REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL NO. 8 OF 1982

BWTWEEN

1. LALCHAND DOULATRAM VHEROOMAL CHOITRAM

2. JILAMATMAL DOULATRAM BHEROOMAL CHITRAM

3. MOHAN DOULATRAM VHEROOMAL CHOITRAM…….....APPELLANT

AND

HERTA ELIZABETH CHARLOTTE NAZARI …….RESPONDENTS

(Appeal from a ruling and order of the High Court of Kenya at Nairobi (Simpson, J.) dated 6th July, 1981

in

Civil Case No. 1287 of 1975

JUDGMENT OF MADAN, J.A.

The foundation for this litigation between the appellants (plaintiffs High Court) and the respondent (defendant) was laid when these parties entered into an oral agreement during December, 1974 for the sale and purchase by the defendant and the plaintiffs respectively, of the defendant's property L.R. No.214/575, known as "Owl House' situate in Muthaiga, Nairobi for the agreed price of shs. 740,000/=. After some argument the defendant finally accepted that she received an initial payment of shs.200,000/= on account of the purchase price from the plaintiffs as contended by them.

When the sitting tenant vacated the property the defendant entered into an agreement to lease it to the Government of the United States of America(U.S.A.I.D.) for five years from 15th March, 1975 at the monthly rent of shs.7,000/= two years rent amounting to shs.168,000/= to be paid in advance (hereafter referred to as the lease). She offered the benefit of the lease to the plaintiffs at the price for the property originally agreed between them. There followed a considerable amount of acrimonicus and undignified correspondence between the advocates of the parties (for the sake of brevity hereafter referred to as Mr Khanna for the plaintiffs and Mr. Malik-Noor for the defendant). Allegations and denials were made in the correspondence that when the agreement for sale was entered into thereafter the defendant held the property as a trustee on behalf of the plaintiffs who wanted it with vacant possession, that she was in breach of her trust by agreeing to lease it at all, and in particular at less than the market rent; that she had also rendered herself liable for the shortfall in rent and other damages.

Perhaps mollified by the short passage of time, as a result of a letter written by Mr. Maliki-Noor on

April 7 and answered by Mr. Khanna on the following day, the parties agreed to complete the deal subject to leaving open the areas of disagreement between them to be resolved later if need be by a suit in court. The terms now agreed were that the plaintiffs tendered a cheque for shs.240.000/=, their Bank having previously agreed to pay to the defendant the balance of the purchase price shs.300,000/=.

On April 9 Mr. Malik-Noor sent the title deeds of th property to Mr. Khanna to enable him to draft a conveyance. On April 14 he wrote to the Bank's advocates that he had asked Mr. Khana to return the documents of title to him together with a draft conveyance for this approval, and thereafter for execution by the defendant. He also wrote that the duly executed conveyance and all other documents of title would be sent to enable the mortgage to be prepared.

On April 15 Mr. Khanna forwarded a draft conveyance for Mr Malik-Noor's approval. On April 17 the Bank's advocates wrote to Mr. Malik – Noor undertaking to pay to him the entire balance of shs.540,000/= instead of shs.300,000/= formerly undertaken to be paid by them, upon registration of a clean conveyance of the property in favour of the plaintiffs, a charge by them over the property in favour of the plaintiffs, a charge by them over the property in favour of plaintiffs, a charge by them over the property in favour of the Bank , and payment of a proportionate part of the advance rent of shs.168,000/=. The plaintiff cheque for shs.240,000/= was not paid for reasons which are not relevant.

On April 21 Mr Malik – Noor returned the draft conveyance duly approved by him with some minor amendments to Mr. Khanna. He also sent some other documents of title to the Bank's advocates on the same day to enable them to prepare the mortgage. He asked them to confirm that the Bank would pay to him shs.540,000/= upon conclusion of the formalities, and promised to send the executed transfer shortly. He added that the defendant would account for the plaintiffs' share of the advance rent at the appropriate time. The Bank had already agreed on April 17 to pay shs.540,000/= to Mr. Malik-Noor.

The draft conveyance was engrossed including the amendments. It was executed by two of the three plaintiffs, and went to Bombay for execution by the third plaintiff.

At this point the agreement between the parties stood as follows: The plaintiffs were buying and the defendant was selling to them her property for shs.740,00/=. She had been paid sh.200,000/= on account of the purchase price. Her advocate supplied the documents of the title of the property to Mr. Khanna, and approved a draft conveyance thereof in favour of the plaintiffs. He asked for an d received an undertaking by the plaintiffs' Bank to pay to him for the credit of the defendant the balance of the purchase price shs.540,000?=. The approved engrossed conveyance was executed by two plaintiffs.

As far as the saleof the property was concerned only completion of the agreed documents remained to be carried out. All else had been agreed and settled between the parties.

On May 6 Mr. Malik-Noor asked Mr. Khanna to confirm that he had sent a copy of the conveyance to the Bank's advocates. He confirmed this with the Bank's advocates on the same day. Mr. Malik-Noor also informed Mr. Khanna that U.S.A.I.D. proposed to make substantial alterations to the property at their own expense. He asked Mr. Khanna to confirm that he plaintiffs had no objection. Mr. Khanna advised on May 7 that U.S.A.I.D. should apply direct in writing in the first instance to the plaintiffs.

On May 14 Mr. Malik-Noor informed Mr Khanna that as a result of the delay caused by the plaintiffs in giving their approval to the proposed alterations U.S.A.I.D. had "withdrawn" from the lease, and they intended to seek diplomatic immunity. Mr Khanna replied on May 15 that the plaintiffs had no intention of withdrawing from the sale or condoning the wrongful letting to U..S.A.I.D.

On May 19 Mr Malik-Noor informed Mr. Khanna that U.S.A.I.D. had withheld payment of the advance rent pending receipt of consent to the proposed alterations. He asked Mr. Khanna to confirm that now the sale was to proceed on that basis. A quick change took place in Mr. Khanna's approach. He replied that the defendant had sold the property subject to the lease. So when was to be the consideration for letting her off the condition as to the lease and passing the advance rent. Mr. Malik-Noor replied on May 23 that his client was still prepared to sell the property with vacant possession. In his reply dated

May 30 Mr. Khanna wrote that without prejudice the plaintiffs would be prepared to consider proposals for modification of the bargain to help out both Mr. Malik-Noor and the defendant.Mr. Malik-Noor replied on June 3 to say that the lease was dead, and the plaintiffs could still have the property with vacant possession which was what they had always been clamouring for. There was no question of any modification of the bargain. Mr. Khanna's new approach was reflected in his reply of June 14 that as the plaintiffs would lose considerably in completing without the benefit of the two years advance rent they were willing to complete with an appropriate and fair compensation which was shs.100,000/= abatement from the purchase price, that the defendant did not wish to reduce the price in any way.

On July 31 the Bank's advocates returned the documents of title to Mr. Malik- Noor in compliance with his request made to them.

We will go back in time. On July 1 the plaintiffs filed their suit against the defendant in which they claimed specific performance of the agreement for sale of the property together with several other reliefs. The defended filed her defence containing averments which said that negotiations took place for sale of the property for shs.740,000/= subject to the U.S.A.I.D. lease but no final binding agreement was concluded between the parties. Alternatively, if any such agreement was concluded the same subject to the condition, namely, the continuance of the said lease to U.S.A.I.D. which was unfulfilled. Although the lease was registered on April 7, U.S.A.I.D. withheld payment of rent pending the carrying out of certain alterations to the property which fell through as a result of the plaintiffs failing to give their consent thereto. The defendant offered to sell the property with vacant possession but the plaintiffs refused to accept it. At no time was there any agreement of which the plaintiffs were entitled to claim specific performance.

The verbose reply to defence did not add anything new or useful to the pleadings.

The plaintiffs filed summons for directions under Order LI rule 2. They asked inter alia for judgment (without waiting for determination of any other question between the parties) to be entered for them and against the defendant pursuant to Order XII rule 6 for specific performance of the agreement and conveyance of the suit property tot hem upon the grounds that sufficient admission of the facts had been made in letters to be found in an attached bundle of documents, and in a draft conveyance duly signed as approved by the defendant's advocate which entitled the plaintiffs to immediate judgment to the extent then sought by them. To avoid difficulties arising from procedural technicalities the plaintiffs also lodged and consolidated a motion with their summons to the same effect.

The plaintiffs have appealed against the ruling of Simpson, J. (as he then was) who dismissed their application. The learned judge said:

> "To entitle a party to judgment admissions must be clear. Judgment should be given under Order XII rule 6 only in a very plain case.
>
> In this case I am asked to analyse the pleadings, the correspondence and other documents and apply the relevant law to determine whether or not admissions are disclosed entitling the plaintiffs to specific performance and damages.
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> It is very far from being a plain case. Order XII rule 6 was not intended to be used in this way. The application goes far beyond what is envisaged. It is dismissed with costs to the respondent."
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> Order XII rule 6 reads:- "6. Any party may at any stage of a suit, where admission of fact had been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

For the purpose of Order XII rule 6 admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and

clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed there is no other way, and analysis is unavoidable to determine whether admission of fact had been made wither on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced.If he allows or refuses an application after having done so that is another matter. In a case under Order XII rule he had then exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law.

The best exposition of rule 6 which I have met so far comes from Roskill, L.J. in a case in which the order ought to have been refused, i.e. in Technistudy v Kelland (1976) 1 WLR 1042 at page 1046 where he said:

The learned judge said “in this application on a summons for directions Mr. D.N. Khanna in a convoluted and complex sentence 21/2 pages in length seeks judgment on admissions (without waiting for determination of any other question between the parties) pursuant to Order XII rule 6 for specific performance of an agreement for sale, damages for delay and various other reliefs”. It was something like what Geoffrey Lane, L.J. felt in Technistudy v Kelland (supra) at page 1046: i.e. “the pleadings are masterpieces of obscurity”. The memorandum of appeal in this court is a mass of jumbled conudrums which runs into thirty grounds of appeal, and it is ten pages in length.

Pleadings should be precise, models of clarity and simplicity of expression. The judge has to understand them in order to understand the case. Long repetitive argumentative averments most of which are suitable subjects for evidence, and argumentative grounds of appeal, only cause confusion. They disincline a judge and lead him to say what the learned judge understandably said towards the end of his ruling.

If the learned judge’s attention had been drawn to section 54 of the Transfer of Property Act, I don’t think he would have rested his attention as he did upon the averments whether the defendant had assumed the role of a trustee for the plaintiff, a stance which the plaintiffs abandoned before us because she did not become a trustee. Section 54 enacts that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. And section 55(6) of the Act says that a buyer is entitled to rents of the property where the ownership of the property has passed to him.

It was clearly incorrect to state in the defence that negotiations took place for sale of the property subject to the U.S.A.I.D. lease but no final agreement was concluded between the parties. Alternatively, if any such agreement was concluded the same was subject to the continuance of the lease which was unfulfilled.

We know there was a sitting tenant when the first oral agreement was made between the parties in 1974. The lease was not contemplated then. At that stage it was as remote as the Roman Empire. The plaintiffs made it clear in the correspondence exchanged between the parties that they did not want the lease at all. There was no reference to continuance of the lease except for the first time in the defence. It was a full red herring if ever there was one.

It was also incorrect to state that the plaintiffs refused to accept the property with vacan possession. In fact they agreed to accept the property, first with the lease as fait accompli, and, when it became a dead letter, without it. Therefore, no further reference to it, or the proposed alterations, which the defendant need not have referred to the plaintiffs for their approval, was necessary. These matters diverted attention from the true issues.

The new negotiations between the parties took a concrete shapo with Mr. Malik- Noor's letter of April 7. The problems arising out of the demise of the lease, and the nonavailability of the advance rent had been resolved because finally the defendant agreed to sell and the plaintiffs to purchase the property with vacant possession at the price and upon terms as to payment under a completely new binding contract made between the parties requiring only the singing of documents for completion as set out earlier.

It did not matter any more, as the learned judge seemed to think whether the plaintiffs overlooked the fact, which they did not, that it was no longer possible to proceed with the contract subject to the lease.

Mr. Khanna made an overture for abatement of the purchase price by Shs.100,000/= after a binding contract had already been made between the parties which could only be altered by a new binding contract. This did not happen. There was no new bargain or variation made, only an attempt at variation . The original contract stood. In his letters of May 6 and 14 Mr. Malik-Noor spoke of "sale" as he could go. Be that as it may, he did not elighten us how or why it was arguable only.

Mr. Couldrey submitted that the plaintiffs repudiated that contract by asking the price to be reduced by shs.100,000/=. A binding contract is not repudiated by a flighty proposal to amend one of its terms. There must be a total refusal to perform it, or words or conduct which evince a well defined intention not to perform it.

At best Mr. Khanna's attempted to obtain abatement of the price was a try-on. At worst it was a flop.

The plaintiffs laid before the court all material which they had in their possession. They will not be able to produce anything more at the trial to prove their case. The relevant correspondence speaks for itself. The conveyance speaks for itself. Everything required for judgment to be entered for the plaintiffs was before the learned judge. On the basis of it, it became obligatory to exercise the court's direction in favour of the plaintiffs by granting their application.

I would allow the appeal with costs, set aside the order of the High Court, and substitute therefore an order for specific performance of the contract for sale and transfer of the property in favour of the plaintiffs with a direction that in the event of the defendant failing, neglecting or refusing to sign the necessary documents therefore the same be done by the Registrar on her behalf. I trust the rest of the suit in the High Court will be allowed to fade away and die. Already nearly 81/2 years have been spent over this dispute since the suit was first filed. A few more cases of similar duration would slam the label of tardiness upon our courts.

I would not give the certificate for two advocates asked for. The mix-up in the case arose because the plaintiffs in their plaint relied heavily and at length upon the first oral agreement. It was not until Mr. Price for them came to address the court in reply that he shifted over to the contract reached in the correspondence exchanged between the parties beginning April 7 through to May, and the draft conveyance with its engrossment upon which the appeal before us then became succinctly centered. Not until then was the equipage with which the suit was caparisoned shed. The plaintiffs have only themselves to blame for the confusion caused by their uncrystallised and prolix pleadings, by cluttering up and clouding the issues by their adherence at length to the first oral contract and trust which were both unceremoniously abandoned before us except only to prove the first payment of shs.200,000/=.

As Kneller, J.A. and Chesoni, Ag. J.A. agree it is so ordered.

Dated at Nairobi this 20th day of January, 1984.

C.B. MADAN

JUDGE OF APPEAL

JUDGMENT OF KNELLER, J.A.

I agree with the judgment of Madan, J.A. and the orders proposed in it save, with respect, for two.

Mr Price was right when he submitted that there came a time when the transfer of this property was accepted subject an amendment which was incorporated in the engrossment. There was a binding agreement on May 7 1975 and whatever happened after that could not and did not affect that bargain for there was no further agreement between the parties to vary it.

This was not made plain and obvious in the High Court or in this court until Mr. Price replied on the second morning of the appeal. So I would order that there should be no costs of the appeal. Goddard v Jeffreys 46 L.T. 904 CA: Dye v Dye 13 QBD 147, 158 CA: Kenya Commercial Commercial Bank Limited v James Osebe 1982 Civil Appeal 60 Hancox, Ag. J.A (as he then was) (unreported): of Babibkhan Sidikhan v Merat din Ahmed Bux (1945), 12 EACA 18, 19 (CA-K).

Had I been of the view that the appellants were entitled to the costs of this appeal I would have proposed it was an appropriate one for a certificate for two advocates.This depends upon the appreciation by this court of the nature of the appeal. See Sir Charles Newbold, P. in Pollock House Ltd v Nairobi wholesalers Ltd (No.2), (1972) EA 172, 175 (CA-K). Each case depends on its own facts and one must consider then all and remember that it can be a luxury for which an opponent should not be made to pay or in some case a precaution which it was proper to take so that the case of the party in question may be fully and properly presented to the court, and that the court may have every assistance possible in a difficult case in arriving at a proper conclusion. See Farewell, J. in In re W.T. Potts, Ex parte Epstein v The Trustee and the Bankcrupt, (1935) 1 Ch 334, 341 (a certificate for leading counself).

Reviewing the history of this matter to see what the interests of the parties were, and how complicated it was for them and the courts, I conclude that a certificate for two advocates would have been justified had the appellants been awarded their costs.

Delivered at Nairobi this 20th day of January, 1984.

A.A. KNELLER

JUDGE

JUDGMENT OF CHESONI, AG. J.A.

On 21st July, 1975, the appellants (plaintiffs) filed a suit by plaint against the respondent (defendant) in the High Court. The plaintiffs prayed for, inter alia, specific performance of an agreement of sale of a property in Nairobi by the defendant filed a statement of defence through her advocates M/S Malik-Noor on 6th August, 1975, and on 8th September, 1975, Messrs Khanna & Company advocates for the plaintiff, filed a reply. On 15th March, 1976, Messrs Khanna & Company, filed a summons for directions in which they asked for judgment on admissions pursuant to Order XII rule 6 of the Civil Procedure Rules for the two reliefs I have referred to herein above, without waiting for determination of any other question between the parties. The alleged admissions are contained in an affidavit sworn to by one of the plaintiffs, MOHAN DOULATRAM BHEROOMAL CHOTRAM, which was included in the bundle of Photostat copies of letters and documents marked “MDECI)” exchanged between the parties and were annexed to the summons for directions. On 18th April, 1980 Messrs Khanna & Company filed a notice of motion under Order L & 8, XI and XII rule 6 and what is stated as other rules applicable. The applicants asked for an order that the application by notice of motion be adjourned to and disposed of in chambers and that it be consolidated with the summons for directions especially item 21 thereof.The two applications were consequently by consent of the parties consolidated and adjourned into chambers for hearing. The High

Court after hearing the application held that there was so far as it could see no factual admissions made by the defendant or her advocate which would entitle the plaintiffs to judgment under Order XII rule 6. The judge, therefore, found that the case was not plain and dismissed the application with costs. The plaintiffs appealed to this court from that ruling some thirty grounds with one of the grounds consisting twenty-three paragraphs. Mr. Price for the appellants, however, argued all the grounds together.

> Order XII rule 6 provides as follows:- "6. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination and the court may upon such application make such order, or give such judgment, as the court may think just."

This rule is in all material respects similar to rule 6 of Order XII of the of the Code of Civil Procedure, 1908 of India, which was a reproduction Order 32 rule 6 of the English Rules of Supreme Court. The new English provision is now Order 27 rule 3. The rule enables either party to get rid of so much of the action as to which there is no controversy: see THRORPT vs HOLDSWORTH, (1976) 3 C.D 637 at page 649 and MULLA ON THE CODE OF CIVIL PROCEDURE ACT v of 1908, 13th Edition Vol. 1 p. 854. Rule 9(1) (3) of Order VI defines what admitted facts in a pleading are. That rule says this:

> "9(1) ……., any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it." www.kenyalawreports.or.ke (3) …….., every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be sufficient traverse of them."

Each party is, therefore, required by the foregoing rules to deal specifically with every allegation of fact the truth of which he does not admit. Rule 9(2) requires him to make his traverse by a denial e.g. "I deny a statement of non admission e.g. :I do not admit", either expressly or by necessary implication. The court should in an application for judgment of denials or no definite refusals to admit. The only exception to the resumption that an allegation of fact made by a party in his pleadings which is not traversed is admitted is where the allegation is that a party has suffered damage and the amount of damages which if not specifically admitted is deemed to have been traversed is admitted is where the allegation is that a party has suffered damage and the amount of damages which if not specifically admitted is deemed to have been traversed (O.VI v 9(4)). Express admissions need no further explanation as they are either admitted in the pleadings or in answer to interrogations (Order X rr 7 and 8).Implied admissions are admission which are inferred from the pleadings as a result of the form of pleading adopted (MULLA, ibid refers to the latter admissions as "constructive admissions" – p.855). For example where a defendant fails to specifically deal with an allegation of fact in the plaint the truth of which he does not admit there may be necessary implication may also arise where a defendant denies an allegation in the plaint evasively. Nevertheless, the admissions must be clear – ELLIS vs ALLEN, (1914) 1 Ch. At p.909; ASH vs HUTCHISON & CO. (Publisher), (1936) Ch. 503 and TECHNISTUDY vs KELLAND, (1976) 3 All E.R. 632, C.A. at p.856 MULLA ON THE CODE OF CIVIL PROCEDURE ibid, says:

> "An order on admissions on the pleadings will not be made, unless
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> the admissions are clear and unequivocal."

In GILBERT vs SMITH, (1976) 2 C.D. 686 at pp.688 – 689 MELISHIH, L.J. referring to an equivalent English rule said:-

> "I think that rule was framed for the express purpose, that if there was no dispute between the parties, and if there was on the pleadings such an admission as to make it plaint that the plaintiff was entitled to a particular order, he should be able to obtain that order at once upon motion. It must, however, be such an admission of facts as would show that the plaintiff is clearly entitled to

> the order asked for, whether it be in the nature of a decree, or a judgment, or anything else. The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitled the plaintiff to an order, to wait but might at once obtain any order which could have been on an original hearing of the action."

I agree with the position as stated in that case which also appears at p.856 in MULLA ON THE CODE OF CIVIL PROCEDURE ACT, ibid . An admission is clear if the answer by a bystander to the question whether there was admission of facts would be "of course there was." In KIPROTICH vs GATHUA & OTHERS, (1976) K.L.R. 87 at p.90 the former Court of Appeal for Eastern Africa said:

> "… the jurisdiction to award judgment on admissions resulting from failure to reply to a counterclaim should only be exercised in the clearest of cases ….."

The principle is the same when considering an application under Order XII rule 6 for judgment on admissions arising in any form.

Admissions of fact under Order XII r.6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rule uses the words "or otherwise" which are words of general application and are wide enough to include admissions made through letter, affidavits and other admitted documents and proved oral admissions.

The rule empowers the court to make such order, or give such judgment, as it (court) may think just. It is settled that a judgment on admissions is in the discretion of the court and not a matter of right: see MULLA ON CODE OF CIVIL PROCEDURE ibid p.854. The court's discretion in the matter is unfettered, but as it was said in KIPROTICH vs GATHUA & OTHERS (supra at p.92 that discretion must be exercised judicially. As the application in this appeal involved an exercise of discretion by the learned judge this court should not, on appeal, interfere with the exercise of that discretion unless this court is satisfied that either –

> (a) he misdirected himself in some matter and as a result arrived at a wrong decision, or
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> (b) it is manifest from the case as a whole that the learned judge was clearly wrong in the exercise of his discretion and that as a result there has been misjudtice –

see MBOGO AND ANOTHER vs SHAH, (1968) E.A. 93 and KIPROTICH vs GATHUA & OTHERS supra at p.91 Letter H. In my opinion failure to direct oneself on some relevant matters which results in arriving at a wrong decision is the same as misdirection which produces the same result.

Having set out in the preceding paragraphs the law relating to obtaining judgment on admissions under O.XII r.6 I should now proceed to look for any admissions on the pleadings and otherwise. In the latter case I shall consider the admitted documents which included the letters exchanged between the parties, receipts, draft transfer, affidavits and any proven verbal admissions. For the appellants to succeed the admissions must relate to or be of a binding contract capable of being enforced by an order for specific performance, which is the remedy sought.

Paragraph 1 of the Plaint states that by letters more particularly during April and May 1975, exchanged between or copied to the parties' advocates and Barclays Bank International Ltd., Nkrumah Road Branch, Mombasa including a receipt signed by the defendant dated 23rd November, 1974, it was agreed that the defendant should sell and the plaintiffs should buy for the sum, of shs.740,000/= certain freehold house property with all improvements thereon known as L.R. 214/575 Muthaiga, upon the terms hereinafter stated. The answer to this allegation in paragraph 2 of the defence. There is no traverse to the allegation in paragraph 1 of the plaint as the reference to an oral agreement between the defendant and 2nd plaintiff for the sale of unspecified property for shs.740,000/= is in my view not a traverse to the plaintiffs' allegation of fact aforesaid. The allegation of a sale agreement of L.R. 214/575 (a freehold house at Muthaiga) by the defendant to the plaintiffs seems to be traversed in para 19 of the defence which states that except where expressly admitted in the defence each and every allegation in the plaint

denied. The price of shs.740,000/= is, however, expressly admitted and so are the terms of payment set out in paragraph 3 of the plaint except the value of the diamond ring, which I shall comment on later. Paragraph 5 of the plaint reads as follows:

> "5. It was also agreed by the aforesaid letters that the said agreement, for sale of the suit property should be given effect by drawing up a conveyance of the suit property from the defendant to the plaintiffs in a legal form."

Again the allegation of fact in this paragraph was traversed by the defendant in the general terms in paragraph 19 of the defence. Paragraph 7 of the plaint which alleged that on the 9th April, 1975 with a letter of that date the defendant's advocate loaned to the plaintiffs' advocate the documents of title to the suit property to give effect to the agreement mentioned in paragraph 5 was also generally denied in the said paragraph 19. The defendant denied generally in paragraph 19 of the defence the contents of paragraph 8 of the plaint that a draft conveyance was prepared and sent to her advocate. Paragraph 9 and 12 of the plaint are important to the application and I should reproduce them. They say this:

> "9. The defendant's advocate duly approve and return one copy of the said draft on or about the 21st April, 1975, endorsing the same with his signature reading as follows "Approved as amended in blue. (sd) S. Malike-Noor Vendor's advocate 19.4.1975."

> "12. The said draft conveyance duly signed by the defendant's advocate along with particulars of the agreement herein sued upon."

The aforegoing two paragraphs contained allegations of fact which were not specifically traversed, but were generally denied through paragraph 19 of the defence. Paragraph 12 alleged that particulars of the agreement which the defendant's advocates. In my opinion the allegations of facts contained in paragraphs 1,5,8,9 and 12 of the plaint which plaint was served on the defendant required specific traverse of each and every one of them, as provided in Order VI rule 9(3) and the general denial of the said allegation was not sufficient traverse of them. On the pleadings there was inadequate traverse of the allegation that a contract of sale of L.R. 214/575 Muthaiga by the defendant to the plaintiffs for shs.740,000/= existed through correspondence and in the draft conveyance. The existence of the contract was in the result deemed to be admitted. In fact Mr. Couldrey was of the view that it was arguable that the approved draft conveyance constituted a binding contract between the parties.

Paragraph 13 of the plaint alleged that the defendant wrongly failed to forward the conveyance duly executed by her to the Bank's advocate, and she had taken no steps towards completion of the agreement; she had refused or neglected to complete and still refused or neglected to perform the contract.Again, there was only a general denial of the allegations in this paragraph through paragraph 19 of the defence, which was not sufficient traverse for the defendant was required to specifically traverse the allegations – (O.VI rule 9(3)). The defendant is deemed to have admitted refusal of neglect to complete or perform the contract.

I am satisfied that there were admissions of fact on the pleadings that there was a binding contract between the parties and the defendant had refused or neglected to complete or perform.

Let me now turn to the correspondence that passed between or was copied to the parties' advocates. Mr Malik Noo's letter of 3rd January, 1975, speaks of an agreement having been reached between the advocates' respective clients for the proposed sale of L.R. No. 214/575 by the defendant to the plaintiffs for shs.740,000/= and a deposit of shs.100,000/= having been paid Mr. Khanna's letter of 10th March, 1975 sets out more extensive terms of the contract of sale and points out that the deposit paid was shs.200,000/= and not shs.100,000/=, a point that was later admitted by the defendant, the difference having arisen over the value of the diamond ring, which the defendant had put at shs.45,000/=. Although Malik-Noor's letter of 1st April, 1975, denied existence of any binding contract it confirmed the purchase price of shs.740,000/= and fixed the date of completion as 15th May, 1975. In paragraph 4 of Mr. Malik-Noor's letter of 3rd April, 1975. In paragraph 4 of Mr. Malik-Noor's letter of 3rd April, 1975 he says:-

> "…….. my client wishes to sell. Yours wish to buy. If you will confirm that your clients are prepared to buy subject to U.S.A.I.D. lease, I can probably persuade my client to accept the ring at face value."

Mr. Malik-Noor, however, still maintained that there was no binding contract in writing. Mr. Khanna wrote on 5th April, 1975 strongly refuting the suggestion that there was no and had never been a binding contract between parties. On 7th April, 1975 Mr. Malik- Noor wrote back to Khanna & Coy, a letter marked "VERY URGENT" suggesting that the parties maintain their respective positions; that if the defendant accepted the diamond ring at face value the plaintiffs had paid the equivalent of shs.200,000/= and a cheque for shs.240,000/= had been tendered whereas the bank had undertaken to pay the balance of shs.300,000/=. He therefore suggested that the transaction be completed on those understandings. M/S Khanna & Coy., wrote on 8th april, 1975 noting what Malik-Noor had stated. On the 9th April, 1975 Mr. Malik-Noor forwarded the documents of title receipt of which was acknowledged by M/S Khanna & Coy on the same day. In the last paragraph of his letter Mr. Malik-Noor wrote:

I now look forward to receiving the draft conveyance for my approval." He said the same in his letter dated 10th April, 1975, the draft conveyance was sent to Mr. Malik Noor for approval and he approved it with minor amendments on 19th April, 1975. On 17th April, 1975 Atkinson, Cleasby & Catchu, advocates for the bank as soon as the same were returned to him by M/S Khanna & Co. On 15th April, 1975 the draft conveyance was sent to Mr. Malik-Noor for approval and he approved it with minor amendments on 19th April, 1975. On 17th April, 1975 Atkinson, Cleasby & Satchu wrote to Mr. Malik-Noor undertaking to pay the balance of the purchase price i.e. shs.540,000/= upon registration of the transfer with clean title in favour of the purchasers, registration of the charge in favour of the bank and payment to the bank by the defendant of the proportionate part of the advance rent. On 21st April, 1975 Malik-Noor forwarded to M/S Atkinson, Cleasby and Satchu the documents of title for preparation of the mortgage, and on the same day returned to M/S Khanna & Co., the draft Transfer duly approved as amended. By 6th May, 1975, it is clear from the documents i.e. the letters exchanged between the parties' advocates and advocates of the Bank and the draft Conveyance that a binding contract, the full particulars of which were now contained in the draft Transfers, had been concluded between the plaintiffs and the defendant.By that time either party could get an order for specific performance if the other party failed or refused to perform.

The draft conveyance expressed that the transfer was subject to the U.S.A.I.D. LEASE. The U.S.A.I.D. had proposed to make certain alterations to the property at its own expense and the approval sought from the plaintiffs was delayed and M/S Khanna & Co. informed Mr. Malik –Noor that U.S.A.I.D. should apply to the plaintiffs for consent. On 14th May, 1975, Mr. Malik-Noor wrote to Khanna & Co. informing them that U.S.A.I.D. had withdrawn from the lease and the property would not be sold with vacant possession. The new position was not acceptable to the plaintiffs' advocates who suggested compensation for their clients in the tune of shs.100,000/=, a proposition flatly rejected by the defendant's advocate. In my view this latter development did not affect the contract concluded on 19th April, 1975 when the defendant's advocate approved the draft Transfer. The contract was still enforceable, despite the defendant's attempt to alter the terms.

Again, I am satisfied that there were admissions of facts otherwise, i.e. in correspondence and the draft Transfer, of the existence of an enforceable contract between the parties.

The admission on the pleadings and otherwise were clear and unequivocal. Like in CASSAN vs SACHANIA Civil Appeal No.63 of 1983 (unreported) the facts material to the application for judgment were expressly and impliedly admitted. The defendant therefore did not only admit the original oral agreement, but she also admitted the agreement incorporated in the draft Transfer and which as stated in paragraph 12 of the plaint was the basis of the suit, by the plaintiffs against the defendant. The transfer could still have been registered subject to the U.S.A.I.D. lease though the lease was on no beneficial value to either party. Either party could have enforced the contract incorporated in the draft Transfer with an order for specific performance. For the reasons stated I would allow the appeal, set aside the High Court order and grant an order for specific performance. I would award the costs in the High Court and in this court to the appellants, but as the case did not involve any complicated points I would not certify costs for

two Counsel. I would leave the question of damages for delay for trial in the lower court should the parties wish to pursue the matter any further.

Delivered at Nairobi this 19th day of January, 1984

Z R CHESONI

AG. JUDGE OF APPEAL