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No. 8 of 1950.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

HARNAM SINGH - - - - - - - - - - - *Appellant*

AND

JAMAL PIRBHAI - - - - - - - - - - - *Respondent*

RECORD OF PROCEEDINGS

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6 WESTMINSTER PALACE GARDENS,
VICTORIA STREET,
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Solicitors for the Respondent.

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No. 8 of 1950.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

HARNAM SINGH (Plaintiff) - - - - - - *Appellant*

AND

JAMAL PIRBHAI (Defendant) - - - - - - - - *Respondent.*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

EXHIBITS

No. 8 of 1950.

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

HARNAM SINGH (Plaintiff) - - - - - *Appellant*

AND

JAMAL PIRBHAI (Defendant) - - - - - *Respondent.*

RECORD OF PROCEEDINGS

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 1.
Plaint, 4th May 1948.

No. 1.
PLAINT.

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

Civil Case No. 207 of 1948

Between HARNAM SINGH - - - - - - Plaintiff

and

JAMAL PIRBHAI - - - - - - Defendant.

The Plaintiff above named states as follows:

1. The Plaintiff is an Indian and is a Cabinet maker residing at Nairobi and his address for service in this suit is care of Saeed R. Cockar, Advocate, Regal Mansion, Northey Street, Nairobi.

2. The Defendant is an Indian and his address for service is Government Road, Nairobi.

3. The Plaintiff is the absolute owner of the Plot No. 2555 and the buildings erected thereon in Government Road.

4. The Defendant is in possession of the said property under a lease Title No. I.R. 4914.

5. The said lease was to expire two years after 1st April, 1939.

6. After the expiry of the said lease the Defendant was enabled to continue in possession of the said premises through the coming into operation of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, notwithstanding the fact that they were required by the Plaintiff for his own use.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 1. Plaint, 4th May 1948, *continued.*

7. The Plaintiff reasonably required in January and February and reasonably requires now the said premises for occupation as a residence for himself, his wife and minor children.

8. In January and again in February the Defendant was offered alternative accommodation, reasonably equivalent as regards rent and suitability in all respects which the Defendant refused and or neglected to accept without cause or justification.

9. The Rent Control Board has sanctioned Court Action against the Defendant for recovery or possession of the above premises.

10. The Defendant was given due notice to vacate the above premises on or before 30th April, 1948.

11. The Defendant has refused to vacate the above premises as required by the Plaintiff.

12. The cause of action arose in Nairobi within the Jurisdiction of this Honourable Court.

13. The annual rent of the said premises for the purposes of Court fees is Shillings 4137/48.

14. And the Plaintiff claims :

(A) An order requiring the Defendant to vacate the above premises.

(B) Mesne profits that might reasonably accrue from the above premises at the rate of Shs. 344/79 cts. per month from 1st May, until the Defendant vacates them.

(C) Interest at Court rates till payment.

(D) Costs of this action.

(E) Any other or alternative relief or reliefs that the Court might grant.

Dated at Nairobi this 4th day of May, 1948.

Filed by :

(Sgd.) SAEED R. COCKAR.

SAEED R. COCKAR, Esq.,
Advocate for the Plaintiff.

No. 2.
DEFENCE.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 2.
Defence,
31st May
1948.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.
Civil Case No. 207 of 1948.

Between HARNAM SINGH - - - - - - - Plaintiff

and

JAMAL PIRBHAI - - - - - - Defendant.

The Defendant above named states as follows :

1. The Defendant admits the allegations contained in paragraphs 1, 2, 4, 9, 11, 12 and 13 of the Plaint and save as hereinafter expressly admitted denies every other allegation contained in the Plaint.

2. As to paragraph 3 of the Plaint the Defendant admits the same save that he says that the Plaintiff's ownership is not absolute but is subject to the tenancy interest of the Defendant in the said premises.

3. As regards paragraphs 5 and 6 of the Plaint the Defendant admits and says that he was the Plaintiff's tenant under a lease dated the 27th day of June, 1939, for a term of two years commencing from 1st April, 1939, and thereafter determinable on six months' written notice by either party. Save as in this paragraph admitted the Defendant does not admit any of the allegations contained in paragraphs 5 and 6 of the Plaint.

4. The Defendant denies each and every allegation contained in paragraphs 7 and 8 of the Plaint save that he admits that he refused to accept the alternative accommodation offered by the Plaintiff. He further says that the alternative accommodation offered by the Plaintiff was not alternative accommodation reasonably equivalent as regards rent and suitability in all respects within the meaning of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, and further he denies that any such accommodation as required by the Ordinance is available.

5. As regards paragraph 10 of the Plaint the Defendant admits receiving the notice referred to therein which notice was dated the 11th March, 1948, but he does not admit its validity.

6. The Defendant says that his tenancy of the premises let to him by the Plaintiff whereof possession is sought by him has not been duly determined.

7. The Defendant will object that the Plaintiff should have filed this suit in the Subordinate Court of the First Class.

The Defendant, therefore, prays that this suit may be dismissed with costs.

Dated at Nairobi this 31st day of May, 1948.

(Sgd.) J. M. NAZARETH,
for Trivedi, Nazareth & Gautama,
Advocates for the Defendant.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 3. Amended Plaint, 27th May 1948.

No. 3.

AMENDED PLAINT.

IN HIS MAJESTY'S SUPREME COURT OF KENYA, AT NAIROBI.

Civil Case No. 207 of 1948.

HARNAM SINGH - - - - - - - - - Plaintiff

and

JAMAL PIRBHAI - - - - - - - - Defendant.

The Plaintiff above named states as follows :—

1. The Plaintiff is an Indian and is a Cabinet maker residing at Nairobi and his address for service in this suit is care of Saeed R. Cockar, Advocate, Regal Mansion, Northey Street, P.O. Box No. 737, Nairobi.

2. The Defendant is an Indian and his address for service is Government Road, Nairobi.

3. The Plaintiff is the absolute owner of the Plot No. 2555 and the building erected thereon in Government Road.

4. The Defendant is in possession of the said property under a lease Title No. I.R. 4914.

5. The said lease was to expire two years after 1st April, 1939.

6. After the expiry of the said Lease the Defendant was enabled to continue in possession of the said premises through a separate eleven months agreement made between the Plaintiff and the Defendant which came into force from April 1st, 1941.

7. The aforesaid eleven months agreement expired on 1st March, 1942.

8. During the months of March and April, 1942, the Defendant continued in occupation of the said premises as a Statutory tenant.

9. On 1st May, 1942, the Defendant continued in possession of the said premises for eleven months under another eleven months agreement, which expired on 1st April, 1943. As from 1st April, 1943, onwards the Defendant continued as a Statutory tenant.

10. On 24th August, 1943, the Plaintiff gave the Defendant a notice to quit the said premises by 30th September, 1943, although no notice to quit was necessary or required by law.

11. The Defendant refused to vacate the premises as required by the above notice or otherwise at all, stating that he was a Statutory tenant under the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940.

12. The Plaintiff reasonably required in January and February 1948 and reasonably requires now the said premises for occupation as a residence for himself, his wife and minor children.

13. In January and again in February 1948 the Defendant was offered alternative accommodation, reasonably equivalent as regards rent and suitability in all respects which the Defendant refused and/or neglected to accept without cause or justification. The Plaintiff further if requisite or necessary is prepared to offer alternative accommodation as stipulated by law.

14. The Rent Control Board has sanctioned Court Action against the Defendant for recovery of possession of the above premises.

15. The Defendant was given due notice and/or reasonable time to vacate the above premises on or before 30th April, 1948, although no such notice was requisite by law.

16. The Defendant has refused to vacate the above premises as required by the Plaintiff.

17. The cause of action arose in Nairobi within the Jurisdiction of this Honourable Court.

18. The annual rent of the said premises for the purpose of Court fees is Shillings four thousand, One hundred and thirty-seven and Cents forty-eight (Shgs. 4137/48).

19. And the Plaintiff claims :

(A) Possession of the premises and ejectment of the Defendant therefrom.

(B) Mesne profits that might reasonably accrue from the above premises at the rate of Shs. 344/79 cts. per month from 1st May, until the Defendant vacates them.

(C) Interest at Court rates till payment.

(D) Costs of this action.

(E) Any other or alternative relief or reliefs that the Court might grant.

Dated at Nairobi this 27th day of May, 1948.

(Filed on 28/8/48.)

Filed by :
Saeed R. Cockar,
Advocate,
Nairobi.

(Sgd.) SAEED R. COCKAR,
Advocate for the Plaintiff.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 4. Defence to Amended Plaint, 8th September 1948.

No. 4.

DEFENCE to Amended Plaint.

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

Civil Case No. 207 of 1948.

HARNAM SINGH - - - - - - - - Plaintiff

and

JAMAL PIRBHAI - - - - - - - - Defendant.

The Defendant above named states as follows :—

1. The Defendant admits the allegations contained in paragraphs 1, 2, 4, 14, 16 and 17 of the Amended Plaint and save as hereinafter expressly admitted denies every other allegation contained therein.

2. As to paragraph 3 of the Plaint the Defendant admits the same save that he says that the Plaintiff's ownership is not absolute but is subject to the tenancy interest of the Defendant in the said premises.

3. As regards paragraphs 5, 6, 7 and 8 of the Amended Plaint the Defendant does not admit any of the allegations therein contained save as in this paragraph admitted and says that he was the Plaintiff's tenant under a lease dated the 27th day of June 1939 for a term of 2 years commencing from 1st April, 1939, and thereafter determinable on 6 months' written notice by either party. From the 1st April, 1941, the rent was reduced to Shs. 250/– per month but the other terms of the lease were not altered.

4. As regards paragraph 9 of the Amended Plaint the Defendant denies any fresh agreement for 11 months but admits that the rent was increased during the same period to the original level but the tenancy under the original lease dated the 27th day of June, 1939, was at no time determined and all other terms save as to the amount of rent payable thereunder at all times continued in force and are still in force.

5. As to paragraphs 10 and 11 of the Amended Plaint the Defendant admits the receipt of the notice referred to therein but states that the notice was not in accordance with law or in conformity with the lease dated 27th June, 1939, and further says that the reply given by him was under a mistake of fact and law. The said notice did not operate to determine the Defendant's tenancy not being a six months' notice and not terminating on the appropriate day.

6. The Defendant denies each and every allegation contained in paragraphs 12 and 13 of the Amended Plaint save that he admits that he refused to accept the alternative accommodation offered by the Plaintiff. He further says that the alternative accommodation offered by the Plaintiff was not alternative accommodation reasonably equivalent

as regards rent and suitability in all respects within the meaning of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, and further he denies that any such accommodation as required by the Ordinance is available.

7. As to paragraph 15 of the Amended Plaint the Defendant says that he received a letter dated 11th March, 1948, giving him notice to vacate the said premises by 30th April, 1948. The Defendant repeats paragraph 5 above and says that the said letter or notice did not operate to determine the Defendant's tenancy.

8. Without prejudice to anything contained above the Defendant says that if his contractual tenancy at any time previously had determined (which the Defendant denies it ever did) by notice to quit such notice to quit was waived by the giving of subsequent notices which waived any previous determination of the tenancy but did not themselves operate to determine the tenancy.

9. The Defendant says that his tenancy of the premises let to him by the Plaintiff whereof possession is sought by him has not been duly determined.

10. The Defendant will object that the Plaintiff should have filed this suit in the Subordinate Court of the First Class.

11. Save as above expressly admitted the Defendant denies each and every allegation contained in the amended Plaint.

Reasons wherefore the Defendant prays that this suit may be dismissed with costs.

Dated at Nairobi this eighth day of September, 1948.

(Sgd.) J. M. NAZARETH,

Trivedi, Nazareth & Gautama,
Advocates for the Defendant.

I hereby agree to the Defence being filed out of time.

(Sgd.) SAEED R. COCKAR.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 5.

PROCEEDINGS.

No. 5. Proceedings, 23rd August 1948.

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

Civil Case No. 207 of 1948.

HARNAM SINGH - - - - - - - - Plaintiff

and

JAMAL PIRBHAI - - - - - - - - Defendant.

PLAINTIFF'S CASE.

23.8.48. Khanna (Cockar with him) for Plaintiff.
Nazareth for Defendant.

Khanna opens case.

Defendant statutory tenant. Plaintiff landlord. Reasonably requires premises for his own use. Present accommodation unsuitable. Defendant refused alternative accommodation.

Plaintiff's Evidence.

No. 6. John Henry Sydney, 23rd August 1948.

No. 6.

PLAINTIFF'S EVIDENCE.

John Henry Sydney, sworn.

Secretary Rent Control Board. I have custody of records of Board. I have record of matter between parties. Parties went to Board concerning the matter in difference between them. It started with an application made to the Rent Control Board by Plaintiff on 19.1.48. Board gave its consent on 3.3.48. I produce the consent (Ex. 1). It is signed by the Assistant Secretary.

Agreed bundle of correspondence put in by consent subject to all just exceptions (Ex. 2). (Letters 19.1.48, 26.1.48, 23.1.48, 12.2.48, 17.2.48, 27.2.48.)

I visited plot No. 60 Eastleigh Section I mentioned in letter of 12.2.48.

The building is on ½ acre land surrounded by wire fence and consists of 7 main rooms enclosed courtyard and enclosed verandah. Stone built house, G.C.I. roof. New house. Premises were visited before Board gave consent. I know premises which are the subject of this action. Tin and iron building. I have only been on the verandah of the building.

I have been in Nairobi since October, 1946. I am acquainted with different areas of Nairobi. Government Road is primarily commercial. The house occupied by Defendant has a school on one side and business premises on the other. I should say the house is 20 years old.

I have seen the Defendant's business premises. They are in Government Road behind his residence.

Cross-examination : The access to Defendant's premises is alongside the residence and forms part on the land on which residence is. Defendant has an auction mart. The public approach the auction through the access. If residence taken away the public would not be able to have access to auction room from Government Road.

I have twice visited premises. They are fenced in. Goods could be stored in the sale yard.

Plot 60 Eastleigh would have been suitable for men with several children. Good premises. It is in area usually occupied by artisans. It is 3 miles from town. The Rent Control Board had no hearing of the dispute because they felt there could not be agreement.

Re-examination : There is a road at the back of the business premises of Defendant. There is an entrance there to the business premises. I saw a gap between the residence and business premises.

Mainly artisans live in Eastleigh.

T.A.R.

M.C. Nageon de Lestang.

No. 7.

Jashbhai Bhailalbhai Amin, sworn.

I know Plaintiff since a long time. I am his family doctor since 1937. One of his daughters died in 1947. I do not know how many of his children died. He lives in Canal Road since a long time. I do not know how long. His wife is anæmic and suffering from chronic bronchitis. I know his youngest son. He is also suffering from chronic asthma. Plaintiff's house is surrounded by factories and garage and is an unhealthy place. I have advised him for long to change residence.

Cross-examination : Eastleigh is a healthy locality. It is healthier than Government Road. Better for Plaintiff to live at Eastleigh than Government Road. Desirable for Plaintiff's wife and child to shift to Eastleigh.

Re-examination : I have not seen the premises in question in Government Road. This Court is in good surroundings.

T.A.R.

M.C. Nageon de Lestang.

No. 8.

Harnam Singh, sworn.

I am Plaintiff. I own plot 2555 in Government Road. Defendant is in occupation of my premises. In 1939 I leased premises to him. This is the lease (Ex. 3). It was for 2 years from 1.4.39.

In January, 1941, I received this letter from Defendant.

Nazareth objects to letter going in as it apparently refers to a new lease after the 2 years one.

In His Majesty's Supreme Court of Kenya at Nairobi.

Plaintiff's Evidence.

No. 8.
Harnam Singh,
23rd August 1948,
continued.
14th October 1948.

Khanna applies for leave to amend pleadings to rely on that second lease.

Nazareth : In that case I apply for adjournment—Surprise.

Order : Leave to amend plaint granted to be made within 8 days. Defendant to have leave to amend defence within 8 days thereafter.

S.O.G.
M.C. Nageon de Lestang.

This is the letter I received in January, 1941 (Ex. 4) from Defendant. I agreed to the 11 months' tenancy referred to in Exhibit 4. I had other arrangements with Defendant subsequently. The agreement was further extended for another 11 months on 22.4.42. I sent a letter to the Defendant by messenger. Defendant signed for it in my delivery book. Delivery book is not here. The second extension of 11 months was to start on 22.4.42. On expiry of the second period of 11 months I served on Defendant notice to quit.

(Notice to quit and answer put in by consent) Ex. 5.

Defendant has not vacated. I produce a plan showing my plot which is 2555 and Defendant's plot which is 2556 (Ex. 6). My plot fronts on Government Road. Access is had to Defendant's plot by a small road branching off Swamp Road. There is a sanitary lane between my plot and Defendant's plot. Both plots are quite separate. The building on plot 2555 is a wood and iron house on stone foundations consisting of 4 or 5 rooms. I purchased the plot and building in 1939. It is a very old house—about 30 years. I do not know the extent of Defendant's family. Defendant owns a car. He is an auctioneer. He owns 6 or 7 houses in the town. He is a wealthy man and recently he purchased another house. It is easy to buy house with vacant possession. For the last 6 or $6\frac{1}{2}$ years I have been trying to get Defendant to vacate my premises. Defendant told me he was trying to find other accommodation but he did not in fact try.

Ex. 1 is permission of Rent Control Board.

I offered Defendant premises in Eastleigh. I showed the house to Rent Control Board. It is a house of 7 rooms in Section I, Eastleigh. It is 6 or 7 minutes by car from Town. It is bigger than the house presently occupied by Defendant and is a new house. I think the Defendant pays me 480 or 485/– rent per month. Rent may be 483/45 per month. I offered Defendant house in Eastleigh at the same rent or less as fixed by the Board. Defendant refused to move. Many wealthy men live in Eastleigh. It is not true that only artisans live in Eastleigh. People in all walks of life live there. I was in a position to put Defendant into the Eastleigh house. I kept it for two months. I can offer a house to Defendant now. It is in Parklands plot 106/4/3 in 1st Parklands Avenue. It is a new house built of stone. Accommodation comprises 6 rooms with garage and boy's room. House is on one acre plot. The house is available to me for purchase with vacant possession and I am prepared to purchase it for Defendant, and rent it to him at the controlled rent, but not exceeding 483/45. The premises can be viewed.

I reside in Canal Road in my own house. I produce a sketch plan of it (Ex. 7). Premises are workshop with an office and a room. Workshop for carpentry work with much machinery. I have workmen working there. I occupy the premises with wife and six children. Two rooms are used as bedrooms. I required premises in Government Road for occupation by myself. The ages of my children are 19, 15, 13, 10, 7 and 6 years. Large quantities of timber are stored on Ex. 7. There is a saw mill there and lots of sawdust. There is danger of fire and offensive smells.

I want possession of premises occupied by Defendant because they are now suitable to me and can be developed. It is a very valuable site. It does not pay me to have wood and iron house on it. I pay heavy rates for the site value. To make it pay I intend erecting stone buildings on it at cost of 300/400,000. Defendant has a building permit for building on his plot but he does not intend to build.

I offered house in Eastleigh to Defendant in September, 1947.

I demanded possession on 11th March, 1948. This is the notice (Ex. 8).

Apart from plot in Government Road and plot in Canal Road I own a plot with a stone house thereon at Eastleigh. It is a very old house—about 35 years old. There is water laid on but no light. House has three rooms. The premises are let.

Cross-examination: When I purchased Government Road premises Defendant was a tenant. I gave him lease Ex. 3. There are other persons, sub-tenant of Defendant—living on the plot. The sub-tenant was not living there when I purchased. I do not know when he became sub-tenant.

(Clause 6 of lease read to witness.)

I do not remember the clause. Defendant owns the plot behind mine on which there is a building in which Defendant holds his auctions. I can read a plan.

(Plan put to witness Exhibit A.)

A.B.C.D. is Defendant's plot, E.F.G.H. is my plot.

There is no hedge or other physical division between the two plots. Between the two plots there is a vacant piece of land occupied for a lease by Municipality. There is, however, no lease. From B to E and continuing therefrom there is a corrugated iron fence shutting off the access to sale yard. There is a building on my plot protruding into the lane. Along A–D there is a 60 feet road with an entrance into Defendant's plot. I have seen traffic go along that road. The road is properly made up to the end of and beyond Defendant's plot. People usually enter the auction room from Government Road. I cannot say if Defendant stores things in the passage leading from Government Road to Sales Room.

My plot is completely enclosed except for the back. There is a gate on Government Road. Defendant's plot has a gate at the back through which people could enter, and goods brought in. On the wall at the back and over the gate Defendant has his name and business written. He has also sign boards on my plot facing Government Road. I have been living in Canal Road since 20 years. I had other building in Canal Road which I have sold. I used to live in it. I live in the present building in Canal Road since over 5 years. I moved therein during February and March, 1943. Nobody lived there before as it was a workshop. Before

In His Majesty's Supreme Court of Kenya at Nairobi.

Plaintiff's Evidence.

No. 8. Harnam Singh, 14th October 1948, *continued.*

that I lived since 1929 or 1930 in another building in Canal Road which I owned. Since 1929/30 to this date I have lived in only two places. I sold the other house in 1943. I never lived in a room in which Tara Singh and his father lived. I filed a case in 1942 against Tara Singh and Jwala Singh. I obtained an order for vacant possession. I never went to live in that room. The room was in a house belonging to my wife. It never belonged to me. It has been sold. When I got Court order for possession I was not living in workshop. I was living, I think, then, on plot 135 Canal Road. I went to workshop from that house. I left because tenants were creating nuisance.

There were negotiations between Defendant and I regarding the passage from Government Road to his plot. I refused to sell or rent it to him.

My wife owns no buildings now. I have never lived on Government Road plot. I want to move for health and business reasons. My wife and family are in bad health. I could do good business there also. I own a car. The premises I offered to Defendant at Eastleigh were healthy and better from health point of view than Government Road plot.

Parklands very healthy. Eastleigh not good for business. I intend to develop the Government Road plot by and by. I want to reside there first and then make up my mind. I have not been negotiating for the sale of plot with anybody. I honestly want to reside there.

It was on 22.4.42 that I went to Defendant regarding lease for 11 months. The rent was to be 280/– per month. It was not stated in the letter.

I know this man. (Identified as Fazli Abas.) He was not residing on Government Road plot when I purchased. I think that he is living there now.

The rent in January, 1941, was 280/– per month in accordance with the two years' written lease. By that letter (Ex. 4) the rent was reduced to 250/–. Ex. 3 was due to expire on 1.4.41. I do not know if Defendant had vacant premises in Gulzaar Street in January, 1941. I reduced rent on application of Defendant because he said business was bad. From the date of Ex. 4 rent was reduced to 250/–. I am not sure from what date rent was reduced, whether January or April. The letter I mentioned this morning is not entered in my delivery book. I have only one delivery book. I may have delivered the letter myself as I sometimes did. In April, 1942, there was discussion as to increase of rent. I wanted 280/– rent. I think that the rent was to be increased from April, 1942, to the original rent of 280/–. Defendant paid the increased rent after I had sent the letter in April, 1942. Before that Defendant was paying 250/– per month. I have a copy of the letter but I cannot say whether it was delivered by myself, my boy or my son.

I have receipt books for rent but not for 1942. I have no account books.

Defendant paid 250/– per month for 11 months. It may be that he paid for 14 months. I cannot remember exactly. The agreement in April, 1942, was for 11 months. From January, 1942, to January, 1943, Defendant did not pay me rent at the rate of 265/– per month as far as I remember but I do not remember. Rent was increased only once, from 250/– to 280/–. After December, 1945, rent was further increased by the increase in rates. These are my receipts for rent (Ex. B).

It is difficult to get premises these days but it is possible to get them.

No rent was discussed as regards the Eastleigh house which I offered to Defendant. The Parklands house is newly built. There is a road of access to it.

Defendant himself told me he had a building permit and had submitted plans for approval. I do not know if it is true or not. He told me he had told Hamid to prepare plans and requested me to see Hamid and tell him to make haste.

Re-examination : At one time wife and I had three plots in Canal Road—two for me and one for wife. We occupied two rooms on one of my plots. I intended leaving those rooms because the tenants were annoying me. The two rooms were not enough for my use. I wished to acquire all the rooms in wife's house. I gave notice to quit to all six occupants but did not file suits against them all. I got order against Tara Singh. Tara Singh was not in personal occupation. His father occupied the room. I did not execute order for possession because other tenants refused to vacate. I filed actions against two or three tenants and when I found that I would not be able to eject them we settled the suits and I sold the property. I sold the plot on which I occupied two rooms in 1943, I think, and then shifted to the factory plot. After shifting I partitioned a room to make two rooms. Defendant used to pay rent by cheques.

I reduced rent to 250/– in 1941. I endeavoured to increase the rent after agreement expired but I do not remember exactly what happened. After the expiry of the 11 months mentioned in Ex. 4 I saw Defendant and then wrote him a letter. When I saw Defendant I said I wanted original rent of 280/–. He agreed to it.

Court on reading over the witness stated—

" It may be that Defendant paid me rent at the rate of 265/– per month. I am doubtful on this point."

By Court : " When rent was reduced from 280/– to 250/– in 1941 that was the only thing discussed."

" When I applied for possession against Tara Singh I stated in the Court that I wanted to occupy the room myself."

R.O.C.

M.C. Nageon de Lestang.

In His Majesty's Supreme Court of Kenya at Nairobi.

Defendant's Evidence.

No. 9.
Fazli Abas Mulla Ahmadali, 14th October 1948.

No. 9.

DEFENDANT'S EVIDENCE.

Fazli Abas Mulla Ahmadali, sworn.

I live on Plaintiff's plot in Government Road. I rent the premises from Defendant. I have been living there for the last 11 years. I was living there before 1939. I do not know when Plaintiff purchased plot. I know the vacant place in front of sale room and the passage from Government to Sales Room. Defendant keeps goods for sale there and also on the verandahs of the house.

Cross-examination : I occupy two rooms, kitchen and bathroom. I do not know how many rooms Defendant occupy. I am not entitled to any part of the verandah. I do not use verandah to get to my rooms. Defendant also sells the goods he keeps on the vacant place in situ. He conducts sale outside or under the verandah of his house when there are lots of goods. He keeps the goods outside. The verandahs are always full of goods. The yard behind the sale room is about three-quarters of the Court room. The sale room is about more than half of the Court room. The sale room and yard are full of goods two or three days before auction. He starts receiving goods on Monday and sells on the following Sunday. He receives until Saturday. I never saw Plaintiff visiting my house. I have seen him in Nairobi.

No re-examination.

R.O.D.W.

M.C. Nageon de Lestang.

Adjourned Tuesday 19th October, 1948.

M.C. Nageon de Lestang.

Proceedings continued, 19th October 1948.

19.10.48. Proceedings continued.

Court inspected : Plaintiff's premises.
Premises in question in suit.
Alternative accommodation.

No. 10.
Jamal Pirbhai, 19th October 1948.

No. 10.

Jamal Pirbhai, sworn.

Defendant. At present I reside on a plot owned by Plaintiff. I have been residing there since 1931. Premises then belonged to Jivanjee. I own a plot with premises next to the premises in which I reside. Originally both premises formed one plot with another premises. Before Plaintiff purchased I rented both plots from Jivanjee for 5 years. I purchased my plot in 1939. When the two plots were separated no fence was erected between them. In April, 1939, I leased Plaintiff's plot. In January, 1941, arrangement was made regarding rent. I had then premises in Gulzaar Street. In January, 1941, it was agreed that although the rent was 280/- in lease I should pay 250/- per month. The rent was to be reduced from April, 1941.

Apart from the reduction of the rent no other terms of the lease were discussed. The same conditions of the old lease were to remain in force. No alteration to them was to be made. I paid rent at rate of 250/- per month as agreed. I paid for 14 months.

(*Witness refers to his books of account.*)

I paid at rate of 250/- per month from and including April, 1941, till end of May, 1942. Thereafter the rent was altered again. From June, 1942 I paid 265/- per month till end December, 1942. From 1st January, 1943, I paid at rate of 280/- per month, and I have been paying at that rate since except for addition of increased site value tax. I started paying for increased site value tax in 1944–1945. The increased tax was added to the rent of 280/- per month. The other terms of the lease remained the same.

(*Para. 9 of plaint read to witness.*)

In 1942 there was no eleven months' agreement made between Plaintiff and I. On 1.5.42 my rent was 250/- per month. It was altered to 265/- from 1.6.42 and on 1.1.43 to 280/-.

I produce my books of accounts for 1941, 1942 and 1943.

1941 at page 66.

1942 at page 148.

1943 at page 30.

Ex. B is bundle of receipts for rent given by Plaintiff from May, 1941, till March, 1943, with the exception of receipts of three months—September, October and November, 1942. I have receipts after that. By referring to those receipts I can say that rent was increased by addition of tax from 280/- to 293/2/7 from 1 December, 1945. Thereafter there have been further increases in the tax which I have paid.

I did not receive a letter from Plaintiff on 22.4.42.

I remember sending Ex. 4 to Plaintiff in January, 1941. I received no letter from Plaintiff the following year relating to an 11 months tenancy. No verbal arrangement agreed was made by another period of 11 months in 1942.

I received Ex. 5 and answered to it. When I answered I had not shown lease to advocate. I showed Ex. 5 to advocate for reply. I first showed lease to advocate after the filing of the suit. I then obtained a copy from the Land Office. When I replied to Ex. 5 I believed that I was not obliged to vacate and I instructed advocate to reply accordingly. After producing lease to advocate I ceased paying rent because I had paid it in advance by way of increased tax. The highest rate of rent I paid was 344/79 per month. I believed I was bound to pay at the increased rent.

The place marked " sale yard " in Ex. A is used to store my auction goods. The part marked " sale room " is also used for storing goods. Place is kept in sale room for seating customers. At the back of the premises there is a road reserve. It is used occasionally to bring goods to sales premises. There is an open drain at junction of Swamp Road and the road reserve. The customers enter the premises from Government Road. Ninety per cent. of the customers are Europeans. They never come through the back. The verandahs of the house are used to store auction goods especially furniture. I actually start auction from the sales yard, then proceed to the verandahs and then to sales room. In 1939 I

In His Majesty's Supreme Court of Kenya at Nairobi.

Defendant's Evidence.

No. 10. Jamal Pirbhai, 19th October 1948, *continued.*

held auctions in verandahs and sale yard and not in sale room. If I lost sale yard my business would have to stop as there would be no road to go in. Since 1931 I have been advertising my business as being in Government Road. I have a wife and 4 children. Wife suffers from chronic asthma for years. One child goes to school and the other three work with me in the auction. In view of her health wife cannot be left alone as she occasionally gets attacks of asthma. When that occurs I call the doctor by telephone from my sales room. I have only one telephone and it is needed for my business.

I tried to purchase on lease the passage but was not successful. They did not refuse but we could not agree on the terms.

I own a building in Gulzaar Street. It is a corrugated iron building. If I could obtain vacant possession of those premises I would have built premises for business with residence above. I have been wanting to build on my present premises but I have not been able to obtain a building permit. I cannot get vacant possession of Gulzaar Street premises. On the plot I occupy I wanted to build a double storey building but the Municipality wants a flush system and this is impossible. My plans have not been approved despite every endeavour from several of us.

I inspected the premises offered by Plaintiff at Parklands. There is no proper road leading to the premises. It is merely a track. The building is in a hollow. I own an Austin 14 which I could not take right up to the house. I had to leave it one hundred yards from the house.

In view of wife's state of health I must have my business together with my residence. It is difficult to get telephones. I know very well when there are vacant premises. I have not yet found suitable premises. Had I found them I would have vacated Plaintiff's premises.

Cross-examination : I could have bought Plaintiff's plot but I came to know that it was for sale after it had been sold. It was a private sale. Plaintiff's plot is next to Indian Girls' School. I have a board on the fence. At the back there is a vacant road reserve 60 ft. wide. It is a flat piece of land with hard surface. Any kind of traffic can be taken to the back of the premises. I have there a big gate with iron doors with my name and business painted on it. There are business premises on the other side of the 60 ft. reserve. All the business premises except a bottle store face Swamp Road. Karmali Nathoo's shop is on the corner and faces Swamp Road. Its entrance is on the corner and not in line with the other shops opening on Swamp Road. My back entrance is about 100 feet from Swamp Road. It is visible from Swamp Road. There is no access to my premises from Sanitary Lane. My sale room is in line with C. B. Mistri's store. Mistri uses lane to get to his store. An iron partition separates my plot from Mistri's plot. This partition closes the sanitary lane. There is a double door in it which is closed from my side. It could be easily opened. The Plaintiff could fence off his plot if he wanted. The goods which were in the verandah of the house this morning are partly left over from last auction and partly new arrivals on Monday. In the passage from Government Road to the sales room there were 98 boxes and not two cars. One of the cars was received last week and one two weeks' ago. Cars are brought earlier for inspection. Time for inspection is advertised. Goods are open for inspection all the time because I live there. The sale room was not empty this morning.

I do not store all goods in the sale room because there would be no room for the customers. In Muter's sales room customers sit on furniture and stand among them because it is a European concern. I follow my own practice. My 90 per cent. European customers are the sellers. On Saturday sales the customers—purchasers—are almost all native. Very few Europeans come to sales on Sundays. I am an Auctioneer in these buildings since last 17 years. I was Auctioneer before that. I am familiar with Auctioneer's licence. I am entitled to auction in my yard. The licence only bears my address. It relates to either of the two plots. My business is established since 1922. I am well known by Indians, Africans and European sellers. They do not know that access to premises can be had from Swamp Road. Unless the access remained from Government Road I would lose my business altogether. My business premises must be convenient to my clients. If I advertised that my entrance is from Swamp Road it would be useless. People park their cars in my yard. Europeans would find it difficult to come from the back. The other auctioneer next door would get my business if my entrance were from the back. My wife is 55 years' old. I married her in 1910. I had another wife also. I married another wife in 1930. One died in 1937. I have three sons aged 18, 16½ and 12. I have only one daughter aged 15 years. Eldest son works with me in my auction. He lives with me and receives no salary. I give him pocket money. I have other clerks. The largest number of clerks I have had was 5. In 1946 I had one whole-time clerk and my nephew helped me part time. I had one clerk full time from the last 4 to 5 years. My second son also works with me. He assists with his brother. My daughter left school last year and works with me in the shop. She deals with the piece goods. A boy, supervised by wife, does the cooking. Daughter also does house work. She is daughter of deceased wife. All children are of deceased wife. Daughter is unable to look after wife. Wife is not always bed ridden. Suffers from asthma for last ten years. Doctor comes whenever she has an attack and gives her injection. If doctor does not come we go to Aga Khan's dispensary. As far as I remember doctor always came. If doctor delays she has to go to bed. The house has a passage with sitting on right and bedroom leading from sitting room. Five beds in bedroom. Four children and I occupy that room. Then there is dining room and off it a small room with one bed, occupied by wife. She sleeps under an open window otherwise she cannot sleep and her asthma continues. I usually close sale room at 6 p.m. The furniture is left outside. I have a watchman. When it rains I put the good furniture inside. If old furniture I leave outside. I open sale room at night if I want to work or use the telephone at night. Had I obtained passage from Plaintiff I would have vacated his premises after the completion of the building I intended to build over the sale room.

(Two letters put in by consent (Ex. 9).

I could not vacate until my building had been completed. The Plaintiff refused and the negotiations broke down. I was not prepared to vacate the premises on Plaintiff renting passage to me only. The completion of my building was a condition of my vacating. I have a boy; boy could not go for doctor. It would be very inconvenient.

In His Majesty's Supreme Court of Kenya at Nairobi.

Defendant's Evidence.

No. 10. Jamal Pirbhai, 19th October 1948, *continued.*

Parklands Plot : I did not want the rooms. It would accommodate my family and furniture. My sub-tenant occupies three rooms 15′ x 12′, 9′ x 8′. Parklands house is new. I have no need of the garage. There are boys quarters. My car is Austin 14. My son drove it this morning. It stopped. There is no road. A big car can pass. I saw a bad patch. If it is repaired car can pass. I was offered premises at Eastleigh. I want business and residential premises together. I made no attempt to visit Eastleigh premises. A person who has lived in Government Road will not look at premises at Eastleigh. I am a wealthy man. I can afford the rent. I have property. I own premises in Ngara Road. It is not vacant. Not suitable to me. Good people live in Ngara Road. I have premises in Chambers Road. I must have residential and business premises together because of my business and wife's health. In Bazaar Road the premises used to be business and residential combined. Municipality has not stopped it. I could have bought a house with vacant possession but I never thought of doing so. It is easier to rent a house than to buy one with vacant possession. There are some newly built houses kept vacant. They can be purchased. Plaintiff has been after me for the last 5 or 6 years.

I have tried to obtain building permit. I did not get permit. I saw architect about it.

The lease was for 2 years.

Ex. 4 is in 2 parts—(1) Reduction of rent (2) 11 months further term. The rent was to be reduced for 11 months only. He could not have increased my rent for 11 months. After the 11 months the rent was charged for 3 months at the same rate. I do not remember if it was Plaintiff or I who suggested 265/– per month.

It is probable that we had talk about it. I accepted the notice to quit.

I received this notice of increase (Ex. 10). I received demolition order for Gulzaar Street premises in 1942. Since then I tried to get possession. I wrote to R.C.B. through Mr. Shapley. I was advised that I had to offer alternative accommodation. I know the auctioneers of the town. I am the only one residing near my business premises.

Adjourned till 21.10.48.

M.C. Nageon de Lestang.

21st October 1948.

21.10.48.

Re-examination : There is a drain at the junction of Swamp Road and the road reserve. It would be dangerous for a small car and difficult for a handcart to cross over that drain. In my business I continually use handcarts. Nobody delivers goods by the back entrance. The yard at the back is lower than the level of salesroom. There are steps leading from salesroom to back yard. I have tried to get use of the sanitary lane between salesroom and Swamp Road. I applied to Municipality. They promised to come and see but nobody came. C. B. Mistry objects to it being used. The sanitary lane in fact is non-existent. It is merely marked on plan as sanitary lane. I tried to have use of sanitary lane so that cars from Government Road could go out that way. At present cars entering from Government Road can without much difficulty get out the same way. Messrs. M. & O.'s salesroom is twice bigger than mine.

Auctioneer's licence contains no restrictions. My business is extending. I require more assistance in business now. My wife is not agreeable to shift to Parklands' house—is far from other houses and it is not completed. There is no road of access and the bad condition of the track would cause damage to exhaust pipe and would render it impassable in rainy weathers. The buses must be over half mile from the Parklands' house. My Austin is an Austin 12 h.p.

On 7.5.42 I got demolition order from Municipality. I tried to comply with it but I could not get the tenants to move out. I saw Town Clerk and Magistrate about it and took legal advice.

Application was made to R.C.B. for ejectment of tenants but R.C.B. replied that I had to provide alternative accommodation before application could be considered.

I tried to build on my own plot. There was difficulty about sewer. I was advised that in the absence of sewer no plan would be passed.

Houses with vacant possession are now expensive than those without vacant possession. Difference in value between the house I live in with and without vacant possession would be 100,000/–. Parklands house about three miles away from business premises.

T.A.R.

M.C. Nageon de Lestang.

No. 11.

Kurji Karsan, sworn.

Dealer in second-hand goods. I often go to Defendant's auctions. His goods are stored on the verandahs of his residence. They are also stored outside in the yard. Auctions are actually carried out there for the past 15 years.

Cross-examination : I go to inspect goods on days other than auction days. Goods are also stored in Salesroom. It is usually full up. I have always found salesroom full and goods also stood outside. I have never found salesroom empty. Auctions are held in salesroom. People stand in the doorway. Some stand inside between the goods and sit on the goods. I attend all sales of Muter & Oswald Limited. There also people sit on the furniture for sale. There is more business in auction business now than before. Since war started business has been better.

Re-examination : Since 1939 my business has kept on improving. When sales take place in Defendant's salesroom the salesroom is fully occupied. It would be impossible to bring all the goods into the salesroom. On many occasions lorries and cars are sold by Defendant by auction. They are kept in the sales yard.

T.A.R.

M.C. Nageon de Lestang.

In His Majesty's Supreme Court of Kenya at Nairobi.

Defendant's Evidence.

No. 12. Ahmed Mohamed, 21st October 1948.

No. 12.

Ahmed Mohamed, sworn.

Proprietor of Ahmed Bros. and managing director. Been 40 years in Kenya. I know Defendant. I have dealt with him for a long time. I have attended his auctions. I know his salesroom. Auction is conducted there and also in the yard outside on Government Road side. I have seen goods stored outside the salesroom and on the verandahs of his private residence. Defendant sells the goods under the verandah in situ. I have been attending sales of Defendant for about 10 years. The residential premises of Defendant formerly belonged to Jivanjee. They were used as offices.

Cross-examination : Premises were also used as residence for Jivanjee's guests. It was common practice to have offices and residence together. Customers at Defendant's sales are mostly Indians with few Europeans and Africans. I have seen more than five Europeans at sales. Sundry articles are stored in salesroom. Bulky articles outside. People stand outside in the yard. Goods in salesroom are auctioned in salesroom. Goods in verandah and outside are auctioned on verandah. I have been in the premises on days on which there were no sales. I have found goods lying about in the compound. I know the back of the premises and the back yard. I have seen on some occasions goods e.g. building material there. Customers do not go there. There is no road at the back of the premises. There is a drain at junction of Swamp Road about 6″ deep at least. Salesroom is about 100 ft. from Government Road. From Government Road one sees signboard. If I have to go to Defendant's office I would go anyhow wherever it is.

Re-examination : Access to premises is better by Government Road than by the back. If Defendant had no access to Government Road it would adversely affect his business by more than 50%. The full depth of drain is not less than 1 foot.

T.A.R.

M.C. Nageon de Lestang.

No. 13. Hargovinddas Ranchhoddas Pavagadhi, 21st October 1948.

No. 13.

Hargovinddas Ranchhoddas Pavagadhi, sworn.

M.B., B.S. (Bombay). I was formerly employed as doctor at Aga Khan's dispensary about 200 yards from defendant's house. Defendant became my patient and is still my patient. Seven years my patient. I have attended on his wife many times. She is about 55 years old. Her main trouble is asthma. I have often received urgent calls for her. It makes no difference to her health to live far or near town. In attacks of asthma a doctor is not as urgent as in a heart attack but a doctor should be sent for quickly. A person subject to attacks of asthma should not be left alone and the doctor should be summoned. I would not advise her to live ½ mile from a bus stop.

Cross-examination : Asthmatic patients require a lot of fresh air. I have many such patients. Some live far from my surgery—from one end

of town to the other. Relief is quicker when doctor comes sooner. I am not always in my surgery. When defendant calls me for his wife I usually visit her inside a house. There are ways of self treatment but not so effective as injections. When drug is used often it loses its efficacy. I give injections which relieves for a few hours within 10 to 15 minutes. I have a car. If my patient lives far I do not visit during office hours. I have asthmatic patients about 2 miles from surgery. I do not visit that far during office hours unless urgent. I do not always charge extra fee for visits. I do not if I am the family doctor for many years.

No. 13. Hargovinddas Ranchhoddas Pavagadhi, 21st October 1948, *continued.*

My practice is round Ngara, Parklands, etc. Asthma attack is not very urgent, not as urgent as heart attack, accidents etc. When I get a call before 9.30 a.m. I visit immediately. If I am called after 9.30 a.m. I visit straightaway if close, if far, I wait until 1 p.m. I have a dozen asthmatic patients. Defendant's wife is free from attacks during certain months. At other months she gets attacks often. No danger to leave asthmatic patient for hour or two.

T.A.R.
M.C. Nageon de Lestang.

No. 14.

No. 14. Jamal Pirbhai (recalled), 21st October 1948.

Jamal Pirbhai, recalled.

I accompanied the Court to premises of Plaintiff. I saw the bedroom, and the office which is used as a sitting room and opens on Cross Road. Both rooms completely separated from workshop.

Cross-examination : I did not see any bathroom. There are two bedrooms. I believe accommodation is sufficient for him.

Re-examination : Indians do not usually use bathrooms. They use a bucket of water and pour it over them.

T.A.R.
M.C. Nageon de Lestang.

Plaintiff's Evidence.

No. 15.

PLAINTIFF'S EVIDENCE.

No. 15. Harnam Singh (recalled), 21st October 1948.

Harnam Singh, recalled.

My present accommodation is not enough for me. The office is used as a bedroom. I have neither proper office nor bathroom. A w.c. is used as a bathroom. As a result of taking living accommodation I have less assistants. We are over-crowded. No privacy.

Cross-examination : One of my sons uses the small office as a study. The w.c. is not adequate as a bathroom. It is small and there is smell.

I once occupied three rooms. After that when my children returned from India I occupied two rooms for 10 years. Youngest child 6 years old. My business is going on as it was before. Since 4 or 5 years I have fewer people working for me. I discharged some fundis when I took over factory premises.

T.A.R.
M.C. Nageon de Lestang.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 16. Defendant's Counsel, 22nd October 1948.

No. 16.

DEFENDANT'S COUNSEL.

22.10.48

Nazareth addresses Court :

1. Has tenancy been determined ? Original lease—2 years certain. Clause 10 (B). Lease only expires on 6 months previous notice.

Letter dated 7.1.41. Merely reduces rent for period of 11 months. Arrangement acted upon reduced rent paid for 14 months. Original tenancy continued except as regards rent.

Doe v. 114 E. Rep. 1466 (1844). 10
(1852) 155 E. Rep. 968.

Bridges v. *Potts* 144 E. Rep. 127.
Mitchell v. *Turner* 31 Digest 436 (5807).
Paragraphs 8 and 9 of plaint 2nd lease for 11 months.
No such agreement. Letter not proved.
Letter fabrication. Period May, 1942—April, 1943.
Rent from 1.4.42 till 1.6.42 =250/-.
,, ,, 1.6.42 ,, 1.1.43 =265/-.
,, ,, 1.1.43 ,, — =280/-.
Facts disproved 2nd alleged lease for 11 months. 20

2. Two notices to quit. 24th May. 11th March.
Does acceptance of notice make deft. a statutory tenant ?
(1942) 2 A.E.R. 311.
No agreement to surrender. No estoppel pleaded.
Now objection not waiver of notice
(1791) 100 E.R. 1064.
Johnstone v. *Hudlestone* (1825) 107 E.R. 1302.
v. *Johnstone* (1825) 148 E.R. 359.
Tenancy not determined notwithstanding conduct of deft.

3. Notices to quit invalid. 30
Even if monthly tenancy no valid notice. New tenancy on 22.4.1942 according to Plaintiff. In any case notice to quit must be given to tenant on 1st month as original tenancy before on 1st April.
(1933) 59 I.A. 414.
S.C. 39/1941.
Mulla 2nd Edn. 589.

4. Assuming tenancy determined subsequent notice operates as a waiver of previous determination. Letter of 11th March gave more than one month. Notice allowed Deft. to remain in occupation until 30.4.47. This is not same demand for possession. Relied on as a notice to quit in 40 original plaint.
Hill & Redman 9th Edn. 435.

5. Assuming tenancy determined.

A. Does landlord reasonably require possession.
Is suitable alternative accommodation site available.
Is it reasonable to make order for possession.
(A) Reason : Death of child.

Illness of wife and children. Voluntarily resided there for long time. Shifted from other premises to present ones. Suitable for his work. No serious attempt to get possession of premises. No valid reason for wanting to shift.

He could even necessary move into another house.

Contradictory reasons given for wanting premises back.

Real reason to sell premises with vacant possession.

Insincerity of landlord.

Previous conduct in obtaining order for vacant possession of other premises and not occupying. In that case reason he was owner of premises which he was not. He sold premises subsequently.

(B) No evidence that Parklands' house available. Lease for business and residential premises. Clauses 6, 10. Parklands' premises could not be used as ancillary to Deft.'s own premises and to his business.

Locality of alternative accommodation.

Wilcock v. *Booth* 89 L.J.Q.B. 864 at pp. 865–866.

Distance 3 miles from town. No proper road of access.

Health of Deft.'s wife. Essential that wife should be within reach of help and that Deft.'s business should be together with his residence. Great hardship on wife to live far away.

Deft.'s business would suffer considerably if premises removed from him. Deprived of good access. Access thro' back difficult. Open drain.

Onus on Plaintiff to prove alternative accommodation.

Auctioneer's Ordinance. Caps. 103. S. 13 & four.

(C) Reasonableness. Hardship to be borne in mind.

20 K.L.R. part 2 p. 1. *Bennett* v. *Hunter* 11 E.A.C.A. 29.

Tenant did everything he could. Tried to get Gulzar Street premises. Tried to build on present premises. Impossible owing to absence of river.

No. 17. Plaintiff's Counsel, 22nd October 1918.

No. 17.

PLAINTIFF'S COUNSEL.

Khanna :

1. Lease creates only fixed tenancy for two years.

Notice only to give information of the parties intention.

Six months before termination. S. 10 (*b*) (*c*).

S. 10 (*b*) a courtesy clause.

Agreement for 11 months lease independent of original lease. S. 108 T. Prop. Act. Terms of original lease not incorporated in 11 months lease. English common law rule has no application.

S. 116 T.P. Act governs the case. Not a case of holding over. If case of holding over then S. 116 applies.

Express Agreement after expiry of old lease.

S. 17 (1) R.R. Ord. Many clauses not consistent therewith. No difference whether one or two agreements for 11 months. Second term perhaps not proved but *no fabrication.* What about denial of Deft. himself in his first defence proved incorrect and subsequently admitted. After termination of 1st eleven months Deft. became statutory tenant. S. 17 (1) R.R.O.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 17. Plaintiff's Counsel, 22nd October 1948, *continued.*

2. No notices required. Statutory tenancy. Notice to quit was accepted as valid. If notice admitted as valid it cannot afterwards be attacked.

Hankey v. *Clavering* (1942) 2 A.E.R. at p. 313. 107 E.R. 1302 turns upon special statements.

Deft. estopped. Paid increased rent.

(1946) 2 A.E.L.R. 628.

Waiver. May have been good before R.R.O. but not since.

Lowenthal v. *van Houte* (1947) 1 A.E.L. 116.

Acceptance of rent merely evidence of implied agreement. Notice to quit is merely a demand.

Definite lease for 2 years. Followed up by agreement for 11 months. Possible 2nd agreement for further 11 months. Deft. statutory tenant. Original lease inapplicable on account of 11 months agreement.

If under S. 116 notice required notice whether invalid or not was accepted and increased rent was paid.

Claim for possession.

Agree with 3 elements in 5.

(a) required at time of instituting proceedings.

" Reasonably " as opposed to " Arbitrarily." History of Plaintiff.

Occupied 3 rooms then 2 rooms when family in India, then on their return tried to obtain possession of other premises and instituted proceedings. Before completion sold premises. Improvised accommodation in his factory. Admitted that Plaintiff has been after Deft. for the last 5 or 6 years. Deft. tried to meet Plaintiff in every way he could. Plaintiff's premises unsatisfactory. No bathroom, W.C. bathroom. Insufficient accommodation.

Alternative accommodation reasonable.

It is not for Deft. to say that Plaintiff should occupy the alternative accommodation. Plaintiff entitled to his own property on giving alternative accommodation.

Kelly v. *Goodwin* (1947) 1 A.E.R. 810.

Briddon v. *George* (1946) 1 A.E.R. 609 at p. 614.

Material consideration is " accommodation " and not outside things like road of access. *Thompson* v. *Rolls.*

On question of reasonableness.

Clauses re business quite alien to question of reasonableness. S. 17 (1) Business conditions are not consistent with Ordinance. Health of tenant immaterial. In any case of little weight. Flimsy excuses relating to loss of business if possession ordered because of inconvenience, inaccessibility etc. Deft. made no serious attempt to go out Gulzar Street premises—S. 11 (1) (*e*).

Statutory tenant. Wealthy. No attempt to get premises.

Not interested in any alternative accommodation.

C.A.V.

(Sgd.) M. C. NAGEON DE LESTANG.

No. 18.

JUDGMENT.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 18.
Judgment, 5th November 1918.

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

Civil Case No. 207 of 1948.

HARNAM SINGH and JAMAL PIRBHAI.

This is a suit by a landlord for the recovery of possession of certain premises to which the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance applies.

The facts are as follows :—

The Plaintiff is the owner of certain premises in Government Road, Nairobi, known as Plot 209/2555. The Defendant is the owner of adjacent premises known as Plot 209/2556 situated at the back of Plaintiff's premises and has been occupying the Plaintiff's premises as a tenant since 1931. By a written lease dated 27.6.39 the Plaintiff leased his premises to the Defendant for two years from 1.4.39 at a monthly rental of Shs. 280 subject to various conditions and stipulations of which only the following have any bearing on this case :

"6. The Lessee shall use the said hereditaments and premises for the purposes of business and/or residence including the business of auctioneer.

10. The Lessor shall not erect any building or do or alter the present arrangement of the demised premises so that the Lessee may be obstructed or hindered in his present business etc. etc. etc. and it is hereby expressly agreed and declared as follows :

* * * * *

(b) If the Lessor or the Lessee shall desire to determine the present demise at the expiration of the said term then either party shall give to the other six months' previous notice in writing of his intention so to do."

Neither party gave notice of the termination of the lease as provided by Clause 10 (b) but in January 1941 it was agreed between them that the Defendant should continue in possession of the premises for a further term of 11 months as from the expiry of the lease at the monthly rent of Shs. 250. This agreement is set out in a letter dated 7th January 1941 addressed to the Plaintiff by the Defendant in the following terms :

"Mr. Harnam Singh s/o Jhanda Singh,
Nairobi.

Dear Sir,

With reference to our conversation on Saturday the 4th January 1941 I have to confirm the arrangement made between ourselves on that day that the rent of Plot No. 209/2555 will be shs. 250/– per month on a 11 months agreement as from the expiry of the lease at present in force.

I shall be glad if you will confirm the above arrangement from your side.

Yours faithfully,

(Sgd.) JAMAL PIRBHAI."

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 18. Judgment, 5th November 1948, *continued.*

On the expiration of the term of 11 months on 1.3.42 the Defendant remained in possession and from 1.4.42 till 1.6.42 he paid rent at the rate of Shs. 250 per month ; from 1.6.42 till 1.1.43 at the rate of Shs. 265 per month and from 1.1.43 onwards at the basic rate of Shs. 280 with in later months the addition of varying amounts representing the increase in the Municipal rates which the Plaintiff added on to the rent in accordance with Section 9 of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance.

The Plaintiff alleges that on 22.4.42 a tenancy for a second term of 11 months was agreed upon between himself and the Defendant but in view of the denial of the Defendant and of the fact that rent during such period was charged at three different rates I am unable to find this second tenancy for 11 months proved.

On 24th August 1943 the Plaintiff gave notice to the Defendant to vacate the premises on or before 30th September 1943 and by way of alternative accommodation offered to the Defendant three rooms in his own house in Canal Road. The Defendant replied through his Advocate on the following day in the following terms :

" Mr. Harnam Singh,
Cabinet Maker,
Canal Road,
Nairobi.

Dear Sir,

Your letter of the 24th instant addressed to Mr. Jamal Pirbhai has been handed to us for a reply.

Our client will not vacate the premises in accordance with your notice but will remain in occupation as a statutory tenant from the date of the expiry of the notice.

As you have several houses in Nairobi and as you are living in one of your houses, you will not be able to recover possession.

It is needless to say that the alternative accommodation offered by you is not in any way equivalent as regards suitability.

Yours faithfully,
for Trivedi & Nazareth,
(Sgd.) J. D. TRIVEDI."

Although the Plaintiff was always anxious to obtain possession of his premises and pressed the Defendant on many occasions to vacate them he took no active steps to secure possession of the premises until 1948 when he approached the Rent Control Board for the necessary permission to eject the Defendant. The Board granted its consent on 3.3.48 and on the 11.3.48 the Plaintiff caused the following letter to be written to the Defendant :

" Jamal Pirbhai, Esq.,
Government Road,
Nairobi.

Dear Sir,

Re : Plot No. 2555 Government Road.

I have been instructed by my client, Mr. Harnam Singh, the Landlord of the premises on the above plot, to give you notice, which I hereby do, to vacate the aforesaid premises by 30th April 1948.

The Rent Control Board has sanctioned Court Action against you for recovery of possession of the said premises, and if the said premises are not vacated by the afore-mentioned date, legal proceedings will be instituted for the recovery of posession of same.

My client was prepared to provide you with reasonably suitable alternative accommodation, which you refused to accept. He may be able to suggest to you some other premises for accommodation but he does not hold himself bound to do so as you without any justification, refused to accept the accommodation which he had already offered to you.

The reasons why my client needs the possession of the said premises have been made amply known to you through the correspondence with the Rent Control Board.

I am, Dear Sir,

Yours faithfully,

(Sgd.) S. R. COCKAR."

On the 4th May 1948 the Plaintiff instituted these proceedings for possession and on 12.7.48 served on the Defendant another notice to quit expiring " on or before 31st August 1948 " which, however, is not material in the present suit.

The first question for decision is whether the Defendant was at the time of the institution of these proceedings a contractual or a statutory tenant.

The Plaintiff submits that the Defendant was a tenant whose tenancy had been lawfully determined by notice to quit or otherwise and who retained possession by virtue of the Rent Restrictions Ordinance and that therefore he was a statutory tenant to which Section 17 of the Ordinance applied. The Plaintiff contends that the Defendant's contractual tenancy has been terminated on two grounds. Firstly he says that the written lease came to an end on 1.4.41 and that thereafter there was a new lease for 11 months which expired by effluxion of time on 1.3.42 making the Defendant a statutory tenant from that date. Secondly he says that if he is wrong in his first contention then after 1.3.42 the tenancy was one from month to month and was duly determined by the notice to quit of 24th August 1943.

On behalf of the Defendant it is contended that the agreement for 11 months was not a new tenancy at all but merely a modification of the terms of the written lease relating to rent for a period of 11 months, that in all other respects the written lease continued as it were, that it could only be determined by six months' notice, and that as such notice was never given the tenancy has never been determined. It is also contended that if the written lease has expired and been replaced by a tenancy from month to month then the notice to quit was invalid and in any event was waived by the second notice to quit.

Although, in the view that I take of this case, it is unnecessary for me to decide whether the Defendant's tenancy has been lawfully determined by notice to quit or otherwise, nevertheless in deference to the arguments which have been addressed to me on this point, and lest the case should be taken further, I propose to briefly express my opinion on it.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 18. Judgment, 5th November 1948, *continued.*

While I am unable to subscribe to all the arguments addressed to me by the Advocate for the Defendant, I agree with his concluding submission that the Defendant never became a statutory tenant.

At first sight the written lease appears to be made for a term of two years certain but Clause 10 (b) provides that if either party desires to determine the lease at the end of two years he has to give six months' previous notice of his intention to do so. This clause clearly supposes that the parties may not be desirous of terminating the lease after two years and in my view its effect is to create a lease for an indefinite period subject to a minimum term of two years. It was thus open to the parties to end the lease at the end of two years by giving the prescribed notice. But what would be the position if they did not? According to my interpretation of the lease it was to continue until lawfully determined. It is common ground that neither party gave notice to terminate the lease after two years as required by Clause 10 (b) but instead they agreed that the Defendant should remain in possession for a further 11 months at a slightly reduced rent. Whether this agreement was intended by the parties to fix the rent for 11 months or to extend the lease for a fixed period of 11 months or to create a new tenancy for a term of 11 months because they considered the written lease to have expired is immaterial in this case because in my view on the expiry of the 11 months the tenancy became a tenancy from month to month determinable by 15 days' notice in accordance with Section 106 of the Indian Transfer of Property Act. Nevertheless I cannot agree with the contention that the agreement for 11 months was merely intended to fix the rent for that period. As I understand it it had the effect of extending the written lease for a period of 11 months so that on the expiry of that term the tenancy became determined by effluxion of time.

It has been contended that the lease could only be determined on six months' notice. I do not agree. If my construction of the lease is correct then it appears clearly from the wording of Clause 10 (b) on which the Defendant rests this branch of his argument that this clause is designed to meet a particular contingency and it ceases to have any effect the moment the contingency becomes impossible. In other words Clause 10 (b) prescribes the notice necessary to determine the tenancy on the expiration of two years. It does not say or mean that should the tenancy continue beyond the first two years it can only be determined by six months' notice. The clause is incapable of such meaning.

If I am right in my decision that except as regards termination at the end of two years the lease is silent on the question of notice then no notice was necessary to determine the tenancy on the expiry of the term of 11 months. Unfortunately the Plaintiff did not then seek to obtain possession and he allowed the Defendant to retain possession and accepted rent from him. Thus prior to the coming into force of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance the position of the Defendant at the time he received the notice to quit of the 24th August 1943 would have been that of a tenant holding over after the expiration of a lease for 11 months and the nature of his tenancy and the notice required to terminate it would, by virtue of Sections 106 and 116 of the Indian Transfer of Property Act, have depended on the purpose for which the premises were leased. As it seems to me to be beyond argument that the lease was at all material times for both business

and residential purposes only it follows that from the expiry of the period of 11 months, i.e. from 1.3.42 the tenancy would have been, prior to the Rent Restriction Ordinance, a tenancy from month to month terminable by 15 days' notice expiring with the end of a month of the tenancy. Since the enactment of the Rent Restriction Ordinance the position has been slightly altered. It is no longer possible from the mere fact of allowing a tenant, holding over after his tenancy has determined, to retain possession or of accepting rent from him, to imply a new contractual tenancy. No such inference can be drawn because the landlord is restrained by the Rent Restrictions Ordinance from recovering possession. The result is, therefore, that a tenant who holds over after the expiration of his tenancy becomes, in the absence of a new agreement for a tenancy, a statutory tenant who can only be dispossessed by an order of the Court without the necessity, however, of any notice to quit. *Davies* v. *Bristow* [1920] 3 K.B. 428. *Morrison* v. *Jacobs*, 2 A.E.R. 431 (1945). A new tenancy may, however, result from the conduct of the parties notwithstanding the Rent Restriction Ordinance if such conduct points conclusively to the creation of a contractual tenancy. In my view this is the case here. The fixed term tenancy came to an end by effluxion of time on 1.3.42. The Defendant was not required to and did not yield possession. He continued to pay rent at the same rate until 1.6.42, thereafter for seven months he paid at the rate of Shs. 265 per month and from 1.1.43 at the rate of Shs. 280 per month. Undoubtedly the variations in the rent were the subject of agreement between the parties. Had the Defendant been holding as a statutory tenant he would have been paying one rent, i.e. the standard rent at all times.

I, therefore, hold that the Defendant retained possession not under the provisions of the Rent Restriction Ordinance (in which case only would he become a statutory tenant (vide Section 17)) but under one or more new agreements of tenancy with the Plaintiff and differing only from the previous tenancy in the matter of rent. Such being the case there was at the time of the notice to quit of 24th August 1943 in force a tenancy from month to month terminable by 15 days' notice expiring with the end of a month of the tenancy as provided by Section 106 of the Indian Transfer of Property Act.

I now come to the question whether this notice to quit was a valid one. It will be recalled that this notice purported to terminate the tenancy " on or before the 30th September 1943."

The Defendant accordingly contends that it is bad because according to him it is a day short. The Plaintiff argues that it is good and relies also on the acceptance of the notice by the Defendant as validating it.

I have already quoted both the gist of the notice and the acceptance thereof. While there can be no doubt in my judgment that the notice was invalid by reason of the fact that it purported to terminate the tenancy a day too soon, it is equally clear that it was accepted and acted upon by the Defendant. A notice to quit must expire on the last day of the tenancy, otherwise it is invalid. " The date of expiry of a tenancy depends upon the date of its commencement and that again depends upon whether the lease is expressed to begin from or on a certain day." (Mulla, Transfer of Property Act, p. 589.) This distinction is the effect of Section 110, Indian Transfer of Property Act, which provides that " Where the time limited by a lease of immovable property is expressed as commencing

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No. 18. Judgment, 5th November 1948, *continued.*

from a particular day, in computing that time such day shall be excluded." The first tenancy was expressed to begin from 1st day of April 1939 and, therefore, by the application of Section 110 it began on 2nd day of April 1939 and terminated after 2 years and 11 months on the anniversary of its commencement, i.e., 2nd March 1942. The following tenancy or tenancies began on the 2nd day of a month and expired on the 2nd day of the following month. To be valid, therefore, a notice to quit had to expire at midnight on the first day of a month and not on the last day of the preceding month as the notice in question in this case purported to do.

As regards the acceptance of the notice by the Defendant this results clearly both from his reply to the notice and from his conduct in behaving as a statutory tenant and in paying the increased rent from time to time under Section 9 of the Ordinance.

The effect, however, of accepting an invalid notice and afterwards taking advantage of the invalidity is by no means clear. I have considered the authorities which learned Advocates have referred me to, i.e.,

Green v. *Corpus* (1791) 100 E.R. 1064
Johnstone v. *Huddlestone* (1825) 107 E.R. 1302
Clerk v. *Johnstone* (1825) 148 E.R. 359
Hankey v. *Clavering* (1942) 2 A.E.R. 311
Hill v. *Swanson* (1946) 2 A.E.R. 628

and I have come to the conclusion that a bad notice to quit cannot be cured by acceptance. Such an acceptance, however, may amount to a surrender and may give rise to an estoppel as was the case in *Hill* v. *Swanson*. There was clearly no surrender in the present case for the simple reason that the Defendant expressed the intention not to vacate the premises and as regards " estoppel " it is sufficient to say that it must be specially pleaded. Not only was estoppel not pleaded here but the Plaintiff obviously relied on his notice being a good and valid notice to quit. I hold, therefore, on the first issue in this case that the Defendant's tenancy has not been lawfully determined and that consequently the Plaintiff is not entitled to possession. On the assumption that I am wrong in so holding I proceed to consider the second question which is whether the Plaintiff is entitled to possession under Section 11 (1) (*d*) of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance. This section reads as follows :

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

* * * * *

(*d*) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself or for his wife or minor children, or for any person bona fide residing, or to reside, with him, or for some person in his whole-time employment or in the whole-time employment of some tenant from him, and (except as otherwise provided by this sub-section) the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available ; "

It may be convenient also at this stage to quote Section 11 (2) and Section 19 which appear to me relevant for the decision of this Case :

"11.—(2) Nothing in this section contained shall be deemed to permit a landlord to recover possession of a dwelling-house if by such recovery he and his wife and/or minor children would be in occupation of, or would acquire the right to occupy, more than one dwelling-house at the same time."

"19. The Governor in Council may, by Proclamation, declare that the provisions of this Ordinance shall apply to any area, district or place in the Colony in respect of premises used for business, trade or professional purposes, or for the public service, as it applies to a dwelling-house in that area, district or place, and with effect from the date of such Proclamation, or from a date specified therein, this Ordinance shall be read as though references to 'dwelling-house,' 'house' and 'dwelling' included references to any such premises, provided that the Ordinance in its application to such premises shall have effect subject to the following modifications :

(*a*) The following paragraph shall be substituted for paragraph (*d*) of sub-section (1) of section 11 of this Ordinance :—

'(*d*) The premises are reasonably required by the landlord for business, trade or professional purposes or for the public service, and (except as otherwise provided by this sub-section) the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects is available' ;

(*b*) Sub-section (2) of section 11 and section 14 of this Ordinance shall not apply."

The facts on this aspect of the case may be briefly stated as follows :

The Plaintiff is an elderly married man and lives with his wife and six children aged from 19 to 6 years. He is by trade a cabinet maker. For the past 20 years he has been residing with his family in Canal Road where for some time he and his wife owned between them three premises. One of those premises is used by the Plaintiff as a factory for the manufacture of furniture and since February or March 1943 the Plaintiff and his family have been occupying part of the factory as a dwelling-house. The accommodation occupied by them consists of two bedrooms, kitchen, pantry, store and W.C. There is no proper bathroom and one small cubicle originally built as a W.C. is used by them as a bathroom.

He alleges that his present accommodation is inadequate, that it is in an unhealthy locality surrounded by factories, that three of his children died there, that his wife is in poor health and that he desires possession of the premises presently occupied by the Defendant in order to dwell thereon with his family and to develop the same. It is his intention to pull down the old wood and iron buildings which exist thereon and erect in their place a substantial stone building. Before filing this suit he offered to the Defendant by way of alternative accommodation premises in Eastleigh which the Defendant declined to accept and he now offers to him a new stone house standing on one acre of land in 1st Parklands Avenue consisting of six living rooms with garage, boys rooms and usual

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No. 18. Judgment, 5th November 1948, *continued.*

offices. This house is almost but not quite completed and the road of access to it is for a short distance a track and in bad condition. As a dwelling-house it is situated in pleasant surroundings and appears well built.

The Defendant is by profession an Auctioneer and for many years has been using both his own premises and those rented from the Plaintiff for the purpose of his business. His sale room is in the building standing on his own plot but as it is not large enough for his business he stores his auction goods both under the verandahs of the house which he rents from the Plaintiff and in the yard and outside passage and it is his practice to hold his auctions both in his saleroom and in the yard and verandahs nearby. His own premises have no access on Government Road and at present access to them is had through the Plaintiff's plot but were the two plots to be separated then the only means of access to Defendant's premises would, at the present time, be from a road reserve at the back branching off Swamp Road. According to the plans there should be a sanitary lane between the two premises but this lane does not exist at the moment. Apart from the verandahs, courtyard and outside passage the Defendant occupies the Plaintiff's premises as a dwelling-house with his wife and four children. He sub-lets part of the premises to somebody else. The Defendant owns other premises as well which are let. He contends that the alternative accommodation offered to him is unsuitable because :

1. It is purely residential.

2. It is too far and inaccessible due to the absence of a proper road of access.

3. Owing to ill-health of his wife his residence must be in close proximity to his business.

4. His business would suffer considerably if he gave up possession of Plaintiff's premises as he used in connection with his business.

The Rent Restriction Ordinance protects both dwelling-house and business premises and for a landlord to obtain an order for possession under Section 11 (1) (*d*) he must establish :—

(a) in the case of a dwelling-house

(1) that he reasonably requires it for occupation as a residence for himself and for his wife etc.

(2) that there is available for the tenant alternative accommodation reasonably equivalent as regards rent and suitability in all respects

(3) that it is reasonable to make an order for possession, and

(4) that by the recovery of possession he will not be in occupation of, or acquire the right to occupy more than one dwelling-house at the same time

(b) in the case of business premises

(1) that they are reasonably required by him for business, trade or professional purposes

(2) that alternative accommodation is available as in (a) (2), and

(3) that it is reasonable to make the order for possession.

It will be seen that the question of double occupation is no impediment to an order for possession in the case of business premises.

It follows, I think, that a landlord cannot obtain possession of a dwelling-house if he requires it for business or if he offers business premises as alternative accommodation. Conversely he is not entitled to possession of business premises if he merely requires them for a residence or if the alternative accommodation available is purely residential. What is the position, however, where the premises are let and used for both residential and business purposes? In my view a landlord who seeks to recover what I may for convenience call mixed premises must satisfy the requirement of the law relating to both kinds of premises, i.e. he must require the premises both for the purpose of residence and for business and he must offer in return premises suitable both for dwelling and business purposes.

A section similar to Section 19 of the Rent Restriction Ordinance was in force in England and for a short time both dwelling-houses and business premises were protected and it was held in *Tompkins* v. *Rogers* [1921] 2 K.B. 94, which was a case of premises being used both as a residence and as business premises, that the landlord could not recover possession upon the ground that he required them for his own occupation unless he showed that he required the premises for business, trade, etc.

Reference to the lease and to the evidence shows that the premises in the present case were both let and used for business and residential purposes and it is clear from the facts of the case that the Plaintiff seeks to obtain possession of them for his own occupation as a dwelling-house and that the alternative accommodation available is a dwelling-house definitely unsuitable for the kind of business carried on by the Defendant. In these circumstances the Plaintiff has not complied with the provisions of Section 11 (1) (*d*) and Section 19 of the Ordinance and he is not entitled to possession.

If it should be found that I am wrong in this conclusion then I say that there is a further reason why the Plaintiff cannot succeed. The Plaintiff at present occupies a "dwelling-house" within the meaning of the Ordinance and an order for possession would confer upon him the right to occupy more than one dwelling-house. This is expressly forbidden by Section 11 (2) which I have already quoted and an order for possession would have to be refused under that section.

The result is that the Plaintiff's suit fails and must be dismissed with costs.

(Sgd.) M. C. NAGEON DE LESTANG.

In His Majesty's Supreme Court of Kenya at Nairobi.

No. 19.

DECREE.

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

Civil Case No. 207 of 1948.

No. 19. Decree, 25th February 1950.

HARNAM SINGH - - - - - - - - Plaintiff

and

JAMAL PIRBHAI - - - - - - - - Defendant.

CLAIM for (1) possession of the premises and ejectment of the Defendant therefrom (2) Mesne profits at the rate of Shs. 344/79 from 1st May 1948 until the possession is given (3) Interest at Court rates till payment (4) Costs of this action and (5) Any other or alternative relief or reliefs that the Court might grant.

THIS SUIT coming on the 24th day of August 1948, 14th, 19th, 21st and 22nd days of October 1948 for hearing and on the 5th day of November 1948 for Judgment before His Honour Mr. Justice de Lestang in the presence of Counsel for the Plaintiff and for the Defendant IT IS ORDERED that the Plaintiff's claim be dismissed with costs AND IT IS FURTHER ORDERED that the Plaintiff do pay to the Defendant the sum of Shillings 3,147/50 his taxed costs of this suit.

Given under my hand and the Seal of the Court at Nairobi this 25th day of February, 1950.

(Sgd.) M. C. NAGEON DE LESTANG,
Judge,
Supreme Court of Kenya.

In His Majesty's Court of Appeal for Eastern Africa.

No. 20.

MEMORANDUM OF APPEAL.

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

Civil Appeal No. 24 of 1948.

No. 20. Memorandum of Appeal, 13th December 1948.

HARNAM SINGH - - - - - - - - Appellant (Original Plaintiff)

and

JAMAL PIRBHAI - - - - - - - - Respondent (Original Defendant).

The Appellant above-named hereby appeals from the judgment (a certified copy whereof accompanies this memorandum) delivered on the 5th day of November 1948 in Civil Suit No. 207 of 1948 by Mr. Justice

M. C. N. de Lestang (Supreme Court of Kenya) and sets forth the following grounds among others, of objection to the judgment appealed from namely :—

1. Section 11 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940 (Consolidated Edition), hereinafter referred to as "the Ordinance,"

(a) had no application whatever ;

(b) was invoked by the Court without affording an opportunity to the Appellant to argue against it ;

(c) was interpreted by the Court contrariwise to the decision thereon of this honourable Court in *Tara Singh & Anor.* v. *Harnam Singh* (1944) E.A.C.A.

2. The premises let were purely residential, and did not consist of two combined and severable units of business cum residential premises. Accordingly, user of verandahs thereof, and unbuilt on land forming curtilage thereof, under a permissive clause in the lease, up to and at the date of the hearing of the suit, for deposit of goods there before auction sales, and the actual conduct of auction sales there, could not have,

(a) altered the residential character of the premises ;

(b) or added to the Appellant's obligation of giving in exchange alternative accommodation of a residential character only without more.

3. In view of the foregoing, Sections 11 (1) (*d*) and 19 (*a*) (*d*) which are mutually exclusive, were incapable of concurrent application.

4. If (as was the case) coincidentally, the Respondent's business premises (not the subject of letting from the Appellant to the Respondent), were next door, and as such conveniently situated, the Appellant had by the legislature been placed under no obligation to provide alternative business premises also, before being allowed to regain possession of a dwelling-house so enjoyed. Section 11 (1) (*d*) of the Ordinance does not place any such impossible burden upon the Appellant and must be strictly construed.

5. Clause 10 of the lease was for the benefit of the Respondent's own adjoining business premises, and could not subsist under Section 17 (1) of the Ordinance, as it was not necessary to the enjoyment of the premises let qua such premises.

6. Residential premises permitted to be used for business, and actually used also for business ends at the date of the hearing of the suit, are not protected under the Ordinance.

7. User of the verandahs and curtilage of the house, for conducting auctions was unlawful, and could not be taken into account in assessing the nature and extent of the alternative accommodation to be provided.

8. The alternative accommodation was not being offered precluding any similar use thereof.

In His Majesty's Court of Appeal for Eastern Africa.

No. 20. Memorandum of Appeal, 13th December 1948, *continued.*

9. A case of a monthly tenancy having arisen at any time had not been set up on the pleadings, on which it was not open to the Court to find any such monthly tenancy.

10. Further, in any case there was no evidence of parties having communicated with each other upon the subject of a monthly tenancy.

11. There was, moreover, no evidence conclusively or unequivocally pointing to the creation of an implied monthly tenancy.

12. The evidence was consistent with and only pointed to an acquiescence by conduct to restore to the original rent reduced under an eleven months' tenancy, after expiry of which the Respondent's rent as statutory tenant could have been raised in one stroke or by stages by the Appellant as landlord by a unilateral act, or by agreement.

13. Inasmuch as a monthly tenancy had not been set up in the defence, there was no opportunity to specifically plead in answer estoppel, and moreover, the rule is that such a plea should be specifically raised only if there is opportunity to do so.

14. In any case if a monthly tenancy was being found by the Court without pleadings, it was only equitable and just to have allowed the plea of estoppel to negative it.

15. There was such an acceptance of the notice to quit (if necessary) as to have effectively created a statutory tenancy.

16. There was further, if notice to quit was necessary, an effective mutual agreement to effect a surrender of the contractual tenancy; without actual delivery of possession, and intention to stay qua statutory tenant was not inconsistent with an intention to surrender the contractual tenancy.

17. The Appellant in his pleading did not say any notice to quit at all was necessary, so as to terminate the tenancy.

Wherefore, the Appellant prays that this appeal be allowed with costs both here and below, or such other order be made as may in the premises be deemed meet.

Dated at Nairobi this 13th day of December, 1948.

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

No. 21.

PRESIDENT'S NOTES.

In His Majesty's Court of Appeal for Eastern Africa.

No. 21. President's Notes, 11th February 1949.

11.2.49. Coram Nihill, P.
Graham Paul, C.J.
Edwards, C.J.

Khanna for Appellant.

Nazareth for Respondent.

KHANNA : A very valuable site on which rests a very dilapidated bungalow. Back plot owned by Respondent.
Reads judgment first.
Ordinance applied to business premises in Nairobi on 1.1.41.
re ground one : in Memorandum of Appeal—
XI 1944 E.A.C.A. 24.
learned judge did not give me an opportunity of citing this case. This Court has therefore held that the section must have a restricted meaning. Judge was therefore quite wrong in saying that an order for possession could not be given because of Sec. 11 (*a*).
re ground 2 : Judge's finding at p. 31.
Tompkins v. *Rogers* [1921] 2 K.B. 94 (a boarding House) Salter at p. 97.
the user determines the character of the business.
You must find out dormant user. You can't say half one, half the other.
Middlesex County Council v. *Hall* [1929] 2 K.B. 110.
Note this looks like a good case for K.
[1929] 2 K.B. 110 see page 115.

* * *

Adjourned to 9.30 on Monday 14th February.

(Sgd.) J. H. B. NIHILL, P.

14.2.49.

9.30 a.m. Hearing resumed.

KHANNA : continues—

House not consist of two severable units : residence and business. You can't create goodwill from open letting and then say I can't move. Article 6 of Exh. 6 *in effect an open letting*. Under Ord. you must decide whether a business is residence or premises. If you can't decide premises outside the Ordinance altogether. *No restriction covenants here.*
? v. *Clark* 25 L.T.R. at 525 head-note.

14th February 1949.

where premises occupied as a dwelling house but also used for other purpose—this does not permit it being a dwelling house for Ordinance.

BY COURT : U.K. Act did not apply to business premises at all except for one year 1921.

In His Majesty's Court of Appeal for Eastern Africa.

No. 21. President's Notes, 14th February 1949, *continued.*

Ellen v. *Goldstein*, 1920 89 L.J. Chancery 586.
ground floor business. held protected. 2 residential floors above. Not capable of separate letting.
Russell, J. at 590. Note word " substantially ".
1924 *Williams* v. *Perry* 1 K.B. 936.
shop on ground floor—living room above but in 1919 let as store rooms. Held let as business premises. at 939.
See 12ii of U.K. Act. No such saving clause in our Ordinance.
1925 Vol. II K.B. 713. Living rooms over garage.
Held letting was severable. at 725.
By his own act a tenant can change the status of the premises. " if no prohibition a house may be used in any unlawful purpose ".
Phillips v. *Hailallaham* [1925] 1 K.B. 750 at p. 758, Banks, J.
Wilcox v. *Booth* 1920 89 L.J.K.B. 864.
Court must not enlarge the obligation of the landlord any further than the language of the Act. at 866.
" the particular mischief ".
Kelly v. *Woodley* 1947 1 A.E.L.R. 810 at 812 (para. 8 5th line).
Bindly v. *George* 1946 1 A.E.L.R. 609.
(Landlord owned 2 houses, order for possession made. Court refused to consider garage. Confused question to ? " roof over your head ").
Thogmorten v. *Winter.*
re ground 2 of Memorandum of Appeal
" 3 " " "
You cannot apply 11 (1) (*d*) and 19 (*d*) concurrently to our premises.
" if Respondent say I must have my residence next to my own business premises " he multiplies the Act.
reason for Sec. 17 (1)
Respondent entitled as a statutory tenant only, to benefit if the clauses which apply to demised premises. Either you say it must be either residence or business.
GROUND 7 : unlawful to conduct an auction on a verandah.
Chapter 103, secs. 5 and 13. See XX p. 9.
Nairobi Bye-Laws 1948 Trade and Trade business.

BY COURT : this is doubtful
house appeared is opposed free of any restrictive covenants.

KHANNA continues—

re GROUND 17 : Judge did not say he were unreasonable. But he had no statutory tenancy, Court may think retrial bad course.
Selwyn v. 1948 1 A.E.L.R.
Appeal Court can't decide on question of reasonableness and suitability.
Two courses open—either give order for possession or new trial on right basis.
GROUND 17 : No part of our case or defendant's that there was a monthly tenancy.
para : nothing
See paras 8 and 10 of amended plaint. Defendant at no time sets up monthly tenancy. On what basis has judge found a monthly tenancy.

GROUND 10: no communication between parties about a monthly tenancy.
See evidence, p. 6 of record. Plaintiff's assertions. There must be some evidence to support Judge's theory that there must have been a new tenancy. see p. 26.
1945 2 A.E.L.R. 430.

Mere acceptance of rent does not give rise to new contract of tenancy.
Davies v. *Bristow* [1920] 3 K.B. 428 line 11 to 17.
P. College Ltd. v. *Butler.*
It was only an acceptance of the statutory position.
Phillips v. *Copping* [1935] 1 K.B. 15.
9th Edn. Hills Landlord & Tenant p. 716.
Standard rent was 280/-
GROUND 13: 1946 White Book Ord. XIX Rule 15 at p. 382.
I had no opportunity of setting up estoppel.
Hill v. *Swanson* 1946 2 A.E.L.R. 220.
N.B. Plaintiff's case that contractual tenancy ceased on 1.3.42.
Para. 8 of amended Plaint.
re GROUND 14 of Memo of Appeal.
" " 15 p. 28 Judgment.
accepting an invalid notice.
Green v. *Corpus* 100 E.R. 1064
Johnstone v. *Hudlestone* 107 E.R. 1302 at 1304.
(case of double payment of rent not being payable if notice to quit bad even if accepted).
Doe v. *Johnstone* 148 E.R. 359.
Casual conversation. No surrender because not in writing.
Hankey v. *Clavering* 1942 2 A.E.L.R. 311.
Hill Swanson (1946) 2 A.E.R. 628.

* * *

Adjourned to 2.15 p.m.

(Sgd.) J. H. B. NIHILL, P.

2.15 p.m. Hearing Resumed.

KHANNA continues—

GROUND 16: in order to create a surrender English law requires formality.
Hailsham Vol. 20 p. 267 Art. 300.
an express surrender must be by deed or in writing.
" a deed is unknown to the Indian system."
Art. 301 and 302.
Transfer of Property Act Sec. 9.
a surrender of a lease may be made orally. p. 84 Mulla.
p. 640. p. 641 Implied surrender.
(1) by creation of a new relationship
(2) by relinquishment of possession if the tenant decides to stay on as a contractual tenant that is a surrender.
All the evidence points that the possession is being persisted in on the strength of the statute.
Exhibits (3) dated 27.6.39.

In His Majesty's Court of Appeal for Eastern Africa.

No. 21. President's Notes, 14th February 1949, *continued.*

Art. 9 (b) incapable of reconciliation with 2 years term.
Exh. 4 : Judge held a new lease for 11 months.
Exh. 5 (a).
Exh. 5 (b).
Exh. 9 (b) letter of 11th April 1946. Clearly he recognised himself as a statutory tenant. Letter of 27th February 1948.
Rent Restriction Act 1933 Sec. 3. Proximity of place of work not in English Act.
Sec. 11 (*d*) " reasonably equivalent . . . in all respects ".
Cooke at place.
Exh. A put in by Defendant.
Learned Judge had 3 difficulties (1) Whether contractual tenancy had come to an end (2) Whether joint dwelling and business alternative accommodation had to be provided.
re reasonableness : Tenant kept saying he must have a house next door to his business. Judge was impressed by Plaintiff's evidence that he can build.
Plaintiff . . . that Plaintiff living in a family.
p. 9 re wife's asthma. X p. 9 very chronic bronchitis.
Doctor's evidence on p. 2. Look at defendant's excuses p. 10 and 11.
Reads defendant's evidence p. 11 and 12. He keeps on saying he must have residence and business combined.
If you think there is no definite finding no reasonableness should at back.
Judge in error in assuming that there was a contractual tenancy in existence. If there was notice to quit was accepted there was a surrender in law.
You must find the principal user. Can't mix residence and business.
If he had been right on above he would have found landlord's request reasonable.
1944 Vol. XI E.A.C.A. 24 re scope of 11 (2). sued for original reversal.
You will see that decision re Sec. 11 (2) was not *obiter dicta.*
Order for possession and mesne profits. If new trial costs of this appeal and that only costs on issue of reasonableness should abide the event.

Adjourned until 9.30 a.m. to-morrow.

(Sgd.) J. H. B. NIHILL, P.

15th February 1949.

15.2.49.

9.30 a.m. Hearing resumed.

NAZARETH :

5 main points :—
(a) Was the defendant a statutory tenant.
(b) Was suitable alternative accommodation available.
(c) Were the premises reasonably required by landlord.
(d) Reasonableness of order for possession.
(e) Effect of Sec. 11 (2).
Plaintiff must succeed on every point. On none has he got an affirmative finding in his favour.

re (b) no clear finding as regards residential accommodation available. A negative finding as regards business accommodation available.
(c) finding that Plaintiff did not want premises for business nor clear finding whether Plaintiff needed it for residence.
(e) Judge's decision contrary to Mr. Justice Webb's obiter.
(e) Was he a statutory tenant. Onus on Plaintiff.
1946 2 A.E.R. at 329. I say 6 months' notice was required. But if I am wrong then must be 15 days notice terminating at the end of a month.
Submit lease did not determine on 1.4.41 continued with variation as to rent.
if wrong—
I say that after the first 11 months we became monthly tenants.
(1) Was 6 months notice necessary. Lease shows that it was primarily for business premises. Clauses 5, 6 and 10. Clause 6 business mentioned first.
Clause 10 emphasis again on " business ".
p. 24 judgment. Judge construed document as a lease for two years. After that determinable subject to six months' notice. No it could not come to an end before 2 years.
10 (b) " at " significance of this word. Must read the word " after " as well as " at ".
Stroud's Judicial Dictionary 138.
41 L.J. 63.
Both parties must have contemplated continuance of lease.
(2) What is effect of first 11 months agreement ?
(no dispute here).
See p. 21 judgment.
Judge did not find second 11 months agreement proved.
Clause 10 (b) was just as applicable to new arrangement as to old.
Parties held over.
Wembley Corporation v. *Sherrin* 1938 4 A.E.L.R. 255.
31 E & E Digest 436 case No. 5807 (submits this on all fours).
Sec. 116 Indian Transfer Act (read with Sec. 106).
Submits that after 1.4.41 lease would have been terminated by six months notice to expire on 1.3.42 thereafter there was no variation of lease except as regards rent so that 6 months notice could have been given at any time.
Judgment p. 26. Second 11 months Were agreed rent. He only started paying increased site value tax in 1944.
Amended plaint para. 9. Plaintiff does not allege that between 1.5.42 and 1.4.43 defendant was other than a contractual tenant.
Next question was defendant a contractual tenant at date of filing suit. On Judge's view valid notice under Sec. 106 had to be given. No valid notice was given. Really not contested by Khanna.
1933 59 Indian Appeals 414.
Khanna's argument is that statutory tenancy came into being by determination of lease by effluxion of time.
Is defendant precluded from challenging notice to quit ?
Surrender not pleaded—no evidence. see p. 641 Mulla.
estoppel. Acceptance of Notice.
Defendant never attempted to prove an agreement of surrender.

In His Majesty's Court of Appeal for Eastern Africa.

No. 21. President's Notes, 15th February 1949, *continued.*

" a statutory tenancy is the negation of agreement."
Re acceptance of notice to quit : 1942 2 A.E.R. 311
acceptance does not turn a bad notice into a good one but it may raise estoppel.
Johnstone v. *Huddlestone* 107 E.R. 1302 at p. 1303.
Huddlestone v. *Johnstone* 108 E.R. 359.
Indian Transfer Act Sec. 106. (Oral notice to quit does not operate unless you could prove it was an agreement to surrender.)
Estoppel not pleaded.
Bullen and Leake's Precedents of Pleadings—at p. 661. 10
9th Edition at 663. There was ample opportunity to plead estoppel.
Amended Plaint 9, 10, 11 and 15, answered by 4, 7, 8 and 9 of Amended Defence.
We did challenge notice to quit and Plaintiff's reply should have said that we were estopped by our conduct. In any case elements of estoppel were not made out.
See Sec. 103 Indian Transfer of Property Act.
Woodrofe 9th Edition 896.
1910 35 Bombay I.L.R. 182 at 187 and 188.
1882 19 I.A. at 115 at 116 (Privy Council). 20
1881 7 Calcutta 594 at 604.
Here Plaintiff relied on his notice to quit—11.3.48.
Exhibit 8. To expire 30.4.48.
Plaintiff in Exh. 5 says he is bringing contractual tenancy to end.
re *Hill* v. *Swanson* (1946) 2 A.E.R. 628 at 633.
cf. with *Hankey* v. *Clavering* (1942) 2 A.E.R. 311 at 312.
Hill v. *Swanson* not quite in conformity with *Hankey* v. *Clavering*.
1948 2 A.E.R. 439.
re Ground 9 of Memo of Appeal—
Facts on which Judge came to conclusion that there was a monthly 30
tenancy were all pleaded. Once contractual basis established Plaintiff had to show termination (see 106 I.T.A.)
Abbey v. *Barnstyn* [1930] 1 K.B. p. 660 at 671.
Newell v. *Crayford Cottage Society* [1922] 1 K.B. 656.
(the contractual interest must be terminated.)
re my question (b) : Was suitable accommodation available ? It was purely " residential ". Under lease defendant could have used whole place for business. See p. 14 of record. Must be careful how one reads English cases. Sec. 13 of 1920 Act only applied to business premises for a year. Therefore all English cases do not deal with 40
business.
Tompkins v. *Rogers* [1921] 2 K.B. 94.
This really an authority because of date. Act in U.K. then did apply to both residence and business.
[1921] 1 K.B. at 611.
English cases must be decided in light of Sec. 12 (2) of U.K. 1920 Act which is still in force.
Colls v. *Parnham* [1922] 1 K.B. 325.
Cohen v. *Benjamin* 1922 39 T.L.R. 10.

* * * 50

Adjourned until 2.15 p.m.

(Sgd.) J. H. B. NIHILL, P.

2.15 p.m. Hearing resumed.

NAZARETH :

[1922] 1 K.B. 325.
" Both purposes must be protected ".
At all material times Ordinance applied to business as well as residential premises.
English cases—
a. If a house used for both purposes it does not cease to be a dwelling-house ; b. If premises severable business part loses protection.
Epsom Grand Stand Association (Ltd.) v. *Clarke.*
Ellen v. *Goldstein.*
Williams v. *Perry.* wrongful use of business premises not protected.
Wilcox v. *Broth* (1920) 89 L.J.K.B. 864.
In 1933 Act you get a statutory guide to what is alternative accommodation. Stafford 156.
Sec. 3 (3) ii. (This not reproduced in Kenya Ordinance.)
Irvine v. *Nelson* 1 E. & E. Digest 587.
(56 Irish L.T. 107)
Kelly v. *White.*
Shifting locality. *Cameron* v. *Wilson* 161 Stafford.
Locality for a doctor must be considered. Burden on Plaintiff to prove suitability in all respects.
1921 Chancery 404 *Neville* v. *Hardinge.*
(c) Did Plaintiff reasonably require premises. He did not require them as business purposes. See 4 (a) of record. He conceded he wanted to reconstruct premises.
From Plaintiff's evidence doubtful if he even interested to live in them. His evidence shows a certain lack of sincerity. Plaintiff did not discharge onus of proof. In Clause 6 of Agreement shows neither purpose predominant. It was lawful for the tenant to use it for business.
re Ground 4 : Nothing in Auction Ordinance to make it unlawful for auctioneer to carry on business in the premises.
re ground 8 : alternative premises obviously unsuitable for an auction.
(d) re Sec. 11 (2) *Tara Singh* v. *Harnam Singh.*
Court found son was a tenant and was not entitled to protection because he was out of possession. ? Court held that case was not within Sec. 11 (1) therefore 11 (2) did not come into play.
re Webb J.'s view. No absurdity if 11 (2) given its full construction.
31 Hailsham 436–437.
4th Edition of Craig's Statutes.
re reasonableness :
Cummings v. *Danson* 1942 2 A.E.R. at 652.
1947 1 A.E.R. 164 at 166 & 7.
XI E.A.C.A. 29.
If his access from Government Road cut off his business would practically come to an end.

* * *

Adjourned to 9.30 a.m. to-morrow.

(Sgd.) J. H. B. NIHILL, P.

In His Majesty's Court of Appeal for Eastern Africa.

No. 21. President's Notes, 16th February 1949, *continued.*

16.2.49.

9.30 a.m. Hearing Resumed.

NAZARETH continues—

re reasonableness: Looks at doctor's evidence. He once got an order for possession but did not go there. p. 5 Plaintiff obviously not severe. Certainly hardship on Plaintiff. To road at back no culvert on the drain—no other proper approach. The lane shown on plan from Government Road. Never discussed in the evidence.
(NOTE: No doubt that evidence established that it would have a very serious effect on business.)
re House in Eastleigh: Good reason for not going.
SUMMING UP:
(1) Plaintiff must show that defendant not a contractual tenant.
? Plaintiff
(2) No finding that Defendant reasonably requires it as residence.
(3) alternative accommodation. Not suitable for business.
(4) Judge did not go into question of reasonableness.
Object of Ordinance to protect business user.
Ord. 39 Rule 2. Some effect must be given to 11 (2).
re COSTS: might leave to be argued if Appellant succeeds on any point.

* * *

10.35 a.m.

KHANNA:

p. 25 Judge quite definite that clause 10 (b) could not be construed as meaning 6 months notice after first 2 years. Ordinance came into force with regard to dwelling houses on 20th April 1940. Business premises 1st Jan. 1941. So before lease ran out Ordinance applied in both capacities.
No room for notice to quit in fixed term tenancy.
20 Hailsham 129 in para 139.
Mitchell v. *Turner* was a lease at a yearly rent.
Doe v. ? 114 E.R. 1466 (1844).
Crowley v. ? 155 E.R. 968.
(even a reduction in rent does not necessarily create a new tenancy without determination of the old)
How can one assume that a monthly tenancy was created. Can only assume this on a proved fact. Neither party said on oath that there was a monthly agreement. No issue before the Court as to a monthly tenancy.
Lemon v. *Landor* possible to cure a bad notice by acceptance.
re Surrender: can be formal or informal.
Ex. 5 the 2 letters. Defendant accepted position that he was a statutory tenant. Was this not implied surrender. p. 641 Mulla.
re *Hudlestone* v. *Johnstone:*
claim for double rent—no question of ejectment. Acceptance of a bad notice to quit is " admission by conduct ". There was omission to contract validity of notice.
Lowenthal v. *Houte*, 1947 1 A.E.L.R. 117.

Once a statutory status arises it continues for ever until converted into a new contract. Exh. 5 is fact both parties behind statutory status had been brought about.
re *Stone* v. *Libbett* 1946 2 A.E.L.R. 653 House of Lords case. Estoppel by factual position.
re *Abbey* v. *Barnstyn*.
re suitable alternative accommodation.
In Kenya Sec. 19 both " units " must be considered separately.
Vickery v. *Martin* 1944 2 A.E.L.R. 167.
1942 2 A.E.L.R. 625.
" in England at any rate they have said a residence is a dwelling house whether you use it for business or not ".
re substantial or principal user.
1946 (1 A.E.L.R. 675). converse case.

KHANNA submits—
" Where there are not severable lettings you must determine real character of premises to see which type of alternative accommodation is to be offered."
Middlesex C.C. v. *Hall* [1929] 2 K.B. 110
(see p. 161 Safford).
the 1933 Act only confirmed the principles with regard to " A.A." that judges had followed.
(NAZARETH : Defendant was a tenant of previous owner.)
re Sec. 11 (2). This section was introduced by an amending Act.
(1918 A.C. 595)
Copland v. *King* 1947 2 A.E.L.R. 393.
question of reasonableness is for the trial judge. Plaintiff's family growing up therefore naturally wants more room.
See X at top of p. 6. Plaintiff hiding nothing.
that he would like to develop site.
If there is no finding must send it back.

* * *

Judgment reserved.

(Sgd.) J. H. B. NIHILL, P.

9.3.49 Coram as before. 9th March 1949.
Judgments delivered.
Appeal dismissed.

(Sgd.) J. H. B. NIHILL, C.J. (P.).

14.3.49 Khanna for Appellant. 14th March 1949.
Nazareth for Respondent.
KHANNA : Where landlord sues for possession it must be for value of the premises.
Africa Boot Co. v. *Morley.*
Judgment to be looked at from point of view of person appealing. *Lipshiting* v. *Valero* (A.C.) Jan. 1948.
NAZARETH : consents.
COURT : We think there is an appeal as of right, in this case.
Order delivered.

(Sgd.) J. H. B. NIHILL, P.

In His Majesty's Court of Appeal for Eastern Africa.

No. 22.
Judgment, 9th March 1949.

No. 22.

JUDGMENT.

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

Session holden at Nairobi.

Civil Appeal No. 24 of 1948.

HARNAM SINGH s/o JHANDA SINGH - - - Appellant (Original Plaintiff)

versus

JAMAL PIRBHAI - - - - - - - - Respondent (Original Defendant).

Before THE PRESIDENT and CHIEF JUSTICES.

Nihill, P.

NIHILL P.

This is an appeal against a judgment in the Supreme Court of Kenya dismissing a suit asking for an order of possession in respect of certain premises situated in Government Road, Nairobi. Both in the Court below and before us learned counsel have addressed us at considerable length as to the precise nature of the contractual relationship, if any, subsisting between the parties, at the date of the filing of the suit, but in my opinion taking into account the basis of the Plaintiff's case as disclosed in the amended plaint, these issues are really immaterial. In fact with the greatest respect to the learned trial judge who dealt with these issues most faithfully I think that these proceedings would have been much shortened had the learned judge proceeded on the basis that the Defendant was in possession of the premises as a statutory tenant within the meaning of Section 17 (1) of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940, as was pleaded in paragraph 9 of the amended plaint. It is true that the Defendant in his defence to the amended plaint asserted that he was a contractual tenant whose lease had never been duly determined but this issue only became material if the learned judge came to the conclusion that in all the circumstances of the case it was reasonable for the Court to make an order for possession in the Plaintiff's favour. Neither is the issue material now unless this Court is of the opinion that the learned judge's refusal to make the order was wrong and unreasonable, and even then if we held that the contractual tenancy had never been determined this would bring cold comfort to the Appellant who could not succeed in this appeal. The best that could happen to him would be that after duly determining the contractual tenancy he would have another opportunity, if he obtained the permission of the Rent Control Board, of attempting to persuade the Court that he had reasonably complied with all the relevant requirements of Section 11 of the Ordinance. I am content therefore in my examination of the judgment appealed against to assume that at the date of the filing of the suit the Defendant was a statutory tenant who was holding over after the determination of his contractual tenancy. One point taken by Mr. Khanna, although I think not very seriously, I must however deal with. He has submitted that where premises are used partly as a residence and partly

for business purposes the Ordinance can have no application unless you are in a position to discover which is the dominant user. The issue of dominant user was of great importance in many of the English cases, because for a brief period after the close of the first world war, rent restriction has never been applied to business premises. The burden of all these decisions is therefore that a tenant did not lose the protection of the Acts if he in fact used the premises as a dwelling-house although part of the premises were in use for business premises (*Epsom Grand Stand Association (Limited)* v. *Clarke*, 35 L.T.R. 525). Contra it was held that premises let solely for business premises were not brought within the Acts because a tenant in breach of agreement chose to sleep there from time to time (*Williams* v. *Perry*, 1924, 1 K.B. 936). In *Tompkins* v. *Rogers* (1921, 2 K.B. 94), which is a case of exceptional interest because it was decided at a time when the English Acts did apply to business premises it was held that a dwelling-house used as such by the tenant but also as a lodging house was "a house used for business purposes." An order for possession was denied to the landlord in that case because although he was able to show that he reasonably required the house for his own occupation it was not shown that he required it for business, trade or professional purposes. With this case in mind and relating it to the provisions of Section 19 of our local Ordinance I find no difficulty in holding that premises which are used for business and also let in whole or in part as a "dwelling-house" are doubly protected by the Ordinance.

In the present case the lease between the parties which caused so much trouble in the Court below contained one clear unambiguous clause in happy contrast to some of its other provisions. By Clause 6 the Appellant let the premises to the respondent for the double purpose of residence and business and the latter purpose was set out as "including the business of auctioneer." Accordingly a very heavy burden rested upon the Appellant when faced by the obstacles presented to his possession of his own property by the provisions of Section 11 of the Ordinance particularly those set out in paragraph (*d*) of subsection (1). On this part of the case I am in complete agreement with the conclusion reached by the learned judge. Good residential alternative accommodation was undoubtedly available for the Respondent but bearing in mind the business user to which the premises in Government Road had always been put with the knowledge and approval of the Appellant, it is impossible to maintain that any Court could be satisfied that a house in a residential suburb such as Parklands represents alternative accommodation, reasonably equivalent as regards suitability in all respects. That being so it constitutes an end of the matter and it is not necessary to balance nicely the pros and cons urged by the parties in evidence on the question of "reasonableness." One can have sympathy for the landlord in this case and I myself have not a little but as the law stands he is debarred from entering into his own and developing the site to the mutual advantage of himself and the community. At the conclusion of his judgment the learned judge when discussing an alternative reason why the Appellant could not succeed in his prayer considered the provisions of Section 11 (2) and came to the conclusion that as the Appellant already occupied a "dwelling-house" within the meaning of the Ordinance he could not regain possession of another dwelling-house as he would then "be in occupation of, or would acquire the right to occupy more than one dwelling-house at the same time." Fortunately for the

In His Majesty's Court of Appeal for Eastern Africa.

No. 22. Judgment, 9th March 1949, *continued.*

Nihill, P.

purposes of this appeal it is not necessary for this Court to decide whether the construction put on the wording of this subsection by the learned judge is correct or not. The section is unknown to the English Acts and was perhaps inserted because the draftsman had an eye on the polygamous landlord. Be that as it may it is surprising that it has not caused more trouble than it has. It was considered in the case by this Court in the case of *Tara Singh and Jwala Singh* v. *Harnam Singh* (XI E.A.C.A. 24), but in that case the tenant being out of possession this Court held that Section 11 (2) had no application to a case where the tenant had lost the protection of the Ordinance by abandoning possession. Speaking for myself I see no reason to differ from the view expressed by Webb, C.J., in his judgment at page 28. Where a provision of law is open to two constructions it is a sound principle to adopt the construction which does not render the enactment of which it forms a part an absurdity. For the reasons I have set out I am of the opinion that this appeal should be dismissed with costs.

(Sgd.) J. H. B. NIHILL, P.

9th March, 1949.

Graham Paul, C.J.

GRAHAM PAUL, C.J.

By Lease dated 27th June 1939 the Appellant leased to the Respondent certain land at Government Road, Nairobi, together with the buildings thereon. The purposes of the Lease appear from Clause 6 of the Lease which is in the following terms :—

> " The Lessee shall use the said hereditaments and premises for the purposes of business and/or residence including the business of auctioneer."

It is agreed that at all material times the Respondent has in fact occupied the leased premises in accordance with the terms of Clause 6 and he is still doing so. According to the Respondent's evidence which is uncontradicted on the point the Respondent resides there. He also uses parts of the premises for the purposes of his auctioneering business, notably the " Sale Yard " and the " Sale Room " shown on Exhibit A and the verandahs of the dwelling-house. It is clear from the Lease that the Respondent was entitled to use the whole premises as from time to time he might wish wholly as a dwelling-house, or wholly as business premises, or partly as one and partly as the other in any proportions he thought fit. In fact he has been, and is, using the premises partly as dwelling-house and partly as business premises.

Upon that state of the facts in my view the first questions to be answered in this Appeal are whether the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940—hereinafter called " the Ordinance " —applies to this letting, and if so to what effects.

The Ordinance when it first came into force (on 26th April 1940) applied only to " dwelling-houses " as defined in the Ordinance. " Dwelling-house " is defined in Section 2 of the Ordinance as " any house or part of a house let as a separate dwelling where such letting does not include any land other than the site of the dwelling-house and garden or other premises within the curtilage of the dwelling-house."

The wording of this definition which is taken from the English Act has apparently been the subject of interpretation by the Courts in England in two cases. Unfortunately the cases are reported only in the Weekly Notes and are not available for reference. The case of *Smith* v. *Prince* (1923 W.N. 131) decided that the word "separate" in the definition meant "distinct." The case of *Woodifield* v. *Bond* (1921 W.N. 309) decided that the words "let as a separate dwelling-house" qualify only the words "part of a house" and not a "house." I agree with these decisions and adopt them in so far as they affect the issues in this case.

As from 1st January 1941 (by Proclamation No. 53 of 1941) the provisions of the Ordinance were applied to the area under the jurisdiction of the Municipal Council of Nairobi "in respect of premises where the annual amount of the standard rent does not exceed five hundred pounds, used for business, trade or professional purposes, or for the public services, as it applies to a dwelling-house in the said area." The premises in question in this case are within the said area.

By Section 19 of the Ordinance where such Proclamation is promulgated "the Ordinance shall be read as though references to 'dwelling-house' 'house' and 'dwelling' included references to any such premises" (i.e., the premises specified in the Proclamation) subject to the following modifications :—

"(A) The following paragraph shall be substituted for paragraph (*d*) of sub-section (1) of Section 11 of this Ordinance :—

(*d*) The premises are reasonably required by the landlord for business, trade or professional purposes or for the public service, and (except as otherwise provided by this sub-section) the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available.

(B) The following paragraph shall be added after paragraph (*j*) of the same sub-section :—

(*k*) The premises are bona fide required for the purpose of a scheme of reconstruction or improvement which appears to the Court to be desirable in the public interest.

(C) Paragraph (*i*) of the same sub-section shall not apply.

(D) Sub-section (2) of Section 11 and Section 14 of this Ordinance shall not apply."

From the terms of the Proclamation it is clear that as a matter of policy the Legislature intended and expressed the intention that "premises used for business" should come within the protection of the Ordinance in the same way and to the same extent (subject to the express modifications quoted) as "dwelling-houses."

In this present case there is the special feature that there is one letting of one property and it is a letting which as I have explained may be —at the whim of the lessee— wholly for business purposes, wholly for residential purposes or partly for one and partly for the other. If there had been a provision in the lease that one specified part of the premises should be used only for business purposes and another specified part

In His Majesty's Court of Appeal for Eastern Africa.

No. 22. Judgment, 9th March 1949, *continued.*

Graham Paul, C.J.

only for residential purposes it is clear that the protection of the Ordinance would apply to the tenancy of each part. Does the fact that the Lease, instead of specifying which part of the premises is to be used for each purpose, has left the user entirely to the Lessee's discretion take this tenancy out of the protection of the Ordinance altogether? It is clear in my view that if the residential user is excluded from the protection of the Ordinance by the terms of this Lease then the business user must also be excluded. To exclude both from the protection of the Ordinance would in my opinion be in such direct conflict with the expressed policy and intention of the Legislature as to require compelling definite enactment, and I can find nothing of the kind.

From the evidence it appears that the premises let consisted physically of what might be fairly described as a dwelling-house with the usual yards and offices plus a sale room. It is possible to argue with great force that this letting would have been protected by the Ordinance even if the Legislature had never expressly extended the Ordinance to cover premises used as business premises. The case of *Epsom Grand Stand Association (Limited)* v. *E. J. Clarke* (35 T.L.R. 525) goes a long way to support that argument.

In the *Epsom Grand Stand* case Warrington, L.J. (at p. 526) said :—

> " That brings me to the question whether the premises were a ' dwelling-house.' The Act applied to a house or part of a house let as a separate dwelling (see the Act of 1915, Section 2, sub-section (2)). The premises in the present case were let for occupation under an agreement. The defendant and his family and servants had continually lived on the premises, and their residence was in accordance with the terms of the agreement. Was this a dwelling-house? The house was dwelt in, and it was let to the Defendant for that purpose. In the fullest sense it was a dwelling-house, and none the less so because it was also a public-house. He could not accept Mr. Disturnal's contention that because it was let for business purposes it could not be a dwelling-house within the Act. If that contention were accepted it would exclude a great many premises which the Legislature did not intend to be excluded. The object of the Legislature was to include all houses which were occupied as dwelling-houses, provided that they were within the class named, irrespective of whether the premises were also used for some other purpose. They came within the statute, although part of the premises might be used for other purposes. The appeal succeeded and must be allowed, with costs."

There may be a little doubt, but I think only a little doubt, on the question whether this letting was protected before the Legislature expressly extended the Ordinance to premises used as business premises. I am rather surprised at the suggestion that the expression of the Legislature's intention to extend the Ordinance to premises used as business premises did not remove any doubt there might have been before that express extension.

The *Epsom Grand Stand* case was decided at a time when in England the protection of the Act had not been expressly extended to premises used for business. The case of *Tompkins* v. *Rogers* [1921] 2 K.B. 94 was

decided at a time when the protection had been so extended. That was the case of a woman tenant of a residential house who ran the house as a boarding-house. The question in the case was whether the house was being used for business purposes and Lord Coleridge who gave the leading judgment said " I have no hesitation in coming to the conclusion that this house was being used for business purposes." The fact that the appellant in that case also used the house as her dwelling-house did not prevent it being regarded as " used for business purposes." It may be observed that the Legislature in extending the scope of the Ordinance did not extend it to " business premises " but to " premises used for business." And if what would be ordinarily regarded as a dwelling-house is by the letting to be used wholly or partly for business purposes the letting comes within the protection afforded to such premises used for business purposes.

I have no hesitation in holding that the letting in the present case is protected as a letting of a " dwelling-house " in so far as it is used as a dwelling-house *and* as a letting of premises used for business in so far as it is so used. The Ordinance in short applies to the whole of this distinct letting.

Now I come to the effect of so holding on the issues raised in this case. That brings me to Section 11 of the Ordinance the operative part of which is :—

> " No order for the recovery of possession of any dwelling-house to which this Ordinance applies, or for the ejectment of a tenant therefrom shall be made unless . . . "

and then follow ten subsections only one of which is relevant to the present issues, namely, subsection (*d*), which is in the following terms :—

> " the dwelling-house is reasonably required by the landlord for occupation as a residence for himself or for his wife or minor children, or for any person bona fide residing, or to reside, with him, or for some person in his whole time employment or in the whole time employment of some tenant from him, and (except as otherwise provided by this subsection) the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available."

That subsection (*d*) was of course in the Ordinance before it was extended to premises used for business purposes and it still is in the Ordinance. It of course refers only to the user of premises as a dwelling-house, and applies in this case in so far as the premises in this case are used as a dwelling-house.

But, as we have seen, the reference to " dwelling-house " in the operative part of Section 11 is now to be read as if it included a reference to " premises used as business premises," and as regards the use as business premises in the present case it is the new subsection (*d*) that applies.

It follows that before the Court below could make an order for possession it had to be satisfied (for the onus of proof was on the Appellant—see Lord Justice Scrutton's judgment in the *Epsom Grand Stand* case at p. 526) (A) that the Appellant reasonably required the premises in

In His Majesty's Court of Appeal for Eastern Africa.

No. 22. Judgment, 9th March 1949, *continued.*

question both for residential and business purposes and (B) that " alternative accommodation reasonably equivalent as regards rent and suitability in all respects is available ".

In the present case it is clear that at any rate as regards the use of the premises for business purposes the Appellant failed to establish either (A) or (B). Failure to establish either (A) or (B) was enough to disentitle him to an order for possession. In my judgment therefore the decision of the Court below refusing the order for possession and dismissing the suit with costs was right. I would dismiss the appeal with costs.

G. GRAHAM PAUL.

Edwards, C.J.

JUDGMENT : (EDWARDS, C.J.)

I agree with the Judgments just delivered and do not wish to add anything.

D. EDWARDS.

9th March, 1949.

No. 23. Decree, 9th March 1949.

No. 23.

DECREE.

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

Civil Appeal No. 24 of 1948.

(From Original Decree in Civil Case No. 207 of 1948 of H.M. Supreme Court of Kenya at Nairobi.)

HARNAM SINGH (Plaintiff) - - - - - - Appellant

v.

JAMAL PIRBHAI (Defendant) - - - - - Respondent.

This Appeal coming on 9th March, 1949 for hearing before His Majesty's Court of Appeal for Eastern Africa in the presence of D. N. Khanna, Esq., Advocate on the part of the Appellant and of J. M. Nazareth, Esq., Advocate on the part of the Respondent.

It is ordered that the appeal be and hereby is dismissed with costs.

(Sgd.) D. F. SHAYLOR,
Registrar,
H.M. Court of Appeal for E. Africa.

Dated this 9th day of March, 1949.

No. 24. Order granting conditional leave to appeal to His Majesty in Council, 14th March 1949 (*not printed*).

No. 24.

ORDER granting Conditional Leave to Appeal to His Majesty in Council, 14th March 1949.

[*Not printed.*]

In His Majesty's Court of Appeal for Eastern Africa.

No. 25.

ORDER granting Final Leave to Appeal to His Majesty in Council.

No. 25. Order granting final leave to appeal to His Majesty in Council, 12th January 1950.

The conditions set out in the conditional order having been complied with final leave to appeal is granted. In the event of the appellant not proceeding with the appeal the Respondent will have the costs of and incidental to the application for leave to appeal. Otherwise the costs will abide the orders of the Privy Council.

(Sgd.) G. GRAHAM PAUL, Ag.P.
(Sgd.) D. EDWARDS, C.J.
(Sgd.) G. B. RUDD, J.

Nairobi,
12th January, 1950.

Exhibits.

EXHIBITS.

No. 3. Lease, Title No. I.R. 4914, 27th June 1939.

No. 3.

LEASE. Title No. I.R. 4914.

(Stamp £1)

REGISTRATION DISTRICT: INLAND
ANNUAL RENT SHS. 60/48

TERM 99 YEARS FROM 1.6.1903 TO 1.6.2002.

I, HARNAM SINGH, son of Jhanda Singh of Nairobi in the Colony of Kenya, Cabinet Maker (hereinafter called the Lessor which expression shall include my executors administrators and assigns where the context so admits) being registered as proprietor (subject however to such charges leases and encumbrances as are notified by the Memorandum endorsed hereon and to the annual rent of Shs. 60/48 and subject also the special conditions contained in the hereinafter described Grant No. 4914) of All That piece of land situate in the Nairobi Municipality (Town) of the Nairobi District of the said Colony containing by measurement nought decimal one five two one of an acre more or less that is to say Land Office Number 209/555 of Meridional District $\frac{\text{South A 37}}{\text{G H d}}$1 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan drawn on a Grant dated the first day of March One thousand nine hundred and thirty nine (registered at the Registry of Titles Nairobi as No. I.R. 4914/1) and more particularly on Land Survey Plan Number 36539 deposited in the Survey Records Office at Nairobi Do Hereby Lease to Jamal Son of Pirbhai of Government Road (hereinafter called the Lessee which expression shall where the context so admits include his executors administrators and assigns) All and Singular the said hereditaments and premises comprised in the said Grant Together with all buildings and other improvements now standing or being thereon To be Held by him for the period of two years from the first day of April One thousand nine hundred and thirty nine now past at the monthly rent of Shillings two hundred and eighty free of deductions payable in arrear on the last

Exhibits.

No. 3. Lease, Title No. I.R. 4914, 27th June 1939, *continued.*

day of every calendar month the first of such payments to become due and payable on the thirtieth day of April One thousand nine hundred and thirty nine now past Subject to the conditions modifications restrictions and stipulations following that is to say :—

1. The Lessee shall pay the said monthly rent hereby reserved at the times and in the manner hereinbefore provided for payment of the same.

2. The Lessee shall bear pay and discharge all existing and future water conservancy and lighting charges whatsoever imposed or charged upon the demised premises or upon the owner or occupier in respect thereof.

3. The Lessee shall during the continuance of the said term keep the interior of the premises hereby leased including all doors windows and Landlord's fixtures in good and tenantable repair and condition (fair wear and tear and damage by fire only excepted) And shall at the expiration or sooner determination of the said term quietly yield up the said premises with the Landlord's fixtures which now are or at any time during the said term may be thereon in such good and tenantable repair and condition as the same ought to be in having regard to foregoing condition in that behalf and with all locks keys and fastenings complete Provided always that the Lessor shall first complete all the locks keys and fastenings to the doors and windows of the demised premises in order and shall hand them over to the Lessee in such condition.

4. The Lessee shall permit the Lessor and his agents with or without workmen or others at all reasonable times to enter upon the demised premises and to view the condition thereof and upon notice being given by the Landlord to repair in accordance therewith Provided that the Lessor or his agent shall make an appointment for such purpose.

5. The Lessee shall not without the previous consent in writing of the Lessor erect or suffer to be erected any other building upon the demised premises nor shall he make or suffer to be made any alterations in or additions to the demised buildings or cut maim or injure or suffer to be cut maimed or injured any of the walls or timbers thereof such consent shall not be unreasonably withheld and it is hereby expressly agreed that the Lessee shall be entitled to make any alteration or addition to the building at his own cost and expenses in order to use the same as auction hall with the permission of the Municipal or other local authorities but not otherwise and any materials belonging to the Lessor removed from the premises for making any alteration or addition as aforesaid shall be handed over to the Lessor but at the expiration of the tenancy or sooner determination thereof the Lessee shall be entitled to remove such alteration and addition at his own cost and expense and he shall be liable to make good any damage to the demised premises by such removal.

6. The Lessee shall use the said hereditaments and premises for the purposes of business and/or residence including the business of auctioneer.

7. The Lessee shall perform and observe all the conditions under which the piece of land is held so far as affecting the premises hereby leased

the condition for payment of rent only excepted and shall not do or suffer anything whereby the Grant of the said piece of land may be forfeited.

8. The Lessor shall during the said term keep the main walls roof and outside of the said premises hereby leased in good and proper condition and repair.

9. The Lessor shall erect one W.C. as and when required by the Lessee and shall repair and repaint the said hereditaments and premises in good workmanlike manner but the Lessor shall not be responsible to repair and repaint any alteration or addition which the Lessee may make at his own cost and expenses and shall also erect a corrugated iron fencing on the boundary of the said premises on the side of the Girl School and re-wire the electric light installation if so required by the authorities.

10. The Lessor shall not erect any building or do or alter the present arrangement of the demised premises so that the Lessee may be obstructed or hindered in his present business except if he is ordered and/or obliged to remove the buildings encroaching on the sanitary lane and also in having to erect the W.C. mentioned above Provided that if such order be for dismantling any portion or portions of the demised buildings on the said sanitary lane then the Lessor shall give a rebate in the rent per month to the Lessee in the payment of the rent hereby reserved such rebate to be mutually agreed upon by the parties and in the event of the parties not being able to agree to the amount of rebate the Lessee shall be entitled to terminate the present demise on giving one month's previous notice of his such intention Provided always and it is hereby expressly agreed and declared as follows :—

(A) That if the said monthly rent or any part thereof shall be in arrear for the space of fourteen days next after any of the days whereupon the same ought to be paid as aforesaid whether formally demanded or not or if there shall be any breach non-performance or non-observance by the Lessee of any of the conditions and stipulations hereinbefore contained and on his part to be performed and observed or if the Lessee or any assign or assigns of the Lessee shall become bankrupt or make any assignment for the benefit of his or their creditors or enter into any agreement or make any arrangement with his or their creditors for liquidation of his or their debts by composition or otherwise or if any assign of the Lessee being a company shall enter into liquidation whether compulsory or voluntary (not being a voluntary liquidation merely for purposes of reconstruction) then and in any such case it shall and may be lawful for the Lessor although he may not have taken advantage of some previous default of a like nature to re-enter upon the said premises hereby leased or any part thereof in the name of the whole and the same to have again repossess and enjoy as in his former estate anything herein contained to the contrary in anywise notwithstanding but without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of any of the conditions or stipulations hereinbefore contained or implied and on the part of the Lessee to be performed and observed

Exhibits.

No. 3. Lease, Title No. I.R. 4914, 27th June 1939, *continued.*

(B) If the Lessor or the Lessee shall desire to determine the present demise at the expiration of the said term then either party shall give to the other six months' previous notice in writing of his intention so to do

(C) At all times during the one calendar month immediately preceding the determination of the tenancy the Lessee shall permit the Lessor or his agent to affix upon any part of the premises a notice for reletting the same and during the same one month to permit intending tenants and others with written authority from the Lessor or his agent at reasonable times of the day to view the premises by appointment

(D) Any notice requiring to be served hereunder on the Lessor or the Lessee shall be sufficiently served on him by delivery to him personally or sent to him by registered post at his last known address in the said Colony of Kenya A notice sent by post shall be deemed to be given at the time when in due course of posting it would be delivered at the address to which it is sent.

11. The lessee paying the rent hereby reserved and performing and observing the conditions and stipulations herein contained or implied and on his part to be performed and observed shall and may peaceably and quietly possess and enjoy the premises hereby leased during the term hereby granted without any interruption from or by the Lessor or any person rightfully claiming from or under him.

12. In case the demised premises or any part thereof shall at any time during the said term be destroyed or damaged by fire or condemned by any authority so as to be unfit for occupation and use and the policy or policies effected by the Lessor shall not have been vitiated or payment of the policy moneys refused in consequence of some act or default of the Lessee the rent hereby reserved or a fair proportion thereof according to the nature and extent of the damage sustained or condemnation thereof shall be suspended until the said premises shall be again rendered fit for occupation and use and in case of difference touching this proviso the same shall be referred to the award of a single arbitrator in case the parties can agree upon one and otherwise two arbitrators one to be appointed by each party and in either case in accordance with the provisions of the Arbitration Ordinance Chapter 18 of the Revised Edition of the Laws of Kenya or any statutory modification thereof for the time being in force.

And I the Lessee hereby accept this lease subject to the conditions modifications restrictions and stipulations hereinbefore contained or implied.

In Witness whereof the parties hereto have hereunto set their hands this 27th day of June One thousand nine hundred and thirty-nine.

Signed by the Lessor in the presence of sgd. HARNAM SINGH

Edward Barret
Advocate,
Nairobi

Signed by the Lessee in the presence of
Edward Barret
Advocate
Nairobi

sgd. JAMAL PIRBHAI

Exhibits.

No. 3.
Lease, Title No. I.R. 4914, 27th June 1939, *continued.*

MEMORANDUM OF CHARGES LEASES AND ENCUMBRANCES CHARGE

dated 17th March, 1939, to Dinshaw Byranjee Randeria and Avanbai Dinshaw Randeria

Land Titles Registry—Colony of Kenya.
Inland District—Nairobi
Registered No. I.R. 4914/4
Presented 28.6.1939
Time 11 a.m.

sgd. R. A. HAWKINS
Registrar of Titles.

Stamp Duty	Shs. 20
do Counterpart	8
Registration fee	20
	Shs 48

No. 4.

LETTER, Defendant to Plaintiff.

No. 4.
Letter, Defendant to Plaintiff, 7th January 1941.

Established 1921.

Jamal Pirbhai
Auctioneer
and
Official Broker.

P.O. Box 209.
Telephone No. 2842.
Government Road,
Nairobi.

7th January, 1941.

Mr. Harnam Singh s/o Jhanda Singh,
Nairobi.

Dear Sir,

With reference to our conversation on Saturday the 4th January 1941 I have to confirm the arrangement made between ourselves on that day that the rent of Plot No. 209/2555 will be shs. 250/– per month on a 11 months agreement as from the expiry of the lease at present in force.

I shall be glad if you will confirm the above arrangement from your side.

Yours faithfully,

Sgd. JAMAL PIRBHAI.

Exhibits.

B.1. Receipt, Plaintiff to Defendant, 8th May 1941.

No. B.1.

RECEIPT for 250/–, Plaintiff to Defendant.

Plot No. : 138/135, Canal Road,
No. : 735. Nairobi.
8th May, 1941.

Harnam Singh
Furniture Maker & Upholsterer.

Received from Mr. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two hundred fifty only.
being payment of April Rent a/c.
Shs. 250/–

10 cent Stamp.
Sgd. HARNAM SINGH.

B.2. Receipt, Plaintiff to Defendant, 11th June 1941.

No. B.2.

RECEIPT for 250/–, Plaintiff to Defendant.

Plot No. : 138/135, Canal Road,
No. : 763. Nairobi.
11th June, 1941.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two hundred fifty only.
being payment of May Rent a/c.
Shs. 250/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

B.3. Receipt, Plaintiff to Defendant, 11th July 1941.

No. B.3.

RECEIPT for 250/–, Plaintiff to Defendant.

Plot No. : 138/135, Canal Road,
No. : 774. Nairobi.
11th July, 1941.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two hundred and fifty only.
being payment of June Rent a/c.
Shs. 250/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

Exhibits.

No. B.4.

RECEIPT for 500/–, Plaintiff to Defendant.

B.4. Receipt, Plaintiff to Defendant, 2nd September 1941.

Plot No. : 138/135, Canal Road,
No. : 789. Nairobi.

2/9/1941.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Mr. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Five hundred only.
being payment of July and August Rent.
Shs. 500/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

No. B.5.

RECEIPT for 250/–, Plaintiff to Defendant.

B.5. Receipt, Plaintiff to Defendant, 10th October 1941.

Plot No. : 138/135, Canal Road,
No. : 809. Nairobi.

10/10/41.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two hundred & fifty only.
cheque.
being payment of Sept. 41 Rent a/c.
Shs. 250/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

No. B.6.

RECEIPT for 250/–, Plaintiff to Defendant.

B.6. Receipt, Plaintiff to Defendant, 11th November 1941.

Plot No. : 138/135, Canal Road,
No. : 819. Nairobi.

11/11/1941.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot No.: 2555)
the sum of Shillings two hundred & fifty only.
being payment of October Rent a/c.
Shs. 250/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

Exhibits.

B.7. Receipt, Plaintiff to Defendant, 2nd December 1941.

No. B.7.

RECEIPT for 250/–, Plaintiff to Defendant.

Plot No. : 138/135, Canal Road,
No. : 822. Nairobi.
2/12/1941.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two Hundred Fifty only.
being payment of November Rent a/c.
Shs. 250/–

10 Cent. Stamp.
Sgd. HARNAM SINGH.

B.8. Receipt, Plaintiff to Defendant, 8th January 1942.

No. B.8.

RECEIPT for 250/–, Plaintiff to Defendant.

Plot No. : 138/135, Canal Road,
No. : 833. Nairobi.
8th January, 1942.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two Hundred and fifty only.
being payment of December rent a/c.
Shs. 250/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

B.9. Receipt, Plaintiff to Defendant, 7th February 1942.

No. B.9.

RECEIPT for 250/–, Plaintiff to Defendant.

Plot No. : 138/135, Canal Road,
No. : 836. Nairobi.
7/2/1942.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two hundred fifty only.
being payment of January rent a/c.
Shs. 250/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

Exhibits.

No. B.10.

RECEIPT for 250/–, Plaintiff to Defendant.

B.10. Receipt, Plaintiff to Defendant, 10th March 1942.

Plot No. : 138/135, Canal Road,
No. : 840. Nairobi.

10/3/1942.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two hundred fifty only.
being payment of February Rent a/c.
Shs. 250/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

No. B.11.

RECEIPT for 250/–, Plaintiff to Defendant.

B.11. Receipt, Plaintiff to Defendant, 6th April 1942.

Plot No. : 138/135, Canal Road,
No. : 846. Nairobi.

6/4/1942.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two hundred fifty only.
being payment of March Rent a/c.
Shs. 250/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

No. B.12.

RECEIPT for 250/–, Plaintiff to Defendant.

B.12. Receipt, Plaintiff to Defendant, 6th May 1942.

Plot No. : 138/135, Canal Road,
No. : 856. Nairobi.

6/5/1942.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai, the sum of Shillings Two hundred fifty only.
being payment of April rent a/c.
Shs. 250/–

10 Cent Stamp.
Sgd. HARNAM SINGH.

Exhibits.

B.13. Receipt, Plaintiff to Defendant, 2nd June 1942.

No. B.13.

RECEIPT for 250/–, Plaintiff to Defendant.

Plot No. : 138/135, Canal Road,
No. : 863. Nairobi.

2/6/1942.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Messrs. Jamal Pirbhai
(Plot 2555)
the sum of Shillings Two Hundred fifty only.
being payment of May rent a/c.
Shs. 250/–

10 Cent stamp.
Sgd. HARNAM SINGH.

B.14. Receipt, Plaintiff to Defendant, 3rd July 1942.

No. B.14.

RECEIPT for 265/–, Plaintiff to Defendant.

Plot No. : 138/135, Canal Road,
No. : 877. Nairobi.

3/7/1942.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Mr. Jamal Pirbhai
(Plot 2555)
the sum of Shillings Two hundred sixty five only
being payment of June rent a/c.
Shs. 265/–

10 Cent. stamp.
(Sgd.) HARNAM SINGH.

B.15. Receipt, Plaintiff to Defendant, 4th August 1942.

No. B.15.

RECEIPT for 265/–, Plaintiff to Defendant.

Plot No. : 138/135 Canal Road,
No. : 886. Nairobi.

4/8/1942.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Mr. Jamal Pirbhai
(Plot 2555)
the sum of Shillings Two hundred and sixty five only
being payment of July Rent a/c.
Shs. 265/–

10 Cent. stamp.
(Sgd.) HARNAM SINGH.

Exhibits.

No. B.16.

RECEIPT for 265/–, Plaintiff to Defendant.

B.16. Receipt, Plaintiff to Defendant, 11th November 1942.

Plot No. : 138/135,
No. : 907.

Canal Road,
Nairobi.

11/11/1942.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Mr. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two hundred sixty five only
being payment of October Rent a/c.
Shs. 265/–

10 Cent stamp.
(Sgd.) HARNAM SINGH.

No. B.17.

RECEIPT for 280/–, Plaintiff to Defendant.

B.17. Receipt, Plaintiff to Defendant, 9th March 1943.

Plot No. : 138/135,
No. : 931.

Canal Road,
Nairobi.

9/3/1943.

Harnam Singh,
Furniture Maker & Upholsterer.

Received from Mr. Jamal Pirbhai
(Plot No. : 2555)
the sum of Shillings Two hundred eighty only
being payment of February Rent a/c.
Shs. 280/–

10 Cent stamp.
(Sgd.) HARNAM SINGH.

Exhibits.

No. 5.
Letter, Plaintiff to Defendant, 24th August 1943.

No. 5.

LETTER, Plaintiff to Defendant.

Harnam Singh,
Cabinet Makers and Upholsterers.

Plot No. 135.

Canal Road,
Nairobi,
Kenya Colony.
24th August 1943.

Mr. Jamal Pirbhai.
Nairobi.

Dear Sir,

With reference to my Plot No. 2555 with buildings on Government Road, which you have occupied on monthly tenancy from me, I hereby give you notice to vacate the same and give possession to me on or before the 30th September 1943.

As I have told you personally several times, I want the premises for my own use and as you have your own Auction Hall behind my property, I regret I cannot let to you my premises any longer.

Regarding living accommodation for your family I am prepared to offer three rooms in Canal Road in my house.

Please take this letter as legal notice and urgent matter.

Yours faithfully,

No. 5a.
Letter, Defendant's Solicitors to Plaintiff, 25th August 1943.

No. 5a.

LETTER, Defendant's Solicitors to Plaintiff.

Government Road,
Nairobi.
25th August 1943.

Trivedi & Nazareth
Advocates
and
Commissioners for Oaths.
H. D. Trivedi
J. M. Nazareth
Telephone 2046
P.O. Box 1048.

In reply please quote No. 583/1.

Mr. Harman Singh,
Cabinet Maker,
Canal Road,
Nairobi.

Dear Sir,

Your letter of the 24th instant addressed to Mr. Jamal Pirbhai has been handed to us for a reply.

Exhibits.

No. 5a. Letter, Defendant's Solicitors to Plaintiff, 25th August 1943, *continued.*

Our client will not vacate the premises in accordance with your notice but will remain in occupation as a statutory tenant from the date of the expiry of the notice.

As you have several houses in Nairobi and as you are living in one of your houses, you will not be able to recover possession.

It is needless to say that the alternative accommodation offered by you is not in any way equivalent as regards suitability.

Yours faithfully,

for TRIVEDI & NAZARETH,

Sgd. H. D. TRIVEDI.

Copy to :
The Secretary,
Rent Control Board,
Town Hall,
Nairobi.

GKD/LJG.

No. 9.

LETTER, Plaintiff's Solicitors to Defendant.

No. 9. Letter, Plaintiff's Solicitors to Defendant, 9th April 1946.

9th April, 1946.

Mr. Jamal Pirbhai,
Nairobi.

Dear Sir,

Plot No. 2555—Government Road.

My client Mr. Harnam Singh s/o Jhanda Singh informs me that this morning at his request you agreed to vacate the premises on the above plot for the residence for himself, his wife and children provided my client allows you the use of the open place (passage) leading to your auction hall behind the building now occupied by you at a rental to be agreed upon.

I am informed that the rental was discussed between you and my client but the figure was not agreed upon.

I shall be glad to know if you will vacate the premises for the residence of my client his wife and children on the above condition and the rent you propose to pay for the use of the passage for going to and coming from your auction hall during the day time with the things handed to you by the customers for sale by auction, or otherwise.

Yours faithfully,

Exhibits.

No. 9a. Letter, Defendant's Solicitors to Plaintiff's Solicitors, 11th April 1946.

No. 9a.

LETTER, Defendant's Solicitors to Plaintiff's Solicitors.

Government Road,
Nairobi.

11th April, 1946.

Trivedi & Nazareth
Advocates.

In reply please quote No. 583/1.

Dear Sir,

Plot No. 2555—Government Road.

Your letter of the 9th instant written on behalf of Mr. Harnam Singh s/o Jhanda Singh and addressed to Mr. Jamal Pirbhai has been handed to us with instructions to reply.

Our client does not intend and never intended to vacate the premises let to him so long as the Rent Restrictions Ordinance is in force.

It is true that negotiations were in progress regarding the sale or letting by yours for a term of 25 years the passage across your client's plot but no agreement has been reached.

Yours faithfully,
For TRIVEDI & NAZARETH,
Sgd. J. M. NAZARETH.

D. N. Khanna, Esq.,
Advocate, Nairobi.

GKD/NJV.

No. 2a. Letter, Plaintiff's Solicitors to Rent Control Board, 19th January 1948.

No. 2a.

LETTER, Plaintiff's Solicitors to Rent Control Board.

19th January 1948.

H/I.

Saeed R. Cockar
Advocate

The Secretary,
Rent Control Board,
Nairobi.

Re. Plot No. 2555 Govt. Road.
L'Lord : Harnam Singh. Tenant : Jamal Pirbhai.

Dear Sir,

I have received instructions from my client Mr. Harnam Singh to write to you in the following terms.

My client who is the owner of the premises on the above plot leased same to Mr. Jamal Pirbhai on the 1st day of April 1939 for two years. Ordinarily my client would have been entitled to the possession on the expiry of the lease but due to the Rent Restriction Act having come into force Mr. Jamal Pirbhai refused to vacate the premises and still refuses in spite of the fact that Mr. Harnam Singh needs the premises very badly for his and his family's occupation.

The aforesaid premises which are a dwelling house are required by my client for occupation as a residence for himself and his wife and his minor children for the following reasons:—

(A) My client at present is living in a place which is surrounded on all sides by Timber yards and Saw Mills etc. There is always a danger of fire. In fact they are living in a timber yard.

(B) My client and his family are always suffering from some sort of illness which can directly be attributed to their having to live in this unhealthy place and impure air smelling of timber dust all the twenty four hours. I herewith attach a Doctor's certificate to that effect. For your information I might add that my client's three children have died in the premises which he is occupying now.

(C) There are eight persons in my client's family and they have only two rooms. They find this accommodation very inadequate, more so as one of my client's sons is now eighteen years. I am informed that you have personally visited this place.

My client has made numerous verbal requests to Mr. Jamal Pirbhai asking him to vacate the premises as same are required by my client but they have been ignored. My client offered and still offers alternative accommodation to Mr. Jamal Pirbhai in a reasonably suitable locality.

My client has also received information that Building Permit has been allowed to Mr. Jamal Pirbhai provided he submits in his plan of the proposed building. This happened about six months back and Mr. Pirbhai has not yet started his building.

Keeping in view the above my client would like the Board to order Mr. Pirbhai to hurry up with his proposed building to which he would move and if that is going to take very long then to accept the alternative accommodation offered by my client and to vacate the premises in question.

Lastly my client would like Board's permission to take court action for ejectment against Mr. Pirbhai.

I am, Dear Sir,

Yours faithfully,

(Sgd.) SAEED R. COCKAR.

SC/M.

No. 2c.
Letter, Defendant's Solicitors to Rent Control Board, 23rd January 1948.

No. 2c.

LETTER, Defendant's Solicitors to Rent Control Board.

Trivedi & Nazareth
Advocates.

Government Road,
Nairobi.
23rd January 1948.

In reply please quote No. 583/1.

The Secretary,
Rent Control Board,
Nairobi.

Sir,

Your ref. No. 161/24 of 20 : 1 : 48.

Plot No. 2555, Govt. Road, Nairobi.

Harnam Singh v. *Jamal Pirbhai.*

We beg to refer to your above letter addressed to Mr. Jamal Pirbhai and to write you as follows :—

Our client opposes the landlord's application which is frivolous, vexatious and unreasonable.

Our client had in 1939 taken the whole of the premises on the above plot on a two year lease for his residence as he has a business plot at the back where he carries on his business as Court Broker, Official Broker and Auctioneer. The landlord has made several attempts to put our client out by one or other pretext through other advocates of the town and he is now using the same tactics on this occasion.

It is believed that the landlord has various properties and if he wished to live comfortably as he now states he could have done so long ago but our client thinks this is just a lame excuse. Even if he proves a necessity, which is denied, it is not a ground on which he can legally be entitled to recover the premises without alternative accommodation.

In our client's case no alternative accommodation as contemplated by law is available and none can be made available by a mere stroke of the pen. If such accommodation was available the landlord would not have been living in conditions described by his own advocates until this day.

Our client has not had any building permit granted to him and until he has erected a building for his residence no argument can be advanced in this respect.

The Board cannot be expected to order the tenant to build his own house and as stated above no alternative accommodation suitable to our client has ever been offered or made available.

We therefore request that the landlord's application may be refused or if it is not summarily refused that a date and time be fixed for the hearing of the application.

Yours faithfully,
for TRIVEDI & NAZARETH.
(Sgd.) ????

GKD/LW.

Exhibits.

No. 2b.

LETTER, Rent Control Board to Plaintiff's Solicitors.

No. 2b. Letter, Rent Control Board to Plaintiff's Solicitors, 26th January 1948.

COLONY AND PROTECTORATE OF KENYA.

File No. : 161/26.

Date : 26th January, 1948.

From : Rent Control Board,
(Central Province),
P.O. Box 651. Nairobi.
(Town Hall).

To : Mr. Saeed R. Cockar,
P.O. Box 737,
Nairobi.

Sir,

Plot No. 2555, Govt. Road, Nairobi.
Harnam Singh *vs.* Jamal Pirbhai.

I enclose a copy of a letter received from Messrs. Trivedi and Nazareth on which I shall be glad to receive your comments in due course.

Yours faithfully,
(Sgd.) A. M. ELLIS,
Secretary.

(Enclos.)

No. 2d.

LETTER, Plaintiff's Solicitors to Rent Control Board.

No. 2d. Letter, Plaintiff's Solicitors to Rent Control Board, 12th February 1948.

12th February, 1948.

H/I.

The Secretary,
Rent Control Board,
Nairobi.

Re : Plot No. 2555, Govt. Road, Nairobi.

Harnam Singh versus Jamal Pirbhai.

Dear Sir,

Receipt is acknowledged of your letter No. 161/26 of 26th ultimo.

After receiving further instructions from my client Mr. Harnam Singh, I have to write as follows.

As regards the allegation that my client has various properties, he only wishes that he had, but unfortunately Mr. Jamal Pirbhai's allegation is too good to be true. The only other property which my client owns is a house on Juja Road which is in such a dilapidated condition that it is not fit for human habitation.

Exhibits.

No. 2d. Letter, Plaintiff's Solicitors to Rent Control Board, 12th February 1948, *continued.*

In connection with the statement that alternative accommodation cannot be made available by a mere stroke of pen I have to inform you that my client has found accommodation in Eastleigh Section I on Plot No. 60 and which you have very kindly visited. My client can find other premises in the same area if Mr. Pirbhai does not like the one offered to him.

A landlord is entitled to the possession of his own house provided a suitable alternative accommodation is found for the tenant.

It is ridiculous to say of a person, who has lost three children due to the unhealthy atmosphere in which they have been living, and who has applied for the possession of his own house which is situated in a much healthier area, that his application is frivolous, vexatious and unreasonable.

Now that one of the most essential conditions of Sec. 11 (1) (*d*) of the Rent Restrictions Ordinance is being met, in that suitable alternative accommodation has been found for Mr. J. Pirbhai my client would be grateful if on Mr. Pirbhai's refusal to vacate the premises on the above plot my client is given permission to take Court action against him for ejectment.

I am, Dear Sir,

Yours faithfully,

SC/M.

No. 2e. Letter, Plaintiff's Solicitors to Rent Control Board, 17th February 1948.

No. 2e.

LETTER, Plaintiff's Solicitors to Rent Control Board.

17th February, 1948.

H/I.

The Secretary,
Rent Control Board,
Nairobi.

Re Plot No. 2555 Govt. Road, Nairobi.

Harnam Singh versus Jamal Pirbhai.

Dear Sir,

In continuation of my letter No. H/I of the 12th instant, I have to request you to please obtain Mr. Jamal Pirbhai's acceptance or otherwise of the alternative accommodation offered to him on Plot No. 60, Eastleigh Section 1 before the end of this month, as the Landlord cannot keep his premises vacant for a long time and might rent it to someone else.

I am, Dear Sir,

Yours faithfully,

(Sgd.) ? ? ?

SC/M.

No. 2f.

LETTER, Plaintiff's Solicitors to Rent Control Board.

Exhibits.

No. 2f. Letter, Plaintiff's Solicitors to Rent Control Board, 27th February 1948.

Government Road,
Nairobi,
27th February, 1948.

Trivedi & Narazeth.
Advocates

In reply please quote No. 583/1A.

The Secretary,
Rent Control Board,
Nairobi.

Dear Sir,

Plot No. 209/2555, Government Road, Nairobi.
Harnam Singh versus Jamal Pirbhai. File 161.

We beg to acknowledge the receipt of your letters of the 19th and 25th instant.

We are to repeat all what we have already stated in our letter of the 23rd ultimo.

As regards the alternative accommodation offered by the landlord one should not lose sight of the wording of the section dealing with this provision which is to the effect that the court must be satisfied that alternative accommodation reasonably equivalent as regards rent and suitability in all respects, is available.

A house in Eastleigh Section is clearly not one suitable in all respects as alternative accommodation to a house in Government Road. It must be remembered that our client has his business adjoining the dwelling-house he occupies, which makes a world of difference.

The distance between the two houses alone is such that no court could be prepared to say that the alternative accommodation is suitable *in all respects*.

If the alternative accommodation is as attractive as is sought to be made out, there is no reason why the landlord should not avail himself of it.

Yours faithfully,

for TRIVEDI & NAZARETH,

Sgd. ? ? ?

GKD/JS.

Exhibits.

No. 1. Letter, Rent Control Board to Solicitors for Plaintiff and Defendant, 3rd March 1948.

No. 1.

LETTER, Rent Control Board to Solicitors for Plaintiff and Defendant.

COLONY AND PROTECTORATE OF KENYA

Ref. No.: 161/33. 3rd Mar. 48

From: Rent Control Board,
(Central Province),
P.O. Box 651, Nairobi.

To: Mr. S. C. Cockar,
P.O. Box 737, Nairobi.
Messrs. Trivedi & Nazareth,
P.O. Box 1048, Nairobi.

Gentlemen,

Plot No. 2555, Government Road,
L'Lord Harnam Singh. Tenant Jamal Pirbhai.

The Board hereby sanctions Court Action against Mr. Jamal Pirbhai for recovery of possession under Sect. 11 of the Rent Restrictions Ordinance.

Yours faithfully,
Sgd. A. M. ELLIS,
Asst. Secretary.

No. 8. Letter, Plaintiff's Solicitors to Defendant, 11th March 1948.

No. 8.

LETTER, Plaintiff's Solicitors to Defendant.

11th March, 1948.

Jamal Pirbhai, Esq.,
Government Road,
Nairobi.

H/I.

Dear Sir,

Re. Plot No. 2555 Government Road.

I have been instructed by my client Mr. Harnam Singh, the landlord of the premises on the above plot, to give you notice, which I hereby do, to vacate the aforesaid premises by 30th April, 1948.

The Rent Control Board has sanctioned Court Action against you for recovery of possession of the said premises, and if the said premises are not vacated by the afore-mentioned date, legal proceedings will be instituted for the recovery of possession of same.

My client was prepared to provide you with reasonable suitable alternative accommodation, which you refused to accept. He may be able to suggest to you some other premises for accommodation, but he does not hold himself bound to do so as you without any justification, refused to accept the accommodation which he had already offered to you.

The reasons why my client needs the possession of the said premises have been made amply known to you through the correspondence with the Rent Control Board.

I am, Dear Sir,
Yours faithfully,
Sgd. ? ? ?

SC/M.

Exhibits.

No. 10.

LETTER, Plaintiff's Solicitors to Defendant.

No. 10. Letter, Plaintiff's Solicitors to Defendant, 12th August 1948.

12th August, 1948.

R/207/48.

Jamal Pirbhai, Esq.,
Auctioneer,
Government Road,
Nairobi.

Plot No. 2555—Government Road.

On the instructions and on behalf of my client, Mr. Harnam Singh, the owner and the landlord of the above Plot and the premises thereon, I hereby give you notice to quit the above premises on or before 31st August, 1948. This notice is to be regarded as without prejudice as far as C.C. 207 of 48 is concerned.

Take notice that the monthly rent of the above premises will from the date of the expiry of the notice to quit, be Shgs. 483/45 made up as under.

Increase of rates payable by the landlord in respect of the above premises from Shgs. 1276/– in 1947 to Shgs. 2940/– in 1948 is Shgs. 1664/–, i.e., Shgs. 138/66 per month. Your present rent is Shgs. 344/79.

If you continue in occupation you will be deemed to be a statutory tenant at the said increased rent.

Please take notice that this new monthly rent of Shgs. 483/45 from 1st September, 1948, will be recoverable from you at the conclusion of Civil Case No. 207 of 1948, whatever the decision of this case may be.

I am, Dear Sir,

Yours faithfully,
Sgd. ? ? ?

P/SRC.