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Judgment  
3, 1959

Kenya

IN THE PRIVY COUNCIL

No. 23 of 1957

ON APPEAL FROM THE COURT OF APPEAL  
FOR EASTERN AFRICA AT NAIROBI

---

B E T W E E N :

FAZAL ILAHI Appellant

- and -

GATHUTHI HOTEL Respondents

---

RECORD OF PROCEEDINGS

---

HERBERT OPPENHEIMER, NATHAN & VANDYK,  
20, Copthall Avenue,  
London Wall, E.C.2.  
Solicitors for the Appellant.

WRAY SMITH & CO.,  
3 & 4, Adelaide Street,  
London, W.C.2.  
Solicitors for the Respondents.

ON APPEAL FROM THE COURT OF APPEAL  
FOR EASTERN AFRICA AT NAIROBI

---

B E T W E E N :

FAZAL ILAHI

Appellant

- and -

GATHUTHI HOTEL

Respondents

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL

No. 23 of 1957

No. 23 of 1957

ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA  
AT NAIROBI.

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

AT NAIROBI.

B E T W E E N

FAZAL ILAHI

Appellant

- and -

GATHUTHI HOTEL

## Respondents

## RECORD OF PROCEEDINGS

No. 1

PLAINT

In the Supreme  
Court of Kenya  
at Nairobi

IN HER MAJESTY'S SUPREME COURT OF KENYA  
AT NAIROBI

AT NAIROBI

CIVIL CASE No.998 of 1955

No. 1.

Plaint.  
22nd November  
1955.

FAZAL ILAHI                      ...                      Plaintiff

VERSUS

GATHUTHI HOTEL, ... .. Defendants

The Plaintiff above named states as follows :-

1. The Plaintiff is the owner and landlord of business premises situated on Plot No. 282/1/1, Race Course Road, Nairobi. His address for the purpose of this Suit is care of D.V. Kapila, Advocate, Agency House, Victoria Street, Nairobi.

2. The Defendant firm is in possession of the



In the Supreme  
Court of Kenya  
at Nairobi

No.1

Plaint.  
22nd November  
1955 -  
continued.

said premises and carry on the business of an eating house in the same. The address of the Defendants for service herein is care of Gathuthi Hotel, next to Meralli's Bus Service, Race Course Road, Nairobi.

3. The said eating house premises were let to the defendants by the plaintiff on a monthly tenancy from the first to the last day of each calendar month on and from the First day of January 1955 at a monthly rent of Shillings 750/- payable at the end of each month of tenancy. 10

4. By a notice to quit given by the Plaintiff to the Defendants and served on the defendants on or about the 24th June 1955 requiring the defendants to quit and vacate the said premises at the end of their month of tenancy of July 1955, the said monthly tenancy of the defendants was terminated and came to an end at the end of the said month of July 1955.

5. The defendants have failed to quit and vacate the said premises as required by the said notice to quit, and are as from 1st August 1955 in wrongful possession of the same. 20

6. The Plaintiff claims possession of the said eating house premises and mesne profits at the rate of Shillings 1500/- per month as from 1st August 1955, being double the former monthly rent.

7. The plaintiff could have let the said premises at Shillings 1500/- per month as from 1st August 1955 in case the defendants had not kept the plaintiff out of possession of and detained the same since the said date. 30

8. A sum of Shillings three thousand is due from the defendants as mesne profits for the months of August, September and October 1955 at the said rate of Shillings 1500/- per month as per particulars given below:-

Mesne profits for August, September and October 1955	Shs.4500.00	
Less received	<u>Shs.1500.00</u>	40
Balance	Shs.3000.00	

9. The cause of action has arisen and the immovable property of which possession is claimed is situated within the jurisdiction of this Honourable Court.

10. The Plaintiff therefore prays that Judgment be granted to him against the defendants for:-

In the Supreme Court of Kenya at Nairobi

- (a) immediate delivery to the plaintiff of possession of the said eating house premises;
- (b) Shillings 3000/- being the balance of mesne profits for the months of August, September and October 1955;
- (c) mesne profits at the rate of Shillings 1500/- per month as from 1st November 1955;
- 10 (d) interest at court rates from the date of the suit on the sums found due and payable by the defendants to the plaintiff; and
- (e) costs of the Suit.

No.1

Plaint.  
22nd November  
1955 -  
continued.

Dated at Nairobi this 22nd day of November 1955.

(Sgd.) D.V. Kapila  
ADVOCATE FOR THE PLAINTIFF

Filed by:

20 D.V. Kapila,  
Advocate,  
Victoria Street,  
Nairobi.

No. 2.

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND  
AFFIDAVIT IN SUPPORT.

No.2

Notice of Motion  
for Summary  
Judgment and  
Affidavit in  
Support.

TAKE NOTICE that this Court will be moved on Friday the 13th day of January 1956 at 10.30 o'clock in the forenoon by Counsel for the Plaintiff that Judgment be entered against the defendants for:-

30th December  
1955.

- 30 (a) immediate delivery to the plaintiff of possession of eating house premises situated on plot No.232/1/1 Race Course Road, Nairobi;
- (b) payment of mesne profits at the rate of Shillings 1500/- p.m. from 1st August 1955

In the Supreme  
Court of Kenya  
at Nairobi

until delivery of possession (less Shillings 1500/- paid by the defendants) or if so thought fit, an Order directing enquiry as to mesne profits;

No.2

Notice of Motion  
for Summary  
Judgment and  
Affidavit in  
Support.  
30th December  
1955 -  
continued.

(c) costs of the Suit and interest as claimed in the plaint; and

(d) costs of the motion.

The grounds on which this application is made are stated in the affidavit of Fazal Ilahi s/o Fazal Din, plaintiff, annexed hereto and further grounds and reasons may be offered at the hearing of this application.

10

Dated at Nairobi this 30th day of December 1955.

(Sgd.) R.H. Lownie  
DEPUTY REGISTRAR,  
SUPREME COURT,  
NAIROBI.

Copy to be served upon:-  
Mervyn J.E.Morgan, Esq., 20  
Advocate, Nairobi.

Filed by:-  
D.V. Kapila,  
Advocate, Nairobi.

A F F I D A V I T.

I, FAZAL ILAHI s/o Fazal Din of Nairobi in the Colony of Kenya make oath and say as follows:-

1. I am the plaintiff in the above suit.

2. I have filed the above suit against the defendants for recovery of possession of eating house premises situated on plot No.232/1/1 Race Course Road, Nairobi, and mesne profits at the rate of Shillings 1500/- p.m. from 1st August 1955 (less Shs.1500/- received by me) and costs and interest. The premises belong to me.

30

3. The tenancy of the defendants was a monthly tenancy for each calendar month and was duly terminated by valid notice to quit served on the defendants during June 1955 demanding possession at the end of July 1955.

40

4. On or about the 19th July 1955 the Defendants applied to the Landlord & Tenant Court Nairobi for grant of a new tenancy under Part II of the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance 1954, but the said application was dismissed by the said Court on 7th October 1955.

In the Supreme Court of Kenya at Nairobi

No.2

Notice of Motion for Summary Judgment and Affidavit in Support.  
30th Decemner 1955 - continued.

5. The facts stated in the Plaint filed in this suit are true.

6. In my belief there is no defence to the suit.

10 7. The defendants have entered appearance.

8. I pray that the orders prayed for in the application for Summary Judgment (to which this affidavit is annexed) be granted.

Sworn at Nairobi	)	
this 23rd day of	)	
November 1955	)	
	)	(Sgd.) Fazal Ilahi
Before Me:	)	(in urdu)
(Sgd.) R.P. Maini	)	
<u>COMMISSIONER FOR OATHS.</u>	)	

20

No. 3.

AFFIDAVIT IN OPPOSITION.

No.3

Affidavit in Opposition.  
12th January 1956.

I, WACHIRA S/O GIKONYO of Nairobi, in the Colony of Kenya, hereby make oath and say as follows:-

A.1. That I am a Partner in the firm of Messrs. Gathuthi Hotel, who are the Defendants in this suit.

30 2. That the Affidavit of Mr. Fazal Ilahi s/o Fazal Din, who is the Plaintiff in the above suit was duly read over and explained to me in Kikuyu by Henry Ohege, the African clerk of my Advocate, Mr. Mervyn J.E. Morgan.

3. That I now fully undertand the Plaintiff's claim against my firm in the above suit.

4. That the Plaintiff's claim in the above suit contains two main prayers; one a claim for

In the Supreme  
Court of Kenya  
at Nairobi

\_\_\_\_\_  
No.3

Affidavit in  
Opposition.  
12th January  
1956 -  
continued.

recovery of possession of the Eating House and the other a claim for mesne profits.

B.5. That as regards the Plaintiff's claim for recovery of possession of the Eating House, I genuinely believe that I have a good Defence and that briefly the facts giving rise to the grounds of my Defence are as follows :-

(i) That on about the 30th day of June, 1953, the Defendants purchased from the Plaintiff the Eating House in question for the sum of Shs. 20,000/- and a written agreement for Sale was drawn up between the Plaintiff as a Vendor on the one part and the Defendants as Purchasers on the other part, and the said agreement was duly registered, a copy of the said Agreement is attached hereto and marked "A". 10

(ii) Clause 2(d) of the said Agreement reads as follows:-

"The said Purchase Price shall include:-  
"(d) the benefit of the tenancy in respect of the said business which shall be transferred by the Vendor in favour of the purchasers". 20

6. That I was present when the negotiations for Sale took place between the Plaintiff and the Defendants.

7. That it was clearly in the minds of and understood by the Defendants and appeared to be the intention of the Plaintiff also at the time of the Sale aforesaid that the Defendants will be permitted to carry on their business of Eating House on these said premises and would be left undisturbed there and I am further informed by my legal advisers that this is a perfectly reasonable if not the only reasonable interpretation to be placed on the wording. 30

8. That by reason of the foregoing premises I verily believe that there are two limbs for the Defendants legal arguments in their proposed Defence:- 40

(i) That the Defendants hold a contractual tenancy for as long as they carry on the business of Eating House on the said premises under the agreement aforesaid;

(ii) That the terms of a written lease duly registered cannot be varied by the terms of an alleged oral Agreement.

In the Supreme Court of Kenya at Nairobi

9. That I consequently verily believe that the issue of vacant possession is a triable issue.

No.3

Affidavit in Opposition.  
12th January 1956 -  
continued.

10. That on or about the 19th day of December, 1955, I, on behalf of the Defendants' firm instructed Mr. Mervyn J.E. Morgan, Advocate, to write a comprehensive letter to the Plaintiff's Advocate setting out the essential ingredients of the Defendants' Defence and the Counter-Claim and I believe that the said letter was written and delivered in Dr. D.V. Kapila, Advocate's office on the 19th day of December, 1955, a copy of the said letter is attached hereto and marked "B".

11. That the issue of mesne profits being an ancillary issue to the main issue of a claim for possession, I further genuinely believe that there is no merit in the Plaintiff's Application for summary Judgment for mesne profits until the main issue of the Plaintiff's claim for possession is adjudicated upon by this Honourable Court.

12. That the facts herein deposed are within my knowledge and that I am the proper person to make this Affidavit.

DATED AT NAIROBI THIS 12th DAY OF JANUARY 1956.

(Sgd.) Wachira s/o Gikonyo  
SIGNATURE OF DEPONENT

SWORN by the said WACHIRA S/O GIKONYO this 12th day of January 1956 at Nairobi:

BEFORE ME:

(Sgd.) M. L. ANAND  
COMMISSIONER FOR OATHS.

FILED BY:  
Mervyn J.E. Morgan,  
Advocate,  
Crichton Chambers,  
NAIROBI.

TO BE SERVED UPON: D.V. Kapila, Esq.,  
Advocate for the Plaintiff,  
Nairobi.

In the Supreme  
Court of Kenya  
at Nairobi

No.4

JUDGE'S NOTES OF ARGUMENTS ON NOTICE  
OF MOTION FOR SUMMARY JUDGMENT.

No.4

Judge's Notes  
of Arguments  
on Notice of  
Motion for  
Summary  
Judgment.  
13th January  
1956.

13.1.56.

Coram Templeton, Ag.J.

K.V. Kepila for Appellant.

Mervyn Morgan for Respondent (Defendants).

Kapila: Application under O.35 r.2 C.P. Rules. Reads notice of motion. Prays for immediate delivery of possession. Payment of mesne profits @ 150/- per month or direct inquiry as to amount. Defendant made application to Landlord and Tenant Court, dismissed. Plaintiffs could have given notice to quit immediately after the payment of the Shs. 20,000/-. Defendants' affidavit only served 3.30 yesterday. Applies for adjournment to file affidavit in reply.

10

Morgan: Does not oppose adjournment but asks for costs as Kapila argued case before asking for adjournment.

Kapila: Opposes costs.

Morgan: Plaintiff knew by correspondence what contents of affidavit were going to be. I now object to adjournment. Powers under O.35 r. 2 should be used sparingly.

20

Order: Adjournment refused.

J.S. Templeton  
Ag.Judge.

Kapila continues on merits. Plaint paras. 3, 4 and 5. Affidavit of Defendant. Letter attached. Reply 23rd December received by Morgan. 6th January, 1953. Put in as Exhibit 1. Agreement of 30th June, 1956, the 20,000/- not paid for perpetual lease, clause 1 sets out what the price included. Defendant has not shown by affidavit that tenancy was anything different what what is shown in clause 2 (d). Defendants contention is no defence at all. Since 1st August tenant has paid Shs. 1,500/- which landlord has accepted without prejudice. Defendant should be asked to deposit sum equal to 1,500/- per month from 1st August, 1955.

30

Morgan. Shs. 1,600/- per month. No evidence of 1,500/- or even 750/- per month. Plaintiff para. 3 "monthly tenancy" not mentioned whether oral or written. Rep at 0.35 intended for use where no triable issue. 0.35 r.8 (b). Defendants are Africans; led to believe they would get security of tenure. Shs.20,000/- paid. Submit there is a triable issue. We do not claim perpetual lease without qualification. Civil lists not so congested as they were. Case can be heard early.

10

Order: As it appears to the Court that such facts have been disclosed as the Court deems sufficient to entitle the Defendants to defend, unconditional leave to defend is granted. Defence to be filed within 15 days. Costs to be costs in the cause.

J.S. Templeton.  
Ag.Judge.

Early hearing date to be fixed 13.1.55.

20

Leave to appeal against this Order granted (0.42 rule 1(2)).

J.S. Templeton  
Ag.Judge.  
13.1.55.

---

No.5

DEFENCE AND COUNTER-CLAIM.

The above named defendants state by way of their Defence as follows:-

1. The Defendants admit Paragraph One of the Plaintiff.

30

2. The Defendants admit Paragraph Two of the Plaintiff save that the Defendants' Address for service for the purpose of this suit is care of Mervyn J.E. Morgan, Advocate, Chrichton Chambers, Valley Road, Private Bag, Nairobi.

3. (a) The Defendants deny the contents of Paragraph Three of the Plaintiff.

(b) Ex-Contrario, the Defendants would state:-

(i) On or about the 30th day of June, 1953,

In the Supreme Court of Kenya at Nairobi

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No.4

Judge's Notes of Arguments on Notice of Motion for Summary Judgment.  
13th January 1956 - continued.

No.5

Defence and Counter-Claim.  
28th January 1956.



In the Supreme  
Court of Kenya  
at Nairobi

No.5

Defence and  
Counter-Claim.  
28th January  
1956 -  
continued.

the Plaintiff verbally represented that he (the Plaintiff) being the Landlord and Owner of the premises in question would grant to the Defendants a Permanent Lease if the Defendants would purchase the business of an Eating House from the Plaintiff inclusive of certain moveable effects hereinafter enumerated and valued at Shs. 1000/- for the sum of Shs.20,000/- including the value of the tenancy and in fact the Plaintiff further assured the Defendants that in the event of the Plaintiff's selling the demised premises to any third person at a later date the Plaintiff would make it a condition precedent of the transfer that the Defendants would continue in occupation of the premises under the said permanent lease.

10

- (ii) The Defendants relied on the Plaintiff's said representations and assurances and purchased the said business of an Eating House for the said sum of Shd.19,000/- (exclusive of the aforesaid Shs. 1000/- worth of moveable effects but inclusive of certain immoveable effects valued at Shs.1000/- also).

Apart from the good will the moveable effects aforesaid comprised a very old refrigerator, some cooking utensils, some crockery and a few sticks of furniture which as aforesaid are valued at an outside valuation of Shs.1000/-.

30

- (iii) The Plaintiffs present attitude is that he could not make such a grant he being merely a co-owner of the premises in question on the said date, viz: on or about the 30th day of June, 1953, and, therefore he the Plaintiff was not competent to grant the tenancy aforesaid.

30

- (iv) The Plaintiff knew at the material time of his own incompetency and he also knew that the Defendants had a mistaken belief in consequence of his said representations and assurances, and The Plaintiff knew that the Defendants purchased the said business of an Eating House on the faith of their mistaken belief as regards the Plaintiff's competency to grant the said permanent lease.

40

(v) The Plaintiff is now estopped from relying on his incapacity of granting a permanent lease or of talking about any inability to grant such but if the granting of such is in fact impossible of performance then he must be held liable to pay damages as an alternative to the claim for specific performance as hereinafter appears in the counter-claim.

In the Supreme  
Court of Kenya  
at Nairobi

No.5

Defence and  
Counter-Claim.  
28th January  
1956 -  
continued.

10 4. The Defendants admit receipt of the Notice to Quit referred to in Paragraph Four of the Plaint, but the Defendants do not admit any of the effect of the said Notice, and the Defendants would add further that the said Notice was premature and incompetent and that it was in contravention of the plaintiff's said representations and assurances recited in Paragraph 3(b) hereof.

20 5. The Defendants admit the contents of Paragraph Five of the Plaint except that the Defendants would contend that they are not as from the 1st day of August, 1955, or from any other date in wrongful possession of the premises occupied by them.

6. (a) The Defendants do not deny the contents of Paragraph Six of the Plaint except that they dispute the Plaintiff's entitlement to any of the mesne Profits at all either from the 1st day of August 1955 or from any other date.

30 (b) Alternatively to (a) hereof they deny that the said mesne profits can amount to the value of Shs.1500/- as claimed or anything like that figure.

7. The Defendants do not comment upon the contents of Paragraph Seven of the Plaint, but the Defendant would put the Plaintiff to a strict proof with respect to the same.

8. The Defendants do not dispute the contents of Paragraph Nine of the Plaint.

40 9. Save as is hereinbefore expressly admitted the Defendants deny each and every the allegations in the Plaintiff's Plaint contained as though the same were set out expressly herein and specifically traversed seriatim.

#### COUNTER-CLAIM

10. The Defendants repeat the contents of their Defence.

In the Supreme  
Court of Kenya  
at Nairobi

\_\_\_\_\_  
No.5

Defence and  
Counter-Claim  
28th January  
1956 -  
continued.

11. The Defendants state that by reason of the contents of Paragraph 3(b) of their Defence, the Defendants are entitled to a permanent lease, the Plaintiff having, despite several requests failed and/or neglected to draw up a proper lease and the Defendants pray this Honourable Court to Order a lease in the terms promised by way of Specific Performance.

12. (i) In the alternative to Paragraph 11 here-  
of if this Honourable Court holds that 10  
the Plaintiff can not now be ordered to  
grant a permanent lease stated hereof,  
then, the Defendants would claim in dam-  
ages the sum of Shs.19,000/- which sum  
the Defendants paid to the Plaintiff in  
consideration for the good will, the  
premium of the said permanent lease and  
the immoveable fittings.

Further to Paragraph 12 (i) hereof, the  
Defendants state that they have acquired 20  
substantial and increased goodwill at  
the said premises since their purchase  
of same from the Plaintiff due to the  
fact that the Defendants being Africans  
themselves have gained much more Afri-  
can custom than the Plaintiff ever had  
when he was carrying on the same busi-  
ness on the said premises.

If the Defendants have to be evicted  
from the said premises they would lose 30  
the benefit of such increased good will  
and their damages should be not confin-  
ed to Shs.19,000/- but should be in-  
creased by such further sum as consti-  
tute the additional value of the in-  
creased good will which the Defendants  
have built up which value the Defend-  
ants put at not less than Shs.5,000/-.

(iii) That if the Defendants have to be evict-  
ed from the said premises they will suf- 40  
fer loss and damage by reason of the  
disturbance, the necessity of having to  
look for and find alternative premises  
perhaps not so suitable and/or at an  
increased rental and they claim to be  
entitled in the event of such eviction  
to general damages for these aspects  
which would flow directly from the  
Plaintiff's breach.

WHEREFORE the Defendants pray:-

In the Supreme  
Court of Kenya  
at Nairobi

- (a) That the Plaintiff's case be dismissed with costs;
- (b) That the Plaintiff be ordered to get drawn up a permanent lease on such terms and within such period as this Honourable Court deems just and expedient.
- (c) Alternatively to (a) and (b) hereof that the Plaintiff be awarded no costs on his claim if eviction be ordered.
- (d) That the Plaintiff be ordered to pay to the Defendants in damages Shs. 24,000/- the special damages counter-claimed or such other sum as to this Honourable Court do seem just.
- (e) That the Plaintiff be ordered in addition to pay to the Defendants such quantum of general damages in the terms of Paragraph 12(iii) hereof as to this Honourable Court seems just.
- (f) That if the Plaintiff has to succeed in his claim with or without costs the difference between the Rent and Mesne Profits should be added to the damages awarded on the Counter-Claim.
- (g) That the costs of the Counter-claim be awarded to the Defendants against the Plaintiff.
- (h) That such other relief may be granted to the Defendants as may seem to this Honourable Court justly expedient.

No.5

Defence and  
Counter-Claim  
28th January  
1956 -  
continued.

DATED AT NAIROBI THIS 28th day of JANUARY  
1956.

(Sgd.) MERVYN J.E. MORGAN  
Advocate for the Defendants/Counter Claimants

Filed by:  
Mervyn J.E. Morgan,  
Advocate, Crichton Chambers,  
Valley Road, Nairobi.

TO BE SERVED UPON: D.V. Kapila, Esq.,  
Advocate for the Plaintiff,  
Nairobi.

In the Supreme  
Court of Kenya  
at Nairobi

No. 6.

REPLY TO DEFENCE AND DEFENCE TO COUNTER-CLAIM.

No.6

Reply to Defence  
and Defence to  
Counter-Claim.  
9th February  
1956.

1. The Defence is bad in law, does not disclose any reasonable answer and tends to prejudice, embarrass and delay the fair trial of the action.

2. As to paragraph 3 of the Defence, the Plaintiff states that the issue raised by the Defendants' denial of the allegation of the Plaintiff that the tenancy of the Defendants was a monthly tenancy commencing from 1st January, 1955, at Shs. 750/- per month rent, was a matter directly and substantially in issue in two former suits between the same parties litigating under the same title, viz., Resident Magistrate's Nairobi Civil Case No. 3761 of 1955 and Resident Magistrate's Nairobi, Landlord and Tenant Case No.333 of 1955. In both cases the said Courts decided that the previous monthly tenancy of the Defendants (at Shgs. 300/- per month rent) had come to an end on 31st December, 1954, by a notice to quit and that the Defendants had a fresh monthly tenancy from the Plaintiff (at Shs. 750/- per month rent) from 1st January, 1955. All the issues raised by the Defendants in paragraph 3 of the Defence are therefore res judicata.

3. Without prejudice to the foregoing, the Plaintiff states with regard to paragraph 3 of the Defence, as follows:-

(a) The alleged oral agreement to grant a permanent lease (in case the Defendants' pleading in paragraph 3 of the Defence is held to amount to an allegation of such an agreement) is not enforceable in law being vague and uncertain, not in writing, not registered, and contrary to provisions of the laws of Contract. Transfer of Property and Registration of documents in force in the Colony.

(b) The terms of the sale of the business of eating house referred to in paragraphs 3(b) (i) and (ii) of the Defence are contained in an agreement in writing between the parties dated the 30th June 1953. The allegations of the Defendants contained in paragraph 3 of the Defence with regard to the said bargain between the parties are not stated in the said agreement in writing and are contrary to its terms.

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(c) Without prejudice to the Plaintiff's contentions in sub-paragraphs (a) and (b) above he states that he denies each and every allegation of the Defendants contained in all sub-paragraphs and clauses of paragraph 3 of the Defence and puts the Defendants to proof of the same. He states that there was no such representation on his part to grant permanent lease as is alleged, and that the Defendants tenancy was merely a monthly tenancy protected by the Increase of Rent Restriction Ordinance then in force in the Colony. He denies the truth and accuracy of the contentions of the Defendants in clauses (iii), (iv) and (v) of paragraph 3 (b) of the Defence states that there was no question at all of grant of any tenancy other than a monthly tenancy, and that it was true and it was known to the Defendants that he was in June, 1953, a co-owner of the premises, but that he is since March, 1954, or thereabouts their sole owner, and that in any case, as stated above, the Defendants have no case on facts or in law for specific relief or damages against him.

4. The Plaintiff joins issue with the Defendants on their allegation in paragraph 4 of the Defence and repeats his contentions in paragraphs 2 and 3 above.

5. As to paragraphs 5, 6 and 7 of the Defence, the Plaintiff joins issue with the Defendants where and in so far as in the said paragraphs, the Defendants do not admit the Plaintiff's contentions in the Plaint.

6. In answer to paragraphs 10 and 11 of the Defence and Counter-claim, the Plaintiff repeats all the paragraphs herein and states that the Defendants are not entitled to any permanent or temporary lease and that except for a letter from the Defendants advocate after the present suit was filed, there has been no request on the part of the Defendants for any such lease as is alleged.

7. As to paragraph 12 of the Defence and Counter-Claim, the Plaintiff repeats the contents of all the above paragraphs of this "Reply to Defence and Defence to Counter-claim" and states that on the grounds stated in the said paragraphs, the Defendants have no case for and not entitled to, any damages. The Plaintiff repeats that as from

In the Supreme Court of Kenya at Nairobi

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No.6

Reply to Defence and Defence to Counter-Claim.  
9th February 1956 -  
continued.

In the Supreme  
Court of Kenya  
at Nairobi

No.6

Reply to Defence  
and Defence to  
Counter-Claim.  
9th February  
1956 -  
continued.

1st August, 1955, the possession of the Defendants is wrongful. Without Prejudice to the foregoing, he denies that various allegations of the Defendants in the said paragraph 12, and puts them to proof of the same.

WHEREFORE THE PLAINTIFF PRAYS that judgment be granted to him as prayed in the Plaint and that the Defendants' Counter-claim be dismissed with costs.

DATED AT NAIROBI, this 9th day of February, 1956. 10

(Sgd.) D.V. Kapila,  
ADVOCATE FOR THE PLAINTIFF.

Filed by:-

D.V. KAPILA,  
ADVOCATE,  
VICTORIA STREET,  
NAIROBI.

Copy to:-

Mervyn J.E. Morgan, Esq., 20  
Advocate for the Defendants,  
Crichton Chambers, Valley Road,  
Nairobi.

No.7

Proceedings.  
13th February  
1956.

No. 7.

PROCEEDINGS

13.2.56.

Gokaldas for D.V. Kapila.

Vinayak for Morgan.

By Consent: Hearing fixed for 21.5.56. 10.30. 30  
4th in list.

R.H. Lownie  
Deputy Registrar.

18.5.56.

Kapila for Plaintiff.

Order for production of files as prayed.

E.R. Harley.  
Ag. Judge.

In the Supreme  
Court of Kenya  
at Nairobi

No. 7

Proceedings.  
18th May 1956.

21.5.56.

D.V. Kapila for Plaintiff.

21st May 1956.

Morgan for Defendant (with him

10 Kapila opens: Judgments of Magistrate's Court are  
now final.

Agreement in writing for sale of business dated  
30th June, 1935.

PLAINTIFFS EVIDENCE

No. 8

MANOHAR DATT GAUTAM

Plaintiffs  
Evidence

No.8

Manohar Datt  
Gautam.  
21st May 1956.  
Examination.

1 W. MANOHAN DATT GAUTAM, sworn:

Clerk, Resident Magistrate's Court, Nairobi.

20 Exhibit 1. C.C. 3761/55: I have the file. Fazal  
Ilahi v. Gathuthi Hotel. Plaintiff claimed 1,500/-,  
rent for two months. Judgment paras. 4 and 5.  
Judgment for Plaintiff as prayed.

Exhibit 2. Case 333/55, Gathuthi Hotel v. Ilahi.  
Application under Landlord and Tenant, Ordinance,  
1954, for new tenancy.

Dismissed with costs.

Exhibit 3. This is certified copy of the Magis-  
trate's Court judgment.



In the Supreme  
Court of Kenya  
at Nairobi.

Cross-examined: Case 3761/55. "Final Disposal  
case".

Therefore no written defence.

Plaintiffs  
Evidence.

No.8

Manohar Datt  
Gautam.  
21st May 1956.  
Cross-  
Examination.

No.9

Fazal Ilahi.  
21st May 1956.  
Examination.

No. 9

FAZAL ILAHI

2 W. FAZAL ILAHI, sworn:

Plaintiff. I am owner and landlord of business premises in claim. Defendant firm are in possession now. In July, 1953. I sold my business to the Defendants. I first let the premises to Defendants in 1953. Defendants were to pay rent monthly; they were monthly tenants. This tenancy was terminated by notice to quit: This. (To expire 31.12.54). I made a fresh tenancy agreement in 1955: from 1st January, 1955, at rent of Shs.750/- per month: a monthly tenancy. Terminated by notice to quit dated 24th June, 1955. This is a copy of it (To expire 31.7.55). Defendants are still in possession. Application for the premises as from 1st August, 1955, was made to me by several people. They offered me Sh. 1,500/- rent. I am calling Kassim Ali. There are many other eating houses in Race Course Road. 10 30

Kapila: By consent I put in copy correspondence, exhibit 6, between advocates of the parties. I wish to put in other letters to which Defendants' counsel objects.

Morgan: They are negotiating; letters only,

(Mow v M  
(Poole v P  
(Bostock v B

I do not object to their being read by the Court. Also two other letters. Admitted. In June 1953, I sold my business to Defendants. This is copy Agreement of Sale. I was joint owner with my

brother, Abdal Ghani of the building. On 10th February 1954, I bought my brother's half share. I paid him  $\frac{1}{2}$  of Shs.135,000/- (67,500/-).

In the Supreme Court of Kenya at Nairobi.

10 Cross-examined: I received 20,000/- in cash. We did not decide then when their tenancy should be terminated. I say that as long as they go on paying the rent and keep the hotel clean they are my tenants. Paragraph 2(d): I cannot explain the meaning. I had turned out a previous tenant on payment of goodwill. Another part of the building is let to one tenant and I live there myself. Defendants have the ground floor: worth 80% of the whole house for letting. For half the upper floor I get Shs.150/-

Plaintiffs Evidence.

No.9

Fazal Ilahi.  
21st May 1956.  
Examination - continued.

Cross-Examination.

Kapila: I object to question as to the value of trade licence or tenancy. It is covered by paragraph 1 of the Agreement of Sale. Indian Evce. A. s.91, 92.

20 Court: Evidence may be given to clear up the ambiguity arising from the terms of clauses 1 and 2 of the Agreement of Sale.

Court.

O.C.K. Corrie, J.

2 W. continuing, FAZAL ILAHI:

Cross-examination, continued: The goods were worth Shs.12,000/-. Three dozen chairs were included. I said that if they went on paying the rent monthly and kept the place clean I would continue the tenancy.

Cross-Examination - continued.

Adjourned.

30 Resumed.

40 Cross-examination, continued: When Defendants did not pay rent I went to Court claiming rent. It was not the agreement that Defendants should pay Shs.300/- per month during control: and then a reasonable rent. Counter and shelves were included. Defendants may have replaced existing wash-basins. They have not put in a new basin: nor have they concreted floor of kitchen; nor repaired lavatory. In June 1953, during Emergency, I went to Pakistan for a month or two. I made 3,000/- to 4,000/- per month. In 1953 business in June was better than in January. It is not the fact that Defendants paid Shs.20,000/- for fixture of tenure.

In the Supreme  
Court of Kenya  
at Nairobi.

Plaintiffs  
Evidence .

No.9

Fazal Ilahi.  
21st May 1956.  
Re-examination.

To Court:

Re-examined: 14 or 15 tables, 200 to 300 cups new.  
Whole now worth Shs.15,000/- . Trade licence I  
did not charge for. It was a monthly tenancy,  
but I did not fix any term with them.

To Court: Defendants paid Shs.8,000/- for the  
name of my business - Akbari Hotel.

No.10

Kassim Ali.  
21st May 1956.  
Examination.

No.10.

KASSIM ALI

3 W. KASSIM ALI, sworn:

I spoke to Plaintiff about his hotel. I wanted 10  
to rent it: to hire the business being run in the  
building, on the ground floor. I do not know who  
is running it - some natives. I asked Plaintiff  
to rent it to me. He mentioned Shs.1,500/-: but  
said the premises were not vacant. Plaintiff spoke  
of 1,500/- shs. per month and I agreed to it; for  
the running business.

Cross-  
Examination.

Cross-examination: Values have decreased since 20  
January, 1955. I cannot say whether prices now  
are much higher than in January 1953.

No Re-  
Examination.

re-examination. None.

Case for Plaintiff.

Morgan: Burrow v. Scammell. Plaintiff cannot  
now say he could not grant lease: he can do so  
now and specific performance can be decreed against  
him.

DEFENDANTS' EVIDENCE

No. 11.

DANSON KIOMBANI GACHARA.In the Supreme  
Court of Kenya  
at Nairobi.Defendants'  
Evidence.

1 D.W. DANSON KIOMBANI GACHARA, sworn:

No. 11

Danson Kiombani  
Gachara.  
21st May 1956.  
Examination.

10 I am in partnership with Wachira and another. We  
 cook food and sell in an eating-house - Gathuthi  
 Hotel, Racecourse Road, originally Akbari Hotel. We  
 changed the name on 1st July, 1953. In June we  
 paid Plaintiff 20,000/-. For that we were to get  
 the premises: 1,000/- for the tiles on the wall;  
 refrigerator, 1,000/- for utensils, plates and bowls.  
 10,000/- to allow us to stay until we wanted to  
 leave. 8,000/- for goodwill. We paid cash. we  
 made a written agreement. This is my signature on  
 this agreement. These are the signatures of Wama-  
 tha and Wachira. The Asian Advocates explained it  
 to us. There was an African there. We were to  
 pay Shs.300/- per mensem. No arrangement about an  
 increase. Later he told us to pay Sh.750/- per  
 20 month. We did not agree; we paid it for 3 months;  
 we then asked Plaintiff to reduce it. He refused  
 and sued us; he got judgment. We later went to  
 Court to get a rent fixed under Landlord and Tenant  
 Ordinance. We bought 3 basins and 1 table: 4  
 benches. We cemented behind the building. The  
 cups were old. We had to buy 30 new cups. It is  
 now a much bigger business than it was then. The  
 place is very clean. We got the trade licence  
 converted to our own name. In June, 1953, we  
 30 asked Plaintiff if he was in partnership: he told  
 us he was alone. We believed him.

Adjourned.21.5.56.

22.5.56.

Resumed.

22nd May 1956.

1 D.W. DANSON KIOMBANI GACHARA, continuing:

I left Nairobi on 2nd August, 1953. I returned  
recently.

40 Cross-examined: We paid fees for the agreement  
 of Sale to an advocate. I know that Rent Res-  
 triction Ordinance was in force and on that we  
 agreed to Shs.300/- per month. That was the con-  
 trolled rent. We had the whole eating house:

Cross-  
examination.

In the Supreme  
Court of Kenya  
at Nairobi.

Defendants'  
Evidence.

No.11

Danson Kiombani  
Gachara.  
22nd May 1956  
Cross-  
Examination -  
continued.

Re-Examination.

from kitchen to main door. He had no right to take it away from us. Just as if you sell me a shamba.

Re-examined: We paid the advocate cash and got a receipt.

No.12

Wachira s/o  
Gikonyo.  
22nd May 1956.  
Examination.

No.12

WACHIRA s/o GIKONYO

2 D.W. WACHIRA s/o GIKONYO, affirmed:

In Gathuthi Hotel we are 3 partners, last W. is one of them: it is an eating house in Race Course Road, Nairobi. There is one big room and another small one: a stall and two lavatories, and a kitchen. Plaintiff came to me and told me he had an eating-house he wanted to sell. We went to Akram I know his clerk, an Asian. Akram came one day. I dealt with his clerk. We agreed with Plaintiff that we should pay him Shs.20,000/- We agreed that the monthly rent would be Shs. 300/-. We were to have the place for ever. Plaintiff told us that if the control was abolished he would increase the rent. After control was abolished he increased the rent to Shs.750/- per month.

This is my signature on this document. The 20,000/- was divided. Sh.1,000/- for utensils and tables etc. Sh.1,000/- for beams, pipes and fixtures. Shs.10,000/- was a deposit with the Plaintiff for the years we were to remain in the premises. Shs.8,000/- was good will. Increase of rent to 750/- was in January, 1955. I paid that rent for 3 months. I could not pay for 2 months. Court order said that I should pay, and I did so. I made an application. This is it. I signed it. There is a refrigerator - an old type. I fitted things in the premises: cups, plates, tables, wash-basins, which were broken. We repaired the lavatory and put concrete on the floor. Plaintiff owned the building: no one else dealt with me. He said it was his. His name only was put in the

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Official Gazette. (dated 14th July, 1953). (vol.55 No.33, p.724, G.N. 1515).

In the Supreme Court of Kenya at Nairobi

10 Cross-examination: We agreed with Plaintiff that Plaintiff should not use the name of Akbari Hotel. Plaintiff never showed me this notice from City Council. The old wash basins were broken. It was my own intention to put new ones: not because of the Municipality in 1953: the day after I occupied the premises I fitted a new basin and cemented the floor and repaired the lavatory. When Plaintiff sued for 2 months rent I gave evidence (Read). The Magistrate's note is correct. No one translated the Agreement of Sale to me in Swahili. I do not know what is written in it. I did not know that in 1953 there was a law which prevented landlords from turning out their tenants. I have heard about Mr. Roberts. I meant to see him about my rent. I told my advocate that the rent I was paying was very high. I never instructed him to apply for a fresh tenancy. I gave evidence in the Landlord and Tenant Court.

Defendants' Evidence.

No.12

Wachira s/o Gikonyo. 22nd May 1956 Examination - continued.

Cross-Examination.

20 Re-examined: The other eating-house is a partnership business. I paid rent while the place was closed under the Emergency Regulation, for 5 months. Plaintiff told me he would make a reduction when the Emergency ended. He has not done so.

Re-Examination

### CASE FOR DEFENCE.

No.12A

### COUNSELS' ARGUMENTS.

No.12A

Counsels' Arguments. 22nd May 1956.

30 Kapila: I submit that I should be allowed to call the advice clerk who drafted the agreement as witness says it was not read over to him.

Morgan: I oppose. All witness said was that he did not understand English and the clerk told him in Swahili the effect of it.

Court: Application dismissed. The question is what was the meaning of the agreement: and witness has told the Court what he understands the agreement to have been.

40 Morgan addresses Court.

Adjourned.

Morgan resumes.

Morgan addresses Court. Trade licence was not transferable tenancy: not then in existence. Last witness said "We had bought the building". Landlord

In the Supreme  
Court of Kenya  
at Nairobi.

No.12A

Counsels'  
Arguments.  
22nd May 1956 -  
continued.

and Tenant application: "unlimited period". Plaintiff said that rent should be re-assessed when rent control ended. "Final Disposal" case. Wachira did not deny Shs.750/- rent. No issues in that case. Mulla 3rd edn. p.656. para. 107, "permanent leases". p.639, para.105. Permanent tenancy by estoppel. 58 (1931) Indian Appeals. p.91. Arif (1933) 61 Indian Appeals, p.388. Maddison v. Alderson, Specific performance.

Specific performance. Man who holds himself as sole owner: later became sole owner. Specific performance can now be decreed as Plaintiffs now the sole owner. 31 Hailsham, p.396 note (g). 10

Estoppel: 52 L.R. Indian Appeals, Forbes v. Ralli.

Res judicata: Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance. Tenant can apply for lease up to 2 years. Court did not give Defendant a year lease. Defendant claimed "unlimited tenancy". 25 K.L.R. 81, at p.84. Dalip Singh v. A.O. Nathwani. Final Disposal case was a claim for rent. Defendant admitted no issue as to the form of tenancy. Value. Witness would give Sh. 1,500 for the business. Letter, May 4th. 20

Counter claim: Shs. 24,000/-.

Court: Are Defendants entitled to a document?

Morgan: Yes. This is claimed in the correspondence. 58 Indian Appeals, p.91. 61 Indian Appeals, p.388. Both state that specific performance can be granted. No alternative, damages.

Kapila: Transfer of Property Act, 107. Mulla 2nd edn. p.593. Possession under agreement of lease. Defendants only became tenants for 1 year, and then by holding over became tenants from month to month. S.106, p.572, Periodic Leases, S.105. Defn. Lease. Indian Contract Act, S.62. Defendants applied to Court for lease for 2 years. 30

1) Whether old tenancy was at an end. Court held it terminated on 31st December. That was a finding in Court of competent jurisdiction.

2) Damages. 40

30 E. and E. Digest, p.477, para.883.

Agreement must be legally enforceable. 10 Enc.

Forms and Precedent p.374.

Strouds Judicial Dictionary, vol. 2, p.1249. "Good-will".

Shs.12,000 paid for moveable. Claim for Shs.19,000.

Two Courts have disbelieved Defendants. C.A.V.

22nd May, 1956.

31.7.56. Judgment delivered.

Ordered that the files of proceedings in the Resident Magistrate's Court, Nairobi, in Civil Case 3761 of 1955, and Landlord and Tenant Case 333 of 1955 be returned to that Court.

O.C.K. Corrie, J.  
31.7.56.

No.13.

J U D G M E N T.

In the Supreme  
Court of Kenya  
at Nairobi

No.12A

Counsels'  
Arguments.  
22nd May 1956 -  
continued  
31st July 1956.

No.13.

Judgment  
31st July 1956.

The Plaintiff is the owner and landlord of business premises in Race Course Road, Nairobi. The defendant firm is in possession of the premises and carries on there the business of an eating-house under the name of Gathuthi Hotel.

The Plaintiff alleges that the eating-house premises were let by him to the defendants on a monthly tenancy from the 1st January 1955 at a monthly rent of Shillings 750/- payable at the end of each month.

The Plaintiff also alleged that by a notice to quit, served on the defendants on the 24th June 1955, the monthly tenancy of the defendants was terminated at the end of the month of July 1955. He further claims that the defendants have been in wrongful possession as from the 1st August 1955; and he claims possession of the premises. The Plaintiff also claims mesne profits at the rate of Shillings 1,500/- a month for the months of August, September and October 1955 amounting to Shillings 4,500/-, less a sum received of Shillings 1,500/-, leaving a balance due of Shillings 3,000/-; and mesne profits at the same rate from 1st November 1955 to the commencement of action; with interest and costs.



In the Supreme  
Court of Kenya  
at Nairobi

No.13

Judgment  
31st July 1956  
- continued

By their defence the defendants state that on or about the 30th June 1953 the plaintiff verbally represented that he would grant the defendants a permanent lease if the defendants would purchase the business of an eating-house from the plaintiff, inclusive of certain movables valued at Shillings 1,000/-, for the sum of Shillings 20,000/-, which amount should include the value of the tenancy: and that in the event of the plaintiff selling the premises to a third person, the plaintiff would make it a condition of the transfer that the defendants would continue in occupation of the premises under the permanent lease. 10

The defendants say that in reliance on the plaintiff's representations and assurances they purchased the business of an eating house for the sum of Shillings 19,000/- (exclusive of the aforesaid Shillings 1,000/- worth of movable effects but inclusive of certain immovable effects valued at Shillings 1,000/-); and that apart from the goodwill, the movable effects were valued at an outside valuation of Shillings 1,000/-. The defendants deny that they are in wrongful possession of the premises and that the plaintiff is entitled to any mesne profits. They also deny that the mesne profits can amount to Shillings 1,500/- a month. 20

The defendants also counter-claim for an order to the plaintiff for the specific performance of the alleged agreement to grant a permanent lease.

Alternatively the defendants claim damages to the amount of Shillings 19,000/- which they allege that they paid to the plaintiff for the goodwill, the premium on the permanent lease and the immovable fittings. The defendants claim further that they have increased the goodwill by increasing the custom on the premises and they estimate the value of the increased goodwill at not less than Shillings 5,000/-. 30

The defendants also maintain that if they are evicted from the premises they will suffer loss and damage by reason of the disturbance and will be entitled to general damages. They also claim costs of the suit. 40

In his reply to the defence and counter-claim, the plaintiff maintains that the issues raised by the defendants were in issue in two former suits between the same parties, namely Resident Magistrate's, Nairobi, Civil Case No. 376 of 1955 and Resident Magistrate's, Nairobi, Landlord and

Tenant Case 333 of 1955, and that the issues raised by the defendants are therefore res judicata.

In the Supreme  
Court of Kenya  
at Nairobi

The plaintiff also maintains that the alleged oral agreement to grant a permanent lease is not enforceable as it is not in writing or registered; and he states that the terms of the sale of the business of an eating house are contained in an agreement in writing between the parties dated 30th June 1953.

No.13

Judgment  
31st July 1956  
- continued.

10           The agreement of the 30th June 1953 is in evidence (Exhibit 8): paragraphs one and two of this agreement are in the following terms:

1. "The Vendor hereby agrees to sell and the Purchasers to purchase the said business for the price or sum of Shillings Twenty thousand (Shs.20,000/-) which shall be apportioned in the manner following that is to say the sum of Shillings Eight thousand (Shs.8,000/-) as to the goodwill of the said business and the balance of Shillings Twelve thousands (Shs.12,000/-) being the agreed value of the furniture, fittings, cooking utensils and refrigerator etc., all passing by manual delivery".
2. "The said purchase price shall include:-
  - (a) the goodwill of the said business.
  - (b) the furniture, fittings, cooking utensils and refrigerator etc. lying in the business premises.
  - 30       (c) The benefit of trade licence in respect of the said business which shall be transferred in favour of the purchasers.
  - (d) The benefit of the tenancy in respect of the said business which shall be transferred by the Vendor in favour of the Purchasers".

Paragraph 8 provides:

40           "The purchasers shall be entitled to trade under the said firm name or style of "Akbari Hotel" and all proprietary rights therein shall belong to the Purchasers and the Vendor shall have no interest or right therein and shall have no authority to withdraw the same."

In the Supreme  
Court of Kenya  
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\_\_\_\_\_  
No.13  
Judgment  
31st July 1956  
- continued.

With regard to this agreement it must be observed that there is an inconsistency between the terms of the first two paragraphs, as under paragraph 1 the purchasers are to pay Shillings 8,000/- for the goodwill of the business and Shillings 12,000/- for the agreed value of the furniture, fittings, cooking utensils, refrigerator etc. passing by manual delivery. Paragraph 2 on the other hand declares that the purchase price shall also include the benefit of the trade licence and of the tenancy. 10

It is upon the wording of this agreement that the defendants mainly rely. They argue with some force that no one would agree to pay Shillings 8,000/- for the goodwill of a business if the tenancy of the premises in which it was carried on was merely a monthly tenancy determinable by notice at the end of any month. They maintain that the sum of Shillings 12,000/-, which under Clause 1 of the agreement was payable for the furniture, fittings etc. also covered "the benefit of the tenancy" mentioned in Clause 2(d). In evidence, the first defendant, D.K. Gachara, stated that the sum of 12,000/- was apportioned as follows:- 20

"Shillings 1,000/- for the tiles on the walls and the refrigerator.  
Shillings 1,000/- for utensils, plates and bowls.  
Shillings 10,000/- to allow us to stay until we wanted to leave". 30

That is to say, in more technical language, he alleges that the defendants were paying shillings 10,000/- as premium for the grant of a permanent lease.

It may well be that this was what the defendants understood to be the effect of the agreement, which they say was prepared by a solicitor's clerk, who explained its terms to them in Swahili.

The defendants, however, must accept the agreement as it stands: and it is difficult to read paragraph 2(d), which states that the tenancy in respect of the said business "shall be transferred by the Vendor in favour of the Purchasers" as meaning that a permanent tenancy was to be granted by the vendor to the purchasers. 40

The rights of the parties, however, are not to be determined entirely by this ill-drafted document.

It is admitted that originally the defendants paid a monthly rent of Shillings 300/- until the end of 1954; and in his judgment in case No.3761 of 1955 the Resident Magistrate found as a fact that the Defendants had agreed to pay a rent of Shillings 750/- a month from the first of January 1955. In that case the plaintiff was suing for rent in arrears, and the question of the duration of the tenancy was not in issue.

In the Supreme  
Court of Kenya  
at Nairobi

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No.13  
Judgment  
31st July 1956  
- continued.

10 Case No.333 of 1955 arose out of an application by the present defendants for a new tenancy under paragraph 11 of the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance 1954. In their application the defendants gave the following particulars:-

- "2(c) Date of commencement of tenancy;  
30th June 1953.
- (e) Term of tenancy; for an unlimited period.
- (f) Rent reserved under tenancy; Shillings  
20 300/-
- (g) Date and mode of termination of tenancy  
24th June 1955, by notice to quit and deliver vacant possession".

By paragraph 3 of the application the defendants gave as:

"The particulars of the tenancy for which I am applying:

- (a) Period - for the duration of the above Ordinance.
- 30 (b) Rent - as may be fixed by the Court.
- (c) Other terms and conditions as the court may think reasonable".

40 It was admitted on behalf of the defendants that the date of termination of tenancy which was given as 24th June 1955 was a mistake, the fact being that notice to quit was served on that date to take effect upon the 31st July 1955. That, however, is quite immaterial so far as the issues in the present case are concerned. It is also immaterial that on the 30th June 1953, when the agreement for the sale of the business was executed, the plaintiff was only part owner of the premises and of the business, in partnership with his brother. It is in evidence that on the 10th February 1954 the plaintiff bought his brother's half share; and

In the Supreme  
Court of Kenya  
at Nairobi

it is not now suggested that he is not fully responsible for the obligations of the vendor under the agreement of the 30th June 1953.

No.13

Judgment  
31st July 1956  
- continued.

In my view the terms of the defendants' application to the Landlord and Tenant Court in case 333 of 1955 are entirely inconsistent with their present claim that they are entitled to a permanent tenancy of the premises. By that application they alleged that the tenancy which began on the 30th June 1953 had been determined; and they asked the Court to grant them a fresh tenancy for the duration of the Landlord and Tenant Ordinance at a rent to be fixed by the court. I hold that they are now estopped from claiming that they were entitled to a permanent tenancy.

10

Actually they were not granted a fresh tenancy as their application was refused on the ground that it was filed out of time.

Notice to quit expiring on the 31st July 1955 was duly given to the defendants and I hold that the plaintiff is entitled to recover possession of the premises.

20

With regard to the plaintiff's claim for mesne profits for August, September and October 1955, I see no reason to award him more than the Shillings 750/- per mensem to which he agreed on the 1st January 1955, that is to say, Shillings 2250/- less Shillings 1500/- of which the receipt is admitted; leaving a balance due of Shillings 750/-.

The plaintiff is also entitled to mesne profits at the rate of Shillings 750/- per mensem from the 1st November 1955 to the date of filing of his plaint, the 22nd November 1955: with interest at Court rates from that date.

30

The defendants' counterclaim for specific performance of the agreement they allege and alternatively for damages is dismissed. They will pay the costs of the suit including the counterclaim.

O.C.K. Corrie  
Judge.

40

31st July 1956.

No. 14

NOTICE OF APPEAL

In the Supreme  
Court of Kenya  
at Nairobi

TAKE NOTICE that GATHUTHI HOTEL the Defen-  
dants herein, being dissatisfied with the decision  
of the Honourable Mr. Justice Corrie given herein  
at Nairobi on the 31st day of July 1956 intend to  
appeal to Her Majesty's Court of Appeal for Eastern  
Africa against the whole of the said decision.

No.14  
Notice of  
Appeal.  
14th August 1956.

DATED AT NAIROBI THIS 14th DAY OF AUGUST 1956.

10

(Sgd.) R.N. Sampson  
p.p. MERVYN MORGAN & COMPANY  
ADVOCATE FOR THE DEFENDANTS.

TO: 1. The Registrar,  
Supreme Court of Kenya,  
Nairobi.  
2. D.V. Kapila, Esq.,  
Advocate for the Plaintiff,  
Nairobi.

20

The address for service of the appellants is  
care of Mervyn Morgan & Company, Cargen House, Coro-  
nation Avenue, Nairobi.

30

Note: A respondent served with this notice is  
required within fourteen days after such service  
to file in these proceedings and serve on the ap-  
pellants 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 pro-  
ceed ex-parte.

Filed the 14th day of August 1956 at Nairobi.

(Sgd.) Hymors.  
REGISTRAR.

In the Supreme  
Court of Kenya  
at Nairobi

No. 15  
D E C R E E

No.15  
Decree.  
19th September  
1956.

CLAIM for (1) Immediate delivery of Possession of the eating house premises more particularly set out in the Schedule annexed hereto and marked "A".

(2) Mesne profits.

(3) Interest and costs.

THIS SUIT coming on the 21st and 22nd days of May, 1956, for hearing and on the 31st day of July, 1956, for judgment before the Honourable Mr. Justice Corrie in the presence of Counsel for the Plaintiff and Counsel for the Defendants, IT WAS ORDERED: 10

(1) That the Defendants do deliver to the Plaintiff immediate possession of the premises described in the Schedule above referred to;

(2) That the Defendants do pay to the Plaintiff the sum of Shs.750/-; 20

(3) That the Defendants do pay to the Plaintiff mesne profits at the rate of Shs. 750/- per month from the 1st day of November, 1955 to the 22nd day of November, 1955, with interest thereon at the rate of eight per cent per annum from the 22nd day of November, 1955, until the 31st day of July, 1956, and at the rate of six per cent per annum from the 1st day of August, 1956 until realisation;

(4) That the Defendants Counter Claim for specific performance of the agreement alleged by them and alternatively for damages be dismissed; 30

(5) That the Defendants do pay to the Plaintiff taxed costs of the suit;

(6) That the Defendants do pay interest on the decretal amount at the rate of six per cent per annum from the 1st day of August, 1956, until realisation.

GIVEN under my hand and the Seal of the

Court at Nairobi this 19th day of September, 1956.

(Sgd.) P.C. Connell

JUDGE,  
SUPREME COURT OF KENYA.

THE SCHEDULE HEREIN REFERRED TO  
AND MARKED "A"

The business premises situated on Plot  
No.232/1/1, Race Course Road, Nairobi.

In the Supreme  
Court of Kenya  
at Nairobi

No.15

Decree  
19th September  
1956 -  
continued.

No.16

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

CIVIL APPEAL No. 67 of 1956.

BETWEEN

GATHUTHI HOTEL ... APPELLANTS  
(Original Defendants)  
(and Counter Claimants)

and

FAZAL ILAHI ... RESPONDENT  
(Original Plaintiff)

In the Court  
of Appeal for  
Eastern Africa

No.16

Memorandum of  
Appeal.  
15th October  
1956.

20 (Appeal from a Judgment and Decree of  
the Supreme Court of Kenya at Nairobi  
(Mr. Justice Corrie) dated 31st of  
July 1956 when he gave Judgment for  
the Plaintiff both on the Claim and  
Counterclaim in:

Civil Case No.998 of 1955  
between

Fazal Ilahi ... Plaintiff  
and

30 Gathuthi Hotel ... Defendants)

MEMORANDUM OF APPEAL

1. The Learned Trial Judge erred in Law in hold-  
ing that the Appellants herein were estopped from



In the Court  
of Appeal for  
Eastern Africa

\_\_\_\_\_  
No.16  
Memorandum of  
Appeal.  
15th October  
1956 -  
continued.

Counterclaiming for Specific Performance of the Respondent's undertaking to grant a permanent lease.

(a) The Appellants' Application to the Resident Magistrate's Court in Landlord & Tenant Case No.333 of 1955 was ambiguous in that in one place they said their tenancy was of unlimited duration and in another they said that it had been determined by a Notice to Quit.

(b) The Appellants in fact made the application in Landlord & Tenant Case No.333 of 1955 themselves and of their own initiation and had no real comprehension of the Landlord & Tenant Ordinance and were certainly not consciously taking up any position by that application (and the contents of sub-paragraph (a) hereof are repeated). 10

(c) The very fact that they paid Shs.8000/- for the goodwill of the business is an affirmative inference to the fact that the tenancy granted was more than a monthly one (and the learned Trial Judge never held that there had been any subsequent waiver nor indeed was waiver pleaded). 20

2. (a) The Learned Trial Judge erred in not holding that the grant of "the benefit of the tenancy" by the written agreement of July 1953 together with the verbal assurances of the Respondent constituted an agreement by the Respondent to grant a permanent lease to the Appellants.

(b) The Learned Trial Judge erred in not specifically enforcing that agreement, which agreement was still extant at the time of this suit in view of the Learned Trial Judge's acceptance of the fact that Resident Magistrate's Court Case No. 3761 of 1955 did not contain as an issue the question of the duration of the tenancy. 30

(c) The Learned Trial Judge erred in giving the Respondent a Judgment in his favour with an Order for possession (and mesne profits and costs).

3. The Learned Trial Judge erred in dismissing the Appellants alternative Counterclaim for damages which was not in issue in any previous proceedings and which is supported by the agreement set out in 40

paragraph 2(a) hereof.

DATED AT NAIROBI THIS 15th DAY OF OCTOBER  
1956.

(Sgd.) R. N. Sampson  
for MERVYN MORGAN & COMPANY  
ADVOCATES FOR THE APPELLANTS.

FILED BY:-

10 Mervyn Morgan & Company,  
Advocates,  
Cargen House,  
Coronation Avenue,  
P.O.Box 20006,  
Nairobi.

TO BE SERVED UPON: D.V. Kapila, Esq.,  
Advocate for the  
Respondent,  
Nairobi.

In the Court  
of Appeal for  
Eastern Africa

No.16

Memorandum of  
Appeal.  
15th October  
1956 -  
continued.

No. 17

20

NOTES OF ARGUMENTS TAKEN DOWN BY THE  
HON'BLE THE PRESIDENT AT THE HEARING  
OF THE APPEAL.

No.17

President's  
Notes.  
1st April 1957.

1.4.57. Coram:

Worley P.  
Briggs J.A.  
Bacon J.A.

Morgan, Sampson with him, for appellants.

Salter, Q.C., D.V. Kapila with him, for  
respondent.

MORGAN : Efforts at settlement have failed.

Open facts :-

30

May '53 - emergency.

Agreement pp. 62-63 £1000 paid.

24.12.54 R.R. Order. ceased to apply

L. & T. etc. Order.

In the Court  
of Appeal for  
Eastern Africa

---

No.17

President's  
Notes.  
1st April 1957  
- continued.

January '55 - rent increased from Shs.  
300 p.m. to Shs.750 p.m.

R.M.'s Court - judgment p. 64.

- no W.S.D. : claim for 2 months rent.

- no decision on lease etc.

Appellants applied under L. & T. etc.  
Ordce.

- evidence p.21 & 22 : p.23.

I say they thought they were trying to get  
reduced rent. Application p.67 - 68 : 10  
(see Vol.XXXIII p.887).

- re address for service - I was acting  
for them but advised against this appli-  
cation.

- they filled in form themselves.

Filled in with contradictory particulars.

(SALTER: I don't intend to argue estoppel : but  
on the legal effect of documents, though  
their conduct may be subject to comment).

Kapila in Supreme Court relied on legal 20  
estoppel - and res judicata in R.M.'s Court  
and L. & T. Court.

As to R.M.'s Court : it was almost con-  
ceded simple claim for rent : see p.24.

TO COURT: The proceedings weren't put in - except  
judgment: p.64: deals only with quantum  
of rent.

Supreme Court judgment p. 28.

As to L. & T. Court : no decision on 30  
merits - therefore no res judicata.

(Salter agrees).

TO COURT: I agree Court can look behind the words  
if it thinks there was unlawful premium.

Clause 2 (d)

What meaning can be given to this?  
"the tenancy"

- (a) may mean tenancy which vendor has  
i.e. under Crown lease.
- (b) merely saying you can have these  
premises to carry on business -  
leaving term uncertain. Rent con-  
trolled.

In the Court  
of Appeal for  
Eastern Africa

---

No.17

President's  
Notes.  
1st April 1957  
- continued.

- 10 COURT : They may mean tenancy as favourable, as  
conditions on which vendor holds con-  
strued contra proferentum.
- (c) on condition Appellants paid rent  
and keep place clean they could carry  
on in occupation indefinitely.
- Document uncertain : evidence important.
- Respondents evidence p.19.
- "monthly tenancy" i.e. rent payable  
monthly.
- 20 There may have been condition not ex-  
pressed.
- S.P. of uncertain agreement - if not  
capable of precise interpretation can-  
not be enforced.
- One must have precise term for lease :-
- Indian T.F. Act s. 105.
- Mulla 3rd 628 : "Duration".
- Lace v. Chandler 1944 I A.E.R. 305 :  
306 A.B.
- 30 - term must be certain before lease  
can take effect.
- TO COURT:- - agree this is executory agreement but  
terms must be sufficient certain to  
be ascertainable by Court.
- I agree you can provide for optional  
breaks but you must have a maximum  
term certain. Here no such term.

In the Court  
of Appeal for  
Eastern Africa

No.17

President's  
Notes.  
1st April 1957  
- continued.

Misdirection on estoppel : Supreme Court  
p. 29-30.

- but for this (which is now admitted to  
be misdirection) Judge would have found  
for Appellants. This Court should now  
do so.

Reads Supreme Court judgment.

- p.28 - para.2(d) - he said he was the  
owner and Appellants thought he was  
promising he wouldn't turn them out,  
so long as they carry on business and  
pay rent.

10

90? Premises on Crown lease : 90 years from  
1.10.1907.

What did they pay £1000 for?

We should at least have tenancy for  
balance of term of Crown lease.

Wasn't unlawful premium.

Rent should be Shs.750 p.m.

Permanent leases exist in India.

20

- I say they can be created in Kenya.

COURT : Doubtful if such could be registered ;  
if unregistrable we shouldn't order it.  
Couldn't have more than unexpired term.

Evidence

p.18 Respondent. "owner" : see XXn.

Specific Performance

2 Privy Council cases - no need to apply  
here for stay because we made counter  
claim.

30

SALTER : We say the Appellants never had more  
than monthly tenancy.

Agreement p.62 primarily for sale of a  
business : Shs.8000 good and Shs. 12000  
for "agreed value".

Parties themselves never referred to  
balance of Crown lease.

Quaere, because Respondent said he was "owner".

In the Court  
of Appeal for  
Eastern Africa

SALTER : p.75 : Morgan's letter of 7.10.55.  
p.72 and p. 73 : Notices to quit.

No.17

COURT : Those were clearly matters of negotiation.

President's  
Notes.

SALTER : Presumption is in favour of monthly tenancy.

1st April 1957  
- continued.

Pleadings : Defence : para.3(b)(i) & (ii)  
Claim : para.11 & 12(i).

10

No evidence to support claim for permanent lease - not founded on written agreement.

Evidence doesn't support claim.

Judge correct in saying their conduct was inconsistent with their claim for permanent lease

e.g. new agreement in January '55.  
application to L. & T. Court.

Morgan's letter of 7.10.55.

20

Kapila's reply of 12.10.55 p.77.

Morgan on 15.10.55 p.77-78.

S.O. to 2.30 p.m.

2.30 P.M. Bench & Bar as before.

SALTER continues : Title granted under Crown Lands Ordinance - first lease to de Souza 1906 - 99 years w.e.f. 1.1.1906.

Sub-lease on 21.12.1907.

Purchase by Respondent on 10.2.1954

- speaks of 90 years from 1.10.07.

30

Crown Lands Ordinance : No. 21/1953  
S.8/9.6.53.

- repeals s. 21 of Cap.155 and re-enacts.

There has been sub-division in 1924.

? No consent to transfer from Abdul Ghani to Fazal Ilahi.

In the Court  
of Appeal for  
Eastern Africa

No.17

President's  
Notes.-  
1st April 1957  
- continued.

(But document registered and therefore ?  
consent)

But no application made for consent to  
the alleged agreement to lease part of  
premises to Appellants.

Affects S.P. and certainty of contract.

TO COURT: I agree if he makes contract and doesn't  
obtain Governors consent, there would be  
damages.

Consideration for contract.

10

"Akbari Hotel" : preamble and clause 8.

Notice under Cap. 286 p.95/96.

Appellants got quite a lot even if they  
didn't get a tenancy.

If not straightforward transaction one  
wouldn't expect the "key money" to be  
mentioned.

Not pleaded.

If Court thinks it was key money and no  
contract for lease for 14 years or more,  
then whole contract is void :

20

- Indian Contract Act S. 24.

TO COURT: I admit special rule under R.R.Ordinance.

SALTER: Both parties probably expected a reason-  
able term - to be expressed in a document  
to be drawn up. But actual term never  
expressed.

Refers to evidence : imprecise and uncer-  
tain.

Because parties are in possession, a  
monthly tenancy is created.

30

Appeal must fail as to S.P. because agree-  
ment too uncertain.

MORGAN: I agree case based on oral agreement :  
Defence para.3(b)(i).

Document produced in support of oral con-  
tract.

COURT: Evidence Act s.91.

Reply para.3(b).

You never asked for rectification.

40

You cannot seek to add to it.

MORGAN: But I use the evidence to explain meaning of "benefit of tenancy". Salter says all expected a reasonable term but it wasn't fixed. That is new : their case below was monthly tenancy. If "ever" means 14 years or more, then no illegality in payment of £1000.

10

If he holds himself out as able to give lease, and can't do it we must have damages : defence para.3(v).

No doubt £1000 given for security of tenure.

"The tenancy" must mean all that he had - Respondent can't hide behind need to get consent of Governor.

TO COURT: If Court thinks I should have lease, we could draft lease between ourselves - with liberty to apply.

C.A.V.

In the Court of Appeal for Eastern Africa

No.17

President's Notes.  
1st April 1957  
- continued.

20

No. 18

No.18

NOTES OF ARGUMENTS TAKEN DOWN BY THE  
HON. MR. JUSTICE BRIGGS, A JUSTICE OF  
APPEAL.

Notes of Briggs  
J.A.  
1st April 1957.

1.4.57 Coram: Worley P.  
Briggs J.A.  
Bacon J.A.

Morgan & Sampson for Appts.

Salter Q.C. & Kapila for Respt.

30

Morgan: Respt. was half-owner owner of building. Mid-1953 he went to Pakistan. Before going, he received £1000 from Appts. who wanted to run eating house in the building.

Agreement p.62-63 drawn by Advocate's clerk.

End 1954 Rent Restrictions ceased to apply: new Ordinance came in.



In the Court  
of Appeal for  
Eastern Africa

Beginning of 1955, rent increased from Shs.300 (controlled) to Shs.750. Rent not mentioned in agreement.

No.18

Notes of Briggs  
J.A.  
1st April 1957  
- continued.

Case in R.M's Court. Judgment p.64. Claim for 2 months' unpaid rent. "Final disposal" case i.e. no defence filed. Duration and nature of tenancy not in issue. Before judgment therein - Appn. by appts. to Landlord & Tenants' Court. Ev. at p. about this.

Appts' case was always that the object was only to fix rent. Not to apply for a fresh tenancy. 10

Appn. form p.67-68 Although my chambers are given as the address for service, I was not then instructed in this matter and did not prepare the document.

(Salter says he does not intend to rely on estoppel, but may rely on conduct as throwing light on the document).

Tenancy is stated to be "for an unlimited period". 20

Appn. was dismissed as out of time.

In Sup. Ct. case was decided on res judicata and estoppel.

No res judicata could arise from the original Mag. Ct. decision - rent only. Judgment p.64.

As to res judicata arising from the L. & T appn. Sup. Ct. judgment p.30.

Court: No decision on the merits. Dismissed for want of jurisdiction. 30

Salter: I accept that.

Morgan: Admitted misdirections on estoppel. Sup. Ct. must have dismissed the claim and allowed the counter-claim. Interpretation of agreement is open to this Court.

Court: They seem to have applied under the wrong part of the Ordinance - Pt. II, instead of Pt. I. (Ord.57/54) s.9. s.3. Rules 1954 p.884 & from 887. 40

Morgan: Yes. Judgment p.25. Part ownership admittedly does not matter Respt.

In the Court  
of Appeal for  
Eastern Africa

Court: What does "the tenancy" mean in this connection?

\_\_\_\_\_  
No.18

Morgan: Right of occupation for the whole of the remainder of the Crown Lease ; i.e. till 2013. (Lease is 99 years from 1914 - 56 years to run.)

Notes of Briggs  
J.A.  
1st April 1957  
- continued.

Salter: No, 90 years from 1.10.07 - apparently.

10 Morgan: We should have all he can give us, at least. Remedy in equity. If we get a lease, we do not contend that the rent should be less than Shs.750 p.m. If I get a lease for about 40 years I shall not want damages. Landlord's own evidence p.18.

Reads memo. of appeal.

20 Salter: Respt. submits that appts. never had any tenancy greater than a monthly one. Agreement p.62. Primarily for sale of business. 'Distribution' of purchase price - But I admit Court could go behind that.

What does 2(d) mean?

"The tenancy" may mean the actual rights of the Vendor under the Crown lease.

"The tenancy" may mean "a tenancy" in the sense of a right to occupy the business premises - the term being indefinite.

Court: ( - perhaps, a lease to be given for remainder of term of Crown lease, but with option to lessees to determine at any time).

30 Salter: - continuing right to occupy. subject to conditions as to keeping place clean and paying rent.

Precise meaning not ascertainable. Ev.  
18 & 19.

"monthly tenancy, but did not fix any term".

Agreement void for uncertainty. The term is the crux. It would still be too uncertain even if the true construction is as Court has suggested.

(No!)

In the Court  
of Appeal for  
Eastern Africa

No.18

Notes of Briggs  
J.A.  
1st April 1957  
- continued.

Mulla T.P.A. on s.105. 5 ? 628.

Lace v. Chandler (1944) 1 A.E.R. 305, 306.  
(But that was not an executory agreement for lease).  
(And the event determining the 'lease' was outside  
the control of the parties. The agreement no-  
where suggests a term of 40 years. They had pro-  
tection as statutory tenants. T.P.A. s.106. The  
counterclaim is based on an oral agreement, not on  
the written agreement at p.62. Conduct of appts.  
was in truth inconsistent with any right to a per- 10  
manent lease.

The respt's claim to have determined the ten-  
ancy has been steadily maintained.

The oral agreement is shown to have given no  
more than a monthly tenancy.

The appts. have never relied on the written  
agreement.

2.30 P.M. Bench & Bar as before.

Salter continues: The title is a Crown Lands  
Lease. The first title was on 19.12.06 to Mr. 20  
de Souza for 99 years from 1.1.06. Cannot under-  
stand the 90 years from 1.10.07 mentioned in  
assignment of half-share to respt.

There seems to be a defect in respt's title  
as there appears to be no consents.

s.8 Crown Lands Amendment Order. Ord.21/53  
Amends s.21.

If a lease is to be executed it will require  
the Governor's consent.

Court: If landlord failed to get it, he would 30  
have to pay damages Enquiry.

Salter: Presumably. Name - Akbari Hotel -  
changed to Gathuthi. Something did really pass.

If the consideration was partly "key-  
money" the whole transaction would be void.

S.24 Contract Act.

I admit the parties contemplated a reasonably  
extended term. But they left it to be decided  
later what the term was to be. Not good enough.

Oral agreement is too vague to enforce. Written agreement is not really relied on.

In the Court  
of Appeal for  
Eastern Africa

Morgan in reply: The evidence on both sides confirms that there was to be long term, and Salter has so agreed, but says it was not fixed.

No.18

In the Court below the respt's case was always monthly tenancy, and nothing more.

Notes of Briggs  
J.A.  
1st April 1957  
- continued.

If the lease was to be over 14 years there was nothing illegal.

10 But if only monthly tenancy, clearly an illegal premium, which we must get back.

A substantial part of the Shs.20,000 was paid for entry into the premises and security of tenure there.

"The tenancy" must mean all the landlord had.

C.A.V.

F.A. BRIGGS  
JUSTICE OF APPEAL.

In Court.

20 26.4.57 Coram: Briggs J.A.

Johar for Morgan for Appellant.

D.V. Kapila for Respondent.

Judgment read by me. Appeal allowed with costs and the judgment and decree of the Supreme Court set aside: a decree substituted in terms of my judgment. Draft order to be submitted to me.

F.A. BRIGGS  
JUSTICE OF APPEAL.

In the Court  
of Appeal for  
Eastern Africa

No. 19

NOTES OF ARGUMENTS TAKEN DOWN BY BACON J.

No.19

8th March 1957

Notes of Bacon  
J.A.  
8th March 1957.

Coram: Worley P., Briggs J.A., Bacon J.A.

Dfts - tenants' appeal against decree of Sup.  
Ct. Kenya granting possession and judgt for  
mesne profits in respect of business premises,  
and dismissing counterclaim for specific per-  
formance of alleged agreement to grant a per-  
manent lease.

10

On Counsel on both sides, Mr. Mervyn Morgan  
for appts and Mr. D.V. Kapila for respt., appear-  
ing in chambers on the invitation of the Court  
with a view to a possible settlement, hearing  
adjourned to 1st April 1957 unless previous  
settlement reached.

R.B.

8.3.57.

1st April 1957. 1st April 1957.

Coram: Worley P., Briggs J.A., Bacon J.A.

20

Morgan, Samson with him, for Appellants.  
Salter Q.C., D.V. Kapila with him, for  
Respt.

Morgan: Settlement efforts have failed.

Facts (common ground):-

Respt was at first  $\frac{1}{2}$  owner of Building  
concerned. He then in 1953 went to Pakistan,  
having obtained Shs.20,000 from appts' owners (3  
Africans) and agreement at p.62 dated 30.6.53.

On 25.12.54 R.R. Ordce cased to apply. 30  
At beginning 1955 the parties agreed new rent of  
750/- p.m. vice old 300/- p.m. Case 3761 of 1955  
before Mag's Ct. (see p.64) was a claim for rent  
in arrears simpliciter: judgt given for Shs.1500/-,  
2 months arrears. Duration of tenancy not in issue  
there.

Now see p. 21, 1.22 : appts went to

Court to get a rent fixed by Landlord and Tenant Court - i.e. to get rent reduced. See also p.22 1.32 : further reference to that application; also p.23 1.19 (important). The application is at pp.67 - 68 : I was NOT instructed to act in this : the appts made the application against my express advice : the application was made personally by one of the appt's owners : it's a "stereotyped form". (Original examined : all typed at one time by same machine).

In the Court  
of Appeal for  
Eastern Africa

No.19

Notes of Bacon  
J.A.  
1st April 1957  
- continued.

(Salter Q.C. I do not intend to rely on the estoppel point taken by the Judge. I shall rely on their conduct as evidence of their intention.)

I ask that appts' conduct on that occasion be favourably construed. See partic : item (c) on p.68 Tenancy for an unlimited period.

Kapila relied on:-

(1) ostoppel (now dropped).

(2) res jud. in 3761 of 1955 (p.64).

(3) re jud. in 333 of 1955.

Re (2) : See my argument at p.24 1.21 re (2). Judge accepted that view at p. 29 1.8. Mag's judgt at p.64 see at p.66 1.1 and p.66 1.1.17-21 and p.67 1.12.

Re (3) : The application simply wasn't entertained - as being out of time: There can be no estoppel.

J. was misled by his view of estoppel : he didn't get back on to the rails.

(Form used by appts when they applied (see above) was prescribed at p. 887 of Vol. XXXIII of Procs Rules and Regs - the volume for 1954. Identical with form used by appts. Their application was under Part II of Ordco No.57 of 1954 - in error for Part I.)

At p.30 1.4 - 16 the Judge misdirected himself on estoppel.

See judgment at p.28 1.35 : surely the Judge was there right in his view of the ambiguous phraseology used?

In the Court  
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Eastern Africa

No.19

Notes of Bacon  
J.A.

1st April 1957  
- continued.

In reality the landlord respt was never "the owner" in the full sense (Apparently in Oct. 1907 there was an unexpired period of ninety years - or a ninety years lease as from that date.)

S.P. is equitable remedy : landlord must at least give what he can give, i.e. the residue of his Crown lease period.

I can't contend that the rent should be less than 750/- per month.

A permanent lease exists in Indian law under the Transfer of Property Act. But the respt here has only got the residue. I've claimed damages in the alternative. If appts got about 40 years the damages would admittedly be only nominal - but I haven't actually claimed any damages in this event.

10

See respt's evidence at p. 19, partic at 1.4 et seq. and p.19 1.24.

See p.21 1.29 and p.22 11.17-22.

See p.23 11.17-21.

20

Estoppel and res judicata having gone, it remains to construe the agreement of 30th June 1953. I submit that in effect the Judge construed it in my favour. In any event it should be.

Specific performance:- Two P.C. authorities still good.

I submit this Court has the power to construe this agreement in my favour.

Salter Q.C. At no time did appts have a tenancy greater than a monthly one. See p. 62 (the agreement) : Primarily a contract for the sale of a business. Crux of the matter is clause 2(d). One can look behind the words as to price, if a premium was illegal.

30

Clause 2(d) contemplates, on appts' argument, a further document. But what is the document to contain? It might mean respt's right under the Crown lease; secondly, it might mean occupation for an uncertain time (which involves reading "the tenancy" as meaning "a tenancy"); (thirdly, "a tenancy for as long as I can give it and you want it").

40

(The words "which shall be transferred" indicate a contemplated conveyance.) My third possibility is that it meant appts could carry on as tenants as long as they kept the place clean: see p.19 l.26. See p.21 l.12 "to allow us to stay until we wanted to leave".

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No.19

Notes of Bacon  
J.A.  
1st April 1957  
- continued.

(Impliedly all reasonable and usual covenants would have to be incorporated.

10 Also lease for residue of term of Crown lease, subject to option to break on either side if appts gave up their restaurant business there).

Transfer of Property Act S.105: Mulla p.568 of 2nd Edn. (p. 628 3rd Edn.). Under that, it would be a "general letting", not for a term certain, if above were done.

Lace v. Chandler (1944) 1 AER. 305 at p. 306 per Lord Greene: "There must be a term certain, ascertainable at the time when the lease is made".

20 See letter at p.75 from Morgan to my junior. Kapila. (Not of much force: mere negotiations.)

As soon as the R.R. Order ceased to apply to business premises there was a new agreement as to an increased rent. That strengthens the contention that it was never more than a monthly tenancy.

30 Transfer of Property Act S.107: see "Consequences of non-registration". Strong presumption that this was only a monthly tenancy. See Defence para.3(b) and c/c paras.11 and 12(1). That was all founded on alleged oral agreement and NOT on the written agreement 30.6.53. Judge was right when he said the conduct of appts was inconsistent with their present claim: one must deduce intention from conduct.

The application to L. & T. Ct. shows appts thought they were unprotected.

Also the letter 7.10.55, obviously negotiating for a new lease.

40 Also respt's reply 12.11.55.

Also appts' letter on 15.10.55 at p.77-78

None of those things shows a clear reliance on an agreement which protected appts.



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- continued.

Cl. 2(d) is vague - incapable of effect.

Appts pleaded the ORAL agreement, NOT the written one of 30.6.53.

2.30 P.M. Bonch & Bar as before.

Salter continues:-

The original of the last title of present respondent has been found: Granted under Crown Lands Ordinance.

On 19.9.06, with effect from 1.1.06, for 99 years was the original title. Then an assignment by way of sub-lease 21.12.07. Then another on 10.2.24 from A.B. to the respondent, speaking of 90 years from 1.10.07.

10

Since under Crown Lands Ordce. a defect appears in respondent's title : see S.8 of Ordce 21 of 1953 amending S.21 of Cap.155 : consent of Governor required, but apparently never given No indorsement on the document. But it has been registered, and therefore consent must be presumed in absence of evidence. If a transfer to appts, another consent is required. (This wouldn't affect certainty of contract.)

20

Consideration for agreement 30.6.53 : see pp. 62 - 63. Recital re "Akbari Hotel". Then see Cl.8, re that name. The goodwill part of the consideration was all right. See also the Notice under the Fraudt. Transfer of Business Ordce (p.95 - 96) : Cap.206.

I submit that, without a lease, "quite a lot was being transferred" to appts. If part of the Shs.20,000 was key-money, why so open? But if this Court thinks it was key money and illegal under S.18 of R.R. Ordce, it was void in toto under S.24 of Indian Contract Act. If it was void, it can only be set aside and nothing paid thereunder is recoverable (But it is recoverable under S.18(1) of R.R. Ordce.).

30

A reasonably substantial term of lease was what was really agreed and expected. How could that be translated into concrete term? Completely unprecise. See S.105 of Transfer of Property Act, a P.C. case there cited which held it was either a lease from year to year or a permanent lease. (See Mulla 3rd Edn. p.628).

40

When appts went to L. & T. Ct. they wanted security vice the cover of R.R. Ordce. which they lost on 25.12.54.

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of Appeal for  
Eastern Africa

S.P. not available.

No.19

Morgan in reply : I agree that this was a case on an oral agreement : see Defence para 3. The agreement 30.6.53 was produced to bear out the oral agreement. (But wasn't the document the agreement reduced to writing?)

Notes of Bacon  
J.A.  
1st April 1957  
- continued.

- 10 (Reply, para.3(b), at p.14 avors the written agreement was the agreement. Appts never contradicted that.)

Landlord himself said in evidence that appts could stay there as long as they wanted if, they kept the Bye-laws.

Landlord, in Court below, always contended that this was a monthly tenancy.

- 20 Nothing illegal about the premium: it was obviously for 14 years lease or more, under R.R. Ordce S.18.

If damages ariso, the whole 20,000/- should be recovered.

Judge favoured appts until he got to his passage on estoppel.

Lace v. Chandler : another distinction; no lease in perpetuity in England.

When appts went on their own to the L. & T. Ct. they used the phrase "Tenancy for an unlimited period".

- 30 "The tenancy", coupled with landlord's repn. of ownership, point clearly to the term of the Crown lease.

Governor's consent doesn't affect matter. Respt must get it, having undertaken to give a lease.

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We, Counsel, could settle the lease if this  
appeal allowed, with liberty to apply.

C.A.V.

R.B.

No.19

1.4.57.

(Judgments signed 6.4.57. Appeal allowed.)

Notes of Bacon  
J.A.

R.B.

1st April 1957  
- continued

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

(Sgd.)  
for REGISTRAR  
13.7.1957.

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No.20

No. 20

Judgment  
10th April 1957.

J U D G M E N T

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

CIVIL APPEAL No.67 of 1956.

BETWEEN

GATHUTHI HOTEL

...

APPELLANTS

AND

20

FAZAL ILAHI

...

RESPONDENT

BRIGGS, J.A.

This is an appeal from a judgment and decree  
of the Supreme Court of Kenya. The respondent  
and his brother were in early 1953 the owners of  
certain premises in Race Course Road, Nairobi, and  
carried on the business of an eating house in the  
ground floor thereof under the firm name of Akbari  
Hotel. On 30th June 1953 the respondent, perhaps

intending to act for himself and his brother, but in his own name alone, agreed in writing to sell the business to the appellants for Sh.20,000/-. The material parts of the document are as follows:-

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Judgment  
10th April 1957  
- continued.

10 "1. The Vendor hereby agrees to sell and the Purchasers to purchase the said business for the price or sum of Shillings Twenty Thousand (Sh.20,000/-) which shall be apportioned in the manner following that is to say the sum of Shillings Eight thousand (Sh.8,000/-) as to the goodwill of the said business and the balance of Shillings Twelve thousand (Sh.12,000/-) being the agreed value of the furniture, fittings, cooking utensils and refrigerator etc., all passing by manual delivery.

2. The said purchase price shall include:-

- 20 (a) the goodwill of the said business.  
(b) the furniture, fittings, cooking utensils and refrigerator etc., lying in the business premises.  
(c) the benefit of trade licence in respect of the said business which shall be transferred in favour of the Purchasers.  
(d) the benefit of the tenancy in respect of the said business which shall be transferred by the Vendor in favour of the Purchasers.

30 8. The Purchasers shall be entitled to trade under the said firm name or style of "AKBARI HOTEL" and all proprietary rights therein shall belong to the Purchasers and the Vendor shall have no interest or right therein and shall have no authority to withdraw the same."

40 At that time the premises were controlled and the rent of the ground floor was Sh.300/- per month. It is common ground that the respondent was to have the right to raise the rent if the premises ceased to be controlled, but no figure was then agreed. Shortly afterwards the respondent bought his brother's half-share in the premises and he is now sole owner. His title is a lease under the Crown Lands Ordinance and is believed to be for 99 years from 1st January 1906. On 25th December 1954 the premises became decontrolled, and in anticipation of this the respondent on 29th November 1954 served

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on the appellants one month's notice to quit on 31st December 1954. They did not do so. A further notice was served for 31st July 1955. Early in 1955 the appellants agreed to pay in future a rent of Shs.750/- per month. They defaulted in April and May and the respondent sued and recovered judgment in the Magistrate's Court on 9th August 1955. This was a claim for rent and nothing more. It is accepted that it constitutes a res judicata as to the amount of present and any future rent. On 19th July 1955 the appellants made an application in the Magistrate's Court under the Landlord & Tenant (Shops and Hotels) (Temporary Provisions) Ordinance. On its face the application was made under Part II and asked for a new tenancy, but it seems highly probable that the appellants really intended to apply under Part I and merely asked for rent to be fixed. The application was never heard on the merits, but was dismissed as being made out of time. On 22nd November 1955 the respondent sued the appellants in the Supreme Court for possession of the premises and mesne profits. The appellants' defence and counterclaim is a rambling and inconsequential document; but the gist of it is that they claim to be entitled to occupy the premises for an unlimited period and counterclaim for specific performance of an agreement to grant a permanent lease and alternatively for damages. Instead of basing their claim on the written agreement they allege an elaborate oral agreement, which cannot have been in fact anything but negotiations for the written agreement, and all evidence of the supposed oral agreement should in my opinion have been excluded under s.91 of the Indian Evidence Act. Fortunately for the appellants, the respondent expressly relied on this written agreement in his reply and defence to counterclaim, and the right to receive a lease under the provisions of the written agreement is sufficiently put in issue. It should be noted that the appellants never in fact used the business name of Akbari Hotel, but at once began to use and are still using the name of Gathuthi Hotel.

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The learned trial Judge was inclined to think that paragraph 2(d) of the agreement could not be read as an agreement to grant a permanent tenancy. He observed that in the first proceedings in the Magistrate's Court the duration of the tenancy was not in issue. He observed also that the fact that the respondent was at one time only a part owner of the premises was not material. He discussed the terms of the appellant's

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application for a new tenancy and said:-

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10th April 1957  
- continued.

"In my view the terms of the defendants' application to the Landlord and Tenant Court in case 333 of 1955 are entirely inconsistent with their present claim that they are entitled to a permanent tenancy of the premises. By that application they alleged that the tenancy which began on the 30th June 1953 had been determined; and they asked the Court to grant them a fresh tenancy for the duration of the Landlord and Tenant Ordinance at a rent to be fixed by the court. I hold that they are now estopped from claiming that they were entitled to a permanent tenancy.

Actually they were not granted a fresh tenancy as their application was refused on the ground that it was filed out of time."

He thereupon dismissed the counterclaim and gave judgment on the claim for immediate possession, mesne profits and costs. We are informed that execution has been stayed and the appellants are still in possession. They appeal from this judgment.

Mr. Salter for the respondent did not attempt to support the finding that the second proceedings gave rise to an estoppel. There are no grounds constituting an estoppel in pais and there can be no estoppel by record, since the Magistrate's decision was in effect that he had no jurisdiction, and there was no decision on the merits. The question is therefore purely one of construction of the agreement in the light of the surrounding circumstances. I start from the point that it is highly improbable that the chattels used in the business would be worth Shs.12,000/- or anything like it, and that the evidence indicates that they were probably worth not more than Shs.2,000/- at most. I note next that the goodwill of an eating-house of this kind could not survive a removal of premises, unless the distance were very short, and I think the appellants cannot have intended to pay a large sum for goodwill unless they were going to have some security of tenure in the premises they took over. The respondent admitted in evidence that he had agreed that, if the appellants duly paid the rent and "kept the place clean", (by which I understand him to mean "observed the municipal regulations for eating houses") he would continue the tenancy. These factors all

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10th April 1957  
- continued.

indicate the inherent improbability of a mere monthly tenancy. Mr. Salter suggests that the appellants would have been sufficiently protected by the increase of Rent (Restriction) Ordinance; but it was already universally known in June 1953 that business premises would very soon be removed from the ambit of the Ordinance. That the appellants themselves were well aware of this appears from the express agreement that the rent might then be raised.

10

Looking at the words of the agreement with these points in mind, one sees that the respondent undertook to transfer "the benefit of the tenancy in respect of the said business." The words are unexpected in their context of fact for the respondent was not, at least in the colloquial sense, a "tenant". Yet "the tenancy" which he agreed to transfer must mean his own tenancy. It was not merely "a tenancy". It seems to me that there is only one possible interpretation, if the words are to have a grammatical meaning. The respondent was agreeing to transfer the remainder of his interest under the Crown lease in the premises in question. This would not be a "permanent lease" as suggested by the appellants, and, for myself, I am by no means convinced that a permanent lease would be capable of registration under Kenya law. In this case there is an unexpired term of something under forty years, and a lease for one day less than that would be a perfectly ordinary transaction. It would of course be subject to the usual covenants, and, in addition, to any covenants which may appear from the terms of the agreement to have been expressly or impliedly intended by the parties to be embodied in the lease. These require some consideration.

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I think the tenancy was to be transferred for the purposes of this business of an eating-house, and for no other purpose. I think no assignment or sub-letting should be permitted unless on a sale of this business, and that there should be a covenant that the premises will not be used for any purpose other than the purposes of this business - to whomsoever it may from time to time belong. The usual covenants will provide that the business must be conducted in a lawful and decent manner. I think next that there is a clear intention to allow the appellants to surrender the lease if they wish to discontinue the business. I would suggest that a fair effect could be given to that intention by a

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provision that they may determine the lease at the end of any quarter by giving twelve months' notice to do so. The amount of the rent now causes no difficulty: it will be Shs.750/- per month, payable as it is now paid.

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Judgment  
10th April 1957  
- continued

10 Mr. Salter raised various objections to this interpretation of the agreement. He says first that, if a consideration was given for the creation of the tenancy, it was an unlawful premium under s. 18 of the Increase of Rent (Restriction) Ordinance; but if, as I think, the term is to be nearly forty years a premium could lawfully be paid under the provision of ss.(3) of that section. He says next that the lease could not be valid under the Crown Lands Ordinance without the consent of the Governor. That is true; but it is the duty of the respondent, having made an open contract in this respect, to obtain that consent. If he cannot do so, he will have to pay damages in lieu, and I would order an enquiry as to those damages, if the necessity should arise. Mr. Salter's principal argument, however, was that the agreement is so vague and uncertain in its terms as to be unenforceable. He relies on Lace v. Chandler, (1944) 1 A.E.R. 305. In that case the document which fell to be considered was itself intended to operate as a lease. I think different considerations apply to an executory agreement. If the Court can fairly find room from an executory agree-  
20 ment the intention of the parties as to all essential terms of the proposed lease, that is sufficient. It is also to be noted that the event which was to determine the "lease" in Lace v. Chandler was one outside the control of the parties and the term of the lease was therefore wholly uncertain.

40 Mr. Salter was constrained to admit on the evidence that the parties had contemplated a reasonably extended term, but he said that its actual extent could not be ascertained from the agreement. The respondent is grantor in this case, and I think the agreement should be construed, if necessary, contra proferentem. If the words "the tenancy in respect of the business" were too wide to express the respondent's true intention, he should have used other words. Construing them so as to make them, if possible, effective rather than ineffective, I think they refer to a term of one day less than the unexpired period of the Crown lease.

50 I give full weight to the fact that the respondent has consistently alleged that there is only a monthly tenancy, and also to the fact that the



In the Court  
of Appeal for  
Eastern Africa

No.20  
Judgment.  
10th April 1957  
- continued

appellants, in that very inept document, their application to the Magistrate's Court, stated that their tenancy had been determined. I note also that they were advised to base their claim primarily on an alleged oral agreement instead of the obviously valid written one. In spite of these matters I think the correct interpretation of the written agreement is as I have described it. I think that the agreement, though admittedly somewhat obscure, is not too uncertain to be enforced. 10

I would accordingly allow this appeal and set aside the judgment and decree of the Supreme Court. I would substitute a decree dismissing the plaintiff's claim with costs and on the counterclaim ordering specific performance of the agreement to grant a lease, the lease to be on the lines which I have described above: in the alternative, if the consent of the Governor to the lease cannot be obtained, there should be an inquiry as to damages. The plaintiff should pay the defendants' costs of the counterclaim, and the parties should have liberty to apply. Both parties have stated that they expect to be able to settle the draft lease by agreement, and that it is not necessary at this stage to refer it to conveyancing counsel of the Court. The respondent must pay the costs of this appeal. 20

F.A. BRIGGS  
JUSTICE OF APPEAL.

Worley, P.

WORLEY P.

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I have had the advantage of reading beforehand the judgment which has just been delivered. I agree with it and do not wish to add anything. An order will be made in the terms suggested in that judgment, and a draft of that order is to be submitted to Mr. Justice Briggs for approval before it is passed by the Registrar.

N.A. WORLEY.  
PRESIDENT.

NAIROBI.  
10th April 1957.

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BACON J.A.

I also had the advantage of reading the judgment now delivered by my brother Briggs. J.A. I agree and have nothing to add.

ROGER BACON  
JUSTICE OF APPEAL.

NAIROBI.  
10th April, 1957.

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of Appeal for  
Eastern Africa

No.20

Judgment.  
10th April 1957  
- continued.

Bacon, J.A.

DELIVERED at Nairobi on 26th April 1957.

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

for REGISTRAR.  
4.5.1957.

No. 21.

O R D E R.

No.21

Order.  
26th April 1957.

In Court this 26th day of April, 1957.

Before the Honourable the President (Sir Newnham  
Worley)

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the Honourable Mr. Justice Briggs, a Jus-  
tice of Appeal  
and the Honourable Mr. Justice Bacon, a  
Justice of Appeal.

30

This appeal coming on for hearing on the 8th  
day of March, 1957 and on the 1st day of April, 1957  
in the presence of M.J.E. Morgan Esquire and R.N.  
Sampson Esquire of Counsel for the Appellants and  
Clive Salter Esquire Q.C. and D.V. Kapila Esquire of  
Counsel for the Respondent it was ordered that this  
appeal do stand for judgment and upon the same com-  
ing for judgment this day IT IS ORDERED that this  
appeal be allowed AND THAT the judgment and decree  
of the Supreme Court be set aside AND THAT a decree  
be substituted dismissing the Plaintiff's claim with

In the Court  
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Eastern Africa

costs and on the Counterclaim ordering specific performance of the agreement to grant a lease on the following terms:-

\_\_\_\_\_  
No.21  
Order.  
26th April 1957  
- continued.

1. The Lease to be for one day less than the unexpired term which the Respondent at present holds from the Crown.
2. The premises to be used for the business of an eating house and for no other purpose.
3. There is to be no assignment or sub-letting of the premises unless on a sale of the business and there should be a covenant that the premises will not be used for any purpose other than the purposes of this business to whomsoever it may from time to time belong. 10
4. Among the usual covenants to be inserted in the Lease one should be a covenant that the business must be conducted in a lawful and decent manner.
5. The Appellants to be allowed to surrender the Lease if they wish to discontinue the business and this to be effected by inserting in the Lease a provision that they may determine the Lease at the end of any quarter by giving twelve months notice to do so. 20
6. The rent to be Shs.750/- per month payable in arrears on the last day of each month.

AND IN THE ALTERNATIVE IT IS ORDERED that if the consent of the Governor to the Lease which must be now sought by the Respondent in case it is necessary to do so, cannot be obtained, there shall be a further enquiry to be made as may be directed by this Honourable Court as to damages. The parties shall have liberty to apply generally AND LASTLY IT IS ORDERED THAT the Plaintiff (Respondent) shall pay the Defendants' (Appellants) costs of the Counterclaim AND the Respondent must pay the costs of this appeal. 30

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

F. HARLAND  
REGISTRAR.

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ISSUED this 10th day of June, 1957.

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

(Sgd.)  
for REGISTRAR.

11.6.57

No. 22.

ORDER GRANTING FINAL LEAVE  
TO APPEAL.

In the Court o  
of Appeal for  
Eastern Africa

In Chambers this 30th day of September, 1957.

Before the Honourable the Vice-President  
(Sir Ronald Sinclair).

No.22

Order granting  
final leave to  
Appeal.  
30th September  
1957.

O R D E R.

10 UPON the Application presented to this Court  
on the 12th day of September 1957 by the above named  
Applicant for final leave to appeal to Her Majesty  
in Council AND UPON READING the Affidavit of his  
Advocate, D.V. Kapila, Esq., sworn on the 12th day  
of September 1957 in support thereof AND UPON HEAR-  
ING the Advocates for the Applicant and the Respon-  
dent THIS COURT DOTH ORDER that the Application for  
final leave to appeal to Her Majesty in Council be  
and is hereby granted AND DOTH DIRECT that the re-  
cord including this ORDER, be dispatched to England  
within 14 days from the date of issue of this Order  
20 AND DOTH FURTHER ORDER that the Costs of this Ap-  
plication do abide the result of the Appeal.

GIVEN under my hand and the Seal of the Court  
at Nairobi, the 30th day of September 1957.

F. HARLAND.  
REGISTRAR.

ISSUED at Nairobi, this 30th day of September  
1957.

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

(Sgd.)  
for REGISTRAR.  
30/9/57.

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EXHIBITS"A"

Memorandum of  
Agreement  
30th June 1953.

E X H I B I T S"A"MEMORANDUM OF AGREEMENT

MEMORANDUM OF AGREEMENT made the 30th day of June One thousand nine hundred and fifty three BETWEEN FAZAL ILAHI S/O FAZAL DIN of Nairobi in the Colony of Kenya merchant (hereinafter called "the Vendor") of the one part and WACHIRA S/O GIKONYO, WAMATHAI S/O MUME and KIUMBANI S/O GACHARA all of Nairobi aforesaid African traders (hereinafter called "the Purchasers") of the other part WHEREAS the Vendor has been for some time past carrying on the business of an eating house on Plot No. 209/232/1/1, Race Course Road, Nairobi aforesaid under the firm name or style of "AKBARI HOTEL" (hereinafter referred to as "the said business") AND WHEREAS the Vendor has agreed with the Purchasers for the sale to them of the said business including its goodwill, furniture, fittings, refrigerator etc., for the price of Shillings Twenty thousand (Shs.20,000/-) 10  
NOW THIS AGREEMENT WITNESSETH as follows :- 20

1. The Vendor hereby agrees to sell and the Purchasers to purchase the said business for the price or sum of Shillings Twenty Thousand (Shd.20,000/-) which shall be apportioned in the manner following that is to say the sum of Shillings Eight thousand (Shd. 8,000/) as to the goodwill of the said business and the balance of Shillings Twelve thousand (Shd.12,000/-) being the agreed value of the furniture, fittings, cooking utensils and refrigerator etc., all passing by manual delivery. 30

2. The said purchase price shall include:-

- (a) the goodwill of the said business,
- (b) the furniture, fittings, cooking utensils and refrigerator etc., lying in the business premises,
- (c) the benefit of trade licence in respect of the said business which shall be transferred in favour of the Purchasers,
- (d) the benefit of the tenancy in respect of the said business which shall be transferred by the Vendor in favour of the Purchasers. 30

EXHIBITS

"A"

Memorandum of  
Agreement  
30th June 1953  
- continued

3. The said purchase price shall be paid by the Purchasers to the Vendor upon the signing of this Agreement (receipt whereof the Vendor hereby acknowledges).

4. The Vendor shall hand over the possession of the said business to the Purchasers on the first day of July One thousand nine hundred and fifty three which shall be the date of sale of this business.

10 5. All profits and receipts of the said business and all losses and outgoings in respect thereof up to the Thirtieth day of June One thousand nine hundred and fifty-three shall belong to and be paid and discharged by the Vendor and as from the First day of July One thousand nine hundred and fifty-three all profits and receipts of the said business and all losses and outgoings in respect thereof shall belong to and be paid and discharged by the Purchasers PROVIDED HOWEVER, that the Vendor shall indemnify the Purchasers if they may be held responsible for payment of any debts incurred by the Vendor up to the Thirtieth day of June One thousand nine hundred and fifty-three.

6. All necessary notices required to be published under the Fraudulent Transfer of Business Ordinance, 1930 shall be signed by the Vendor and the Purchasers and be published as required under the said Ordinance.

30 7. All costs of and in connection with this Agreement shall be borne and paid by the Purchasers.

8. The Purchasers shall be entitled to trade under the said firm name or style of "AKBARI HOTEL" and all proprietary rights therein shall belong to the Purchasers and the Vendor shall have no interest or right therein and shall have no authority to withdraw the same.

IN WITNESS WHEREOF the parties hereto have hereunto subscribed their names the day and year first hereinabove written.

40 SIGNED by the said VENDOR) (Sd.) Fazal Ilahi s/o  
in the presence of:- ) Fazal Din.  
)  
)  
G. Sarwar, )  
Advocate's Assistant, )  
Nairobi. )

EXHIBITS"A"

Memorandum of  
Agreement  
30th June 1953  
- continued.

SIGNED by the said PURCHASERS)  
in the presence of:-

J.R. Thairo,  
Advocate's Clerk,  
  
G. Sarwar,  
Advocate's Assistant,  
Nairobi.

WACHIRA  
WAMATHAI  
KIUMBANI

This is Exhibit marked "A" referred to in the annexed Affidavit of Wachira s/o Gikonyo sworn before me this 12th day of January 1956 at Nairobi.

10

Sgd.

N. L. Anand.

Commissioner for Oaths.

No.1

Judgment of  
Resident  
Magistrate,  
Civil Case  
No.3761.  
9th August  
1955.

No. 1

JUDGMENT OF RESIDENT MAGISTRATE,  
CIVIL CASE No.3761.

IN THE RESIDENT MAGISTRATE'S COURT AT NAIROBI

CIVIL CASE No.3761 of 1955

FAZAL ILAHI

...

...

PLAINTIFF

versus

20

GATHUTHI HOTEL

...

...

DEFENDANT

J U D G M E N T

The Plaintiff in this Case is the owner of premises in Race Course Road, Nairobi, where the Defendants carry on the business of Hotel-keeping

in partnership under the style "Gathuthi" Hotel. The Defendants are the tenants of the Plaintiff, who claims from them the sum of 1500/- as arrears of rent at an agreed rate of 750/- P.M., for the months of April & May, 1955.

EXHIBITS

No.1

Judgment of  
Resident  
Magistrate,  
Civil Case  
No.3761.  
9th August  
1955 -  
continued.

10 Having heard the evidence in the Case, The Court took the point as to whether or not the Plaintiff was non-suited by virtue of the provisions of the credit to Africans (Control) Ordinance (Cap. 104). Having heard argument and studied the Ordinance on this point, I do not find it necessary to determine whether or not rent paid in arrears implies the granting of credit by the Landlord to the tenant.

20 In my view the operation of Sub-sec.(1) of Sec.2 of the Ordinance is specifically made inapplicable to the circumstances of this case by virtue of the Proviso to the sub-sec. in question, it being undisputed that the African Defendants are carrying on a business in partnership under a name required to be registered under the provisions of the Registration of Business Names Ordinance (No.48 of 1951) which replaced Cap.289 on 29th September 1951.

30 It was strenuously argued by Mr. Morgan (for the Defendants) that the Proviso in question only applies to one part of Sub-Sec.(1) i.e. that portion marked (c). This submission however, involves an interpretation which is contrary to the express wording of the Proviso, which states categorically: "Provided that the provisions of this sub-section shall not apply .....".

If the Proviso had only been intended to apply to part of Sub-sec.(1), that intention could only have been effected by expressly so reserving its application.

40 In my view the meaning of the wording of the Proviso is clear on the face of it, and it is not possible to infer meanings which may have been intended but not expressed.

I am satisfied therefore that the provisions of the Ordinance do not apply to the determination of this Case.

It is admitted that the Defendants are the tenants of the Plaintiff, and it is further admitted that the Defendants owe the Plaintiff rent



EXHIBITS

No.1

Judgment of  
Resident  
Magistrate,  
Civil Case  
No.3761.  
9th August  
1955 -  
continued.

for the months of April and May 1955. The only issue is as to the quantum of rent payable for the two months in question.

The Plaintiff's Case was that the Defendants had the tenancy of the premises in question at a monthly rental of 300/- until the end of December 1954 when it was terminated by a Notice to quit. A new tenancy had then been granted commencing on 1.1.55. at an agreed rental of 750/- P.M. which in turn expired on a notice to quit on 31.7.55. The Defendants duly paid this rent for the months of January, February & March 1955, but paid nothing for the two months in question. 10

The Defendants on the other hand stated that no new rent was agreed as from 1st January, 1955, and that anything in excess of 300/- P.M. paid, was in payment of an old debt. They admitted they had paid nothing for the two months in question, but stated they were willing to pay whatever rent was assessed by the Landlord and Tenant Court, to which they had applied. 20

It transpired however, that this application was dated 19.7.55 & stated that the Defendants tenancy expired on 24.6.55, & clearly applied for a new tenancy at a rent to be assessed by the Landlord & Tenant Court. Nowhere in the application is any application made for the assessing of rent in any previous tenancy. I am satisfied therefore that the application in question has no bearing whatsoever on the rent payable for the months of April & May. The rent payable for these two months was clearly a fixed sum agreed between the parties. 30

Now, doubt has been cast on the unreliability of P.W.2, & it is true he made a mistake as to receipts he had issued, which he openly admitted when he was shown to be wrong. Failure of memory as to detail is a very ordinary human weakness, and it does not follow that this witness was lying or mistaken when he said he was present when the Defendants agreed to pay rent in 1955 at the rate of 750/- p.m. In this respect he corroborates the Plaintiff, and their evidence is in turn supported by the receipts produced from the custody of the Defendants (Ex.2). These receipts show that the Defendants paid 750/- as rent for the months, January, February and March 1955. 40

I was not impressed by the Defendant's

attempt to escape the wording of these receipts by saying they did not understand them. It may well be that the Defendants are Africans & do not read English, but it is in evidence that they have 20,000/- invested in their hotel business, & from this & the manner in which both D.W.1 & D.W.2 gave their evidence, it is obvious they are both shrewd business men unlikely to pay out sums of money without troubling to check the receipts.

EXHIBITS

No.1

Judgment of  
Resident  
Magistrate,  
Civil Case  
No.3761.  
9th August  
1955 -  
continued.

10 On the evidence, I am fully satisfied that the Defendants agreed to the rent at 750/- p.m. and in fact paid that rent for 3 months. Doubtless finding the burden of that rent heavy, they intended the Landlord & Tenant Court to intervene on their behalf, but they never applied for such intervention, nor as I have already found, can their present application (Ex. "X") have any bearing on the two months in question.

20 In the result I find that the agreed rent for these two months was 750/-, and I accordingly enter judgment for the Plaintiff as prayed.

(Sgd.) R.L. Le Gallais  
RESIDENT MAGISTRATE  
9.8.55.

No.2

APPLICATION FOR NEW TENANCY IN LANDLORD  
& TENANT CASE No.333 of 1955.

IN THE RESIDENT MAGISTRATE'S  
COURT AT NAIROBI

30 CASE No.333 of 1955.

(APPLICATION FOR NEW TENANCY UNDER PART IX OF THE  
LANDLORD AND TENANT (SHOP AND HOTELS) (TEMPORARY  
PROVISION) ORDINANCE.

GATHUTHI HOTEL	...	...	<u>APPLICANTS</u>
			<u>TENANTS</u>
			VERSUS
FAZAL ILAHI	...	...	<u>RESPONDENT</u>
			<u>LANDLORD</u>

40

I, WACHIRA S/O GIKONYO, a Partner in GATHUTHI

EXHIBITS

No.2

Application for  
new tenancy in  
Landlord &  
Tenant Case  
No.333 of 1955.  
19th July 1955  
- continued.

HOTEL, of Race Course Road, Nairobi, apply to the Court for the grant of new tenancy pursuant to Part II of the above Ordinance.

2. The following are the particulars of the expiring tenancy.

- (a) (Address of premises) Plot No. 232/1/1, Race Course Road, Nairobi.
- (b) (Specification of premises) Hotel.
- (c) (Date of commencement of tenancy) 30th day of June, 1953. 10
- (d) (Name of parties) GATHUTHI HOTEL (TENANT) and FAZAL ILAHI (LANDLORD).
- (e) (Term of Tenancy) for an unlimited period.
- (f) (Rent reserved under tenancy) Shs.300/-.
- (g) (Date and mode of termination of tenancy) 24th June, 1955. By Notice to Quit and deliver possession.
- (h) (Nature of trade or business carried on in the premises by the tenant) AN EATING HOUSE.

3. The following are the particulars of the tenancy for which I am applying:- 20

- (a) (Period) for the duration of the above Ordinance.
- (b) (Rent) AS MAY BE FIXED BY THE COURT.
- (c) (Other term and conditions) AS THE COURT MAY THINK REASONABLE.

4. A copy of this application is being served on D.V. Kapila, Esq., Advocate for the Respondent-Landlord, Victoria Street, Nairobi.

5. Our address for service is care of MERVYN J.E. MORGAN, ESQ., ADVOCATE, CRICHTON CHAMBERS, VALLEY ROAD, NAIROBI. 30

DATED AT NAIROBI this 19th day of July, 1955.

(Sgd.) WACHIRA S/O GIKONYO  
SIGNATURE OF APPLICANT-TENANT.

No.3.

RULING IN LANDLORD AND TENANT CASE  
No.333 of 1955.

RULING.

The Applicant had a tenancy from the Respondent for an Eating House in Race Course Road from June 1953 on a month to month agreement at a rent of Sh.300/-.

10      A.1 has admitted in this case that he received a notice to quit on this tenancy dated 20.11.54, which terminated that tenancy on 31.12.54.

A.1 has admitted in this case that he went to Respondent and agreed with him for a new monthly tenancy at a monthly rent of Shs.750/- per month.

A.1 has admitted in this case that he received a notice to quit dated 24.6.55 timed to expire on 31.7.55.

20      Civil Case 3761/55 in the R.M's Court has been produced as Ex.A. in this Court. This case was by the Respondent against the Applicant for rent at Shs.750/- per month for April and May 1955. From the Applicant's possession were produced rent receipts at Shs.750/- per month from January to March. However in this Case 3761/55 it was the present Applicant's defence that there was never any agreement at the rate of Shs.750/- per month. The payments on the receipts had been for arrears of the Shs.300/- rate of rent. Applicant's witness, a partner in the firm made a similar statement. Judgment was given against the Applicant for the two months rent at Shs.750/- p.m.

30

It thus appears from A.1's admission in Court in this case that there WAS an agreement for rent at Shs.750/- p.m. This clearly shows that in C.C. 3761/55 the Applicant and his witness were perjuring themselves very deliberately.

40      In Court today the Applicant was a most evasive witness. His demeanour was very much against his veracity. The evidence in Court today shows that he was in arrears with the rent of Shs.300/- for the period while the premises were closed, and the evidence also shows that he made default in the payment of the Shs.750/- rent for two months. There

EXHIBITS

No.3

Ruling in  
 Landlord & Tenant  
 case. No.333 of  
 1955.  
 7th October 1955.

EXHIBITS

No.3

Ruling in  
Landlord & Tenant  
Case. No.333 of  
1955.  
7th October 1955  
- continued.

is evidence on C.C.3761/55 to show that he was in arrears for other rents.

When these facts are taken into account, together with the fact that Applicant perjured himself in an attempt to deny the agreement for rent at Shs.750/- entered into freely by him in January, I can only say that in my opinion the Applicant is not a good tenant: and leave it at that for the present.

It has been argued that by the contract of sale of the business the Respondent agreed that Applicant should have the benefit of the tenancy and has now served a notice to quit; and that the Applicant has thereby suffered an injustice. If an injustice has arisen, it is one which can be corrected by a claim for damages. I do not think that I need consider it at this stage in the proceedings as a possible hardship, because I have not as yet reached the stage where hardship has to be taken into account. 10 20

Mr. Morgan has asked for leave to amend the Application by substituting the tenancy mentioned in the Application, for the new tenancy of January 1955 for Shs.750/- per month.

Mr. Morgan has submitted that he did not draft the Application. I have accepted this submission. It appeared to me that Para.2 (g) of the Application was so patently in error that no advocate drafted the Application. This is further borne out by the fact that it was filed by the A.1. (It might be noted that A.1, in my opinion, perjured himself again when he stated that he saw Mr. Morgan draft the application; the whole set of answers here show a deliberate intention to prejudice himself). 30

It is Mr. Morgan's submission that A.1. got Mr. Morgan's clerk to draft the Application; and that the clerk did this very inefficiently. Mr. Morgan sought leave to call the clerk on this subject, but I did not grant this request. I consider the pleadings are on the file, placed on the file by Applicant; and in all the circumstances of the case I consider that it is right and proper that the Applicant should stand by those pleadings. 40

Mr. Morgan has urged that he should be allowed to amend that pleadings because he can show that A.1. disclosed in his instructions the

agreement with regard to the Sh.750/-.

EXHIBITS

No.3

Ruling in  
Landlord & Tenant  
Case No.333 of  
1955.  
7th October 1955  
- continued.

In my view the pleadings ought not to be amended at this stage.

I consider that such an amendment would completely alter the pleadings. The case would be based on an entirely new contract which is not mentioned in this Application; and it would be basing the pleadings on a contract the existence of which the Applicant denied, on oath just about the time he was filing this Application. Thus of the reasons given for refusing the application to amend given on page 596 of Mulla (2) has some weight with me.

But when I come to consider reason (3) it appears to me that to allow the amendment would alter entirely the period under which the Application should be filed under Ordinance 57/54, and this would deprive the Respondent of a right which accrued to him under Ordinance 57/54.

The application to amend the Application is refused.

It is submitted by Mr. Kapila under O. vi. R. 27 and 28 that the Court should now proceed to deal with the point of law raised by him in Para. 1 of his Answer.

I consider this submission to be correct in law. The Application Para.2 (c) refers to the tenancy commenced on 30.6.53 Para.2 (f) refers to the rent as Sh.300/-. These clearly point to the tenancy which was brought to an end by the notice to quit of 29.11.54. The period for filing an application expired on 25th January 1955. I have not the power to extend that time.

It is true that para.2 (g) mentioned 24.6.55 as the date of the termination of the tenancy. This is clearly in error. The notice to quit was dated 24th of June, and did not terminate the second tenancy until 31.7.55. This erroneous mention of the date of the termination of the tenancy cannot, in my opinion, rectify the remainder of the document.

The application as it stands is with regard to the tenancy which expired on 31.12.54, and the time for the Application was prior to 25.1.55.

EXHIBITS

No.3

Ruling in  
Landlord & Tenant  
Case No.333 of  
1955.  
7th October 1955  
- continued.

This application has been filed out of time.

The case is dismissed with costs for the  
Respondent.

(Sgd.) I. Gillespie  
RESIDENT MAGISTRATE.

7.10.55.

No.4

Letter D.V.  
Kapila to  
Gathuthi Hotel.  
29th November  
1954.

No.4.

LETTER D.V. KAPILA TO GATHUTHI HOTEL.

29th November, 1954.

1. Wachira s/o Gikonyo,  
2. Wamathai s/o Muma,  
3. Kiumbani s/o Gachara,  
All trading as Gathuthi Hotel,  
Race Course Road,  
Nairobi.

10

Dear Sirs,

Plot L.R. 209/232/1/1  
Race Course Road - Nairobi.

I have been instructed by your landlord Mr. Fazal Ilahi to give you this notice to quit, which 20 I hereby do, that you must vacate the premises you occupy on the above plot, and deliver their possession to my client Fazal Ilahi on 31st December, 1954, that is to say, at the end of your month of tenancy commencing on 1st December, 1954.

Yours faithfully,

(Sgd.) D.V. KAPILA.

No.5.

LETTER D.V. KAPILA TO GATHUTHI HOTEL.EXHIBITS

No.5

24th June, 1955.

Messrs. Gathuthi Hotel,  
Race Course Road,  
Nairobi.

Letter D.V.  
Kapila to  
Gathuthi Hotel.  
24th June 1955.

Dear Sirs,

Hotel Premises on Plot No. 232/1/1  
Race Course Road, Nairobi.

10 I am instructed by my client Mr. Fazal Ilahi of Nairobi to give you this notice which I hereby do, that you must quit and deliver vacant possession to him on the 31st July 1955 of the above premises situated on the above plot which you occupy as my client's tenants on a monthly tenancy from the first to the last day of each calendar month.

On your failure to quit as requested above, proceedings will be filed against you for your ejection from the premises.

20

Yours faithfully,

(Sgd.) D.V. Kapila.

The boy says the above letter was taken delivery of but refused to sign on the Despatch Book. Informed Mr. Kapila by me.

(Sgd.) (?)

27.6.



EXHIBITS

No.6.

No.6

LETTER D.V. KAPILA to GATHUTHI HOTEL

Letter D.V.  
Kapila to  
Gathuthi Hotel.  
24th June 1955.

D.V. KAPILA  
ADVOCATE.

24th June, 1955.

Messrs. Gathuthi Hotel,  
Race Course Road,  
Nairobi.

Dear Sirs,

Hotel Premises on Plot No. 232/1/1  
Race Course Road, Nairobi.

10

I am instructed by my client Mr. Fazal Ilahi of Nairobi to give you this notice which I hereby do, that you must quit and deliver vacant possession to him on the 31st July 1955 of the above premises situated on the above plot which you occupy as my client's tenants on a monthly tenancy from the first to the last day of each calendar month.

On your failure to quit as requested above, proceedings will be filed against you for your ejection from the premises.

20

Yours faithfully,

(Sgd.) D.V. Kapila.

---

No.7

EXHIBITSLETTER M.J.E. MORGAN TO D.V. KAPILA.

No.7

October 7th, 1955.

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
7th October 1955.

55/2464/G.1794/17

D.V. Kapila, Esq.,  
Advocate,  
NAIROBI.

Dear Sir,

RE: FAZAL ILAHI AND MESSRS: GATHUTHI HOTEL.

10 I refer to your conversation with my legal assistant, Mr. Winayak, with regard to the granting of a new tenancy to my clients, Messrs. Gathuthi Hotel.

I understand that you promised Mr. Winayak that you would negotiate with your client, Mr. Fazal Ilahi on the question of a new tenancy to my clients on reasonable terms.

20 As I suggested to you in Court, I shall again put in writing that I shall instruct my clients to deposit three months rent with you and pay the agreed rent in advance every month. I am prepared to go further in as much as I can advise my clients to enter into a written agreement with your client so that your client may not have to face difficulty of collecting rent from my clients.

I have no doubt that you will persuade your client to let my clients have a further tenancy on reasonable terms.

Your early attention will be appreciated.

30

Yours faithfully,

(Sgd.) Mervyn J.E. Morgan.

MERVYN J.E. MORGAN.

EXHIBITS

No.8

No.8

LETTER D.V. KAPILA TO M.J.E. MORGAN.

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
11th October  
1955.

D.V. KAPILA  
ADVOCATE.

11th October, 1955.

Mervyn J.E. Morgan, Esq.,  
Advocate,  
Nairobi.

Dear Sir,

L. & V. Cause No. 333 of 1955.  
Gathuthi Hotel versus Fazal Ilahi.

The sum of Shs. 592-50 is due from your clients for costs in the above case as per particulars stated below :- 10

Advocate's fee	Shs. 540. 00	
Fee for Chamber Application and production of file of C.C.3761	22. 50	
Court fee for Respondent's Answer	2. 00	
Court fee for production of file of C.C.3761	14. 00	
Paid for copy of proceedings and Judgment in C.C.3761	14. 00	20
	<u>592. 50</u>	

Please advise your clients that if they do not move out of the premises by 15th October 1955 a case will be filed in the Supreme Court for their ejection without any further warning.

Yours faithfully,

(Sgd.) D.V. Kapila.

No. 9

LETTER D.V. KAPILA TO M.J.E. MORGAN.D.V. KAPILA  
ADVOCATE.

12th October, 1955.

Mervyn J.E. Morgan, Esq.,  
Advocate,  
Nairobi.

Dear Sir,

re: Fazal Ilahi and Messrs. Gathuthi Hotel.

10

I am in receipt of your letter ref. No. 55/2464/G.1794/17 dated 7th October 1955. I regret very much my client does not agree to grant a fresh tenancy to your client.

Yours faithfully,

(Sgd.) D.V. Kapila.

No.10

LETTER M.J.E. MORGAN TO D.V. KAPILA

55/2543/G.1794/25

October 15th 1955.

20 D.V. Kapila, Esq.,  
Advocate,  
P.O. Box 636,  
Nairobi.

Dear Sir,

FAZAL ILAHI AND MESSRS. GATHUTHI HOTEL.

I acknowledge receipt of your letter of the 11th instant.

2. I am studying the figures quoted therein and whatever is correct I will advise my client to pay.

EXHIBITS

No.9

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
12th October  
1955.

No.10

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
15th October  
1955.

EXHIBITS

No.10

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
15th October  
1955 -  
continued.

3. As regards your final paragraph you are rushing this matter and should give my clients at least until the end of the month before taking any action.

I understand that you have spoken at some length to my assistant, Mr. Winayak.

4. I also acknowledge receipt of your letter of 12th instant and note the contents.

Yours faithfully,

(Sgd.) MERVYN J.E. MORGAN.

c.c. J. Winayak, Esq.

10

No.11

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
19th December  
1955.

No.11

LETTER M.J.E. MORGAN TO D.V. KAPILA.

December 19th. 1955.

Please quote  
55/3271/G.1881/29

D.V. Kapila, Esq.,  
Advocate,  
NAIROBI.

Dear Sir,

SUPREME COURT CIVIL CASE No.998 of 1955  
FAZAL ILAHI VERSUS GATHUTHI HOTEL.

20

I have, this morning, entered an Appearance on behalf of Messrs. Gathuthi Hotel in the above case, and thus, it will be apparent that I am acting for them in this case.

Your Plaint disclosed two causes of action:-

- (1) An action for vacant possession of the Eating House occupied by my client, Messrs. Gathuthi Hotel, of which premises, your client is the Landlord.

30

- (2) An action for mesne profits from August 1955, until vacant possession is delivered to your client.

EXHIBITS

No.11

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
19th December  
1955 -  
continued.

10 As regards the first cause of action I do not propose to comment on the rights of your client; however, I would like to state on behalf of my clients that my clients are entitled to a Contractual tenancy as long as they carry on the business of an Eating House on the said premises in accordance with Clause 2(d) of the Memorandum of Agreement dated 30th June, 1953, concluded between your client as a Vendor of the business then carried on under the firm name or style of "AKBARI HOTEL" on the one part and my clients on the other part.

20 Even if your client was entitled to vacant possession of the premises which is denied by my clients, your client is under an obligation to compensate my clients for the Good Will of the business purchased and paid for by my clients under the aforesaid agreement and also for the Good Will accrued to my clients since their purchase of the said Hotel.

My clients assess the present value of the Good Will at Shs. 16,000/-.

Over and above, my clients paid for the fittings etc. without doing considerable damage to the walls of the Eating House.

30 My clients, therefore, wish to ask your client if he is prepared to compensate them for the value of the fittings attached to the walls and for which they have paid your client under the said agreement.

My clients assess the value of the said fittings at Shs. 8,000/-.

Dealing with your client's claim for mesne profits, my clients do not wish to comment at this stage except that my clients would state that if the Court holds that my clients are trespassers, then my clients would admit that your client is entitled to mesne profits.

40 With regard to quantum, it is for the Court to assess this.

In conclusion, I wish to ask your client if he is prepared to pay the sum of Shs. 24,000/- in respect of the Good Will of the premises and the

EXHIBITS

No.11

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
19th December  
1955 -  
continued.

value of the fittings attached to the said Eating House.

If your client does not admit his liability my clients must consider a Counter Claim for the same against your client.

Yours faithfully,

(Sgd.) MERVYN J.E. MORGAN.

This is Exhibit marked "B" and referred to in the annexed Affidavit of Wachira s/o Gikonyo sworn before me this 12th day of January 1956 at Nairobi. 10

(Sgd.)

M.L. Anand

Commissioner for Oaths.

No.12

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
4th January  
1956.

No.12

LETTER M.J.E. MORGAN TO D.V. KAPILA.

January 4th. 1956.

46/19/G.1881/14.

D.V. Kapila, Esq.,  
Advocate,  
P.O. Box 636,  
NAIROBI.

20

Dear Sir,

RE: SUPREME COURT CIVIL CASE No.998 of 1955  
FAZAL ILAHI - versus - GATHUTHI HOTEL.

On the 27th ultimo, my Legal Assistant, Mr. Winayak, rang up your office and your Asian Clerk, Mr. Gokaldas informed him that you were away at the Coast during Court Vacations.

Mr. Winayak telephoned your office on my instructions with a view to getting fifteen days 30

extension for the purpose of filing Defence in the above case.

EXHIBITS

No.12

Your Asian Clerk referred to above Mr.Winayak that I need not worry about the extra time for filing my Defence, because you were applying for summary judgment in the above case.

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
4th January  
1956 - continued.

Relying on your Clerk's information I have not filed my Defence as yet.

10 I wish to ask you now whether or not you are, in fact, applying for summary judgment in this case.

If you are applying, then, of course, it will be proper for me to wait for the result of your application and then if I am given conditional or unconditional leave to defend, I can file my Defence within fifteen days from the date of that order.

If, however, your application for summary judgment is granted that will be the end of the matter.

20 On the other hand, if you are not now applying for summary judgment, then, I must ask for fifteen days, within which to file my Defence, from the date of receipt of your confirmation to do so.

Your early reply will be highly appreciated.

Yours faithfully,

(Sgd.) for MERVYN J.E. MORGAN.

RNS/JKW/HMC.

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EXHIBITS

No.13

No.13

LETTER D.V. KAPILA TO M.J.E. MORGAN

Letter D.V.  
Kapila to M,J.E.  
Morgan.  
5th January  
1956.

D.V. KAPILA  
ADVOCATE.

5th January 1956.

Mervyn J.E. Morgan, Esq.,  
Advocate,  
Private Bag,  
Nairobi.

Dear Sir,

SUPREME COURT CIVIL CASE No.998 of 1955  
FAZAL ILAHI VERSUS GATHUTHI HOTEL.

10

I have your letter of 19th December 1955. Your clients put forward their claim to some sort of perpetual lease before the Landlord & Tenant Court but they did not succeed in that their application for renewal of tenancy was dismissed. They have no defence at all to my client's action for ejectment and an application for summary judgment is being prepared and filed in court.

If your clients feel they are entitled to any compensation, they can always file their claim separately, and my client will resist any such claim.

20

I can only say that your clients will save some costs if they vacate the premises forthwith, without prejudice to their claim for compensation, if any.

In case your clients are prepared to leave at once, the figure of mesne profits claimed by my client can be amicably settled.

30

My client is not prepared to allow your clients to stay for a day longer. He is definite about it.

Yours faithfully,

(Sgd.) D.V. KAPILA.

No.14

EXHIBITS

LETTER D.V. KAPILA TO M.J.E. MORGAN.

No.14

D.V. KAPILA  
ADVOCATE.

6th January, 1956.

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
6th January 1956.

Mervyn J.E. Morgan, Esq.,  
Advocate,  
Nairobi.

Dear Sir,

Supremo Court C.C. No. 998 of 1955  
Fazal Ilahi vs. Gathuthi Hotel.

Please refer to your letter ref. 56/19/G.1881/  
14 dated 4th instant. An application for Summary  
Judgment has already been made and it is listed for  
hearing on 13th January 1956 at 10.30 a.m.

You have probably not noticed a notice in  
a recent issue of Official Gazette (Rules and Pro-  
clamations Section) which publishes a new Civil Pro-  
cedure Rule that time for filing pleadings etc. will  
not run from 25th December to 15th January. You  
are therefore in any case safe in not filing your  
defence until 15th January 1956.

Yours faithfully,

(Sgd.) D.V. KAPILA.

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EXHIBITS

No.15

No.15

LETTER M.J.E. MORGAN to D.V. KAPILA.

Letter M.J.E.  
Morgan to D.V.

January 13th 1956.

13th January  
1956.

56/118/G.1881/23.

D.V. Kapila, Esq.,  
Advocate,  
NAIROBI.

Dear Sir,

RE: SUPREME COURT CIVIL CASE NO.998 OF 1955  
FAZAL ILAHI VS. GATHUTHI HOTEL.

10

With reference to Paragraph three of your  
Plaint in the above case, I shall be glad if you  
will supply the following Further and Better Parti-  
culars:-

- (a) Whether the alleged monthly tenancy was  
a written contract or an oral one;
- (b) The names of the persons between whom the  
said monthly tenancy was concluded or ag-  
reed upon;
- (c) The date on which the said written or oral 20  
contract was made;
- (d) The place where the said written or oral  
contract was completed.
- (e) If written will you please let me have a copy.

2. Please also let me know whether or not the  
Plaintiff, Mr. Fazal Ilahi, was the registered own-  
er or co-owner of the premises (on which the said  
Gathuthi Hotel is situate) on the 30th day of June,  
1953.

If you are not prepared to disclose this  
information I shall have to apply for leave to  
administer an interrogatory which may involve some  
delay in the hearing of the suit.

30

3. Since further and better particulars are re-  
quired for the purpose of drafting a proper Defence  
and since the time for filing the same is short  
i.e. fifteen days from today I must ask you to  
expedite the dispatch of the Further and Better  
Particulars requested herein by letting me have

them within 24 hours and if you are not able to do this I will have to ask 15 days from the receipt of the Particulars in which to file my Defence.

Yours faithfully,

MERVYN J.E. MORGAN

c.c. The Registrar,  
Supreme Court of Kenya,  
NAIROBI.

EXHIBITS

No.15

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
13th January  
1956 - continued.

No.16

No.16

10

LETTER M.J.E. MORGAN TO D.V. KAPILA.

January 19th 1956.

56/195/G.1881/29/W.

D.V. Kapila, Esq.,  
Advocate,  
NAIROBI.

Dear Sir,

SUPREME COURT CIVIL CASE NO.998 OF 1955  
FAZAL ILAHI VERSUS GATHUTHI HOTEL.

20

I am instructed by my clients, Messrs. Gathuthi Hotel, to refer you to their Agreement for Sale with Fazal Ilahi dated the 30th day of June, 1953, and in particular to Paragraph 2(d) thereof.

My instructions are that your client, Mr. Fazal Ilahi agreed with my clients at the time the said Agreement was drawn up, to allow my clients to carry on the business of an Eating House at his premises situate on Plot No. 209/232/1/1 Race Course Road, Nairobi, as long as they desired so to do.

30

In fact my clients would state further that they purchased the business of the Eating House, from your client on the distinct understanding:-

EXHIBITS

No.16

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
19th January  
1956 - continued.

(a) That my clients shall have the benefit of the tenancy at the said Plot as long as they do desire;

(b) That your client made representations to my client that he was the sole owner of the Plot in question and the building thereon.

According to my instructions, your client gave a further undertaking to my clients that in the event of your client selling the said plot and the building thereon, to a third person, your client would make it a condition precedent of such sale that my clients would remain as tenants of the Vendor aforesaid as long as they so desired. 10

The only proviso being that my clients will pay the rent to the Landlord, whoever is the Landlord, as agreed between them and the Landlord from time to time.

In view of the foregoing, you will observe that, your client is under an obligation to give a written lease to my clients for a reasonable period (there being no express duration of the tenancy in question agreed to by the parties in this case). 20

I should think that in view of the fact that my clients have paid your client substantial money for the benefit of the tenancy as well as for the good-will of the business it will be only fair and reasonable that my clients are given at least a seven years tenancy from the 1st day of January 1956. 30

My instructions are that if you do not notify this office within three days from the date hereof as to your client's intentions in this matter, to Counter-Claim against your client for specific performance of the Agreement for lease.

Secondly, as you will see from the above mentioned version of my clients, your client made representations to my clients that he was the sole owner of the Plot in question and the building thereon at the time the agreement aforesaid was drawn up. 40

My clients relied on your client's representations and purchased the business of an Eating House from your client.

If, now, it turns out that your client was not the sole owner of the Plot and the building in question and therefore he could not give such a tenancy as hereinbefore stated, and in the end my clients have to vacate the Eating House, my clients will hold your client responsible for the damages they suffer as a result of their eviction due to your client's misrepresentation..

EXHIBITS

No.16

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
19th January  
1956 - continued.

10 In such circumstances my clients will reckon their damages at Shs.18,000/- being Shs.8,000/- paid to your client by my clients in respect of the good-will of the business and Shs.10,000/- approximately in respect of the benefit of the tenancy plus General Damages for the loss of good-will which has accrued to my clients since they purchased the business of Eating House from your client.

20 My clients would state that they, being Africans themselves, have a much more flourishing business at the said premises due to exclusively African custom than your client had when he was carrying on the same business. Consequently, my clients are entitled to a larger sum in respect of good-will than your client had from my clients at the time of his sale of the business to my clients.

Your early reply will be appreciated.

Yours faithfully,

(Sgd.) MERVYN J.E. MORGAN.

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EXHIBITS

No.17

No.17

LETTER M.J.E. MORGAN TO D.V. KAPILA.

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
19th January  
1956.

January 19th. 1956.

56/194/G.1881/29.

D.V. Kapila, Esq.,  
Advocate,  
Agency House,  
Victoria Street,  
NAIROBI.

Dear Sir,

10

SUPREME COURT CIVIL CASE NO.998 OF 1955  
FAZAL ILAHI VERSUS GATHUTHI HOTEL.

I would refer you to my letter of 13th instant.

I have not yet received the further and better particulars asked by me in my letter referred to above.

Not even the courtesy of an acknowledgment as a matter of fact.

2. As I have not received the Further and Better Particulars to-date - not to speak of receiving the same within 24 hours from the 13th instant - I must now request you to allow me 15 days from the receipt of these Particulars in which to file my Defence.

20

3. Finally may I please have the Further and Better Particulars asked for or in default of same some reason for their not forthcoming.

4. I may have to take the matter to Court in the event of a refusal.

30

Yours faithfully,

(Sgd.) MERVYN J.E. MORGAN.

c.c. The Registrar,  
Supreme Court of Kenya,  
NAIROBI.

No.18

EXHIBIT 3LETTER D.V. KAPILA TO M.J.E. MORGAN.

No.18

D.V. KAPILA  
ADVOCATE.

23rd January, 1956.

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
23rd January  
1956.

Hervyn J.E. Morgan, Esq.,  
Advocate,  
Private Bag,  
Nairobi.

Dear Sir,

10 Supreme Court Civil Case No.998 of 1955  
Fazal Ilahi versus Gathuthi Hotel.

Please refer to your letter ref.No. 56/195/  
G.1881/29/W of 19th January 1956.

I am instructed by my client Mr.Fazal Ilahi to reply that the allegations of your clients contained in your letter are totally false and to state that he is under no obligation to grant your clients the lease you ask for.

20 In 1953 my client was the co-owner of the premises and the fact was well known to your clients. Your clients' tenancy during 1953 and 1954 was a monthly tenancy protected in the event of its termination, by law. It was terminated at the end of December 1954 and a fresh monthly tenancy granted on 1st January 1955 which was in turn terminated on 31st July 1955. As a result the present proceedings have been filed. Your clients' application to the Landlord & Tenant Court was unsuccessful. The allegation of an agreement of a  
30 lease for as long a period as your clients desired is untrue.

I have used the heading in this letter that you have given to your letter under reply, although I fail to see any connection between your letter and the case referred to in the heading and any attempt to introduce irrelevant matters in the case will be resisted.

Yours faithfully,  
(Sgd.) D.V. KAPILA.



EXHIBITS

No.19

No.19

LETTER D.V. KAPILA TO M.J.E. MORGAN.

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
23rd January  
1956.

D.V. KAPILA  
ADVOCATE.

23rd January, 1956.

Mervyn J.E. Morgan, Esq.,  
Advocate,  
Nairobi.

Dear Sir,

Re: Supreme Court Civil Case No.998 of 1955  
Fazal Ilahi vs. Gathuthi Hotel.

10

Please refer to your letter ref.No. 56/118/  
G.1881/23 dated 13th January 1956. I give below  
the answers to questions asked by you in the above  
letter :-

1. (a) The Contract of monthly tenancy at Shs.  
750/- p.m. as from 1st January 1955 was  
verbal.
- (b) It was made between the Plaintiff and the  
Defendant firm's partners Wachira s/o  
Gikonyo and Gitabi s/o Kametha.
- (c) It was made sometime in January 1955.
- (d) It was made at Nairobi.
- (e) It was not in writing.

20

2. Mr. Fazal Ilahi was the registered co-owner of  
the premises in June 1953.

3. I must point out that the issue as to a fresh  
monthly tenancy as from 1st January 1955 at  
Shs.750.00 p.m. between the plaintiff and the  
defendants was adjudicated upon in R.M's Civil  
Case No.3761 of 1955 and in R.M's (Landlord &  
Tenant) Case No. 333 of 1955 and it is res  
judicata twice over. You appeared for the  
present defendants in both cases and the fur-  
ther and better particulars you now ask were  
stated in evidence in R.M's Case No. 3761 of  
1955 and were admitted by your clients in  
Landlord & Tenant Case No.333 of 1955. You

30

will agree that this question cannot be now reopened, and any attempt to put this question in issue again will be met with the appropriate application to the Court.

I have promised to give you 15 days for defence from the date of this letter, but I hope you will file your defence much earlier than the expiry of 15 days as the request for these particulars, in my humble view, was altogether unnecessary.

10 Yours faithfully,  
(Sgd.) D.V. KAPILA.

EXHIBITS

No.19

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
23rd January  
1956 -continued.

No.20

LETTER D.V. KAPILA TO M.J.E. MORGAN.

D.V. KAPILA  
ADVOCATE.

22nd March, 1956.

No.20

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
22nd March 1956.

Mervyn J.E. Morgan, Esq.,  
Advocate,  
Nairobi.

Dear Sir,

20 Re: Supreme Court Civil Case No.998 of 1955  
Fazal Ilahi versus Gathuthi Hotel.

30 Please refer to your letter dated 20th November 1955 and my reply to the same dated 26th November 1955. Admittedly the monthly rent that your clients were paying before the tenancy was terminated on 31st July 1955 was Shs.750/-. My client has claimed Shs.1500/- per month as mesne profits from the defendants as from 1st August 1955 but in view of the fact that a fairly large sum will become due and payable by your clients even if they are ordered to pay mesne profits equal to monthly rent, my client will be prepared to accept without prejudice to his claim for larger mesne profits, a payment of Shs.750/- per month as from 1st October 1955 which your clients admit to be due for the

EXHIBITS

No.20

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
22nd March 1956  
- continued.

last 5 montns. In case your clients do not pay this sum an application will be made to the court for payment of Shs.750/- per month at least, without prejudice to the amount claimed. My client will have no objection to your clients depositing this sum in court within the next 7 days.

Yours faithfully,

(Sgd.) D.V. KAPILA.

No.21

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
4th April 1956.

No.21

LETTER M.J.E. MORGAN TO D.V. KAPILA.

10

4th April, 1956.

56/1093/G.1881/14W.

D.V. Kapila, Esq.,  
Advocate,  
Agency House,  
Victoria Street,  
NAIROBI.

Dear Sir,

Re: Supreme Court Civil Case No.998 of 1955  
Fazal Ilahi versus Gathuthi Hotel.

20

I acknowledge receipt of your letter dated the 22nd ultimo.

I am sending herewith my cheque for Shs. 2,250/- being the rent for the months of October, November and December, 1955 at the rate of Shs. 750/00 per month.

With regard to rent for the months of January, February and March, 1956 I am writing my clients to put me in funds so that I may send you same.

30

Please acknowledge receipt.

Yours faithfully,  
(Sgd.) MERVYN J.E. MORGAN.

Encl.  
MJEM/W/EJ

EXHIBITS

No.21

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
4th April 1956  
- continued.

No.22

LETTER D.V. KAPILA TO M.J.E. MORGAN.

D.V. KAPILA  
ADVOCATE.

17th April, 1956.

No.22

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
17th April 1956.

10 Mervyn J.E. Morgan, Esq.,  
Advocate,  
Private Bag,  
Nairobi.

Dear Sir,

Supreme Court Civil Case No.998 of 1955  
Fazal Ilahi vs. Gathuthi Hotel.

20 I beg to acknowledge with thanks receipt of  
your letter ref. 56/1023/G.1881/14W dated 4th April  
together with your cheque for Shs.2250/- in response  
to my letter of the 22nd March 1956. The payment  
is accepted on terms stated in my letter dated 22nd  
March 1956, and I will be grateful if a further  
cheque in respect of the sum of Shs.750/- each for  
the months of January, February and March be sent  
to me, which will be accepted again on terms con-  
tained in my letter of 22nd March 1956.

Yours faithfully,  
(Sgd.) D.V. KAPILA.

EXHIBITS

No.25

No.23

LETTER M.J.E. MORGAN TO D.V. KAPILA.

Letter M.J.E.  
Morgan to D.V.  
Kapila.  
4th May 1956.

56/1459/GW.1881/14.

May 4th. 1956.

D.V. Kapila, Esq.,  
Advocate,  
Agency House,  
Victoria Street,  
NAIROBI.

Dear Sir,

RE: SUPREME COURT C.C. No.998 of 1955  
FAZAL ILAHI -V- GATHUTHI HOTEL.

10

I acknowledge receipt of your letter dated  
the 17th ultimo.

I am sending herewith my cheque for Shs.  
2250/- in respect of rent payable by my clients to  
your client for the months of January, February  
and March, 1956.

Please acknowledge receipt.

Yours faithfully,

(Sgd.) MERVYN J.E. MORGAN.

MM/JKW/HMC

ENCLOSURE: CHEQUE.

20

No.24

EXHIBITS

LETTER D.V. KAPILA TO M.J.E. MORGAN.

No.24

D.V. KAPILA  
ADVOCATE.

9th May 1956.

Letter D.V.  
Kapila to M.J.E.  
Morgan.  
9th May 1956.

Mervyn J.E. Morgan, Esq.,  
Advocate,  
Private Bag,  
Nairobi.

Dear Sir,

10

Supreme Court Civil Case No.998 of 1955  
Fazal Ilahi vs. Gathuthi Hotel.

I beg to acknowledge with thanks receipt yesterday of your letter of 4th May 1956. The cheque is accepted on terms on which your previous cheque for Shs.2250/- was accepted as stated in my letter of 17th April 1956.

Yours faithfully,

(Sgd.) D.V. KAPILA.

No.25

No.25

20

GENERAL NOTICE No.1515 IN THE OFFICIAL  
GAZETTE.

General Notice  
dated 10.7.53  
in the Official  
Gazette of 14th  
July 1953.

Page 724 THE OFFICIAL GAZETTE. 14th July, 1953

General Notice No.1515.

THE FRAUDULENT TRANSFER OF BUSINESSES  
ORDINANCE, 1930.

NOTICE is hereby given that the business of an eating house carried on by Fazal Ilahi s/o Fazal Din on Plot 209/232/1/1, Race Course Road, Nairobi, under the firm name and style of "Akbari Hotel", has been

EXHIBITS

No.25

General Notice  
dated 10.7.53  
in the Official  
Gazette of 14th  
July 1953 -  
continued.

sold and transferred to Wachira s/o Gikonyo, Wamathai s/o Mume and Kiumbani s/o Gachara as from the 1st day of July, 1953.

The address of the transferor is P.O. Box 1468 Nairobi.

The address of the transferees is care of House No.395, Ziwani, Nairobi.

The transferees intend to carry on the said business at the same premises under the name of "Gathuthi Hotel".

10

The transferees do not assume and are not intended to assume the liabilities incurred by the transferor in the said business up to and including the 30th day of June, 1953.

FAZAL ILAHI S/O FAZAL DIN  
Transferor.

WACHIRA S/O GIKONYO,  
WAMATHAI S/O MUME,  
KIUMBANI S/O GACHARA  
Transferees.

20

Nairobi.

10th July, 1953.

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

(Sgd.) R.N. Sampson

p.p. MERVYN MORGAN & COMPANY.

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No.26

EXHIBITS

PLAINT IN RESIDENT MAGISTRATE'S  
CIVIL SUIT No.3761 of 1955.

No.26

Plaint in  
 Resident  
 Magistrate's  
 Civil Suit No.3761  
 of 27th June 1955.

COLONY AND PROTECTORATE OF KENYA

IN THE RESIDENT MAGISTRATE'S COURT AT NAIROBI.

CIVIL SUIT No. 3761 of 1955.

Fazal Ilahi,	)	
Landlord,	)	PLAINTIFF
Race Course Road, Nairobi.	)	

10 Address for service C/o D.V. Kapila, Advocate,  
 Victoria Street, P.O. Box 636, Nairobi.

VERSUS

Gathuthi Hotel,  
 Hotel Keepers,  
 Race Course Road, Nairobi.

PLAINT

The Plaintiff above-named states as follows :-

- 20 1. Plaintiff's claim against the defendants is of the sum of Shillings 1500/- being arrears of rent for the two months of April and May 1955 for hotel premises situated on Plot No.232/1/1 Race Course Road, Nairobi let to the defendants by the Plaintiff at monthly rent of Shillings 750/- payable at the end of each month of tenancy.
2. Payment was repeatedly demanded from the defendants but they neglect or refuse to pay.
3. The cause of action has arisen at Nairobi within the jurisdiction of this Honourable Court.
- 30 4. The Plaintiff therefore prays that Judgment be granted to him against the defendants for



EXHIBITS

No.26

Plaint in  
Resident  
Magistrate's  
Civil Suit  
No.3761 of  
27th June 1955  
- continued.

(a) Shillings 1500/- (b) costs of this Suit and  
(c) interest at Court rates from the date of the  
Suit.

Dated at Nairobi this 27th  
day of June 1955.

Value of subject  
matter of the  
suit for purpose  
of Court fee is  
1500/-.

(Sgd.) D.V. Kapila.

Advocate for the Plaintiff.

10

Filed by:-  
(Sd.) D.V. Kapila,  
Advocate,  
Agency House,  
P.O. Box 636,  
Victoria Street,  
Nairobi.

No.27

No.27

Notes of  
Evidence in  
Resident  
Magistrate's  
Civil Suit  
No.3761 of 1955,  
26th, 29th July  
and 4th August  
1955.

NOTES OF EVIDENCE IN RESIDENT MAGISTRATE'S  
CIVIL SUIT No.3761 of 1955.

20

IN THE RESIDENT MAGISTRATE'S COURT AT NAIROBI.

CIVIL SUIT No.3761 of 1955

FAZAL ILAHI ... PLAINTIFF

VERSUS

GATHUTHI HOTEL ... DEFENDANT

26.7.55.

Mr. D.V. Kapila for Plaintiff.

Mr. Amin for Mr. Morgan for defendant.

Amin. Ask for case to be taken out of list in  
terms of letter dated 19.7.55 filed in Court.

30

Kapila. Claim for 2 months rent. Agree no rent paid no possible defence. Application has been made by defendant for grant of new tenancy to landlord and tenant court. This could not effect the old agreement.

Original tenancy was terminated in December last year.

10 Claim is for April and May 55. A fresh tenancy was in January. Any new tenancy by landlord and tenant court could only commence from 1.7.55 when tenancy on which claim is based is terminated.

Amin. Notice to quit not received.

The amount claimed is not the agreed rent.

Order. Hearing s/o to 10 a.m. on Friday 29th July 1955.

R.L. LEGALLAIS.

29.7.55. Mr. D.V. Kapila for plaintiff.

Mr. Johar for Morgan for Defendants.

Hearing 11 a.m. today.

20

R.L. LEGALLAIS

Johar.

Defendants admit that rent is due for 2 months in question and only question quantum. Deny amount claimed.

Only issue: Question of rent.

P.W. 1. Page 1 Ilahi (sworn).

30

I am the Plaintiff in this case and am the owner of the premises in this case of which the defendants are the tenants. The defendants carrying on the business of eating house. The monthly rent of the premises is 750/-. This rent was agreed between the defendants and myself in January this year.

The defendants paid this rent for January February and March and have paid monthly for the months of April and May. My advocate sent this notice. (Ex.1.).

40

I have demanded rent for the 2 months in question, but the defendants have paid nothing. The rent is payable at the end of each month of the tenancy.

# EXHIBITS

No.27

Notes of  
Evidence in  
Resident  
Magistrate's  
Civil Suit  
No.3761 of 1955,  
26th, 29th July  
and 4th August  
1955 -  
continued.

EXHIBITSRXD.

No.27  
Notes of  
Evidence in  
Resident  
Magistrate's  
Civil Suit  
No.3761 of 1955,  
26th, 29th July  
and 4th August  
1955 -  
continued.

I let the premises to the defendants in January this year. Previous to that the defendants have been my tenants from 1953. Before that I ran the business myself. I sold the business as a running concern to the defendants. The defendants paid their rent regularly until the end of December 1954.

In December 1954 I served a notice on the Defendants to terminate the old agreement.

10

The new rent of Shs.750/- was agreed between the defendants and myself in January or February. I settled the rent with them. Two persons (identified):- (Wachira s/o Gikonyo and Latahi s/o Kamica.)

I issued receipts for the months of January, February and March. The defendants are of better education than myself. I am illiterate. I got someone else to write the receipts and only affix my signature. The receipts were written at my dictation. The receipts were written in the presence of the defendants. I explained the contents of the receipts to the Defendants. I could not read myself what was on the receipts. There was no dispute about the amount of rent in January, February and March. In June the Defendants told me they would not pay the rent. They said they would approach the Rent Control Board. The conversation was in Swahili. I do not speak Swahili. I speak a little. The defendants did not say that they would pay the rent agreed, but not 750/-. I have not gone back on my words. It was not agreed that the defendants would approach the landlord and tenant court for the months of April and May.

20

30

The Defendants have not paid rent for June, but that did not fall due to 1st July. When I instructed my advocate I know that the Defendants had said they would go to the Rent Control Board. I do not know if they did. It was not agreed in January that the Defendants would pay me 750/- for months on account and the actual rent would be fixed by the Landlord and Tenant Court. I have not taken advantage of the fact that the receipts did not show that the rent had been received without prejudice.

40

My advocates' clerk was present when the rent of 750/- was agreed. The rent was not paid on condition that it would later be assessed by the Rent Control Board.

RXD. The name of the clerk present at the discussions was Gokaldas. These are the copies of the receipts for January, February and March. (Ex.2.).

The receipts were written by my son. He wrote two and a shop-keeper I think, wrote the third.

T.A.R.

R.L. LEGALLAIS.

EXHIBITS

No.27

Notes of  
Evidence in  
Resident  
Magistrate's  
Civil Suit  
No.3761 of 1955,  
26th, 29th July  
and 4th August  
1955 -  
continued.

P.W.2. Gokaldas Ravji. (sworn).

10 I am Mr. Kapila's clerk. I look at Ex. 2. None of the receipts are in my handwriting.

I know the plaintiff in this case. The rent for the premises was settled in January in my presence. The plaintiff and two of the defendants were present. The rent was settled at Shs.750/- per month from 1.1.55. There was no agreement at all that the rent would be provisional and subject to assessment later.

RXD.

20 The conversation was in Swahili. I speak Swahili. I explained the exact terms to the defendants. I speak Swahili fluently. Nothing was said about assessment of rent. All the arrangements were made in my presence. There would be a record in my office of the interview.

30 Instructions are usually recorded but not results of interviews. This is the book in question. I have recorded the date of the agreement. It is 30.12.54. I have recorded the name of the Plaintiff only. I usually only record the name of our client. I did not take any note of what transpired. I have spoken from memory. I remember facts although I made no note. I have a good memory. I did not anticipate being called as a witness in this case. I am sure. I am not mistaken. It was an oral agreement. Later on rent was paid - I wrote a receipt for 750/-. It would be for January rent. There may be a duplicate of receipts. I issued receipts against payments. The rent for the month of January was paid to me. 40 I do not know if any further amount was paid to the Plaintiff. I see a receipt for January in Ex. 1. The money was not paid to me.

RXD.

This receipt dated 5.1.55 is for rent for June 1954 (Ex.3.)

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Notes of  
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continued

This receipt dated 16.2.55 is for rent for August 54. (Ex.4.).

This receipt dated 9.3.55 is for rent for September to November 1954. (Ex.5.).

Exs.3, 4 and 5 are in my handwriting and the money was received by me. I must be mistaken as to the receipt I said I signed for 750/-. The actual money I received is recorded in my office books.

I refresh my memory from my office records and I see that the amounts do not include an amount of Shs.750/- received on behalf of the Plaintiff. 10

To Court. Every time there was a payment made in our office both the plaintiff and defendants came.

R.L. LEGALLAIS.

Plaintiff's case.

D.W.1. Wachira s/o Gikonyo.

I am one of the partners in the Defendant's firm, and have been since 30.6.53. My firm never agreed to pay 750/- per month as rent for the hotel. The agreed rent was Shs.300/-. I paid 750/- to the plaintiff 3 times I forgot the dates. The amount was in respect of a past debt. The rent was only 300/- per month. I was also awaiting the decision of the Landlord and Tenant Court. The plaintiff demanded 750/- and I said I must see the Rent Control Board. The plaintiff said he would also see Judge Roberts of the R.C.B. The plaintiff then filed this case. I know P.W. 2 by sight. I never agreed in his presence that I would pay Shs. 750/- p.m. for the hotel in question. I admit I owe two months rent for the hotel to the plaintiff at Shs.300 per month. 20 30

I have applied to the Landlord and Tenant Court for an assessment of rent. The date of my application is 20.7.55.

I am prepared to pay whatever rent is assessed by that Court.

XXD.

I paid 750/- as I wanted to clear the old debt. These are the receipts (Ex. 6). This is a receipt for 900/- which I also paid in 1955 (Ex. 7). 40

I also paid an amount of 300/-. This is the receipt (Ex. 8).

The 900/- was part rent for the period April -

September 1954 when the Hotel was closed and I was unable to pay my rent. If the receipt Ex. 7 says the rent was for September, October and November, it is wrong.

750/- was not rent for January. I received Ex. 1. I could not leave the hotel as my capital is invested in it.

10 I did not try and settle with the plaintiff. I just stayed on in the hotel in spite of Ex. 1. I did not go to the office of P.W. 2 and settle the rent with the Plaintiff.

The application I made to the landlord and tenant court was because I wish to continue the tenancy and because the plaintiff asked me to pay more rent. I made the application in July. I have not received any notice to quit at the end of July. I now agree that I have received a notice to quit at the end of July. This is the notice (Ex. 9).

RXD.

20 The hotel was closed for five months under Emergency Regulations. My object in making an application to the Landlord and Tenant Court is to be allowed to remain in the premises at an assessed rent. I am prepared to pay that rent.

To Court.

I wish the landlord and tenant court to allow me to stay on. This is a copy of the application (Ex. X.) Court Ex.

T.A.R.

30

R.L. LEGALLAIS.

D.W.2. Simeon Gitahi s/o Kamaitha (Sworn).

40 I am one of the partners of the defendant firm, and have been since 1953. I have never agreed with the plaintiff to pay to the plaintiff 750/- rent. We paid 750/- to pay off an old debt. I did not settle the rent at Shs.750/- at Mr.Kapila's office with P.W.2. The rent was Shs.300/-. The rent was not increased in January, although the plaintiff did approach D.W.1. for more rent, but he refused.

We have made the application (Ex. X.) as we have received notice to quit. We could not quit as we had paid 20,000/- for the business.

# EXHIBITS

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continued.

XXD

We paid 750/- three times to clear the debt.

The first payment was in April 1955. At that time we owed more than three months' rent.

We have not now paid rent for April, May, June and July 1955. We have paid rent up to and including March 1955.

RXD. NIL.

T.A.R.

R.L. LEGALLAIS.

Defendant's case.

10

Johar.

Onus on the plaintiff that rent was Shs. 750/-. P.W.2 not reliable. Had to subtract contradiction in plaintiff's case.

Ex. 9 is not notice as there has already been a previous notice.

Kapila.

Defendants admit first notice to quit. This terminated tenancy on 31.12.54 on expiry of Rent Control Board.

20

New tenancy from 1.1.55., now terminated on 31.7.55.

Agreed rent payable from 1.1.55 to 31.7.55. Unaffected by R.C.B. or Landlord and Tenant Court.

Ex. X. is under part 2 for fresh tenancy. But has not been referred under part 1.

Receipts are produced from possession of defendants. Clearly for agreed rent.

D.W. 2 admits rent not paid after March.

Judgment reserved. (Sgd.) R.L. LEGALLAIS

4.8.55. Kapila for Plaintiff.  
Morgan for Defendants.

30

On motion of Court, the parties are invited to discuss application of Cap. 104 Laws of Kenya to the facts of this case.

Morgan. Cap. 104 Section 2 (1) (a).

S.C. CC. 1885 of 1953.

Application was made for judgment by default.

Ruled that need not be pleaded that Defendants were Africans.

Generally when act relied on it should be pleaded.  
Court can act if contract made illegal by an Act.  
Plaintiff non-suited unless he can prove exception.

VOL. 23 L.R. 1948 Page 12 (Bourke J.)

Proviso of Section applies only to section 2 (1)(b).  
No certificate of exemption applied for. Rent was  
in arrear and therefore credit.

Kapila.

(1) The case quoted - based on previous ordinance.

10 Proviso in section 2 enacted for first time on  
31.8.48. Applies to whole sub-section (1). Ord-  
inance does not apply. Defendants partners.  
Ordinance 48/51 essential (section 4) that busi-  
ness names should be registered.

Replacing Cap.289.

(2) Letting of property to an African is not giving  
credit.

20 Not contemplated by Ordinance. Nothing to show  
that credit given. Rent due in cash at end of  
month. Failure to sue for some days does not  
mean that credit given. Defendants sued for two  
months together.

If Morgan right property could never be recovered  
by ejectment.

Morgan. Admit Sub-section seem to be numbered num-  
erically.

Agreed that proviso only came in 1948 after Bourke  
J's judgment.

30 Submit nevertheless proviso only intended to apply  
to section 2(b) in particular with regard to Chat-  
tles Mortgage.

Agree Defendants should have been registered.

Judgment reserved to 9.30 on Tuesday 9.8.55.

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Notes of  
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Resident  
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continued.

H.L. LEGALLAIS.



EXHIBITS

No.28

No.28

RESPONDENT'S ANSWER IN LANDLORD &  
TENANT CASE No.333 of 1955.Respondent's  
Answer inLandlord & Tenant  
Case No.333 of  
1955, 3rd August  
1955.IN THE RESIDENT MAGISTRATE'S COURT AT NAIROBI

LANDLORD &amp; TENANT CASE No.333 of 1955

Gathuthi Hotel ... .. APPLICANTS  
(Tenants)

versus

Fazal Ilahi ... .. LANDLORD  
(Respondent) 10RESPONDENT'S ANSWER.

The Respondent above named resists the application made by Wachira s/o Gikonyo in the above case for grant of a new tenancy under Part II of the Landlord & Tenant (Shops & Hotels) (Temporary Provisions) Ordinance on the following grounds:-

1. The tenancy which is referred to in the above application expired at the end of December 1954 as a result of valid notice to quit given by the respondent to the above-mentioned applicants Gathuthi Hotel at the end of November 1954. The present application not having been made within the time limited by Section 10(1) of the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance 1954 does not lie and is barred by limitation set forth in the said Section. 20

WITHOUT PREJUDICE to the above the respondent states that a new tenancy was subsequently created by mutual agreement between the parties commencing from 1st January 1955 at a monthly rent of Shillings 750/-, and that the said new tenancy was terminated by a notice to quit dated 24th June 1955 requiring the tenants to quit at the end of July 1955. No application having been made for continuation of this subsequent tenancy, any fresh application by way of amendment or otherwise, for continuation of the same would again be barred by provisions of Section 10 of the said Ordinance. 30

WITHOUT PREJUDICE to ground 1 above, the respondent states as follows:-

2. The tenants repeatedly broke the terms and conditions of the tenancy referred to in the tenants' application in that they never paid the monthly rent punctually. They even broke the terms and conditions of their new tenancy commencing from 1st January 1955 and had to be sued for recovery of arrears of rent.

3. Greater hardship would be caused to respondent by grant of new tenancy in that the tenants are not likely to pay the rent punctually and it will be necessary for the respondent to have recourse to court for recovery of rent and that even then full recovery of rent may be doubtful.

4. The premises occupied by the tenants are neither a shop nor a hotel, as they consist of an eating house.

5. The application herein having been made only by one partner of a tenant firm and not by all partners collectively or individually, is not properly before the Court on behalf of the tenant firm and does not lie.

6. The respondent states further that he is the owner and landlord of the premises and no person is likely to be affected by the grant of renewal of a new tenancy.

Dated at Nairobi this 3rd day of August 1955.

(Sgd.) D.V. Kapila  
ADVOCATE FOR THE RESPONDENT.

Filed by:-

(Sgd.) D.V. Kapila ,  
Advocate,  
Nairobi.

Copy to be served upon:-

Mervyn J.E. Morgan, Esq.,  
Advocate for the Applicant,  
Nairobi.

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Respondent's  
Answer in  
Landlord &  
Tenant Case  
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continued.

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No.29

NOTES OF EVIDENCE IN LANDLORD & TENANT  
CASE No.333 of 1955.

Notes of Evidence  
in Landlord &  
Tenant Case  
No.333 of 1955,  
15th August,  
19th September,  
4th, 5th &  
7th October  
1955.

IN THE RESIDENT MAGISTRATE'S COURT AT NAIROBI

ESTABLISHED UNDER THE LANDLORD & TENANT (SHOPS &  
HOTELS) (TEMPORARY PROVISIONS) ORDINANCE 1954

L & T Case No.333 of 1955

FAZAL ILAHI ... Landlord.

VERSUS

WACHIRA s/o GIKONYO a partner in GATHUTHI HOTEL. 10  
Tenant.

15-8-55

Mr. Akram for Mr. Morgan.

Mr. D.V. Kapila for Respondent.

Mr. Morgan in Mombasa on holiday.

Hearing 3.10.55.

(Sgd.) I. Gillopie.

19-9-55

Upon reading consent letter dated 8th  
September and signed by both parties' advocates, 20  
case taken out of the hearing list on the 3rd  
October and fixed for hearing on 5th October, at  
10-30 a.m.

(Sgd.) R.L. Le Gallais.

4-10-55.

Mr. D.V. Kapila for Respondent (Applicant)

Applies for C.C.3761/55 shall be produced.

Order: Mr. Abdulla to be asked to attend with

the file. Pripr permission to be obtained from  
Mr. Le Gallais.

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(Sgd.) I. Gillespie  
R.M.

Notes of Evidence  
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continued.

5-10-55

Mr. Morgan for Appellant.

Mr. D.V. Kapila for Respondent.

By consent. Clerk to be called first.

Manooar Dutt Gautama s/o

10 I am R.M.'s civil Court Clerk. I do not have  
custody of the records.

I. Gillespie.

CHATANYA HARIBHAI PATEL sworn states:-

I am R.M.'s Court clerk Civil Side. I have  
custody of the records.

I produce R.M.'s 3761/55 plaintiff. Fazal  
Ilahi vs. Gathuthi Hotel. Ex. A.

Nil.

I. Gillespie.

20 Al.

WACHIRA GIKONYO - Affirmed states:-

I am one of the people who paid the land-  
lord. We paid him Shs. 20,000/- We paid it in  
June 1953. I was going to buy a hotel premises  
which was being run by Fazal Ilahi.

30 We were to pay Shs.300/- rent. From April  
to September 1954 the premises was closed by Dis-  
trict Commissioner's order. We paid the rent for  
those premises late. I paid rent while the prem-  
ises were closed. I paid the current rent. I  
received a notice to quit. I cannot read this  
paper shown me. I remember giving evidence in  
the previous case. I did say I had received this

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letter Ex.1 on Ex. A.

Ex.1 on Ex. A - Dated 29-11-54 Notice to quit.

The premises is used for sale of cooked food and tea. There is a large room for eating and another small one. There is one kitchen. There are two latrines. There is a bathroom separate from latrine. There is a very small store. The measurements are on the piece of paper with Mr. Morgan. A man made those measurements for me. He is alive, and at his work.

10

The small dining room is about 4 ft. wide and 12 ft. long I think. It has no wash basin in small dining room. It is just used for eating.

Mr. Fazal Ilahi is in Court. When I got the notice I did not go to any lawyer. Fazal Ilahi asked me to pay Shs.750/-. In April I paid him Shs.750/- for January. In June I paid him Shs.750/- for February. In June I paid Shs. 750/- for March. I did not pay for April and May and judgment was given against me and I paid.

20

Since then I have paid Shs.750/- for June and Shs.750/- for July. I have also paid Shs. 750/- for August but not for September yet.

In June this year I received another letter. This is the letter Ex. 2. I took it to Mr. Morgan's office.

Ex. 2. Notice to quit of 24-6-55, which is Ex. 9 in R.M. 3761/55.

30

Then I made an application to this court on 19-7-55. It was drafted by a lawyer. It was done by Mr. Morgan, who is here in court.

Question. Did you see Mr. Morgan draft it for you.

Answer. (Having pause).

1. I saw him draft it.

2. It was brought to me and I signed it.

(Note the witness has been warned very carefully to answer the questions directly but he is not doing so).

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Notes of Evidence  
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continued.

I did not give the Advocate's clerk any money. I now want a lease at as small a rent as possible. There is no good business because people are few.

If I did not get a new tenancy I will not be able to find other premises.

10 The Advocates clerk

Chogge does not eat in my restaurant.

XXD. My tenancy commenced on 1st of June 1953. The rent was reserved at Shs.300/-

Note. Witness is not answering the question put to him.

Yes, I assumed for an unlimited period.

Yes, I was paying a monthly rent.

We agreed I should carry on the business. There was no fixed period.

20 I received the notice not to leave at the end of December 1954. After I received the notice I went to Fazal Ilahi. It was in January.

There I made a fresh agreement with him. It was for a fresh monthly agreement at Shs.750/- p.m. In June 1955 Fazal Ilahi has given me a new notice to quit. He wanted some more money.

I made the application on 19-7-55. I am now waiting the decision of the court.

30 Question:- If you wanted the old tenancy at 300/-, why did you not make the application in January?

Answer:- I did not know what to do.

Yes, my business was closed for April to September 1954.

Yes, people eat food there.

There is no arrangement for people to sleep there save for one person who prepares tea. He is my servant.

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continued.

Question. Do you sell cigarettes or things like that.

Answer. 1. I sell Soda. 2. I sell cashew nuts.  
3. I do not sell cigarettes.

(Witness will not answer such a question directly.)

The place is only an eating house. I am selling nothing else but food.

XXD. not complete.

Question by court:- Why was it you made no mention in your application of the agreement in January to pay Shs.750/- rent. 10

Ans. Because that rent was in excess.

Question. But there was an agreement.  
Why did you not mention it.

Answer. I did not mention it because the rent was too much.

I did not want to hide it. I have got a receipt.

(Sgd.) I. Gillespie.

Adjourned 2-20 p.m.

20

XXD. Cont.

Yes Respondent brought a case against me in the R.M.'s Court, in June this year.

He claimed two months rent for April and May 1955. Yes, he claimed at Shs.750/- per month.

Question: In that case you claimed you had never made an agreement for Shs.750/- rent?

Answer: I agreed to pay him Shs.750/- until I saw judge, Roberts.

Question: Was not your defence that there was no agreement to pay Shs.750/- . 30

Answer: He was demanding money for May month and I paid the whole amount.

Question: You made out your application in this

case on the rent of 300/- to help you fight the case in the R.M.'s.

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Answer: (1) When I paid him Shs.20,000/-, the rent, the rent was to be Shs.300/-.

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continued.

Witness again warned not to evade the question.

(2) No, that was not the reason. I put my application because the rent was higher.

10 I put in my application because he wanted to increase my rent by Shs.450/- at once.

When I paid Shs.20,000/- there were no fittings.

Question by court:

Were there any tables then which you brought.

Answer: Would I have paid that for these tables.

Question: Did you buy any tables in that Shs. 20,000/-.

Answer: He sold me the whole business.

20 Question: You must understand that when the court puts a question, an answer is required. Did you buy any tables included in that Shs.20,000/-.

Answer: Yes, there were three tables and one for the cashier. There was a refrigerator. There were two chairs.

Question: So it was not true when you said there were no fitting.

Answer: There were not many fittings.

30 XXD. Yes there were plates and sufurias, but there were not many.

The business was not very good at that time. The business was closed on 2-4-1954.

The business of an eating house between June 1953 and March 1954 was not good.

I could not know how much we were making



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continued.

a day there because sometime we had to waste meat.

Witness warned to answer question and not  
to ask the Advocate question.

No I was not making Shs.400/- to Shs.500/-  
per day.

XXD. I consider the value of the chairs, tables  
was worth about Shs.400/-. The refrigerator I do  
not know the value of. I have no idea of the val-  
ue.

One of the terms of the contract was that I 10  
was to get the benefit of the tenancy.

Yes he gave me the tenancy.

I. Gillespie.

Mr. Morgan.

A.W. I said I drafted the Application. I  
never saw it in my life. I may have to ask to  
give evidence.

I may wish to give evidence. I am asking  
to be allowed to go into the witness box. I will  
accept Mr. Morgan's word, he did not draft the ap- 20  
plication.

I wish to call my clerk to show that A.I did  
not intend to hide the agreement for Shs.750/-. he  
gave instruction about it. The position has arisen  
through my African clerk having allowed a precedent.

My African clerk did this entirely without  
instruction.

I apply to amend my application by substit-  
uting, the 1955 Shs.750/- tenancy for the 1953 Shs.  
300/- tenancy Sec - 2(9) 24-6-55. 30

Court: It was that item 2(9) which made me accept  
it that the application had not been drafted by an  
Advocate.

Mr. Morgan. I would urge that Ord.57/54 is for  
the tenant.

Is an African.

Some latitude should be allowed on pleadings drafted by Applicant.

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Had the benefit of tenancy not just.

Apply to amend application.

Mr. Kapila:

I have raised point of law in the pleadings O.VI. r.27 and 28 apply.

I could have raised the point this morning but felt there should be evidence.

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7th October  
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continued.

10 Re Application for amendment.

I very strongly oppose it. A.1 does not support Mr. Morgan's submission.

A.1 said he deliberately applied for the old tenancy not for a renewal of the new tenancy.

While I have a great deal of sympathy with Mr. Morgan. Application filed 20-7-55. Hearing of 3761/55 on 29-7-55. No application was made to the Court to amend.

20 Now at a very late stage this application is having made. I drew his attention to it in my answer.

O.VI R.18... see O.VI. R.17 of code of Civil Procedure Mulls 12 Edition - Volume 1. p.596. "Leave to amend when refused." "When plaintiff's case will be wholly displaced."

(3) Where the amend. would take away from the defendant, a legal right which has accrued to him by lapse of time.

He should have applied before end of July.

30 Respondent has now a legal right to eject, If amendment allowed, he will lose that right.

Applicant tried to have it both ways.

Litigants must not adopt tactics to mislead the Court.

I now apply Rule 22 Or.VI r.27 and 28.

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continued.

This point could not be disposed of until there was some evidence so I could not apply to court.

Now stage arrived for court's opinion.

I submit decision on this point of law will dispose of the whole suit.

This application is hopelessly out of time.

A.1 admit his tenancy which commenced in June at 300/- was terminated by the expiry of N.Q. of 29-11-1952. Under old 57/54 application should have been made by 24-1-55. That time cannot be extended by 10 any means.

On this ground case must be dismissed. The decision of the point will dispose of whole case.

Mr. Morgan.

I can see if the amendment is not allowed Mr. Kapila 'argument is good'.

If court is going to take this awful document (Application) is an application under Part II to extend the old tenancy, unless I can amend. I have "had it".

20

It is so awful it could be read to both or either 2 ( ) shows drafted by a person who knows nothing.

It is obviously absurd.

If the amendment is allowed.

I find it very different to answer.

(3) As Respondent will have lost something.

Adjourned 9-15 a.m. on 7-10-55.

I. Gillespie.

7-10-55.

30

Mr. Kapila for Respondent.

Representation for Mr. Morgan,  
who has not been entered yet.

I. Gillespie.

IN THE PRIVY COUNCIL

No.23 of 1957

ON APPEAL FROM THE COURT OF APPEAL  
FOR EASTERN AFRICA AT NAIROBI

---

B E T W E E N :

FAZAL ILAHI                      Appellant

- and -

GATHUTHI HOTEL                      Respondents

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RECORD OF PROCEEDINGS

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HERBERT OPPENHEIMER, NATHAN & VANDYK,  
20, Copthall Avenue,  
London Wall, E.C.2.  
Solicitors for the Appellant.

WRAY SMITH & CO.,  
3 & 4, Adelaide Street,  
London, W.C.2.  
Solicitors for the Respondents.