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Appeal No. 6 of 1962

25/1963

IN THE PRIVY COUNCIL

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN:

WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED (Defendants) — Appellants

- and -

JAFFERALI & SONS LIMITED (Plaintiffs) — Respondents

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from a judgment of Her Majesty's Court of Appeal for Eastern Africa (Forbes V.P. Crawshaw J.A. and Newbold J.A.) reversing a decision of Farrell J. in Her Majesty's Supreme Court of Kenya at Nairobi whereby he dismissed with costs the Respondents' claim against the Appellants for a sum of Shs 51,350/- damages for breach of an alleged agreement for the grant by the Respondents to the Appellants of a godown in Clarke Lane Nairobi.

2. The following facts were either admitted or established in evidence and are not in dispute:-

(a) The Appellants are a wholly owned subsidiary of Leslie & Anderson (East Africa) Limited and carry on the business of warehousemen having their main office in Mombasa. — p.14 ll.18-24; p.15 l.6

(b) On the 1st July 1957 the Appellants took a lease for a term of 5 years of certain warehouse property in Factory Street Nairobi (hereinafter called "the Factory Street premises") from Jafferali Madatally (the managing director of

the Respondent) and his two brothers Gulamali Madatally and Nazarali Madatally.

p.24 ll.24-32

(c) Owing to damp caused by seepage of water the premises proved unsuitable for the storage of goods and towards the end of 1957 the Appellants were anxious to terminate their lease and to find suitable alternative accommodation. Mr. Elliott (who was a director of Leslie & Anderson (East Africa) Limited and the manager of the Nairobi branch of the Appellants' business) entered into negotiations with Jafferali Madatally (hereinafter called "Mr.Jafferali") who on behalf of the Respondent offered to make available a godown in Clarke Lane Nairobi (hereinafter called "the Clarke Lane premises").

(d) On the 3rd December 1957 following a meeting with Nazarali Madatally Mr.Elliott wrote to Madatally Suleiman Verjee & Sons Limited (of which Company Mr. Jafferali was a director) a letter referring to terms on which it was proposed that the Appellants should vacate the Factory Street premises in which he said

p.107. Exhibit 3.

> "In connection with the offer of your Clarke Lane godown we have in our hands the offer of a similar type godown at a rental of £100 per month which after negotiation, we could probably obtain £90. We are, however, prepared to offer you a three year lease for your Clarke Lane godown at £112.10.0 per month provided you agree free vacation of Factory Street godowns.
>
> Kindly note the foregoing is, subject to approval by the General Manager of Wafco, Mr.Keir and by copy of this letter Mr.Keir is requested to confirm our comment on the proposals contained in this letter."

(e) Following the receipt by Mr.Jafferali of the letter above referred to between the 20th and 30th December 1957 further discussions (hereinafter referred to as "the December discussions") took place between Jafferali and Mr.Elliott following which the Appellants were let into possession of the Clarke Lane premises from the 1st January 1958 and on the 9th January 1958 Mr.Jafferali wrote to the Appellants a letter in the following terms:-

p.25 ll.10-20.

"Re: Godown Plot No. L.R. 209/1081.
Clarke Lane

In accordance with our mutual arrangement the above godown has been let to you on the following terms..... p.108. Exhibit 4.

(1) Monthly rental of the godown to be Shs. 2250/- net payable by you to us in advance.

(2) The godown has been let to you upon three years lease commencing from 1st January 1958.

(3) The lease will be prepared by our solicitors at your expense.

(4) Water, Light and Conservancy charges are payable by you.

...and usual conditions

Kindly confirm so that we could proceed with preparing the lease.

The possession of the godown has already been handed to you."

(f) On the 13th January 1958 the Appellants replied to the last-mentioned letter in the following terms:-

"Thank you for your letter of the 9th instant.

The terms as set out by you are agreed with the exception of No.2. We wish to have the lease for one year with an option of renewal. p.109. Exhibit 5.

Would you kindly forward to us a draft of the proposed lease as prepared by your solicitors so that we may examine it before signing."

(g) Subsequently a further meeting (hereinafter referred to as "the January meeting") took place between Mr.Jafferali and Mr.Elliott following which Jafferali wrote to the Appellant on the 25th January 1958 a letter in which he said p.37 l.1.

" We refer to your letter dated 13th instant, in reply to ours of the 9th inst.,

and to subsequent interview with your Mr. Elliott, it is now agreed that you are

p.109 Exhibit 6 renting the godown for a lease of three years from 1.1.58.

We are now proceeding to instruct our Solicitors to prepare a draft of lease and be sent to you for approval."

To this the Appellants replied on the 3rd February 1958 by a letter the material paragraph of which was in the following terms:-

p.111. Exhibit 8 "We are in receipt of your letter of the 25th instant and are disappointed that you appear unable to accede to our request for one year's lease with our option of extending for a further two years. May we ask you to kindly give this matter further consideration"

(h) No reply was sent to the last-mentioned letter but on the 17th February 1958 the Respondents' Solicitors submitted for approval a

p.112. Exhibit 9 draft lease containing a demise of the Clarke Street premises for a term of three years from

p.113. Exhibit 9A. the 1st January 1958. By letter dated the 14th March 1958 the Appellants raised certain points on the draft lease (not connected with the

p.118. Exhibit 12. length of the term) and further correspondence then ensued between the Respondents' Solicitors and the Appellants with regard to the provisions of the draft lease and in particular the Appellants' proposal that they should not be under any liability for repair save such as was occasioned by abuse of the Lessee. No agreement was reached on such proposal and on the 24th April 1958 the Respondents' solicitors wrote to the Appellants a letter concluding with the following paragraph:-

p.124. Exhibit 15. " Beyond this our clients are not prepared to accede to your suggestions. Our clients are not desirous of undertaking nor do they seek to cast upon you obligations which are manifestly more onerous than would be the case in an ordinary lease - and this is nothing more than an ordinary lease. If, for instance, you must insist on a clause which renders our clients responsible for all repairs save only those directly attributable to abuse by you, our clients feel that no useful purpose can be served by a further continuance of the present relationship."

(i) The Appellants replied to the last-mentioned letter on the 29th May 1958 by a letter the material passage in which was as follows:-

" With reference to your letter of the 24th instant, the matter has been carefully considered and we can only agree with the last sentence of your letter that no useful purpose can be served by a further continuance of the present relationship. p.126. Exhibit 17

Kindly note therefore, that we hereby formally tender one month's notice of our intention to vacate the warehouse on the above-mentioned plot. We will vacate the premises on the 30th June 1958."

Shortly prior to such reply (on the 17th May 1958) an instrument of Surrender in respect of the Factory Street premises had been executed such surrender being expressed to take effect from the 31st December 1957. The Appellants did in fact quit the Clarke Lane premises on the 30th June 1958. p.141. Exhibit 2.

3. In September 1959 the Respondents commenced proceedings against the Appellants claiming damages for breach of an agreement to take a lease of the Clarke Lane premises for a term of 3 years from the 1st January 1958 at a rent of Shs 2250/- per month. By their plaint in the action the Respondents pleaded that such agreement was made at Nairobi in or about January 1958. By their Defence the Appellants denied that any concluded agreement for a lease was ever reached and that in any event the alleged agreement was not registered as required by law and could not in law be sued upon. p.2 l.17 p.4.

Order XIV Rule 1(5) of the Civil Procedure (Revised) Rules 1948 for the Colony and Protectorate of Kenya provides as follows :-

" At the hearing of the suit the Court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."

p.7. l.17. Pursuant to the said Rule the following issues were suggested at the hearing by counsel for the Respondents

p.7. "1. Was any agreement for a lease of premises on Plot L.R. 209/1081, Clarke Lane, Nairobi, concluded between the parties? If so, for what term and at what rent?

2. If such agreement concluded, can it be sued upon notwithstanding the same is not registered? 10

3. If agreement concluded and can be sued upon what damages?"

p.7. l.30 The said issues were accepted by the Appellants subject to the insertion in the second part of the first issue of the words "upon what conditions" and such issue was then clarified by counsel for the Respondents who stated the Respondents' case as being that an

p.7. l.36. oral agreement was reached in November or December 1957. 20

4. At the hearing of the action (which took place before Farrell J. on the 2nd and 3rd May 1960) no argument was addressed to the Court on the second of the above mentioned issues and the quantum of damages was not disputed the only issue before the Court being whether there was a concluded oral agreement for a lease between the parties in November or December 1957. The case was argued on behalf of the Respondents on

p.8. l.14. the basis that a binding oral agreement for a 30 lease was arrived at not as originally pleaded

p.9. ll.21-36 in or about January 1958 but in the course of the December discussions and evidence was adduced on behalf of the Respondents in support of such contention. As to this the learned judge in the course of his judgment said:-

p.28. ll.28-44. " The Plaint in paragraph 5 sets up an agreement between the Plaintiffs and the Defendants made 'in or about January 1958' for a lease of the Clarke Lane premises for a 40 term of 3 years commencing on the 1st January 1958 at a rental of Shs. 2,250/- per month. It is not specified whether the agreement was oral or in writing. Mr.Cleasby for the Defendants objected that the facts as opened by Mr.Nazareth for the Plaintiffs suggested that the agreement (if any) was concluded not

in January 1958 but in the latter part of December 1957. Mr.Nazareth declined to ask for any amendment and elected to stand or fall on the allegation as set out in his plaint on the ground that the description 'in or about January 1958' was wide enough to cover an agreement concluded in the last days of December 1957"

In support of the Respondents' case Mr. Jafferali's evidence was that he reached an oral agreement with Mr.Elliott between the 20th and 30th December 1957 and that there was then no difference on any point. He regarded everything as binding after his conversation in December. p.9 l.35.

In his evidence Mr.Elliott agreed that there might have been discussions between the 3rd December 1957 and the 9th January 1958 but stated that by the 9th January 1958 the Appellants had not agreed to a three year lease and that the letter of the 13th January 1958 was written on his instructions. p.15. ll.9-12.

As regards this conflict of evidence the judge said

" The direct evidence of the discussions that took place between Mr.Jafferali and Mr.Elliott late in December 1957, is inconclusive, consisting of an assertion by the one and a denial by the other. The probabilities also are evenly balanced. For the Plaintiffs it may be argued that the possession given to the Defendants makes it rather more than less likely that a concluded agreement was first reached, though such possession is not exclusively referable to a three year term as alleged by the Plaintiffs: for the Defendants it may be argued that Mr.Elliott, having made it plain in his letter of the 3rd December that he had no authority to enter into a binding agreement without reference to the Defendants' general manager in Mombasa, would have been unlikely to do so on his own responsibility towards the end of the same month. In this connection it is to be noted that the Plaintiffs had been warned at the outset that Mr.Elliott did not have full authority as agent for the Defendants, and there is no evidence that anything was said to Jafferali that might have led him to believe that the position had been changed. On the contrary, Mr.Elliott claims to have informed

the Plaintiffs on a number of occasions that confirmation of any arrangement would be required from Mr.Keir: but as this claim was not put to Jafferali in cross-examination, its value as evidence is diminished."

6. The learned judge went on to state that in view of the conflict in direct evidence a decision had to be sought from a consideration
p.35. l.31. of the correspondence which he then proceeded to review. Dealing with Mr.Jafferali's letter of the 9th January 1958 and the Appellant's reply of the 13th January 1958 he said:

" The Defendants are asked to confirm the arrangement as set out, and if they had done so in unequivocal terms I should have had no hesitation in holding that conclusive and binding agreement had been reached and that
p.36 ll.9-46. all that remained was to draw it up in formal terms.

The Defendants' reply of the 13th January is short but significant. The material words are in the second paragraph:-

'The terms as set out by you are agreed with the exception of No.2. We wish to have the lease for one year with an option of renewal.'

Disregarding for a moment the exception, the question is what meaning is to be given to the words 'the terms as set out by you are agreed.' Prima facie they should be taken as relating back to the words in the letter of the 9th January 'the above godown has been let to you on the following terms'. But the words are equally capable of meaning 'the terms you propose are acceptable to us', that is, as having a future rather than a past reference, and in the light of the immediately following sentence the conclusion is inescapable that this was the intention. If the writer of the letter had intended to confirm that an agreement had been reached but to question the correctness of one of the terms set out he might have been expected to say that what had been agreed was not a lease for three years, but a lease for one year with an option of renewal. He did not say this, but used the words 'we wish to have a lease for one year.' The question

relates to an essential term of the agreement, and the language used suggests that the writer did not consider that any concluded agreement had been reached, at any rate on this point."

6. The learned judge then proceeded to consider the evidence with regard to the January meeting and the subsequent correspondence between the parties. He said:

" It is common ground that a further meeting took place between Jafferali and Mr.Elliott between the 13th and 25th January but again there is a conflict of evidence as to what passed at that meeting. Jafferali says that he referred to Mr.Elliott's letter on the 3rd December, and the latter finally agreed to a three-year lease. Mr.Elliott says he told Jafferali that he would write to Mombasa and 'it was agreed that we should take a three-year lease.' If confirmation had to be obtained from Mombasa, it could not have been obtained in the course of the same discussion in which Mr.Elliott said he would refer to Mombasa: and in cross-examination Mr. Elliott said that confirmation had been received by the time the draft lease was submitted, which was on the 17th February. p.37 ll.1-32.

The pattern of the correspondence immediately ensuing on the meeting in January is very similar to that of the earlier correspondence..... In other words, Jafferali is saying that agreement had been reached, the Defendants that no agreement had been reached. The letters reflect the same conflict of evidence as has been disclosed by the evidence given in Court."

8. The learned judge did not consider that the correspondence between the Respondents' solicitors and the Appellants was of any great significance in relation to the issue but found that, so far as the Appellants were concerned, it was consistent with the attitude disclosed in the earlier correspondence that the Appellants continued merely in negotiations up to the 29th May when notice to quit was served. p.37 l.38.

9. In the result the learned judge held that the Respondents had failed to satisfy him that any binding agreement was concluded. He said

" The onus is on the Plaintiffs to satisfy the Court on the balance of probabilities that a binding and concluded agreement was arrived at p.38. ll.19 et seq.

between the parties as set out in the plaint. If the matter falls to be decided on the unsupported evidence of the witnesses, I should find the case not proved as I have no reason to prefer the word of one rather than of the other. If the balance is to be tilted in the Plaintiffs' favour, it can only be on the basis of the contemporary correspondence, and while there are letters written by Jafferali which lend support to the Plaintiffs' case, there are no letters on the other side which in any way amount to an admission against the Defendants and the correspondence on the Defendants' side is completely consistent with the Defendants' case as presented in evidence. My conclusion on the whole case is that the parties concerned in the discussions were never ad idem one believing quite honestly that an agreement had been finally reached, the other that the matter had never proceeded beyond the stage of negotiations. I accordingly hold that the Plaintiffs have failed to discharge the onus of proving that a binding agreement was ever concluded. The Plaintiffs' claim is accordingly dismissed and there will be judgment for the Defendants with costs."

10. From this decision the Respondents appealed to Her Majesty's Court of Appeal for Eastern Africa which unanimously allowed the Appeal and directed that judgment be entered for the Respondents for the damages claimed in the plaint and the costs of the action. On the hearing of the Appeal on the 12th July 1961 the Respondents abandoned the basis on which the case had been argued before Farrell J that there had been a concluded oral agreement in December 1957 and the case for the Respondents was argued on the basis that a concluded agreement for a lease was reached at latest before the 17th February 1958 when the draft lease was sent to the Appellants.

p.58. 11.18-26

p.73. 11.3-7

In support of such contention it was argued that the crucial matter was the January meeting and that the effect of Mr.Elliott's evidence was either that there was then concluded agreement for a lease for three years or that there was an agreement subject only to confirmation from Mombasa which was in fact obtained at some time prior to the 17th February 1958.

p.53. 11.3-13.

On behalf of the Appellants it was contended

that the Respondents having presented their case in the Court below on the footing of an oral agreement concluded in December 1957 and the witnesses having been examined and cross-examined on this basis it was not open to the Respondents on appeal to rely upon a different agreement then alleged to be concluded on some different occasion and that the only issue in fact tried by Farrell J. was the first issue as clarified by the Respondents' counsel namely whether an oral agreement was concluded in November or December 1957. p.53. ll.3-13.

11. The Court (Forbes V.P. Crawshaw J.A. and Newbold J.A.) rejected the Appellants' contention and held that the Respondents were entitled to rely on the new agreement alleged on the grounds (a) that the plea of an agreement made 'in or about January 1958' was sufficiently wide to cover such an agreement (b) that Farrell J. had stated the first issue in the Court below as being whether a binding agreement was "ever" concluded and (c) that inasmuch as the Appellants' case was that negotiations were continuing throughout the relevant evidence had been before the Court. In his judgment Crawshaw J.A. said

" Mr.Cleasby....says that as a result the case was fought exclusively on the issue whether there was a concluded agreement in December and that he has been embarrassed by the new argument raised on appeal. For instance he says that his cross-examination of Jafferali was directed to the alleged December Agreement, and that he could have led evidence to shew that at a later date a lease would only have been agreed if the terms had first been approved by the Respondent Company's solicitors, especially in view of the repairs which were required to the building. I think that had the Respondent Company been able to satisfy the learned judge that, whilst negotiations were still unconcluded, a new contentions term relating to repairs had been raised, then even though the length of term was subsequently agreed the learned judge might have been justified in holding that so long as the condition as to repairs was outstanding there was no binding agreement. This is a matter which I shall return to shortly. As to his adducing evidence, Mr.Cleasby may have been misled by the way in which the Appellant Company's case was conducted in the lower Court, but it is to be observed that the plaint says in or about January 1958 and no better particulars were p.89 ll.35 et seq.

asked for. Also the first issue is in general terms as to time."

After referring to certain authorities Crawshaw J.A. continued:

p.91. ll.9-37

" In the instant case as I have said, the learned judge's decision was not confined to the question whether there was a binding agreement in December, but was that no binding agreement 'was ever concluded.' In my opinion the learned judge was, on the pleadings and the issue, right in taking this broader view, in spite of the nature of Mr.Nazareth's submissions....It was the defence case that negotiations were continuing throughout, and any evidence produced by the defence to that effect would have been relevant. No new matter is now being relied on by Mr.O'Donovan which was not before the Court below, and I think he is entitled to adopt a different approach to the evidence than that adopted at the trial."

12. Forbes V.P. and Newbold J.A. were to the same effect. In his judgment Forbes V.P. cited the principle stated by Lord Watson in Connecticut Fire Insurance Co v. Kavanagh /1892/ A.C. 473 that the raising of new points of law for the first time in an Appellate Court ought not to be permitted unless the Court is satisfied that the evidence upon which it is asked to decide "establishes beyond doubt that the facts, if fully investigated, would have supported the new plea." He said

p.95. l.47

p.96. ll.1-20.

"I stress the words 'if fully investigated'. In the instant case Mr.Cleasby for the Respondent Company contended, in effect, that the evidence led was directed solely to the point whether or not an agreement was concluded in December, and that the facts in relation to the Appellant Company's case as now put forward have not been fully investigated. I have considered this submission carefully and have come to the conclusion that it is not justified. The Respondent Company's case was that the parties never got beyond the stage of negotiations which were still continuing in April. Evidence was accordingly given of the correspondence between the parties and contacts between their representatives up to April and later. Looking at that evidence, it appears to me that the relevant matters were in fact fully investigated and that all the available relevant evidence is before the Court."

13. As regards the merits of the Appeal the Court unanimously held that a binding agreement had been concluded at some time before the 17th February 1958 because by that date Mr.Elliott had received from the Appellants confirmation that they agreed the term of three years. Crawshaw J.A. accepted that Mr.Elliott had no authority to conclude a binding agreement of lease without confirmation of the managing director of the Appellants. He held however that the receipt by Mr.Elliott of confirmation that they would accept a three year term was itself sufficient to constitute a binding agreement since there was then no other outstanding term to be agreed. He said: p.79 l.20.

> "The term of three years was at least agreed by the 17th February, on which date the draft lease was sent to the Respondent Company, for Elliott in cross-examination said 'the draft lease provided for a term of three years. By that time confirmation had come from Mombasa for a three year lease'. It is not in evidence exactly when confirmation was received." p.89. l.22.

Later in his judgment the learned Judge of Appeal said:

> "I think the key to the situation is to be found in the letters of the 9th and 13th January respectively and that the learned judge was fully justified in implying that had the Respondent Company's letter of the 13th January contained no exception to the terms set out in the letter of the 9th he would have held that it would have concluded a binding agreement ..... With respect, I think where the learned judge went wrong was in not pausing to consider the effect, following these letters, of Elliott obtaining confirmation from the Respondent Company that it agreed the term of three years. At that time no other conditions of the lease were in disagreement."

14. The Appellants submit that in considering these letters and reaching the conclusion that their effect was that a concluded agreement had been reached on all terms except the length of the lease Crawshaw J.A. misconceived the finding of fact by Farrell J. at the trial. Farrell J. found as a fact that in the December discussions p.36. ll.42-46.

p.36. ll.42-46. the parties were not ad idem. Mr. Jafferali thought that he had concluded an agreement whilst Mr.Elliott regarded himself as still negotiating the terms of a proposed lease and it is submitted that it is clear from the judgment of Farrell J. that he considered that the importance of the Appellants' letter of the 13th January was not only that it showed that there was no agreement as to the length of the lease but also that it was written on the basis that the parties were still in negotiation. The finding by the Court of Appeal for Eastern Africa that a concluded agreement had been reached on all terms except the length of the lease was inconsistent not only with the learned trial judge's findings of fact as regards the December p.38. ll.37-40. discussions but also with his final conclusion expressed after seeing and hearing the witnesses when he held that the parties were never ad idem one believing quite honestly that agreement had been finally reached, the other that the matter had never proceeded beyond the stage of negotiations.

The inferences drawn by the Court of Appeal that there were no further terms to be negotiated beyond the term of the lease ignored (a) the fact that the parties were contemplating the negotiation and preparation of a formal lease (b) the fact that no discussion had taken place regarding the conditions to be incorporated in such lease and (c) the subsequent negotiations p.30. l.5. as to the terms of such lease all of which it is p.37. l.41. submitted were rightly taken into account by the p.38. l.3. learned judge in considering whether the parties were still in the process of negotiation.

15. Crawshaw J.A. then considered the Appellants' letter of the 3rd February 1958. It is clear from his judgment that he did not consider that at that stage any binding agreement had been concluded since his consideration was directed to the question of whether the letter was written with a view to introducing a new term relating to repairs into the negotiations (which would have been irrelevant had an agreement already been concluded). He said:

p.92. ll.13-33. "I do not think it can be said however that this was written on the basis of introducing a new condition relating to repairs: it might perhaps have been thought by Respondent Company, rightly or wrongly, that under the

'usual conditions' which were to be incorporated in the lease such repairs would be the obligation of the landlords. It was not until its letter of the 14th March that the Respondent Company, in commenting on the draft lease, first introduced specific terms relating to liability for repairs, a matter on which agreement was never subsequently reached.

Looking then at all that had happened prior to the draft lease being submitted to the Respondent Company, it can be said that all the terms which had been under negotiation, including the term of three years, had by then been agreed by the parties, and no condition not previously raised was in dispute."

16. Forbes V.P. and Newbold J.A. concurred in the reasoning of Crawshaw J.A. In his judgment Newbold J.A. said:

"Mr. Elliott stated in his evidence that the draft lease provided for a term of three years and by that time confirmation had come from Mombasa for a lease for that period. I understand this to mean that the period of three years had been agreed to by the Respondent on or before the 17th February 1958. As that was the last term of the agreement which had to be settled, then a concluded agreement must have been reached unless, before that term was settled, new terms, as for example, the liability to repair, were introduced into the negotiations." p.98 ll.34-45.

17. The Appellants submit that in so holding the Court was in error. It was accepted that there was no binding and concluded contract at the December discussions and it is clear from Crawshaw J.A.'s judgment that he did not consider that any concluded agreement was reached at the January meeting for in such event a consideration of whether the letter of the 3rd February 1958 introduced a new term would have been irrelevant. Farrell J. found as a fact that the confirmation from Mombasa was not received by Mr.Elliott at the January meeting and there was no evidence of any kind that the willingness of the Appellants to accept a three-year term was ever communicated to Mr.Jafferali or anyone acting on his behalf. Indeed the evidence was to the contrary for Mr. Jafferali in his evidence stated that nothing was heard from Mr.Keir. The correspondence p.37. l.10. p.12. l.7.

following the January meeting made no mention of such confirmation and there was no evidence of any subsequent meeting or discussion between the parties or their respective representatives. The basis of the judgment of Crawhsaw J.A. was therefore either that the mere receipt by the Appellants' own agent of confirmation of their willingness to accept a term of three years was itself sufficient to conclude a binding contract (which the Appellants submit was wrong in law) or that such confirmation was communicated to the Respondents prior to the 17th February 1958 (which was contrary to the Respondents' own evidence).

18. The Appellants further submit that the Court of Appeal was wrong in entertaining a submission by the Respondents basically different from that made by the Respondents at the trial and in holding that such submission was open to the Respondents on the pleadings. Having regard to the provisions of the Civil Procedure (Revised) Rules 1948 hereinbefore referred to the Court was bound to decide the case not upon the pleadings but solely upon the issue as framed at the trial namely whether an oral agreement had been concluded in November or December 1957. Although the learned judge at the beginning of his judgment stated the only issue as being "whether
p.24. l.13. the parties ever entered into a concluded and binding agreement" the Appellants submit that this was in fact a misstatement or an incomplete statement of the issue as framed and that it is clear from the judgment of the learned judge that he was in fact considering only the issue formulated and clarified by counsel for the Respondents namely whether an oral agreement was concluded in November or December 1957.

In stating the facts the learned Judge said:

p.25. ll.10-26 "Between the 20th and 30th December 1957 further discussions took place between Mr. Elliott and Jafferali. There is a fundamental conflict of evidence between them as to the upshot of these discussions. Jafferali says that a binding agreement was entered into under which the Defendants agreed to take a lease of the Clarke Lane premises for a period of three years commencing on the 1st January 1958 at a monthly rental of Shs. 2250. Mr. Elliott says that the only terms agreed were the date of occupation and

the rental, and that in any case the negotiations were subject to the approval of the General Manager, Mr. Keir. He denies that there was any agreement for a three years lease or that he had authority to enter into such an agreement."

Having stated the principles of law applicable the learned judge said:

"The Plaintiffs' case is that a concluded and binding agreement was arrived at orally in the last days of December 1957: the Defendants' case is that the parties never passed beyond the stage of negotiations and that no concluded agreement was ever reached." p.34. l.41.

He then proceeded to review the evidence regarding the December discussions and continued: p.35. ll.1-30.

"In view of the conflict in the direct evidence, a decision is to be sought primarily from a consideration of the correspondence, and particularly of the letters dated respectively 9th January, 13th January, 25th January and 3rd February. p.35. l.31.

The Appellants submit that it is clear that the learned judge was considering the said letters solely in relation to the only issue before him namely whether an agreement was reached at the December discussions and that when the learned judge said "a decision is to be sought primarily from a consideration of the correspondence" he was referring to a decision on that issue and that issue alone.

19. The Appellants further submit that the facts upon which the Court of Appeal held that an agreement had been reached were never fully investigated. On the basis that (as submitted at the trial) a completed oral agreement was concluded at the December discussions it was not material to lead evidence or to cross-examine as to the date on which confirmation from Mombasa was received or as to the terms of such confirmation or whether it was communicated to the Respondent. On the basis on which the Court of Appeal decided the appeal it was in the Appellants' submission vital to know the terms upon which such confirmation was given, whether it was subject to any restrictions or conditions, when it was received by Mr.Elliott and whether or when (if at all) it was ever communicated

to the Respondents. Having regard to the manner in which the case for the Respondents was presented at the trial those matters were never investigated and the Appellants submit that the decision of the Court of Appeal was based upon an inference (contrary to the evidence before the Court) (a) that the confirmation of the Appellant given to Mr.Elliott was unqualified and (b) that it was communicated to Mr.Jafferali or his representatives at some time prior to the submission of the draft lease on the 17th February 1958.

20. The Appellants further submit that even on the footing that the case presented by the Respondents was within the issue as framed the Court of Appeal did not in fact determine that issue as formulated since the conditions upon which a lease was to be granted under the agreement found by the Court to have been concluded were not and could not on the evidence be determined by the Court.

21. The Appellants accordingly submit that the judgment of Farrell J. was right and the judgment of the Court of Appeal for Eastern Africa was wrong and that this appeal should be allowed for the following, amongst other

R E A S O N S

(1) BECAUSE the decision of the Court of Appeal was based on a misconception of the findings of fact by the trial judge:

(2) BECAUSE the decision was contrary to the trial judge's finding of fact after seeing and hearing the witnesses that the parties were never ad idem:

(3) BECAUSE the mere confirmation by the Appellants of their willingness to take a three-year lease (even if unconditional) could not in the absence of communication to the Respondents constitute a binding agreement:

(4) BECAUSE there was no evidence as to the terms of such confirmation or that it was unconditional:

(5) BECAUSE the decision insofar as it was based on the communication of such willingness to the Respondents was contrary to the Respondents' own evidence and there was no other evidence from which such communication could be inferred.

(6) BECAUSE it was not open to the Respondents to raise on Appeal or to the Court of Appeal to decide an issue not raised or formulated at the trial.

(7) BECAUSE it was not open to the Respondents to rely on appeal on an agreement basically different from that relied on at the trial and based upon inference from matters which were not fully investigated at the trial.

(8) BECAUSE the decision of the Court of Appeal was based on a misconception of the issue formulated at the trial namely whether an oral agreement was concluded in December 1957 (on which the Court did not differ from the learned judge).

(9) BECAUSE the Court of Appeal did not and could not decide the issue as to the conditions upon which a lease was to be granted under the new agreement relied upon by the Respondents.

(10) BECAUSE the judgment of the Supreme Court of Kenya was right and ought to be restored and the judgment of the Court of Appeal was wrong and should be reversed.

E.F.N. GRATIAEN

PETER OLIVER.

Appeal No.6 of 1962

IN THE PRIVY COUNCIL

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN :-

WAREHOUSING & FORWARDING COMPANY OF EAST AFRICA LIMITED (Defendants) — Appellants

- and -

JAFFERALI & SONS LIMITED (Plaintiffs) — Respondents

CASE FOR THE APPELLANTS

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