

~~Q12.04~~

(35) 1963

IN THE PRIVY COUNCIL

No.14 of 1962

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

B E T W E E N

MARIE AYOUB
CECILE KYRIAZIS (formerly Galanos)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB (Plaintiffs)

APPELLANTS

and

STANDARD BANK OF SOUTH AFRICA LIMITED
and WILLIAM P. HOLDER as EXECUTORS OF
THE ESTATE OF CHRISTOS GALANOS
Deceased. (Defendants)

RESPONDENTS

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

19 JUN 1964

25 RUSSELL SQUARE
LONDON, W.C.1.

74105

MERRIMAN WHITE & CO.,
3, King's Bench Walk,
Inner Temple,
London, E.C.4.
Solicitors for the Appellants.

LOWE & CO.,
2, Temple Gardens,
Temple,
London, E.C.4.
Solicitors for the Respondents.

IN THE PRIVY COUNCILNo.14 of 1962ON APPEALFROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBIB E T W E E N

MARIE AYOUB
 CECILE KYRIAZIS (formerly Galanos)
 ANGELA MARY HURLEY
 HENRY ANTOINE AYOUB (Plaintiffs) Appellants

and

STANDARD BANK OF SOUTH AFRICA LIMITED
 and WILLIAM P. HOLDER as EXECUTORS OF
 THE ESTATE OF CHRISTOS GALANOS
 Deceased (Defendants) Respondents

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NO.1
PLAINT

In the Supreme
Court of Kenya

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

S.C.C.C. No.1185 of 1959

No.1

Plaint
11th August 1959

MARIE AYOUB)
CECILE GALANOS)
ANGELA HURLEY)
HENRY AYOUB) ... Plaintiffs

10

versus

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS Deceased Defendants

P L A I N T

1. The Plaintiffs reside in Nairobi in the Colony of Kenya and their address for service for the purpose of this suit is c/o Sirley & Kean, Princes House, Government Road, Nairobi.

20

2. The Defendants are the Executors of Christos Galanos deceased who died on the 29th June 1957 and their address for service for the purpose of this suit is c/o Buckley Hollister & Co., Advocates, New Stanley House, Nairobi aforesaid.

30

3. By an Agreement in writing dated 12th November 1955 made between the said Christos Galanos deceased and the Plaintiffs it was agreed that in consideration of an Estate known as Cranhurst Estate Land Reference Number 7532 (hereinafter called "the Estate") being registered in the name of the said Christos Galanos deceased and of the Transfer in favour of the said Christos Galanos deceased acknowledging full payment of the purchase price for the Estate despite the fact that the said purchase price had not been paid said Christos Galanos deceased should pay to each of the Plaintiffs who were beneficially entitled to the Estate to

In the Supreme
Court of Kenya

No.1

Plaint
11th August
1959
continued

the extent of one quarter each one quarter each of a sum representing the difference between the sale price of the estate and any sums which should be due to either the said Christos Galanos deceased personally and/or to Tongoni Plantations Limited such sum to be paid within seven days of completion of a sale of the Estate. The said agreement further provided that in the event of the death of the said Christos Galanos deceased prior to a sale of the Estate the Executors of the said Christos Galanos deceased should not sell the said estate without the agreement of each of the Plaintiffs as to the price which the estate was to be sold and that the Executors of the said Christos Galanos deceased should account to the Plaintiffs in accordance with the said agreement. The Plaintiffs will crave leave at the trial to refer to the said agreement for its full tenor meaning and effect.

10

4, The said Christos Galanos died on the 29th June 1957 and Probate has been granted to the Defendants.

20

5. One Christos Dimitri Zagoritis as Lessee of the Estate and another in the year 1956 instituted proceedings against the said Christos Galanos deceased being S.C.C.C. No.99 of 1956 claiming certain relief more particularly set out in the Plaint arising out of the acts of the said Christos Galanos deceased in connection with the Estate.

30

6. The Defendants were subsequently made parties to the said suit and compromised the said suit by a settlement providing for the payment by the Defendants to the said Christos Dimitri Zagoritis of the sum of Shs.133,000/- and costs.

7. The Estate has been sold by the Defendants for the price or sum of £35,000 with the consent of the Plaintiffs.

8. The Defendants maintain that the Plaintiffs are bound by the said settlement and that all payments made by the Defendants in connection with the said settlement including the costs of the Advocates for the Defendants and the Plaintiffs in the said case are payable by the Plaintiffs and that the Defendants are entitled to

40

retain such monies out of the proceeds of the sale of the Estate.

In the Supreme
Court of Kenya

9. The Plaintiffs notified the Defendants prior to the said settlement by a letter written by the Plaintiffs' Advocates and dated 8th day of April 1957 that the Plaintiffs would not be liable for any payments to be made to the said Christos Dimitri Zagoritis under any settlement of the said case.

No.1

Plaint
11th August
1959
continued

10. The cause of action is within the jurisdiction of this Honourable Court.

WHEREFORE THE PLAINTIFFS claim a Declaration that the Defendants are not entitled to deduct any of the monies relating to the settlement of the said case or any of the costs thereof and/or in connection therewith from the said proceeds of sale and Costs of this suit.

Dated at Nairobi this 11th day of August 1959.

(Sgd.) L. KEAN.

20

SIRLEY & KEAN
ADVOCATES FOR THE PLAINTIFFS.

Filed by:
Sirley & Kean,
Advocates,
Nairobi.

No.2

WRITTEN STATEMENT OF DEFENCE

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

30

CIVIL CASE NO.1195 of 1959

MARIA AYOUB, CECILE GALANOS,
ANGELA HURLEY, HENRY AYOUB

Plaintiffs

versus

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P.HOLDER
as EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS, Deceased

Defendants

WRITTEN STATEMENT OF DEFENCE

1. Paragraphs 1, 2, 4, 5, 6, and 10 of the

No.2

Written
Statement of
Defence
8th September
1959

In the Supreme
Court of Kenya

No.2

Written
Statement of
Defence
8th September
1959
continued

Plaint are admitted.

2. The Agreement of the 12th November 1955 referred to in paragraph 3 of the Plaintiff is admitted, but no other admissions are made in respect of paragraph 3 of the Plaintiff, and the Defendants will refer to the Agreement at the trial for its meaning and effect.

3. Paragraph 7 of the Plaintiff is denied. The said Christos Galanos deceased sold Cranhurst Estate during his lifetime at the request of the Plaintiffs, and upon terms which will be proved at the said trial.

10

4. The Defendants maintain that the Plaintiffs are bound by the said settlement referred to in para.8 of the Plaintiff and that all payments made by the Defendants in connection with the said settlement including the costs of the advocates for the deceased and also the costs of the Advocates of the Defendants in connection with Cranhurst Estate generally and in connection with S.C.C.C. No.99 of 1956 in particular are properly deducted from any purchase monies which have come or are coming into the hands of the Defendants from the Purchaser of Cranhurst Estate.

20

5. The Settlement and costs referred to in para 8 of the Plaintiff were for the benefit of the Plaintiffs and each of them and the Plaintiffs agreed with the Defendants that they the Plaintiffs would be liable for any payments incidental to the said Suit including costs.

30

6. Paragraph 9 of the Plaintiff is denied, but the Defendants admit that by a letter written by the Plaintiffs' then advocate and dated the 8th day of April 1958 the Plaintiffs contended that they had not agreed that they were in any way concerned in the outcome of the proceedings between the Defendants and Mr.Zagoritis and that they were accordingly not concerned with any settlement.

7. The Defendants will contend that the Plaintiffs by their prior conduct are estopped from denying their interest in the settlement, and in the outcome of the Court proceedings referred to in the previous paragraph.

40

8. The Defendants state that there is not yet

anything due by the Defendants to the Plaintiffs or any of them, as they the Defendants have not yet received sufficient of the proceeds of the sale of Cranhurst Estate to enable them to make a payment to the Plaintiffs and there is not yet any money owing to the Plaintiffs under the said Agreement of the 12th November 1955.

In the Supreme
Court of Kenya

No.2

Written
Statement of
Defence
8th September
1959
continued

10 WHEREFORE the Defendants deny that the Plaintiffs are entitled to the declaration as prayed, and pray for the Plaintiffs' suit to be dismissed with costs.

DATED at Nairobi this 8th day of September 1959.

Sd. Denis Shaylor
BUCKLEY HOLLISTER & CO.
Advocates for the Defendants

Filed by:-

20 BUCKLEY HOLLISTER & CO.
Advocates,
New Stanley House,
York Street,
P.O.Box 481,
Nairobi.

No.3

AMENDED PLAINT

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

S.C.C.C. No.1185 of 1959

No.3

Amended Plaint
14th September
1959

30 MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB) Plaintiffs

versus

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER as
EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS Deceased) Defendants

AMENDED PLAINT

40 1. The Plaintiffs reside in Nairobi in the

In the Supreme
Court of Kenya

No.3

Amended Plaint
14th September
1959
continued

Colony of Kenya and their address for service for the purpose of this suit is c/o Sirley & Kean, Princes House, Government Road, Nairobi.

2. The Defendants are the Executors of Christos Galanos deceased who died on the 29th June 1957 and their address for service for the purpose of this suit is c/o Buckley Hollister & Co. Advocates New Stanley House, Nairobi aforesaid.

3. By an Agreement in writing dated 12th November 1955 made between the said Christos Galanos deceased and the Plaintiffs it was agreed that in consideration of an Estate known as Cranhurst Estate Land Reference Number 7532 (hereinafter called "the Estate") being registered in the name of the said Christos Galanos deceased and of the Transfer in favour of the said Christos Galanos deceased acknowledging full payment of the purchase price for the Estate despite the fact that the said purchase price had not been paid the said Christos Galanos deceased should pay to each of the Plaintiffs who were beneficially entitled to the Estate to the extent of one quarter each one quarter each of a sum representing the difference between the sale price of the estate and any sums which should be due to either the said Christos Galanos deceased personally and/or to Tongoni Plantations Limited such sum to be paid within seven days of completion of a sale of the Estate. The said Agreement further provided that in the event of the death of the said Christos Galanos deceased prior to a sale of the Estate the Executors of the said Christos Galanos deceased should not sell the said estate without the agreement of each of the Plaintiffs as to the price at which the estate was to be sold and that the Executors of the said Christos Galanos deceased should account to the Plaintiffs in accordance with the said agreement. The Plaintiffs will crave leave at the trial to refer to the said agreement for its full tenor meaning and effect.

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40

4. The said Christos Galanos died on the 29th June 1957 and Probate has been granted to the Defendants.

5. One Christos Dimitri Zagoritis as Lessee of the Estate and another in the year 1956 instituted

proceedings against the said Christos Galanos deceased being S.C.C.C. No.99 of 1956 claiming certain relief more particularly set out in the Plaint arising out of the acts of the said Christos Galanos deceased in connection with the Estate.

In the Supreme
Court of Kenya

No.3

Amended Plaint
14th September
1959
continued

10 6. The Defendants were subsequently made parties to the said suit and compromised the said suit by a settlement providing for the payment by the Defendants to the said Christos Dimitri Zagoritis of the sum of Shs. 133,000/- and costs.

7. The Estate has been sold by the said Christos Galanos deceased for the price or sum of £35,000.

20 8. The Defendants maintain that the Plaintiffs are bound by the said settlement and that all payments made by the Defendants in connection with the said settlement including the costs of the Advocates for the Defendants and the Plaintiffs in the said case are payable by the Plaintiffs and that the Defendants are entitled to retain such monies out of the proceeds of the sale of the Estate.

30 9. The Plaintiffs notified the Defendants prior to the said settlement by a letter written by the Plaintiffs' advocates and dated 8th day of April 1958 that the Plaintiffs would not be liable for any payments to be made to the said Christos Dimitri Zagoritis under any settlement of the said case.

10. The cause of action is within the jurisdiction of this Honourable Court.

WHEREFORE THE PLAINTIFFS claim a Declaration that the Defendants are not entitled to deduct any of the monies relating to the settlement of the said case or any of the costs thereof and/or in connection therewith from the said proceeds of sale and Costs of this Suit.

In the Supreme
Court of Kenya

August, 1959.

No.3

Amended Plaint
14th September
1959
continued

Amended this 14th day of September,
1959.

(Sgd.) L.KEAN

SIRLEY & KEAN
ADVOCATES FOR THE PLAINTIFFS.

Filed by:
Sirley & Kean,
Advocates,
Nairobi.

10

To be served on:
Messrs.Buckley,Hollister & Co.,
Advocates,
New Stanley House,
York Street,
Nairobi.

No.4

Court Notes
26th August
1959 to
25th November
1959

No.4

COURT NOTES

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

CIVIL CASE No.1185 of 1959

20

1. MARIE AYOUB
2. CECILE GALANOS
3. ANGELA HURLEY
4. HENRY AYOUB ... Plaintiffs

versus

STANDARD BANK OF SOUTH AFRICA
LIMITED

and

WILLIAM P.HOLDER as EXECUTOR
of the Estate of CHRISTOS
GALANOS Deceased ...

Defendants

30

26.8.59

Defendants appeared by M/s Buckley, Hollister
and Co., Advocates, Nairobi.

G. Waddell.
Dy.Reg.

8.9.59.

Defence filed by M/s Buckley, Hollister and Co.,
Advocates, Nairobi.

In the Supreme
Court of Kenya

No.4

G. Waddell.
Dy.Reg.

Court Notes
26th August
1959 to
25th November
1959
continued

14.9.59

Amended Plaint filed by M/s Sirley and Kean,
Advocates, Nairobi.

G.Waddell
Dy.Reg.

10

20.10.59

Mrs.Kean, Varia.

By consent, hearing fixed for 25th and 26th
November, Parties agreed this is a 1½ day
case.

P. Heim
Dy.Reg.

17.11.59

Upon the application of counsel for the
Defendants:

20

Order: Case to be listed before Miles J. (1st
on list) for 25.11.59.

P. Heim
Dy.Reg.

25.11.59

Mrs.Kean for Plaintiffs.

O'Donovan Q.C. and Shaylor for Defendants.

Kean: I have been notified by letter yesterday
that a preliminary objection will be taken that
plaint discloses no cause of action. Defence
raises no point of law to this effect. I cannot
agree to any point of law being taken as a pre-
liminary point. I am informed matter will be
taken further. Plaintiffs will be prejudiced.
They are entitled to money if deduction not

30

In the Supreme
Court of Kenya

No.4

Court Notes
26th August
1959 to
25th November
1959
continued

allowed. Order 17, rule 1. Not as preliminary point. Order VI rule 27 raised by pleading. Does not apply nor does rule 28. Not necessary to show cause of action when you sue for declaration. Jurisdiction is discretionary. Court should not give ruling without going into circumstances.

Hanson v Ratcliffe U.C. (1922) 2 Ch.490, 507.

Order 25, rule 5 English Rules. Our Order II, rule 7. Not confined to cases where Plaintiff has complete cause of action apart from rules. Court will have to determine what issues arise and go into issues to determine circumstances.

10

Stevenson Blake and Co. v. Grant 86 L.J. Ch.439, J. 440. Order XIV. Court is seized with matter at large. Defence contains admissions. Defence filed. Order VI rule 29 - striking out. Defendant should begin under Order XVII rule 1. Court should not exercise discretion to allow this to be argued as preliminary point. Allegations of fact are admitted. Onus of proof of estoppel also of agreement in para.5 and that plaintiff trust is on defendant.

20

O'Donovan: Only merit in Plaintiff's argument is its complete novelty. Not entitled to notice; pleadings do not have to raise points of law. Cases only decide that where some issues of fact and some of law - legal issues would be singled out. Plea in bar can be taken outset. This is stage to hear objection. Legal right must be estopped, and a cause of action must be shown. A declaration can be sought on future right although no cause of action not yet accrued.

30

(1) Must be shown that Plaintiff entitled to relief in fullest sense of word.

Assuming all averments in plaint accepted at face value Plaintiff not entitled to relief.

Ruling. In my opinion a Defendant is always entitled to raise a preliminary objection that the plaint does not disclose a cause of action. It is not necessary to plead this although it is sometimes done. Stevenson Blake and Co. v.

40

Grant, 86, L.J. Ch. 439, only decides that where there are issues of fact and law it is undesirable to single out the legal issues for preliminary determination. Here the Defendants say that even if all the averments of fact in the plaint are accepted they do not show a right to the relief claimed. The provisions of Order XVII rule 1 may be applicable in certain cases but they do not preclude a defendant from raising a preliminary objection of this nature. I rule accordingly that the Defendants may raise the preliminary objection that the plaint discloses no cause of action.

In the Supreme
Court of Kenya

No.4

Court Notes
26th August
1959 to
25th November
1959
continued

B.R. Miles, J.

O'Donovan Q.C. - Order VII rule (1) (e) -
plaint must disclose facts constituting cause
of action. All existing grounds must be shown.
Mulla Vol.1, page 606, 10th edn. 555.
Chitale Order VII, rule 1.

20 Discretion to make declaration but Plaintiff
must plead facts on which prima facie entitled
to declaration. Paras, 3, 15, 8 and 9 of
Plaint.

Para.3, 5, 6, 8, 9. Impossible to tell whether
Plaintiff entitled to declaration without know-
ing much more of circumstances.

2 issues arise on plaint -

- (1) are payments mentioned in para.6 and 8
sums of money due to deceased or Tongoni
Plantations Limited;
- 30 (2) apart from express provisions of agreement
is there any right implied by law on part
of Defendant to deduct sums.

40 To answer (1) it is necessary to know what sums will
be due to deceased or Tongoni under the agreement,
from whom they become due and for what consideration.
Para.3 of plaint vouchsafes no information on these
points. Claim is unrelated to any existing circum-
stances and not capable of construction. Do they
include amounts due prior to agreement or expenses
of management?

Implications of para.3 in law.

1. Pleaded that Plaintiffs are beneficial owners of

In the Supreme
Court of Kenya

No.4

Court Notes
26th August
1959 to
25th November
1959
continued

estate. Therefore deceased was trustee. Resulting trust. Therefore Defendants are Trustees. Trustees Ordinance, Cap.36, Sec.2. Whatever other sums might be due to deceased or company would include sums due to deceased as trustee of estate unless expenditure in breach of trust or not acting sensibly or reasonably. If no trust, plaint is in still worse shape. One would not know what position of deceased was. Was it contractual?

10

Para.5 of Plaint - acts of deceased as trustee not excluded - "certain relief". Plaint in other case a private document, Sec.74 Evidence Act. Eventual facts would be such that Defendants had no right to deduct payments. If this is trust this could only arise if deceased or representatives have acted in breach of trust. All para.5 says certain acts complained of or whether in breach of trust or contract. Claim might be frivolous by Zagoritis or acts of deceased might be within his duty as trustee. Not alleged acts of deceased were breach of trust or settlement was breach of trust. If deceased acted wrongfully to Zagoritis or in breach of trust it might be settlement perfectly proper and liability rightly fell on estate. If acts of deceased were proper and not unlawful settlement might be a breach of trust. Acts may be unlawful and if settlement payment excessive but Plaint does not say what position is.

20

30

Para.8 - only shows disagreement. Facts do not show who is right.

Para.9 - irrelevant. Either sums reasonable at law or in equity. Fact of letter does not make them irrecoverable if they are recoverable. Do not say why they are irrecoverable. Not alleged Defendants told not to settle or settle on certain terms. Merely told not acceptable. Only way for Plaintiff to succeed would be by pleading specific acts of Defendants or which were wrongful or amounted to breach of trust. Order VI r.2.

40

Kean: I make no allegation of trusteeship or breach of trust.

O'Donovan: If no trust have we committed a

breach of contract? What have we done wrong? Trustee entitled to indemnity. Sec.31(2) Trustees Ordinance. Sec.16 form to compromise claims Sec.59 - what amounts could contractually be retained? Clear averment of facts showing right to legal declaration must be made.

Kean: Whole of O'Donovan's argument based on misapprehension of purpose of proceedings.

In the Supreme
Court of Kenya

No.4

Court Notes
26th August
1959 to
25th November
1959
continued

- 10 1. Declaration must be based and made against a person who has claimed a specific right. Only point at issue is that we say we are entitled to proceeds of estate less amount due to Defendant or Galanos. Only point of dispute is that Defendants claim to be entitled to deduct settlement from proceeds of sale of estate. Plaintiff's claim not based on relationship of trust between Plaintiff and Defendant as to management. The agreement and plaint para.3 -
- 20 full terms will be referred to. That agreement only an agreement to pay certain monies. It amounted to a debt due, payable within 7 days of completion of sale. Plaintiff's case is that Galanos agreed to pay us sale price of estate. Estate has been sold. We are therefore entitled to purchase price as far as received. At date of plaint no statement of account but this promised - therefore no claim for an account. Account was later furnished.
- 30 Position in declaration is what is claim against other side. No claim to deduct amount under agreement. This was an agreement between A and B to pay proceeds of sale less any amounts due to B at date of agreement. Other party claims to be entitled to deduct something from those monies. For him to prove this. If money received action could have been for those monies. Not for Plaintiff to show Defendant not entitled to deduct monies. Only necessary to plead specific claim put forward by Defendants.
- 40 Odgers: Pleading and Practice, 373/4. Defence raises matters on which onus is on them. Material facts here are that the Plaintiffs are entitled under agreement to a certain sum of money. Not action for breach of trust. It will be for Defendants to prove that they are entitled to make a deduction from the sale price. Amounts due mean those due at date of agreement.

In the Supreme
Court of Kenya

No.4

Court Notes
26th August
1959 to
25th November
1959
continued

O'Donovan: Case as put by Kean not case pleaded. Debt if so limited could not exclude act of settlement, could not be deducted. "Should be due": she has said the contrary. Argument ignores Order VII. Preamble 61 cited in Edgers not applicable here. Court bound on construction of facts in plaint prima facie Defendants are entitled to deduct those monies. Court bound to read in para.3 of plaint a resulting trust. Underhill: p.171, 10th edition. Here is claim that trustees be personally responsible for payments in which indemnity should be given unless contrary shown. Defendants must have right to deduct on own showing of Plaintiff. Halsbury Vol.33, para.528, 2nd edn: Trustee presumed to have dealt properly. Prima facie Defendants are entitled to an indemnity.

10

Alternatively - Plaintiff says no trust. Merely commercial contractual obligation to pay over a certain sum less specific deduction. Nothing on plaint to indicate whether expenses of settlement are proper deduction or not. She says not proper because after agreement whether under agreement only sums deductible are sums due at date of agreement. Not what is pleaded.

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Adjourned to 2.15 p.m.

2.15 p.m.

Court: In my opinion it cannot be said that the plaint does not disclose a reasonable cause of action. I overrule the preliminary objection and will give reasons in my judgment if necessary.

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B.R.Miles, J.

Agreed bundle of correspondence put in as Exhibit 1.

O'Donovan: Estoppel is not being pursued with. Nor Agreement. Case will be that this is a resulting trust. I suggest :-

- (1) whether Defendants are Trustees;
- (2) if not, what is effect of agreement dated 12.11.55? Are Defendants entitled to deduct expenses thereunder.

40

Kean: Nothing in defence to suggest that Defendants settled case as Trustees. Defendants must show they are entitled to deduct on some ground. Correspondence all along alleged agreement and estoppel.

In the Supreme
Court of Kenya

No.4

I frame issues as follows:-

Court Notes
26th August
1959 to
25th November
1959
continued

10

(1) Whether the Defendants are trustees and entitled in that capacity to deduct the sums involved in the settlement of Court case No.99 of 1956.

(2) If not whether they are entitled to deduct the said sums under the agreement of 12th November, 1955.

O'Donovan: I submit person who claims declaration should begin. It is discretionary remedy.

Kean: I will begin.

Kean opens. Reads agreement of 12.11.55. Para.3 of agreement. £11,000 due at date of agreement.

20 Agreement of Sale, 5th March, 1957.

(Copy put in by consent as Exhibit 2).

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Plaintiff's case that this is an agreement drawn by Mr. Allin of Shapley Barrett and Allin. Endorsement. Parties took advice of Mr. Allin. Transaction put through by legal transfer to Galanos who became legal owner. Only rights of Plaintiff were not against estate but to be creditors of Galanos. Para.2 of agreement. Agreement negatives implication of trust which would otherwise have arisen. Resulting trust based on presumed intention. Presumption that something not done illegally. Here an express agreement. Court is entitled to look at circumstances. Sec.92 Indian Evidence Act, Recital 3.

Date of settlement not within our knowledge.

(I agreed that this is 15th August, 1958).

(1) Agreement relation of debtor and creditor.

(2) At no time was amount paid - a debt due to

In the Supreme
Court of Kenya

No.4

Court Notes
26th August
1959 to
25th November
1959
continued

Galanos or Tongoni Plantations. Effective date 7 days after completion of sale. I did not come prepared to argue case on basis of trustee. I ask for adjournment. This may shorten case.

No objection by O'Donovan.

Adjourned to 26.11.59.

B.R.Miles, J.

26.11.59.

O'Donovan Q.C. - I ask leave to interpose evidence of a witness who has to return to Tanga.

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Mrs. Kean agrees.

Ex.'A' Transfer dated 11.11.55 from Hurley to Galanos
Ex. 3 put in by consent as Exhibit 'A', also letter to
deceased and Plaintiff of 18.1.57 as Exhibit 3.

Defendant's
Evidence

No.5

William Peter
Holder
26th November
1959
Examination

DEFENDANT'S EVIDENCE

No.5

WILLIAM PETER HOLDER

D.W.1. - WILLIAM PETER HOLDER, Christian, sworn:

Examined O'Donovan. I am an advocate of this Court and Tanganyika High Court. I am one of the Defendants and an executor of the estate of Christos Galanos, deceased, in regard to his affairs in Tanganyika and occasionally in regard to his Kenya affairs. I recollect seeing him. I would not be certain - about 1955. I think it was in the early part of 1956. He had only just taken possession of this Cranhurst Estate. I went up to the estate. Mr. Galanos and his wife and Mr. Ayoub were there and the manager, Mr. Giattas. I remember Mrs. Ayoub referring to the condition of the estate, saying that the lessee had allowed the estate to become overgrown with couch grass. The lessee was a Mr. Zagoritis. She said the estate generally was in a wretched condition or words to that effect. She gave me to understand that she was very dissatisfied with the situation, the estate having got into

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that condition. I knew that the estate was registered in Galanos' name but what the arrangements were between Mr. Galanos and the Ayoub family I did not know. Mr. Ayoub did most of the talking. Mr. and Mrs. Galanos left first when I left. Mrs. Ayoub was still there. She helped me in taking an inventory of the goods in one of the rooms. I remember a door being forced. I think Mrs. Ayoub was relying on me as to whether a door should be forced. I advised her to use force in entering a room after a police officer arrived. Galanos was not there. My advice was followed. I went to Athens in June 1957. I returned on 16th July. The following day Mrs. Galanos telephoned me. I went to see her at her home, Mrs. Ayoub was present. I remember Mrs. Ayoub talking about Cranhurst estate and an interview at which she was present with Mrs. Galanos. Mrs. Ayoub referred to unsatisfactory advice which had been given to them by an advocate, Mr. Allin, i.e. herself and Galanos. I gathered the advice was that Galanos had the right to enter on Cranhurst estate and to take possession from the lessee. This was a propos a case filed by Zagoritis against Galanos for wrongful dispossession. Mrs. Ayoub certainly was dissatisfied with wrong advice which she said Mr. Allin had given them. Mr. Fulbrook the Trust Officer of the Standard Bank met me and Mr. and Mrs. Ayoub. Mr. Henry brought his son. The meeting took place on 23rd July 1957. I made notes in my diary of that interview. I later completed a memorandum: (Exhibit 1). I prepared this document based on my notes. It accurately reflects what did take place at the meeting. I know of my own knowledge that the bank sent a copy to Mr. Ayoub. I have seen a copy of the letter written by the Trust Officer to Mr. Ayoub (1st letter page 1,). That is the letter. I met Mr. H. Ayoub on August 8th at 3 p.m. at the Bank's offices. Mrs. Ayoub, her son Henry, Mr. Fulbrook and myself were present.

Meeting 23.7.57. - Memorandum. I prepared this memorandum and gave it to Mr. Fulbrook to consider. I cannot say whether this is completely the memorandum as I prepared it. I am not in a position to say how the words "without interest" were added.

On 8th August Mr. Ayoub said that he and Mrs. Ayoub were representing the other two members of the

In the Supreme
Court of Kenya

Defendant's
Evidence

No.5

William Peter
Holder
26th November
1959
Examination
continued

In the Supreme
Court of Kenya

Defendant's
Evidence

No.5

William Peter
Holder
26th November
1959
Examination
continued

family. Mr. Fulbrook showed them the offer of settlement Zagoritis had made. The sum was Shs.133,000 approximately. I am not sure whether that was the figure at that time. They declined the offer rather emphatically. They said they would not settle on any basis except a payment by Zagoritis of £1000. There was a counterclaim against him. After further discussion Mr. Ayoub said we could wash out that decision about the £1000 and would see Mr. Allin and get his views and then see us again. He took a copy of the memorandum of the previous visit. Mr. Ayoub also took away the formal writing prepared by Mr. Fulbrook. This was a form of acquittance I am not sure what it was. Mr. Ayoub said he would consult the other two members of the family before signing the document. Later I had a note from Mr. O'Beirne that the Ayoub family dis-associated itself from the settlement with Zagoritis: (letter 8.4.57). We settled the case without referring to the Ayoub family. We had obtained an opinion from Mr. Clive Salter and from Mr. Shaylor. We acted in settling on Mr. Shaylor's advice. One of the issues in that case was whether Zagoritis had committed waste. I regarded Galanos as a relevant witness on that. Had he not died he would have been called as a witness. Mr. Hurley never to my knowledge went back to the estate after Galanos took possession. At the time I took the view that there had been a wrongful entry on the part of Galanos and that Zagoritis had a claim against Mr. Galanos. I acted bona fide in the settlement and tried to protect the interest of everybody.

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Cross-
examination

Cross-examined Kean: I maintain that this is an expense which should legitimately be borne by the Ayoub family. I would have to refer to the agreement. This provides for expenses. Claims 3, 4. In my view Mr. Galanos was acting as trustee and if he had himself settled the claim of Zagoritis bona fide that would be a "sum due" by the Ayoub family to Mr. Galanos. I always took that view as it was very serious. I have a note of a meeting with Mr. Shaylor on 25.7.57. I cannot say whether I ever put this memo on record vis a vis the Plaintiffs without making some researches.

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On 23rd July, 1957, I had come to the conclusion that Mr. Galanos was a trustee. If any money

had been received it would be for the benefit of the beneficiaries under the terms of the agreement. We would have had to pay it to the beneficiaries.

Letter 14.3.58. I was giving Mr. Shaylor instructions. That agreement was reached. I normally make my rough notes immediately after the interview. I remember they agreed. The executors agreed.

In the Supreme
Court of Kenya

Defendant's
Evidence

No.5

William Peter
Holder
26th November
1959
Cross-
examination
continued

10 Minutes, para.3. It was not a personal agreement. This interview took place a few years ago. The meeting of 23rd July - I have a note of a meeting on 20th July with Mr. Fulbrook. I believe it was Mr. Fulbrook who arranged the meeting. We had only just taken over as executors. It was for the purpose of discussion. I contend that there is a debt due to Mr. Galanos. This is an expense incurred by a trustee on behalf of the beneficiaries and is a debt due by

20 the beneficiaries. I was aware that Mr. Galanos had lent money to Mr. Zagoritis on the security of the coffee crop on Clovelly Estate. I think the correct version is this: Mr. Galanos gave Zagoritis £14,000 without any security. I remember telling Mr. Galanos that I was a trustee in a settlement which he had made in his lifetime and that I could not close my eyes to his giving such a large sum as this without security. He left for Greece the same day as the money was

30 given to Zagoritis. I followed up the question of security and got the security on the Clovelly crop. Mr. Galanos told me that some of the coffee was disappearing from Clovelly estate. I was concerned about this. I had heard a rumour that some of the property was being taken to Cranhurst. I went out to Cranhurst. I was a partner in Archer and Wilcock. It was quite a considerable time I should say before the re-entry. I did see some coffee in a shed. I think there were 28

40 bags. Nothing was done. I did not know if it was Cranhurst or Clovelly coffee. I did not ask Zagoritis to return the coffee. I have no recollection of discussing this with Zagoritis. I don't know the tonnage of coffee at Clovelly. It might quite well have been 60 tons. I should say Clovelly is an estate which would produce that. The money would have gone to Galanos direct. The final amount was paid to our firm.

In the Supreme
Court of Kenya

O'Donovan: I object to this. In re Wrightson
(1908) 1 Ch. 789, 798.

Defendant's
Evidence

No.5

William Peter
Holder
26th November
1959
Cross-
examination
continued

Q. Is it practice where no breach of contract
alleged, to conduct roving inquiry as to whether
deceased acted rightly or wrongly?

Kean: No question of breach of trust. Defence
para.4. Defendants must prove in law those
expenses are chargeable. Evidence has been led
on this.

I note that this evidence is admissable in view
of para.4 of Defence (but not on the question
as to whether this is a breach of trust. It is
relevant to the question whether under the
agreement if there is no breach the sum was
chargeable under the agreement).

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A. I would not say I was completely definite
but it was not a reason which at any time was
given to me that he had entered on the estate
to seize the Clovelly crop. I have no recollec-
tion of Mr. Galanos looking at the harvested
crop or the estate. He did not in my presence.
It is very possible that the arrear of rent was
one of the reasons for the re-entry. It is pos-
sible there were penalty arrangements between
Galanos and the Ayoub family for which there
were no documents. I interpret the situation
that when Mr. Galanos entered under the agree-
ment I knew nothing about this agreement until
later. I knew there was an arrangement be-
tween Galanos and the Ayoub family. Just what
it was I did not know.

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Q. The Ayoub family were claiming £1000 rent
due before the transfer, do you agree that
there was a conflict of interest?

A. I don't know that the premiums are right.
The £1000 - have no direct knowledge of. I
do not relate that £1000 with the £1000 refer-
red to in my diary.

I have assisted the Ayoub family in this
respect. The agreement mentions the specific
sum of £11,000 as owing to Galanos. Whether
he had given them this amount I don't know but
as managing director of Tongoni Plantations

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Limited I have access to their books. I have not debited them with the full £11,000. I have given the benefit of the doubt. I have no knowledge of any other dispute. I don't know that Galanos had personally gone over the estate, I believe experts had investigated the condition of the estate. Mr. Ayoub certainly represented the other members of the family at the interview for the purpose of discussion.

10 How far he had authority to bind the other members of the family I would not like to say. I would say he probably had not full authority to bind them afterwards. The questions were put to him spontaneously.

Minutes - Note (a). The £11,000 was an estimate Para.1 - it might have been Fulbrook or I who explained the purpose of the meeting. I had in mind dealings with the Cranhurst matters only. This was for preparing the inventory.

20

Re-examined: I don't know if Zagoritis after dispossession was permitted to remove all the coffee.

As far as I am concerned the accounts are agreed apart from the Zagoritis case. I believe there have been proper credit for income. To the best of my knowledge they have been debited with all expenses prior to this sale. So far as I know the Plaintiffs have accepted this.

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O'Donovan: Either Galanos is beneficial owner who can do what he liked or he is trustee. Issue is very narrow.

Kean: If it is conceded that if no trust, I must concede there is little between us.

O'Donovan: If he is liable to account for profits he is entitled to be indemnified. He must be trustee. In construing phrase "which shall be due" Court may look at evidence.

40 Adjourned to 2.15 p.m.

2.15 p.m.

In the Supreme Court of Kenya

Defendant's Evidence

No.5

William Peter Holder
26th November 1959
Cross-examination continued

Re-examination

In the Supreme
Court of Kenya

No.6

COURT NOTES

No.6

Court Notes
26th November
1959

Mrs. Kean: Now agreed that only point for decision is whether the agreement of 12.11.55 taken with the transfer constitutes a trust, i.e. whether Galanos deceased was a trustee of the estate. If he did hold as trustee it is agreed that the Plaintiffs are not entitled to the declaration. If he did not hold as Trustee it is agreed that Plaintiffs are entitled to the declaration. I submit agreement is unambiguous and must be construed without reference to any extrinsic circumstances such as the conduct of the parties. As it was agreed that Holder's evidence should be taken de bene esse, it is agreed that my evidence should also be taken de bene esse subject to legal argument.

10

O'Donovan: I agree.

Court: Would it not be desirable for me to rule at this stage?

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Mrs. Kean: I agree.

O'Donovan: I agree provided it is open to me to challenge on ruling later.

Court: This ruling will certainly be open to challenge by either party as a ground of appeal.

O'Donovan: I submit evidence is admissible.

(1) Consideration. Extraneous evidence always admissible to controvert formal document.

(2) Evidence of circumstances in which formal document executed admissible to explain document but not to contradict or vary it.

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(3) This document contains one phrase "relating to deduction of sums which shall be due" which is an ambiguity which might be resolved by evidence of surrounding circumstances and as to how far they themselves interpreted it.

Sec.92 Indian Evidence Act.

Section 93 Patent ambiguity not explicable. I submit there is a latent ambiguity.

In the Supreme
Court of Kenya

Woodroffe 9th edition 683 - "words to which a reasonable meaning may be attached".

No.6

Kean: (1) Consideration. Not the point at which we differ.

Court Notes
26th November
1959
continued

(2) Court has to construe agreement.

10

"Sums which shall be due" - Court no longer called on to decide what sums due. No dispute as to accounts. Phrase has nothing to do with relationship between parties. In plain words no ambiguity. Agreement provided for payment of sum of money. Nothing in agreement creates rights or liabilities. Nothing to show "sums due" in respect of Cranhurst Estate. Court not called on to decide what sums due. Legal position is that evidence of surrounding circumstances not admissible if no ambiguity.

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Lazar v. Choitram, Court of Appeal 83/58.
Section 94.

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O'Donovan: If there were any equitable obligations on part of deceased which Plaintiffs could enforce in respect of the estate there is automatically a trust. If he was entitled to deduct expenses of management and to account for proceeds of sale Court need go no further. This means he was a trustee. Words "which shall be due" deliberately chosen so as to include any adjustment on original debt of Shs. 11,000 which had to be made by reason of receipt of income and expenditure on outgoings. It would have been simple if they were intended to refer only to original debt without increasing or diminishing it - "to deduct debt". The words by themselves unrelated to circumstances could conceivably apply to a large

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of debts. Court is entitled to look at circumstances and subsequent conduct. In agreeing accounts Plaintiffs have been debited with expenses and credited with proceeds. As soon as Court decides the words include management expenses that is end of argument. Balance to be struck at stage when sale completed. No transfer to Purchaser yet. Liability would arise on 18.1.56 when cause of action accrued.

In the Supreme
Court of Kenya

No.6

Court Notes
26th November
1959
continued

Ruling. In my opinion there is a latent ambiguity in the words "any sums which shall be due" within the meaning of section 93 of the Indian Evidence Act. The construction of this phrase is necessary in order to decide whether there is a trust. I rule that extrinsic evidence of facts which would show the meaning is admissible.

Plaintiffs
Evidence

PLAINTIFFS EVIDENCE

No.7

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No.7

CECILE KYRIAZIS

Cecile Kyriazis
26th November
1959
Examination

P.W.1. CECILE KYRIAZIS - Christian, sworn:

Examined Kean. I was formerly the wife of Christos Galanos, deceased. I am now married. This agreement of 12.11.55 was drawn up by Mr. Allin. He was acting for Mr. Galanos. I had no separate legal representative nor other members of my family. The only means my mother had previous to the sale was the coffee farm. Having sold the estate to my husband she was completely without means. He decided that in order to help her and provided she agreed to assume the cost of running the farm the crop would be hers. This arrangement was made after the sale when my husband bought the farm. I don't think the phrase was meant to say that Mr. Galanos was entitled to deduct running expenses. It was meant to include only the money which we owed him at the time of the sale - the £11,000/-. We had never seen accounts. After 12th November my husband took all decisions with regard to running of the estate. Henry Ayoub is my brother. (Minutes of meeting) - I did not agree at all with my brother that we would bear the expenses. I expressed my view to Mr. Fulbrook. My husband did not take our views when he wanted to sell. He only told us what the price would be.

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Cross-
examination

Cross-examined O'Donovan: My husband was a multi-millionaire. The Ayoub family had the farm - that is all. We did not intend to make a gift to my millionaire husband at all. We owed him a certain sum. It was as if he had paid us

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money. Certainly we did not intend to give my husband the use of the estate as long as he liked to keep it. The estate was the property of the Ayoub family. It was registered in the name of my brother-in-law. I don't know why we wanted to get rid of Mr. Hurley. I don't know where he is now. I don't know if he is still my brother-in-law. My sister and brother-in-law are in England. Mr. Hurley was not a trustee. He was proprietor. It was our Estate but he was proprietor. When Galanos took over the estate it was his. We made a business arrangement. We trusted my husband as a business man to sell the estate for us. We trusted him to manage it properly. He knew about these things. It was his. He did what he wanted. We owed him money. I am not being

10 The arrangement with my mother was not written, it was verbal. I don't remember when it was made. I was present. My brother was in England. My mother, my husband and I were present. I think it was after he re-entered. I consulted Mr. O'Beirne. I told him of this arrangement. The arrangement was that my mother for one year - 1956 - was to receive the proceeds of the coffee crop on condition that she assumed the expenses of producing the coffee. My brother was in England. She had no means. I only saw my brother when my husband died. I

20 only told my brother of this after he had seen the Trust Officer and we discussed the matter. The expenditure might have been more than the proceeds. That is the way he tried to help. We have seen no accounts. I did not see accounts for myself. I haven't notified the banks that the accounts were wrong. My mother represented the whole family. We have never had accounts separate. On 23rd July 1957 my brother did not know of this arrangement. Why should I tell Mr. Fulbrook? Why should he be concerned? I did

30 not tell Mr. Holder. Why should I tell him?

40

Re-examined: When we entered into this agreement it was a legal agreement. There was no other legal agreement. I knew it was wrong for him to hold the estate as trustee. I mean Mr. Galanos.

Close of case for Plaintiff.

In the Supreme
Court of Kenya

Plaintiffs
Evidence

No.7

Cecile Kyriazis
26th November
1959
Cross-
examination
continued

Re-examination

In the Supreme
Court of Kenya

No.8

COURT NOTES

No.8

Court Notes
26th November
1959

O'Donovan: Case for Plaintiff stands or falls on the construction that the words "which shall be due" are limited to the aforesaid debt of £11,000. Does violence to language. Tense is wrong if it relates to an ascertained amount already due and recited in the agreement.

Recital 3 - Conveyance would have said "afore-said debt" because if Kean's argument is that it can't be increased or decreased even by interest. I almost say there is no ambiguity.

10

1. It is known by the transfer Galanos became registered proprietor from Hurley.

2. We know Hurley was a trustee from recital 1 in agreement. Rent claimed under a lease by Hurley to Zagoritis.

Recital 2 - £15,000 in transfer is a pure fiction. Not paid. Never becomes due. Debt of £11,000 not set off against purchase price. It has to be deducted when sale effected. It remains a debit subject to any adjustment arising out of management. Deceased did not release any part of £11,000. Deceased takes transfer, without paying a penny, from a trustee. Agreement reveals full knowledge of equities outstanding against title. Even if he did not know of equities he is bound as volunteer, therefore he must take as a trustee. No presumption of advancement in favour of Galanos, therefore there is a resulting trust unless parties make it plain in agreement that there is to be no resulting trust. It arises from law from circumstances of payment and fact that transferor was a trustee. All parties say is, Galanos took estate for nothing. We are beneficial owners, we owe £11,000. He will adjust his accounts between us when estate is sold. Nothing inconsistent with resulting trust. Galanos may become a beneficiary to some extent. Debt remains alive. If Galanos sold estate for £1000 the debt will still be due to him. Clear that parties accepted that position.

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(a) Interview on 23.7.57 - Henry Ayoub admits Plaintiffs liable for expenditure and entitled to profits.

In the Supreme
Court of Kenya

No.8

Court Notes
26th November
1959
continued

(b) Letter of Mr. O'Beirne 8.4.58. He is saying that because deceased acting not as trustee should act, he is personally liable. Arrangement alleged altered basis on which accounts drawn up. Letter 9th April correctly construes agreement. Original amount adjusted by crediting receipts and debiting outgoings. Letter 20th March, 1959. No mention of agreement with Mr. Ayoub.
Letter 28.4.59 - "My clients' property".
Letter 1st May - "Volte face" in letter 24.6.59.

1. Hurley being trustee this was a trust.
2. No payment.
3. Notice of outstanding equities.
4. No exclusion of resulting trust in agreement. Financial arrangement consistent with continuing trust. Any other construction leads to remarkable result.

(a) Bad drafting.

(b) Family in financial difficulties, gave up beneficial interest to make a present to a multi-millionaire to keep as long as he liked and to make what profits he liked. No obligation to manage estate. No court could interfere if he uprooted all the coffee. He could lease at peppercorn rent to Tongoni Plantations or other company.

(c) He could keep estate without selling.

Obvious embarrassment about using word "trust". This vague phrase "sums which shall be due" used. Concealment difficult. Illegality - Defendants do not raise any defence of illegality. Unbecoming a bank and advocates to do so. Defendants were assured by Allin that interest of Ayoub family disclosed to Land Control Board. They accept this assurance here at cost of adverse finding. Illegality would be in obtaining consent of Land Control Board to transfer what is fictitious. We would be deprived of costs. P.Rs. in pari delicto with deceased.

In the Supreme
Court of Kenya

Nothing on record to show obvious illegality.
I call no evidence.

No.8

Letter 30.9.57 and 18.11.57.

Court Notes
26th November
1959
continued

(2) Not admitted as received. It is admitted
they were posted.

Adjourned to 27.11.59.

B.R.Miles, J.

27th November
1959

27.11.59.

Mrs. Kean: I ask leave to correct para.3 of
plaint by substituting "had been" for "were
beneficially entitled".

10

No objection by O'Donovan.

Order: Amendment as prayed.

Mrs. Kean: I apply for issues to be changed
and defence properly amended. The case for
Plaintiffs was never that the relationship of
trusteeship existed. Defence was agreement
and estoppel. Basis of trial completely chang-
ed. I may have injured my case. If defence
had been that they were entitled as trustees to
make the deductions they would have to show
they acted reasonably. Order VI rule (2).

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Court still has power under Order XIV rule 5(1)
to amend issues. I ask issues to be struck
out and for pleadings to be amended.

O'Donovan Q.C. Mrs. Kean and I reached agree-
ment yesterday that if defendants were trustees
the action failed and if it were not the action
succeeded. I do not release my friend from
that agreement - not unfair. This is an agree-
ment on what are certain automatic consequences.

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Order XIV rule (1)(5). Examination of parties
or advocates. Trust is not a legal but an
equitable relationship. Construction of agree-
ment of 12.11.55 is one which does arise on
pleadings. It would have been sufficient if
only second issue framed. My case is that under
that agreement the expense was deductible because
defendants were trustees. Defence does expressly

In the Supreme
Court of Kenya

No.8

Court Notes
27th November
1959
continued

raise issue as to meaning of agreement. Far too late to resile from a position in which Mrs. Kean fully concurred. She is driven to meeting argument that plaint disclosed no cause of action. Any act by a trustee falling short of standard required is a breach of trust. Order VI rule 2 - nobody can raise breach of trust unless pleaded. Para.528 - Halsbury Vol.33. Plaintiff cannot raise into further issue. Trial should not be as to whether trustees have acted properly. Case has proceeded on only issue relevant on pleadings.

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Kean: I do not want to address Court further. Agreement was on basis of first two issues to which I objected.

Court: In my view on the pleadings the issue as to the construction of the agreement of 12.11.55 is clearly raised. The only issue which arises in this case is whether the agreement creates the relationship of trustee and cestui que trust. I see no necessity for amending the issues.

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Kean: 1. It is submitted by Defendant that this is a voluntary transfer and therefore a resulting trust unless excluded by parties I submit transaction, transfer and agreement is in fact a sale for consideration. Payment is postponed.

Sale defined Sec.56 Indian Transfer of Property Act.

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Object was to make agreement not contrary to Land Control Ordinance. What was approved was prior interest of Ayoub family. Allin could have drawn a proper trust deed. Under agreement only legal right was to receive money and amount and time payable fixed. If this a trust instrument Galanos could keep not only estate but proceeds of sale. If trust it is illegal. Ayoub would not enforce an illegal trust. Ayoub prepared to trust Galanos but not in any legally binding arrangement.

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Civ. Appeal 78/56 - Sargent v. Tisdale-Jones p.4p.20. Only thing here intended to be enforceable was that money would become due.

In the Supreme
Court of Kenya

No.8

Court Notes
27th November
1959
continued

Parties knew they could not enter into relationship of trustee and beneficiary which would be illegal. Presumption of legality is very strong. Woodroffe 9th edition, page 825; 836. No intention to make gift. Sale subject to price payable at a future date. Interest of Ayoub family disclosed to Land Control Board was prior interest under Hurley agreement.

Para.2 of agreement "sum due". Debtor and creditor.

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Para.1 refers to debtor and creditor arrangement.

My case is that any debts that shall be owing Galanos entitled to deduct. Court not called on to decide what sums are to be deducted under this agreement. It could easily have been drafted to make clear that Galanos entitled to deduct running expenses of estate. "Mr.Galanos shall pay". Not settled that a voluntary conveyance implies resulting trust. Snell 23rd edition 129.

20

Submitted trust arises because Galanos knew Hurley held property as trustee. Snell page 137. Hurley was legal owner. Property transferred to Galanos in consideration of price. Thereon ceased to be trust property. Property not transferred in breach of trust.

Legal and beneficial interest vested in Galanos who became legal and beneficial owner.

Letter 20.3.59 - Parties could have required Galanos, if trustee, to hand over property. If Galanos a complete stranger it might be said he could commit waste etc. This was a family arrangement. Many cases not intended to create legal relations. This document intended to protect their rights - would prevent them from getting anything. Court asked to presume agreement drawn this way to get round law. No presumption of trust.

30

Correspondence and Minutes - whole attitude taken by Defendants based on trusteeship.

40

Letter 8.8.57.

Minutes 23.7.57 (e) "First charge".

Words can mean (1) £11,000 referred to in recital, or (2) Galanos entitled to deduct debts due. Holder said other family accounts. Words cannot mean running expenses and profits.

Letter 27.1.59 - one of duties of trustee to keep beneficiaries informed. It is not contended that relationship arises by reason of being unpaid vendors.

In the Supreme
Court of Kenya

No.8

Court Notes
27th November
1959
continued

- 10 O'Donovan: Even on a resale it is not the purchase price which is to be paid. Said that if Galanos allowed to deduct managerial expenses he must be a trustee. Where in agreement can it be said that Plaintiffs were entitled to ask for account of profits of estate.

See para.2. If trustee no agreement need have been made. Alternatively trust deed would have been drawn up. In calculation purchasing price debt due was to be deducted. Sec.54.

- 20 Plaintiffs only entitled to sums - not estate.

Copy of agreement of 12.11.57 put in by consent as Exhibit 4.

C.A.V.

B.R. Miles, J.
27.11.59.

Owing to illness delivery of judgment has had to be deferred.

28.1.60.

Judgment delivered in presence of -
Mrs. Kean for Plaintiffs.

- 30 Shaylor for Defendants.

- (2) The Land Control Board has refused to allow the Ayoub Family to have the farm registered in their names and Mr. Galanos has agreed to take over the farm and have the same registered in his name.

In the Supreme
Court of Kenya

No.9

- (3) At the date of this Agreement there is due to Mr. Galanos or Tongoni Plantations Limited a sum of approximately Eleven thousand pounds. Although the transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos is being registered the total purchase money is not being paid as Mr. Galanos hereby admits notwithstanding a full receipt having been given in the formal transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos.

Judgment
28th January
1960
continued

- (4) The Ayoub Family and each of them hereby declares that they are entitled to one quarter each of the benefit of any sums which may become payable under this agreement

NOW IT IS HEREBY AGREED AND DECLARED as follows :-

1. Mr. Galanos shall pay to the Ayoub Family a sum which shall represent the difference between the sale price of the Estate and any sums which shall be due to either Mr. Galanos personally or to Tongoni Plantations Limited such sum to be paid within seven days of the completion of a sale.
2. Pending a sale the Ayoub Family and each of them hereby agree that they will not take any action whatsoever to recover the sum due under this Agreement.
3. In the event of the death of Mr. Galanos before a sale of the Estate Mr. Galanos hereby directs that his Executors shall not sell the farm unless the price is agreed by the Ayoub Family and each of them and thereafter account to the Ayoub Family in accordance with the terms hereinbefore stated.

In January 1956 one C.D. Zagoritis, to whom the Cranhurst Estate had been leased on 11th May, 1954, by L. W. Hurley previously mentioned, instituted

In the Supreme
Court of Kenya

No.9

Judgment
28th January
1960
continued

proceedings possibly with another person claiming, inter alia, damages for wrongful dispossession against Galanos. In those proceedings Galanos counterclaimed damages for various breaches of covenant. This action was ultimately settled by the Defendant as the result of legal advice by the payment of Shs.133,000/- and costs to the Plaintiff Zagoritis on the 15th August, 1958.

The estate was sold by the Defendants for the sum of Sh.700,000/- on the 5th March, 1957. This sum was payable as to Sh.100,000/- on the signing of the agreement and the balance by six equal yearly instalments of Sh.100,000/-, payable on the 1st day of March in each year.

10

The Defendants claim to be entitled to deduct from the proceeds of sale all sums paid to Zagoritis under the settlement and the Plaintiffs now claim a declaration that they are not entitled to do so.

20

By way of preliminary objection at the commencement of the hearing Mr. O'Donovan, for the Defendants, contended that the Plaintiff disclosed no cause of action. His argument in substance was that the Plaintiff disclosed that the Defendants were trustees and since no misconduct or breach of trust was alleged the Defendants were prima facie entitled on the face of the Plaintiff to make the deduction in question.

30

I took the view that it was arguable that the agreement might be constructed as an agreement for sale and that if so the consequence would be that the Defendants would not be entitled to deduct the sums in question. Order VI rule 29 only requires a Plaintiff to disclose a "reasonable", that is to say an arguable cause of action and I therefore overruled the objection.

I then framed issues as follows :

40

- (1) "whether the Defendants are trustees and entitled in the capacity to deduct sum involved in Civil Case No.99 of 1956.

- (2) If not whether they are entitled to deduct the said sum under the agreement of 12th November, 1955".

In the Supreme
Court of Kenya

No.9

Mrs. Kean objected to the first issue on the ground that there was no plea in the defence that the Defendants were trustees and that the only defences pleaded were -

Judgment
28th January
1960
continued

- (1) an express agreement by the Plaintiffs that they would be liable for the sums in question, and -

10

- (2) estoppel, both of which were abandoned at the hearing.

It seemed to me that paragraph 2 of the defence raised the question of the construction of the agreement which is a matter of law, and the Defendants were entitled at the trial to make legal submission on the point. It is obvious that the construction of this agreement was the essence of this case.

20

After the conclusion of the evidence it was agreed by Counsel on both sides that the point for decision was whether the agreement taken with the transfer constitute a trust with the consequence that if Galanos did hold as a trustee the Plaintiffs were not entitled to the declaration, while if he did not the Plaintiffs would be entitled to the declaration.

30

This was in my view clearly the right approach to the case since if the deceased Galanos was a trustee no breaches of trust or negligence was alleged in the plaint as required by Order VI rule 2. Moreover as stated in Halsbury's Laws of England (2nd Edition) Vol.33 page 304 (para.528) : "A mere error of judgment does not in itself constitute a breach of trust; and a trustee is presumed to have dealt honestly and properly with the trust estate until the contrary is shown".

40

I now come to the question of construction. Mr. O'Donovan's first point was that if the only sum to be deducted from the proceeds of sale was the sum of £11,000 mentioned in recital (3), the

In the Supreme
Court of Kenya

No.9

Judgment
28th January
1960
continued

use of the words in paragraph 1 of the agreement "any sums which shall be due to either Mr. Galanos personally or to Tongoni Plantations Limited" were hopelessly inapt. The tense was wrong being future instead of past. It would have been perfectly simple to have said "the aforesaid debt" or words to that effect. I would observe here that the agreement was drafted by the late Mr. B. Allin, an advocate. Lawyers are of course not infallible in these matters but I think there is considerable force in Mr. O'Donovan's argument.

10

Mrs. Kean says that she does not contend that these words are confined to the original debt of £11,000, but that they refer to other debts which might be due. In my opinion the words mean that the sum of £11,000 is not set off against the purchase price but remains a debit subject to any adjustment arising out of the management of the estate by Galanos.

20

Mrs. Kean contends that this agreement amounts to an agreement of sale by virtue of Sec.54 of the Indian Transfer of Property Act which defines sale as "a transfer of ownership in exchange for a price or promised part-paid and part-promised.

This argument might have been sound had the agreement imposed a definite obligation on Galanos to sell the estate at some specified time, but so far as I can see there was no obligation on him to sell it at all if he did not wish to do so.

30

The position seems to me to be this. It is clear from recital (1) in the agreement that Hurley was in fact a trustee. Galanos purchased from a person whom he knows to be a trustee. He acquired the estate without payment and with knowledge of the outstanding equities. Even if there were a payment Galanos had knowledge of the outstanding equities. There is nothing in the agreement to exclude a resulting trust and the arrangement was connected with such a trust. Any other construction would have the consequences which could never have been intended by the parties, least of all by the Plaintiffs. It would mean that the Plaintiffs, whose only

40

asset was this estate were in effect making a present of it to Galanos who was, according to the evidence, a multi-millionaire. He could keep it as long as he wished without any obligation on his part to manage it properly. No court could interfere whatever acts of waste he committed. He could have let the estate at a peppercorn rent to Tongoni Plantations Limited or to any other person.

In the Supreme
Court of Kenya

No.9

Judgment
28th January
1960
continued

That this was the view of the Plaintiffs themselves is plain from the correspondence. In a letter dated 8th April 1958, Mr. D.P. O'Beirne, who was then acting for the Plaintiffs, claims that because the deceased was acting from some indirect motive in dispossessing Mr. Zagoritis, the Plaintiffs cannot accept responsibility. The inference from this is that if he had acted in the interests of the estate they would have done so. In his letter of 9th April 1958, Mr. O'Beirne says "In addition, the deceased received the proceeds of the 1956 coffee crop, Sh.92473/66 together with the sum of Shs.10,000/- being a proportion of interest on the purchase price of the property. At the date of the deceased's death my clients were indebted to the deceased to the extent of a loan from the deceased and the running expenses of the Estate since 12th November, 1957". A similar argument is put forward by Mr. O'Beirne in a letter dated 20th March, 1959. This construction of the agreement is precisely that contested for by Mr. O'Donovan and in my opinion the correct one.

Finally in his letter of 28th April, 1959, Mr. O'Beirne refers to "my client's property" it was not until there was a change of advocates that there was what Mr. O'Donovan described as a "Volte face" in the Plaintiffs' attitude. I hold accordingly, that the Defendants are trustees and are entitled to make the deductions which they claim. Mrs. Kean points out that if the relationship between Galanos and the Plaintiffs was that of trustee and beneficiary the transaction was illegal since the consent of the Land Control Board which would be required under the Land

In the Supreme
Court of Kenya

No.9

Judgment
28th January
1960
continued

Control Ordinance would have been obtained to a transfer which was in fact fictitious. (See Sec.7 (1)(b) of the Land Control Ordinance Cap. 150). There would also have been a contravention of Sections 88 (1) of the Crown Lands Ordinance Cap.155. As pointed out in the commentary to Section 114 of the Indian Evidence Act (Woodroffe 9th Edn. page 836) the presumption that parties intend to act legally is strong. The learned author states: "a conspicuous example of this presumption exists in the rule that when an instrument is susceptible of two conflicting probable constructions the court will adopt that which is most consistent with good faith and will hold that such construction was intended by the parties".

10

Mr. O'Donovan dealt with the question of illegality with some delicacy, no doubt because this has not been pleaded. A court will not, however, assist a party to enforce an illegal contract whether illegality has been raised as defence or not.

20

To what extent the transaction was disclosed to the appropriate authorities I do not know, but there is nothing to indicate that the consents required by Section 7(1)(b) of the Land Control Ordinance and Section 88(1) of the Crown Lands Ordinance to the Land being acquired by Galanos on behalf of another person have been obtained. It would, therefore, appear that if the instrument of 12th November 1955 created a trust the transaction was illegal. It is not necessary, however, for me to decide the case on that ground, and I do not do so, since it is conceded that if the instrument does amount to a trust the Plaintiffs are not entitled to the declaration claimed for that reason alone.

30

Since I have construed the instrument of 12th November 1955 to create a trust the action fails and there will be judgment for the Defendant. I will hear argument as to costs.

40

B. R. Miles,
Judge.

28th January, 1960

In the Supreme
Court of Kenya

No.9

Judgment
28th January
1960
continued

Shaylor: I submit case suitable for two Counsel. Complicated questions of law and construction. To be taxed inter parties. In re Grimthorpe's (Baron) Will Trusts (1958) 1 All.E.R.765. All costs reasonably incurred. Payable out of estate, i.e. proceeds of sale of estate.

10 Mrs. Kean. I submit no costs allowable. Pleading and correspondence. At no time trust suggested. Litigation necessary on ground of estoppel suggestion. No objection to costs out of general estate. Sued as executors.

2. Only difficulty arose out of result of unsatisfactory state of defence. Proper case for disallowing costs of preliminary objection or other issues. Half costs only.

20 Shaylor: Plaintiffs have maintained this not a trust. Mr. Kean in effect asking for costs against Defendants personally. Held to be trustees. If no trust only party and party costs. Trustees not covered if costs out of estate. Position complicated by Plaint. Estate of Galanos should not suffer.
"All such expenses as put to" - Sec.31(2) Trustee Ordinance. Follows English Act.

ORDER:

30 I consider that costs should be awarded on the footing that Defendants are trustees; any other order would involve a penalisation. The order will be that the Defendants are entitled to be paid out of proceeds of sale of Cranhurst Estate all costs and expenses properly incurred.

(re Grimthorpe's (Baron) Will Trust (1958) 1 All E.R. 765)

40 I consider that this case was of sufficient complexity to warrant the employment of Queen's Counsel and I certify accordingly.

B.R.Miles
Judge.

28th January, 1960.

In the Supreme
Court of Kenya

No.10
D E C R E E

No.10

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

Decree
28th January
1960

CIVIL CASE NO.1185 of 1959.

MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB Plaintiffs.

versus

10

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS Deceased Defendants.

D E C R E E

CLAIM FOR:-

(a) A Declaration that the Defendants
are not entitled to deduct any of
the monies relating to the settle-
ment of Supreme Court Civil Case
No.99 of 1956 or any of the costs
thereon and/or in connection there-
with from the said proceeds of sale.

20

(b) Costs.

THIS SUIT coming on the 25th, 26th and
27th days of November, 1959, for hearing and
on the 28th day of January, 1960, for Judgment
before The Honourable Mr. Justice B.R. Miles
in the presence of Counsel for the Plaintiffs
and Counsel for the Defendants IT IS
ORDERED :-

30

- (1) That the Plaintiffs' suit be dis-
missed.
- (2) That the Plaintiffs do pay to the
Defendants all costs and expenses

properly incurred by the Defendants to be taxed and certified by the Taxing Master of this Court and to be paid out of the proceeds of sale of Cranhurst Estate.

In the Supreme Court of Kenya

No.10

- (3) That the Plaintiffs do pay to the Defendants the costs of a Queen's Counsel to be taxed and certified by the Taxing Master.

Decree
28th January
1960
continued

10 GIVEN under my hand and the seal of the Court at Nairobi this 28th day of January, 1960.

ISSUED at Nairobi this 8th day of April, 1960.

(Sgd) P. HEIM
DEPUTY REGISTRAR
SUPREME COURT OF KENYA

No.11

No.11

NOTICE OF APPEAL

Notice of Appeal
9th February
1960

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

CIVIL CASE NO.1185 of 1959

MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB Plaintiffs

versus

30 STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P.HOLDER
as EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS dec'd. Defendants

NOTICE OF APPEAL

TAKE NOTICE that MARIE AYOUB, CECILE KYRIAZIS (formerly GALANOS), ANGELA MARY HURLEY and

In the Supreme
Court of Kenya

No.11

Notice of Appeal
9th February
1960
continued

HENRY ANTOINE AYOUB being dissatisfied with the decision of the Honourable, Mr. Justice Miles given herein at Nairobi on the 28th day of January 1960, intend to Appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the said decision.

DATED at Nairobi this 9th day of February 1960.

Sd. L. Kean
for SIRLEY & KEAN
ADVOCATES FOR THE PLAINTIFFS
(Intended Appellants)

10

To, The Registrar,
Supreme Court,
Nairobi.

and to, Messrs. Buckley, Hollister & Co.,
Advocates for the Defendants
(Intended Respondents)
New Stanley House,
York Street,
Nairobi.

20

The address for service of the Appellants is:
care of Messrs. Sirley & Kean, Advocates,
Princes' House,
Government Road, P.O.Box 5018,
Nairobi.

NOTE:

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

30

Filed the 9th day of February 1960.

Sd. P. HEIM
DEPUTY REGISTRAR
SUPREME COURT OF KENYA

40

No.12
O R D E R

In the Court
of Appeal for
Eastern Africa

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

No.12

CIVIL APPLICATION NO.6 of 1960

Order
6th April 1960

In the matter of an Intended Appeal:

BETWEEN

10 MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB } Appellants

versus

STANDARD BANK OF SOUTH AFRICA)
LIMITED and WILLIAM P. HOLDER)
as EXECUTORS OF THE ESTATE OF)
CHRISTOS GALANOS deceased) Respondents

20 (Intended Appeal from a Judgment of the Supreme
Court of Kenya at Nairobi (Mr. Justice Miles)
the Judgment being given on the 28th day of
January, 1960, in Civil Case Number 1185 of
1959).

Between

MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB } Plaintiffs

versus

30 STANDARD BANK OF SOUTH AFRICA)
LIMITED and WILLIAM P. HOLDER)
as EXECUTORS OF THE ESTATE OF)
CHRISTOS GALANOS deceased) Defendants

In Chambers on the 6th day of April, 1960.
Before the Honourable Mr. Justice Forbes - Vice
President.

O R D E R

UPON reading the motion paper filed by the
Advocate for the Applicant herein and letter No.
S/11546 dated 5th April, 1960, from the Advo-
cates for the Respondents addressed to the Acting

In the Court
of Appeal for
Eastern Africa

No.12

Order
6th April 1960
continued

Registrar of the Court: in pursuance of Rule 9
(3)(a) of the Rules of the Court THIS COURT DOETH
ORDER the time for lodging the intended appeal
be extended by six weeks from the 6th day of
April, 1960 and that the costs of the applica-
tion abide the result of the intended appeal.

DATED at Nairobi this 6th day of April, 1960.

(Sd) M.D. DESAI

ACTING REGISTRAR

H.M.COURT OF APPEAL FOR EASTERN AFRICA

Issued at Nairobi this 17th day of May, 1960.

10

No.13
Memorandum of
Appeal
17th May 1960

No.13

MEMORANDUM OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN
AFRICA

CIVIL APPEAL NO.33 of 1960

BETWEEN

MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB } Appellants

20

versus

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS deceased } Respondents

(Appeal from a Judgment of the Supreme Court of
Kenya at Nairobi (Mr. Justice Miles) dated
28th day of January 1960)

- in -

HER MAJESTY'S SUPREME COURT
CIVIL CASE No.1185 of 1959

30

BETWEEN

MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB } Plaintiffs

- and -

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS deceased } Defendants)

40

MEMORANDUM OF APPEAL

MARIE AYOUB, CECILE KYRIAZIS (formerly GALANOS)

ANGELA MARY HURLEY and HENRY ANTOINE AYOUB
the Appellants above named appeal to HER
MAJESTY'S COURT OF APPEAL FOR EASTERN
AFRICA against the whole of the decision
above mentioned on the following grounds,
namely :

In the Court
of Appeal for
Eastern Africa

No.13

Memorandum of
Appeal
17th May 1960
continued

10

1. THAT the learned Trial Judge erred in framing the issue reading "Whether the Defendants are Trustees and entitled in that capacity to deduct the sums involved in the settlement of Civil Case Number 99 of 1956" such issue not having been raised on the pleadings.

2. In the alternative that the learned Trial Judge erred in framing the said issue without the Defence being properly amended and an adjournment granted to the Appellants.

20

3. THAT the learned Trial Judge erred in not acceding to the Appellants application that the said issue be struck out and that the pleadings be properly amended.

4. THAT the learned Trial Judge erred in ruling that extrinsic evidence was admissible to explain the agreement of the 12th November 1955.

5. THAT the learned Trial Judge erred in ruling that there was a latent ambiguity in the words "any sums which shall be due".

30

6. THAT the learned Trial Judge erred in holding that the construction of such phrase was necessary in order to decide whether there was a Trust.

40

7. THAT the learned Trial Judge erred in referring to the correspondence to interpret the said agreement of the 12th November 1955 despite the learned Judge's ruling to the effect that extrinsic evidence was admissible only to show the meaning of the said phrase.

8. THAT the learned Trial Judge erred in construing the meaning of the said phrase set out in paragraph 5 hereof as meaning

In the Court
of Appeal for
Eastern Africa

No.13

Memorandum of
Appeal
17th May 1960
continued

that the sum of £11,000 is not set off against the purchase price but remained a debit subject to any adjustment arising out of the management of the Estate by Galanos.

9. THAT the learned Trial Judge erred in holding that the said agreement of the 12th November 1955 was not an agreement for sale.

10. THAT the learned Trial Judge erred in holding that because the said Galanos purchased from a person whom he knew to be a Trustee with knowledge of the outstanding equities the said Galanos took as Trustee.

10

11. THAT the learned Trial Judge erred in not giving effect to the presumption of legality.

12. THAT the learned Trial Judge erred in holding that it was the view of the Appellants from the said correspondence that the said Galanos was a Trustee.

13. THAT the learned Trial Judge misdirected himself in stating that it was not until there was a change of Advocates that the Appellants' attitude as to the position of the said Galanos relating to the said Estate changed.

20

14. THAT the learned Trial Judge erred in failing to consider that because of the relationship between the said Galanos and the second Appellant the Appellants were prepared to rely on the good faith of the said Galanos without the imposition of a Trust enforceable in a Court of Equity.

30

15. THAT the learned Trial Judge failed to give any or any adequate weight to the fact that the said agreement of the 12th November 1955 having been drafted by an Advocate could have been clearly drawn in the form of a Trust Instrument should this have been the intention of the parties.

16. THAT the learned Trial Judge erred in holding that the said agreement of the 12th November 1955 constituted a Trust or that a

40

Trust arose in any other manner.

17. THAT the learned Trial Judge in holding that a Trust arose not as a result of construction of the said agreement of the 12th November 1955 but aliunde went outside the agreed issue and outside the pleadings.

18. THAT the learned Trial Judge erred in awarding the whole costs of the suit to the Respondents and erred in awarding such costs on the basis that the Respondents were entitled to be repaid all costs and expenses properly incurred and that the learned Trial Judge erred in certifying that the case was of sufficient complexity to warrant the employment of a Queens Counsel.

DATED at Nairobi this 17th day of May, 1960.

SIRLEY & KEAN,
Advocates for the Appellants.

In the Court
of Appeal for
Eastern Africa

No.13

Memorandum of
Appeal
17th May 1960
continued

TO:

THE HONOURABLE JUDGES OF HER MAJESTY'S
COURT OF APPEAL FOR EASTERN AFRICA.

and to:

MESSRS.BUCKLEY HOLLISTER & CO.,
Advocates for the Respondents,
Nairobi.

The address for service of the Appellants is c/o Sirley & Kean, Advocates, Princes House, Government Road, Nairobi.

FILED this 18th day of May 1960.

AG. REGISTRAR

In the Court
of Appeal for
Eastern Africa

No.14

NOTES OF ARGUMENT OF O'CONNOR P.

No.14

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

Notes of
Argument of
O'Connor P.
16th June 1961

CIVIL APPEAL No.33 of 1960

BETWEEN

(1) MARIE AYOUB)	
(2) CECILE KYRIAZIS (formerly)	
GALANOS))	
(3) ANGELA MARY HURLEY)	
(4) HENRY ANTOINE AYOUB)	Appellants

10

and

STANDARD BANK OF SOUTH AFRICA)	
LIMITED and WILLIAM P. HOLDER)	
as EXECUTORS OF THE ESTATE OF)	
CHRISTOS GALANOS, deceased)	Respondents

NOTES TAKEN BY THE HON. THE PRESIDENT - SIR
KENNETH O'CONNOR.

20

16.6.61. Coram: O'Connor, P.
Gould, Ag.V-P.
Newbold, J.A.

Gratiaen, Q.C., Mrs.Kean with him, for
Appellants.
O'Donovan, Q.C., Shaylor with him, for
Respondents.

Gratiaen:

Appellants Ayoub family - 1st Plaintiff
Mother, 2nd Plaintiff Daughter of Galanos,
third Widow of Hurley.

30

Cranhurst Estate - 320 acres. Property
belonged to Crown and Crown lease for 99 years
from 1/6/05.

Hurley registered as proprietor as Lessee
under the Crown on 24/11/44.

Common ground that the property was purchased with money belonging to the Ayoub family so that Hurley held the legal estate and the beneficial interest was in the family.

In the Court
of Appeal for
Eastern Africa

No.14

Notes of
Argument of
O'Connor, P.
16th June 1961
continued

On the 11/5/54 Hurley leased the estate for 5 years to Zagoritis, Rent 60,000/- a year payable in 3 instalments of 20,000/- at end of October, February and June each year.

10 Zagoritis had not paid the rent which fell due on the 31/10/54. After that, on the 11/11/55 Hurley conveyed the property to Galanos - Ex.A.

Outright transfer for £15,000 and stated to be received but admittedly was not paid to Hurley.

Galanos was registered as proprietor under the Land Control Ordinance (Cap.150) and under the Crown Lands Ordinance (Cap.155).

20 Day after transfer to Galanos there was an independent agreement made between 4 Plaintiffs and Galanos dated 12.11.55. (Record p.58).

On the 18.1.56 Galanos as proprietor to whom the leasehold rights had passed, evicted Zagoritis without due process of law claiming right to do so on 2 grounds:

(1) default by Zagoritis in last instalment of rent due during Hurley's proprietorship

(2) failure to maintain estate.

30 Galanos on the 5/3/57 sold the property to Horn who became absolute owner for £35,000. Ex.2. Arrangement was that Horn was to pay and he paid £10,000 down and the balance at £5,000 per annum over 5 years.

29/6/57 Galanos died.

40 In the mean time Zagoritis had sued Galanos in suit 99/56 for damages for wrongful eviction and Galanos claimed damages for failure to maintain estate and wrongful removal of articles (Record 65-92).

In the Court
of Appeal for
Eastern Africa

No.14

Notes of
Argument of
O'Connor, P.
16th June 1961
continued

After Galanos died the Respondents were substituted as parties and on the 15/8/58 they compromised Zagoritis' claim by paying him 133,000/- and costs. Total expenses to Galanos's estate Shs.149,130/50.

The dispute between the parties is whether the Respondents as Executors are entitled to claim the whole of this sum from the Plaintiffs by deducting the amount from the monies which would be due from the Respondents to the Appellants under the Agreement of 12.11.55.

10

Appellants sued for a declaration that the sum claimed could not be properly deducted.

p.5. Plaint.

para.3. "who were beneficially entitled", "were" was amended to "had been", i.e. till the transfer to Galanos.

Paras.4-7.

Para. 8.

p.7.

20

p.8. Defence.

para. 4.

para.5. "Plaintiffs agreed with the Defendants"

para. 7. estoppel.

Those defences were both abandoned at the trial.

So far as the written defence goes it is not possible (after leaving those out) to ascertain what other defence arose. Without further pleadings on the part of the defence issues were sought to be introduced that we were liable to meet this expenditure because Galanos had only the legal estate and as a trustee was entitled to indemnity from us who had the beneficial interest.

30

The judge should not have framed issues introducing question of trust and if it was sought to do this, defence should have been

directed to amend by pleading facts on which they relied to justify inference that there was a trust. Judge said only a question of law. But the inference of law must depend on pleaded and proved facts so that the alleged trustee should know the case he has to meet.

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This goes beyond a procedural objection.

p.22. Agreement between Counsel.

line 15.

Notes of
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10 There was an agreement and I do concede that if the issues introducing the question of a trust are to be confined to a pure question of law on the construction of 2 documents, I could not fairly complain of embarrassment.

20 But I do complain as a matter of fundamental importance of the complaint, not merely that these 2 documents created a trust but that independently of them there was a resulting trust arising by operation of law from certain circumstances and that the agreement, even if it did not create a trust, was not inconsistent with the existence of one. That was an alternative and independent question outside the agreement which should never have been considered because it necessarily called for a clear statement in the pleadings of the facts which caused a resulting trust independent of the trust created by the Agreement.

p.26. "Mrs. K."

30 p.27, line 9. "Whether the agreement creates the relationship of trustee and cestui que trust."

If that were the only issue I do not complain.

p.105. "After the conclusion"

p.107. "Since I have construed the instrument"

40 Submit the judge has misconstrued the instrument which properly interpreted does not create a trust on the agreement between Counsel, but Plaintiffs are entitled to their declaration.

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In the absence of pleadings the Plaintiffs were not entitled to rely on any other trust and the Judge was wrong in holding in other parts of his judgment that there was a resulting trust.

p.106. "Galanos", etc.

Judge holds on the fact that certain matters were in the knowledge of Galanos and that those facts created a resulting trust preceding the agreement which the agreement did not exclude.

Once it was clear that the parties were at issue on whether the agreement created a trust there were facts not pleaded which created a trust.

10

I am entitled on these pleadings to a declaration unless the agreement created a trust.

True interpretation of the document.

Hurley was a trustee and had lost our confidence. Disappeared. We beneficiaries were faced with difficulties. We had failed to secure registration in own name. Without violating section 7(1)(b) of the Land Control Ordinance and section 88(1) of the Crown Lands Ordinance we could not get a transfer to a trustee for us as beneficiaries. Would have been illegal.

20

Only possible legal solution.

We were indebted to Galanos - wealthy - he wanted his money back and we wanted to get financial benefit by legal means. We secured transfer of absolute title to Galanos who got legal and beneficial interest. He as absolute owner would sell property and the purchase price which would come to him as vendor would be applied to pay what we owed him. He agreed to pay the balance to us.

30

Without prejudice to my objection, on my argument on the resulting trust I submit - the judge's suggested resulting trust (p.106). Hurley was a trustee - if he had conveyed absolute property to Galanos and Galanos had knowledge we could have valued the property.

40

But where a beneficiary is a consenting person and arranged the transaction, the beneficiaries could not say that they had a right to claim the property as against the transferee.

Lewin 15th edn. p.721.

10 That is a case where there is a breach of trust and in such a situation the trust is not extinguished. There is no such doctrine where the entire estate goes to a third party with the consent of the beneficiary. Beneficial interest is extinguished and cannot arise unless new trust created in a way recognised by law.

To Court: It would be possible to create a new trust by agreement but a resulting trust does not arise.

The recital that the money had been received would not preclude saying that the purchase price had not been received.

20 I say there was a new Agreement which was an agreement between parties who stood in 2 relationships -

- (1) creditor and debtor;
- (2) new owner and former beneficiaries who could have called on him to pay purchase price; but the Agreement substituted an obligation to pay after sale of the property.

30 The correct approach of the Agreement, is if it is capable of being construed, as creating legally enforceable rights and obligations, that interpretation is to be preferred to another interpretation which would give rise to an illegal and unenforceable arrangement. The view preferred by the judge led to an illegality prohibited by law.

2.30.

On resumption: Bench and Bar as before.

Gratiaen continues:

40 Resumed:

A legal result is to be preferred if can be done without violence to the language.

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The other construction would involve a criminal offence - giving false information in an application - section 46(d), section 7(1)(c).

We got the advice of a well-known lawyer who drafted the conveyance.

Not to be lightly assumed that there was a contravention of the law.

Mills v. Dunham (1891) 1 Ch.576. 2 interpretations.

p.589. "It was suggested

10

p.590. A wide construction so as to make it illegal

Carnie v. Chartered Bank of India (1869)
2 P.O. 393.

p.406. "It is, says Sir E. Coke "the intendment that standeth that the law shall be taken."

p.58. Nothing in this creates a trust by agreement of parties.

Consistent with agreement by owner entering in contract with family which had been owner but could not legally continue as such. p.61. Back sheet. "Acknowledgment of Debt".

20

(2) "Has agreed to take over the farm".
(3)
(4)

1. "sums which shall be due" refer to any sums which they in fact owed or more subsequently followed.

Suggestion that these words were intended to refer to the management expenses as too much. No question of management expenses could be in contemplation as there was a lessee in possession and no one knew he was going to be displaced. If this was a trust why is there no provision for paying rents and profits to Appellants but only an ultimate purchase price?

30

If this refers to management expenses why were they not to be deducted from rents and profits instead of purchase price when the property is sold?

40

He does not undertake to do anything inconsistent with ownership.

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p.59, clause 3. Important.

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He undertakes to direct his executors to consult us as to the purchase price after he is dead; but not when he is alive. Why not after he was a trustee?

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Is it not implicit in the arrangement that the Purchaser is going to get the beneficial interest?

Operative words have nothing which create a trust. Recitals cannot create a trust, but in any case are consistent with his having the ultimate ownership with an arrangement that he gets back his loan and we get the rest.

The only other point made against us by the judge is that there are no express words compelling him to sell the property at an early date.

It was clearly an implied term that he would sell within a reasonable time.

If it was intended to create a trust what would a competent conveyancer have put into the document - management expenses, rents and profits, consultation re price on sale.

Civ.App.78/56. Sargent v. Tisdale Jones
[1957] 2 E.A.226.

Agreement for continuation of the trust - continuation or creation immaterial. There can never be an agreement to continue a resulting trust. Trustee relationship only follows where there has been a transfer in breach of trust to a transferee with knowledge. The only allegation of a new trust which I have to meet is a trust springing from the document.

I have given notice of additional grounds but I do not ask you to consider them. Except for the taint of illegality interesting points could be raised.

It was suggested that extraneous evidence could be admitted because of latent ambiguity.

Don't admit that there is an admission that point is a trust; but even so this is for the court.

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p.46.

True that at a certain stage we did admit that Galanos was entitled to be credited with some management expenses. That liability arose not from the Agreement but in 1946 after Galanos had gone into possession after evicting the lessees.

p.23. "The only means"

p.24. Cross-examination. "The arrangement was that for one year"

10

Never contemplated in November 1955.

3.20. O'Donovan:

First 3 grounds of appeal.

Gratiaen said judge should not have framed an issue whether there was a trust.

Original plaint.

p.5.

p.10. para.3. The prima facie evidence to be drawn from the plaint that on the Plaintiffs' own pleadings Galanos was a trustee.

20

The compromise was with them as personal representatives of a deceased trustee. Plaint seeks a declaration that Defendants are not entitled to.

The burden of showing themselves entitled to that declaration was on the Plaintiffs. It was incumbent on them to prove facts which constitute a breach of trust.

p.15. "I make no allegation of trusteeship or breach of trust".

30

K. applied to substitute "had been" for "were" at a late stage.

p.26. Mrs. Kean "I ask leave to correct.. .."

The defence does not in terms allege that Galanos held as trustee or that the compromise was entered into as the representatives of a deceased trustee.

By para.2 of the defence the meaning of the Agreement was put in issue. It was open to prove the circumstances in which it was made.

40

Proviso 6 to s.92 of Indian Evidence Act.

Impossible for court to decide on meaning and effect of Agreement without evidence of surrounding circumstances.

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Cannon v. Villars (1878) 8 Ch.D.415.

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p.419. "In construing all instruments you must know what the facts were".

Hart v. Hart. (1881) 18 Ch.D.670.

p.692. "I agree that here"

Notes of
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10 In the present case the one vital fact was whether Galanos held the estate as the beneficial owner or as a trustee.

It was open to defence to prove by ext: evidence that Galanos was a trustee because that was relevant to the construction of the agreement.

Judge justified in framing issue as to trust.

Plaintiffs lucky not to have case dismissed in limine.

20 O.14, r.(1)(5): Rule designed to cover such a case as this where the issue of trusteeship not clearly defined on the pleadings. (Issues p.17).

p.18, line 6.

Adjournment granted.

p.22. We agreed what the only remaining issue was. Announced to court by Mrs. Kean. Agreement reached before close of defence case.

p.26. Mrs. Kean applied for issues to be changed etc. So belated, rightly rejected. Anyway misconceived.

30 Gratiaen said that the point was whether one could adduce a trust from the Agreement and not a trust outside the agreement. Not a valid argument.

Correct, but trust only arises where legal and eq: estate separated.

Crucial fact was whether he was a trustee.

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Transfer.

Never paid the £15,000 nor intended that he should.

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If the judge was right correspondence was admissible not because it contained opinion of an advocate; but because relevant to the conduct of the parties and the circumstances of the agreement.

(1) Meeting at Standard Bank - 2 Plaintiffs - Holder, etc. p.63.

10

p.64.

p.31, 2nd para.

p.37, para. 3.

p.38.

p.39, para. 2.

p.46. "beneficial owner" inconsistent with the rest of the letter (p.47 running expenses).

p.48.

20

p.49. "my clients' property".

All relevant as circumstantial evidence as to what they meant by the Agreement.

Substantial circumstances as relevant to the position at the date of the negotiations. It was not admissible to lead direct evidence of meaning.

p.23 bottom. Inadmissible.

I don't support the judge on that "shall be due". It was necessary first to decide whether there was a trust in order to decide what that phrase means.

30

That phrase is not inapt, but include expenses qua trustee. "Personally" distinguished me from his company.

Odd if it does not point to the future; but no importance. It does not exclude his statutory right to reimbursement of his expenses incurred as trustee.

If Galanos held as trustee for the Ayoub family he had right to reimbursement under s.31 (2) and the Agreement did not deprive him of those rights. Fundamental fact is whether he held as trustee to be beneficial owner.

40

Galanos said it would be monstrous to set up a trust and provide the beneficiaries with no remedy. But the only remedies the beneficiaries have are as cestui que trust's. If not,

he could keep the estate for 99 years and exclude the beneficiaries from anything. He could transfer or assign the lease and commit waste without being liable. It is not monstrous because the Plaintiffs have rights as cestui que trust.

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p.24. "Certainly"

p.58 agreed to "take over" not "purchase".

Choitram v. Lazar [1959] E.A.157, 164G.

Notes of
Argument of
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10 That was an agreement between laymen.

Why did not he say so if he intended to buy. No minimum price fixed or date for payment on.

20 Once it is conceded that the £15,000 stated in the transfer is a myth, the effect is to constitute the Purchaser a trustee. He is a volunteer and he takes over a trust estate with the consent of the beneficiaries. The prima facie intention was to take over as trustee.

The Agreement is not conceivably an Agreement for sale. Why should plaintiffs convey the estate to him which was bringing them in £3,000 p.a. to Galanos which they were getting under the lease, and forego profits after the lease.

To Court: The resulting trust arises from the acts of the parties, one of them being the Agreement.

30 What was the intention of the parties. What were the circumstances under which they executed the agreement? The circumstances are such as to show a trust with or even without the execution of the Agreement. Galanos relied on presumption that parties acted legally and that Land Control Board were not informed that Galanos was holding as a trustee and therefore that would be illegal.

40 Mills v. Dunham (1891) 1 Ch.576,586. Construe "without any leaning either way".

p.587. "You are to construe"

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Argument based on illegality as not available to the appellants because

- (1) No evidence to show that Land Control Board was not told that Ayoub family would have a continuing interest;
- (2) No allegation on illegality in the pleadings.

On the face of it the Agreement is not illegal.

North West Salt v. Electrolytic Alkali
(1914) A.C.461.
p.469, line 4.

10

This Agreement is only tainted if it could be shown that deceit was practised on the Land Control Board.

Adjourned 9.30 tomorrow.

O. O'C. 16/6.

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17.6.61. Bench and Bar as before.

O'Donovan continues:

Had argued that illegality argument not available in absence of information when information was given to authorities.

20

Legality of Hurley trust not canvassed by the Galanos succession. Ayoub family acquired no new beneficial interest. Agreement contained no new beneficial interest.

Land Control Board must be assumed to have given its consent - particulars have been produced to Land Registration Board.

Sec.44 Land Control Ordinance, S.89 Crown Lands Ordinance.

30

If consent obtained and misleading information, there is no provision in the Ordinances nullifying effect of registration or Galanos' certificate of title.

He held legal estate as trustee.

It was never open to Defendants to set up defence of illegality. It would have been fraud if Galanos or personal representatives claimed to be beneficial owner with ground that the estate was purchased for £15,000.

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Court of Equity to impose personal obligations and would prevent applying statute to accommodate fraud.

Notes of
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10 McCormick v Grogan (1869) 4 Eng & Ir.
Ap. 82, 97.

It was never open to defence to say that the transfer was approved on a certain basis and we are going to make use of the statutes to perpetrate a fraud.

It is not open to the Appellants either.

Gratiaen's point

Explanation given by the 2nd Plaintiff.
p.23 at bottom.

20 Judge by implication disbelieved this.
After purported explanation of conduct it
is not adequate.

Trustees were never informed.

Inconsistent with basis on which accounts
were rendered.

Never hinted at in correspondence.

p.24. Unconvincing explanation. Not true.

If Galanos was the beneficial owner, he was under no obligation to account for proceeds and they were under no obligation to reimburse him.

30 Galanos could keep the estate as long as he liked. If he was, as I submit, a trustee for the Ayoub family, the action could only be maintained if there was a breach of trust in entering or in settling.

Very little evidence but not necessary to go into that in view of the agreement between Counsel.

Mrs. Kyriazis alleged no breach of trust.

Appeal should be dismissed.

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GRATIAEN in reply:

This litigation started on wrong foot and has got completely out of hand.

The parties are at issue in this case as to whether or not the Respondents are entitled to deduct from the purchase price which is due to me £7,500 which Galanos' representatives say he was entitled to claim against them as indemnity as trustee.

Entails proving Galanos was a trustee.

10

Nowhere in correspondence has a claim been formulated on the basis of a trustee claiming indemnity. They relied on agreement to indemnify. We denied agreement.

Court:

We pleaded that under the Agreement Galanos had promised to pay. We repudiated agreement.

They said: (1) You agreed to pay the money, and (2) are estopped by conduct from denying.

DANIEL'S CHANCERY PRACTICE, Vol.I, p.336.

20

"Wherever in contract or relation is to be implied.... An allegation that one party is a trustee should be supported by facts."

Complain

The pleadings gave me no notice of the basis of the claim as now formulated.

p.26 "had been"

p.15 - bottom. I make no allegation on trusteeship or breach of trust.

p.17. Agreed bundle of correspondence. We agreed because relied on Agreement.

30

O'Donovan then withdrew agreement and estoppel.

Issues and matters not pleaded.

p.22. Parties agreed the kind of trust on

which defence relied. We agreed that after they agreed what kind of trust; they succeeded. We waived right to challenge good faith of Galanos and his promise.

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Clarification of kind of trust not an idle matter.

Innumerable kinds of trust.

Lewin, p.16.

Notes of
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10 We were required to meet an allegation that the agreement and transfer constituted the trust.

"constitute"

p,27, line 10.

p.107.

It is not a case on which I was ever called on to meet, that this was not a trust constituted by a written instrument but a resulting trust.

No ambiguity in counsels' agreement.

20 Appeal tribunal should not say that judge was wrong and if we piece together some papers it looks as if there was a resulting trust which came into existence prior to the agreement relied on.

"No exclusion of resulting trust....."

Complete change of front.

p.26. Application for issues to be changed.

p.27. Court.

p.105, line 2. relying on "agreement".

30 When parties faced with unpleaded allegation agree to confine the issue to a particular kind of trust and other parties on the strength of that abandon rights, an appellate court should not permit the raising of another kind of trust.

When Mrs.Kean found that there was a change of front she wanted to take out. O'Donovan would not release her. I now refuse to release him.

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You must plead the facts if you want to rely on a resulting trust.

O'Donovan now says never mind Counsel's agreement, I want to prove resulting trust by extraneous circumstances. Thus came on to the record at p.22 when he wanted to rely on ext.

p.23. Ruling. Latent ambiguity and extrinsic circumstances admitted on that ground.

Formulate Case:-

I agreed to the dismissal of the action if one agreed issue was answered against me. Hands of the court are tied by the terms of that agreement. I cannot be bound by it on the footing of a different kind of trust.

10

Could it be said it was realised that they might lose if a resulting trust was used?

If there was a resulting trust it came into existence by operation of letter before the agreement was signed. That is different from creating a trust under the Agreement.

20

Illegality.

I introduced this construction of the document. I did not rely on illegality.

But how can he - here are two people - O'Donovan says the transfer recorded a pretended sale for a fictitious sale and there was a resulting trust and a new agreement arrived at between the trustee and the beneficiary.

Disclosed to Allin.

On the face of transfer there is an out and out transfer. Is it not unjust to hold that there is a resulting trust out of the transaction which a reputable lawyer brought into existence. Can you hold that without an investigation into the facts.

30

If there had been a proper pleading and issue arose, when we could not have called evidence to rebut it?

C.A.V.

K.E.O'Connor

40

17.6.61.

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NOTES OF ARGUMENT OF NEWBOLD J.A.

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

No.15

CIVIL APPEAL NO.33 of 1960

Notes of
Argument of
Newbold, J.A.
16th June 1961

BETWEEN

MARIE AYOUB & ORS. ... Appellants
and

10 STANDARD BANK OF SOUTH AFRICA LTD
and WILLIAM P.HOLDER as EXECUTORS
of the estate of C.GALANOS,
deceased ... Respondents

NOTES TAKEN BY THE HON. MR. JUSTICE NEWBOLD
(JUSTICE OF APPEAL)

16.6.61. CORAM: O'CONNOR P.
GOULD Ag.V-P.
NEWBOLD J.A.

20 Gratiaen Q.C., Mrs. Kean with him,
for Appellants O'Donovan Q.C., Shaylor
with him, for Respondents.

GRATIAEN:

Appellants known as Ayoub family.
1st Plaintiff Mother.
2nd Plaintiff Widow of Galanos & daughter
of 1st Plaintiff.
3rd & 4th Plaintiffs daughter & son of 1st
Plaintiff.

30 This arises out of transaction of coffee
estate known as Cranhurst.

Property held on Crown lease for 99 years
commencing 1.6.1905.

Hurley registered as lessee in 24.11.44.

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Notes of
Argument of
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continued

Property purchased with money of Ayoub family and Hurley held as trustee for family.

Hurley leased estate in 11.5.54 for 5 years to Zagoritis for Sh.60,000/- a year payable at end of October, February and since in 20,000/- instalments.

Zagoritis not paid rent due on 31.10.54. Shortly after that Hurley conveyed Cranhurst to Galanos on 11.11.55. Purports to be outright transfer for £15,000 stated to have been received but admittedly not paid. Galanos registered as proprietor under Cap.150 and also under Cap.155. Day after transfer an independent agreement between 4 Plaintiffs and Galanos on 12.11.55. Document at p.58.

10

On 18.1.56. Galanos evicted Zagoritis, claimed right to do so on grounds:

- 1) default of rent during Hurley's ownership
- 2) Zagoritis in breach of obligations failed to maintain estate.

20

On 5.3.57. Galanos sold Cranhurst to Horne for £35,000 - Ex.2. Horne paid £10,000 at once and had to pay balance at £500 p.a. for 5 years.

On 29.6.57 Galanos died.

In C.C.99/56 Zagoritis sued Galanos for damages for eviction and Galanos counterclaimed. Pleadings at pp.65-92.

After Galanos died Respondents substituted as parties.

On 15.8.58. they settled C.C. 99/56 by paying Sh 133,000/- and costs. Total expenses were Sh 149,130/50.

30

Dispute is whether the Respondents as executors are entitled to deduct this amount from moneys coming from sale of estate under agreement of 12.11.55.

Appellants brought action for declaration that deduction could not be properly made.

Plaint, p.5 - para.3 - beneficially entitled

till transfer to Galanos - amendment.
 Para.8 - claim of Respondents.

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Defence Para.4 - maintain bound by settlement.
 Para.5 - agreement.
 Para.7 - estoppel.

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The Defences that we agreed to meet expenditure and that we estopped - were both abandoned. Submit that not possible to ascertain what other defence arose.

Notes of
 Argument of
 Newbold, J.A.
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 continued

10 Without further pleadings by defence issues were introduced suggesting we liable to meet expenditure as Galanos a trustee and as such he and Respondents entitled to indemnify.

20 Judge should not have framed issues of trust - proper course to direct defence to amend and plead particular facts on which he relied. Judge rejected this submission on ground issue was pure question of law. Question of trust must be drawn from facts pleaded and framed so that person may know case he has to meet.

30 P.22 - agreement between Counsel - only point for discussion was whether Galanos a trustee. There was an agreement in spite of earlier protest and concede that if issue of trust confined to pure question of law from construction of agreement of 12.11.55. and transfer could not complain of prejudice.
 But do complain that independently of construction of documents there was a resulting trust and that in circumstances agreement not inconsistent with resulting trust. This calls for clear statement of facts in which resulting trust arises independently of agreement.

40 P.26, line 28 - apply for change of issues.
 P.27, line 9 - only issue whether agreement creates position of trustee.
 If issue confined to this issue I do not complain.
 p.105, line 8 - construction of agreement.
 p.107, line 28 - order.

Submit judge misconstrued instrument - does not create trust and therefore in terms of counsels agreement Plaintiff entitled to declaration.

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In absence of pleadings not open to Respondents to rely on any resulting trust independently of agreement. Nor was judge entitled to consider anything else.

P.106, lines 1-8. Judge holds as fact that by operation of law there was a resulting trust not created by agreement and that agreement does not exclude resulting trust.

Once parties agreed on issue then unfair to decide on matter not pleaded.
Submit entitled to declaration unless agreement itself created trust.

10

Submit true interpretation of agreement as follows:- Hurley as trustee had lost our confidence. We were faced with difficulties - failed to secure registration in our own name. Without violation - see 7(1)(b) of Land Control Ordinance and section 88(r) of Crown Lands Ordinance - could not obtain transfer. Only solution was Galanos - a wealthy person to whom we indebted - he wanted money and we wanted benefit.

20

Arrangement whereby Hurley transferred to Galanos the property as absolute owner. He was to sell property and when this done the purchase price to be applied in satisfaction of what we owed and he agreed to pay balance of purchase price to us.

In alternative, the resulting trust suggested by judge cannot arise because beneficiary was not only consenting party to transfer but actually arranged it and in such position consenting beneficiaries who approved of transfer cannot have right to claim unhurt.

30

LEWIN ON TRUSTS 15th Ed. p.721 - resulting trust arises where breach of trust by trustee and alienee knew. But this not so where beneficiaries knew and approved - in such case beneficial interest extinguished and cannot arise until recreated in proper manner.

Beneficiary could have claimed purchase price (although stated to have been paid) except for agreement.

40

Agreement provided a substituted obligation to

pay after resale and not at time of transfer to Galanos.

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Notes of
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Newbold, J.A.
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continued

10 If agreement is capable of being construed as creating legal enforceable rights and obligations then that is to be preferred to suggested interpretation which would give rise to alleged and unenforceable arrangements. View taken by judge led to illegality - that is that transfer and agreement represented one transaction where- by Galanos acquired property for our benefit and this contrary to Ordinances.

Adjourned to 2.30.

ON RESUMPTION: BENCH & BAR as before

GRATIAEN continues:

Not merely contract illegal but would almost certainly involve criminal offence: sec.140(d) of Land Control Ordinance. Also sec.7(1)(c).

20 Also document drawn by reputable lawyer and he could not have intended to do something against the law.

Mills v Dunham (1891) 1 Ch.576 - two interpretations - legal one chosen.
p.589 at bottom and after.

Carnie & Gilden v Chartered Bank (1869) 2 P.C.C. 393 at p.406 - legal intendment to be taken.

P.58 - agreement - nothing in it creating a trust by agreement of parties. Consistent with agreement of contractual arrangement between parties.

30 P.61 - Bank - acknowledgment of debt.

All recitals tell the true position - no reference to rents, profits, etc.

Suggested that words "shall be due" refer to future indebtedness - submit refers to "approximately £11,000". Not to include management as trustee.

At time of agreement no question of management

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continued

expenses as this a lease in existence and not contemplated Galanos could evict tenant.

If trustee no provision for paying over rents and profits - this remarkable.

Also remarkable that if to deduct management expenses this to be done from purchase price and not from profits, rents, etc.

Does not undertake to do anything as trustee.

Clause 3 - executors to consult Ayoub family re purchase price but not so if he alive. If he trustee he would have been required to consult beneficiaries re purchase price.

10

Implicit that Purchaser would get both legal and beneficial interest from Galanos.

Judge says only issue is if agreement creates trust - operative words do not create trust nor do recitals.

Everything consistent with absolute ownership - he was relied on to do everything for Ayoub family. It is a substituted obligation.

20

Judge says no express words compelling sale at early date.

Submit an implied term that he was to sell in a reasonable time.

This is not a trust.

If intended to create trust any competent conveyancer would have put in provisions for management, etc.

Nothing in instrument to show it an unholy arrangement to which lawyer a party.

30

C.A. 78/56 Sargent v Tisdale Jones (1957) 2 E.A. 226.

Whether agreement to continue a resulting trust or to create a new trust it must spring from contract.

Resulting trust suggested in this case is acquisition of property with knowledge of existing trust.

A new trust must be pleaded and proved - only allegation of trust is that it springs from agreement - not possible to say agreement creates trust.

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I have agreed to issues on basis of whether trust comes from agreement, not from anything else.

Notes of
Argument of
Newbold, J.A.
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continued

If trust illegal that an end of matter and we entirely at mercy of Galanos and Respondents.

10 Suggested that latent ambiguity and that extraneous matters can be looked at.

Latent ambiguity does not arise on document, e.g. agreement to sell house and party has two houses.

Do not agree legal advisers have signed a trust. Even so irrelevant as for court to determine. p.106.

P.46 - last paragraph. Beneficial ownership in Galanos.

20 True that at certain stage we did admit that Galanos entitled to be credited with certain management expenses. Submit this does not arise from agreement but arose in 1956 after Galanos had possession consequent on eviction.

P.23, line 40 - end. - he agreed crop mother's if she paid expenses as she had no money.

P.24, line 35 - arrangement for one year.

Act of generosity on part of Galanos - not contemplated in agreement.

30 Do not ask for amendment of Grounds of Appeal.

O'DONOVAN:

Dealing with first 3 grounds of appeal.

Plaint, para.3 - claim that beneficial ownership in Plaintiffs. On Plaintiffs own pleadings Galanos a trustee.

Plaint seeks a declaration that Defendants not entitled to indemnity for certain disbursements. Onus on Plaintiffs and incumbent on them to plead facts. No facts alleged. No attempt to amend P.15, line 45.

40

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continued

On basis of no trust I agreed to amendment at p.26 to para 3 of plaint.

Defence - para.2 - this puts in issue meaning of agreement.

Reference to circumstances indispensable to construing agreement. Sec.92 of Indian Evidence Act.

Impossible to interpret agreement in vacuo without evidence of surrounding circumstances.

Cannon v Villars (1878) 8 Ch. D.415 at p.419.

Hart v Hart (1881) 18 Ch.D.670 at p.692.

10

In present case a vital fact affecting whole position was whether Galanos held as beneficial owner or as trustee.

For Defence to prove that Galanos a trustee.

Judge framed issue of trusteeship after argument as to whether plaint disclosed a cause of action.

O.14,R.1(5) - court shall frame issues
(6) - not necessary where issues in pleadings.

This was a case where issues were properly framed as defence not so clear as should have been.

20

Issues framed on first day.

P.18, line 6 - adjournment as plaintiff not prepared for issue of trust.

P.22, line 18 - agreement that trust only issue.

P.26, line 28 - application for issues to be changed and defence amended.

At this stage there can be no complaint of issue of trust.

Point that trust arose independently of agreement is not valid - no trust except as result of transfer and agreement.

30

In this case did not pay £15,000 nor was it intended that he should.

Judge right in admitting extrinsic evidence of circumstances in order to interpret agreement.

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Correspondence relevant not for opinion of lawyer but showing conduct of parties and surrounding circumstances.

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P.63 para.2(b)(c)(d) -- expenses
(g) - costs of case.

Notes of
Argument of
Newbold, J.A.
16th June 1961
continued

P.31. P.37 & 33 - reason for securing recovery of coffee.

10

P.39 - running expenses.

P.46 - Address of beneficial owner slipped in accidentally - not consistent with rest of letter.

P.48 - all payments.

P.49 - "my clients' property".

These facts relevant in determining what parties really intended.

Direct evidence not admissible P.23, line 43 - evidence should have been disallowed.

20

Do not support passages in judgment that construction of phrase meaning in order to determine whether a trust - other way round.

In light of circumstances which point only to trust this phrasenot inapt to deal with trustees expenses - word "personally" to distinguish from company:

Construction of phrase at bottom of p.58 of no importance.

30

If Galanos held as trustee then he had a statutory right of reimbursement under sec.31(2) of Trustee Ordinance.

Crux of case is whether a trust.

Friend submits monstrous if no provisions pro-bity beneficiaries. But here they suggest a position in which they have no rights until sale. Galanos could have leased for balance of time and Appellants would have got nothing - that would be monstrous. P.24, line 9 - Appellants said did not intend to give Galanos use as long

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as he liked.

P.58, para (2) - "take over the farm".

Choitram v Lazar [1959] E.A.157,164 - "taking over".

One would expect minimum price or date for sale to be fixed.

Once £15,000 conceded to be myth the prima facie problem is that he a resulting trustee. Resulting trust arises from presumed intention - when one party gets an estate for nothing presumed to hold as trustee.

10

Not conceivable that Ayoub family owing £11,000 would convey property for nothing and lose rents, etc.

Trust arises from acts of parties - an essential link was agreement.

It was a resulting or constructive trust which arose in all the circumstances. Even without agreement a resulting trust would have arisen.

On question of illegality refer to

Miles case (1891) 1 Ch.D. 586,587.

20

Argument based on illegality not available as no evidence to show Land Control Board not informed that Ayoub had a continuing interest. Also no allegation of illegality in pleadings or in proceedings. On its face, agreement of 12th Nov., not illegal.

North Western Salt Co.Ltd. v. Electrolyte Alkali Co.Ltd. (1914) A.C.461 - where illegality depends on circumstances it must be raised in pleading. p.469.

30

Here illegality depends not on face of document but in surrounding circumstances.

Adjourned to 9.30 on 17th June.

C.D.N. - 18/6.

17.6.61. BENCH & BAR as before.

O'DONOVAN continues:

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continued

10

In any case argument of illegality based on policy. Legally if Hurley trust not questioned and by transfer to Galanos Ayoub family obtained no new beneficial interest - nor did agreement of Nov. '55 create any new interest. Control Board must be assumed to have given consent to transfer. Sec. 44 of Land Control Ordinance and Sec.89 of Crown Lands Ordinance.

20

Assuming consent obtained on incorrect information - no provision which nullifies registration or certificate of title to Galanos which is conclusive evidence.

Never open to defence to set up illegality - it would have been a fraud on Ayoub family - it would have been using Ordinance as instrument of fraud. Equity not allow statute to be used as instrument of fraud - it would impose a personal obligation. Lord Westbury in McCormick v Grogan (1869) 4 L.R.-W.L. 82, 97. As not open to defence to raise this defence it is not open to plaintiffs.

30

P.23 & 24 - verbal agreement re 1956 crops and expenses - this inconsistent with rest of evidence - by implication learned judge disbelieved it.

On any count not an adequate arrangement - trustees never informed and inconsistent with basis of accounts - not hinted at in correspondence - explanation of evidence of unsatisfactory - mother had no money to finance arrangement.

40

If Galanos full owner he could do what he wanted - witness said that was not position.

If trustee this declaration could only be obtained if breach of trust in entering or in settling. Not necessary to go into this by reason of the agreement of counsel.

Appeal should be dismissed.

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GRATIAEN:

Litigation started on wrong foot and as it has developed has gone right out of hand.

Parties at issue as to whether or not Respondents can deduct a certain sum which they say as trustees they entitled to indemnity for expenses properly incurred.

This monstrous allegation that Galanos was a trustee - nowhere in correspondence has claim been formulated on basis of trustee claiming indemnity. It has been based on agreement which we deny. Appellants came to court and pleaded they had contractual obligation and they claimed a right to deduct. They replied with agreement and estoppel. That position on pleadings DANIEL'S CHANCERY PRACTICE Vol.1, p.336 - this shows how trustee should plead - allegation of trustee should be supported by facts.

10

I complain pleadings gave no notice of basis on which claim now formulated is relied on. By agreement word "were" in para.3 of Plaint deleted for "had been". At p.15 Mrs. Kean said make no allegation of trust.

20

P.17 - while obligation of agreement or estoppel on record agreed bundle put in. As soon as they in, Defence says two defences not being proceeded with - what basis remained - he claims trust - notwithstanding objection court framed generally an issue of trust - this involves fact and law not pleaded.

30

P.18. Mrs. Kean asks for adjournment - granted - witness interposed - then P.22 agreement which involved clarification of kind of trust on which Defendants relied. On this we said if you prove that kind of trust we agree to lose declaration - if you fail we get declaration - right to challenge good faith of Galanos and settlement.

40

LEWIN ON TRUSTS 15th Ed. p.16.

Form of issue clarified - does agreement taken with transfer constitute trust.

Judge at p.27, line 20.

Only issue was whether these documents created trust.

P.107, line 12 - judge decided on resulting trust.

P.25, line 38 - question of resulting trust raised.

P.26, line 20 - Mrs. Kean applied for issue to be changed and defence properly pleaded. P.27/10 application refused.

Where parties faced with particular type of trust and one involves questions of good faith it would be wrong to decide case on matter which not pleaded and not in issue.

P.26, line 25 - O'Donovan refused release from agreement.

LEWIN ON TRUSTS 15th Ed. P.130 - 135.

Must plead facts giving rise to relationship.

They now say they want to prove a resulting trust by extraneous circumstances - which came on to record when issue was simply on trust arising from agreement.

P.22, & P.23 - latent ambiguity.

O'DONOVAN:

Do not agree that construction of phrase necessary in order to ascertain if trust.

GRATIAEN:

Whole case as follows:-

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Agreed to dismissal of action if one agreed
issue answered against me. They agreed to
declaration if issue in my favour.

Most unfair if I bound by it if different
trust.

At this stage can court be satisfied that
Appellants know they would lose if resulting
trust proved. Object of pleadings to enable
parties to know case.

If a resulting trust it came into existence
before agreement and nothing in agreement
created resulting trust which, if it exists,
had already existed.

10

On illegality - purpose was construction of
document - not relying on illegality.

They say transfer recorded a fictitious
sale for purchase price not intended to be
paid. Is it not unjust without full in-
vestigation to hold that a resulting trust
arises when document prepared by reputable
lawyer at request of parties. We say a
genuine sale.

20

Can you say that if a proper issue framed
further evidence would not have been led.

C.A.V.
C.D.Newbold
17/6

I certify that this is a true
copy of the original.

Sgd. ?

REGISTRAR
2.3.62.

30

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

No.16

CIVIL APPEAL NO.33 of 1960

Judgment of
O'Connor P.
2nd October 1961

B E T W E E N

MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB

Appellants

AND

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS deceased

Respondents

(Appeal from judgment of H.M. Supreme Court at
Kenya at Nairobi (Miles J.) given on 28th
January, 1960,

in

Civil Case No.1185 of 1959

Between

Marie Ayoub & 3 others

Plaintiffs

and

Standard Bank of South Africa
Ltd. & William P. Holder as
Executors of the Estate of
Christos Galanos, deceased.

Defendants)

JUDGMENT OF O'CONNOR P.

I have read the judgment of Gould J.A. and
agree with it.

The following facts were not in dispute.

The Appellants are members of the Ayoub
family. The second Appellant was formerly the
wife of one Christos Galanos who died in 1957.
The third Appellant is the wife of one Hurley.
The Defendants are the Executors of the Will of
Christos Galanos.

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continued

Cranhurst estate (hereinafter referred to as "the estate") is an estate of 320 acres held on a Crown lease for 99 years from 1905. It is situated in the Highlands of Kenya and is subject to the Land Control Ordinance (Cap.150 of the Laws of Kenya) as well as to the Crown Lands Ordinance (Cap.155). It is a valuable estate.

The estate was bought with money belonging to the Ayoub family and transferred to and registered in the name of Hurley, the husband (as has been mentioned) of one of the Ayoub daughters. Thereupon, since the property was conveyed to a person other than the real purchasers (no presumption of advancement being applicable), a resulting trust arose in favour of the purchasers. It is, indeed, common ground that Hurley held the estate as a trustee for the Ayoub family. As Mr. Gratiaen, for the Appellants, stated in opening the appeal, Hurley held the legal estate and the beneficial interest was in the Ayoub family. Under sections 7(1) and 46 of the Land Control Ordinance, it is an offence, involving serious consequences, for any person to acquire any right, title or interest in or over any land for or on behalf of any person without the consent in writing of the Land Control Board. There is no evidence whether the Land Control Board was informed that Hurley held the estate as a trustee for the Ayoub family.

In 1954 Hurley leased the estate to one Zagoritis. Zagoritis failed to pay an instalment of rent which fell due on the 31st October, 1954.

On the 11th November, 1955, Hurley executed a transfer of the estate to Galanos expressed to be in consideration of Shs.300,000 paid by Galanos, the receipt of which was acknowledged by Hurley. Galanos, was a wealthy man, and (as already mentioned) the husband of the second appellant. On the following day, 12th November, 1955, an Agreement (hereinafter referred to as "the Agreement") was entered into between Galanos and the Ayoub family.

The Agreement recited that the estate had been purchased by the Ayoub family and registered in the name of Hurley. The Agreement then recited that the Land Control Board had refused to allow

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the Ayoub family to have the farm registered in their names and that Galanos had agreed to take it over and have it registered in his name. It was stated that at that date a sum of approximately £11,000 was due to Galanos. It was further recited that although a transfer of the estate from Hurley to Galanos was being registered, the total purchase money was not being paid as Galanos thereby admitted, notwithstanding that a full receipt had been given in the formal transfer of the estate from Hurley to Galanos. The Ayoub family and each of them then declared that they were entitled to one quarter each of the benefit of any sums which might become payable under the Agreement and it was agreed and declared that Galanos should pay to the Ayoub family a sum which should represent the difference between the sale price of the estate and "any sums which shall be due" either to Galanos personally or to Tongoni Plantations Ltd., such sum to be paid within seven days of the completion of a sale. By Clause 2 the Ayoub family agreed, pending a sale, to take no action to "recover the sum due under this Agreement". In the event of the death of Galanos before the sale of the estate, Galanos thereby directed that his executors should not sell the estate unless the price was agreed by the Ayoub family and each of them and should thereafter account to the Ayoub family in accordance with the terms thereinbefore stated.

The recitals in the Agreement are admitted to state the facts correctly. I understood it to be common ground also that the words "the total purchase money is not being paid" meant that none of the purchase money was being paid; and that none of it was in fact paid. The consideration mentioned in the transfer was, therefore, fictitious. There was, of course, consideration for the transfer in that Galanos agreed to take over the estate and have it registered in his name (the Ayoub family being unacceptable as registered owners of this land in the Highlands) and in that Galanos was put in a position to sell the estate and recover out of the proceeds any sums which should be due to him or to Tongoni Plantations Ltd. (there being already £11,000 due) the balance being payable to the Ayoub family. But that was not the consideration mentioned in the transfer.

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It is difficult to understand why a fictitious sum (upon which presumably stamp duty would be calculated) should have been inserted in the transfer unless it was to lend verisimilitude to the transaction for the benefit of the Land Control Board. Upon the registered title taken alone Galanos was apparently the absolute owner of the estate to the complete exclusion of the Ayoub family. There was nothing on the title to show that Hurley had been a trustee having only the legal estate. It was, therefore, necessary for the Ayoub family to be in a position to prove that, in fact, they were the beneficial owners which, at that stage, they undoubtedly were. Hence the Agreement, which recited the true position and contained an admission by Galanos that the purchase money mentioned in the transfer was not being paid and an undertaking by Galanos to pay to the Ayoub family the balance of the purchase price on a sale of the estate less whatever might be due to him or Tongoni Plantations Ltd. No period was fixed by the Agreement within which the estate was to be sold and nothing was said as to the expenses or the allocation of the rents and profits in the mean time. If any express provision had been made for payment of profits less expenses to the Ayoub family, that would have disclosed a trust. It is difficult to appreciate the reason for Clause 2 of the Agreement since on the face of the Agreement "the sum due under this Agreement" would not be due in any event until seven days after the completion of a sale.

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On the 18th January, 1956, Galanos as proprietor of the leasehold title re-entered on the estate evicting Zagoritis without due process of law, claiming a right to do so on two grounds: first that Zagoritis had defaulted in payment of an instalment of rent due during Hurley's proprietorship; and, secondly, that Zagoritis had failed to maintain the estate.

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In January, 1956 Zagoritis sued Galanos in Civil Case No.99 of 1956 for wrongful re-entry, claiming, among other claims, over Shs.800,000 as damages.

On the 5th May, 1957, Galanos sold the estate to one Horn for £35,000 payable as to £5,000 down

and the balance by annual instalments of £5,000 per annum.

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On the 29th June, 1957, Galanos died. After his death the Respondents were substituted as Defendants and, on the 15th August, 1958, they compromised Zagoritis' claim by paying him Shs.133,000 and costs, making a total of Shs.149,000 odd.

10 The Respondents, as executors of Galanos, claimed to be entitled to recoup themselves this expenditure by deducting it from sums payable to the Appellants under the Agreement as proceeds of the sale of the estate to Horn. The Appellants denied the Respondents' right to this recoupment. On the 11th August, 1959, the Appellants filed a plaint in which they claimed a declaration that the Respondents were not entitled to deduct from the proceeds of the sale of the estate the money paid to Zagoritis to settle his claim (hereinafter called "the Zagoritis settlement money"). In paragraph 3 of their original plaint the Plaintiffs pleaded the Agreement and pleaded that it had there-
20 by been agreed inter alia that Galanos should pay the sums mentioned to each of the Appellants "who were beneficially entitled to the estate to the extent of one quarter each". This was amended during the hearing to read "who had been beneficially entitled to the estate" meaning
30 during the trusteeship of Hurley and before the transfer to Galanos.

By paragraph 2 of the Defence, the Respondents admitted the Agreement, and said that they would refer at the trial to the Agreement for its meaning and effect. The Respondents maintained that the Appellants were bound by the settlement with Zagoritis and pleaded that the settlement was for the benefit of the Appellants and that the Appellants had agreed to be liable
40 for any payments incidental to Zagoritis' suit including costs, and they pleaded that the Appellants were estopped by their conduct from denying their interest in the Zagoritis Settlement. They denied that the Appellants were entitled to the declaration prayed.

The case came on for trial on these pleadings

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Counsel for the Respondents made a preliminary objection that the plaint disclosed no cause of action. He submitted inter alia that the implication of paragraph 3 of the plaint was that Galanos was a trustee of the estate and that he would be entitled to indemnity in respect of the Zagoritis settlement money as paid out on behalf of the beneficial owners of the estate (the Appellants) unless he had acted unreasonably or in breach of trust in making the payment. Counsel for the Appellants submitted (inter alia) that their case was that Galanos agreed to pay them the sale price of the estate and that the estate had been sold: the Respondents claimed to be entitled to deduct certain monies: it was for them to prove that they were entitled to do so. The learned judge overruled the preliminary objection.

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Counsel for the Respondents then announced that the defences of estoppel and agreement by the Appellants to the Zagoritis settlement were not being proceeded with: the Appellants' case would be that there was a resulting trust.

20

The court then framed issues:-

"(1) Whether the Defendants are trustees and entitled in that capacity to deduct the sums involved in the settlement of Court case No.99 of 1956.

(2) If not whether they are entitled to deduct the said sums under the agreement of 12th November, 1955."

30

The first two grounds of appeal allege that the learned judge erred in framing the first issue, as this was not raised on the pleadings, or alternatively in framing it without the defence being properly amended and an adjournment granted to the Appellants. I think that it would have been better if the pleadings had been amended; but it was the duty of the court to frame issues upon the points of fact or law upon which the parties were at variance (Order XIV rule 1(5) of the Kenya Civil Procedure Revised Rules, 1948); and under rule 3 of that Order the material on which issues can be framed includes allegations made by the advocates of the

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parties. The Agreement had been pleaded in the
 10 Plaint and the meaning and effect of it had been
 put in issue by the Defence and it was quite
 clear from the argument which had already taken
 place that a material proposition of law on
 which the decision of the case might well depend
 was whether or not the circumstances disclosed
 by the Agreement constituted Galanos a trustee
 for the Appellants. I think that the judge was
 entitled to frame the issues as he did. In fact,
 an adjournment was granted shortly afterwards.
 I think that Grounds 1 and 2 of the Memorandum
 of Appeal fail.

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To return to the course of the proceedings
 in the Supreme Court:- Learned Counsel for the
 Appellants, having started to open her case,
 said that she had not come prepared to argue the
 case on the basis of trustee and asked for an
 adjournment. The hearing was adjourned to the
 20 following day.

On the following day the evidence of a wit-
 ness who had to return to Tanganyika was inter-
 posed.

The following is the record on what then
 took place between Counsel as recorded in the
 learned judge's notes:-

30 "O'Donovan: Either Galanos is beneficial
 owner who can do what he likes or he is
 trustee. Issue is very narrow.

Kean: If it is conceded that if no trust,
 I must concede there is little between us.

O'Donovan: If he is liable to account for
 profits he is entitled to be indemnified.
 He must be trustee. In construing phrase
 'which shall be due' Court may look at
 evidence.

Adjourned to 2.15 p.m.

2.15 p.m.

40 Mrs. Kean: Now agreed that only point for
 decision is whether the agreement of
 12.11.55 taken with the transfer consti-
 tutes a trust, i.e. whether Galanos de-
 ceased was a trustee of the estate. If

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he did hold as trustee it is agreed that the Plaintiffs are not entitled to the declaration. If he did not hold as trustee it is agreed that Plaintiffs are entitled to the declaration."

A legal argument followed as to the admissibility of evidence of surrounding circumstances to assist in the construction of the Agreement. It was argued for the Respondents that there was a latent ambiguity in the words "any sums which shall be due" to Galanos which occur in clause 1 of the Agreement. This phrase could cover expenses of management of the estate incurred by Galanos as well as the debt owing to him as recited in the Agreement: if they enabled Galanos to charge management expenses against the sale price of the estate, this would show that he was in the position of a trustee. It was argued contra that the words were unambiguous. The learned judge ruled that there was a latent ambiguity in the words "any sums which shall be due" and admitted evidence of surrounding circumstances. This decision was attacked on appeal. Mr. Gratiaen, for the Appellants argued, among other things, that the estate was then leased to a tenant in possession so that the words could not possibly refer to management expenses incurred by Galanos. But, only about two months after the execution of the Agreement, Galanos evicted the tenant and he may well have had the intention to do this when the Agreement was executed. I think that evidence of the surrounding circumstances was admissible under the sixth proviso to section 92 of the Indian Evidence Act, and see Cannon v Villars (1878) 8 Ch. D. 415, 419; Hart v Hart (1881) 18 Ch. D. 670.

The Appellants called a witness and closed their case. Counsel for the Respondents addressed the court and the case was adjourned till the following day. At that late stage Counsel for the Appellants applied to amend paragraph 3 of the plaint by substituting "had been" for "were" beneficially entitled, and the amendment was allowed. Counsel for the Appellant then said:-

"I apply for the issues to be changed and defence properly amended. The case

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for the Plaintiffs was never that the relationship of trusteeship existed. Defence was agreement and estoppel. Basis of trial completely changed. I may have injured my case. If the defence had been that they were entitled as trustees to make the deductions they would have to show they acted reasonably. Order VI rule 2. Court still has power under Order XIV rule 5(1) to amend issues. I ask issues to be struck out and for pleadings to be amended."

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continued

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Learned Counsel for the Respondents replied that Counsel for the Appellants and he had reached agreement the day before that if the Defendants were trustees, the action failed and that if they were not, the action succeeded. That agreement was not unfair and he did not release his friend from it: it was an agreement with certain automatic consequences. The learned judge after hearing further argument, ruled as follows:-

"...on the pleadings the issue as to the construction of the agreement of 12.11.55 is clearly raised. The only issue which arises in this case is whether the agreement creates the relationship of trustee and cestui que trust. I see no necessity for amending the issues."

30

That ruling was challenged on appeal. I think that the issues as framed sufficiently covered the question of trust or no trust. It would have been better, as I have said, to have amended the pleadings at an earlier stage; but I do not think that the failure to do this was fatal.

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The learned judge found that Hurley had been a trustee, that Galanos had acquired the estate from him without payment and with knowledge of the outstanding equities and was also a trustee. He held that if the Agreement created a trust, the transaction was illegal; but that it was not necessary for him to decide the case on that ground, since it was conceded that if the instrument did amount to a trust, the Plaintiffs were not entitled to the declaration claimed and that the action failed.

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The main argument addressed to us on the appeal concerned the agreement which had been made between Counsel.

The effect of the agreement between Counsel was, as it seems to me, on the one hand to make it unnecessary for the court to consider whether the transaction by the Plaintiffs which was evidenced by the transfer and the Agreement was illegal; and, on the other hand, to make it unnecessary for the Court to consider the propriety of Galanos' action in re-entering upon the estate which he had leased to Zagoritis and the propriety of the settlement made by the executors of the suit launched by Zagoritis as a result of that re-entry.

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Counsel were both experienced Counsel and to make such an agreement was within their ostensible authority. The agreement was reached after an adjournment. In the circumstances of this case, I see no reason to doubt that, in coming to their agreement, Counsel were acting prudently and in the best interests of their respective clients.

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Mr. Gratiaen, in his argument before us, said that if the issues introducing the question of trust were to be confined to a pure question of law on the construction of two documents, he could not fairly complain. But he did complain of the finding of the learned judge that, independently of the transfer and the Agreement, there was a resulting trust arising by implication of law from certain circumstances and that the Agreement, even if it did not create a trust, was not inconsistent with the existence of one. The passage in the judgment is:-

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"The position seems to me to be this. It is clear from recital (1) in the agreement that Hurley was in fact a trustee. Galanos purchased from a person whom he knows to be a trustee. He acquired the estate without payment and with knowledge of the outstanding equities. Even if there were a payment Galanos had knowledge of the outstanding equities. There is nothing in the agreement to exclude a resulting trust and the arrangement was connected with such a trust."

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Mr. Gratiaen said that that was an independent question outside the agreement between Counsel which should not have been considered, as it necessarily called for a clear statement in the pleadings of the facts which caused a resulting trust independently of the trust created by the Agreement.

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10 I cannot agree. In the passage referred to the learned judge was not relying on extraneous facts, but on the facts disclosed in the Agreement which had been pleaded and produced by the Plaintiffs, and which facts were not denied. I think that the distinction sought to be drawn between a trust created by, and a trust constituted from the facts disclosed in, the Agreement is too narrow and I feel confident that no such distinction was in the minds of Counsel when they made their agreement. The argument of
20 Counsel for the Defendants on the preliminary point had been that there was a resulting trust arising from the facts recited in the Agreement and the Plaintiffs' beneficial ownership of the estate as pleaded in paragraph 3 of the plaint. Moreover, Counsel for the Plaintiffs had explained the only point then left at issue in the terms quoted above which, in my opinion, do not fairly bear the narrow construction put upon them by Mr. Gratiaen.

30 I understood Mr. Gratiaen to argue in the alternative and without prejudice to his contention that there was no resulting trust, that even if Hurley was a trustee, the following would be the position. If Hurley conveyed the property to Galanos absolutely and Galanos had knowledge of the equities, Hurley's beneficiaries could follow the trust property; but where the beneficiaries were consenting persons and arranged the transaction, they could not say that they
40 had a right to claim the property as against the transferee. That seems to me to beg the question. It depends on what the arrangement was which the beneficiaries made or to which they consented. That, we know, was an arrangement by which, since they, the Ayoub family, could not be registered as owners of the estate, Galanos took from their trustee a transfer to himself, expressed to be for a consideration which was not in fact paid, and agreed that when he sold

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the estate, he would pay the proceeds to the Ayoub family after deducting the sums due to himself and Tongoni Plantations Ltd. Was Galanos to be the absolute owner pending a sale at some undetermined future time or was he to hold the estate in the mean time for the benefit of the Ayoub family? Whether the Ayoub family could claim the property as beneficiaries and were subject to the liabilities of beneficiaries depended on the answer to that question. The learned judge found that the balance of probabilities was strongly in favour of the latter supposition and I agree. If that was the arrangement to which the Ayoub family consented, there was nothing (apart from the question of illegality under the Land Control Ordinance) to prevent them exercising their rights as beneficiaries against their new trustee. Per contra they would be liable to indemnify him against expenditure properly incurred in connection with the trust.

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Mr. Gratiaen argued that a legal interpretation of the transaction was to be preferred, if this could be done without violence to the language used. As a general proposition I agree. The case for such an interpretation in this instance would have been very much strengthened if the consideration expressed in the transfer had not been untruly stated. It would have been further strengthened if it had been proved that the true position, as disclosed in the recitals to the Agreement, had been disclosed to the Land Control Board when their consent to the transfer was obtained. In my opinion, the language of the first three recitals to the Agreement discloses the existence of a trust by implication of law and there is nothing in the operative part of the Agreement which is inconsistent with the position of Galanos as a trustee. Hurley had only a legal estate and could convey nothing but a legal estate to a transferee who had notice of the equities, as Galanos had, unless the beneficiaries - the Ayoub family - authorised and directed him to convey their beneficial interest also, so as to make Galanos an absolute owner. Did they do so? That was a question of fact. Hurley transferred the estate as registered proprietor. But he was admittedly a trustee. The wording of the transfer would have been the same whether or not he held the beneficial interest. It was quite inconclusive to show that the beneficial interest

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passed. There is nothing in the Agreement which states that Galanos is to have the estate beneficially. Indeed, the first two recitals, reciting as they do that the estate had been purchased by the Ayoub family and registered in Hurley's name and that Galanos had agreed "to take over the farm and have the same registered in his name" are far more apt to describe a transaction by which Galanos is to step into Hurley's shoes as a trustee, than to describe a sale or transfer to Galanos absolutely. There is not a word to say or imply that the transfer was more than a transfer of Hurley's legal estate to Galanos. If the Ayoub family intended their beneficial interest to pass and authorised Hurley to convey it, then that fact, since the documents do not establish it, would have to be established by admissible evidence dehors the documents. The second Appellant, the widow of Galanos, was called to state what the arrangement was. I doubt whether her evidence was admissible. If it was, it certainly did not establish that the estate was intended to be made over to Galanos absolutely. She said, among other things, that she knew it was wrong for Galanos to hold the estate as trustee; but in cross-examination she said:-

"My husband was a multi-millionaire. The Ayoub family had the farm - that is all. We did not intend to make a gift to my millionaire husband at all. We owed him a certain sum. It was as if he had paid us money. Certainly we did not intend to give my husband the use of the estate as long as he liked to keep it. The estate was the property of the Ayoub family. It was registered in the name of my brother-in-law. I don't know why we wanted to get rid of Mr. Hurley. I don't know where he is now. I don't know if he is still my brother-in-law. My sister and brother-in-law are in England. Mr. Hurley was not a trustee. He was proprietor. It was our estate but he was proprietor. When Galanos took over the estate it was his. We made a business arrangement. We trusted my husband as a business man to sell the estate for us. We trusted him to manage it properly. He knew about these things.

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It was his. He did what he wanted. We owed him money. I am not being .
The arrangement with my mother was not written, it was verbal."

There was evidence, which I think was admissible as an admission by a party and possibly also as evidence of a course of conduct, of a meeting on 23rd July, 1957, at the Standard Bank, Nairobi, between Mrs. Ayoub and Mr. Henry Ayoub and the Trust officer of the Bank and a Mr. Holder an executor of the estate of Christos Galanos deceased. Mr. Holder took notes and prepared Minutes which he produced. He testified that they accurately reflected what took place at the meeting. Mr. Holder is an Advocate of the Supreme Court of Kenya and of the Tanganyika High Court and there is no reason to doubt that statement. The Minutes show that the Agreement was before the meeting and that, in response to a question put to Mrs. Ayoub and Mr. Henry Ayoub, (the 4th Appellant) the latter put forward a claim by the Ayoub family not only to the proceeds of sale of the estate, but to the proceeds of the 1956 coffee crop. Mr. Ayoub admitted that there would be owing to Galanos not only the sum of £11,000 (presumably the £11,000 mentioned in the Agreement) but also the expenses incurred by Galanos in connection with the running of the estate. Mr. Ayoub "admitted that such expenses would be a debt due by the Ayoub family to Mr. Galanos". If this evidence was correct, it was decisive against the thesis that Galanos was the absolute owner of the estate and that the Ayoub family had intended to convey their beneficial interest to him absolutely. They were claiming as of right the profits of the estate subsequent to the Agreement and admitting liability for running expenses. This is quite incompatible with an absolute sale of the estate to Galanos, and incompatible with the theory that the trust merely attached to the proceeds when the estate came to be sold by Galanos. These Minutes were not agreed by the Ayoub family; but the point of disagreement apparently was the part of the Minutes dealing with the Zagoritis settlement and not the part referred to above. In any event there is no reason to doubt Mr. Holder's evidence.

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The learned judge admitted evidence of the course of dealing between the parties and certain letters from their advocates as illustrating how the Agreement had been interpreted.

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As already stated, I think that evidence of the circumstances surrounding the execution of the Agreement was admissible under Proviso (6) to section 92 of the Indian Evidence Act. Whether evidence of the course of dealing (which must be a course of dealing by both parties) was admissible or not would depend on whether the meaning of the document was doubtful. MONIR ON EVIDENCE 3rd Ed. p.682; N.E.Railway Co. v Hastings (Lord) (1900) A.C. 260. I incline to the view that the evidence of a course of dealing by both parties was admissible. I find it unnecessary, however, to decide whether such evidence was admissible or not and would merely say that, in my opinion, the recitals in the Agreement whose correctness was not challenged disclosed that Galanos was in the position of a trustee. If the other evidence was admissible, it did not displace, but strongly reinforced, that conclusion.

To sum up: Galanos, with knowledge of the equities took a transfer from a trustee, the effect of which was to give him the legal estate in the property transferred, and it was not shown that he ever obtained the equitable estate, that is to say it was not shown that the legal and equitable estates were co-extensive and became united in the same individual. On the contrary, on the construction of the Agreement Galanos was a trustee and this conclusion was strongly supported by the oral evidence, if admissible. The salient fact was that Galanos took the transfer from a trustee of an existing trust who had only a legal estate. Dicta taken from cases in which transferor or settlor was the owner of the beneficial as well as the legal interest are not, in my opinion, of assistance.

In the absence of evidence of what facts were put to the Land Control Board, I feel

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dubious about the legality of the transaction effected by the transfer and the Agreement. I am doubtful also as to the propriety of the re-entry by Galanos on the land leased to Zagoritis and consequently as to his right to indemnity in respect of that transaction. These matters, however, were removed from consideration of the court below by the agreement between Counsel and were not argued either there or before this court. In the circumstances, I express no concluded opinion upon them.

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I agree with the learned judge's conclusion that, on the case as it was conducted, the Plaintiffs were not entitled to the declaration which they claimed.

There will be an order in the term proposed by Gould J.A.

Dated at Nairobi this second day of
October, 1961.

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K. K. O'CONNOR.

President.

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

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CIVIL APPEAL NO.33 OF 1960

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1961

B E T W E E N

MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB

Appellants

and

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as EXECUTORS of THE ESTATE OF
CHRISTOS GALANOS deceased

Respondents

(Appeal from judgment of H.M. Supreme Court of
Kenya at Nairobi (Miles J.) dated 28th Janu-
ary, 1960,

in

Civil Case No.1185 of 1959

Between

MARIE AYOUB & 3 OTHERS

Plaintiffs

and

STANDARD BANK OF SOUTH
AFRICA LTD. & WILLIAM
P. HOLDER as EXECUTORS
OF THE ESTATE OF CHRISTOS
GALANOS, deceased

Defendants).

JUDGMENT OF GOLD J.A.

This is an appeal from a judgment of the
Supreme Court of Kenya at Nairobi.

At some time prior to November, 1955, one
Leslie Norman Hurley became the registered
lessee of the Crown lease of land called the
Cranhurst Estate (hereinafter called "the
Estate"). Hurley was the husband of the

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third Plaintiff and it is common ground that he held the lease as trustee for the four plaintiffs, who were beneficially entitled to it. The Plaintiffs were all members of the Ayoub family, and the second Plaintiff was the wife of one Christos Galanos. By a transfer dated the 11th November, 1955, Hurley transferred the lease to Christos Galanos for a consideration expressed in the instrument to be Shs.300,000, but it was common ground that no consideration was in fact paid or intended to be paid.

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An Agreement dated the 12th November, 1955, was entered into between Christos Galanos of the one part and the four Plaintiffs (in the agreement referred to as "the Ayoub family") of the other part, and contained the following material provisions :-

"WHEREAS

- (1) An Estate known as Cranhurst Estate (hereinafter referred to as 'the Estate') and being Land Reference Number 7532 S.W. of Thika Township in the said Colony of Kenya was purchased by the Ayoub family and registered in the name of the husband of the party of the fourth part namely Leslie Norman Hurley.
- (2) The Land Control Board has refused to allow the Ayoub family to have the farm registered in their names and Mr. Galanos has agreed to take over the farm and have the same registered in his name.
- (3) At the date of this Agreement there is due to Mr. Galanos or Tongoni Plantations Limited a sum of approximately Eleven thousand pounds. Although the transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos is being registered the total purchase money is not being paid as Mr. Galanos hereby admits notwithstanding a full receipt having been given in the formal transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos.

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- (4) The Ayoub Family and each of them hereby declares that they are entitled to one quarter each of the benefit of any sums which may become payable under this Agreement.

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NOW IT IS HEREBY AGREED AND DECLARED
as follows:-

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1. Mr. Galanos shall pay to the Ayoub family a sum which shall represent the difference between the sale price of the Estate and any sums which shall be due to either Mr. Galanos personally or to Tongoni Plantations Limited such sum to be paid within seven days of the completion of a sale.

2. Pending a sale the Ayoub Family and each of them hereby agree that they will not take any action whatsoever to recover the sum due under this Agreement.

3. In the event of the death of Mr. Galanos before a sale of the Estate Mr. Galanos hereby directs that his Executors shall not sell the farm unless the price is agreed by the Ayoub family and each of them and thereafter account to the Ayoub family in accordance with the terms hereinbefore stated."

In 1954 Hurley had subleased the Estate to one Christos Dimitri Zagoritis, and in January, 1956, Zagoritis and another commenced an action against Galanos, claiming damages for wrongful re-entry upon and their eviction from the Estate. During the pendency of that action, viz on the 5th March 1957, Galanos sold the Estate for £35,000, payable as to £5,000 on the signing of the agreement and thereafter by six yearly instalments of £5,000 each. Christos Galanos died on the 29th June, 1957; his executors, who are the Defendants in the present action settled the Zagoritis action by paying Shs.133,000 and costs on the 15th August, 1958. The dispute which thereafter arose and which resulted in the present proceedings was whether the moneys paid on the settlement of the Zagoritis action were deductible by the Defendants, as executors of Galanos from

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the proceeds of the sale of the Estate in addition to the sum of £11,000 mentioned in the agreement of the 12th November, 1955 (hereinafter called "the Agreement").

I come now to the pleadings and to certain events during the trial which had the effect of limiting the matters which fell to be considered by the learned judge in delivering his judgment. I would say at once that this is a case which exemplifies and emphasizes the importance of having cases decided upon clear cut issues derived from, or if the issues are separately formulated, based upon, pleadings which leave no doubt as to the cases upon which the parties rely. The claim in the plaint was for a declaration that the defendants were not entitled to deduct from the proceeds of the sale of the Estate any of the moneys relating to the settlement of the Zagoritis action or any of the costs thereof. The Agreement was pleaded as follows, in paragraph 3 :-

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"3. By an Agreement in writing dated 12th November, 1955 made between the said Christos Galanos deceased and the Plaintiffs it was agreed that in consideration of an Estate known as Cranhurst Estate Land Reference number 7532 (hereinafter called 'the Estate') being registered in the name of the said Christos Galanos deceased and of the transfer in favour of the said Christos Galanos deceased acknowledging full payment of the purchase price for the Estate despite the fact that the said purchase price had not been paid the said Christos Galanos deceased should pay to each of the Plaintiffs who were beneficially entitled to the Estate to the extent of one quarter each of a sum representing the difference between the sale price of the estate and any sums which should be due to either the said Christos Galanos personally and/or to Tongoni Plantations Limited such sum to be paid within seven days of completion of a sale of the Estate. The said Agreement further provided that in the event of the death of the said Christos Galanos deceased prior to a sale of the Estate the

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Executors of the said Christos Galanos deceased should not sell the said estate without the agreement of each of the Plaintiffs as to the price at which the estate was to be sold and that the Executors of the said Christos Galanos deceased should account to the Plaintiffs in accordance with the said agreement. The Plaintiffs will crave leave at the trial to refer to the said agreement for its full tenor meaning and effect."

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The history of the matter as I have outlined it above and the existence of the dispute, were related in the other paragraphs. This court was informed that at a late stage of the trial an amendment of paragraph 3 was asked for and allowed, substituting the words "had been" for the word "were" prior to the phrase "beneficially entitled". The judge's note confirms this. In spite of this order the record of appeal shows the plaint in its original form. A failure to amend after order may well have certain technical consequences under Order VI Rule 24 of the Civil Procedure (Revised) Rules, 1948, but I would like also to quote from the judgment of Evershed, M.R. in Cole v Lejeune (1951) W.N. 353, where he said :-

"It is, however, important that the record should be in order when the case comes before this court, and the more so since the matters upon which appeal lies to this court from the county court are strictly limited by statute. What I desire to say in the plainest terms is this: the judge having ordered an amendment of the pleadings, it was the duty of the court and of counsel to see that that amendment was effected, and that the record was put in order. We have now done that. The claim has been amended in certain respects which make it show as a pleading that it covers an allegation of licensor and licensee as well as that of landlord and tenant.

Pleadings are not invented to ensnare litigants, who are unaccustomed to the intricacies of the law: they are

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made to formulate the issues which the Court has to determine; and it is therefore of the utmost importance, when a matter of this kind is settled by the judge's allowing an amendment, that the record be put in proper order."

This passage bears not only upon the inconvenience and possibility of error arising from incorrect records on appeal, but upon what I said earlier on the subject of clarity of pleading.

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The Written Statement of Defence admitted the Agreement, but made no other admissions in respect of paragraph 3 of the plaint. Paragraphs 4, 5 and 7 of the Written Statement of Defence were as follows:-

"4. The Defendants maintain that the Plaintiffs are bound by the said settlement referred to in para.8 of the Plaint and that all payments made by the Defendants in connection with the said settlement including the costs of the advocates for the deceased and also the costs of the advocates of the Defendants in connection with Cranhurst Estate generally and in connection with S.C.C.C. No. 99 of 1956 in particular are properly deducted from any purchase monies which have come or are coming into the hands of the Defendants from the Purchaser of Cranhurst Estate.

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5. The settlement and costs referred to in para.8 of the Plaint were for the benefit of the Plaintiffs and each of them and the Plaintiffs agreed with the Defendants that they the Plaintiffs would be liable for any payments incidental to the said Suit including costs.

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7. The Defendants will contend that the Plaintiffs by their prior conduct are estopped from denying their interest in the settlement, and in the outcome of the Court proceedings referred to in the previous paragraph."

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When the case came on for trial, Mr. O'Donovan, for the Defendants, submitted that the

plaint disclosed no cause of action. He argued that the implications of paragraph 3 in law were that the Plaintiffs were the beneficial owners of the estate and that therefore Galanos was a trustee at the time of his death. Only if the settlement of the Zagoritis action by the Defendants amounted to a breach of trust would liability fall on the estate and the Plaintiffs could not succeed on that basis because no breach of trust had been pleaded. Mrs. Kean, for the Plaintiffs, said that there was no allegation of trusteeship or breach of trust. The basis of the claims was the agreement to pay certain moneys upon sale of the estate. Mr. O'Donovan replied that the court was bound to read into paragraph 3 of the plaint a resulting trust. The trial judge disallowed the preliminary objection giving his reasons in the final judgment as follows:-

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"I took the view that it was arguable that the agreement might be construed as an agreement for sale and that if so the consequence would be that the Defendants would not be entitled to deduct the sums in question, Order VI rule 29 only requires a Plaintiff to disclose a 'reasonable', that is to say an arguable cause of action and I therefore over-ruled the objection."

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After the ruling, Mr. O'Donovan said that neither estoppel nor agreement (the grounds set out in paragraphs 5 and 7 of the Written Statement of Defence respectively) were being pursued; his case would be that there was a resulting trust. The trial judge then framed the following issues:-

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"(1) Whether the Defendants are trustees and entitled in that capacity to deduct the sums involved in the settlement of Court Case No. 99 of 1956.

(2) If not whether they are entitled to deduct the said sums under the agreement of 12th November, 1955."

Mrs. Kean then opened the case for the Plaintiffs, after which she is recorded in the trial judge's notes as saying:-

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"I did not come prepared to argue case on basis of trustee. I ask for adjournment. This may shorten case."

There was no objection by Mr. O'Donovan and the case was adjourned until the following day. When the court resumed, the transfer from Hurley to Galanos was put in by consent and it was arranged that Mr. O'Donovan should interpose a witness, Mr. W.P. Holder, one of the Defendants. Mr. Holder then gave evidence at some length and immediately following his testimony there is a portion of the judge's notes which reads as follows:-

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"O'Donovan: Either Galanos is beneficial owner who can do what he likes or he is trustee. Issue is very narrow.

Kean: If it is conceded that if no trust I must concede there is little between us.

O'Donovan: If he is liable to account for profits he is entitled to be indemnified. He must be trustee. In construing phrase 'which shall be due' Court may look at evidence.

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Adjourned to 2.15 p.m.

2.15 p.m.

Mrs.Kean: Now agreed that only point for decision is whether the agreement of 12.11.55 taken with the transfer constitutes a trust, i.e. whether Galanos deceased was a trustee of the estate. If he did hold as trustee it is agreed that the Plaintiffs are not entitled to the declaration. If he did not hold as trustee it is agreed that Plaintiffs are entitled to the declaration."

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This agreement which apparently was arrived at between Counsel during the luncheon adjournment, narrowed the issue substantially. The effect seems to have been that if it were held that there was no trust Mr. O'Donovan could not rely upon any other interpretation of the agreement, and if there were a trust the Plaintiffs' claim failed without any need for the court to consider whether

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the Zagoritis settlement amounted to a breach of that trust. Mrs. Kean obviously had in mind the two documents, the transfer from Hurley to Galanos and the Agreement, but does not appear to have restricted the agreement between Counsel to any particular type of trust, for the words "i.e. whether Galanos deceased was a trustee of the estate" are quite general.

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10 There followed argument as to whether extrinsic evidence was admissible to assist in the task of the construction of the documents, and the ruling of the trial judge was as follows:-

20 "Ruling. In my opinion there is a latent ambiguity in the words 'any sums which shall be due' within the meaning of Section 93 of the Indian Evidence Act. The construction of this phrase is necessary in order to decide whether there is a trust. I rule that extrinsic evidence of facts which would show the meaning is admissible."

A witness was then called for the Plaintiffs and their case was closed. Mr. O'Donovan then submitted argument and the case was adjourned to the following day. It is necessary to set out at some length the trial judge's note of the proceedings when the court resumed. I have taken this from the learned judge's manuscript notes. There are some inaccuracies in the typed transcription in the appeal record.

30 "27.11.59.

Mrs. Kean: I ask leave to correct para.3 of plaint by substituting 'had been' for 'were beneficially entitled'.

No objection by O'Donovan.

Order: Amendment as prayed.

40 Mrs. Kean: I apply for issues to be changed and defence properly amended. The case for Plaintiffs was never that the relationship of trusteeship existed. Defence was agreement and estoppel. Basis of trial completely changed. I may have injured my case. If defence had been that they were entitled as trustees to make the deductions they would have to show they acted reasonably. Order VI rule (2).

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Court still has power under Order XIV rule 5(1) to amend issue. I ask issues to be struck out and for pleadings to be amended.

O'Donovan Q.C: Mrs. Kean and I reached agreement yesterday that if Defendants were trustees the action failed and if it were not the action succeeded. I do not release my friend from that agreement - not unfair. This is an agreement on what are certain automatic consequences.

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Order XIV rule (1) (5). Examination of parties or advocates. Trust is not a legal but an equitable relationship. Construction of agreement of 12.11.55 is one which does arise on pleadings. It would have been sufficient if only second issue framed. My case is that under that agreement the expense was deductible because defendants were trustees. Defence does expressly raise issue as to meaning of agreement. Far too late to re-sile from a position in which Mrs. Kean fully concurred. She is driven to meeting argument that plaint disclosed no cause of action. Any act by a trustee falling short of standard required is a breach of trust. Order VI rule 2 - nobody can raise breach of trust unless pleaded. Para.528 - Halsbury Vol.33. Plaintiff cannot raise (illegible) further issues. Trial should not be as to whether trustees have acted properly. Case has proceeded on only issue relevant on pleadings.

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Kean: I do not wish to address Court further. Agreement was on basis of first two issues to which I objected.

Court: In my view on the pleadings the issue as to the construction of the agreement of 12.11.55 is clearly raised. The only issue which arises in this case is whether the agreement creates the relationship of trustee and (illegible) cestui que trust. I see no necessity for amending the issues."

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The purpose of the amendment asked for there, is not entirely clear. Presumably it was to lay a foundation for Counsel's next submission (which, if successful, would have necessitated a new

alignment of evidence and argument on both sides) by making it clear that no admission of a trust was intended by paragraph 3 of the Plaint. The submission having failed, I do not think anything turns upon the amendment, for the sole issue at that stage of the trial, trust or no trust, was to be determined by the construction of the documents and the evidence and not by any supposed admission. The trial judge clearly held that Mrs. Kean was bound by the agreement between counsel, and I would emphasize that the correctness of his decision in this respect has not been made a ground of appeal, though it was included in proposed additional grounds which were apparently contemplated, but were not pursued. As to the words used by the trial judge in his ruling, I am satisfied he did not intend to refer to the Agreement to the exclusion of the transfer from Hurley to Galanos, which was specifically mentioned in the Agreement. The emphasis was on the Agreement in my opinion, as the guide to the intention of the parties in relation to the capacity in which Galanos took the Estate under the transfer. In his judgment the trial judge did mention the transfer when he said:-

"After the conclusion of the evidence it was agreed by Counsel on both sides that the point for decision was whether the agreement taken with the transfer constitute a trust with the consequence that if Galanos did hold as a trustee the Plaintiffs were not entitled to the declaration, while if he did not the Plaintiffs would be entitled to the declaration."

This was in my view clearly the right approach to the case."

There would appear to be a slight and immaterial inaccuracy in that passage, for the agreement between Counsel was arrived at before the evidence was completed.

Having dealt in his judgment with certain of the arguments, the trial judge expressed his conclusions in the following paragraph :-

"The position seems to me to be this. It is clear from recital (1) in the agreement

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that Hurley was in fact a trustee. Galanos purchased from a person whom he knows to be a trustee. He acquired the estate without payment and with knowledge of the outstanding equities. Even if there were a payment Galanos had knowledge of the outstanding equities. There is nothing in the agreement to exclude a resulting trust and the arrangement was connected with such a trust. Any other construction would have the consequences which could never have been intended by the parties, least of all by the Plaintiffs. It would mean that the Plaintiffs, whose only asset was this estate were in effect making a present of it to Galanos who was, according to the evidence, a multi-millionaire. He could keep it as long as he wished without any obligation on his part to manage it properly. No court could interfere whatever acts of waste he committed. He could have let the estate at a pepper-corn rent to Tongoni Plantations Limited or to any other person."

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(I will have occasion later to refer to this paragraph and will do so as "Paragraph A"). Having referred to the correspondence and to submissions on the question of illegality the trial judge concluded his judgment as follows:-

"Since I have construed the instrument of 12th November, 1955 to create a trust the action fails and there will be judgment for the Defendant. I will hear argument as to costs."

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I think this last passage must be read as conveying the trial judge's interpretation of what he had held in paragraph A. as there appears to be nothing else to which it could appropriately refer.

The Plaintiffs having failed in their claim for a declaration, brought the present appeal; I will refer to them hereafter as "the appellants" and to the Defendants as "the respondents". Mr. Gratiaen, who led for the Appellants, expressed the view that the trial judge should not on the pleadings have framed an issue introducing the question of a trust. That however was

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not argued as a ground for upsetting the judgment, for Counsel conceded that in the light of the agreement between Counsel, if the issues introducing the question of a trust were to be confined to a pure question of law arising from the construction of the transfer and the Agreement he could not fairly complain of prejudice or embarrassment. Mr. Gratiaen's main argument was as follows :-

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10 "I complain as a matter of fundamental
importance of the attempt made from time
to time to argue, not merely that these
two documents created the trust, but that
independently of them a resulting trust
arose by implication of law from certain
circumstances, and that in those circum-
stances the agreement of the 12th November,
1955, if it did not create a trust was not
inconsistent with the continued existence of
20 a resulting trust. That was an alternative
question outside the agreement which should
never have been considered by the judge be-
cause it necessarily called for a clear
statement in the pleadings of the facts re-
lied upon to establish a resulting trust in-
dependently of the trust allegedly created
by the agreement."

I trust that this submission has been transcribed
correctly, for though it can be rested upon
30 Ground 17 of the Memorandum of Appeal, it does not
follow it in phraseology. Mr. Gratiaen submitted
that the learned judge misconstrued the Agreement
and he asked this court to decide that it did not
create a trust, and that pursuant to the agree-
ment between Counsel the Appellants were entitled
to a declaration. He submitted that in view of
Counsel's agreement and in the absence of appro-
priate pleadings it was not open to the Respond-
ents to rely on any other trust, and that the
40 learned judge was wrong in holding that there was
a resulting trust. He said that in the paragraph
from the judgment which I have set out above as
Paragraph A, the learned judge found that because
certain matters were known to Galanos there was a
resulting trust preceding and not excluded by the
Agreement; that once one specific issue had been
agreed upon it was wrong to take the view that
even if the Agreement did not create a trust cer-
tain other facts not pleaded, gave rise to an

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independent trust. The court was tied by the agreement between counsel.

I agree that, in the circumstances, what the court had to do was to decide the single issue upon which counsel had agreed that the success or failure of the action depended. It was an issue for which the pleadings, in my opinion, provided only a dubious base; at least it was not defined in the pleadings with clarity as such an issue ought to be defined. Nevertheless it was an agreement between experienced counsel who had all the facts before them, and an agreement from which, on the appeal, neither side was sought to resile. With all respect to Mr. Gratiaen's argument, however, I am unable to accept, after careful examination of the whole record, that the issue agreed upon was as narrow as he has suggested. Mrs. Kean, when informing the court of the agreement after the luncheon adjourned on the 26th November, 1959, referred to "the agreement of 12.11.55 taken with the transfer", and although the learned judge later mentioned the Agreement only, I have no doubt at all that the court was intended to consider and did consider the effect of both documents. The transfer was referred to in the Agreement and both documents were obviously essential parts of whatever arrangement the parties wished to arrive at. What Mr. Gratiaen's submission amounts to is that unless the Agreement was itself to be construed as creative of a trust, either express or to be implied from the language employed, by way of settlement or declaration by Galanos as a full beneficial owner, the declaration asked for in the plaint must be made. That, to my mind, is too narrow and artificial, and I am satisfied that what counsel had in mind was the question whether the arrangements effected by the transfer and agreement in November, 1955, resulted in a relationship of trustee and beneficiaries between Galanos and the Appellants or in some other relationship such as debtor and creditor. That is in accord with Mrs. Kean's own explanatory words to the court, "i.e. whether Galanos deceased was a trustee of the estate".

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Mr. Gratiaen's alternative argument was that the learned judge was wrong in finding that a resulting trust arose in the present case. He submitted that if Hurley had transferred the

property without the consent of the Appellants they could have followed it, but where, as here the beneficiaries themselves arranged the transaction, they could not claim the property as against the transferee. That proposition ignores the fact that the consideration set out in the transfer was never paid or intended to be paid. Nor do I construe the Agreement as imposing upon Galanos any obligation of such a nature that it could be said to provide consideration for the transfer in lieu of the sum mentioned in that document, or which was inconsistent with the position of a trustee. Had the Appellants directed Hurley to transfer the Estate for value he would of course have remained a trustee for the consideration received and the transferee would have taken the Estate. But where beneficiaries direct a transfer for no consideration I see no reason why the ordinary rules should not apply; the transferee would hold as trustee for the beneficiaries, though he could adduce parole evidence to show that the intention was that he was to take beneficially: see LEWIN ON TRUSTS (15th Ed.) p.130.

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My own view of the task which was before the court is this. As I have said, if the transfer, established to be a voluntary one, stood alone, there would be a trust in favour of the Appellants unless otherwise rebutted. The transfer does not stand alone but must be read together with the Agreement which followed it. It was within the competence of the Appellants and Galanos to arrive at any legal position which they desired; it was a question of what they intended and their intention must be arrived at by construing the transfer and the Agreement together. In the approach to such a task, however, I think it is a relevant consideration that the effect of a voluntary transfer standing alone would have been as I have stated.

On the question of the Agreement Mr. Gratiaen submitted that the correct approach was that if a document is capable of being construed as creating legally enforceable rights that interpretation was to be preferred to one which, though possible, would give rise to an illegal and unenforceable arrangement. He relied upon Mills v. Dunham (1891) 1 Ch. 576 and Rodger v. The Comptoir d'Escompte de Paris (1869) L.R.2 P.C. 393. He submitted that

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the Agreement had no marks of creating a trust between parties; that it was consistent with an agreement reached between a new owner and former beneficial owner. He suggested that the object of the words "any sums which shall be due" in clause 1 of the agreement was to cover any loans which might be made after the date of the agreement, not to cover management expenses; no question of management expenses would be anticipated as the land was leased at the date of the agreement. He pointed out that there was no undertaking by Galanos to do anything inconsistent with full ownership. Though there was an obligation upon Galanos' executors under clause 3 not to sell without the agreement of the Appellants as to the price, there was no such restriction upon Galanos personally. He submitted that though the Agreement cast no specific obligation upon Galanos to sell, there was an implied term that he would do so in a reasonable time. An instrument intended to create a trust would, he submitted, have contained provision for disposal of rents and profits.

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The matter of possible illegality, which Mr. Gratiaen relied upon as an aid to the construction of the Agreement is rather obscure. If Galanos acquired the Estate on behalf of the Appellants without the consent of the Land Control Board in writing, that would be contrary to Section 7 (b) of the Land Control Ordinance (Cap. 150 the Laws of Kenya). The consent of that Board is in fact endorsed on the transfer to Galanos, as is that of the Commissioner of Lands under Section 38 of the Crown Lands Ordinance (Cap.155). There is no evidence as to what was disclosed to these authorities when the consents were given; the matter was only raised in argument at the end of the case in the court below. In the absence of anything to show the contrary, Hurley's trusteeship must be presumed to have been in accordance with and not contrary to law. There is no evidence to show that it would have been impossible to obtain official sanction for Galanos to continue that trust. If that had been established it would have provided stronger support for Mr. Gratiaen's argument that the transfer and Agreement, which were drawn by an advocate, were designed to accomplish ends similar to those of a trust but by the different and

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10 legal means of vesting the legal and beneficial interest in Galanos and creating a new debtor and creditor relationship. That position, however, was not established. On the other hand Mr. O'Donovan pointed out that even if a trust was contrary to the provisions of the relevant Ordinances, it was an illegality upon which Galanos could not have relied without fraud, and therefore could not have relied on at all; this factor may have been present to the mind of the draftsman. I think this question is too speculative to provide any assistance. What does, to my mind, weigh heavily against the debtor-creditor argument is the fact that no provision was made in the Agreement for the Appellants to receive any portion of the rents or profits or of any compensatory interest pending sale. As beneficiaries under a trust they were protected as to the rents and profits.

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20 I turn now to a question of evidence. Certain grounds of appeal in the memorandum complain of the admission by the learned judge of extrinsic evidence, to explain the Agreement. I did not understand Mr. Gratiaen to press this matter strongly, though he contested the correctness of the learned judge's ruling that there was a latent ambiguity in the words "any sums which shall be due" in the Agreement. His objection to the evidence in the main was re-
30 lated to his principal contention that the learned judge had found some form of trust not within the agreement made between counsel; he said that it was not open to the learned judge to find that the correspondence showed some kind of trust prior to the Agreement. With respect I do not think that the learned judge did that. I think that the passage from his judgment which I have already quoted as Paragraph A, shows that he formed his opinion primarily from the circumstances surrounding the ex-
40 ecution of the two documents. He then drew, it is true, confirmation for his view from the subsequent attitude of the Appellants as disclosed in the correspondence but I do not think that he can be said to have based his opinion on that.

I have no doubt that evidence of surrounding circumstances was admissible in this case

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to enable the court to ascertain and give full effect to the intention of the parties when they executed the transfer and the Agreement. The latent ambiguity lies in the question of the capacities in which the parties were dealing with each other and the main circumstances are in fact referred to in the recitals of the Agreement which show the original beneficial interest of the Appellants in the Estate, the reason for Galanos' taking it over, and the fact that he did not pay the consideration mentioned in the transfer. The Agreement itself is one of the circumstances upon which the Appellants must rely to rebut the presumption of a trust in Galanos arising from the transfer of the estate to him without consideration. Galanos' own evidence would have been admissible for the purpose: as was said by James L.J. in Fowkes v. Pascoe (1875) L.R. 10 Ch. Ap. 343 at 349:-

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"Where the Court of Chancery is asked, on an equitable assumption or presumption, to take away from a man that which by the common law of the land he is entitled to, he surely has a right to say: 'Listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances.'"

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It must follow, I think, that either party is entitled to insist that all of the surrounding circumstances are placed before the court. On the other hand I am doubtful whether any sound basis has been shown for relying upon the subsequent correspondence as a guide to the construction of the two documents in question. Where there is ambiguity, the sense in which both parties have acted upon the document is admissible in explanation: MONIR'S LAW OF EVIDENCE (3rd Edn) p.682, relying upon English authorities. In my opinion it is difficult to spell out of the correspondence, which is mainly between advocates, any such mutual course of conduct, and to any extent that it tended to show the way in which the Appellants' advocate construed the documents it was irrelevant. The learned judge mentioned a statement in a letter from the advocate for the Appellants in which he said that his clients were indebted to the deceased for the running expenses of the estate

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since the 12th November, 1957. If made by a deceased person that statement might have been admitted as a statement against interest under Section 32 (3) of the Indian Evidence Act (and see the judgment of Wickens V.C. in Stock v McAvoy (1872) L.R. 15 Eq. 55 at 58). In the circumstances of this case I see little more in the statement than the expression of the Advocate's opinion of the legal position, which I do not think was relevant to the question of construction.

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On this matter of evidence, for the reasons I have given I consider that the learned judge correctly considered all surrounding circumstances but ought not to have attached any weight to the correspondence. As I have already said, however, as I read the judgment the learned judge only referred to the latter to show that it confirmed the view which he had already expressed, to the effect that Galanos was a trustee. This court was not invited to consider ordering a new trial on any ground relating to wrongful admission of evidence; I would in any event have taken the view that any evidence which was wrongly admitted caused no substantial wrong or miscarriage of justice and that under rule 76 (2) of the Eastern African Court of Appeal Rules, 1954, an application for such an order would have had to be refused.

On the question of the construction of the transfer and the agreement, I am of opinion that the learned judge in effect arrived at the correct result, which is, I consider, that the effect of the two documents was to constitute Galanos a trustee. The transfer without consideration inevitably clothed him with that role unless a contrary intent could be drawn from the Agreement and the surrounding circumstances. I do not think it is material whether the position is regarded as a resulting trust stemming from the transfer, or whether that document should be contemplated as vesting property subject to an existing trust in a new trustee. Either possible view could have been negatived if the Agreement and the surrounding circumstances had shown that the intention was that Galanos should take beneficially. I agree with the learned judge that they do not. I have already dealt with the

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argument based upon the possible illegality of a trust and found it indeterminate. The estate was at the material time leased to Zagoritis at £3,000 per annum, and, as the learned judge pointed out the Estate was the Appellants' only asset. Could the intention have been to surrender these rentals to the wealthy Galanos, which would have been the result of the debtor-creditor relationship contended for? If such a relationship were intended, also there appears to be no reason why provisions should not have been inserted limiting Galanos' right to commit waste pending sale and imposing some form of obligation to use his best endeavours to sell and some restriction as to price. With Galanos as a trustee the Appellants were protected in respect of all of these matters. I do not consider that the fact that Galanos was entitled, under the Agreement, to deduct from the purchase money sums due to himself or Tongoni Plantations Ltd., is incompatible with a trust; nor is there anything in the Agreement to prevent interest running on the existing loan if interest was payable under whatever arrangement was in force in relation to that loan. The fact that Galanos was not called upon by the Agreement to consent the Appellants as to the minimum sale price, whereas his executors were so obliged, merely points to the fact that the Appellants, no doubt by reason of their relationship to him, had confidence in Galanos personally. As a trustee he would have to obtain the best price in any event. The restriction on the right of sale by Galanos' executors I think to be equally consistent with either a trust or a debtor-creditor arrangement. I do not find anything in the Agreement which points to an intention to alter, with relation to the land, the position which the parties would have occupied if the Agreement had not been entered into. It may be asked, if that is the case, why the Agreement was in fact signed. No firm answer can be given, beyond the facts that on the one hand, it contradicted the statement in the transfer that the purchase price had been paid in full and put on record certain obligations to be performed by Galanos, and on the other, that it

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contained acknowledgment of the debt to Galanos or Tongoni Plantations Ltd., and gave Galanos a secure way of obtaining payment of that indebtedness.

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For the reasons I have given I am of opinion that the declaration asked for was rightly refused by the learned judge. I would therefore dismiss the appeal with costs and certify for two counsel: In the Supreme Court the order for costs, following re Grimthorpe's Will Trusts (1958) 1 All E.R. 765, was that the Defendants were entitled to be paid out of the proceeds of sale of Cranhurst Estate all costs and expenses properly incurred. I would make the order as to the costs of the appeal in the same terms: as however, no argument on the question of costs was addressed to this court, I would also give leave to either party to apply to a judge of this court for a variation of that order if they so desire.

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Dated at Nairobi this 2nd day of
October, 1961.

T.J.GOULD

JUSTICE OF APPEAL.

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No.18

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

Judgment of
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CIVIL APPEAL NO.33 of 1960

B E T W E E N

(1) MARIE AYOUB
(2) CECILE KYRIAZIS (formerly GALANOS)
(3) ANGELA MARY HURLEY
(4) HENRY ANTOINE AYOUB Appellants

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and

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS deceased Respondents

(Appeal from judgment of H.M. Supreme Court of
Kenya at Nairobi (Miles, J.) dated 28th
January, 1960,

in

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Civil Case No.1185 of 1959

Between

Marie Ayoub and 3 others Plaintiffs

and

Standard Bank of South Africa
Limited and William P. Holder
as Executors of the Estate of
Christos Galanos deceased Defendants)

JUDGMENT OF NEWBOLD J.A.

This appeal comes before this court in a
confused and unsatisfactory condition. As Mr.
Gratiaeen, who appeared for the Appellants,
stated, the litigation started on the wrong
foot and as it has developed it has gone right
out of hand. I am doubtful whether on the
pleadings as they stand the learned judge should,
at an early stage in the case, have framed the
issues which he did, which issues remained with-
out change or addition until the end. When an

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issue of the relationship of trustee is framed by the court in circumstances in which the pleadings of neither party clearly allege such relationship and one party specifically denies this relationship there is a danger of the provisions of Order VI rule 2, which require particulars of any alleged breach of trust to be pleaded, being overlooked until too late. I am also doubtful whether in all the circumstances of this case, including the pleadings, the issues, the arguments, the nature of the evidence and the way in which it was led, the learned judge should not, in spite of the agreement of counsel, have acceded to the request of counsel for the Plaintiff made towards the end of the case and allowed the pleadings to be amended and the issues changed. There are many aspects of this appeal which lead me to the view that the most satisfactory course would be to have a retrial with amended pleadings, but neither party to this appeal has suggested such a course and this court is left to make the best of what, in my view, is an unsatisfactory position.

The facts of this case reduced to their simplest form are as follows:- The Appellants were the beneficial owners of Cranhurst Estate but the Estate could not be registered in their names; they caused the Estate to be transferred to and registered in the name of Mr. Galanos, who was the husband of one of the Appellants and who was owed money by the Appellants, on the understanding that when Mr. Galanos sold the Estate they would receive the excess of the sale price over the amount owed to him; while Mr. Galanos was the registered owner of the Estate he took certain action which resulted in a suit against him; Mr. Galanos sold the Estate and shortly thereafter died while the suit was still pending; Mr. Galanos' executors, who are the Respondents, settled the suit on payment of a sum of money and costs and they claimed to be entitled to deduct the expenses of the settlement of the suit from the amount owed to the appellants as a result of the sale of the Estate. To enable the executors to sustain their claim it is essential that Mr. Galanos should have been a trustee of the Estate and the Appellants the beneficial owners thereof.

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As I have stated, I am doubtful whether the learned judge was correct in reducing the problems posed in this case in effect to the simple issue of whether or not Mr. Galanos held Cranhurst Estate as a trustee. However, the essential issue now before this court is whether the learned judge was correct in holding that Mr. Galanos was a trustee of the Estate and the appellants the beneficial owners thereof. Should Mr. Galanos have been the trustee not of the Estate but of the proceeds of the sale of the Estate that would not, as this case has been presented, be sufficient to enable the executors to sustain their claim. Having regard to the view which I take of the essential issue I shall not deal with the other matters raised by Mr. Gratiaen, though I should say that the agreement of counsel does not appear to me to be restricted to a trust arising in a particular manner.

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In order to determine the issue of whether Mr. Galanos held the estate as a trustee it is necessary to examine the circumstances at the time the Estate was transferred to him, the documents executed at or about the time and the relevant statute law. There is remarkably little evidence on oath as to the circumstances at the time the Estate was transferred to Mr. Galanos but it appears to be common ground that the Appellants were the beneficial owners of the Estate; that Mr. Hurley, in whose name the Estate was registered, was the trustee of the Estate and that the Appellants desired, for some unspecified reason, that he should cease to be the registered owner; that the Appellants were unable to register the Estate in their names; that Mr. Galanos, a very wealthy man and the husband of one of the Appellants, was owed about £11,000 by the Appellants; that the Estate was transferred by Mr. Hurley to Mr. Galanos for £15,000 (which amount was never intended to be paid) and the necessary consents to such transfer were endorsed on the deed; and that on the day following the transfer an agreement, drawn by an advocate, was entered into between the Appellants and Mr. Galanos in relation to the Estate.

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Before examining the terms of this Agreement it is necessary to bear in mind that under the Land Control Ordinance of Kenya it is unlawful for

a person to acquire any interest over land coming within the ambit of the Ordinance without the consent of the Land Control Board. As a result of this it would have been unlawful for Mr. Galanos to hold the Estate as trustee for the Appellants unless the Land Control Board had given their consent thereto. There is no specific evidence as to whether this consent was ever applied for or obtained and the issue of illegality, though not pleaded, has been referred to delicately both in the judgment of the learned judge and in the submissions before the Supreme Court and this Court. There is, however, evidence that the Appellants, or at least one of them, were aware that they could not have an interest in the Estate without such consent: at the end of the evidence of Mrs. Kyriazis she states that she knew it was wrong for Mr. Galanos to hold the Estate as trustee and the agreement of the 12th November, 1955, recites that the Land Control Board had refused their consent to registration of the Estate in the names of the Appellants. I consider that the only possible inference from this evidence is that the consent to Mr. Galanos being a trustee of the Estate was never given. This, of course, does not decide the issue, as either Mr. Galanos was nevertheless a trustee of the Estate in breach of the law, or the arrangement arrived at by the Appellants and Mr. Galanos was such that it did not result in their having any interest in the Estate, in other words that Mr. Galanos was not a trustee of the Estate. I regard, however, this possibility of illegality as a fact to be borne in mind in determining the intention of the Appellants and Mr. Galanos when the Estate was transferred to him.

Turning now to the transfer of the Estate and the agreement of 12th November, 1955, there is nothing in either of these documents which expressly declares that Mr. Galanos is to be a trustee of the Estate or that the Appellants are to have any beneficial interest in the Estate. If Mr. Galanos is to be a trustee and the Appellants to have an interest in the Estate a trust has to be implied. As long ago as 1672 it was said in Cook v. Fountain, 36 E.R.984 at p.987; "so the trust, if there by any, must either be implied by the law, or presumed by the Court. There is one good, general, and infallible rule that

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goes to both these kinds of trust; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; the law never implies, the Court never presumes a trust, but in case of absolute necessity". In my view that statement of the law is as good to-day as it was nearly 300 years ago. Do the circumstances of this case require as of necessity that a trust should be implied? In my view they do not. The persons involved in this transaction were all related or connected; one of them was very wealthy and was owed a considerable sum of money by the others who were beneficially entitled to an estate; and it is clear there was an intention to sell the Estate with the result that the debt could be discharged and any surplus given to the persons entitled to it. It is not an unwarranted assumption that the Appellants considered the person most suitable to obtain a satisfactory sale would be Mr. Galanos, the wealthy husband of one of the beneficiaries, and that the simplest way of achieving this object would be to convey the Estate to him absolutely while at the same time entering into an agreement setting out their various interests in the sale proceeds. This, on the facts, I consider a perfectly possible interpretation of the documents and one which would not result in a trust of the Estate arising. While a different interpretation is possible, there is nothing in the circumstances which I regard as requiring as of necessity the existence of a trust.

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The courts will not imply a trust save in order to give effect to the intention of the parties. As was said by Lindley, L.J. in Standing v. Bowring (1886) 31 Ch.D.282, at p.289:-

"Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied."

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Further, the intention of the parties to create a trust must be clearly determined before a trust will be implied Lord Halsbury, L.C. in Smith v. Cooke (1891), A.C. 297, said at p.299:-

"I must say I for one have always protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would or might or perhaps ought to have intended when they began to frame their instrument. I think I am not entitled to put into the instrument something which I do not find there, in order to satisfy an intention which is only reasonable if I presume what their intentions were. I must find out their intentions by the instrument they have executed; and if I cannot find a suggested intention by the terms of the instrument which they have executed I must assume that their intentions were only such as their deed discloses."

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In my view to imply a trust in the circumstances of this case might well defeat the intention of the parties to the agreement. I see nothing in the agreement nor in the circumstances of the transfer which compels me to say that the only intention of the parties concerned was to create a trust. It is true that the consideration mentioned in the transfer was never intended to be paid, but there nevertheless was very real consideration for the transfer. It is also true that if the Appellants transferred the Estate absolutely to Mr. Galanos they lost the right to any interim income from the Estate pending the sale and they had no legal means of enforcing a sale save possibly from an implied term that the sale should take place in a reasonable time, but they obtained in effect a discharge of their current liability and, as Mrs. Kyriazis said in evidence, they relied on Mr. Galanos who was a member of the family and a business man who "knew about these things" to sell the Estate to their greatest advantage. In fact he sold the Estate in less than 18 months and the circumstance that the sale price was £35,000 while the consideration mentioned in the transfer was £15,000 is as much evidence that he made an advantageous sale as that the figure of £15,000 was an under-valuation of the Estate. The only direct evidence of the intention of the Appellants at the time of the transfer is that given by Mrs. Kyriazis and is to the effect that no trust

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of the Estate was intended. It is true that the learned judge, in deciding that a trust was created, would appear to have rejected this evidence, but as I understand the reasoning of the learned judge he appears to have come to this conclusion on a presumed intention of the Appellants from the construction of the documents fortified by statements subsequently made by the advocates in correspondence. With respect to the learned judge, while I agree that a possible construction of the documents is an implied trust I do not think it the only or, in the circumstances, the more probable construction; and I consider the subsequent correspondence by the advocates a somewhat dubious base for implying a trust.

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The basic facts of this case are not in essence dissimilar from the basic facts in Central Trust and Safe Deposit Co. v. Snider, 1916 I A.C. 266. In that case a niece conveyed to her uncle absolutely a half share in a property (the other half share already belonged to the uncle) for a nominal consideration. The real consideration, which was to take effect in future, was set out in a letter written on behalf of the uncle at about the time of the conveyance. The niece subsequently claimed that the conveyance, though absolute in form, was intended as a conveyance in trust for her. At p.271 the Privy Council, which held that no trust arose, said "The intention, as manifested by the conveyance, is clear enough. All the interest (of the niece), whether legal or equitable, is intended to pass. The letter contains nothing inconsistent with and a good deal to confirm this. (The uncle) was evidently intended to be put in a position to grant a lease or leases of the property on such terms as he might think desirable, which could not properly be done if (the niece) remained equitable owner of a moiety of the property". In my view the Appellants in this case, having regard to all the circumstances, intended to transfer the Estate absolutely to Mr. Galanos so that he had a free hand to deal with it in consideration of the discharge of their debt and the division of the expected surplus after a sale which, as members of a family, they relied on Mr. Galanos to make to their best advantage. This transaction in my view was never intended to be a trust and did not give rise to an implied trust.

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Accordingly I would allow the appeal.

Dated at Nairobi this 2nd day of October,
1961.

C.D. NEWBOLD.
JUSTICE OF APPEAL.

I certify that this is a true copy of the
original.

(Sgd) ?
for REGISTRAR
18.10.1961.

In the Court
of Appeal for
Eastern Africa

No.18

Judgment of
Newbold J.A.
2nd October
1961
continued

10

No.19
JUDGE'S NOTES

No.19
Judge's Notes
2nd October
1961

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

CIVIL APPEAL NO.33 of 1960

B E T W E E N

20

(1) MARIE AYOUB
(2) CECILE KYRIAZIS (formerly GALANOS)
(3) ANGELA MARY HURLEY
(4) HENRY ANTOINE AYOUB
and
STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as EXECUTORS OF THE ESTATE OF
CHRISTOS GALANOS deceased.

APPELLANTS

RESPONDENTS

2.10.61. Coram: O'Connor P.

2.30 p.m. Newbold J.A.

Sirley for Appellants
Shaylor for Respondents.

30

Judgment of Gould J.A. delivered by me.
Judgment of Newbold J.A. delivered by him.
My judgment delivered by me.
Appeal dismissed with costs. Certificate
for two Counsel. Respondents entitled to be paid
out of the proceeds of sale of Cranhurst Estate
all costs and expenses properly incurred, subject
to leave to either party to apply to a judge of
this court for a variation of that order if they
so desire.

40

K.K. O'CONNOR
P.

2.10.61.

123A.

In the Court
of Appeal for
Eastern Africa

No.20

O R D E R

No.20

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

Order
2nd October 1961

CIVIL APPEAL NO.33 of 1960

B E T W E E N

MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB
} APPELLANTS

10

- and -

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as EXECUTORS of the ESTATE of
CHRISTOS GALANOS deceased
} RESPONDENTS

(Appeal from Judgment of Her Majesty's Supreme
Court of Kenya at Nairobi (Mr. Justice Miles)
given on the 28th day of January, 1960, in
Civil Case No.1185 of 1959

20

BETWEEN

MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB
} PLAINTIFFS

- and -

STANDARD BANK OF SOUTH AFRICA
LIMITED and WILLIAM P. HOLDER
as Executors of the Estate of
CHRISTOS GALANOS deceased
} DEFENDANTS)

30

In Court this 2nd day of October, 1961.

Before the Honourable the President (Sir
Kenneth O'Connor) the Honourable Sir
Trevor Gould, a Justice of Appeal and the
Honourable, Mr. Justice Newbold, a Justice
of Appeal.

O R D E R

This Appeal coming on for hearing on the

123B.

16th and the 17th days of June, 1960 AND UPON
HEARING E.F.N. Gratiaen, Esq., of Her
Majesty's Counsel and Mrs. L. Kean of Counsel
for the Appellants and B. O'Donovan, Esq., of
Her Majesty's Counsel and D.F. Shaylor, Esq.,
of Counsel for the Respondents it was ordered
that this Appeal do stand over for judgment
and upon the same coming for judgment this day
IT IS ORDERED by a majority of the Court :-

In the Court
of Appeal for
Eastern Africa

No.20

Order
2nd October 1961
continued

- 10 1. THAT this Appeal be dismissed;
2. THAT the Appellants do pay to the
 Respondents all costs and expenses proper-
 ly incurred by the Respondents and such
 costs and expenses to be for two Counsel
 and be paid out of the proceeds of sale
 of Cranhurst Estate;
3. THAT leave be granted to either party to
 apply to a Judge of this Honourable Court
 for a variation of the order as to the
20 costs if they so desire.

GIVEN under my hand and the Seal of the
Court this 2nd day of October, 1961.

F. HARLAND
REGISTRAR

ISSUED this 13th day of February, 1962.

I certify that this is a true copy
of the original.

(Sgd.) ?

for REGISTRAR.

14.2.62.

In the Court
of Appeal for
Eastern Africa

No.21

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

No.21

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

Order Granting
Final Leave to
Appeal to Her
Majesty in
Council
13th April 1962

CIVIL APPLICATION NO.19 of 1961

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

B E T W E E N

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MARIE AYOUB
CECILE KYRIAZIS (formerly GALANOS)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB

APPLICANTS

- and -

STANDARD BANK OF SOUTH AFRICA
LTD. and WILLIAM P. HOLDER as
Executors of the Estate of
CHRISTOS GALANOS, deceased

RESPONDENTS

(Application for final leave to appeal to
Privy Council in an intended appeal from
a judgment and order of Her Majesty's
Court of Appeal for Eastern Africa at
Nairobi dated 2nd October 1961

20

in

Civil Appeal No.33 of 1960

Between

Marie Ayoub & 3 Ors. ... Appellants

and

Standard Bank of South Africa
Ltd. & Anor. as Executors of
the Estate of Christos Galanos,
deceased

Respondents)

30

In Chambers this 13th day of April, 1962.

Before the Honourable Mr. Justice

123D.

Crawshaw, a Justice of Appeal.

In the Court
of Appeal for
Eastern Africa

No.21

Order Granting
Final Leave to
Appeal to Her
Majesty in
Council
13th April 1962
continued

10

UPON the application presented to this Court on the 9th day of April, 1962, by the above-named Applicants for final leave to appeal to Her Majesty in Council AND UPON READING the affidavit of MICHAEL KEAN sworn on the 7th day of April, 1962, in support thereof AND UPON HEARING Counsel for the Applicants and for the Respondents IT IS ORDERED that the application for final leave to appeal to Her Majesty in Council be and is hereby granted AND IT IS DIRECTED that the record including this Order, be despatched to England within fourteen days from now AND IT IS FURTHER ORDERED that the costs of this application do abide the result of the appeal.

DATED at Nairobi this 13th day of April 1962.

20

M.D. DESAI.
ACTING REGISTRAR.

ISSUED this 13th day of April 1962.

I certify that this is a true
copy of the original.

(Sgd.) ?
for REGISTRAR. 13/4/62.

Defendants
Exhibits

EXHIBIT D.1.COPY

D.1.
Agreement
12th November
1955

A N A G R E E M E N T made the Twelfth day of November One thousand nine hundred and fifty five B E T W E E N CHRISTOS GALANOS of Nairobi in the Colony of Kenya Company Director (hereinafter called "Mr. Galanos" which expression shall where the context so admits include his personal representatives and assigns) of the first part MARIE AYOUB of Nairobi aforesaid Widow of the second part HENRY AYOUB of Nairobi aforesaid of the third part ANGELA MARY HURLEY of Nairobi aforesaid of the fourth part and CECILE GALANOS of Nairobi aforesaid of the fifth part (hereinafter the parties of the second, third, fourth and fifth parts are collectively referred to as "the Ayoub Family") W H E R E A S

- (1) An Estate known as Cranhurst Estate (hereinafter referred to as "the Estate") and being Land Reference Number 7532 S.W. of Thika Township in the said Colony of Kenya was purchased by the Ayoub Family and registered in the name of the Husband of the party of the fourth part namely Leslie Norman Hurley
- (2) The Land Control Board has refused to allow the Ayoub Family to have the farm registered in their names and Mr. Galanos has agreed to take over the farm and have the same registered in his name.
- (3) At the date of this Agreement there is due to Mr. Galanos or Tongoni Plantations Limited a sum of approximately Eleven thousand pounds. Although the transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos is being registered the total purchase money is not being paid as Mr. Galanos hereby admits notwithstanding a full receipt having been given in the formal transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos.
- (4) The Ayoub Family and each of them hereby declares that they are entitled to one quarter each of the benefit of any sums which may become payable under this Agreement.

NOW IT IS HEREBY AGREED AND DECLARED as follows :-

1. Mr. Galanos shall pay to the Ayoub Family a

sum which shall represent the difference between the sale price of the Estate and any sums which shall be due to either Mr. Galanos personally or to Tongoni Plantations Limited such sum to be paid within seven days of the completion of a sale.

Defendants
Exhibits

D.l.

Agreement
12th November
1955
continued

2. Pending a sale the Ayoub Family and each of them hereby agree that they will not take any action whatsoever to recover the sum due under this Agreement.

10

3. In the event of the death of Mr. Galanos before a sale of the Estate Mr. Galanos hereby directs that his Executors shall not sell the farm unless the price is agreed by the Ayoub Family and each of them and thereafter account to the Ayoub Family in accordance with the terms hereinbefore stated.

AS WITNESS the hands of the parties the day and year first hereinbefore written.

20

SIGNED by the said CHRISTOS GALANOS in the presence of:-
Sd/- B. Allin
Advocate

Sd/- Ch. Galanos

SIGNED by the said MARIE AYOUB in the presence of:-
Sd/- A.P. Manning
Advocates Asst.
Nairobi.

Sd/- Marie Ayoub

30

SIGNED by the said HENRY AYOUB in the presence of:-
Sd/- Ph. Goodenough
Registered Chiropodist
London.

Sd/- Henry Ayoub

SIGNED by the said ANGELA MARY HURLEY in the presence of:-
Sd/- A.P. Manning
Advocates Asst.
Nairobi.

Sd/- Angela Mary Hurley

40

SIGNED by the said CECILE GALANOS in the presence of:-
Sd/- A.P. Manning
Advocates Asst.
Nairobi.

Sd/- Cecile Galanos

Defendants
Exhibits

DATED 12th November 1955.

D.1.

Agreement
 12th November
 1955
 continued

CHRISTOS GALANOS ESQ., 1st part.

MRS. MARIE AYOUB 2nd part.

HENRY AYOUB ESQ., 3rd part.

MRS. ANGELA MARY
 HURLEY 4th part.

MRS. CECILE GALANOS 5th part.

ACKNOWLEDGMENT OF DEBT.

DRAWN BY:
 Shapley Barret Allin & Co.,
 Advocates,
 Nairobi.

COPY/
IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

CIVIL CASE NO.99 OF 1956

Defendant's
Exhibits

D.1.

Plaint

January.
1956

1. CHRISTOS DIMITRI ZAGORITIS
Proprietor of Coffee and Sisal Estates,
and producer, exporter and dealer of
coffee and sisal, Nairobi.

- 10 2. MICHAEL LOGOTHETIS, Coffee and Sisal
Estate Manager, Nairobi. Plaintiffs

Address for service care of D.N. &
R.N. Khanna, Advocates, Sheikh
Building Victoria Street, P.O.
Box 1197, Nairobi

versus

CHRISTOS GALANOS
C/o Tongoni Plantation Limited
Princes House, Government Road,
Nairobi.

Defendant

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P L A I N T

The Plaintiff above-named states as follows:-

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1. By a Lease dated the 11th May, 1954, and made between LESLIE NORMAN HURLEY and the first Plaintiff, the said LESLIE NORMAN HURLEY, demised to the first Plaintiff 329 acres of land (less road reserve of 7 acres), situate South West of Thika in the Kiambu District, known as "CRANHURST ESTATE" for a term of five years from 1st April, 1954, at a yearly rent of Shs. 60,000/- payable by certain instalments specified therein.

2. The said Lease contained a covenant that the said first Plaintiff might peaceably hold and enjoy the said premises during the said term without any interruption by the said LESLIE NORMAN HURLEY or any person lawfully claiming by under or in trust for him.

3. By a transfer dated 11th November, 1955, and registered at the Registry of Titles at Nairobi, on

Defendant's
Exhibits

D.1

Plaint

January
1956
continued

23rd November, 1955 the said LESLIE NORMAN HURLEY transferred all his right title and interest in the said premises to the Defendant.

4. The said Lease provided for payment of an instalment of rent of Shs. 20,000/- on or before the 31st October 1955, which accrued due to and only to the said LESLIE NORMAN HURLEY, who ceased after the date of the said transfer of his reversion aforesaid to the Defendant to have any right to re-enter upon the said premises on account of the non-payment thereof. Moreover, the said LESLIE NORMAN HURLEY, by his duly authorised agents and advocates Messrs. Shapley, Barret, Allin & Company, on the 15th September, 1955, agreed, without resiling from such acceptance pursuant to the liberty in that behalf and within the period stipulated, to accept a deferred payment of the said rent, from funds which his said agents and advocates, were up to a sum of £5,000, duly authorised to receive, from time to time as they became due, through Tanganyika Coffee Growers Association of Moshite Zagoritis Investments Limited, who released the same to the said agents and advocates for the said first plaintiff's account.

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5. The Defendant was not entitled to the said instalment of rent, which had accrued due, if at all, before the date of the aforesaid transfer, or to re-enter upon the said premises or enforce a forfeiture of the said lease in respect of it. Nevertheless on the 18th day of January, 1956, on account of the alleged non-payment of the said instalment of rent the Defendant without the consent and against the will of the said first Plaintiff evicted the first Plaintiff, his manager, and servants from the possession use and occupation of the said premises and has since kept them so evicted.

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6. The Defendant before purporting to re-enter and to evict the Plaintiff as aforesaid never did any act evincing an intention to determine the lease before re-entering and wrongfully evicting the Plaintiff.

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7. The Defendant further purported by a letter dated January, 19th, 1956, to justify the said wrongful eviction and re-entry, on account of

alleged breaches of covenant, without specifying the same, or whether their alleged breach occurred before or after the aforesaid date of transfer to the Defendant.

Defendant's
Exhibits

D.1.

Plaint
January
1956
continued

8. The said premises were at all material times in as good a condition as they were when demised, subject to fair wear and tear, and were considerably improved by the first Plaintiff beyond what they were at the time of the letting, and the first Plaintiff had with all due diligence, performed all his obligations under the Lease, or had with reasonable despatch taken steps to carry out his obligations in a reasonable and practicable manner.

9. The said lease contained a proviso for re-entry by the said LESLIE NORMAN HURLEY, in the event of any such instalment of rent as aforesaid or any part thereof remaining unpaid for twenty one days after becoming payable whether legally demanded or not and in case inter alia of any breach or non-observance of any of the aforesaid covenants.

10. By a letter dated 25th January, 1956, the Defendant purported to justify the said wrongful entry alleging breaches of covenants, and giving particulars thereof in the said letter.

11. The Defendant never preceded his wrongful entry, and eviction of the Plaintiff, by any act evincing an intention to determine the lease on account of the alleged breaches of covenants as aforesaid.

12. The Defendant further never by his letter dated 25th January, 1956, purported to state whether the alleged breaches had occurred before the date of the transfer to him or after.

13. The said first Plaintiff denies that he ever committed breaches of the said covenants as alleged or at all and if contrary to his contention it should be found that he has committed the alleged breach or breaches of the said covenants he says that the said breach or breaches was or were (i) past breaches, waived by acceptance of rent or otherwise condoned or whose performance was by mutual agreement postponed or deferred,

Defendant's
Exhibits

or (ii) not the subject of any express conditions such as provide for re-entry.

D.1.
Plaint
January
1956
continued

14. By reason of the foregoing the Defendant has derogated from his grant to the Plaintiff and is in breach of the covenant for quiet enjoyment, set out in paragraph 2 hereof whereby the Plaintiff has suffered loss and damage.

PARTICULARS

Loss of the value of the un- expired term demised to the Plaintiff	200,000-00	10
Loss of profit from 18th January 1956 to 1st April 1959	300,000-00	
Loss of salary to Manager and wages to the labour, until dis- charged by reasonable notice.	<u>6,000-00</u>	
	<u>506,000-00</u>	

15. Further, when on the 18th January, 1956, the Defendant trespassed upon and wrongfully took possession of the premises aforesaid, the coffee plantation, was then or within a matter of days after stoppage of the rains, ready for pruning and spraying and the grass ready for weeding, in order to preserve the crop from destruction or deterioration. 20

16. The Defendant or his servants or agents, wrongfully dispossessed the Plaintiff, and his manager, of the said premises, by forcibly entering and remaining thereupon in a summary and high-handed manner accompanied by several persons, despite the second Plaintiff's protests, and caused wrongfully to deprive the second Plaintiff and his family of the enjoyment and use of the house, and a cessation, interruption of the first Plaintiff's business, and interference and prevention of the Plaintiff's looking after and preserving his coffee crop, estimated at 40 tons and valued at Shs. 300,000/-. 30

17. ALTERNATIVELY, the Plaintiff claims possession of the said premises and to be relieved from the alleged forfeiture (if contrary to his contention it should lawfully be found to have 40

occurred) on account of the alleged nonpayment of rent upon such terms as the court shall think fit.

Defendant's
Exhibits

D.1.

Plaint
January
1956
continued

18. Further, when on the 18th January, 1956, the Defendant trespassed and wrongfully took possession of the premises as aforesaid, there were upon the said premises the goods, furniture, clothing and household effects which were the property of the second Plaintiff, valued at Shs. 60,000/- which said goods the Defendant has either wrongfully converted, or deprived the second Plaintiff of the use thereof.

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The Plaintiffs accordingly claim:-

- (a) A declaration that in entering and remaining upon the said premises, the Defendant was and is a trespasser, has derogated from his grant, and is in breach of his covenant for quiet enjoyment;
- (b) Judgment for the first Plaintiff for Shs. 506,000/- under paragraph 14 hereof;
- (c) Judgment for the first Plaintiff for Shs. 300,000/- under paragraph 16 hereof;
- (d) Exemplary, punitive and vindictive for the first Plaintiff for trespass and dispossession in a forcible, summary, and high-handed manner;
- (e) Further or in the alternative,
 - (i) An injunction to restrain the Defendant by his servants or agents or otherwise from remaining upon the said premises;
 - (ii) Possession of the said premises;
 - (iii) A Declaration that the rent is suspended and not payable from 18th January, 1956, until possession is restored;
 - (iv) Relief against the forfeiture of the said lease;
 - (v) Damages for deterioration, destruction or loss of crop, ready for pruning;
- (f) Exemplary, punitive and vindictive damages,

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Defendant's
Exhibits

D.1.
Plaint
January
1956
continued

for the second Plaintiff for trespass and dispossession in a forcible, summary, and high-handed manner;

- (g) Shs. 60,000/- or other sum representing goods and chattels lost as a consequence of the trespass, for the second Plaintiff under paragraph 18 hereof, or damage for conversion thereof;
- (h) Costs;
- (i) Further or other relief that this Honourable Court may deem fit to grant.

DATED at Nairobi this day of January, 1956.

for D.N. & R.N. Khanna

$$Sd/_$$

ADVOCATES FOR THE PLAINTIFFS.

Filed by:

D.N. & R.N.Khanna,
Advocates,
Sheikh Building,
Victoria Street,
P.O. Box 1197,
NAIROBI.

20

COPY/..

Defence and
Counterclaim
March
1956

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

CIVIL CASE NO.99 OF 1956.

1. CHRISTOS DIMITRI ZAGORITIS and
2. MICHAEL LOGOTHETIS Plaintiff
- versus

CHRISTOS GALANOS Defendant 30

Address for service:-
Shapley, Barret, Allin & Company,
Clarkes Chambers,
Northey Street,
Nairobi.

DEFENCE AND COUNTERCLAIM

1. The Defendant admits paragraphs 1,2,3 and 9 of the Plaint save and except:-

- (a) The rent stated in paragraph 1 of the Plaint
include moveable assets specified in the 40

said lease as well as the immovable property let;

Defendant's
Exhibits

D.1.

Defence and
Counterclaim
March
1956
continued

- (b) The covenant described in paragraph 2 of the Plaintiff was declared in the said lease to be, and is by virtue of the provisions of Section 108 (c) of the Indian Transfer of Property Act, 1882, conditional upon the first Plaintiff paying the rent reserved in the said lease and observing and performing the several covenants stipulations and contracts contained in the said lease on the part of the first Plaintiff to be performed and observed;

- (c) The said lease contained (inter alia) a proviso and agreement, as set out in paragraph 4 of the said lease, in the following terms:-

"PROVIDED FURTHER AND IT IS HEREBY AGREED that if any part of the rent hereby reserved shall be unpaid for twenty one days after becoming payable whether formally demanded or not or if any covenant on the Tenant's part hereby contained shall not be performed or observed or if the Tenant or other person in whom for the time being hereby created shall be vested shall become bankrupt or shall enter into any arrangements or execute an assignment for the benefit of his creditors or suffer any execution to be levied on his goods then in any such case it shall be lawful for the Landlord at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely determine."

- (d) The said lease contained in Clause 3 thereof covenants to be performed and observed by the first Plaintiff (inter alia) as follows:-

"a) To pay the reserved rent on the date and in the manner aforesaid."

"c) To repair and keep in tenantable repair every part of the demised premises and all additions thereto including all machinery and equipment as per attached inventory .

Defendant's
Exhibits

D.1.

Defence and
Counterclaim
March
1956
continued

referred to hereinbefore including all hedges fences gates drains walls and walks of every description and to keep the roads walks and paths properly gravelled and in good repair."

"d) To keep the wood and wire work of all buildings and structures and the glass in and upon the demised premises in good condition fair wear and tear excepted."

"g) To cultivate and manage the demised premises according to the approved methods practised in this Colony in regard to the class of property demised and to keep the land free from weeds and in good order and to specifically manure all the coffee trees of the agreed bearing area of the estate calculated for the purpose of this Agreement to be One hundred and twenty acres (120 acres) of coffee in the fourth year of the term hereby granted and to use not less than one debi of manure for each tree of coffee referred to hereinbefore and to return the demised premises on the termination of the said Lease in a condition not inferior to that described in the Delapidation Report attached hereto and marked "A"."

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"h) To preserve all fruit trees plants and any other trees and not to remove or cut any trees except such as may be dead and the removal of which would benefit the demised premises."

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"j) Not to commit or permit or suffer any waste or spoil any part of the demised premises."

"l) To yield up the demised premises with all additions thereto at the termination of the demise in such a state of repair cultivation management and otherwise as shall be in compliance with the Tenants covenants herein contained."

40

"e) On the 11th November 1955 the ownership in all moveable assets then the property of the said Leslie Norman Hurley

and situate on and used in connection with the said piece of land passed to the Defendant.

Defendant's
Exhibits

2. The Defendant will refer to the said lease at the hearing for the full terms and meaning thereof.

D.1.
Defence and
Counterclaim
March
1956
continued

3. The Defendant states that upon transfer to him by Leslie Norman Hurley of all the right title and interest of the said Leslie Norman Hurley in the said premises there was transferr-
ed to the Defendant all the rights of the said Leslie Norman Hurley of re-entry and of forfei-
ture and of compensation for breaches of coven-
ant whether already accrued or which might ac-
crue, after the transfer.

4. The Defendant denies being indebted to the first or to the second Plaintiff or to any other person or persons in the sums claimed in para-
graphs 14, 16 and 18 of the Plaint for the reas-
ons set out in the Plaint or in any other sum or
sums or for any other reason or at all.

5. The Defendant denies being liable to the first or to the second Plaintiff or to any other person or persons for damages whether liquidated or unliquidated as claimed in the Plaint or for any other reason or at all and joins issue with the Plaintiffs and with each of them on all ques-
tions of damages.

6. As to paragraphs 4 and 5 of the Plaint the Defendant does not admit that the instalments of rent of Shillings 20,000/- which was due to Leslie Norman Hurley on or before 31st October 1955 was paid and does not admit that the said Leslie Norman Hurley agreed to accept a deferred payment of the said rent as stated or at all. The Defendant denies that he was not entitled to re-enter upon the said premises or to enforce a forfeiture of the said lease in respect of non-
payment of rent due to the said Leslie Norman Hur-
ley before the said transfer of this reversion and
repeats paragraph 3 hereof.

7. As to paragraph 5 of the Plaint the Defendant further states that the first Plaintiff committed breaches of covenant contained in Clause 3 of the

Defendant's
Exhibits

D.1.

Defence and
Counterclaim
March
1956
continued

said lease and on the part of the first Plaintiff to be performed and observed other than the covenant for payment of rent.

PARTICULARS.

The First Plaintiff

(a) Has not repaired or kept in tenantable repair every part of the demised premises and all additions thereto and in particular has permitted the following defects to occur in the main dwelling-house, the roof to fall into disrepair and leak, the verandah ceiling to be removed, the water system to the house to become defective, the electric supply to the house to be disconnected, the hand basin and lavatory to be broken; has permitted the coffee factory buildings and fermenting and washing tanks attached thereto to become defective and unserviceable and the wood-work in such factory to be removed and/or damaged; had permitted the water tanks to become cracked and unserviceable; has permitted the stores and outhouses adjacent to the dwelling house to be damaged, the walls thereof to become defective with holes in them and plaster to fall away and guttering to fall into disrepair; has permitted the guest cottage walls to become defective by plaster falling away and the roof to become unserviceable and the glass in the windows thereto to be broken, has permitted lorry garage roof to be removed and a wall thereof to be broken down; has permitted the roofing to the cattle dip together with the wood and wire work used in conjunction with such dip to be removed; has permitted the concrete work of the coffee barbecue to fall into disrepair and break up; has permitted walls of labour lines to fall in and has permitted roofs thereon to be removed; has permitted windows in the main store to be broken and allowed the wooden stairs and loading platform and the door to the first story thereof to become defective; has allowed the septic or cess pit concrete work to break and holes to appear therein and has removed the water closet bath and hand basin from the outside bath house. The First Plaintiff has failed to repair or remedy all or any of the foregoing defects.

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(b) Has not repaired or kept in tenantable

repair all machinery and equipment let to the First Plaintiff and in particular one Land Rover damaged, coffee cleaning machinery unserviceable, Fordson tractor out of repair, 50 coffee trays out of repair and 100 missing, and one rotovator broken.

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D.1.

Defence and
Counterclaim
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continued

10 (c) Has not kept the wood or wire work of all buildings and structures or the glass in or upon the demised premises in good condition even allowing for fair wear and tear and in particular the glass in the windows of the guest cottage main store and stores near the dwellinghouse has been broken and not replaced. The expanded metal and wire work at the cattle dip and in the coffee factory has been removed and not replaced and the wire enclosures together with the fencing poles carrying the same used in conjunction with the cattle dip have been removed and not replaced.

20 The woodwork of the coffee factory has been damaged and or removed and not repaired or replaced and the woodwork on the coffee drying tables has been removed and not replaced. The electric wiring connecting the generating plant and the main house has been removed and not replaced.

30 (d) Has not cultivated or managed the demised premises according to the approved methods practised in Kenya Colony in regard to the class of property demised and has not kept the land free from weeds or in good order and in particular has not pruned or kept pruned adequately or at all coffee trees and has failed to check the growth of or remove couch grass and other weeds from and amongst the coffee trees.

(e) Has not preserved trees and plants and in particular has permitted growing coffee trees to be burnt or destroyed by fire and to be destroyed or rendered useless through the growth of couch grass amongst coffee trees and has ploughed out or otherwise destroyed a pineapple plantation.

40 (f) Has removed or cut or felled living trees, other than coffee trees, on the said premises.

(g) Has committed or permitted or suffered waste on the said premises and has spoilt the garden and pleasure ground adjacent to the dwellinghouse on the said premises in that he has removed the

Defendant's
Exhibits

D.1.

Defence and
Counterclaim
March
1956
continued

electric light plant and wires connecting the same to the dwellinghouse, has converted the metal electric light pole into a water pipe after removing the same, has destroyed the tennis court and has erected sheds on the same and has failed to keep the said tennis court in such condition as to permit it being used for its proper purpose; He has removed coffee drying tables, pulled down a store and demolished the cattle shed and milking shed; in addition he has felled and removed trees and pulled off roofs and demolished wired enclosures of bomas as stated in the foregoing sub-paragraphs of this paragraph.

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(h) The First Plaintiff has not yielded up the demised premises with all additions thereto in such a state of repair cultivation or management as was in compliance with the Tenants covenants in the said lease contained.

8. The Defendant states that the aforesaid breaches of covenant being failure or neglect of the first Plaintiff to repair and keep in tenantable repair the said buildings and machinery, to cultivate and manage the demised premises in accordance with the approved methods practised in Kenya Colony in regard to the class of property demised, the cutting or removal of living trees and the spoiling of the tennis court and other acts of waste and the failure to reinstate buildings and erection have continued up to the 18th day of January, 1956 and were continuing breaches of covenant from the 11th day of November 1955 to the 18th day of January 1956.

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9. The Defendant states that on the 18th day of January 1956 on account of the several breaches of covenant aforesaid committed by the first Plaintiff the Defendant peaceably and quietly re-entered upon the demised premises and informed the second Plaintiff that he was doing so and thereby showed his intention to determine the lease and the lease thereupon determined.

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10. As to paragraph 6 of the Plaint the Defendant repeats paragraph 9 hereof and denies that he evicted either the first or second Plaintiff, alternatively, if, which is denied, he did evict either Plaintiff it is denied that such eviction was wrongful.

11. It is denied that the letter dated the 19th January 1956 purports to justify any eviction whether wrongly (which is denied) or otherwise. On the contrary, the said letter, to which the Defendant will refer at the hearing for its full contents and meaning, advised the first Plaintiff that the Defendant had re-entered and stated the grounds for so long.

Defendant's
Exhibits

D.I.

Defence and
Counterclaim
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continued

10 12. The Defendant denies each and every allegation contained in paragraph 8 of the Plaint and repeats paragraph 7 and 3 hereof.

13. As to paragraph 10 of the Plaint, the Defendant admits he wrote to the first Plaintiff on 25th January 1956 but otherwise denies the allegations contained in the said paragraph and in particular denies that his entry was wrongful. The said letter, inter alia, set out some of the breaches of covenant committed by the first Plaintiff but specified that the same were not exhaustive.

20 14. As to paragraph 11 of the Plaint, the Defendant repeats paragraphs 9 and 10 hereof and denies that his entry was wrongful.

30 15. As to paragraph 13 of the Plaint the Defendant states that the first Plaintiff did commit the Breaches of covenant specified in the said letter of 25th January 1956 and also the several breaches of covenant hereinbefore stated. It is not admitted that the breaches of covenant were past breaches and on the contrary states that breaches of covenant were continuing breaches as is pleaded in paragraph 8 hereof and it is denied that any of the said breaches of covenant were waived by an acceptance of rent or were otherwise condoned by the aforesaid Leslie Norman Hurley or by the Defendant or by any person acting on their behalf. It is further denied that any agreement was made to postpone or defer the performance of any covenant to be performed or observed by the first Plaintiff. It is also denied that breach of the said covenants or any of them was not the subject of any express conditions as provided for re-entry and the Defendant repeats paragraph 1, 7 and 8 hereof.

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16. As to paragraph 14 of the Plaint it is denied that the Defendant derogated from his or any grant to the first Plaintiff or committed any breach of

Defendant's
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D.1.

Defence and
Counterclaim
March
1956
continued

covenant for quiet enjoyment or any other breach or at all. The Defendant does not admit that the first Plaintiff has suffered loss of salary to any Manager or labour or that the said Manager and/or labour were given any notice. The Defendant denies that the first Plaintiff has suffered loss or damages by reason of the loss of the value of the unexpired term and denies that he has suffered loss of profit in the sum alleged or at all and in any event the loss, if any, which is denied, in the value of the unexpired term is merged in the loss of profits, if any, which is denied. The first Plaintiff has given no allowance for income or other tax to be assessed on his profits, if any, which is denied.

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17. As to paragraph 15 of the Plaint the Defendant states the coffee trees ought to have been pruned and the grass weeded the said trees before the 18th January 1956. The Defendant denies that he trespassed upon the said property or that his taking possession thereof was wrongful.

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18. As to paragraph 16 of the Plaint it is denied that the Defendant wrongfully dispossessed the First or the Second Plaintiff of the said premises or any part thereof either by his own act or those of any servant or agent of his and denies that he forcibly entered the said premises or remained thereon in a summary or high handed manner. It is denied that the second Plaintiff made any protests and it is denied that the second Plaintiff or his family were deprived of the use and enjoyment of the house and the Defendant repeats paragraph 9 hereof and further states the second Plaintiff was by letter delivered to the second Plaintiff on 21st January 1956 informed that he was at liberty to remain on the said premises until he could find alternative accommodation. Further on the 18th day of January 1956 the second Plaintiff was offered employment by the Defendant on the said premises which offer was neither accepted or rejected on that day. Any cessation or interruption of the first Plaintiff's business and interference and prevention of the first Plaintiff's looking after and preserving his growing crops was in the premises, justified and followed upon the determination of the lease in the

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circumstances stated herein. The Defendant permitted the first Plaintiff to remove from the premises all coffee picked by the first Plaintiff which the first Plaintiff has removed. It is denied that a proper estimate of the coffee crop was 40 tons or that the crop was 40 tons or that the value thereof was Shs.300,000/-.

Defendant's
Exhibits

D.1.

Defence and
Counterclaim
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1956
continued

10 19. As to paragraph 17 of the Plaint the Defendant denies that the first Plaintiff is entitled to or should be granted relief against forfeiture whether for non payment of rent or any other breach of covenant by the first Plaintiff and denies that the first Plaintiff is entitled to possession of the said premises.

20 20. As to paragraph 18 of the Plaint the Defendant repeats paragraph 9 hereof and states that all times the second Plaintiff has been at liberty to remove all goods and chattels belonging to him or to his family from the premises and has since filing action removed some of the same. It is denied that the Defendant has ever converted or deprived the second Plaintiff of the use of any article belonging to him or that he trespassed upon the premises or wrongly took possession thereof.

30 21. Save and accept as is herein expressly admitted, the Defendant denies each and every the allegations contained in the Plaintiff's Statement of Claim as though the same were herein set out and traversed seratim.

40 22. The Defendant repeats the foregoing paragraphs of the Defence and states that by reason of the breaches of the said covenant to repair and keep in repair the buildings and structures and the breaches of covenant to cultivate the lands in the manner aforesaid and to yield up the demised premises in such state of repair cultivation or management as was in compliance with the Tenants covenants in the said lease contained the Defendant has suffered loss and damage to the extent of Shs.83,000/-.

Particulars.

- (a) To repairing and reinstating buildings and structures, replacing roofs where removed Shs.60,000/-

Defendant's <u>Exhibits</u>	(b) To removing couch grass and weeds from coffee lands	Shs.20,000/-
D.1.	(c) To pruning coffee which ought to have been pruned by the first Plaintiff prior to 18th January 1956	<u>Shs. 3,000/-</u>
Defence and Counterclaim March 1956 continued		Shs.83,000/-

23. The first Plaintiff has removed from the said premises and has converted to his own use and deprived the Defendant of the use thereof the following articles valued as hereafter appears which articles are the property of the Defendant.

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2 Electric light plants	value	Shs. 2,500/-	
1 Massey Harris Pony Tractor	value	Shs. 6,000/-	
1 Coffee King Spray machine	value	Shs. 1,800/-	
1 Trailer	value	Shs. 1,500/-	
100 Coffee trays @ Shs.30/- each	value	Shs. 3,000/-	20
5 Pedigree cattle	value	Shs. 5,000/-	
Sundry tools and equipment of farm and workshop	value	<u>Shs. 3,000/-</u>	
		Shs.22,800/-	

24. The first Plaintiff has cut and removed from the said premises 60 planted and growing trees valued at Shs. 6,000/- in breach of his aforesaid covenant in that behalf.

25. The first Plaintiff has damaged and failed to repair machinery and equipment the property of the Defendant for which the cost of replacing or repairing amount to Shs. 8,600/-.

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Particulars

Repairs to Fordson Tractor	Shs. 2,000/-
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Repairs to Hydram	Shs. 600/-	Defendant's <u>Exhibits</u>
Repairs to 50 coffee trays at Shs.10/- each	Shs. 500/-	D.1.
Replacement valued of Land Rover car damaged so as to be useless	Shs.6,000/-	Defence and Counterclaim March
Less salvage value	<u>Shs.2,500/-</u> 3,500/-	1956 continued
Replacement value of Rotovator broken and useless	<u>Shs. 2,000/-</u>	
	<u>Shs.86,000/-</u>	

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26. The Defendant counterclaims against the first Plaintiff in the sum of Shillings 120,400/- being the sum total of amounts set out in paragraphs 22 to 25 (both inclusive) hereof.

WHEREFORE the Defendant prays that this Honourable Court do :-

(a) Dismiss this suit as against the First and Second Plaintiff

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(b) Give judgment against the First Plaintiff in favour of the Defendant in the sum of Shillings 120,400/-

(c) Award the costs of this suit and counterclaim to the Defendant

(d) Award the Defendant interest at Court rates on the said sum of Shillings 120,400/- from the date hereof till decree and on the decretal sum found due from date of decree till payment in full.

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(e) Grant such further or other relief as the Court shall deem fit.

DATED this day of March 1956.

Shapley, Barret, Allin & Company
Advocates for Defendant

We hereby consent to this Defence and Counterclaim

Defendant's
Exhibits

D.1.

Defence and
Counterclaim
March
1956
continued

being filed out of time.

D.N. & R.N. Khauna

Advocates for First and
Second Plaintiffs.

Filed by:

Shapley, Barret, Allin & Co.,
Clarke's Chambers,
Northey Street,
Nairobi.

Opinion
16th April
1956

ZAGORITIS and LOGOTHETIS versus GALANOS

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O P I N I O N

In this case Mr. Zagoritis (the first Plaintiff) and Mr. Logothetis (the second Plaintiff) have brought a suit against Mr. Galanos (the Defendant), claiming some £40,000 and £3,000 respectively, together with general damages in respect of the Defendant's re-entry upon a coffee farm, known as Cranhurst Estate.

This Estate was leased to the first Plaintiff by a Mr. Hurley under a lease dated 11th May 1954. On the 11th November, 1955, Mr. Hurley transferred all his interest in the lease to the Defendant.

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At the time of the transfer it would appear - although there may be an issue of fact as to this, having regard to the matters pleaded in paragraph 4 of the Plaint - that an instalment of rent, amounting to Shs.20,000/-. , was then in arrear. It was because of the non-payment of rent and also because of alleged breaches of covenant, with which I will deal later in this opinion, that the Defendant entered upon and took possession of the said Estate on the 18th January 1956.

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I do not intend to refer in detail to the facts of the re-entry or to the Plaintiffs' claim and the Defendant's defence thereto and counterclaim, as set out in the pleadings. I am instructed that negotiations for a settlement are now under consideration and the Plaintiffs

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have reduced their claims to a figure of approximately £4,000, whilst the Defendant has reduced his counterclaim to approximately £2,000. I am now asked to advise the Defendant with regard to any such settlement. Before I do so, I should like to make one comment upon the defence as pleaded, merely to draw attention to the fact that no alternative plea of set-off has been included in the defence.

Defendant's
Exhibits

D.1.

Opinion
16th April
1956
continued

10 In order to advise upon any settlement, it is first necessary to consider the strength or weakness of the Defendant's case, i.e. whether, apart from any question immediately connected with the circumstances of the re-entry, he had a right to re-enter at all. As stated, he purported to re-enter and take possession of the Estate on two grounds - (i) non-payment of rent and (ii) breaches of other covenants.

20 With regard to non-payment of rent, it is necessary to refer to Section 109 of the Indian Transfer of Property Act and the proviso thereto, which reads:

"Provided that the transferee is not entitled to arrears of rent due before the transfer"

30 Even assuming that there was a breach of covenant to pay rent in accordance with the terms of the lease, existing at the time of the transfer, Section 109 must at least make it doubtful whether the Defendant, as transferee, could enforce the right to re-enter contained in Clause 4 of the lease for non-payment of rent. The next rent was due on the 31st March 1956, and therefore there was no rent in arrear due to the transferee at the time of re-entry. Unless therefore, it could be argued that the breach was continuing I think that the Defendant's right to re-enter on this ground would be defeated by the proviso to Section 109.

40 With regard to the other breaches of covenant, upon which the Defendant founded his right to re-enter it is necessary again to refer to the terms of the lease.

Clause 3 provided:

Defendant's
Exhibits

D.1.

Opinion
16th April
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continued

"The Tenant for himself and his assigns hereby covenants with the Landlord as follows:-

- (a) To repair and keep in tenantable repair every part of the demised premises and all additions thereto including all machinery and equipment as per attached inventory referredetc., and
- (g) To cultivate and manage the demised premises according to the approved methods practised in this Colony in regard to the class of property demised and to keep the land free from weeds and in good order.....etc., etc., "

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At the time when the Defendant re-entered the Estate, the reports show that it was in a very poor condition, and I refer particularly to the report of Mr. Merryweather dated 19th January 1956. However, it must be mentioned that the Estate had been inspected, on the instructions of the Defendant by Mr. Tisdale Jones in November 1955, who had submitted a report which appeared to show that there had been an improvement in the condition of the Estate compared with its conditions at the time when it was originally leased to the first Plaintiff. This report did not meet with the approval of the Defendant, who obtained a second report from Mr. Evans of Messrs. Dalgety & Co. Ltd., which was submitted early in January 1956 and which clearly disagreed with the report submitted by Tisdale Jones. It is significant that Mr. Evans had known the Estate since 1937. It is quite clear that the statements of the Defendant, who is himself an experienced coffee grower, of Mr. Evans and Mr. Merryweather establish that the Estate was in poor condition with regard to the buildings thereon and the manner in which it had been cultivated, and I think these statements would undoubtedly show that the report of Mr. Tisdale Jones was unrealistic. Nevertheless we are left in some doubt as to what the condition of the Estate was at the time of the lease to the first Plaintiff, and it would therefore be difficult to refute Mr. Tisdale Jones' statement that improvement had taken place between that date and November 1955. The

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obligation placed upon the Tenant under Section 108 (m) of the Indian Transfer of Property Act is :-

Defendant's
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"to keep the property in as good a condition as he found it and to yield it up in the same condition at the termination of the lease, subject only to fair wear and tear and irresistible force"

Opinion
16th April
1956
continued

10 The Plaintiff appears to rely upon this in paragraph 8 of the Plaint, but the wording of that section and the terms of the lease are different, in particular the first two words in Clause 3 (c) of the lease - "To repair"; without these words there might have been something in the Plaintiffs' allegation. The words are of the utmost importance and, in my view, they mean that there was an obligation placed upon the tenant to put the premises in repair, if at the commencement of the lease they were not already in repair; furthermore, I think that the words can also be construed as a notice to the Lessee to repair the premises, machinery and equipment as set out in the inventory, if they were not already in repair.

30 If I am right with regard to that construction, then, whatever was the actual condition of the premises, machinery and equipment at the time of the lease, it was the duty of the lessee to put them in good repair within a reasonable time. It is clear from the reports that he had failed to do so and that a reasonable time had long been exceeded.

40 With regard to Clause 3(g) the reports show that at the time of re-entry, a great deal of the coffee had become derelict and that an immense amount of work was necessary to clean the Estate of weeds and couch grass etc., before the Estate could be said to be free from weeds and in good order. Some latitude must be given to the lessee with regard to cultivation, since it is impossible to clean the Estate and thereafter to cultivate it in a proper manner in a matter of weeks, or even months. If, as might reasonably be supposed, the Estate was in poor condition at the time of the granting of the lease, one would expect it to take at least twelve to eighteen months to put it in

Defendant's
Exhibits

D.1.

Opinion
16th April
1956
continued

good order. The most that can be said is that, according to the reports of Evans and Merryweather, the condition of the Estate in November 1955 and January 1956 was such that no reasonable steps could have been taken to put the Estate in good order, but it must be remembered that this is not in accordance with the report of Tisdale Jones.

Looking at the matter as a whole, I think it can be fairly established that there was a breach of covenant on the part of the first Plaintiff (i) to repair the premises, machinery and equipment (ii) to keep them in repair and (iii) to cultivate and clean the Estate in accordance with the provisions of Clause 3(g). That being so there was, prima facie, a right to the Defendant under the lease to re-enter the Estate. I say this because such covenants run with the land and the breaches must be considered to have been continuing.

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The next matter to consider is whether the Defendant should have given notice to the first Plaintiff (i) to remedy the breaches within a reasonable time before re-entry and (ii) of his intention to re-enter in default. Under English Law - Conveyancing Act 1881, Section 14 and Section 146 (1) of the Law of Property Act 1946 - such notice is required before the lease can be said to be forfeited. Similarly, under Section 111 (g) of the Indian Transfer of Property Act 1882, as amended by the Act of 1929, such notice is also necessary. However the amending Act has not been applied to this Colony and therefore it is necessary to look at the provisions of the Act before that date; it was then necessary only for the lessor to do "some act showing his intention to determine the lease".

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In this connection it has been held that a lessor does such an act when he takes possession. Furthermore, there is nothing in the terms of the lease which obliges the Lessor or his assignees to give any notice in writing the last proviso to Clause 4 of the lease provides that if

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".....any covenant on the Tenant's part

hereby contained shall not be performed or observed.....then in any such case it shall be lawful for the Landlord at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely determine".

Defendant's
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Opinion
16th April
1956
continued

10 I have therefore come to the conclusion that, although it might have been more prudent to have given the lessee notice in November 1955 to remedy any breaches of covenant it was not strictly necessary to do so, either under the terms of the lease or under the Indian Transfer of property Act before the Defendant re-entered the premises in January 1956. I have already said that I think it could be argued that the words "To repair" contained in the lease were themselves tantamount to a notice to repair as well as a covenant.

20 The first Plaintiff has claimed relief against forfeiture of the lease (paras.17 and 18 (e) (iv) of the Plaintiff) but it is to be observed that under the unamended Indian Act relief against forfeiture is not granted in the case of a breach of covenant to repair, or for breaches other than non-payment of rent. Therefore the first Plaintiff must base any such claim under Section 114 of the Indian Transfer of Property Act. - The new section 114a has not been applied to this Colony.

30 I do not propose to deal with the claims for forcible entry or the alleged conversion of the second Plaintiff's property these are issues of fact and the statements before me suggest that there is no substance whatsoever in them. Similarly the claim for the loss of the coffee crop (para.16 of the Plaintiff) cannot be seriously pursued in my opinion, in view of the fact that according to my instructions, the first Plaintiff removed all the bags of coffee.

40 His claim for loss of profit from the 18th January 1956 to the 1st April 1959 is, in my opinion, too remote, whilst his claim for the loss of the value of the unexpired term can also be considerably attacked. The comparatively small claim Shs. 6,000/- for the loss of salary to the manager and wages etc., is, again in my opinion, without

Defendant's
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D.1.

Opinion
16th April
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continued

foundation in view of the fact that the manager was offered employment by the Defendant immediately after re-entry. Presumably the other labour have been kept on.

Turning to the actual terms of settlement suggested, I am unable to see how the Plaintiffs can persist in asking for £4,000. I presume that the second Plaintiff has in fact received all his personal effects, which formed the subject of his claim for £3,000. In the Plaint, the first Plaintiff has asked for relief against forfeiture for non-payment of rent. I have already expressed the view that the Defendant is on weak ground when he re-entered for non-payment of rent, and, if this was the only breach, I consider that either the first Plaintiff would succeed, or the Court would grant him relief on terms. Therefore, in assessing a settlement, one must have regard to this matter. Furthermore, if, contrary to the opinion which I have expressed the Court did not think that there were strong grounds for re-entry in respect of the other breaches, the first Plaintiff would succeed. It must not be overlooked that the Plaintiff might be able to produce evidence, stronger even than that of Tisdale Jones, (whose report was given on behalf of the Defendant) to show that he had done all that could reasonably be expected of him in putting the Estate in proper order, even though that fell short of the actual requirements of the lease. He might even be able to explain his inability to repair the buildings, on the grounds of shortage of materials due to the Emergency etc., and it does not appear to be seriously disputed that some of the machinery was actually undergoing repair at the time when the property was inspected. If these arguments were supported by reasonably strong evidence, there is a risk that the Court might lean against holding that there had been such breaches of covenant as would entitle the Defendant to re-enter.

For these reasons although I do not think that the Plaintiffs will succeed, the risk of their, or at least the first Plaintiff's doing so, is to be considered.

With regard to the Defendant's counter-claim he clearly has a substantial case for the

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re-payment of Shs.22,800/- under paragraph 23, if it can be shown that these articles had been removed. I am not in a position to express any firm view with regard to paragraph 24. As to paragraphs 22 and 25, I have no doubt that this expenditure was incurred in putting the Estate and equipment in order, and looked at realistically, will help to produce the income from the Estate which the Defendant may now reasonably expect to receive. There is good reason to say that the first Plaintiff should pay these items on the other hand, since the Defendant will obtain benefit from the expenditure and since it is necessary to make concessions, if a settlement is to be achieved, I am inclined to suggest that the Defendant should drop this claim. He might anyhow obtain some Income Tax relief in respect of this expenditure.

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D.1.

Opinion
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1956
continued

In my opinion the fairest settlement is for each side to withdraw their claims and pay their own costs. If, as is likely, this suggestion is unacceptable, then I think that the Defendant might make some payment, not exceeding £1,000 to the first Plaintiff, or at least make some concession with regard to costs. Upon the material before me, I cannot see how the second Plaintiff can substantiate his claim, and therefore I cannot recommend any payment to him, unless the Defendant is prepared to help him with regard to costs.

I have found it difficult at this initial stage of negotiations, to suggest these terms of settlement, and it may be that they will have to be adjusted as negotiations proceed. I think the Defendant should emphasise the strength of his case with regard to the breaches of covenant, other than non-payment of rent, pointing out that there is no relief against forfeiture in respect of such breaches. He should then press for a settlement on the lines that each party should withdraw their claims. Only if a settlement cannot be reached on these lines, should he make any other concessions with regard to a payment to the Plaintiffs, and the first Plaintiff in particular.

Sd/- Clive W. Salter.

NAIROBI - 16th April, 1956.

Defendant's
Exhibits

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

D.1.

CIVIL CASE NO.99 OF 1956

Reply to
Defence

16th July 1956

1. CHRISTOS DIMITRI ZAGORITIS
2. MICHAEL LOGOTHETIS

Plaintiff

versus

CHRISTOS GALANOS

Defendant

REPLY TO DEFENCE

1. Each of the Plaintiff joins issue with the Defendant on his defence save in so far as the same consists of admission. 10

2. The first Plaintiff does not admit that the title of Leslie Norman Hurley in the movable assets leased, ever effectively ceased, or passed on the Defendant, by any manual delivery thereof (which is not admitted, ever took place) or by any formal written and stamped transfer.

3. The first Plaintiff further does not admit -

(i) That any covenants had been broken before the date of the transfer from the said Leslie Norman Hurley to the Defendant, or 20

(ii) that any right to any compensation had accrued to the said Leslie Norman Hurley for any alleged breaches of covenant;

(iii) that any right of re-entry of forfeiture had accrued due to the said Leslie Norman Hurley, or 30

(iv) that the said Leslie Norman Hurley, ever purported to assign or transfer any alleged accrued rents or any of his alleged rights, if any, to any compensation, re-entry, or forfeiture, alleged as having accrued to him, or

(v) that after parting with the reversion, any right of re-entry or forfeiture in

respect of any past acts was left in or could have in respect of any future act accrued to the said Leslie Norman Hurley to transfer, or to pass by the use of any general words purporting to transfer all his right, title or interest in the suit premises;

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Reply to
Defence
16th July 1956
continued

10 (vi) that a bare right to litigate in respect of any compensation for any alleged breaches of covenant was assignable or was purported to be assigned by any writing or otherwise at all.

20 (vii) that any covenants or condition of the lease had been broken, or that the said Leslie Norman Hurley, ever had any right at his option to claim to re-enter or to claim to sue for compensation; or that he ever exercised his option, or that if he ever at any time purported to do so by himself or any alleged agent, that he had any subsisting right to do so, which he had not, waived by his acts showing an intention so to do including, acceptance of rent, and agreement to defer payment thereof

30 4. The first Plaintiff never covenanted to put the building or the machinery, which were not in tenantable repair at the commencement of the tenancy, in a tenantable repair, either forthwith or within a specified time, or within an unspecified or reasonable time, or at all, nor was it possible so to do save over a very very long period, extending to the entire period of the lease or beyond, but the true intention of the parties, having regard to the circumstances of the letting and the dilapidation reports prepared and supplied them, was that any disrepair occurring after the commencement of the lease was to be remedied in a tenantable manner.

40 5. If and in so far as if at all, the obligations as to repair are not in accordance with the true intention of the parties, mentioned in paragraph 4 aforesaid, and are more extensive, the first Plaintiff states, the lease fails to embody the true obligation in regard thereto, both in its nature and in its extent, and that the obligations as to repair, mentioned in paragraph 4 hereof, were the only obligations as agreed to between the Plaintiff and the said Leslie Norman Hurley,

Defendant's
Exhibits

D.1.

Reply to
Defence
16th July 1956
continued

and which only according to their true tenor and effect should really have been embodied in the lease, and not greater or extensive in tenor and effect (if at all, may be held to be the case.)

6. The first Plaintiff denies that he failed to remedy or repair in a tenantable manner, any disrepair occurring during or after the commencement of the term.

7. The first Plaintiff denies that any improvements were ever included in the lease by specification or otherwise and any such improvements ever existed to speak of at the date of the demise. 10

8. The first Plaintiff denies that an inventory was never attached to the lease of any machinery or equipment and does not admit that any oral evidence to add to the lease any inventory or other matter is admissible.

9. If and in so far as the covenant for quiet enjoyment was conditional upon payment of rent, the rent was duly paid or deferred payment mutually arranged and accepted, and the several covenants in the lease were performed according to their tenor, the true intention of the parties, and the conditions of the premises demised. 20

10. No right to re-enter for non-payment of rent (which is denied) had ever accrued to the Defendant or his predecessor in title, and there was no default in due payment of rent or on the postponed date mutually arranged by and between the parties or their representative. 30

11. All such parts of the demised premises as were handed in tenantable repair, were repaired if they fell into dis-repair, and were kept in repair, and so were the machinery and equipment, if and in so far as and such of them were part of the demise.

12. Having regard to the class and condition of the premises demised, cultivation and management was in accordance with approved methods practised in the Colony. 40

13. The first Plaintiff denies that any Dilapidation Report marked "A" was ever attached to

the lease, and subject to evidence being admissible, if at all, to connect the same with the lease, the covenants in regard to repair, cultivation and management are subject to the overriding condition, that the condition of the demised premises and movable assets should not during the currency of the lease or at the termination thereof, be inferior to that described in the said report.

Defendant's
Exhibits

D.1.

Reply to
Defence
16th July 1956
continued

10 14. The first Plaintiff does not admit that the roof was in disrepair at all or beyond what it was at time of demise and denies that any leaks ever were there up to the time of wrongful entry, or any (if such were the case) beyond those at time of the demise.

15. The first Plaintiff denies that there was ever any ceiling to the verandah at the time of the demise, and if any ever existed, it was removed before the demise.

20 16. The first Plaintiff denies that the water system was ever defective, or any more defective than it was at the time of the demise.

17. The first Plaintiff denies that any electric supply was connected to the house and states that any disconnection that took place was before the demise.

30 18. The first Plaintiff denies that the hand-basin or the lavatory were ever broken, until the time of wrongful entry and eviction of the Plaintiffs.

19. The first Plaintiff denies that the factory buildings and fermenting and washing tanks were ever used or touched by the Plaintiff and states that any defects, unserviceable condition, or woodwork if removed or damaged as alleged was done or occurred before the demise.

40 20. The water tanks were cracked and unserviceable before the demise, and were actually being repaired at the time of the wrongful entry, and the stores and outhouses were damaged (if at all) before the date of the demise.

21. The first Plaintiff states that no cottage is described in the lease or known to the

Defendant's
Exhibits

D.1.

Reply to
Defence
16th July 1956
continued

Plaintiffs, and condition of it, if the same exists or existed, occurred before the demise or after the wrongly entry.

2. The first Plaintiff denies that the lorry garage ever had a roof to it, and any wall was ever removed, and if any wall ever existed, it was removed before the demise.

23. The first Plaintiff denies that any cattle dip was ever demised, and if one ever existed, and removable as alleged took place, they took place before the demise. 10

24. The first Plaintiff denies that the coffee barbecue was ever touched or used, and disrepair and breaking up (if any) occurred before the date of the demise.

25. The first Plaintiff states that labour lines (such as they were and in the condition in which they were demised) were removed under orders issued under Emergency Regulations and new ones were constructed by and at the expenses of the Plaintiff. 20

26. The first Plaintiff denies that any windows of the main store were ever broken at the time of wrongly entry and states that the loading platform had been renewed a little before the wrongful entry, and the door was locked at the time of wrongly entry and was not defective then.

27. The first Plaintiff does not admit that the septic tank for the main house was in disrepair, and the outside bath was ever known to exist or demised, if it existed, or was demised and removal as alleged took place, they took place before the demise. 30

28. The first Plaintiff admits that the Land Rover was damaged and states that instructions for its repair were given but could not be carried out because of wrongful entry.

29. The first Plaintiff denies that the coffee cleaning machinery was ever used or touched or damaged during or after the commencement of the lease, or that the Fordson tractor was out of repair and states that the said tractor had cultivated the whole farm in December, 1955, and was 40

not out of repair to the time of the wrongful entry.

Defendant's
Exhibits

30. The first Plaintiff denies that coffee trays were ever used, and if 100 or any number are missing as alleged they were so before the demise, or otherwise than through the default of the first Plaintiff.

D.1.

Reply to
Defence
16th July 1956
continued

10

31. The first Plaintiff denies that a totovatro was ever used, or damaged during or after the commencement of the lease.

32. The first Plaintiff denies that he ever interfered with wood or wire work, or glass, or expanded metal or wire work. The Plaintiff further does not admit that the said things were ever there. He does not admit that any woodwork or coffee drying tables woodwork was ever removed if they ever existed.

20

33. The first Plaintiff denies that any electric light ever existed or any electric wiring either connected the generating plant or the main house, or if so connected has been ever removed, by the first Plaintiff at any time during or after the commencement of the lease.

30

34. The first Plaintiff denies that he has not cultivated or managed the demised premises according to the approved methods practised in Kenya Colony in regard to the class of property demised or that he has, as alleged, never kept the land free from weeds or in good order, or as further alleged, has never pruned or kept pruned adequately or at all coffee trees, or that as alleged he has ever failed to check the growth of or remove couch grass and other weeds from and amongst the coffee trees.

40

35. The first Plaintiff denies that he has ever failed to preserve trees or plants or ever permitted growing coffee trees to be burnt or destroyed by fire or to be destroyed or rendered useless through the growth of couch grass among coffee trees.

36. The first Plaintiff denies that he ever took over any pineapple plantation or that any such plantation, if demised or existed was ever ploughed

Defendant's
Exhibits

D.1.

Reply to
Defence
16th July 1956
continued

out or otherwise destroyed after the demise.

37. The first Plaintiff denies that he ever removed or cut or felled living non-coffee trees, referred to in the Defence, and states that a few trees dangerously leaning were cut in October, 1955, before the transfer to the Plaintiff.

38. The first Plaintiff denies that he ever took over any garden or pleasure garden or any ever existed at or before the demise.

39. The first Plaintiff admits that the remains of an electric light plant existed in pieces as junk but denies that it was ever part of the demise, or could have been or was demised as an electric light plant.

10

40. The first Plaintiff does not admit that any electric pole did ever exist at the date of the demise or if any ever existed, or removals as alleged took place, they took place before the demise.

41. The first Plaintiff denies that any tennis court as alleged ever existed as a tennis court at the time of demise and any tennis court as such was ever demised, or that what might have once been a tennis court, was to be restored into a tennis court under the terms of the demise.

20

42. The first Plaintiff denies that any coffee drying tables were ever demised, or that any store was ever pulled down or that any cattle shed or milking shed if they existed or were demised were ever demolished.

30

43. The first Plaintiff does not admit that he has ever felled and removed trees, pulled off roofs and demolished wired enclosures, or bomas.

44. The second Plaintiff denies that he was ever offered an employment at the same premises by the Defendant but admits that he was told that if he would vacate the premises he would be given a job later elsewhere.

45. Save as is hereinafter expressly admitted, the first Plaintiff denies each and every allegations of fact upon which the counterclaim is

40

founded as if the same were set forth herein seriatim and specifically traversed, and in particular the Plaintiff denies that the Defendant personally ever had or now has any right to claim or sue in respect of the said counter-claim, or has or ever had any valid cause of action therefor in law or in fact.

Defendant's
Exhibits

D.1.

Reply to
Defence
16th July 1956
continued

10 46. The first Plaintiff by way of defence to the counter-claim repeats paragraph 1 to 45 of this Reply to Defence and further does not admit that any conditions or covenants of the lease had been broken or the Defendant had suffered any loss or damage as alleged or is entitled to sue for -

- (a) the alleged repairing or reinstating of buildings or structures, or replacing of roofs;
- (b) the alleged removing of couch grass or weeds, if any, from the coffee lands;
- 20 (c) the alleged pruning of coffee which the first Plaintiff does not admit ought or could satisfactorily or at all owing to rains have been pruned prior to 18th January, 1956 to the extent envisaged under the lease or to any extent at all.

30 47. The first Plaintiff does not admit that he has either removed from the said premises or has converted to his own use or deprived the Defendant of the use thereof any articles as stated in paragraph 23 of the Defence and Counter-claim of the Defendant and states (a) Massey Harris Pony Tractor and Coffee King Spray were undergoing repairs at Settlers Service Garage at Ruiru at the time of wrongful entry (b) the said Massey Harris Pony Tractor and Coffee King Spray Machine as one compact unit was taken away by the Defendant from the said Settlers Service Garage at Ruiru (c) one Trailer was undergoing repair at the time of wrongful entry (d) no cattle were handed over at the time of the demise and (e) no sundry tools and equipment for
40 farm or workshop were ever handed over to the first Plaintiff at the time of the demise. The first Plaintiff denies that the Defendant has suffered any loss or damage on account of any of the foregoing, or that he has or ever had any right to sue therefor.

48. The first Plaintiff denies that he has cut and

Defendant's
Exhibits

D.1.

Reply to
Defence

16th July 1956
continued

removed from the said premises sixty or any other number of planted or growing trees or that such trees were of a value of Shs.6,000/- or at all and states that the dangerously leaning trees were cut and timber was used for the benefit of the estate.

49. The first Plaintiff denies that he has ever damaged or failed to repair machinery or equipment or that the Defendant has suffered any loss or damage as alleged in paragraph 25 of the Defence and Counter-claim or has any right to sue for -

10

- (a) alleged repairs to Fordson Tractor;
- (b) alleged repairs to Hydram;
- (c) alleged repairs to 50 coffee trays;
- (d) alleged replacement value of Land Rover car, or
- (e) alleged replacement value of Rotovator.

50. The first Plaintiff denies his liability to the Defendant or any other person in the sum counter-claimed or any other sum as claimed in paragraph 26 of the Defence and Counter-claim.

20

WHEREFORE, the Plaintiff pray that their claims be decreed in accordance with the prayers in the plaint, and that the lease be rectified, if necessary to accord with obligations as to repair actually mutually intended, imposed and undertaken (if not already in such accord), and that the Counter-claims be dismissed with costs.

DATED at Nairobi this 16th day of July,
195 .

30

for D.N.& R.N. KHANNA
S/d D.N. Khanna
ADVOCATES FOR THE PLAINTIFFS

Filed by:-

D.N. & R.N.Khanna,
Advocates,
Victoria Street, Nairobi.

To be served upon:

Messrs.Shapley,Barret,Allin & Co.,
Advocates,
Northey Street, Nairobi.

40

We agree to this Reply to Defence being filed out of time.

for SHAPLEY,BARRET,ALLIN & COMPANY
(SD) B. Allin
ADVOCATES FOR THE DEFENDANT.

re: ESTATE C. GALANOS, DECEASEDDefendant's
ExhibitsMeeting at the Standard Bank at 2.30 p.m. on
Tuesday, the 23rd July, 1957.

D.1.

Present: Mrs. Ayoub
Mr. H. Ayoub
Mr. Fulbrook and
Mr. Holder.Minutes of
Meeting
23rd July 1957

1. It was explained that the purpose of the meeting was (a) to clarify the position regarding any claim the Ayoub family may have against the estate of the late Mr. Galanos, and (b) to ascertain to what extent the Ayoub family claim an interest in the pending Court case by Mr. Zagoritis against Mr. Galanos and to what extent they expected to be consulted.

2. There was before the meeting a copy of an agreement dated the 12th November, 1955 between Mr. C. Galanos of the first part, Marie Ayoub of the second part, Henry Ayoub of the third part, A. M. Hurley of the fourth part and Cecile Galanos of the fifth part. In response to the question put to Mrs. Ayoub and Mr. Henry Ayoub, the latter replied as follows :-

(a) On the 12th November, 1955 there was owing by the Ayoub family to Mr. Galanos the sum of £11,000. This was an interest free loan.

(b) The expenses incurred in connection with the running of the estate since that date were financed by Mr. Galanos. The exact sum was not known but Mr. Ayoub said he was sure that Tongoni Plantations Ltd. had been keeping the accounts and that that Company would be in a position to supply the figures. He admitted that such expenses would be a debt due by the Ayoub family to Mr. Galanos.

(c) Against the indebtedness under (a) and (b) above, Mr. Galanos received following sums:-

Proceeds of 1956 coffee crops	Shs.92,473/66
First instalment of the sale price of Cranhurst Estate	100,000/-
Interest paid by Mr. Horn to Mrs. Ayoub and paid over to Mr. Galanos by her.	<u>10,000/-</u>

Shs.202,473/66

Defendant's
Exhibits

D.1.

Minutes of
Meeting
23rd July 1957
continued

(d) Mr. Ayoub said there was thus owing to Mr. Galanos the sum of £11,000 plus the running expenses referred to in (b) above less the sum of Shs.202,473/66 referred to in (c) above.

(e) Mr. Ayoub intimated that Mr. Galanos's claim would be a first charge against the balance of the principal sum owing by Mr. Horn in respect of the purchase price of Cranhurst Estate.

10

(f) He claimed that the interest on the balances owing from time to time in respect of the said purchase price would be entirely for the account of the Ayoub family and that since the sum of £11,000 was an interest free loan there was no interest payable to Mr. Galanos.

(g) As regards the Court case, Mr. Ayoub said that the Ayoub family would claim any monies received thereunder and similarly would be liable for any payments made. He intimated that the Ayoub family accordingly would expect the executors to consult them in any steps they take regarding the case.

20

(h) In the result, the Ayoub family claimed the difference between the sale price of Cranhurst Estate (£35,000) and the sum owing to Mr. Galanos described above. In addition they claimed all the interest on the balances owing by the Purchaser (Mr. Horn) from time to time.

30

3. Mr. Fulbrook and Mr. Holder intimated to Mrs. Ayoub and Mr. Henry Ayoub that the executors would give proper consideration to the representations put forward by them.

Copy/
Memorandum of Meeting at the Standard Bank of South Africa Limited, Malik Street Branch, Nairobi, at 2.30 p.m. on Tuesday the 23rd July, 1957.

Present: Mrs. Ayoub
Mr. H. Ayoub
Mr. Fulbrook and
Mr. Holder

40

1. It was explained that the purpose of the

meeting was (a) to clarify the position regarding any claim the Ayoub family may have against the estate of the late Mr. Galanos, and (b) to ascertain to what extent the Ayoub family claim an interest in the pending Court case by Mr. Zagoritis against Mr. Galanos and to what extent they expect to be consulted.

Defendant's
Exhibits

D.1.

Minutes of
Meeting
23rd July 1957
continued

10 2. There was before the meeting a copy of an Agreement dated the 12th November, 1955 between Mr. C. Galanos of the first part, Marie Ayoub of the second part, Henry Ayoub of the third part, A.M. Hurley of the fourth part and Cecile Galanos of the fifth part. In response to questions put to Mrs. Ayoub and Mr. Henry Ayoub, the latter replied as follows :-

(a) On the 12th November, 1955 there was owing by the Ayoub family to Mr. Galanos the sum of £11,000. This was an interest free loan.

20 (b) The expenses incurred in connection with the running of the estate since that date were financed by Mr. Galanos. The exact sums was not known but Mr. Ayoub said he was sure that Tongoni Plantations Ltd. had been keeping the accounts and that that Company would be in a position to supply the figures. He admitted that such expenses would be a debt due by the Ayoub family to Mr. Galanos without interest.

30 (c) Against the indebtedness under (a) and (b) above, Mr. Galanos received the following sums:-

Proceeds of 1956 coffee crop	Shs.92,473/66
First instalment of the sale price of Cranhurst Estate	100,000/-
Interest paid by Mr. Horn to Mrs. Ayoub and paid over by her to Mr. Galanos	<u>10,000/-</u>
	<u>Shs.202,473/66</u>

40 (d) Mr. Ayoub said there was thus owing to Mr. Galanos the sum of £11,000 plus the running expenses referred to in (b) above less the sum of Shs. 202,473/66 referred to in (c) above.

Defendant's
Exhibits

D.1.

Minutes of
Meeting
23rd July 1957
continued

- (e) Mr. Ayoub intimated that the sum due to Mr. Galanos would be a first charge against the balance of the principal sum owing by Mr. Horn in respect of the purchase price of Cranhurst Estate.
- (f) He claimed that the interest on the balance owing from time to time in respect of the said purchase price would be entirely for the account of the Ayoub family and that since the sum of £11,000 was an interest free loan there was no interest payable to Mr. Galanos. 10
- (g) As regards the Court case which involves a claim by Mr. Zagoritis against Mr. Galanos and a counterclaim in reverse order, Mr. Ayoub said that in the event of the case resolving in Mr. Zagoritis having to make a payment to Mr. Galanos such payment in effect would be for the account of the Ayoub family and would be claimed by them. That being the case, the Ayoub family in turn would be liable for any such payments as would fall to be met by Mr. Galanos incidental to Mr. Zagoritis' claim including the costs of the action. Accordingly, the Ayoub family would expect the executors to consult them in all matters concerning the case. 20
- (h) In the result, the Ayoub family claimed the difference between the sale price of Cranhurst Estate (£35,000) and the sums owing to Mr. Galanos described above. In addition they claimed all the interest on the balances owing by the Purchaser (Mr. Horn) from time to time. 30
3. Mr. Fulbrook and Mr. Holder intimated to Mr. Ayoub and Mr. Henry Ayoub that the executors would give proper consideration to the representations put forward by them. 40

Sd/-

EXHIBIT D.2.Civ. Case No.1185 of 1959Defendants
Exhibits

D.2.

EXHIBIT NO.2.Agreement of
Sale
5th March 1957

THIS AGREEMENT is made the 5th day
of March One thousand nine hundred and fifty-
seven BETWEEN CHRISTOS GALANOS of
Nairobi in the Colony of Kenya (hereinafter call-
ed "the Vendor" which expression shall where the
context so admits include his personal represent-
atives and assigns) of the one part and HARRIS
HORN of Nairobi aforesaid (hereinafter called "the
Purchaser") which expression shall where the con-
text so admits include his personal representa-
tives and assigns) of the other part

WHEREAS :-

(1) The Vendor is registered as the proprietor as
lessee from the Crown of ALL THAT piece of land
comprising Three hundred and twenty-nine (329)
acres or thereabouts (less Road Reserve of Seven
acres or thereabouts) situate South-West of Thika
Township in the Kiambu District of the said Colony
and known as Land Reference Number 7532

(2) The Vendor has agreed with the Purchaser for
the sale to him of the said piece of land TOGETHER
WITH the buildings and other improvements standing
or being thereon AND TOGETHER WITH the movable pro-
perty hereinafter described

NOW IT IS HEREBY AGREED by and between the
parties hereto as follows:-

1. The Vendor shall sell and the Purchaser shall
purchase ALL THAT piece of land hereinbefore
described TOGETHER WITH the buildings and other im-
provements standing or being thereon AND TOGETHER
WITH the machinery chattels and movables as listed
in the Schedule attached hereto

2. The purchase price shall be the sum of Shill-
ings Seven hundred thousand (Shs.700,000/-) which
shall be payable by the Purchaser as to the sum of
Shillings One hundred thousand (Shs.100,000/-) on
the signing hereof and the balance (namely Shill-
ings Six hundred thousand (Shs.600,000/-) in six

Defendants
Exhibits

D.2.

Agreement of
Sale

5th March 1957
continued

equal yearly instalments of Shillings One hundred thousand (Shs.100,000/-) each payable on or before the first day of March in each year the first of such payments to be made on the first day of March One thousand nine hundred and fifty eight.

3. The payment of the instalments aforesaid shall be secured to the Vendor by the Purchaser giving to the Kenya Planters Co-operative Union Limited irrevocable authority to pay to the Vendor a sum equal to each such instalment on or before the first day of March in each year from the proceeds of the respective coffee crops from Cranhurst Estate until the full sum of Shillings Six hundred thousand (Shs.600,000/-) shall have been so paid the first of such payments to be made on or before the first day of March One thousand nine hundred and fifty-eight.

10

4. The Purchaser will pay the Vendor interest at the rate of Seven per centum per annum on the balances of the purchase price owing from time to time calculated from the First day of March One thousand nine hundred and fifty-seven and to be payable quarterly in arrear on the First day of June, the First day of September, the First day of December and the First day of March in each year the first of such payments to be made on the First day of June One thousand nine hundred and fifty-seven.

20

5. All payments of interest to become due hereunder shall be made by the Purchaser direct to Mrs. Maria Ayoub at such address as she may direct from time to time and the Vendor declares that the said Mrs. Maria Ayoub shall have his authority to execute valid and effectual receipts for all such payments of interest.

30

6. The Purchaser shall have the right to increase the instalments payable under Clause 2 by such sums as he may decide.

7. On payment of a total sum equal to Fifty per centum of the purchase price the Vendor shall execute and deliver to the Purchaser or as he shall direct a legal transfer of the premises hereby agreed to be sold free from encumbrances PROVIDED THAT in the event of the Purchaser

40

forming a company and directing that all his right title and interest herein shall be transferred to the said company the Purchaser shall personally guarantee that the said company will perform and observe all the conditions restrictions and stipulations herein contained and on the part of the Purchaser to be performed and observed.

Defendants
Exhibits

D.2.

Agreement of
Sale
5th March 1957
continued

10 8. The balance of the purchase price together with interest thereon as aforesaid shall be further secured by the Purchaser executing in favour of the Vendor a first legal mortgage of the property hereby agreed to be sold. Such legal mortgage shall contain all usual conditions covenants and powers and in particular the following covenants (which in any event are to be observed from date of possession)

- 20 (a) A covenant by the Purchaser to observe the usual methods of good husbandry in the working of the said property
- (b) Power for the Vendor to enter and view the state and condition of the property
- (c) Power for the Purchaser to accelerate payment of any sum due under the mortgage at any time without notice of such intention

30 9. Should there be default in payment of any of the instalments hereinbefore provided for or any breach by the Purchaser of the terms of this Agreement the deposit of Shillings One hundred thousand (Shs.100,000/-) herein provided for shall be forfeited to the Vendor and the Vendor shall in addition to his right to damages be entitled to cancel this Agreement.

40 10. This transaction is subject to the consent of the Land Control Board being obtained and should such consent be refused or not obtained within three months from the date hereof this Agreement shall be null and void and the Purchaser shall forthwith vacate the premises and the Vendor shall immediately refund to the Purchaser all moneys paid hereunder but without interest.

11. The Purchaser shall be given possession on

Defendants
Exhibits

the First day of March One thousand nine hundred and fifty-seven.

D.2.

Agreement of
Sale
5th March 1957
continued

12. All costs incidental to this Agreement shall be borne by the Purchaser. Each party shall be responsible for his own legal charges in regard to the Transfer but all stamp duties and registration fees shall be borne by the Purchaser and the Purchaser shall be responsible for all legal costs and stamp duties in connection with the mortgage referred to in Clause 8 hereof.

10

13. It is further agreed between the parties that the purchase price of Shillings Seven hundred thousand (Shs.700,000/-) shall be apportioned as follows :-

Land, Buildings and all improvements thereon	Shs.580,000/-
All movables as listed in the Schedule hereto	<u>Shs.120,000/-</u>
	<u>Shs.700,000/-</u>

20

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

THE SCHEDULE HEREINBEFORE REFERRED TO

1	Engine (Faribanks Morse) 3 H.P. petrol paraffin	
1	3-disc Pulper William McKinnon	
50	New coffee trays	
30	Old coffee trays	
1	New Avery platform scale	30
1	Fordson Major Tractor - petrol paraffin	
3	Tractor wheel weights	
1	Rib roller	
1	Rake (tractor drawn)	
1	3-ton Fordson Lorry (Diesel) 6,958 miles - imported body	
1	Rotary Hoe	
1	Old disc Harrow	
1	Old spring type harrow	
1	3-disc German plough (reversible)	40
1	set of pipe dies $\frac{1}{2}$ " to 2"	
1	Blow Lamp (new)	
2	Grease guns	

	34	Pruning seccoteurs	Defendants
	9	Old Avery weights	<u>Exhibits</u>
	7	Rakes (hand)	
	4	Shovels	D.2.
	2	Pick Axes	
	70	Fork jembes	Agreement of
	2	Pruning saws	Sale
	1	Hock saw	5th March 1957
	37	Pangas	continued
10	31	Jembes	
	1	Pruning Knife	
	2	2-lb hammers (stone)	
	4	Crow bars	
	2	Pipe spanners	
	30	Assorted spanners	
	2	Long saws	
	1	Finnemore travel builder	
	2	Jacks	
	1	Foot pump	
20	1	Old hand grinding mill	
	1	small hand saws	
	1	Vice	
	1	Anvil	
	1	Grindstone	
	1	Styrup pump	
	1	Garden shears	
	2	Axe heads	
	2	Hammers	

CRANHURST HOUSE

30	<u>OFFICE</u>	<u>SPARE BEDROOM</u>
	1 Cupboard	2 beds
	1 Armchair	1 chair
	2 Mattresses	1 wardrobe
	1 Desk (roll top)	1 wash hand stand
	1 Rubber stamp	1 chest of drawers
	<u>DINING ROOM</u>	<u>SITTING ROOM</u>
	1 Cupboard	2 large chairs
	6 small chairs	1 sideboard
	1 big chair	1 mirror
40	1 table	1 settee
	1 sideboard	1 rug

Defendants
Exhibits

KITCHENBEDROOM

D.2.
Agreement of
Sale
5th March 1957
continued

2 cupboards
1 stove
1 chair
1 washing basin
1 table
1 Pressure lamp
(large)
1 Pump up lamp
1 set of shelves
1 Filter

1 Wardrobe
1 bed and mattress
1 large chair
1 dressing table
1 book case
1 rug

BATHROOM

2 cupboards
1 table
1 bath
1 basin
1 cupboard

1 wash hand stand
1 mirror
1 towel rack

10

SIGNED by the said CHRISTOS)
GALANOS in the presence of:-)

(Sgd.) C.GALANOS

(Sgd.) W.P. Holder
Advocate
Nairobi

20

SIGNED by the said HARRIS)
HORN in the presence of:)

(Sgd.) H. HORN

(Sgd.) W.P. Holder
Advocate
Nairobi

DATED 1957

Defendants
Exhibits

D.2.

C. GALANOS, ESQ.

- to -

Agreement of
Sale
5th March 1957
continued

AGREEMENT FOR SALE

ARCHER & WILCOCK,
Advocates,
Nairobi,
Colony of Kenya.

Defendants
Exhibits

EXHIBIT D.3.

EXHIBIT NO.3
C.C.1185/59.

D.3.

Letter, Buckley
Hollister & Co.
to Galanos
18th January
1957

BUCKLEY, HOLLISTER & CO.
Advocates.

New Stanley House,
York Street,
NAIROBI
Kenya Colony.

P.O. Box 481.

10

Please Quote our Ref.S/9041.

18th January, 1957.

C. Galanos, Esq.,
P.O. Box 35,
TANGA.

Dear Mr. Galanos,

Re Yourself and Zagoritis and
Another.

I have written to Messrs. Khanna & Khanna,
notifying them that I represent you in this
matter. I have now ascertained that the hearing
has been set down for the 4th February, and I
understand from Mr. Khanna that he anticipates
that this case will last 14 days at least. I
understand that you have been ordered to the
Coast on medical grounds, and if you are unable
to be present at the hearing, will you please
let me have a medical certificate by return of
post, setting out the grounds why you are un-
able to be present.

20

30

If you are unable to be here because of
Doctor's Orders, it will indeed suit me very
well, as this is a lengthy case, and if it is
likely to last 14 days, we shall have to go
through the evidence and law very carefully, and
I would prefer to take this case later in the
year when I have had time to study it and confer
with Mr. Salter. I should be glad to know
whether you wish me to brief Mr. Salter in this
case, to appear for you with me as his junior.
As you know, he has already given an opinion on
this case, and with that opinion I am in entire
agreement at present.

40

I do not think that your chances of success in the case should be put any higher than a 50/50 chance. As you know, re-entry on the grounds that the rent was in arrear will have to be abandoned as a defence as the law is against you on that point. There remains the question whether re-entry without notice was justifiable in view of the damage and waste caused to the property by Mr. Zagoritis. Whilst it may be argued for us that the law does not provide that notice need be given, yet it must be borne in mind that this law has elsewhere been changed and it is generally accepted that notice is necessary. The Court will therefore incline as far as possible to implement what is the new law and not the old. Therefore, reasons may be found to show that your entry, despite the waste, was unlawful and if this is the case, then the Plaintiff will succeed, though not to the extent of the damages he asks. However, the position would be indeed, a serious one, as I understand that you have spent a very considerable amount of money on the estate after re-entry.

It is difficult to estimate fees in this matter, but I think that a case of this complication should carry an initial instruction fee, and daily court fees. I should be glad to know if you are agreeable to pay (£300 instruction fee, and £100 per day hearing), after the second day. If this is agreeable to you, will you please let me have your cheque for £300 in respect of the initial instructions.

In the event of Messrs. Khanna & Khanna approaching me with regard to a settlement, will you please let me know what my instructions are. As you know, I consider that if the case were settled on the basis of each side withdrawing its claim, and counterclaim, and paying its own costs, you would be well advised to agree. This leaves, however, the action by Mr. Hurley for £1,000 arrears of rent outstanding, and it seems likely that Zagoritis will not agree to the settlement I have mentioned above, without bringing the Hurley case into it, and insisting that at least that case is withdrawn, and each side pay its own costs. Will you please let me know what I am to do. As I explained at our meeting, in the presence of Mrs. Ayoub, Snr., and yourself, I considered that Mr. Salter's opinion was sound,

Defendants
Exhibits

D.3.

Letter, Buckley
Hollister & Co.
to Galanos
18th January
1957
continued

Defendants
Exhibits

D.3.

Letter, Buckley
Hollister & Co.
to Galanos
18th January
1957
continued

and that you should accept his advice as regards a settlement. I appreciate that from Mrs. Ayoub's point of view and the point of view of the Ayoub family, a settlement which may appear favourable to me as your Advocate would not appear so favourable to them, and immediately a conflict of interest and instructions will arise between yourself and Mrs. Ayoub and her family. It is not possible for me to represent both you and Mrs. Ayoub and her family in such circumstances, and unless I can have the clearest instructions herein, and know precisely how far I can go, I am afraid that I must return the papers to you as Mr. Lean had to. Will you please let me hear from you as fully as possible.

10

Yours sincerely,
(Sgd.) Denis F. Shaylor.

c/o
Mrs. M. Ayoub,
P.O. Box 3432,
NAIROBI.
DFS/GT.

20

D.4.

EXHIBIT D.4.

Agreement
12th November
1955

A N A G R E E M E N T made the Twelfth day of November One thousand nine hundred and fifty five B E T W E E N CHRISTOS GALANOS of Nairobi in the Colony of Kenya Company Director (hereinafter called "Mr. Galanos" which expression shall where the context so admits include his personal representatives and assigns) of the first part MARIE AYOUB of Nairobi aforesaid Widow of the second part HENRY AYOUB of Nairobi aforesaid of the third part ANGELA MARY HURLEY of Nairobi aforesaid of the fourth part and CECILE GALANOS of Nairobi aforesaid of the fifth part (hereinafter the parties of the second, third, fourth and fifth parts are collectively referred to as "the Ayoub Family") W H E R E A S

30

(1) An Estate known as Cranhurst Estate (hereinafter referred to as "the Estate") and being Land Reference Number 7532 S.W. of Thika Township in the said Colony of Kenya was

40

purchased by the Ayoub Family and registered in the name of the Husband of the party of the fourth part namely Leslie Norman Hurley.

Defendants
Exhibits

D.4.

- (2) The Land Control Board has refused to allow the Ayoub Family to have the farm registered in their names and Mr. Galanos has agreed to take over the farm and have the same registered in his name.

Agreement
12th November
1955
continued

- 10 (3) At the date of this Agreement there is due to Mr. Galanos or Tongoni Plantations Limited a sum of approximately Eleven thousand pounds. Although the transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos is being registered the total purchase money is not being paid as Mr. Galanos hereby admits notwithstanding a full receipt having been given in the formal transfer of the Estate from the said Leslie Norman Hurley to Mr.
20 Galanos.

- (4) The Ayoub Family and each of them hereby declare that they are entitled to one quarter each of the benefit of any sums which may become payable under this Agreement.

NOW IT IS HEREBY AGREED AND DECLARED as follows :-

- 30 1. Mr. Galanos shall pay to the Ayoub Family a sum which shall represent the difference between the sale price of the Estate and any sums which shall be due to either Mr. Galanos personally or to Tongoni Plantations Limited such sum to be paid within seven days of the completion of a sale.

2. Pending a sale the Ayoub Family and each of them hereby agree that they will not take any action whatsoever to recover the sum due under this Agreement.

- 40 3. In the event of the death of Mr. Galanos before a sale of the Estate Mr. Galanos hereby directs that his Executors shall not sell the farm unless the price is agreed by the Ayoub Family and each of them and thereafter account to the Ayoub Family in accordance with the terms hereinbefore

Defendants
Exhibits

stated.

D.4.

AS WITNESS the hands of the parties the day
and year first hereinbefore written.

Agreement
12th November
1955
continued

SIGNED by the said CHRISTOS
GALANOS in the presence of:-

Sd/- Ch. Galanos

Sd/- B. Allin
Advocate

SIGNED by the said MARIE
AYOUB in the presence of:-

Sd/- Marie Ayoub

Sd/- A.P. Manning
Advocates Asst.
Nairobi.

10

SIGNED by the said HENRY
AYOUB in the presence of:

Sd/- Henry Ayoub

Sd/- Ph. Goodenough
Registered Chiropodist
London

SIGNED by the said ANGELA
MARY HURLEY in the presence
of:

Sd/- Angela Mary
Hurley

20

Sd/- A.P. Manning
Advocates Asst.
Nairobi.

SIGNED by the said CECILE
GALANOS in the presence of:-

Sd/- Cecile Galanos

Sd/- A.P. Manning
Advocates Asst.
Nairobi.

DATED 12th November 1955

Defendants
Exhibits

CHRISTOS GALANOS ESQ. 1st part

MRS. MARIE AYOUB 2nd part

HENRY AYOUB ESQ. 3rd part

MRS. ANGELA MARY
HURLEY 4th part

MRS. CECILE GALANOS 5th part

D.4.
Agreement
12th November
1955
continued

ACKNOWLEDGMENT OF DEBT

DRAWN BY:
Shapley Barret Allin & Co.,
Advocates,
Nairobi.

Defendants
Exhibits

DA
Transfer,
11th November
1955

EXHIBIT D A.

(Seal mark)
Kenya Revenue
(Two Hundred
Pounds)

(Seal mark)
Kenya Revenue
(One Hundred
Pounds)

EX.A
CC 1185/59

SD.£300/-
ID/ C.G.W.
15.11.55.

Stamp....
do Counterpart Sh._____

10

Penalty _____

Registration
Fee £ 1-6-6
Copying Fees Sh.4.0
Id/-C.G.W.
23.11.55.

COLONY OF KENYA
REGISTRY OF TITLES
(INLAND DISTRICT)

TITLE NUMBER I.R. 6245

20

Annual Rent; Shillings 64/40 (revisable)
Term: 999 years from 1.6.1905 to
1.6.2904

I, LESLIE NORMAN HURLEY of Voi in the Colony of Kenya a retired Major of the Indian Army being registered as the proprietor as Lessee from the Crown for the term of Nine hundred and ninety nine years from the First day of June One thousand nine hundred and five (subject however to such Charges Leases and encumbrances as are notified by Memorandum endorsed hereon and to the revisable annual rent of Shillings Sixty four and cents forty) of ALL THAT piece of land situate S.W. of Thika Township in the Kiam-bu District of the Colony of Kenya containing by measurement three hundred and twenty acres more or less (less Road Reserve of seven acres more

30

or less) that is to say Land Reference Number 7532 of Meridional District South A 37 1 which

Defendants
Exhibits

DA.

Transfer,
11th November
1955
continued

10 said piece of land being the premises comprised in a Grant dated the Twenty fourth day of November One thousand nine hundred and forty four registered as Number I.R.6245/1 is more particularly delineated and described on Plan Number 39624 annexed to the said Grant and thereon bordered red IN CONSIDERATION of the sum of Shillings three hundred thousand (Shillings 300,000/-) paid to me by CHRISTOS GALANOS of Post Office Box Number 3432 Nairobi in the said Colony (the receipt whereof I hereby acknowledge) DO HEREBY TRANSFER unto the said Christos Galanos ALL my right title and interest in the said piece of land and in and to the buildings and improvements erected and being thereon.

20 IN WITNESS whereof I have hereunto set my hand this Eleventh day of November One thousand nine hundred and fifty five.

SIGNED by the said LESLIE)
NORMAN HURLEY in the) (Sd/-) L. Hurley
presence of:-)

(Sd/-) B. Allin
Advocate
Nairobi.

30 CROWN LANDS ORDINANCE (Cap.155
Sec.88

Under powers delegated to me from the Governor, consent is hereby given to this transaction.

(Sd/
for Commissioners of Lands.

Date
29.11.55.

40 LAND CONTROL ORDINANCE

Consent is hereby given to this transaction.

Sd/-

CHAIRMAN, LAND CONTROL BOARD

Date
29.11.55.

Defendants
Exhibits

MEMORANDUM OF CHARGES LEASES AND ENCUMBRANCES.

DA.

Lease registered as No. I.R. 6245/13.

Transfer,
11th November
1955
continued

LAND TITLES REGISTRY - COLONY OF KENYA
INLAND DISTRICT NAIROBI REGISTERED NUMBER
L.R. 6245/16

Presented 23.11.1955
Time 2.25 p.m.

C.G.Wrensch
Registrar of Titles

Defendants
Exhibits

DA.

Transfer,
11th November
1955
continued

DATED the 11 day of 1955

LESLIE NORMAN HURLEY

- to -

CHRISTOS GALANOS

T R A N S F E R

of L.R. No. 7532 S.W. of

Thika Township

SHAPIRO, JARRET, ALLIN & COMPANY,
Advocates,
Nairobi,

Kenya Colony.

We, Buckley, Hollister & Company, Advocates for the Defendants certify that this is a true copy of a transfer of L.R. Number 7532 South West of Thika dated the 11th day of November 1955 and made between L.N. Hurley and Christos Galanos and produced by the Defendants marked as exhibit "A" in Civil Suit No.1185 of 1959 instituted in Her Majesty's Supreme Court of Kenya at Nairobi.

10 Certified this 23rd day of August 1960.

Buckley, Hollister & Co.,

(Sd) Denis F. Shaylor.

Agreed Bundle of
Correspondence

AGREED BUNDLE OF CORRESPONDENCE

COPY

TRUST DEPARTMENT

1. Letter,
Acting Trust
Officer to H.
Ayoub and M.
Ayoub
8th August 1957

8th August 1957.

Mr. H. Ayoub and Mrs.M.Ayoub,
c/o Mrs. C. Galanos,
P.O. Box 10325,
Nairobi.

Dear Sir and Madam,

Estate of the late
Christos Galanos

10

We would refer to your call at this office on the 23rd July last when matters affecting the Estate insofar as Cranhurst Estate was concerned were fully discussed with ourselves and Mr. W.P. Holder, our Co-Executor.

We enclose herewith a memorandum of the meeting and if you are in agreement therewith we shall be glad if you will append your signatures at the foot thereof.

20

With particular reference to the action against the deceased by Mr. Zagoritis, we have, based on our understanding of the points discussed at the meeting in question, prepared and we enclose herein a form of undertaking to the Executors of the Estate concerning any payment which is to be made to the Plaintiff, whether as a result of the action or in the event of settlement being reached, and if you are in agreement therewith we shall be grateful if you will kindly sign this document, also obtaining the signatures of the other members of the Ayoub Family as referred to in the Agreement dated 12th November, 1955 and entered into between the Ayoub family and the late Mr.Galanos. In the event of your agreeing to sign such an undertaking we hereby confirm that any payments directly related to the action in question and which may be received by us will be paid to the Ayoub family.

30

40

Yours faithfully
Signed
ACTING TRUST OFFICER

COPY

Trust Department

Agreed Bundle of
Correspondence

9th August 1957.

H. Ayoub, Esq.,
P.O. Box 3432,
Nairobi.

2. Letter,
Acting Trust
Officer to H.
Ayoub
9th August 1957

Dear Sir,

Estate of the late Christos Galanos

10 Further to our letter of the 8th August
and, as arranged during your call here on that
day, we enclose a copy of the Certificate and
Analysis of Expenses which were recently hand-
ed to us by Mr. Zagoritis in connection with
Cranhurst Estate.

20 We understand that, together with the
other members of your family, you are giving
consideration to the proposals put to us by Mr.
Zagoritis and that as soon as you are able to
do so you will notify us of your views in order
that the Executors may take further action.

We also take this opportunity of enclosing
the memorandum referred to in our previous lett-
er duly amended as agreed and in due course we
shall be grateful if this, together with the
form of undertaking, could be returned to us
after signature by the parties concerned.
Additional copies of these documents are en-
closed for your retention.

Yours faithfully

Signed

ACTING TRUST OFFICER

Agreed Bundle of COPY
Correspondence

3. Letter,
H. Ayoub to
Acting Trust
Officer
10th August 1957

H. Ayoub,
P.O. Box 3432,
Nairobi.

10th August, 1957.

Messrs. The Standard Bank
of South Africa Ltd.
Trust Department,
P.O. Box 30003,
Nairobi.

10

For the attention of the Acting
Trust Officer.

Dear Sir,

Estate of the late Christos Galanos

I am in receipt of your letter of the 9th
crt. and notice that you are referring me to
a letter of yours dated the 8th August, I re-
gret to inform you that I have not received
any letter from you with such a date on it,
will you kindly check with your mail depart-
ment if they ever sent such letter and if so
please forward a copy.

20

As discussed at the meeting we held in
your office, I am together with the other mem-
bers of my family giving consideration to the
proposals put to you by Mr. Zagoritis but to
enable us to come to a decision I would be
grateful if you could obtain for us a copy of
Mr. Zagoritis plaint or if that would be too
difficult the original plaint which we would
return to you at the same time as our views.

30

Yours faithfully

signed: HENRY AYOUB.

COPY

14th August 1957

H. Ayoub, Esq.,
P.O. Box 3432,
Nairobi.

Dear Sir,

Agreed Bundle of
Correspondence

No.4 Letter,
Acting Trust
Officer to
H. Ayoub
14th August 1957

Estate of the late
Christos Galanos

10 We thank you for your letter of the 10th
August and trust that you have now received
our letter of the 8th August since we have
confirmed with our despatch department that
that letter duly left this office.

We are endeavouring to obtain a copy of
the plaint to which you refer and will let you
have this as soon as possible.

Yours faithfully,
Signed

ACTING TRUST OFFICER

20 COPY
S/9041

21st February 1958.

D.P.R.O'Byrne Esq.,
Advocate,
Church House,
P.O. Box 12201,
Nairobi.

No.5, Letter,
Buckley, Hollis-
ter & Co. to
D.P.R.O'Byrne
Esq. -
21st February
1958

Dear Sir,

re. Galanos, deceased and Zagoritis

30 We enclose a copy of the Agreement of the
12th November 1955 between Christos Galanos,
now deceased, and the members of the Ayoub fam-
ily. We also enclose Minutes of a meeting held
on the 23rd July 1957. We shall be grateful if
you will obtain your client's instructions
thereon, and if you will then contact us we can
arrange matters with regard to a conference.

Yours faithfully,
BUCKLEY HOLLISTER & CO.

DFS/SG

Agreed Bundle of
Correspondence

COPY

4th March, 1958.

No.6, Letter,
Buckley Holli-
ster & Co. to
D.P.R.O'Byrne
Esq.
4th March 1958

D.P.R.O'Byrne, Esq.,
Advocate,
Church House,
Nairobi.

Dear Sir,

Galanos, deceased, and Zagoritis

Further to our letter of the 21st ultimo
we shall be glad to know whether you have now
been able to take your client's instructions.

10

Yours faithfully,
BUCKLEY HOLLISTER & CO.

DFS/SG.

No.7, Letter,
D.P.R.O'Byrne
to Buckley
Hollister & Co.
10th March 1958

COPY

D.P.R.O'Byrne,
Advocate,
Church House,
Government Road,
Nairobi

G.179.

10th March, 1958.

20

Messrs.Buckley Hollister & Co.
Advocates,
P.O. Box 481,
Nairobi.

Dear Sirs,

Galanos deceased and Zagoritis

In reply to your letters of 21st Febru-
ary and 4th March, my client has gone to
Greece on holiday and is not expected back
for a further couple of weeks. I am unable,
therefore, to obtain her instructions on the
copy Agreement enclosed with your letter of
21st February. I shall get in touch with
you as soon as I have been able to obtain
instructions.

30

I understand from your Mr.Shaylor, that

the property in question, Cranhurst Estate, was sold about the beginning of 1957 for some £35,000. This is confirmed in the notes of the meeting held by the executors of the Estate on 23rd July 1957 with Mr. and Mrs. Ayoub. I should be grateful to be informed of the name of the purchaser, whether the full purchase price or any part has been paid, and where any such monies are at present deposited.

Agreed Bundle of
Correspondence

No.7, Letter,
D.P.R.O'Byrne
to Buckley
Hollister & Co.
10th March 1958
continued

Yours faithfully,

Sd. D.P.R.O'Beirne

COPY
S/9041

D.P.R. O'Beirne, Esq.,
Advocate,
Church House,
Nairobi.

14th March 1958.

No.8, Letter,
Buckley Holli-
ster & Co. to
D.P.R.O'Beirne
14th March 1958

Dear Sir,

Galanos, deceased and Zagoritis

We are in receipt of your letter of the 10th instant, the contents of which are not quite understood. We believe your clients to be the Ayoub family, and even if one had gone to Greece on holiday you would still be able to obtain instructions from the other members of the family who were present, and in particular Mrs. Ayoub, Senior.

We have consulted the executors of the estate of Galanos deceased, and they feel that no useful purpose can be served by delaying matters any further, and the delays to date have been solely because of your client's procrastination. They have been approached by Mr. Zagoritis in this matter with regard to a settlement, and in the circumstances unless we hear from you within the next seven days our clients will take such action as they may be advised in the matter to settle this case. It will be appreciated that they will, of course, effect the most favourable settlement possible

Agreed Bundle of
Correspondence

No.8, Letter,
Buckley Hollis-
ter & Co. to
D.P.R.O'Beirne
14th March 1958
continued

in the circumstances, and this will be as well for the benefit of your clients as for the estate, indeed ultimately it will be a matter for your clients alone in view of the agreement that was reached when Mrs. Ayoub Senior and Mr. Henri Ayoub had their interview with the executors, that the Ayoub family would in turn be liable for any payments as would fall to be met by Mr. Galanos's estate incidental to Mr. Zagoritis' claim, including the cost of the action.

10

Cranhurst Estate was sold for £35,000 to a Mr. Horne, of P.O. Box. 134, Arusha, but this of course is well known to Mrs. Ayoub Senior, who is receiving the interest on the unpaid purchase money. We are instructed that £10,000 has been received on account of the Purchase Price, and the balance of £25,000 is payable over the next five years. The next payment is due on the 1st March 1959, the annual instalments being £5,000. We are not quite clear as to the arrangement whereby Mrs. Ayoub Senior receives this interest, and shall be glad to know whether she is holding it on behalf of Mr. Galanos, deceased, or as a trustee for the Ayoub family.

20

Yours faithfully,
BUCKLEY HOLLISTER & CO.

DFS/SG.

No.9, Letter,
D.P.R.O'Beirne
to Buckley
Hollister & Co.
8th April 1958

COPY

D.P.R. O'Beirne,
Advocate,
Church House,
P.O.Box 12201
Nairobi.

30

G.179

8th April 1958.

Messrs. Buckley Hollister & Co.,
New Stanley House,
Nairobi.

Dear Sirs,

re. Galanos deceased and Zagoritis

40

I refer to your letters of 14th and 26th March regarding the above matter, upon which I have now obtained detailed instructions from

my client and have had an opportunity to study the relevant documents and correspondence.

Agreed Bundle of
Correspondence

10 I have perused a copy of the Agreement of 12th November 1955 enclosed with your letter of 21st February, and also a copy of some minutes of a meeting held on 23rd July 1957 between the Executors, your clients, and Mr. and Mrs. Ayoub. I am instructed to point out that the minutes of the meeting of 23rd July 1957 were apparently drawn up by the Trustee Department of the Standard Bank of South Africa and were sent to my client by the Bank on 8th August 1957, with a request that my clients should sign them if they were in agreement with the contents. The proposals contained in the minutes, particularly that referred to at paragraph 2 (g) were considered by my clients who were not in agreement with the views recorded as having been put forward by Mr. H. Ayoub. As 20 a result, my clients refused to sign these minutes, and similarly refused to sign an undertaking enclosed with the Bank's letter of 8th August 1957. My clients' disagreement with the proposals was communicated to the Bank shortly after receipt of that letter, and the Bank, as one of the Executors has been aware of that position for several months.

No.9, Letter,
D.P.R.O'Beirne
to Buckley
Hollister & Co.
8th April 1958
continued

30 With regard to the terms of your letter of 14th March, I am instructed that in fact no agreement was reached at the interview between the Executors and that Mr. and Mrs. Ayoub as stated in the second paragraph of your letter, nor has any such agreement been reached subsequently. I am now instructed to confirm formally on behalf of my clients that they are not in agreement with the proposal that they should in any way be concerned in the outcome of the Court proceedings between the Estate and Mr. Zagoritis and will neither claim any benefit thereunder 40 nor be liable for any payments. In these circumstances any settlement which may be reached by the Executors will be a matter for them and the Estate alone.

I am further instructed that, according to the Pleadings in this suit, it is claimed on behalf of the deceased that he re-entered the property Cranhurst Estate because of non-payment of

Agreed Bundle of
Correspondence

No.9, Letter,
D.P.R.O'Beirne
to Buckley
Hollister & Co.
8th April 1958
continued

rent and breaches of other covenants in the lease by the Plaintiff Mr.Zagoritis. I have not, of course, seen the Pleadings, but I understand this to be the case from my clients' instructions. I am, however, instructed that, prior to the re-entry on the premises, the deceased had loaned a sum of £15,000 to Mr. Zagoritis, which was secured by the coffee crop from Clovelly Estate, the property of Mr.Zagoritis, and that in January 1956 Mr. Zagoritis removed a large quantity of coffee from Clovelly to Cranhurst Estate - a matter of which Mr. Holder, one of your clients, is aware. I am further instructed that the main reason for the re-entry on the property was the recovery of this coffee. In these circumstances, it would appear that the real, as opposed to the ostensible, reason for re-entry on Cranhurst Estate was the protection by the deceased of his security for a substantial loan. This would be, of course, a matter for the deceased personally and has no concern with members of the Ayoub family.

10

20

Yours faithfully,

Signed: D.P.R. O'Beirne.

No.10, Letter,
D.P.R.O'Beirne
to Buckley
Hollister & Co.
9th April 1958

COPY

D.P.R. O'Beirne,
Advocate,
Church House,
P.O.Box 122 01,
Nairobi.

9th April 1958.

30

Messrs.Buckley Hollister & Co.
Advocates,
P.O. Box 481,
Nairobi.

Dear Sirs,

Cranhurst Estate & Galanos, deceased.

I have been instructed by my clients, Mrs. C. Galanos, Mrs. Ayoub Mr. H. Ayoub and Mrs. A. Hurley to write to you in connection with the proceeds of the sale of the Cranhurst Estate at Thika.

40

Under the terms of the Agreement of 12th

November 1955 entered into between the deceased and my clients, the deceased was to pay to my Clients the amount of the sale price of the Estate, less any sums due to either the deceased personally or to his Company, Tongoni Plantations Ltd. Subsequently, the property was sold for £35,000 of which the deceased or his estate has received the sum of £10,000 to date. In addition, the deceased received the proceeds of the 1956 coffee crop, Shs. 92,473/66 together with the sum of Shs. 10,000/- being a proportion of interest on the purchase price of the property. At the date of the deceased's death my clients were indebted to the deceased to the extent of a loan from the deceased and the running expenses of the Estate since 12th November 1955.

My clients have not so far received an account of the amounts outstanding between them and the deceased's estate. In order that my clients may be aware of their position regarding their liability under the agreement, I shall be grateful to be furnished at your early convenience with a Statement of Account setting out the amounts claimed by the Estate out of the proceeds of the sale, together with details of any balance still claimed as being due by the deceased's estate.

Yours faithfully,

Signed: D.P.R. O'Beirne.

COPY

D.P.R. O'Beirne,
Corner House,
Nairobi.

27th January 1959.

The Trust Officer,
Standard Bank of South Africa Ltd.
P.O. Box 30003,
Nairobi.

Dear Sir,

Estate of C. Galanos deceased
and Cranhurst Estate

I refer to my correspondence with your

Agreed Bundle of
Correspondence

No.10, Letter,
D.P.R.O'Beirne
to Buckley
Hollister & Co.
9th April 1958
continued

No.11, Letter,
D.P.R. O'Beirne
to the Trust
Officer.
27th January 1959

Agreed Bundle of
Correspondence

No.11, Letter,
D.P.R. O'Beirne
to the Trust
Officer.
27th January 1959
continued

Advocates, Messrs. Buckley Hollister & Co., and subsequently with yourself direct in connection with the above Estate, in which I represent Mrs. C. Galanos and the Ayoub family, and note that I have received no communication whatever from you in regard to the matters set out in my letter of 8th April 1958 to Messrs. Buckley Hollister & Co.

You will recollect that, subsequent to that letter, you arranged with Messrs. Buckley, Hollister & Co., that you would deal direct with me in this matter, to which I agreed. Subsequently, you made several arrangements for an appointment at my office in May and June 1958 for your co-executor and yourself to attend to discuss the matters in issue generally. None of these appointments were kept, and you finally informed me in June that a further appointment would be arranged by your co-executor, Mr. Holder, with me. I heard nothing further from you, and again on 24th July wrote to you in this matter. You informed me on 25th July that you and your co-executor wished to discuss Cranhurst Estate with me in the near future, and that you would be communicating with me. I have heard nothing further from you for some six months, and therefore assume that the position set out in my letter of 8th April 1958 is accepted by the executors. I am aware that in August 1958 you reached a settlement with Mr. C.D. Zagoritis in respect of his claim, and made payment to him, without further reference to me or to my client, which would appear to confirm that the position set out in my earlier letter is accepted by the executors.

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I now wish to refer to my letter of 9th April addressed to Messrs. Buckley Hollister & Co. written on behalf of the Ayoub family, relating to the proceeds of the sale of Cranhurst Estate in which I requested you to supply me with a Statement of Account setting out the amounts received by the executors out of the proceeds of sale of Cranhurst Estate to Mr. H. Horn and of any amounts claimed by the Estate out of these proceeds. I have had no reply or acknowledgment of that letter, nor has any account been furnished to me or to my clients as requested. It is most unsatisfactory that, in

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the rather peculiar circumstances, they should be kept in ignorance of the disposal of the proceeds of the sale to which they are entitled under the terms of the agreement of 12th November 1955. I would, in particular, refer you to paragraph 3 of that Agreement, which, while it does not envisage the exact circumstances which have arisen, is closely analogous thereto.

Agreed Bundle of
Correspondence

No.11, Letter,
D.P.R. O'Beirne
to the Trust
Officer.
27th January
1959
continued

10 I must now request you to supply me with a complete statement of account within 10 days from this date. I trust it will not be necessary for me to take any further action to enforce production of such account, but my clients must reserve their rights of action in the event of any further failure by the executors to comply with this request.

Yours faithfully,
Signed: D.P.R. O'Beirne

20 c.c. Messrs.Buckley Hollister & Co.
Advocates,
Nairobi.

COPY

The Standard Bank of
South Africa Ltd.
General Manager's Office,
Trust Department,
Nairobi.

No.12, Letter,
Trust Officer
to D.P.R.O'Beirne
12th February
1959

12th February 1959.

30 D.P.R.O'Beirne,Esq.,
Advocate,
Church House,
Nairobi.

Dear Sir,

Estate of the late C. Galanos
Cranhurst Estate

We write to acknowledge the receipt of your letter of the 27th January, the contents of which have been noted.

40 You will appreciate that the matter in question is one of some complexity and in the circumstances we are consulting with Messrs.Buckley, Hollister & Company and that firm will be communicating with you very shortly.

Yours faithfully,
Trust Officer

Agreed Bundle of
Correspondence

COPY
S/9041

20th February 1959

No.13, Letter,
Buckley Holli-
ster & Co. to
D.P.R.O'Beirne
20th February
1959

D.P.R. O'Beirne Esq.,
Advocate,
Church House,
Government Road,
Nairobi.

Dear Sir,

Charles Galanos, dec'd and
Cranhurst Estate

10

We refer to our telephone conversation of
yesterday's date. We hope to be in a position
to supply you with an account in the next ten
days. One of the Executors is at Dar-es-
Salaam, and the other is about to go there, but
we have explained the position to the Bank, and
asked for an immediate account to be prepared.
We understand that certain figures re Tongoni
Plantations Ltd. are still missing, but will
write you further hereon.

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Will you please confirm that we may have
until the 1st March to supply an account.

Yours faithfully,
BUCKLEY HOLLISTER & CO.

DFS/SG

No.14, Letter,
D.P.R.O'Beirne
to Buckley Holli-
ster & Co.
25th February
1959

COPY

D.P.R. O'Beirne,
Advocate,
Church House,
Nairobi.

25th February 1959

30

G/12

Messrs.Buckley Hollister & Co.,
Advocates,
Nairobi.

Dear Sirs,

Charles Galanos deceased and
Cranhurst Estate

I refer to your letter of 20th February
and my telephone conversation with Mr.
Shaylor.

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195.

I am pleased to note that I may expect to receive an account of the proceeds of the Estate by 1st March next. I confirm that I am agreeable to hold this matter over to the 1st March as requested, and in view of the fact that that date is a Sunday, I am prepared to give as far as 2nd March.

Yours faithfully,
Signed: D.P.R. O'Beirne.

Agreed Bundle of
Correspondence

No.14, Letter,
D.P.R.O'Beirne
to Buckley Hollister & Co.
25th February
1959
continued

10 COPY
S/9041 2nd March 1959.

D.P.R. O'Beirne, Esq.
Church House,
Nairobi.

No.15, Letter,
Buckley Hollister
& Co. to D.P.R.
O'Beirne
2nd March 1959

Dear Sir,
re. C.H.Galanos deceased.

With reference to your letter of the 25th ultimo, we enclose an account from the Executors of the abovenamed deceased in connection with Cranhurst Estate.

20 Yours faithfully,
BUCKLEY HOLLISTER & CO.

COPY
D.P.R.O'Beirne
Advocate
Church House
Government Road,
G/12 Nairobi.
20th March 1959.

No.16, Letter,
D.P.R. O'Beirne
to Buckley Hollister & Co.
20th March 1959

30 Messrs.Buckley Hollister & Co.,
Advocates,
Nairobi.

Dear Sirs,
C. Galanos deceased &
Cranhurst Estate

I refer to your letter of 2nd March together with the enclosed account from the executors of the Galanos Estate.

Agreed Bundle of
Correspondence

No.16, Letter,
D.P.R. O'Beirne
to Buckley Holli-
ster & Co.
20th March 1959
continued

This account has been shown to my clients, who are not in agreement with it, particularly with the last three debit items relating to the amount paid to Mr. Ch.D.Zagoritis, and the costs thereon paid to yourselves and Messrs. Shapley, Barret Allin & Co. As early as April 1958 I made it quite clear to you, in my letter of 8th April, that my clients were never in Agreement with the proposal made by the executors, that they should be concerned in the outcome of the claim by Mr.Zagoritis, and would not be liable for any payments to him. No reply of any sort was received either from you or from the executors to that letter, and it is more than surprising that the executors should now, after some eleven months silence, seek to make my clients liable for the amount of this settlement and costs, which comes to Shs. 149,131/50.

10

With regard to the question of the sale of Cranhurst Estate from Mr. Hurley to Mr. Galanos which took place in about November 1955, I understand that the Deed of Transfer may be in your possession, and if so I shall be glad to have a sight of it or of a copy thereof if you will be good enough to let me have such copy. I am instructed that under the terms of this transfer, Mr. Galanos became a beneficial Owner of the Estate and under the Agreement of 12th November 1955 between the late Mr.Galanos and my client it was agreed that, in the event of a sale of the Estate by Mr. Galanos to a third party, Mr. Galanos would pay to the Ayoub family the difference between the resale price and amounts due to him personally or to Tongoni Plantations Ltd.

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You are aware that in early 1957 the Estate was sold to Mr. H. Horn for £35,000, payable at the rate of £5,000 annually. The only liability of my clients to Mr. Galanos was the sum of £11,000 together with the amount of the running expenses of the Estate, which appear in your client's account at Shs. 154,280/59. These are the only liabilities which my clients are prepared to accept, and they deny any liability for payment of the amounts agreed with Mr. Zagoritis.

40

In consequence, I am instructed to require

the executors to furnish a correct account relating to these monies within 7 days of this date. Such account should include any monies received from Mr.Horn in respect of the instalment of £5,000 due on 1st March 1959. Failing receipt of such account, together with payment of any amounts due to my clients on foot thereof, I have instructions to commence proceedings against the executors for a true and full account of all monies received by them and due to my client.

Agreed Bundle of
Correspondence

No.16, Letter,
D.P.R.O'Beirne
to Buckley Holli-
ster & Co.
20th March 1959
continued

Yours faithfully,

Signed: D.P.R. O'Beirne.

COPY

S/9041

26th March 1959

D.P.R.O'Beirne Esq.
Advocate,
Nairobi.

No.17, Letter,
Buckley Holli-
ster & Co. to
D.P.R. O'Beirne
26th March 1959

Dear Sir,

C. Galanos deceased - Mrs. Ayoub
& Others, Cranhurst Estate

With reference to your letter of the 20th instant, we have sent a copy to our clients.

The meeting which your clients had with ours showed quite clearly that your clients did in fact agree to the settlement of the Zagoritis action, and that any sum paid should be debited to your clients, just as any sum received should be credited to them. Both Messrs. Fullbrook and Holder are quite clear as to what was agreed.

We have not the Deed of Transfer from Harley to Galanos, as we did not act in this matter. Presumably the proceeds of sale of the Cranhurst Estate by the late Mr. Galanos would follow the agreement entered into between the deceased and your clients so far as possible.

We are aware that Cranhurst Estate was sold by the deceased during his lifetime, but we did not act in this matter. We understood that the purchase price is payable by annual instalments.

Agreed Bundle of
Correspondence

We imagine that your clients are well aware of
the terms of the sale.

No.17, Letter,
Buckley Hollis-
ter & Co. to
D.P.R. O'Beirne
26th March 1959
continued

Our clients are making a list of all pay-
ments or loans made by the deceased or by Ton-
goni Plantations on behalf of or to Cranhurst
Estate. It may be that the account already
supplied will have to be amended. We will send
you the list as soon as it is available, but
our instructions are that the Executors deny
liability in this matter i.e. that any moneys
are presently owing to your clients.

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Yours faithfully,
BUCKLEY HOLLISTER & CO.

DFS/SG

No.18, Letter,
D.P.R.O'Beirne
to Buckley
Hollister &
Co.
28th April 1959

COPY
G/12

D.P.R. O'BEIRNE
Advocate
Nairobi.
28th April 1959

Messrs.Buckley,Hollister & Co.,
Advocates,
Nairobi.

20

Dear Sirs,

C.Galanos, deceased - Mrs.Ayoub &
Others Cranhurst Estate.

I refer to your letter of 26th March in
connection with this matter.

I am instructed firstly to deny that any
agreement was made by my clients regarding the
settlement of the Zagoritis claim at the meet-
ing in 1957 referred to. The records of the
meeting do not substantiate the assertion made
in your letter under reply, nor do the actions
of your clients substantiate it in any way.

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I note that you are not in possession of
the Deed of Transfer from Hurley to Galanos,
but presumably your clients, if not in actual
possession of it, would at least be aware of
its whereabouts, and I should welcome your
assistance in tracing it.

With regard to the last paragraph of your
letter, I note that I have not yet received an

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amended account of payments made to or on behalf of my clients' property. In these circumstances, it appears that it will be necessary to commence proceedings against your clients, and I shall be glad to know whether you are prepared to accept service of process on their behalf.

Yours faithfully,
Signed: D.P.R. O'Beirne.

Agreed Bundle of
Correspondence

No.18, Letter,
D.P.R.O'Beirne
to Buckley
Hollister &
Co.
28th April 1959
continued

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COPY

S/9041

1st May 1959.

D.P.R. O'Beirne, Esq.
Advocate
Nairobi.

No.19, Letter,
Buckley Holli-
ster & Co. to
D.P.R. O'Beirne
1st May 1959.

Dear Sir,

C. Galanos, deceased - Mrs. Ayoub
& Others - Cranhurst Estate -
Your ref: G/12.

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We are in receipt of your letter of the 28th ultimo and are informed by our clients that the amended account of payments made on behalf of your clients' property is practically complete and will be forwarded to us shortly.

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With regard to your without prejudice letter of the same date, we think you have misinterpreted our letter of the 8th ultimo, in which we stated that our clients were prepared to consider a compromise on the question of the off-setting of the costs of the Zagoritis settlement with your clients if they are so interested. This was not a reference to the legal costs but to the amount required in effecting the Zagoritis settlement. We do not know whether your clients have understood this, and if so, whether they are interested in a compromise. Will you please take their instructions and let us hear from you in due course.

Yours faithfully,
BUCKLEY HOLLISTER & CO.

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DFS/DJ

Agreed Bundle of
Correspondence

COPY
S/9041

1st June, 1959.

No.20, Letter,
Buckley Holli-
ster & Co. to
Messrs.O'Beirne
& Hearn
11th June 1959

Messrs.O'Beirne & Hearn,
Advocates,
Church House,
Nairobi.
Dear Sirs,

Galanos & Ayoub

We are in receipt of your letter of the
9th instant. The amended account has been
delayed because we have been endeavouring to
obtain the exact figure which was owing to
the deceased and/or to Tongoni Plantations
Limited at the date when the Agreement between
the deceased and your clients was entered into.
Delays have occurred because Mr. Basil Allin
who drew the Agreement died recently and we
have been making enquiries from his firm with
regard to this to see whether they had any
information on his file regarding this. Fail-
ing this, would your clients be prepared to
agree a figure of £11,000 as the commencing
debit in the account?

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We note that your clients are not prepar-
ed to accept liability in respect of the
Zagoritis settlement. We hope to send you the
account in the course of the next few days.

Yours faithfully,
BUCKLEY HOLLISTER & CO.

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DFS/JV.

No.21, Letter,
Sirley & Kean
to Buckley
Hollister & Co.
24th June 1959

COPY
BS/2800
Messrs.Buckley Holli-
ster & Co.,
Advocates,
Nairobi.

SIRLEY & KEAN,
Advocate
Government Rd.,
Nairobi.

24th June 1959.

Dear Sirs,

Mr.Galanos and Ayoub Family
Your S/9041 of 11th June refers

Kindly note that we have been instructed

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to act on behalf of the Ayoub family and Mr. H. Ayoub has handed over to us all the documents and correspondence in this matter and that any future correspondence in this matter should be directed to us.

Agreed Bundle of
Correspondence

No.21, Letter,
Sirley & Kean
to Buckley
Hollister & Co.
24th June 1959
continued

Referring to the position in general, we are to state that our clients are not prepared to let this matter drag on indefinitely and we are to reiterate the position once again in this letter.

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The position appears to be as follows:-

- (1) By an agreement dated 12th November 1955 between Mr. Galanos (deceased) and Mrs. M. Ayoub; Mr. H. Ayoub; Mrs. A.M. Hurley and Mrs. Cecile Galanos the deceased undertook to pay to the above parties the proceeds of the sale of Cranhurst Estate in the event of a sale during his lifetime, within 7 days of the completion of such a sale.
- (2) Mr. Galanos (deceased) did sell the said estate for the sum of £35,000 and in accordance with paragraph 1 of the agreement referred to above, the said sum of £35,000 was payable within 7 days of the sale, after deduction of approximately £11,000 due by the Ayoub family to Mr. Galanos and/or Tongoni Plantations Ltd.
- (3) Subsequently, due to an act of re-entry by Mr. Galanos, contrary to the lease agreement in existence with Mr. Zagoritis the said Mr. Zagoritis filed an action for damages. It was to the knowledge of Mr. Galanos and the trustees that this entry upon the estate was not for the purpose of securing rents, as alleged subsequently in the Defence, but for the purpose of securing a personal loan by the deceased to Mr. Zagoritis.
- (4) In 1957, a meeting was held between the trustees and the Ayoub family, at which the question of the action filed by Mr. Zagoritis was discussed. A minute of the meeting was prepared but our clients have

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Agreed Bundle of
Correspondence

No.21, Letter,
Sirley & Kean
to Buckley
Hollister & Co.
24th June 1959
continued

never agreed to the correctness of this minute and refused to sign the undertaking to pay to the executors, any costs or liabilities to Mr. Zagoritis.

- (5) That, independent of that minute (whether correct or not) by a letter dated 8th April 1958 and written by Mr. O'Beirne to you, it was clearly stated that our clients "are not in agreement with the proposal that they should in any way be concerned in the outcome of the Court proceedings between the Estate and Mr. Zagoritis and will neither claim any benefit thereunder nor be liable for any payments." This letter remained unanswered although no settlement or arrangement has been reached between the trustees and Mr. Zagoritis.

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- (6) At a later date, unknown to our clients, some sort of settlement was reached between the trustees and Mr. Zagoritis and the first official intimation, which our clients received of such a settlement being reached and the terms thereof, was contained in a piece of paper, alleged to be a statement of account, forwarded by your office under cover of your letter of the 2nd March. If you will refer to the said statement you will note that no dates of payment made to Mr. Zagoritis are stated, nor are any dates stated as to payment of fees to yourselves or to Messrs. Shapley Barret Allin & Co. in relation to the said case.

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- (7) Presuming even for a moment that at the original meeting of the trustees the question of our clients contributing to the damages payable to Mr. Zagoritis were discussed, subsequent to the letter of the 8th April 1958 which made it quite clear that our clients deny all liability and, in any case, if settlement was subsequently discussed with Mr. Zagoritis and if your client considered that the Ayoub family would be liable, they should have been an active party to any discussion on this subject.

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- (8) Our clients are now awaiting a final statement of account since April 1959, without having obtained any satisfaction.

Agreed Bundle of
Correspondence

In view of the above our instructions are:

- (a) To deny all liability for any payments to be made by the estate of Mr. Galanos (deceased) relating to the case with Mr. Zagoritis.
- (b) To claim payment of the monies due within 7 days of the date of this letter, failing which our instructions are to file proceedings without further notice.

No.21, Letter,
Sirley & Kean
to Buckley
Hollister & Co.
24th June 1959
continued

Should the latter action be required, please advise whether you are in a position to accept service.

Yours faithfully,
SIRLEY & KEAN

Sd. Partner

ES/GM.

COPY

S/9041

6th July 1959.

Messrs.Sirley & Kean,
Advocates,
Nairobi.

No.22, Letter,
Buckley Hollister & Co. to
Sirley & Kean.
6th July 1959

Dear Sirs,

C. Galanos dec'd and the
Ayoub Family

Your letter of the 24th ultimo was sent to the Standard Bank of South Africa Limited for instructions, but Mr. Fullbrook who deals with this matter has been out of the country and we have only just been able to obtain instructions thereon.

We do not propose to deal with your numbered statements in detail because the position is we think cleared when we say that there was an agreement dated 12th November 1955, and subsequent thereto the deceased with the knowledge of

Agreed Bundle of
Correspondence

No.22, Letter,
Buckley Hollis-
ter & Co. to
Sirley & Kean
6th July 1959
continued

the family and its approval - sold Cranhurst Estate for we believe £35,000 payable by instalments of which we believe there is still £20,000 to be paid in annual instalments of £5,000.

Our clients contend that apart from the £11,000 owing by the Ayoub Family to the deceased and/or to Tongoni Plantations Limited, other amounts are owing and such amounts exceed the amounts received to date. There is therefor nothing yet due to the Ayoub Family.

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Our clients do not agree that the deceased re-entered into the estate for his own purpose, but say he did so for the purpose of protecting the estate for the eventual benefit of the Ayoub family.

Our clients contend yours are bound by the settlement of the case with Mr. Zagoritis and that all payments made by the Trustees in connection with that settlement are payable by your clients out of the proceeds of sale of Cranhurst Estate.

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We understand from the Trustees that we shall be receiving a statement of account shortly, and as soon as this is received we will check it with certain figures which Messrs. Shapley Barret Allin & Co. are obtaining from their files for us, and you will be supplied with a statement. This will not be a final statement as other moneys will be credited to your clients in due course as and when they are received.

30

We have instructions to accept service of any proceedings your clients may care to institute.

Yours faithfully,

BUCKLEY HOLLISTER & CO.

DFS/JV

COPY

S/11546

28th September 1959.

Agreed Bundle of
Correspondence

Your ref: BS/2800

Messrs. Sirley & Kean,
Advocates,
Nairobi.

No.23, Letter,
Buckley Hollis-
ter & Co. to
Sirley & Kean
28th September
1959

Dear Sirs,

S.C.C.C. No.1185 of 1959, M.Ayoub and
others vs. Standard Bank of South
Africa Limited and another as Execu-
tors of the Estate of the late Christos
Galanos

10

We refer to your letter of the 11th instant.
The following are the particulars required by you
therein.

1. The agreement was entered into on the 23rd
July 1957, and was verbal, being made by the
Plaintiffs, Maria Ayoub, and Henry Ayoub on be-
half of all the Plaintiffs with Mr.Fullbrook and
Mr.Holder on behalf of the Executors.

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This agreement was subsequently amended at
the verbal request of Henry Ayoub made to Mr.
Fullbrook on the 8th August 1957, and thereupon
confirmed by the said Henry Ayoub on behalf of
all the Plaintiffs.

30

2. By their conduct in agreeing as above and by
their failure to inform the Defendants that they
did not agree to a settlement despite letters ad-
dressed to Mr.Henry Ayoub and Mrs.Maria Ayoub be-
tween the 23rd July 1957 and the 18th November,
and by their failure to inform the Defendants
until the 8th April 1958 that they the Plaintiffs
were not concerned in the outcome of the Court
proceedings between the estate and Mr. Zagoritis
the Plaintiffs are estopped from denying their
interest in the settlement and in the outcome of
the Court proceedings referred to. Such conduct
was that of the Plaintiffs Maria Ayoub and Henry
Ayoub - as representing all the Plaintiffs.

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DFS/JV

Yours faithfully,
BUCKLEY HOLLISTER & CO.

IN THE PRIVY COUNCIL

No.14 of 1962

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

B E T W E E N

MARIE AYOUB
CECILE KYRIAZIS (formerly Galanos)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB (Plaintiffs) APPELLANTS

and

STANDARD BANK OF SOUTH AFRICA LIMITED
and WILLIAM P. HOLDER as EXECUTORS OF
THE ESTATE OF CHRISTOS GALANOS
Deceased. (Defendants) RESPONDENTS

RECORD OF PROCEEDINGS

MERRIMAN WHITE & CO.,
3, King's Bench Walk,
Inner Temple,
London, E.C.4.
Solicitors for the Appellants.

LOWE & CO.,
2, Temple Gardens,
Temple,
London, E.C.4.
Solicitors for the Respondents.