

*Privy Council Appeal No. 38 of 1964*

Devkunverben, Widow of Popatlal Karman, and others – – Appellants

v.

Ahamed Din Butt – – – – – Respondent

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 16TH NOVEMBER 1965**

*Present at the Hearing:*

LORD HODSON

LORD GUEST

LORD PEARCE

*(Delivered by LORD GUEST)*

This is an appeal from a judgment of the Court of Appeal for Eastern Africa at Nairobi dismissing the appellants' appeal from a judgment of the Supreme Court of Kenya whereby the appellants' suit was dismissed with costs.

The action arose out of a claim made by the appellants who were the partners and the executors of a deceased partner of the firm of Popatlal Karman and Company for the sum of shs. 45,000/00 under a guarantee. Under the principal guarantee, dated 15th August 1956, the respondent in consideration of the appellants agreeing to supply sugar on credit to Sayed Omar and Brothers agreed to be responsible to the appellants for all the sugar the appellants might supply subject to a limitation of liability of shs. 30,000/00. There was also an equitable mortgage in security by the respondent in favour of the appellants and an agreement that the respondent should be treated as jointly and severally liable with Sayed Omar and Brothers. A supplemental guarantee, dated 19th January 1957, provided that the liability was increased to shs. 45,000/00 and extended to cover payment for all sugar and other goods supplied to Sayed Omar and Brothers and Kajiado European Stores.

The respondent in his defence put forward a number of defences to the claim which were rejected by the trial judge and not raised before the Court of Appeal. The trial judge, however, found that the appellants had failed to prove that the sum of shs. 45,000/00 or any sum remained due from Sayed Omar and Brothers or Kajiado European Stores.

The principal document relied upon by the appellants was a letter (Exhibit 9) dated 25th February 1958 in the following terms:—

“ 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.

Kajiado European Store  
Prop: A. M. Khan.”

This document which is holograph was alleged to be in the handwriting of “ A. M. Khan ” and to have been signed by him. A. M. Khan who died on the 12th or 14th June 1960 was a partner in the firm of Kajiado European

Stores. The trial judge rejected this document on the ground that there was no evidence of anyone who saw him sign. This, however, was not accurate, as the Court of Appeal pointed out, as the witness Devjan Karman Malde, a partner in the appellant firm said it was signed by Khan in his presence in his shop in Bazaar Street, Nairobi. A number of witnesses for the appellants said they were familiar with Khan's handwriting and that in their opinion the signature on Exhibit 9 was his signature. There were, however, a number of suspicious circumstances surrounding the execution of this document. In particular the witness Devjan said that Khan and Sayed Mahomed Allahadad, a partner of Khan's in Kajiado European Stores were both present when the document was signed and that Allahadad also signed. His signature and his presence were denied by Allahadad. Their Lordships agree with the criticisms of this document made by Vice-President Sir Trevor Gould in the Court of Appeal. But without deciding the point they are prepared, as they understand were the Court of Appeal, to assume the authenticity of the signature of Khan. But this is not by itself sufficient for the appellants' success. To allow the appellants to succeed in making the guarantor liable upon the written admission of one of the principal debtors without further proof of delivery of the goods or of the indebtedness of Kajiado European Stores would in the circumstances be unsafe. If this were all that were necessary, it is not difficult to envisage a collusive agreement between the creditor and the debtor to the prejudice of the guarantor. Counsel for the appellants recognised this difficulty and endeavoured to obtain support for his case from Exhibit 4 which is marked "Sugar Account" and is alleged to be "To Messrs. Sayed Omar and Brothers and Kajiado European Stores" in account with the appellant company from 31st July 1956 to 31st December 1960. This account was said to have been derived from the firm's books which were available at the trial. Counsel pointed to an entry "1.1.58 To Balance shs. 58,854.33" which exactly coincided with the figure in Exhibit 9 (Khan's acknowledgment of debt). This, he argued, affirmed the probative value of Exhibit 9. When however the evidence is carefully examined, it is clear that Exhibit 4 can give no support to the appellants' case. The "Sugar Account" is a composite account and the payments were allocated to consignees in date order. There is no separate account for Sayed Omar and Brothers since the opening date of the Sugar Account, July 1956. In so far as Sayed Omar and Brothers are concerned their account is cleared and it is agreed that nothing is due from them. The Sugar Account does not therefore assist the appellants to show that anything is due from Kajiado European Stores. No other document was produced to prove the supply to or the indebtedness of Kajiado European Stores.

The Court of Appeal have agreed with the finding of the trial judge that there was insufficient proof of the indebtedness of Kajiado European Stores to the appellant company. Their Lordships agree with this view and are entirely satisfied with the judgment of the Court of Appeal. The appeal will be dismissed with costs.



In the Privy Council

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DELIVERED BY  
LORD GUEST

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