN MALDE and)
- 4. NANDLAL POPATLAL MALDE, in their)
capacity as the Executors of the)
estate of Popatlal Karman, deceased &)
- 5. MAGHJI KARMAN)
- 6. DEVCHAND KARMAN trading as POPATLAL)
KARMAN & COMPANY)

.... APPELLANTS

AND

AHMED DIN BUTT s/o MOHAMED BUX BUTT

.... RESPONDENT

(Appeal from Judgment and Decree
of the Supreme Court of Kenya at
Nairobi (Goudie J.) 11th Feb.1963 -

in

Civil Case No. 2127 of 1960)

(Copy of Notes taken at Hearing by
Mr. Justice Crawshaw, J.A. from 4.3.64
to 9.3.64).

(D.N.Khanna and Bakrania for Appellants
E.P.Nowrojee for Respondent).

4.3.64.

KHANNA: Respondent signed two guarantees and mort-
gage to appellants in respect of debts due
by S.Omar & Bros. and Kajiado European
Stores to appellants.

In the Court
of Appeal for
Eastern Africa
at Nairobi

20/20 S.Omar Bros. existed for longtime.
40/13 }
42/14 } " " ceased business in 1954.
33)

No.19

Notes taken
by Mr. Justice
Crawshaw J.A.
continued

45/32 Bankruptcy - composition
20/21 }
28/30 } Malde was Trustee until '58

4th - 9th
March 1964

93 Ag. by Trustee to sell to Khan, a
clerk with O'Beirne advocate.
Recital shows that European Stores 10
was owned by S. Omar Bros. Only
name sold - no stocks owing to
bankruptcy.

97 Purchase did not go through. Ag.
signed by Allahadad.

104 Issues 2, 3, 4 and 5, do not affect
this appeal.

Ground 4

111/25 J. said impossible to construe Sup. Guarantee. 20
Any alternative proposals for construction
at beginning of that para. Submit Ex.2
merely amended Ex.1. by (a) substituting
2 Drs. for 1 and (b) a larger sum and
(c) other goods as well as sugar.

64 In final clause Provision stores mentioned
for first time - clerical error.

Barrat v. Wyatt (1862) 54 E.R. 961

Arlington v. Merricks (1872) 85 E.R.1215
(last para.1226).

109/33 Submit J's first reaction was right. In 30
64 "European" is contained in recital
which shows intention.

(20 last para; Malde said Khan and Allahadad
(21 " " partners in European stores and
wanted goods. Evid. shows that
Provision stores not involved.

38 Advocate's drafting - submit, a mere coincidence that mistake was "Provision" stores.

In the Court of Appeal for Eastern Africa at Nairobi

24/18 Submit J. did not consider evid. (Khanna being referred to ODGERS ON CONSTRUCTION 4th edn. p.108 where it is sd. operative part over-rules recital if inconsistent, says "64 is not inconsistent but mutually exclusive")

No.19

Notes taken by Mr. Justice Crawshaw J.A. continued

64 In alternative I submit this could include all 3 stores - S.Omar & Sons, European and Provision.

4th - 9th March 1964

10

Rules of construction is that Ct. cannot look at extrinsic evid. in construing document - sec. 94 Indian Evid. Act. "Existing facts" shows that Provision stores not contemplated - surrounding circs. Sect. 95, 96.

If Ct. unable to accept 64 a clerical error in final clause then submit Ex. 1. applies to S. Omar & Sons only from Aug. 1956 to 19/1/57, and from 19/1/57 Ex.1 must be read as if only name is "Provision" stores.

20

"sd. principles" relate to recital "European stores" - this is independent guarantee from that in final clause. There wd. therefore be 3 guarantees, as S. Omar & Bros. included also.

Adjourned to 10.30 tomorrow.

E.D.W. CRAWSHAW.
4/3/64

5/3/64 BENCH AND BAR AS BEFORE

30 Khanna continues:-

J. fundamentally erred in appreciation of evidence.

112/13 Only persons who cd. give evid. of supply of sugar were plaintiffs and principal Drs. Almost ex parte proof, which is minimum - No question of balance of probabilities.

88 Ex. 9 - Acknowledgment of debt - Def. gave no evid. thereon - tho' illiterate he could recognise signature. Submit signature is that of Khan.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.19

Notes taken
by Mr. Justice
Crawshaw J.A.
continued

4th - 9th
March 1964

100) Ex. A - supposed to be Khan's signature.
27/1 } Evid. thereof - never proved, and it should
35/12 } have been taken off record.

23/31 - I submit witness confused when he sd.
33/3 "defendant's signature". Signature in Ex.6
and 9 the same.

{36/15, 24 Submit "this letter" was Exb.9.
{33/5

112/17 J. therefore wrong in saying no evidence
of signature. 10

35/2, 5 - Advocate sd. appeared to be Khan's
signature.

{47/11
{96 - Signature of Khan.

40/21 - witness (Allahadad) not recognised
signature Ex.9

Sec.47 Ind. Ev.Act. - J.should have compared
signature - no expert required to show
ex. 9 and 6 the same.

Taylor v. Whittam (1876) 3 Ch.D. 605, 607. 20

Sufficient to prove by P.W.1 that sugar
etc. supplied. In addition there is
Ex. 9.

15 HALSBURY 272 At 496 - minimum proof
only necessary as evidence of sales not
challenged. Bonnington Castings v. Wardlaw
(1956) 1 All E.R. 615. 618D.

46/14

H.I. Ilanga v. M. Manyoka [1961] E.A. 705. 709B.

Standard of proof 708 I. 30

107/1 - When J. sd. he regarded all non-professional
witnesses as unreliable, he was considering
issues on fraud.

Submit absence of invoices etc., did not
affect other proof of debt. Any documentary
evid. sufficient (Ex. 9) s.34 Ind.Evid.
Books relevant but not essential.

Sarkar evid. 10th Edn. 387, 388.

{105/30 J's reference to books etc.,
(112/5

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.19

36/1 - Railway records destroyed.

Benjamin on Sale - 8th Edn. - 318 - 320

I agree that in para.7 of Plaintiff
treated the transactions as sale and
delivery. Invoices not sent because
of liberty by buyer to return.

Notes taken
by Mr. Justice
Crawshaw J.A.
continued

4th - 9th
March 1964

10 113/3 - Suspicion must not upset evidence.

Faez Buksh Chowdry v. Fakeeroodeen (1871)
20 E.R. 775, 779

Olpherts v. Mahabir (1882) 10 I.A. 25, 30.

Tewari Jaswant Singh v. Lal Sheo Narain,
21 I.A. 6 p.8 last para.

8 - Handwriting.
last para,
12 -

20 Adjourned to 2.30

E.D.W. CRAWSHAW
5/3/64.

2.30 p.m. - BENCH AND BAR AS BEFORE.

Khanna continues:-

Shift of onus to Defts. in view of evid. against
them.

Rangopal v. Gordon Stewart (1872) 20 E.R. 855

R. v. Grees Chunder Banerjee (1884) 10 Cal.1024.

R.P. Singh v. Lakhpati Koer (1903) 30 Cal.231
at 247

30

111/33 - Not necessary to prove continued existence
of respt. firm up to date of hearing of suit.

In the Court
of Appeal for
Eastern Africa
at Nairobi

21/31
36/12
43/-

No.19

Notes taken
by Mr. Justice
Crawshaw J.A.
continued

4th - 9th
March 1964

30/3 -

Our European stores bt. from us, irrelevant
what subsequently they did with their firm.

Payments received by applts. 1st instalment
in payment of unguaranteed and unsecured
debts.

8 HALSBURY 217 Act.370

Kirby v. Marlborough (1813) 105 E.R. P.289 10

On 31st Dec. '56 same 35,000/- owed by
Omar & Sons and subsequent money which
came in through Khan (as agent for both
firms) was allocated to Omar & Sons and
extinguished their debt.

8 HALSBURY 214-6 - para.366 as to
appropriation.

{ 32/34
{ 26/25
{ 27/19

20

41/2-10 - Provision stores owed nothing.

Guarantees:

If held not a clerical error, then
provision (1) of Ex.2. itself an independ-
ent guarantee; last clause left alive Ex.1
so far as Provision stores concerned.

109/20 - "sd. Principals" refers to both firms of
Omar and European in recital.

Limit of guarantee of 45,000/- would
include interest. Interest applt. claims
is from date of suit. 30

Ex.1. cl.2. "all debts" include interest,
without any specific mention of interest.

{ 23/1
{ 40/4

evid. of interest
" " "

Dawson v. Raynes (1826) 28 E.R. 411.

Sureties liable for interest.

Ackenman v. Ehrensperger (1846) 153 E.R.
1115, 17

Asks Court for 2 counsel.

Adj. to 11.30

E.D.W. CRAWSHAW, J.A.
5/3/64.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.19

Notes taken
by Mr. Justice
Crawshaw J.A.
continued

4th - 9th
March 1964

9/3/64 - BENCH AND BAR AS BEFORE.

10.a.m.

Nowrojee:-

10 Test is whether J. satisfied goods were
actually sold and delivered to European
stores.

Standard of proof against guarantor, same
as against principal Dr.

Ex parte Young in re Kitchin (1881) 17 Ch.668

as to proof against surety.
671, 73. Judgments of James and Lush.

Admissions by principal cannot bind surety.

20 Proof of delivery and balance due is
necessary.
Ex. 9 is not evid. against the respt.

P.W. 1.

20

21/31

22/7-9

23/1-3 10-15

25/2 - 8 - Here saying 1st item Ex.4. before
guarantee.

30 26/ at 1. - Mehta is a 3rd party, a stranger
to suit. Karman is the plaintiff.

26/6 "none was actually sold"

26/13-18 - "Claim is not for goods sold".
Not a single invoice against
European stores or Omar.

27/19-25 Suppose "the a/c" was Ex.4.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.19

Notes taken
by Mr. Justice
Crawshaw J.A.
continued

4th - 9th
March 1964

- 28/34 Submits this indicates Ex. 4 is not what it purports to be.
- 30/31 Admission that amount claimed is for "money had and received", and not only for sugar. Ex. 4 does not show this.
- 32/20 - According to books, Omar never owed money for sugar.

P.W.4.

- 36/12-14 10
- 36/26-31- sugar on consignment.
- 37/12-16- J's note. The confusion here was answered at p.37/12. Sale to store took place when goods delivered to store - no credit.

P.W.3. Stationmaster

- 36/1 - sugar railed to applt. Applt. apparently left no record of his instructions to railways, and yet comments that railway did not. 20

The above is collectively the only evid. of sales and delivery. I submit quite inadequate. No evid. of delivery at all.

66 Ex. 4 headed "Sugar Account"

- 20/12 - 1st ref. to ex. 4
- 25/23 - next ref. - P.W. re-called. Invoice shd. be No.331 not 381 - 1st item p.66. No invoice produced relating to exb. 4.
- 25/33 I cannot see invoice 531 in exb.4. 30
- 26/1 - All invoices between Mehta and applt.
- 26/25-30 - P.W.1. said he did not know of "European Store".
- 27/27-30 - Applt. had only a "Sugar a/c"; no a/c for Omar or European stores.
- 29/7 Cannot show a/c in books. Neither 58,000/-, whereas at 67, balance shown as 37,962/95 - not 58,000/- even at end of Jan. 40

Submit exb.4 does not co-ordinate or tally with evid. of P.W. 1.

In the Court
of Appeal for
Eastern Africa
at Nairobi

29/13 Written proof not produced

No.19

29/19 "Ex.4 not an exact copy of anything in our books". How cd. J. accept exb.4?

Notes taken
by Mr. Justice
Crawshaw J.A.
continued

30/13-25 Credits not shown in Ex. 4 - Sums recd. from Provision stores, paid into European stores a/c. Shows inaccuracy of Ex. 4.

4th - 9th
March 1964

10

31/27 P.W.1. again recalled. No credit for the 10,000/- in exb.4, altho' cash book showed the receipt of that sum. Ex. 4 not a true extract from books.

22/24-25 We do not know what this sugar account is. No evid. of consignments to European stores or Omar.

20

88 Exhibit 9; Quite apart from the law I have already referred to:-

1-4 26/15-20 - I think the letter must mean Ex.9. Evid. wrong in saying "both partners signed"; Khanna has stressed that Allahadad and Khan were partners in European stores, whereas Ex.9 is signed by Khan as "proprietor". I do not say signature is not that of Khan, but if Allahadad a partner then Ex.9 valueless as Khan not entitled to sign as "Proprietor". He said "I" owe you on behalf of

30

21-28 This evid. contradicts that of P.W.1. that Ex.9 signed after taking accounts. Immaterial if other witness present at signing.

111/27 J. entitled to find that applts. failed to prove the money due from any of the firms.

Submit applt.'s evid. not sufficient even against European stores, let alone against respt.

40

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.19

Notes taken
by Mr. Justice
Crawshaw J.A.
continued

4th - 9th
March 1964

Guarantee:

In view of above, I follow the J. and do not intend to argue the construction of the documents of guarantee.

J. saw witnesses give their evid. and entitled to form view of credibility.

Khanna: As to ex parte Young (1881) 17 Ch. 568, cited by Nowrojee. If only award of arbitrator tendered as evid. then surety not bound. Case decides nothing else. It does not say that evid. on oath of Dr. could not be proved. 10

Evans v. Beattie (1803) 170 E.R. 725

Headnote

726 (27) - collusion - best evid. must be produced.

Sect. 32 Ind. Evid. Act, in case of statements made by dead man. Acknowledgment is good evid. for all purposes.

Coward v. Motor Ins. (1962) I.A. E.R. 531, 535 to Headnote - declaration against interest 20

Taylor v. Witham (1876) 3 Ch. 605, 607
Submit surety is bound by all the evid. which could be led against principal Dr.

Higham v. Ridgway (1808) 103 E.R. 717, 20.
Admission against interest, after death is evid. against 3 partners.

Exhibit 9: Does not say "sole" proprietor. Exb. honestly says it binds Khan, without alleging liability of Allahadad. Witness obviously mistaken in saying signed by both partners; not cross-examined on this. Confusion owing to interpretation. Submit 2 separate meetings referred to, and so not contradictory with evid. of Allahadad. 30

Allahadad admitted having received goods. If his evid. supports me and is unchallenged it must be accepted.

J. said his evid. is confused as to dates as to who were members of what firm at what particular dates. For purposes of guarantee this does not matter.

In the Court of Appeal for Eastern Africa at Nairobi

Benjamin on Sale of G (315) - does not matter whether P/dr. thinks he is agent or owner - it is a matter of law.

No.19

Notes taken by Mr. Justice Crawshaw J.A. continued

22/24 a/c against Omar and European only.

23/15 Shoud read 17th Jan.

4th - 9th March 1964

10

Mehta invoiced goods to European stores. Mehta manufacturer. Misleading to say sales were to Mehta.

{25/2 - I did not rely on the gentleman's
(108/20-24 agreement. J's. finding - no cross-appeal.

26/1 Mehta a manufacturer invoiced goods to applt.

26/11 Witness, a layman, did not know whether in law a sale or agency.

Submit in fact and in law the transactions were sales.

20

Indirect evid. of delivery - P.W.1. Ex.4. Ex.9.

Submit more than ample proof and J. would so have found had he not misdirected himself.

C.A.V.

(Signed) E.D.W. CRAWSHAW, J.A.
9/3/64.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.20

Notes taken by The Hon. the Vice-President
Sir Trevor Gould

No.20

IN THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould

CIVIL APPEAL NO. 30 of 1963

BETWEEN

4th - 9th
March 1964

- | | | | |
|--|---|------------|----|
| 1. DEVKUNVERBEN widow of POPATLAL
KARMAN | } | APPELLANTS | 10 |
| 2. MEGHJI KARMAN MALDE | | | |
| 3. DEVCHAND KARMAN MALDE and | | | |
| 4. NANDLAL POPATLAL MALDE, in their
capacity as the Executors of the
Estate of POPATLAL KARMAN Dec'd | | | |
| 5. MEGHJI KARMAN and | | | |
| 6. DEVCHAND KARMAN trading as
POPATLAL KARMAN & COMPANY | | | |

AND

AHAMED DIN BUTT s/o MOHAMED BUX BUTT
RESPONDENT 20

(An appeal from a judgment and
decree of the Supreme Court of
Kenya at Nairobi (Goudie J.)
dated 11th February, 1963

in

Civil Case Number 2127 of 1960)

Copy of Notes taken the Hon. the Vice-
President, Sir Trevor Gould

4.3.64 Coram: Quashie-Idun P.
Gould V-P. 30
Crawshaw J.A.

D.N. Khanna and Bakrania for Appellants
E.P. Nowrojee for Respondent

Khanna

Respondent equitably mortgaged to plaintiffs and signed 2 guarantees.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.20

Supply of sugar - to 2 firms.
Many defences raised. Five. Judge overruled 4 of them.
Held amount not proved to satisfaction.
Sayed Omar & Bros. - firm - 40 yrs - Kajiado St.
3 partners. Closed down in 1954. Bankruptcy proceedings.

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued

10

p.40 l. 13. Nov.1954.
P.42 l. 33 K.P.S. that closed?
P.45 l. 32

4th - 9th
March 1964

Appears S.O. & Bros. - 3 partners - bankruptcy.
In 1955 scheme of composition.

P.20. P.W.1., M.K. Malde. 1.21. Trustee.
He continued as trustee in bankruptcy till 1958.
P.28, 1.29-30.

20

P.93, Ex. 12. Bet. P.W.1 as trustee and purporting to sell to Abdul Majid Khan.

K.E. Stores also at one time seemingly owned by bankrupt partners.

Note that merely name & goodwill sold of K.E.S.
No stocks - in view of bankruptcy.
P.94 - plots - name-goodwill
P.96 - Subj. to consent - not there.
Date June 1956.

30

Judge framed 5 broad issues.
P.104. Only issue 1 relevant to appeal.
P.111, 1.24.
Says imposs. to construe.
First construction placed on Ex. 2.
P.64.
It merely amended Ex. 1 (p.63). Three-fold.
1. Ex.2 substituted 2 princ.debtors for one.
2. Increased to 45,000/- from 30,000/-
3. Covers other goods as well as sugar.

40

Final clause of Ex. 2 - a 3rd name appears -
K.P.S. Not mentioned elsewhere.
Was suggested clerical error for K.E.S.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould

continued

4th - 9th
March 1964

Submit error for K.E.S. and also add "& added".
Two authorities.

Barrat v. Wyatt (1862) 54 E.R. 951. 10 W.R.454
P.111 - Judges difficulties. (I am on Gd.4).
P.109, l. 33. His first reaction was right.
Construction cannot be controlled by oral evidence.
Submit correct way to read the 2 guarantees is
together. When do that it is evident that the last
clause contains a clerical error.
Barrat v. Wyatt.

10

Where operative part is less extensive than the
recital. M.R. "On reading over ...".

If recital shows obvious mistake Ct. can correct.

Crawshaw Why is Provision Stores wrong and not
"European". (No satisfactory answer given - as
mre. of construction).

Arlington v. Merricke (1672) 85 E.R. 1215 (at 1226).
P.1226 "

Surrounding circumstances can be taken into
consideration.

20

In negotiation no ref. at all to K.P.S.
P.20, l.25. P.21, l.31.

Shows clearly the request for S.O. & B. & K.E.S.
P.22, ll.1-10.

The advocate who drew them said same.

P.38. Bakrania, l.4.

This lawyer had no connection with Khan.
This evidence was not considered by the judge.
Duty of this Court to do so.

P.24, l. 17. P.W.1 - mistake.

30

P.110, l. 23. Judge does not say Allahadad was
a liar. Only confused.

Admittedly P.W. 6 was confused. Couldn't come
to conclusion on his evidence. Put it aside.

P.41, l. 24. KP.S. lasted till June 1956.

P.90. Khan & P.W.6.

Should 1st. Construe without aid of extrinsic
evidence. Obvious error.

2nd Take evidence.

3rd. There are 3 firms. Ex. 1 covered 1.
Ex. 2 covered 3. I don't mind that.

Rule of construction is can't take any extrinsic
evidence into a/c.

Sect. 94.

I say the language used is plain.
The difficulty is in appln. to existing facts.
The existing facts show K.P.S. not there.
s.95. s.96.

10

If court can't accept that K.P.S. was an error,
must conclude Ex. 1 refers to 1 firm.
& Ex. 2 refers to 3 firms.

Ex. 1 is from 15/8/56 to 19/1/57.

From 19/1/57 Ex. 1 must be read as if S.O. not
there and K.P.S. substituted for it. That is one
object of the final clause. And Ex. 2 in para 1
contains a substantive and independent guarantee.

Adj. to 10.30 a.m. tomorrow,

T. J. GOULD
4/4/64

20

5.3.64. Bench & Bar as before.

Khanna continues:-

Submit judge erred fundamentally and mis-read the
evidence completely.

P.112, 1.13.

The only people who could give the evidence of
deliveries were the princ. debtor and plaintiff.
Deft. stranger to the transactions.

The living partner said had taken the goods and
owed the money.

30

Judge carried away by suspicions.

It was almost ex parte proof. Minimum proof is
enough there.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued

4th - 9th
March 1964

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued

4th - 9th
March 1964

Ex. 9 gives us the strongest corroboration.
P.88.

No one disputed the signature - as the judge said.
And there was evidence of a person who saw him sign.

Defendant was the only witness on his behalf.
He said nothing about the signature - pro. & con.

P.100 Ex.A. Mr. Sirley brought to this hearing an
unknown writing wh. said wd. prove was Khan's -
never did.

P.27, l. 1. P.W.1 Malde. Witness said not Khan's 10
signature.
So it was never proved. Admitted only for
identification.
No expert called to dispute Ex. 9.

P.35. Johar. Says A. is not Khan. l.12.
So mistake to say Ex. 9 disputed.

Malde's evidence (Not P.W.1 - his brother).
P.36. P.W.4.

The letter was Ex. 9. We called him as a 20
result of P.W.1's evidence.
P.33, l. 2.

There is no other letter signed by Khan covering
58,000/- on the record.

Judge wrong in saying no witness saw him sign.
P.34 Johar. l. 32 l. 34.
P.35. He saw Khan sign the doc. at p.91.
c.f. signature at p.88.

P.47. P.W.1, l.11. Saw Khan sign - at p.96. 30
P.24, l. 19 - familiar.
P.33, l. 3.
P.40 Allahadad. L.21.
P.44, l. 33.
P.45, l. 1.
s.47 of Ind. Ev. Act. Judge could and should have
taken these opinions.
Court's own right to compare.

President : Subject to anything urged by Nowrojee
we are satisfied a misdirection on this point.
Submit Ex.9 is a clear acknowledgment of liability.

Decln. against a dec'ds person's interest.

Taylor v. Witham (1876) L.R. 3 Ch. D. 605 at 607.

It is admissible for all purposes.
Once there is a misdirection this Ct. must evaluate
the evidence.

P.W.1's evidence. Uncontradicted - supplied -
unpaid. Judge did not disbelieve.
P.27.

10 Submit it was sufficient for P.W.1 alone to say
what he did in the box.

No corroboration is required of such evidence
But we did - by Ex. 9.

15 HALS. (3rd) 272. "uncontested case". Minimal.
(Case is only contested where there is a conflict of
evidence.)

A "contested issue" - balance of probabilities.

Bonnington Castings Ltd. v. Wardlaw (1956) 1 All.E.R.
615.

At 618 D.

20 We came right up to standard of a contested issue.
Ex. 9. And we went further and called Allahadad -
the other partner.

P.46, l. 14.
P.40, l. 15.

H.I. Ilanga v. Manyoka (1961) E.A. 705

Similar approach. Varying standards.
P.708 l

30 That being so - you look at the degree of the conflict.
Why should judge say our uncontradicted evidence was
insufficient.

P.107, l. 1 - K. That was dealing with ? other issues.

Did the absence of such as delivery notes, invoices,
etc. - books - destroy the other evidence.

Not required as mre. of law. Corroboration may be
any documentary evidence.

s.34 - make books relevant only.
Not alone enough. Does not make them essential.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued

4th - 9th
March 1964

In the Court
of Appeal for
Eastern Africa
at Nairobi

—————
No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued
4th - 9th
March 1964

P.387 SARKAR (10th), 1.13.
No particular form.

P.388 Absence of Entries. No inference.
We put in books. (Nowrojee - were not).

P.31.
Books were physically present - 1 E.4 was entries
from them. Sirley took them home and x-examined
on them.

P.105, 1. 28. P.112.
Judge only complained no separate individual accounts.10

P.33. When we came to put in Ex.10 it was excluded
until each item gone through.

Manufacturers railed to plaintiff.

P.20, 11. 11,-12-13 Ex. 4 - extracted from books. 1.14.
P.23, 1. 11. Railed to us - goodsheds -
We gave written instructions to release it to K.E.S.
Rail records impt. - destroyed.

P.35, P.W.3. P.101 Ex. 3. Shows practice.
Not our fault.

We pleaded. Para 4(a), p.9
Para 5(a) "supply". Neutral.
Agency & sale immaterial.
Defence Para 9, p.15 "supply".
Concede my para 7. S. of G.
Judge treated it as a sale.
BENJAMIN ON SALE (8th). P.318-20.

20

Explanation for absence of invoices was that we
said it was sale or return.

I accept the criticisms - but could not destroy the
cumulative effect of the other evidence.

30

Can't base self on wild suspicions.
That is what judge did.

P.113, 1. 3 -

Faez Buksh Chowdry v. Fakeeroodeen (1871) 20 E.R.
755, 779
Appellate Court will not decide on suspicion.

Olpherts v. Mahabir (1882) 10 I.A. 25 at 30.

Tewari Singh v. Lal Sheo Narain, 21 I.A. 6
P.8 - unsatisfactory - re handwriting.
P.12 - no counter evidence.
Our books never shown to be false.

In the Court
of Appeal for
Eastern Africa
at Nairobi

Adj. to 2.30 p.m.

No.20

T.J.G.

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued

2.30 p.m. Bench & Bar as before.
Khanna continues:-

4th - 9th
March 1964

10 There is a shifting onus. P.W. 1 & Ex. 9 &
Allahadad.

No:17 a list. Ramgopal v. Gordon Stewart at p.858
7 lines from bottom. P.859.

No. 20. Q. Empress v. Grees Chunder Banerjee
10 Cal. at p.1024.

No. 21. Ram Pershad Singh v. Lakhpati 30 Cal.231
at 247

Ex. 4 would not be a concoction.
Refers to invoices by numbers.
P.111, l. 32. Another misdirection. 2-fold.

20 We amply proved debt owing by K.E.S.
Continued existence is not material.

P.20 l. 25.
2 psns. We don't have to prove rec'd it.
P.21, l. 31. P.36, l. 9.
P.39, l. 19. Jan. '57. - Oct. Our a/c does not go
beyond Oct. 53.

P. 43, l. 6.

We were not concerned with whether they sold it
to another firm - or through another.

30 P.46, l. 5 - Government.
P.23, l. 19-20.
P. 29, l. 32.

Nothing in the evidence to suggest plntiffs were
owed money in Oct. 1957 by any other firm than K.E.S.
P. 106, l. 19. Judge found cleared S.O.
P.60, l. 7.

Payments were always made by Khan. Not against any
specified firm or debt. Pl. could apply as wished.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued

4th - 9th
March 1964

p.22, l. 25.
Ex. 1 to 15/8/56.
Ex. 2 19/1/57.

Ex. 4. Item 1 is before 1st guarantee.

That was paid off by the appropriation of payments.
First coming in.

That can't affect right of appropriation.

8 HALS. 217 & 370.

No. 13. Kirby v. Marlborough (1813) 105 E.R. 289.
Unless otherwise agreed. 10

If duty on us Ex. 9 confirms the appropriation.

8 HALS. 214-6, Para 366.

P.32, l. 34 - Khan's cheques.

P.26, l. 20. P.27, l. 23.

Ex. 9

Allahadad p. 41, l. 9-10 Same.

(Ex. B. p.101. Malindi. Was 11/58 - can't
be in it).

Ample evidence if accepted to prove case.

None of it was disbelieved.

Purely evaluation - not perception. 20

Misdirection. Becomes at large.

Proceed to which guarantee was alive and what
was effect.

I dealt with Ex. 1 & 2 on basis of clerical error.

About to deal on basis that no error is involved.

Suits me better. It is -

Ex. 2 contains a substantive and independent guarantee.

Whereas Ex. 1 is only of S.O. & Bros. as to

30,000/- only - only sugar.

Ex. 2 - Cl. 1 covers 2 firms - other goods - 45,000/- .30

Ex. 1 is clear so far as S.O. & Bros. concerned

at all times concurrently with Ex. 2 - new guarantee.

Effect of recital is that it is supplemental to Ex.1.

Keeps 1 alive except as modified by C.1. of Ex. 2
wh. is the effective guarantee.

Last part could be Ex. 1 remains alive
up to 45,000/- for a 3rd firm - i.e. Provision
Stores.

P.109, l. 19. Judge troubled by a paltry matter. Unnecessary. Ex. 2. Para 1 can only refer to those in recital. S.O. & K.E.S. Plaintiff, para 6? (a) & (b) int. The limit of guarantee. 45,000/-. As to interest. Is it covered.

In the Court of Appeal for Eastern Africa at Nairobi

No.20

P.63 "due payment". Same in Ex. 2.

Notes taken by The Hon. the Vice-President Sir Trevor Gould continued

10 P.63 "all debts whatsoever". Could fortify the interest argument. Submit incorporated by ref. in Ex. 2.

Remember int. was part of the price. Stipulated for in the agmt under wh. sugar sold.

4th - 9th March 1964

P.23, l. 1-10.

P.44, l. 3.

P.40, l. 3.

No. 14 Dawson v. Raynes 38 E.R. 412

No. 15 Ackermann v. Ehrensperger, 153 E.R. 1115. at 1117. due acceptance & payment.

20 Case for reversal. Judgment in terms of prayer - liberty to bid - costs here & below. 2 counsel here & below.

Adj. to 11.30 tomorrow.

T.J.G.

V.P.

5/4/64

9.3.64. Bench & Bar as before.

10.00

Nowrojee :-

30 L.F.'s main ground - goods & d. and surety liable. Test is judged was not satisfied that were delivered to K.E.S.

Same standard of proof as against the principal debtors.

You can't prove the indebtedness against a surety by admissions of princ.

Ex. parte Young (1881) 17 Ch.D. 668

James C.J. 671.

Ex. 9 is not the test. Test is what goods delivered and how much due.

40 Lush P.673.

What evidence have we - on sale & delivery

Confident this Ct. would say, on even that standard that there is no evidence at all.

L.F. then says P.W.1 enough. But that he produced Ex. 4 in support (P.66).
What evidence relates?

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued

4th - 9th
March 1964

- 10 P.20 (P.W.1) l. 12 'extracted'.
P.25, l. 23 ? Is this 331. No. 381 in Ex. 4
1st item. Mehta's inv. to Popatlal.
339 - same.
1.29. No single
1.32. I can't even find 531 in Ex.4.
P.26, l. 1.
P.26, l. 25-30. Doesn't even know it exists.
P.27, l.27-31. In overall he can't substantiate
a single item by invoice relating to princ.
debtors.
- 20 P.29, l.7. See p. 67. Bal. 39962.
How can any Ct. accept this a/c as tallying, in
any way with the evidence.
P.29, l. 7, l. 19.
Ex. 4 is not a copy of anything in our books.
"made out "from books.
P.30, l. 13.
l. 11. Look as if could not find these credits.
l. 18. c.f. P.70. 3/9, 30/9, 30/10.
Three bills paid - rec'd from Kajiado
Provision Stores.
Shows judge right in saying not satisfied other
people's a/c's not included.
- 30 P.30, l. 24.
Are 30-40 credits. From whom?
P.31. Recalled. l. 26. Cash book shows 10000/-
received. Can't find.
(see ensuing line). Why should they omit it from
Ex. 4 - even if it was debited again.
- 40 P.22, l. 23. We don't know what the sugar a/c is.
No evidence we were consignees.
My L.F. says Ex. 4 supports evidence of P.W.1 -
full of holes.
Then says
Ex. 9. Quite apart from the law I will point out
the discrepancy in relation to this exhibit.
- P.W.4 P.36. Brother of P.W.1.
l. 15. I agree must mean Ex. 9.

In the Court
of Appeal for
Eastern Africa
in Nairobi

No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued
4th - 9th
March 1964

In shop in B. St. Sayed Mahomed is
Allahadad. Both partners signed.
In fact it is only one man.

The 2nd falsehood is -
P.88, Ex. 9.

Allahadad & Khan were partners my L.F. stresses.
But Khan signed as "proprietor".

I am not saying it is not Khan's signature But
he can't bind surety on a document not signed as
a partner. I say he was not a proprietor. He
says "I owe on behalf of K.E.S." Even if
admissible it has no weight attached.

10

Further suspicion. Allahadad.

P.40, l. 21. I have ignored him so far.
How does this square with P.W.4's a/c.
So contradicted by own witnesses.

Even my L.F. says this witness should not be
taken note of.

That concludes argument on the nature of the
evidence.

20

P.W.1. Does not prove supply.
Ex. 4 - useless.
Ex. 9 - inadmissible against surety & suspect.

Allahadad - so full of holes that unacceptable.
P. lll - justifiable finding of failure to prove.

Burden is as great as in a suit against the debtors.

I do not propose to deal with construction of
guarantees. Immaterial once they are unable to
prove supply. Judge did not rely on suspicion
re the deliveries - found not proved.

L.F. says at large for this Court.
I have shown evidence & so far
that I invite Ct. to support judge's finding &
dismiss with costs.

30

Khanna:

My L.F.'s sheet anchor is Young's case.
(1881) 17 Ch.D. 668.

It is not applicable. It decides no more than merely tendering as award is not admissible, against guarantor. Facts show all they did was put in the award.
P.674 - last five lines.

10 Nowrojee : Ask indulgence. I am due in another court. C.J. gave me only until 11.15 - request withdrawn/

Khanna:

sd. p.670.

Mistake to take it as saying an admission on oath and extrajudicial admission by psn. dead.

I was going to produce authorities.

No.10 Evans v Beattie 170 E.R. 725

20 Headnote. Admission not evidence v. guarantor. But if he comes into box it is as good as anyone else.

P.726 [277] Evidence of the state of the debt. Best Evidence rule applied. There is exception for dead psns. under sect. 32 of J. Ev. Act ss.2

No.8 Coward v Motor Ins. Bureau (1962) 1 All E.R.531. Dectn. against int. by a decd. psn.

p.535 G
p.536 B

No.9 Taylor v Witham (1876) 3 Ch.D.605
There were books of a/c- applies to us under

30 p.607 "for all purposes"

Not a q. of value of it. Value could be destroyed. It has not been here. No evidence of motive, fraud or collusion etc.

Must divide all these cases into 2 Once

In the Court
of Appeal for
Eastern Africa
in Nairobi

No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould
continued

4th - 9th
March 1964

In the Court
of Appeal for
Eastern Africa
in Nairobi

No.20

Notes taken by
The Hon. the
Vice-President
Sir Trevor
Gould

continued

4th - 9th
March 1964

First proof as if against princ. debtor
supply proved does guarantee cover it.

No. 12 Higham v Ridgway (1808) 103 E.R.717,
720.

Peculiar knowledge - entry & declaration - re
increase. It is evidence as bet. 3rd psn after death
if he could have been ex'd to it in his lifetime.
p.720 [1177] & 8 - party making it.

As to the other criticisms of Ex.9 Word
"proprietor". It does not say "sole" proprietor. 10
He does not want to bind any other partner. Even
if it was "sole pptr" it does not detract from it
as admission v. himself.

Even if the psn. who said he saw it signed
said both partners signed that is of no moment.
Not xxd. on it.

p.36 1.15 "Mr. Khan"
1.19 ? Interpretation confusion. Clearly
said Khan signed in his presence. 1.27 He got a
payment - can't say a.m. or p.m. I say it is not 20
contradictory to Allahadad.

Does not affect my case if Ex. 9 binds other
partners or not. Allahadad has sworn to the
indebtedness.

Allahadad was confusing as to particular firm
& dates that does not make him a liar. Judge did
not so find.

p.112 Misdirection. And he considered no
reason to challenge signature or would have
considered it sufficient corroboration. 30

Re sale of goods - agency etc. This issue is
not open to my friend. Judge was right when he
treated it as a sale.

Benjamin - Sale. If no return it is sale.
p.22 1.7 K.E.S.
1.26 The sugar a/c is against those 2 firms.
Ref "consignees" is context is to them.

1.36 Owing by K.E.S.

Mehta invoiced to us. We release the entire consignment to principal debtors - case conveniently their invoice.

In the Court of Appeal for Eastern Africa in Nairobi

p.25 1.2 I have never relied on the gentlemen agreement.

No.20

Judge accepted p.106 1.20-6 - appropriated No X appeal.

Notes taken by The Hon. the Vice-President Sir Trevor Gould continued

p.21 1.1 Mehta manufacturer.

10 1.10 Agents. He was not sure whether it was sale or agency. None of this contradicts the act of supply.

4th - 9th March 1964

Even if liberty to return there was in law an out and out sale.

p.36 1.27 claimed sale.

p.37 1.1 - puzzle as to legal affect.

p.26

Re Ex.4 - L.F. misled.

The cheque returned unpaid - left out.

20 p.31 1.25 Why not. Useless entry.

p.32 1.20-30 1.29 is the crucial line "by name".

Clear sworn uncontradicted evidence wh. was believed.

No need for re-trial. More than ample proof. Ask all relief etc. and certify for 2 counsel.

9/3/64 T.J. Gould
V.P.

C.A.V.

KHANNA argues:-

Refers to issues appearing at page 104. The Court gave judgment in respect of the 1st issue. Refers to Exhibit 2, at page 64, which increased the amount guaranteed from 30,000/- to 45,000/- and also included other items - and also substituted Kajiado Provisions Stores in place of the Principal Guarantee.

10 Ground (4) - Refers to page 109 line 34 which contains the construction placed on Exhibit 2 by the Court. Submits that the two guarantees should have been read together. Refers to Barratt v Wyatt, 54 English Reports, page 960. As far as Exhibit 2 is concerned, apart for the increase of the amount guaranteed another form was added to the original form as guarantee. Refers to Arlington v. Merricks, 85 E.R. page 1215 at page 1226. Refers to evidence of P.W.1 at pages 20-21-22. Refers to evidence of P.W.5 Bakrania at page 37-38 in which he said that he did not know how Kajiado Provisions Store came to be mentioned into the draft. Refers again to the evidence of P.W.1 at page 24 that he did not know how the Kajiado Provision Stores came to be named in Ex.2.

20

Admits that the evidence of P.W.6 was confusing but the court should have considered the evidence of P.W.1 in order to put a proper construction on the Guarantee. Ex.2.

30 Submits that there is no ambiguity on Exhibit 2 and that no extraneous evidence could be given on its construction. Refers Evidence Act Sections 94 & 95 & 96. If the court is unable to accept the submission that Kajiado Provisions Stores mentioned in Ex.2 was an error then Ex.one refers to supplies Sayed Omer Bros. from August 1956 and after and it was Kajiado Provision Stores which were one of the guaranteed in Exhibit 2.

By court adjourned to 10.30 a.m. tomorrow.

S.O. Quashie-Idun
P.

4/3/64.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.21

Notes taken
by The Hon.Sir
Samuel Quashie-
Idun, P.

continued

4th - 9th
March 1964

In the Court
of Appeal for
Eastern Africa
at Nairobi

5.3.64 Bench and Bar as before.

KHANNA continues:-

No.21

Notes taken by
The Hon. Sir
Samuel Quashie-
Idun, P.
continued

4th - 9th
March 1964

The people who were competent to give evidence as to the supply of sugar were the plaintiffs and to from to whom the supplies were made. The living partners gave evidence as to the supplies. Submits that the trial court misdirected himself on that evidence. Refer to Ex.9 at page 88 which is one acknowledgment by Kajiado European Store. Submits that in his judgment at page 112. The court mis- 10
directed himself by saying that the signature on Exhibit was disputed. Refers to Exhibit A at page 100 - evidence as to introduction of Exhibit A is at page 27 - line one, when Ex.A was admitted for identification. Refers also to P.W.2 (Johan) at page 35 where, witness denied that Ex.A was the signature of Khan.

Refers to evidence of P.W.4 (Malde at page 36) who said he saw Khan signed Ex.9 - also the evidence of Johan who identified the signature on Ex.9. 20

Submits that there is a misdirection which misled the court in its judgment.

Submits that Ex.9 was an acknowledgment made in Feb.1958. Ex.9 was admitted for all purposes. Submits that it was sufficient to prove the debt by producing the acknowledgment of the debt as per Ex.9. Refers to Halsbury 3rd Ed. Volume 15 p.272. Submits that the claim was uncontested and that a minimum proof was sufficient (Note by court see defence at page 15). Submits also that even if the standard of proof was required in that case to be high, the evidence led by the plaintiff was high. Refers to Manga v Manyoka, 1961, E.A.L.R. page 705 at page 208. 30

Question - Did the absence of the production of books of account, destroy the evidence of plaintiffs. Refers to section 34 of the Evidence Act - also at page 387. - Absence of books cannot destroy other evidence. 40

As to sale - refers to Benjamin on Sale 8th Edn. page 318-319. Admits there were no invoices or statements of accounts as the goods could have been returned.

Refers to Singh v Lal. 21, Indian Law Reports page 6 at page 8.

2.30 p.m. Bench and Bar as before.

KHANNA continues:-

Submits that sufficient evidence was given to shift the onus on the defendant. Refers to Ramgopal v Gordon Stewart & Co. etc. (1872) 20 E.R. 855; 20 E.R. (P.C.) page 451.

10 Refers to judgment at page 111 line 21 and submits that the court misdirected itself when it said that he had failed to show that 45,000 shillings or any part was due from any of the firms.

1st guarantee Ex.1 at page 63. Right of appropriation if moneys paid to the plaintiffs. Refers to Halsbury 3rd Edition Vol.8 page 214 para.366, 367 and 368.

20 Deals with the two guarantees. Submits that Ex.2 in para. (1) contains an independent guarantee. Ex.2 is wider and covers 2 forms as well as sugar, other goods and larger amounts. Submits that Ex.2 is supplementary to Ex.1 as a continuing guarantee.

Question by Court: Where is the agreement to pay interest?

Khanna: Refers to page 23, and also to para.44 and page 40 and page 44. Refers Dawson v Raynes (1826) 38 E.R. page 411. Last time at page 412. Ackermann v Ehlensperger 153 E.R. p.1115.

30 Submits that judgment should be reversed.

Adjourned to 11.30 p.m.

S.O. Quashie-Idun
P.

5/3/64.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.21

Notes taken by
The Hon. Sir
Samuel Quashie-
Idun, P.
continued

4th - 9th
March 1964

In the Court
of Appeal for
Eastern Africa
at Nairobi

9.3.64 Bench and Bar as before.

10.00 a.m.

No.21

Notes taken by
The Hon. Sir
Samuel Quashie-
Idun, P.
continued

4th - 9th
March 1964

Nowrojee:- The test in the case is whether the goods were sold to the persons guaranteed by the respondent. The case has to be proved as it should in all civil cases. As to proof, refers Ex Parte Young. In Re Kitchin 17 Law Reports Ch-D page 668 at page 671-672. Submits that Exhibit 9 does not bind the respondent. Also judgment of Nash J. at page 673.

10

Reviews the evidence as to delivery of goods. Refers to evidence of P.W.1 at page 20, page 21, line 31, page 22 line 7, page 23 line 1, line 10 etc., page 25 line 2, page 26 line 2 where witness said he did not sell goods to Mehta & Karman and at line 6 where the witness said Sayed Omar & European Store were supplied goods but not sold to them. Also line 13 page 27. Line 20 where witness said that the balance and interest is due from Kajiado European Stores and not Sayed Omar at all and nothing due from Sayed Omar & Bros. Also in line 29 nothing in books to show Kajiado European Stores liable for any invoice. Also at page 28 line 34 where witness states that he never made a claim for amount claimed from Sayed Omar & Bros. and no claim is made against the firm. At page 30 line 31 where witness agreed that he was claiming for money paid and received by Kajiado European Stores. Page 32 line 20 where P.W.1 stated that according to their books Sayed Omar never owed them any money for sugar. Evidence of P.W.4 at page 36 whose evidence conflicts with that of P.W.1. Submits that this contract was sale and delivery by credit. That being so, delivery has to be proved. Submits not a single document was produced to prove delivery through the railway to the Principals guaranteed by the respondent. Refers to evidence of P.W. as to amounts and Ex.4. Refers to evidence of P.W. at page 25 line 24 etc. where the P.W.1 admitted that the invoice Ex.4 and the first item 331 did not refer to the Principals, and that he could not produce a single invoice claiming sale to Principals. Also at page 26 line 24, page 29 where P.W.1 said he could not show the amount of debt in the books. According to Ex.4 at page 67 the account owed us at 31/12/56 was 39962.95. At page 29 line 19 P.W.1 states Ex.4 is not an exact copy of anything in the books. Refers to

20

30

40

P.W.1's evidence at page 30 - line 23 and also at page 31 where P.W.1 noticed that although Kajiado European Stores appeared to have been paid by Kajiado no credit was given presumably because the cheque was not honoured.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.21

Notes taken by
The Hon. Sir
Samuel Quashie-
Idun, P.
continued

4th - 9th
March 1964

10 Refers to page 23 where witness stated that on payment the firms allocated payments to consignees. Refers to Ex.9 (signed by Khan). At page 36 evidence of P.W.4 who gave evidence of the signing of Ex.9 by Khan and another man. But Ex.9 bears only Khan's signature. Reads contents of Ex.9 and submits that Khan signed it as a proprietor and not as a partner of Kajiado European Stores. Submits it does not bind the partnership firm and therefore not binding on the respondent. Again, refers to evidence of P.W.6 at page 40 which contradicts the evidence as to the signing of Ex.9 given by P.W.4.

20 Submits that what the trial court said at page 100 line 25 lines 26-34 is correct. The plaintiffs could not have succeeded against the Principals and could not rescind against the respondent.

KHANNA in reply:-

30 Submits that the authority of Ex Parte Young does not apply - submits that the principal can always give evidence to prove what amount is due. Refers to Evans v Beattie, 170 E.R. page 725. Also at page 726 (para.27). Refers to Coward v Motor Insurance Bureau, 1962, 1 All E.R. 531.

Submits that Ex.9 is a declaration made by Khan against his interest and therefore admissible against his guarantor. Refers to Taylor v. Witham, 1876, 3 L.R. page 605. See judgment of Jessel M.R. at page 607. Higham v Ridgway, 1808, 103 E.R. 717.

40 As to Ex.9 Khan did not sign as the sole proprietor. The fact that the witness P.W.4 said that Ex.9 was signed by Khan and another person is immaterial and does not. Refers to judgment at page 112 and to misdirection as to the signature of Khan being disputed and nobody witnessing the signing.

As to whether there was a sale or not the trial court held that there was a sale which should be proved.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.21

Notes taken by
The Hon. Sir
Samuel Quashie-
Idun, P.
continued

4th - 9th March
1964

Submits there is clear and uncontradicted
evidence that there was sale of goods unpaid for.
The evidence was supported by sworn evidence. The
non-production of consignment notes by the railway
does not destroy the evidence of sale and delivery.

By court; judgment reserved.

S.O. Quashie-Idun
P.
9/3/64

No.22

10

No.22

Judgment of Sir Trevor Gould

Judgment of Sir
Trevor Gould

26th March 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

(Coram: Quashie-Idun, P., Gould, V.P. and
Crawshaw, J.A.)

CIVIL APPEAL NO. 30 OF 1963.

BETWEEN

- | | | |
|---|-------------------|----|
| 1. DEVKUNVERBEN widow of POPATLAL
KARMAN | } APPELLANTS | 20 |
| 2. MEGHJI KARMAN MALDE | | |
| 3. DEVCHAND KARMAN MALDE and | | |
| 4. NANDLAL POPATLAL MALDE in their
capacity as the Executors of
the Estate of POPATLAL KARMAN
dec'd, and | | |
| 5. MAGHJI KARMAN and | | |
| 6. DEVCHAND KARMAN trading as
POPATLAL KARMAN & COMPANY. | | |

AND

AHAMED DIN BUTT s/o MOHAMED BUX BUTT RESPONDENT 30

(Appeal from a judgment and decree of
the Supreme Court of Kenya at Nairobi
(Goudie J.) dated 11th February 1963

in

Civil Case No. 2127 of 1960

Between

Devkunverben widow of
Popatlal Karman & 5 Others. Plaintiffs.

and

Ahamed Din Butt s/o
Mohamed Bux Butt. Defendant).

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

JUDGMENT OF GOULD V.P.

10 The appellants are the executors of a deceased partner and the two surviving partners in a firm trading as Popatlal Karman and Company whose action against the respondent in the Supreme Court of Kenya upon two guarantees was dismissed on the 11th February, 1963. The guarantees were secured by an equitable mortgage over land at Eastleigh, Nairobi.

In the action the appellants relied upon two written guarantees, Exhibits 1 and 2 which read as follows:-

"Ex. 1

20 £1 To,
Rev. Messrs. Popatlal Karman
Stamp Meghji Karman and Devchand Karman of
 Popatlal Karman & Company,
 NAIROBI.

IN CONSIDERATION of your agreeing to supply Sayed Omer & Bros. of Kajiado in the Colony of Kenya (hereinafter called "the Principals") with sugar on credit I HEREBY AGREE with you as follows:-

30 (1) I shall be answerable and responsible to you for the due payment by the said Principals for all such sugar as you may from time to time supply to them but subject to the limitation that my liability under this Guarantee shall not at any time exceed the sum of Shillings Thirty thousand (Shillings 30,000/00).

(2) This Agreement shall be a continuing guarantee to you for all debts whatsoever

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

and whensoever contracted by the said
Principals with you in respect of sugar
supplied to them subject always to the
above limitation.

(3) In consideration aforesaid and for
better securing the said guarantee of
Shillings Thirty thousand (Shillings
30,000/00) I hereby agree to mortgage by
way of Equitable Mortgage in your favour
ALL THAT piece or parcel of land known as
Plot Number 1113, Section III, Eastleigh,
Nairobi together with the buildings thereon.

10

(4) You are to be at liberty without
notice to me at any time and without in any
way discharging me from any liability here-
under to grant time or other indulgence to
the principals and to accept payment from
them in cash or by means of negotiable
instruments and to treat me in all respects
as though I were jointly and severally liable
with them to you instead of being merely
surety for them.

20

DATED at Nairobi this 15th day of August
1956.

(Sgd.) AHMED DIN

WITNESSES

P. Bassett,
Box 2159,
NBI.

Ex.2

S.D.10/-

30

To.

Messrs. Popatlal Karman
Meghji Karman and Devchand Karman
Popatlal Karman & Company,
NAIROBI.

THIS GUARANTEE is made the 19th day of
January One thousand nine hundred and
fifty seven and is supplemental to a
Guarantee dated the 15th day of August, One
thousand nine hundred and fifty six (herein-
after called the Principal Guarantee) 40
WHEREAS the Guarantor Ahmed Din in consider-
ation of Messrs. Popatlal Karman, Meghji
Karman and Devchand Karman of Popatlal

Karman & Company, Nairobi agreeing to supply Sayed Omer & Bros. of Kajiado and Kajiado European Stores of Kajiado with sugar and any other goods HEREBY AGREES as follows:-

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

10

(1) I shall be answerable and responsible to you for the due payment by the said Principals for all such sugar and any other goods as you may from time to time supply to them to the extent of Shillings Forty-five thousand (Shs.45,000/-) instead of the sum of Shillings Thirty thousand (Shs.30,000/-) as mentioned in the Principal Guarantee.

20

(2) In consideration aforesaid I hereby mortgage the property being Plot No.1113 more fully described in the Principal Guarantee for the sum of Shillings Forty-five thousand (Shs.45,000/-) instead of the sum of Shillings Thirty thousand (Shs.30,000/-) mentioned in the Principal Guarantee.

And the said Principal Guarantee shall thenceforth be read and construed as if the sum of Shs. 45,000/- and the name of Kajiado Provision Stores were substituted in the Principal Guarantee.

DATED at Nairobi this 19th day of January 1957.

Witness

30

P. Bassett
Box 2159
Nairobi.

(Sgd.) AHMED DIN."

40

The plaint alleged that the appellants "duly sold and delivered goods to the said Sayed Omar and Brothers of Kajiado and the Kajiado European Stores of Kajiado for a total sum of Shs.41,054/33" and claimed that sum with interest amounting to Sh.11,903/60, but limiting the total claim to the guaranteed amount of Shs.45,000/-, with interest from the date of filing suit.

The defence raised a number of defences, including misrepresentation and suppression of material circumstances, but these were rejected by the learned trial judge; the respondent, however,

In the Court
of Appeal for
Eastern Africa
at Nairobi

—————
No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

put in issue the supply of the goods as alleged to Sayed Omar Bros. and Kajiado European Stores and the judge upheld this defence and dismissed the suit. There is no cross appeal and the correctness of the learned judge's decision to reject the suit on this ground is the one issue on the appeal.

The recital and paragraph (1) of Ex.2 would seem to indicate that the intention of the document was (a) to extend the guarantee to supplies to Kajiado European Stores as well as Sayed Omar & Bros., (b) to include "other goods" in addition to sugar and (c) to increase the amount guaranteed to Shs.45,000/- from shs.30,000/-. There is, however, the most obscure final paragraph containing a reference to Kajiado Provision Stores. As to this the learned judge said:-

10

"I think one's immediate reaction, without knowing anything of the formation, composition or dissolution of any of these firms, would be to say that Exhibit 2 was just badly drafted and that it was at least tolerably clear that the defendant intended to guarantee Kajiado European Stores in addition to Sayed Omar & Brothers, that they were henceforward to be regarded as the 'Principals' and that the name of Kajiado Provision Stores was merely a clerical error and was intended to read Kajiado European Stores.

20

The evidence shows however that whilst the second plaintiff (Malde) professed never to have heard of a firm called Kajiado Provision Stores the witness Allahadad (PW.6) who was a partner in the firm of Sayed Omar & Brothers not only knew of such a firm but said that he was the sole proprietor and that it was a branch of Sayed Omar & Brothers. He further said that Kajiado European Stores was a continuation of Kajiado Provision Stores under another name and that it is now doing business under the name of Sheriff Provision Stores. This witness said he also started another firm called Malindi Stores when Kajiado Provision Stores ceased to function, but whether this was before the European Stores took over or was trading concurrently with it, or whether it had connection with Sayed Omar & Brothers and/or Kajiado Provision and/or European Stores, I

30

40

have found it impossible to answer."

Having considered certain evidence the learned judge said:-

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

10 "In the face of this type of evidence I think it is impossible to say, as Mr. Khanna suggested in opening, that the words, 'Kajiado Provision Stores' in the last paragraph of Exhibit 2 was obviously meant to read Kajiado European Stores, nor do I think that it is possible to say that the words were not a mistake but were meant to be substituted for Sayed Omar & Brothers in Exhibit 1, as I understood him to contend in closing. In my view it would be almost, if not entirely, impossible to say what is the proper construction to be placed on Exhibit 2. Fortunately, however, I do not think this affects the issue greatly since in my view whether the defendant agreed to guarantee Sayed Omar & Brothers, and/or Kajiado Provision Stores and/or Kajiado European Stores, the plaintiffs have entirely failed to show that 20 the Shs.45,000/- claimed, or any other sum, is now due to them from any of these firms and that the firms are still in existence under any of these names, although the latter factor might not have been fatal to an action on the guarantee against the guarantor.

30 In-so-far as Sayed Omar & Brothers is concerned it is agreed that their account is cleared and nothing due. Insofar as the Kajiado Provision Stores is concerned it is no part of the plaintiffs' case that anything is due from this firm. In-so-far as Kajiado European Stores is concerned there is not a single witness who is able to produce a single invoice, statement, or entry, in any books against this specific firm. The so-called statement, Exhibit 4, although addressed to Messrs. Sayed Omar and Brothers and Kajiado European Stores as being 'In account with' the plaintiffs, is merely extract from a composite so-called 'Sugar Account', it has been shown 40 to contain omissions, and the invoices are all to third parties as I understand the position. There is an alleged acknowledgment of indebtedness by deceased person purporting to have signed as proprietor of Kajiado European Stores

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

in February 1958 but the signature is disputed and there is no evidence of anyone who saw him sign. The mere fact that this balance corresponds with the balance as at that date in the 'Sugar account' is not in itself sufficient to satisfy me either that Shs.45,000/- or any sum remains due now from this firm to the plaintiffs.

My own view is that the business dealings of Sayed Omar Brothers, Kajiado Provision Stores, and Kajiado European Stores and others are, on the evidence, inextricably mixed up and it is not for this court to unravel them for the plaintiffs to enable them to establish their claim, particularly when I suspect, as I do in this case, that there have not been a series of separate transactions by separate firms, but that in many cases the same persons have been trading under different trade names at different times and even at the same time as and how it suited them for their own private purposes, and there would be no reasonable possibility of the guarantor knowing whether he was rendering himself liable for genuine transactions of a specific firm or guaranteeing the transactions of a number of different firms, some of whom were not envisaged by him." 10 20

Before this court counsel for the respondent said he was not concerned to argue the meaning of the two guarantees but was content with the approach of the learned trial judge. The construction of the guarantees was immaterial once the appellants were unable to prove that they supplied the goods. I take counsel to mean by this that if this court took the view that a supply of goods to Sayed Omar & Bros. and/or Kajiado European Stores had been established, it was conceded that the guarantees would extend to them; this court therefore need not concern itself with the question of construction. There is of course no pleading that any goods were supplied to Kajiado Provision Stores. 30 40

The only question remaining for the decision of this court is whether the judgment in the Supreme Court has been shown to be wrong in the factual finding that the appellants had entirely failed to show that Shs.45,000/- or any other sum was due from any of the firms. The learned judge found that it was agreed that the account of Sayed Omar & Bros. was cleared and that has not been challenged

on the appeal. To establish the deliveries of goods the appellants relied on the evidence of Meghji Karman Malde (hereinafter called "Meghji") and Devjan Karman Malde (hereinafter called "Devjan") both partners in the appellant firm. They also called as a witness one Sayed Mohamed Allahadad who said he was a partner with Abdul Majid Khan (now deceased) in Kajiado European Stores, which traded until October, 1957.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

10 Meghji stated that his firm supplies sugar to
Sayed Omar & Bros. up to the end of 1956. Khan and
Allahadad made the arrangement and Khan arranged
the guarantee. Khan and Allahadad then wanted a
supply in the name of Kajiado European Stores and
the second guarantee was procured. Sugar was
supplied from the 17th January, 1957, to Kajiado
European Stores. The witness said that the arrange-
ment was that they supplied the sugar f.O.R. Kajiado;
20 they (Popatlal Karman & Company) instructed the
stationmaster at Kajiado to release the sugar to
Kajiado European Stores. He produced a statement
of account (Exhibit 4) which purported to be an
account of the transactions relied on. Unfortunately
for the weight of this testimony there is nothing
to support it and it is in essence no more than a
sworn assertion that these transactions took place.
As the learned judge pointed out there were no
invoices - he said that he understood they were
"all to third parties" but the evidence is clear I
30 think that the invoice numbers in Exhibit 4 related
to the invoices of the firm supplying Popatlal
Karman & Company. The explanation of the lack of
invoices was said to be that the sugar was supplied
to Kajiado European Stores on some sort of sale or
return or agency basis - an unconvincing reason in
relation to any commercial firm operating on
business-like methods. A stationmaster from
Kajiado was called to say that he had looked for
records in relation to sugar railed to Popatlal
40 Karman & Co. but could find none, as records were
only retained for one or two years. This would
imply that the directions for delivery from the
station were in writing but no copy of any has been
produced. No orders for sugar nor any correspondence
relating to orders have been produced. Exhibit 4
was made up from a composite sugar account in
Popatlal Karman's books. No statement of account
in relation to either of the two firms said to have
been supplied was produced. There is, however, in

26th March
1964

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

the record of Meghji's evidence the following:-

"I produce Invoice 2309 of 25.3.57. Not a sale. Invoice and debit. For 20 printed material 80/-. They took this from our shop. 2344 of 3.4.57. Goods not said not to be sold."

Unfortunately, though said to be "produced" these two invoices do not appear to have been put in as exhibits and are not available or included in the record. The reference in the circumstances can do little more than raise the query why if two could be produced, other invoices for goods other than sugar were not.

10

The evidence of Devjan, the other partner of the appellant firm, added nothing direct in relation to the delivery of sugar to Kajiado European Stores. He merely stated that they supplied sugar and other goods in 1956 and 1957. He gave evidence, however, concerning Exhibit 9, a writing purporting to be signed by Khan, to which further reference will shortly be made.

20

The appellant firm relied, in support of the evidence of Meghji and Devjan, upon the evidence of Allahadad and upon Exhibit 9. Allahadad stated that he was in partnership with Khan in Kajiado European Stores - Khan died about June 1960. Allahadad's evidence was confused and contradictory and the learned judge quoted part of it in his judgment to illustrate this fact. He said that Kajiado European Stores took sugar and other goods from January, 1957, and closed down in October, 1957. He said that Kajiado Provision Stores also dealt with Popatlal Karman & Co. in sugar and other goods but gave differing versions of the relevant years. The witness produced no books and his evidence on that subject was also confused. Here is one passage:-

30

"In 1955 we traded under name of Kajiado Provision Stores and continued to do so until 1956. At that time the business was mixed. I do not think we have any books for Sayed Omar Bros. in 1956. I have for Kajiado Provision Stores. I do not know what is written. I do not remember if we have one for Sayed Omar Bros."

40

Again he said:-

"In our books I do not remember how much owed to Popatlal. I could tell from books at Kajiado. I have no documents or written evidence of any kind to show what is owing from any firm in which I am interested to Popatlal & Co. I cannot now check with my records whether this statement is correct or not. We did not check."

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

10 The statement referred to must be Exhibit 4 as it is the only one which purports to show the amount due. The position seems to be then, that the sellers of the sugar had no records of its despatch or delivery or order and the purchaser produced no books or records and had no written evidence to show what was due.

The next question relates to Exhibit 9 which is set out in the record as follows:-

"Messrs. Popatlal Karman & Co. 25.2.58.
Indian Bazaar, Nairobi.

20 I the undersigned beg to acknowledge that I owe you Shs.58,854/33 on behalf of Kajiado European Store and I confirm the same on account of Sugar and other goods etc.

Kajiado European Stores
Prop. (Sgd.)(semble) A.M. Khan.

1/- Stamp
25/2/58"

30 In relation to this document counsel for the appellant claimed that the learned judge had misdirected himself. I have already quoted the portion of his judgment in which the passage objected to occurs - it commences with the words, "There is an alleged acknowledgment of indebtedness". Counsel for the appellants made the point that the signature was only disputed in that it was in issue and had to be proved; there was no evidence that it was not Khan's signature. The major misdirection was in the fact that the judge, in saying that there was no evidence of anyone who saw him (Khan) sign, had overlooked the evidence of Devjan.

It appears from the record that Devjan did in fact give such evidence. He said:-

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

"This letter was signed by Mr. Khan in my presence. He signed in my shop in Bazaar Street, Nairobi. Self and my Accountant present. I do not remember who else. Khan and Sayed Mahomed present. We produced our accounts before signature. Both partners signed after they had checked the Accounts. I think it was in the morning so far as my knowledge goes."

It was common ground on the appeal that the "letter" 10
referred to was Exhibit 9. There are, however,
some peculiar features in the evidence relating to
Exhibit 9. In the passage quoted Devjan said both
partners (Khan and Sayed Mahomed (Allahadad))
signed; how he could say that when the document
obviously had only one signature is difficult to
understand. He said also that it was signed in
Nairobi after the checking of the accounts.
Allahadad's evidence was subject to characteristic
confusion. In chief he gave the impression that 20
Exhibit 9 was brought to Kajiado for signature.
He identified Khan's signature but said he was not
present. In cross-examination he said that he did
not know where Exhibit 9 was signed but he himself
was present when the accounts were checked. In
view of Devjan's evidence that both partners signed
after the accounts were checked it is permissible
to wonder why Allahadad did not sign Exhibit 9,
and why, if Khan signed it, he did so as "proprietor"
and not "partner". The learned judge was fully 30
entitled to place little reliance upon evidence of
this calibre. At one stage in his judgment he
characterised the evidence of all the non-
professional witnesses in the case as "utterly
unreliable and much more concerned with painting
a picture favourable to his own case than with
any strict regard for the truth". If the learned
judge had said that he was not satisfied on the
evidence that anyone had seen Khan sign Exhibit 9
that would have been unassailable, but he went 40
further than that and when he said that "there is
no evidence of anyone who saw him sign" that was
certainly a misdirection and it now falls to be
considered what (if any) importance should be
attached to it.

Counsel for the respondent submitted that
Exhibit 9 was not evidence which bound the
respondent, though he was not prepared to argue

that the document as such was inadmissible in evidence; as the respondent was the only defendant in the action I find an element of contradiction in this attitude for it is only in relation to the defendant that the question whether the document was or was not a relevant fact (and therefore admissible or otherwise) could be tested and decided.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

10 It is clear, I think, that in the lifetime of Khan Exhibit 9 would have been inadmissible in evidence on the ground that it was hearsay. One of the established exceptions to the hearsay rule is the class of statements known as admissions and where a relation such as agency exists the admission of an agent may be that of his principal; but there is no privity between a surety and the principal debtor and the latter is not the agent of the former. Hence the admissions of the principal debtor remain hearsay as against the surety and do not bind him:

20 Re Kitchin, Ex parte Young, (1881) 17 Ch.D.668;15 HALSBURY'S LAWS OF ENGLAND (3rd edn.) 301. There is however another exception to the hearsay rule, which is relied on by counsel for the appellants. Section 32 of the Indian Evidence Act, which was in force in Kenya at the time of the hearing in the Supreme Court, lists many cases in which statements by (inter alios) deceased persons are evidence. The section, though in some respects wider than the corresponding English law, includes in subsection (3) statements against interest and in subsection (2) "an acknowledgment written or signed by him of the receipt of ... goods ...". Properly construed I think that Exhibit 9 falls within both of these exceptions. The document is on the face of it against Khan's pecuniary interest, and in Taylor v. Witham (1876) 3 Ch.D 605, at 607-8, Jessel, M.R. said:-

30

40 "What is the meaning of its being against his interest? I adopt the view of Mr. Baron Parke in the case of Reg. v Inhabitants of Lower Heyford, 2 Sm.L.C. 7th Edn. p.333, that it must be prima facie against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it.

Of course, if you can prove aliunde that the

In the Court
of Appeal for
Eastern Africa
at Nairobi

—————
No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you shew any reason to believe that he had a motive for making it, and that, though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony." 10

Jessel, M.R. also said that, once receivable, the evidence is receivable "for all purposes".

For these reasons I consider that Exhibit 9 was admissible and, indeed, it appears to have been admitted without objection in the Supreme Court. The learned judge did not wrongly exclude it from evidence but he appears, on a mistaken basis, to have excluded it from consideration in whole or in part. The position is therefore analagous to wrongful exclusion of evidence and falls sufficiently within rule 76(2) of the rules of this court, which provides that a new trial shall not be granted upon the ground of wrongful rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage of justice has been thereby occasioned. 20

The question is whether, if the learned judge had appreciated that there was one witness who claimed to have seen Khan sign Exhibit 9, there is any real possibility that he would have arrived at a different conclusion. In my judgment it is in the highest degree unlikely. In the first place, in the light of what I have referred to as the "peculiar features" in the evidence in relation to Exhibit 9 he might well have placed no more confidence in it than he actually did. Secondly, on the basis that Khan did sign Exhibit 9, the question arises how much further does that document carry the case for the appellant than did the evidence of Allahadad, Khan's partner, which failed to satisfy the learned judge. In relation to the question of the weight of such evidence there is a passage of interest in the judgment of James L.J. in Re Kitchin Ex parte Young (supra) at pages 671-2 of the report:- 30 40

10 "It is perfectly clear that in an action against a surety the amount of the damage cannot be proved by any admissions of the principal. No act of the principal can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable to pay. If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it. But it would be a strong thing to say that he has done so, unless you find that he has said so in so many words."

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued

26th March
1964

20 This passage would apply in full to Exhibit 9 if Khan had still been alive when the action was heard in the Supreme Court. As he was dead section 32 of the Indian Evidence Act operated so as to render the document admissible in evidence, but the weight must be less than that of the evidence of Allahadad who could give sworn evidence and be cross-examined. It does nothing to clear up the doubts which influenced the learned judge in relation to the actual supply of goods to the various firms which had existed; this is implicit in what the learned judge himself said i.e. that the mere fact that the balance in Exhibit 9 corresponded with the

30 balance in the sugar account was not in itself sufficient to satisfy him that the money was owing by Kajiado European Stores to the appellants. It does no more than did the evidence of Allahadad, to compensate for the absence of invoices, delivery orders, receipts for goods, orders for and correspondence in relation to goods. It must be remembered that it was insufficient for the appellants to prove that some money may have been owing or even that something was owing if they could not

40 prove what the something was; the respondent was entitled to proof of an exact amount or at least of a minimum amount. Evidence of the creditor and of the principal debtor would normally be able to discharge this burden but the learned judge had good reason in the present case for refusing to accept what was before him as sufficient and for the reasons I have given I take the view that the misdirection in relation to Exhibit 9 occasioned no miscarriage of justice. It may be observed that the wording of the document, in its reference

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.22

Judgment of
Sir Trevor
Gould
continued
26th March
1964

to "sugar and other goods etc." follows that of the second guarantee; that, together with the fact that the principal debtors were not sued, renders it at least possible that it was given with an action against the guarantor in contemplation. That is of course permissible, but does nothing to increase the weight to be attached to the document.

Counsel for the appellant made a submission that the issue of the supply of goods was virtually an uncontested one in the sense that there was no evidence upon it from the respondent. He said it was "almost a case of ex parte proof" and a low or lower standard of proof should have been accepted by the learned judge. I am unable to accede to this proposition. The respondent was a stranger to the transactions in goods upon which his liability depended, and could not be in a position to give evidence or bring independent evidence as to those transactions. He put them in issue and his legal representatives did all they could to test the matter by cross-examination. I see no reason to hold that the appellant firm had to prove its case by anything less than the normal standard of the balance of probabilities. 10 20

For the reasons I have given I would dismiss the appeal with costs.

Dated at Nairobi this 26th day of March, 1964.

T. J. GOULD.
VICE-PRESIDENT.

30

No. 23

Judgment of Sir Samuel Quashie-Idun

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT
NAIROBI

(Coram: Quashie-Idun, P., Gould, V.P. and
Crawshaw, J.A.)

CIVIL APPEAL NO. 30 of 1963

BETWEEN

- 1. DEVKUNVERBEN widow of POPATLAL KARMAN
 - 2. MEGHJI KARMAN MALDE
 - 3. DEVCHAND KARMAN MALDE, and
 - 4. NANDLAL POPATLAL MALDE, in their capacity as the Executors of the Estate of POPATLAL KARMAN Dec'd
 - 5. MEGHJI KARMAN and
 - 6. DEVCHAND KARMAN trading as POPATLAL KARMAN & COMPANY
-) APPELLANTS

AND

AHAMED DIN BUTT s/o MOHAMED BUX BUTT RESPONDENT

(Appeal from a judgment and decree of
the Supreme Court of Kenya at Nairobi
(Goudie J.) dated 11th February, 1963

in

Civil Case Number 2127 of 1960

JUDGMENT OF QUASHIE-IDUN P.

I agree and have nothing to add. The appeal
is dismissed with costs.

Dated at Nairobi this 26th day of March 1964.

S.O. QUASHIE-IDUN
PRESIDENT.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.23

Judgment of
Sir Samuel
Quashi-Idun

26th March
1964

10

20

30

In the Court
of Appeal for
Eastern Africa
at Nairobi

No. 24

Judgment of Mr. Justice Crawshaw

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT
NAIROBI

No.24

Judgment of Mr.
Justice
Crawshaw

(Coram: Quashie-Idun, P., Gould, V.P. and
Crawshaw, J.A.)

26th March 1964

CIVIL APPEAL NO. 30 of 1963

BETWEEN

- | | |
|--|-------------------|
| 1. DEVKUNVERBEN widow of POPATLAL
KARMAN | } APPELLANTS |
| 2. MEGHJI KARMAN MALDE | |
| 3. DEVCHAND KARMAN MALDE and | |
| 4. NANDLAL POPATLAL MALDE, in their
capacity as the Executors of the
Estate of POPATLAL KARMAN Dec'd | |
| 5. MEGHJI KARMAN and | |
| 6. POPATLAL KARMAN & COMPANY | |

AND

AHAMED DIN BUTT s/o MOHAMED BUX BUTT RESPONDENT

(Appeal from a judgment and decree of
the Supreme Court of Kenya at Nairobi
(Goudie J.) dated 11th February, 1963

in

Civil Case Number 2127 of 1960)

JUDGMENT OF CRAWSHAW J.A.

I also agree.

Dated at Nairobi this 26th day of March 1964.

E.D.W. CRAWSHAW
JUSTICE OF APPEAL.

on the 23rd day of July, 1964, by Counsel for the above-named Applicants for final leave to appeal to the Judicial Committee of the Privy Council, AND UPON READING the affidavit of NARSHI VALJI PARMAR of Nairobi in Kenya, Law Clerk, sworn on the 23rd day of July, 1964, in support thereof, and the exhibits therein referred to and marked "NVP 1" and "NVP 2", AND UPON HEARING Counsel for the Applicants and Counsel for the Respondent THIS COURT DOTH ORDER that the application for final leave to appeal to the Judicial Committee of the Privy Council be and is hereby granted AND DOTH DIRECT that the Record including this Order be despatched to England within fourteen days from the date of issue of this Order AND DOTH FURTHER ORDER that the Costs of this application do abide the result of the appeal, and be awarded to the Respondent in case the Appeal is dismissed for want of prosecution.

10

20

GIVEN under my hand and the seal of the Court at Nairobi this 30th day of July, 1964.

Sgd: M. D. DESAI

AG. REGISTRAR,
COURT OF APPEAL FOR E.A. NAIROBI.

ISSUED this 30th day of July, 1964.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.26

Order giving
Final Leave
to Appeal to
the Judicial
Committee of
the Privy
Council
continued

30th July 1964

Exhibits

Exhibit 7
(By plaintiffs)

Title Deed re
Plot No.1113
Eastleigh
Section 3
Nairobi

2nd April 1947

EXHIBITS

Exhibit 7 (By Plaintiffs)

TITLE DEED re Plot No.1113, Eastleigh
Section 3, Nairobi

THIS INDENTURE is made the 2nd day of April One thousand nine hundred and forty-seven Between MOULA BUX son of NERAL DIN of Nairobi in the Colony of Kenya (hereinafter called the Vendor which expression shall where the context so admits include his personal representatives and assigns) of the one part and AHAMED DIN BUTT son of MOHAMED BUX BUTT of Nairobi aforesaid (hereinafter called the Purchaser which expression shall where the context so admits include his personal representatives and assigns) of the other part WHEREAS by virtue of an Indenture dated 26th day of November One thousand nine hundred and forty-two (registered in the Crown Lands Registry at Nairobi in Volume N 28 Folio 176/3) and made between AZIZ BEGUM (therein described) of the one part and the Vendor and the Purchaser of the other part for the consideration therein mentioned the Vendor and the Purchaser are now seized in unincumbered fee simple in possession of the hereditaments and premises hereinafter described as tenants in common in equal shares subject nevertheless to the provisions of the Crown Lands Ordinance one thousand nine hundred and two and to the rules for the time being in force thereunder AND WHEREAS the Vendor has agreed with the Purchaser for the sale to him of all his share and interest in the said hereditaments and premises at the price or sum of Shillings Two thousand and five hundred

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the premises and of the sum of Shillings Two thousand and five hundred (2,500/-) on or before the execution of these presents paid by the Purchaser to the Vendor (the receipt whereof the Vendor doth hereby acknowledge) the Vendor as Beneficial owner hereby GRANTS AND CONVEYS unto the Purchaser ALL THAT the share estate and interest of the Vendor of and in ALL THAT piece and parcel of land forming part of Eastleigh formerly known as Nairobi East Township situate near the Township of Nairobi

being Plot No.1113 of Section III measuring Ninety feet by fifty feet or thereabouts which said piece or parcel of land is more particularly delineated and described on the General Plan of the said Township registered at the Registration of Documents Department Nairobi as Number 567/AA1/1916 together with all buildings and other improvements erected and being thereon TO HOLD the same unto and to the use of the Purchaser his heirs and assigns in fee simple in possession free from incumbrances to the intent that the Purchaser may henceforth stand seised of the entirety of the said hereditaments and premises freed from any state or right of the Vendor therein subject nevertheless to the provisions of the Crown Lands Ordinance one thousand nine hundred and two and to the rules for the time being in force thereunder.

Exhibits

 Exhibit 7 (By Plaintiffs)
 Title Deed re Plot No.1113 Eastleigh Section 3 Nairobi continued
 2nd April 1947

10

20

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and affixed their seals the day and year first hereinbefore written.

MARKED SEALED AND DELIVERED by)
 the Vendor in the presence of:)

L T

SIGNED SEALED AND DELIVERED by)
 the Purchaser in the presence)
 of:-)

AHAMED DIN

COLONY OF KENYA
 CROWN LANDS REGISTRY
 NAIROBI

Registered at	15th April,	Stamp Duty ..	Sh. 60/-
	1947	Do.	
Registration No.	Volume Folio File	Counterpart	Sh.
		Penalty	Sh.
1576	1428 176/4 8979	Registration Fee	Sh. 14/-
		Copying Fees	Sh. 2/-
			<u>Sh. 76/-</u>

Exhibits

Exhibit 13 (By Plaintiffs)

Exhibit 13 Equitable Mortgage by Defendant in favour of
(By Plaintiffs) Barclays Bank.

Equitable
Mortgage by
Defendant in
favour of
Barclays Bank

COLONY AND PROTECTORATE OF KENYA

THE CROWN LANDS ORDINANCE
(Chapter 155 of the Revised Edition)

27th July 1951 MEMORANDUM OF EQUITABLE MORTGAGE BY DEPOSIT OF
DOCUMENTS

(Section 129, Proviso)

To the Registrar of Crown Lands,
Nairobi.

10

I, AHMED DIN BUTT s/o MOHAMED BUX BUTT hereby
declare that Document(s) registered in Volume N28
Folios 176/3 & 4 relating to Plot No.1113, Eastleigh
Sec.III in the District of Nairobi was/were
deposited by me with BARCLAYS BANK (D.C. & O.)
NAIROBI by way of Equitable Mortgage on the 27th
day of July 1951.

DATED this 27th day of July 1951.

Signed in the presence
of:-

Signature of Mortgagor:

20

P.L.Maini.
Advocate
Nairobi

AHAMED DIN

?
Law clerk,
Nairobi.

Received the above-quoted document(s):

Signed in the presence
of:-

Signature of Mortgagee:

30

F.Scott
Barclays Bank (D.C.& O.)
Local Head Office,
Nairobi.
Bank Official

BARCLAYS BANK (DOMINION
COLONIAL AND OVERSEAS)

Attorney

Attorney

Exhibit 14 (BY Plaintiffs)

Agreement for Sale re Plot No.209/2751
Nairobi made between Gyan Singh and Defendant.

A G R E E M E N T

It is hereby agreed between GYAN SINGH, son of KHUSHAL SINGH of Nairobi (hereinafter called "the Vendor"), and AHMED DIN, son of MOHAMED BUX of Nairobi (hereinafter called "the purchaser") as follows:-

- 10 1. The Vendor is the registered owner of the properties known as L.R.209/2751 and IR.5735 situated in Nairobi.
2. The Vendor has agreed to sell, and the Purchaser has agreed to purchase the premises aforesaid for the sum of Shillings One hundred and ninety thousand (Shs: 190,000/-), and the Purchaser shall also pay all legal costs and fees incurred in the transaction.
- 20 3. The Purchaser agrees to pay to the Vendor the sum of Shillings Twenty thousand (Shs: 20,000/-) being a deposit on foot of the purchase price of the premises aforesaid on the signing of this Agreement, and the Vendor acknowledges having received the said sum of Shs: 20,000/-).
4. The parties hereto agree to do all necessary acts for the full and proper transfer of the premises aforesaid to the Purchaser and further agree that the transfer shall be made under Deed of Transfer between them.
- 30 5. Should the Purchaser fail to complete the purchase and make default in payment of the balance of Shillings One hundred and sixty thousand (Shs: 160,000/-) within three months from the date of this Agreement, the deposit of Shs:30,000/- paid upon the signing of this Agreement shall be forfeited to the Vendor.

DATED at NAIROBI this 8th day of March 1956.

Gyan Singh
VENDOR.

AHMED DIN
PURCHASER.

Exhibits

Exhibit 14 (By
Plaintiffs)

Agreement for
Sale re Plot
No.209/2751,
Nairobi

8th March 1956

ExhibitsExhibit 11 (By Plaintiffs)

Exhibit 11
(By Plaintiffs)

Partnership Agreement of Kajiado European
Stores

Partnership
Agreement of
Kajiado Euro-
pean Stores
14th July 1956

THIS AGREEMENT of partnership made the 14th day of July One thousand nine hundred and fifty six BETWEEN ABDUL MAJID KHAN of Nairobi in the Colony and Protectorate of Kenya Law Clerk (hereinafter called the first partner) of the one part and SAYED MOHAMED ALLHADAD of Kajiado Southern Province in the aforesaid Colony and Protectorate of Kenya merchant (hereinafter called the second partner) of the other part WHEREAS by an Agreement dated the 19th day of June One thousand nine hundred fifty six made between Meghajibhai Karman Malde therein described of the one part and the first partner of the other part the first partner purchased the business of KAJIADO EUROPEAN STORE inclusive of Land, the Buildings and the Business Name and the goodwill belonging to the said KAJIADO EUROPEAN STORE in conduct of the business for the consideration therein mentioned AND WHEREAS the first Partner has agreed to take in the second Partner as a partner NOW IT IS HEREBY MUTUALLY AGREED that the said parties shall become partners upon the terms hereinafter contained namely. 10

1. The partnership shall be deemed to have commenced on 19th June, 1956.

2. The Partnership shall be that of Provision Merchants, Hides Skins Merchants, Auto Spares dealers, Transporters and any other trade or trades as the Partners from time to time agree upon. 30

3. The firm name shall be "KAJIADO EUROPEAN STORE".

4. The Bankers of the Partnership shall be Barclays Bank D.C.O. Queensway, Nairobi and all cheques shall be signed by the first partner or any nominee who shall be nominated by the first partner in his absolute discretion.

5. This agreement may be determined by either partner by giving to the other partner one month's notice in writing. 40

6. The usual books of account shall be kept properly posted up and shall not be removed from

the place of business without the consent of the first partner. Every Partner shall have access to them at all times and shall be at liberty to make such extractions therefrom as he may think fit by himself or his agent.

Exhibits

Exhibit 11
(By Plaintiffs)

Partnership
Agreement of
Kajiado Euro-
pean Stores
continued

14th July 1956

10 7. On the 31st day of December, 1956, and on the 31st day of December in each succeeding year during the continuance of the partnership an account shall be taken of all the capital assets and liabilities
sheet and profits and loss account making due allow-
20 10 for depreciation and for recouping any lost capital shall be prepared and a copy thereof furnished to each partner who shall be bound thereby unless some manifest error shall be discovered within three months in which case such error shall be rectified immediately after the preparation of the said balance sheet and profit and loss account the nett profits (if any) shown by such account shall be
20 divided upon such terms as provided in paragraph 8 hereof.

8. The Profits shall be divided by the partners in proportion of 50 per cent to first partner and 50 per cent to the second partner.

30 9. If during the continuance of the partnership, or after the determination thereof any difference shall arise between the partners, in regard to any act or matter (such difference being as to matter of fact and not involving any question of law), such difference shall be referred forthwith to two arbitrators one being nominated by each partner and such arbitrators shall have full power to dissolve the partnership if they shall think fit.

IN WITNESS WHEREOF the parties hereto have signed their names the day and year first above written.

SIGNED by the said ABDUL MAJID KHAN } A. M. KHAN
in the presence of :-

40 T. R. Johar
Advocate, Nairobi.

SIGNED by the said SAYED MOHAMED } SAYED MOHAMED
ALLHADAD in the presence of :- ALLHADAD

T. R. Johar
Advocate, Nairobi.

Exhibits

Exhibit 5 (By Plaintiffs)

Exhibit 5 (By
Plaintiffs)

Letter, Defendant to Plaintiffs, dated
27th July 1956

Letter,
Defendant to
Plaintiffs
27th July 1956

Popatlal Karman & Co., 27.7.56.
Indian Bazaar,
Nairobi.

Dear Sir,

Will you please keep my deed of Plot No.1113
Eastleigh Section III for Shs. 30,000/- as agreed
with Mr. Khan and make the necessary mortgage etc.
and the documents are attached herewith on
completing the same I shall on the original.

Yours

27.7.56.

Ahmed din

Exhibit 6 (By
Plaintiffs)

Exhibit 6 (By Plaintiffs)

Letter,
A.M. Khan to
Plaintiffs
27th July 1956

Letter, A. M. Khan to Plaintiffs, dated
27th July 1956

M/S Popatlal Karman & Co.,
Nairobi.

Herewith the document attached as agreed to
keep under the security of sugar which you are
supplying to M/S Kajiado European Store Kajiado.

A. M. Khan

27/7/56.

Exhibit 4Plaintiffs' Statement of AccountSTATEMENT

To,
Messrs. Sayed Omer & Bros. and
Kajiado European Stores,
KAJIADO.

In Account with: POPATLAL KARMAN & COMPANY, NAIROBI.

		<u>SUGAR ACCOUNT</u>	Dr.	Cr.
			Shs.Cts.	Shs.Cts.
31.7.1956	To, Invoice No.331 - 300 Bags of Sugar		33246.32.	
10.8.56	By, Cheque No.493613			10000.00
24.8.56	To, Invoice No.339 - 300 Bags of Sugar		32599.55	
25.8.56	By, Cheque No.493614			10000.00
3.9.56	By, Cheque No.493615			10000.00
20.9.56	To, Invoice No.363 - 200 Bags of Sugar		21782.39	
27.9.56	By, Cheque No.512459			10000.00
1.10.56	By, Cheque No.512460			10000.00
9.10.56	By, Cheque No.512462			10000.00
18.10.56	To, InvoiceNo.388 - 215 Bags of Sugar		23504.78	
29.10.56	By, Cheque No.512479			10000.00
30.10.56	By, Cheque No.512480			2653.87
5.11.56	By, Cheque No.512483			8000.00
19.11.56	By, Cheque No.512489			4082.39
27.11.56	By, Cheque No.512490			10000.00
30.11.56	To, Invoice No.446 - 250 Bags of Sugar		25923.60	
4.12.56	By, Cheque No.512491			8000.00
10.12.56	To, Telegram charges		8.00	
24.12.56	By, Cheque No. 1905			6000.00
24.12.56	By, Cash			4000.00
27.12.56	By, Cash			6500.00
27.12.56	By, Cheque No.143022			2500.00
TOTALS c/f:			137064.64.	121735.26

Exhibits

Exhibit 4. (By
Plaintiffs)

Plaintiffs'
Statement of
Account

31st July 1956

Exhibits			Dr.	Cr.
		TOTALS B/f:	137064.64	121736.26
Exhibit 4 (By	28.12.56	To, 210 Bags of Sugar	23111.57	
Plaintiffs)	28.12.56	To, Commission on Sugar		
Plaintiffs'		supplied from July		
Statement of		to October 1956.	1523.00	
Account	31.12.56	By, Balance		39962.95
continued				
31st July 1956			161699.21	161699.21
	1.1.1957	To, Balance	39962.95	
	3.1.57	By, Cash		1000.00
	8.1.57	By, Cash		2100.00
	12.1.57	By, Cash		2000.00
	16.1.57	To, Invoice No.514-		
		210 Bags of Sugar	23336.40	
	17.1.57	By, Cheque No.972169		890.00
	21.1.57	By, Cash and Cheque		4900.00
	1.2.57	By, Cheque No.972178		11000.00
	7.2.57	By, Cheque No.972182		4000.00
	20.2.57	To, Commission on Sugar		
		supplied from November		
		56 to January 1957	1002.00	
	21.2.57	To, Invoice No.536 -		
		200 Bags of Sugar	22486.00	
	22.2.57	By, Cheque No.247951		5000.00
	25.2.57	By, Cash		3000.00
	5.3.57	By, Cheque No.247952		10000.00
	9.3.57	By, Cheque No.247953		5000.00
	11.3.57	By, Cash		2500.00
	13.3.57	To, Cheque No.247953		
		unpaid	5000.00	
	20.3.57	To, Invoice No.566 -		
		200 Bags of Sugar	23498.13	
	21.3.57	By, Cheque No.211514		15000.00
	22.3.57	By, Cheque No.211516		3000.00
		<u>SUGAR AND ANY OTHER GOODS ACCOUNT</u>		
	25.3.57	To, Invoice No.2256	3240.80	
	25.3.57	By, Goods Returned		470.00
	29.3.57	To, Invoice No.2309	80.00	
	1.4.57	By, Goods Returned		390.95
		TOTALS c/f:	118606.28	70250.95

		Dr.	Cr.	Exhibits
	TOTALS B/f:	118606.28	70250.95	_____
1.4.57	By, Cheque No.972222		8000.00	Exhibit 4 (By
3.4.57	To, Invoice No. 2344	210.50		Plaintiffs)
8.4.57	By, Cheque No.972231		2000.00	Plaintiffs'
24.4.57	By, Cheque No.972238		7800.00	Statement of
24.4.57	To, Difference in price in 29 Bags and 12 lbs of Sugar at 6/59 per bag. 191.46			Account continued
24.4.57	To, Invoice No.596 - 200 Bags of Sugar	26021.94		31st July 1956
26.4.57	By, Cash		5900.00	
6.5.57	By, Cheque No.247962		4000.00	
13.5.57	By, Cheque No.247962		3000.00	
20.5.57	To, Invoice No.625 - 200 Bags of Sugar	26002.19		
21.5.57	By, Cheque No.247974		5000.00	
22.5.57	By, Cash		4000.00	
25.5.57	By, Cheque No.871027		5000.00	
29.5.57	By, Cheque No.871032		1700.00	
12.6.57	By, Cheque No.89615		6000.00	
14.6.57	By, Cash		2700.00	
19.6.57	To, Invoice No.672- 200 Bags of Sugar	26020.19		
24.6.57	By, Cheque No.896160		12600.00	
25.6.57	To, Invoice No.3100	1283.50		
29.6.57	By, Cheque No.169241		2500.00	
8.7.57	By, Cheque No.871030		1700.00	
12.7.57	To, Invoice No.3274	478.70		
13.7.57	By, Cheque No.928230		7000.00	
19.7.57	By, Cheque No.55859		3967.19	
20.7.57	By, Cheque No.928231		970.85	
22.7.57	By, Cheque No.928242		3000.00	
24.7.57	To, Invoice No.702 - 200 Bags of Sugar	25917.37		
25.7.57	To, Difference in price of sugar supplied on 24.4.57			
		<u>394.20</u>		
	TOTALS c/f:	225126.33	157088.99	

Exhibits			Dr.	Cr.
		TOTALS B/f:	225126.33	157088.99
Exhibit 4 (By Plaintiffs) Plaintiffs' Statement of Account continued 31st July 1956	25.7.57	By, Cheque No.928204		2500.00
	25.7.57	To, Invoice No.3376	1088.50	
	26.7.57	By, Cheque No.928244		3000.00
	29.7.57	By, Cheque No.928247		3000.00
	30.7.57	To, Invoice No.3432	539.00	
	31.7.57	By, Cheque No.928206		2000.00
	12.8.57	By, Cheque No.928205		5000.00
	12.8.57	By, Cheque No.952987		3000.00
	20.8.57	To, Invoice No.719 - 200 Bags of Sugar	26324.00	
	22.8.57	By, Cheque No.952998		5000.00
	27.8.57	By Cheque No.988527		4000.00
	29.8.57	By, Cheque No.8411778		2742.40
	29.8.57	By, Cheque No.988529		257.60
	31.8.57	By, Cheque No.988530		4000.00
	2.9.57	By, Cheque No.988531		2311.57
	5.9.57	To, Member fee to Sugar Agents & Distributors Association of Kenya	150.00	
	13.9.57	To, Invoice No.1394 - 200 Bags of Sugar	26324.00	
	21.9.57	By, Cheque No.021426		3000.00
	23.9.57	By, Cheque No.021428		5500.00
	26.9.57	By, Cheque No.021430		6200.00
	1.10.57	By, Cash		7000.00
	18.10.57	To, Invoice No.781 - 200 Bags of Sugar	25633.06	
	25.10.57	By, Cheque No.062101		8500.00
	27.10.57	By, Cheque No.062104		8000.00
	30.10.57	By, Cheque No.062106		2000.00
	30.10.57	To, Commission on 200 Bags of Sugar	300.00	
	31.10.57	To, Insurance premium on stock of Sugar at Kajiado	70.00	
		TOTALS C/f:	305554.89	234100.56

		Dr.	Cr.	Exhibits
	TOTALS b/f:	305554.89	234100.56	
31.10.57	By, Cheque No.062107		5000.00	Exhibit 4 (By Plaintiffs)
1.11.57	By, Cheque No.021447		3000.00	Plaintiffs'
13.11.57	By, Cheque No.062112		2500.00	Statement of
18.11.57	By, Cash		1000.00	Account
23.11.57	By, Cash		1100.00	continued
31.12.57	By, Balance		58854.33	31st July 1956
		<u>305554.89</u>	<u>305554.89</u>	
1.1.1958	To, Balance	58854.33		
25.2.58	By, Cheque No.232860		1400.00	
25.2.58	By, Cheque No.232861		1400.00	
3.3.58	By, Cheque No.48797		2000.00	
3.9.58	By, Bill Paid		3000.00	
30.9.58	By, Bill Paid		4000.00	
30.10.58	By, Bill Paid		3000.00	
31.12.58	By, Balance		44054.33	
		<u>58854.33</u>	<u>58854.33</u>	
1.1.1959	To, Balance	44054.33		
16.3.60	By, Cheque No.02476		1000.00	
19.4.60	By, Cheque No.04631		1000.00	
25.5.60	By, Cheque No.006694		1000.00	
31.12.60	By, Balance		41054.33	
		<u>44054.33</u>	<u>44054.33</u>	
	To, Balance	41054.33		

E. & O.E.
nvp.

ExhibitsExhibit 1 (By
Plaintiffs)

Guarantee

15th August
1956Exhibit 1 (By Plaintiffs)Guarantee

To,
Messrs. Popatlal Karman
Meghji Karman and Devchand Karman of
Popatlal Karman & Company,
NAIROBI.

IN CONSIDERATION of your agreeing to supply
Sayed Omer & Bros. of Kajiado in the Colony of Kenya
(hereinafter called "the Principals") with sugar on
credit I HEREBY AGREE with you as follows:- 10

(1) I shall be answerable and responsible to
you for the due payment by the said Principals for
all such sugar as you may from time to time supply
to them but subject to the limitation that my
liability under this Guarantee shall not at any
time exceed the sum of Shillings Thirty thousand
(Shillings 30,000/00)

(2) This Agreement shall be a continuing
guarantee to you for all debts whatsoever and when- 20
soever contracted by the said Principals with you
in respect of sugar supplied to them subject always
to the above limitation.

(3) In consideration aforesaid and for better
securing the said guarantee of Shillings Thirty
thousand (Shillings 30,000/00) I hereby agree to
mortgage by way Equitable Mortgage in your favour
ALL THAT piece or parcel of land known as Plot
Number 1113, Section III, Eastleigh, Nairobi
together with the buildings thereon. 30

(4) You are to be at liberty without notice to
me at any time and without in any way discharging
me from any liability hereunder to grant time or
other indulgence to the principals and to accept
payment from them in cash or by means of negotiable
instruments and to treat me in all respects as
though I were jointly and severally liable with them
to you instead of being merely surety for them.

DATED at Nairobi this 15th day of August 1956.

WITNESSES

Bassett,
Box 2159, NBI

Ahmed din

40

Exhibit 3 (By Plaintiffs)

Exhibits

Equitable Mortgage

Exhibit 3 (By Plaintiffs)

COLONY AND PROTECTORATE OF KENYA

Equitable Mortgage

THE CROWN LANDS ORDINANCE
(Chapter 140 of the Revised Edition)

15th August 1956

MEMORANDUM OF EQUITABLE MORTGAGE BY
DEPOSIT OF DOCUMENTS

(Section 104, Proviso)

To the Registrar of Crown Lands
Nairobi.

I, Ahmed Din Butt s/o Mohamed Bux Butt hereby declare that Document(s) N28 Folio 176/3 & 4 relating to holding No.1113, Sec.III, Eastleigh in the District of Nairobi was/were deposited by me with Popatlal Karman, Meghji Karman & Devchand Karman by way of Equitable Mortgage on the Fifteenth day of August, 1956.

Dated this Fifteenth day of August, 1956.

Signed in the presence of: Signature of Mortgagor:

Bassett

Ahmed din

Received the above-quoted document(s):

Signed in the presence Signature of Mortgagee:
of:

?

Meghji Karman

Devchand Karman

Advocate, Nairobi.

?

ExhibitsExhibit 2 (By Plaintiffs)Exhibit 2 (By
Plaintiffs)Guarantee

Guarantee

19th January
1957

To,
Messrs. Popatlal Karman
Meghji Karman and Devchand Karman
Popatlal Karman & Company,
Nairobi.

THIS GUARANTEE is made the 19th day of January One thousand nine hundred and fifty seven and is supplemental to a Guarantee dated the 15th day of August, One thousand nine hundred and fifty six (hereinafter called the Principal Guarantee) WHEREAS the Guarantor Ahmed Din in consideration of Messrs. Popatlal Karman, Meghji Karman and Devchand Karman of Popatlal Karman & Company., Nairobi agreeing to supply Sayed Omer & Bros of Kajiado and Kajiado European Stores of Kajiado with sugar and any other goods HEREBY AGREES as follows:-

10

(1) I shall be answerable and responsible to you for the due payment by the said Principals for all such sugar and any other goods as you may from time to time supply to them to the extent of Shillings Forty-five thousand (Shs.45,000/-) instead of the sum of Shillings Thirty thousand (Shs.30,000/-) as mentioned in the Principal Guarantee.

20

(2) In consideration aforesaid I hereby mortgage the property being Plot No.1113 more fully described in the Principal Guarantee for the sum of Shillings Forty-five thousand (Shs.45,000/-) instead of the sum of Shillings Thirty thousand (Shs.30,000/-) mentioned in the Principal Guarantee.

30

And the said Principal Guarantee shall thenceforth be read and construed as if the sum of Shs. 45,000/- and the name of Kajiado Provision Stores were substituted in the Principal Guarantee.

DATED at Nairobi this 19th day of January 1957.

WITNESS

Bassett
Box 2159
Nairobi

Ahmed din

40

Exhibit 10Another Statement of Account by Plaintiffs

To, Messrs. Kajiado European Stores,
KAJIADO.

In Account with: POPATLAL KARMAN & COMPANY,
NAIROBI.

Exhibits

Exhibit 10 (By Plaintiffs)

Another Statement of Account by Plaintiffs

21st March 1957

		Dr.	Cr.
		Shs.Cts.	Shs.Cts.
	15.6.56 To, Invoice No.14779	2446.20	
10	20.6.56 To, Invoice No.14829	190.00	
	17.9.56 By, Cheque No.N/M.493649		2636.00
	18.9.56 To, Invoice No. 732	2028.20	
	18.9.56 To, Invoice No. 734	229.70	
	1.10.56 By, Goods Returned		262.50
	1.10.56 To, Invoice No. 862	325.00	
	4.10.56 To, Invoice No. 911	24.00	
	2.11.56 To, Invoice No. 1199	992.00	
	6.11.56 To, Invoice No. 1218	801.20	
	12.11.56 To, Invoice No. 1275	80.00	
20	31.12.56 To, Stamp duty on Guarantee and Equitable Mortgage	44.00	
	31.12.56 By, Balance c/d		4261.80
		<u>7160.30</u>	<u>7160.30</u>
	1.1.57 To, Balance b/d	4261.80	
	21.1.57 To, Invoice No. 1723	166.00	
	7.2.57 To, Invoice No. 1890	1490.00	
	7.2.57 By, Cheque No.972182		1000.00
	21.3.57 By, Cheque No.211513		4917.80
30		<u>5917.80</u>	<u>5917.80</u>

/nvp.

ExhibitsExhibit 9 (By
Plaintiffs)Acknowledgment
of Debt by
Kajiado Euro-
pean Stores
25th February
1958Exhibit 9 (By Plaintiffs)Acknowledgment of Debt by Kajiado European
Stores dated 25th February 1958

25.2.58

M/S Popatlal Karman & Co.,
Indian Bazaar, Nairobi.

I, the undersign beg to acknowledge that I owe
you Shs.58,854/33 on behalf of Kajiado European
Store and I confirm the same on account of Sugar
and other goods etc.

10

Kajiado European Store

Prop: A. M. Khan

(1/- stamp)

25/2/58

Exhibit 'B' (By
Defendant)Memorandum -
Plaintiffs to
Stationmaster
Kajiado4th November
1958Exhibit 'B' (By Defendant)Memo - Plaintiffs to Station Master, KajiadoM E M O

POPATLAL KARMAN & COY. To the Station Master
Importers, Wholesalers Kajiado
and General Merchants
NAIROBI Ref.No.A. 4.11.58
Bazaar Road Telephone 3257
P.O.Box3914 Tel.Add."OSWAL"
Bankers:-
Standard Bank of S.A.Ltd.

20

Kindly deliver bearer 250 Bags sugar to the
Malindi Stores Kajiado against your

Yours

Popatlal Karman & Co.

?

30

Exhibit 8 (By Plaintiffs)

Bundle of Correspondence

SIRLEY & KEAN,
Advocates

P.O. Box 5018
NAIROBI.

In reply please
quote:- BS/2933

17th June 1960

Messrs. Velji Devshi & Bakrania,
Advocate,
Market Mansions,
Bazaar Road,
NAIROBI.

10

Dear Sirs,

re: Mortgage

We have been instructed to act on behalf of Mr. Ahamed Din in reference to an equitable mortgage presented by the firm of Velji Devshi & Bakrania for registration on the 20th August, 1956, and in reference to Plot No.1113, Section III, Eastleigh, Nairobi, in favour of Messrs. Popatlal Karman, Meghji Karman and Devchand Karman.

20

Our client claims that he has never received any monies from the persons referred to above and we would appreciate it if you could advise us whether you are aware of any payments being made in this case and if so to whom.

Your early reply would be appreciated.

Yours faithfully,
SIRLEY & KEAN.

sd. B. Sirley.

Partner.

30

BS/MD.

Exhibits

Exhibit 8 (By
Plaintiffs)

Bundle of
Correspondence
(12 letters)

17th June
26th November
1960

Exhibits
Exhibit 8 (By
Plaintiffs)
Bundle of
Correspondence
(12 letters)
continued
17th June -
26th November
1960

SIRLEY & KEAN,
Advocates.

P.O. Box 5018,
NAIROBI.

In reply please
quote:- BS/2933.

30th June 1960

Messrs. Velji Devshi & Bakrania,
Advocates,
Market Mansions,
Bazaar Road,
NAIROBI.

Dear Sirs,

re: Mortgage

10

We wish to refer to our letter of the 17th June and regret to note that we have received no reply or acknowledgment to same. We would very much appreciate an early reply in this matter.

Yours faithfully,
SIRLEY & KEAN.

sd. B. Sirley.

Partner.

BS/MD.

20

SIRLEY & KEAN,
Advocates.

P.O. Box 5018
NAIROBI.

In reply please
quote:- BS/2933.

6th July 1960

TO:
Popatlal Karman, Esq.,
Meghji Karman Esq.,
Devchand Karman Esq.,
c/o Messrs. Popatlal Karman & Co.,
P.O. Box 3914,
Nairobi.

30

Dear Sir:

Mr. Ahmed Din.

Our above named client has found out that an Equitable Mortgage in your favour has been registered on the 20th August 1956 relating to plot No. 1113 - Sec. III Eastleigh. He is unaware

of the circumstances under which this has been done and would be grateful if you could advise whether you have advanced any monies against that property, and if so, to whom, and whether you consider that you have any claims against same.

Kindly treat this matter as urgent.

Yours faithfully,
SIRLEY & KEAN.

sd. B. Sirley.

Partner.

Exhibits

Exhibit 8 (By Plaintiffs)

Bundle of Correspondence (12 letters) continued

17th June -
26th November
1960

10

BS/H.

VELJEE DEVSHI & BAKRANIA,
Advocates.

P.O. Box 5087,
NAIROBI.

Our Ref: D/269

18th July, 1960.

Messrs. Sirley & Kean,
Advocates,
NAIROBI.

Dear Sirs,

re: MORTGAGE

20

Your letter BS/2933 of 17th June, 1960 refers.

In regard to an equitable mortgage, executed by Ahmed Din in favour of Messrs. Popatlal Karman, Meghji Karman and Devchand Karman and registered by us, on the 20th August, 1956, over plot Number 1113, Section III, Eastleigh, Nairobi, there is valid consideration, of which we are aware, and so is your client, though it is quite true, the consideration did not take the form of monies passing from the said mortgagees to the said mortgagor.

30

Yours faithfully,
for VELJEE DEVSHI & BAKRANIA.

sd. T. G. Bakrania.

COPY TO:-

Messrs. Popatlal Karman & Others,
Bazaar Street,
NAIROBI.

TGB/UGB.

Exhibits
Exhibit 8 (By
Plaintiffs)
Bundle of
Correspondence
(12 letters)
continued
17th June -
26th November
1960

SIRLEY & KEAN,
Advocates.

P.O. Box 5018.
NAIROBI.

In reply please
quote:- BS/2933.

19th August 1960

Your Ref: D/269.

Messrs. Veljee Devshi & Bakrania,
Advocates,
Market Mansion,
Second Floor,
Bazaar Street,
NAIROBI.

Dear Sirs,

re: Mortgage

We wish to refer to your letter of the 18th July 1960, and wish to apologise for the delay but this was due to the fact that the writer has been away from the Colony.

We have now obtained further instructions from our client and we are to state that our client is not aware of any consideration valid or otherwise in this case.

We are to request you to state exactly what consideration you are referring to in your letter under reference and if the consideration was not monied had and received why was an amount entered into the documents of the Mortgage. Your early reply to this matter would be appreciated.

Yours faithfully,
SIRLEY & KEAN.

sd. B. Sirley.

Partner.

BS/MD.

VELJEE DEVSHIE & BAKRANIA,
Advocates.

P.O. Box 5087,
NAIROBI.

Exhibits

Our Ref: D/738.

1st September, 1960

Exhibit 8 (By
Plaintiffs)

Messrs. Sirley & Kean,
Advocates,
NAIROBI.

Bundle of
Correspondence
(12 letters)
continued

Dear Sirs,

re: MORTGAGE

17th June -
26th November
1960

10 In reference to your letter BS/2933 of the
19th instant, we regret we do not see why we
should answer your queries, if your client would
not, and feigns ignorance.

What "amount entered into the documents of the
Mortgage" do you refer to, as we cannot follow this
reference or indeed understand the "documents of
the Mortgage" you refer to. Apparently you or your
client has copies of the "documents of the Mortgage".

20 The Mortgage is an equitable one, and you may
conduct searches, instead of asking us to answer
questions.

At your client's request and guarantee our
clients supplied goods (including sugar) to Messrs.
Sayed Omer & Brothers of Kajiado and Kajiado Euro-
pean Stores of Kajiado. The limit at any one time
to which your client under the guarantee is liable
is Shs.45,000/-. The Mortgage is in support of the
guarantee.

We trust you will now be able to get your
client to stop feigning ignorance.

30 The amount due under the guarantee and mort-
gage is Shs.41,054/33, plus interest which we
hereby require your client to pay within SEVEN DAYS,
of the receipt of this letter, as otherwise we
regret we shall have no alternative, but to sue for
a decree for the sale of the property to recover
the said sum.

Yours faithfully,
for VELJEE DEVSHI & BAKRANIA.

sd. T. G. Bakrania.

40 TGB/UGB.

Exhibits
Exhibit 8 (By
Plaintiffs)
Bundle of
Correspondence
(12 letters)
continued
17th June -
26th November
1960

SIRLEY & KEAN,
Advocates.

P.O. Box 5018,
NAIROBI.

In reply please
quote:- BS/2933.

1st September 1960.

Your Ref: D/269.

Messrs. Veljee Devshi & Bakrania,
Advocates,
Market Mansion,
Second Floor,
Bazaar Street,
NAIROBI.

10

Dear Sirs,

re: Mortgage.

We regret to note that we have received no acknowledgment to our letter of the 19th August in the above matter nor any reply to the queries which we have raised. We would very much appreciate to have a reply from you as soon as possible to avoid any difficulties in this matter.

Yours faithfully,
SIRLEY & KEAN.

20

sd. B. Sirley.

Partner.

BS/MD.

SIRLEY & KEAN,
Advocates.

P.O. Box 5018,
NAIROBI.

In reply please
quote:- BS/2933.

14th September 1960

Messrs. Veljee Devshie & Bakrania,
Advocates,
Market Mansion,
Second Floor,
Bazaar Street,
NAIROBI.

30

Dear Sirs,

re: MORTGAGE.

We thank you for your letter of the 1st

September the contents of which we have referred to our client for his comment. We have to advise you that our client denies absolutely the allegations of your clients in this matter.

Exhibits

Exhibit 8 (By Plaintiffs)

Bundle of Correspondence (12 letters)

17th June -
26th November
1960

10 We are to state that our client has never given any guarantee and has never had any dealings with a firm under the name of Sayed Omer & Brothers. We are to request for the details of the alleged guarantee and when the alleged request was made by our client to supply goods to the above-mentioned firm.

Our client will welcome any action your clients wish to file under the alleged guarantee and we presume that by now you have filed an action as more than seven days have elapsed since the date of your letter.

Yours faithfully,
SIRLEY & KEAN.

sd. B. Sirley.

Partner.

20 BS/MD.

SIRLEY & KEAN,
Advocates.

P.O. Box 5018,
NAIROBI.

In reply please
quote:- BS/2933

20th October 1960

30 Messrs. Veljee Devshi & Bakrania,
Advocates,
Market Mansion,
Second Floor,
Bazaar Street,
NAIROBI.

Dear Sirs,

RE: MORTGAGE.

Your letter of the 1st September 1960 and our reply of the 14th September, 1960, refer.

We wish to refer again to your letter under reference and are surprised that we have heard nothing further from you in this case.

Please note that our client has now agreed to

Exhibits

Exhibit 8 (By
Plaintiffs)

Bundle of
Correspondence
(12 letters)
continued
17th June -
26th November
1960

sell the property subject to the mortgage and we are to request the release of the said mortgage forthwith and are to state that unless your client gives release we are to proceed with court action without further notice to your clients within seven (7) days of the date of this letter.

Yours faithfully,
SIRLEY & KEAN.

sd. B. Sirley.

Partner.

10

BS/UB.

SIRLEY & KEAN,
Advocates.

P.O. Box 5018,
NAIROBI.

In reply please
quote:- BS/2933

4th November, 1960

Your Ref: D/738.

Messrs. Veljee Devshi & Bakrania,
Advocates,
Market Mansion,
Second Floor,
Bazaar Street,
NAIROBI.

20

Dear Sirs,

Re: Mortgage

We wish to refer again to your letter of 1st September, and our letter of 20th October, and regret to note that you have not had the courtesy to reply to same.

We would appreciate if it were confirmed that you are still acting for Messrs. Papatlal Karman and the other two gentlemen, and unless we receive confirmation of this within four days of date of this letter we will communicate with them directly.

30

Yours faithfully,
SIRLEY & KEAN.

sd. B. Sirley.

Partner.

VELJEE DEVSHI & BAKRANIA,
Advocates.

P.O. Box 5087
NAIROBI.

Exhibits

Our Ref. D/1653

8th November, 1960

Exhibit 8 (By
Plaintiffs)

Messrs. Sirley & Kean,
Advocates,
NAIROBI.

Bundle of
Correspondence
(12 letters)
continued

Dear Sirs,

Re: MORTGAGE

17th June -
26th November
1960

10 We thank you for your letter Ref. BS/2933
of the 4th instant and apologise for the delay
in replying to your letter of the 20th October,
1960.

We still act for Messrs. Popatlal Karman &
Company, and they have now instructed us to proceed
further against your client unless they pay to us
the amount within 4 days of the date hereof.

Yours faithfully,
For VELJEE DEVSHI & BAKRANIA.

sd. T.G. Bakrania.

20 /UGB.

SIRLEY & KEAN,
Advocates.

P.O. Box 5018,
NAIROBI.

In reply please
quote:- BS/2933.

26th November, 1960

Your Ref. D/1653.

30 Messrs. Veljee Devshi & Bakrania,
Advocates,
Market Mansion,
Bazaar Street,
P.O. Box 5087,
Nairobi.

Dear Sirs,

Re: Mortgage.

We are in receipt of your letter of the 8th
November and note that you have failed completely
to deal with the questions raised in our letter to

the Purchaser has agreed to purchase the said business of Kajiado European Stores comprising the land and buildings hereinafter more particularly described, together with the business name of Kajiado European Stores and goodwill belonging to the Vendor in the conduct of the said business, for the consideration hereinafter appearing

NOW THIS AGREEMENT WITNESSETH as follows:

1. The Vendor will sell and the Purchaser will purchase

(i) ALL THAT the land known as Plot B situated on the Main Road, Kajiado aforesaid together with the buildings and premises erected thereon and comprising one shop, store premises and rooms

(ii) ALL THAT the land known as Plot C situated on the Main Road Kajiado aforesaid together with the stone-built garage erected thereon and all permanent fittings contained therein and thereon:

(iii) the business name of Kajiado European Stores attached to the said premises and

(iv) the goodwill thereof

2. In consideration of the Vendor agreeing to sell the premises and other assets described in Clause 1 hereof the Purchaser will pay to the Vendor the sum of Shillings 82,500/- (eighty two thousand five hundred shillings) made up as follows:

(a) Shillings fifty five thousand (Shs.55,000/-) in respect of the premises described at (1) in Clause 1 hereof:

(b) Shillings twenty two thousand five hundred (Shs.22,500/-) in respect of the premises described at (ii) in Clause 1 hereof: and

(c) Shillings five thousand (Shs.5,000/-) for the business name and goodwill described at (iii) and (iv) in Clause 1 hereof.

3. The consideration aforesaid shall be paid by the Purchaser to the Vendor in the following manner:

Exhibits

Exhibit 12 (By Plaintiffs)

Agreement for Sale of Business of Kajiado European Stores continued

Undated

Exhibits
Exhibit 12 (By
 Plaintiffs)
 Agreement for
 Sale of
 Business of
 Kajiado Euro-
 pean Stores
 continued
 Undated

- (a) Shillings ten thousand (Shs.10,000/-) upon the signing hereof;
- (b) Shillings five thousand (Shs.5,000/-) on the 10th day of July 1956;
- (c) Shillings twenty two thousand five hundred (Shs.22,500/-) on the day of September 1956;
- (d) Shillings twenty two thousand five hundred (Shs.22,500/-) on the day of December 1956;
- (e) Shillings twenty two thousand five hundred (Shs.22,500/-) on the day of March 1957;

10

4. The Vendor shall pay satisfy and discharge all debts and liabilities of whatever nature accrued due in respect of the Plots C and E aforesaid up to the date of this Agreement and hereby indemnifies the Purchaser in respect thereof.

5. The Vendor shall upon the signing of this Agreement deliver possession to the Purchaser of both the premises hereinbefore described together with all permits, licences, franchises and agreements relating to the premises and to the business carried on therefrom which have been issued to him or are in his possession or power and shall do all other acts necessary to enable the Purchaser to carry on the business as before.

20

6. The Vendor shall at or before the date of this Agreement procure the consent thereto of SAYED OMER ALLHADAD; SAYED IBRAHIM ALLHADAD; and SAYED MOHAMED ALLHADAD; the partners of the said firm.

30

7. The Vendor hereby expressly agrees to effect a legal transfer of the lands Plots C and E as described at (i) and (ii) of Clause 1 hereof to the Purchaser so soon as the full consideration herein referred to has been paid to the Vendor.

8. The Purchaser shall pay his Advocate's costs of and incidental to this Agreement and the Purchaser shall pay the cost of Stamp Duties and Registration Fees thereon.

40

IN WITNESS whereof the parties hereto have

hereunto set their hands the day and year first herein written.

Signed by the Vendor in the presence of: J. Bickerton Williams, Advocate, Nairobi. Meghajibhai Karman Malde Trustee Sayed Omer & Bros.

Signed by the Purchaser in the presence of: J. Bickerton Williams A. M. Khan

Exhibits Exhibit 12 (By Plaintiffs) Agreement for Sale of Business of Kajiado European Stores continued Undated

10 We, the partners of the firm Sayed Omer and Brothers, hereby consent to the transfer set out in this Agreement

Signed by the said Sayed Omer Allhadad in the presence of :

Signed by the said Sayed Ibrahim Allhadad in the presence of:

20 Signed by the said Sayed Mohamed Allhadad in the presence of: D.P.R.O'BEINNE Advocate, Nairobi. Sayed Mohamed

Exhibit "A" (By Defendant)

Specimen of A.M.Khan's alleged Signature

A. Majid Khan

28/12

Exhibit "A" (By Defendant)

Specimen of A.M. Khan's alleged signature

Undated

ON APPEAL

FROM THE COURT OF APPEAL FOR
EASTERN AFRICA AT NAIROBI

B E T W E E N :

1. DEVKUNVERBEN widow of
POPATIAL KARMAN
2. MEGHJI KARMAN MALDE
3. DEVCHAND KARMAN MALDE and
4. NANDIAL POPATIAL MALDE in
their capacity as the
Executors of the Estate of
POPATIAL KARMAN deceased
and
5. MEGHJI KARMAN and
6. DEVCHAND KARMAN trading
as POPATIAL KARMAN and
COMPANY

APPELLANTS

and

AHAMED DIN BUTT S/O
MOHAMED BUX BUTT

RESPONDENT

RECORD OF PROCEEDINGS

HATCHETT JONES & CO.,
90, Fenchurch Street,
London E.C.3.

Solicitors for the Appellants.

M. KEAN,
44, Welbeck Street,
London W.1.

Solicitors for the Respondent.