REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 1832 OF 1980

TITUS MUIRURI DOGE.....PLAINTIFF

VERSUS

KENYA CANNERS LTD.....DEFENDANT

JUDGMENT

October 28, 1988 **Shah CA** delivered the following Judgment.

Mr Titus Muiruri Doge, the defendant joined the plaintiff company, Kenya Canners Limited in February, 1959 when the company was owned by Afcot Group of companies. Before Mr Doge was co-opted on to the Board of Directors on or about 2nd October, 1960 he was employed as a coordinator. He remained on the Board (of directors) of the company until April, 1980; the circumstances relating to his not being connected with the company after April, 1980 will be gone into later. There was some question as to when Mr Doge joined the company. PW1. Mr Wallace Nkonge Mantu after going through the plaintiff's file relating to employment of Mr Doge said that Mr Doge's employment commenced on 1st June, 1965.

This point is not difficult to resolve. Exhibit H signed by the then managing director of the plaintiff company, Mr Robert C Brown talks of Mr Doge's "20 years of association with us" that would take us back to 1960 and there can be no doubt that Mr Doge's association with the company or companies owning or associated with Kenya Canners Limited started sometime in 1959.

Mr Doge had been intimately associated with pineapple growing industry in Kenya. He was a member of "Pineapple Consultative Committee".He was seeing to it that allocation of pineapples was properly done. It would appear that as a result of Mr Doge's know how relating to pineapple industry he was employed by the plaintiff or its predecessor. His designation was, when he joined the Board of Directors of the plaintiff company, that of Industrial & Public Relations Co-ordinator. He said he was the very first african director on this board. During 1965 there was change in the ownership of the plaintiff company, Mr Doge said. California Packing Corporation bought out the interest of Afcot Group. Mr Doge opted to continue working for the plaintiff company under the Managing Directorship of Mr Hann who left the company in 1972. Mr Marks then became the Managing Director of the Company.

Mr David Bannatyne Kater was the Training & Development Manager of the plaintiff company in 1973.

During November 1973 Mr Doge discussed with Mr Marks the question of Mr Doge looking for a coffee farm to settle, so Mr Doge says. Then according to Mr Doge followed a sequence of events. Mr Marks and Mr Doge went to see Chania estate which place Mr Doge was interested in buying. Mr Marks said that was too far from Mr Doge's place of work. Then Mr Marks persuaded Mr Doge not to buy another coffee farm allegedly belonging to one Peter Harris.

Mr Kater then suggested to Mr Doge that he (Mr Doge) should buy another place near Blue Posts Hotel. Mr Doge did not like it as it was too close to the main road. Mr Doge said, then Mr Marks suggested they see Sassa house. This is a farm house on land belonging to plaintiff and form part of land described in Exhibit 1. Mr Doge went on to say that Mr Marks suggested that he (Mr Doge) should develop the place, live there and make a home there. The house was in an allegedly dilapidated state. It was not habitable and was used then as a coffee store. Mr Doge went on to say that he and Mr Marks went thereto the place and that Mr Marks ordered the plaintiff company to fence the area. Rondavels thereon were demolished. Coffee from the house was removed and stored elsewhere. Mr Doge showed to court on a plan (Ex. F) the area in question shaded in red. The fenced part has been marked by me, on Exhibit F as shown to me. Thereafter as for Mr Doge, he proceeded to repair the house, refurnish it and carry out renovations, lot of them, that is what Mr Doge said.

He had electricity brought to the place. At this stage I would pause to note that the plaintiff has admitted the following facts:

(1) The defendant undertook a complete renovation and rebuilding of the dilapidated building on the said premises:

(2) The defendant had mains electricity brought to the said house:

(3) The plaintiff executed a guarantee to East African Power & Lighting Company Limited (now KP& L) guaranteeing an adequate consumption of electricity in the house (meaning presumably Sassa house).

Mr Doge said he spent about Shs 300,000/= in repairing the house and Shs 120,000/= in bringing electricity to the house. That he built a fence around the area and troughs for cattle drinking areas. He developed a cattle dip and build *bomas* for goats and cattle. He developed the cattle dip, he said. He said he used the money which was meant to be used for the purchase of a coffee farm, which he did not purchase. At Mr Marks' request the area was photographed from the air see exhibit G.

Mr Doge went on to say he discussed the mechanics of setting aside that portion of land which was to be done in the same way as was done by the plaintiff for Mr Muguro who was once an under-secretary in the Ministry of Finance in charge of Foreign Aid. Mr Doge said another piece of land was similarly given away to Mr Kahengeri the former MP for Juja constituency.

Over the years, Mr Doge says he continued to develop the land in question. The land was not formally surveyed but it is about 100 acres. Against this background I would examine the plaintiff's stand. It was suggested to Mr Doge in cross-examination that all that he said about the land being given away to him was fabricated. That the company could not give away land like that. That Mr Marks alone as the Managing Director had no authority of the Board to give away land in that manner. Mr William Kiarie Kariuki (PW 2) stated that he was occupying the house in question until May, 1974 and that after that it remained unoccupied for 3 to 4 years except for storage of coffee. This witness was an extremely poor witness. He mixed up all his dates. I cannot rely on his evidence for any assistance. Mr Kater, in answer to interrogatories (Exhibit 13) has stated that Mr Doge occupied the house in 1974. Mr J D M Silvester, a partner in the law firm of Hamilton Harrison & Mathews who is also a director of the plaintiff company

gave evidence before this court. He said there was never a request by Mr Doge to the Board of the plaintiff company to transfer any land to Mr Doge as per the minute book of the Company. I would assume that the minute book of the Company is silent on this as Mr Silvester says.

What intrigued me was Mr Silvester's evidence on the minutes of the meeting held in the offices of Kenya Canners Limited on 8th April, 1980. The existence of these minutes which are vital was not put to Mr Doge when he was being cross-examined. All this is at pages 44 and 45 of my notes of evidence on record. Despite Mr Muthoga's objection I allowed these minutes to be exhibited (page 76 of record – see my Ruling) Mr Silvester confirmed that he did inform his litigation partner of the fact of meeting on 8/10/1980 at which meeting Mr Doge had agreed to resign. He confirmed that Ex. 8 was always available to the litigation department of Hamilton Harrrison & Mathews. I would have imagined that Exhibits 8, 10 and 11 which were available would have been put to Mr Doge when he was being cross-examined and he was cross-examined on other matters at length. With the alleged existence of these minutes it would have been the simplest of the matters for the plaintiff simply to plead voluntary resignation by Mr Doge. Instead the plaintiff decided to sue on the basis that the defendant's services were terminated (see paragraph 5 of the amended plaint) and in paragraph 6 thereof the plaintiff pleads removal of Mr Doge as a director) by resolution of an extraordinary general meeting of the shareholders of the company held on 29th May, 1980. Reply does not help me any further.

A document of so vital a nature was at all material times in the possession of the plaintiff. Still no case is based on it. Or the pleadings do not talk of this.

I note that the minutes recorded in Exhibit 8 do not refer to minutes of a board meeting. It was a private meeting of 4 persons allegedly. There was no agenda for this meeting. I note that Exhibit 8 is only a draft. These minutes were apparently never approved or ratified. Considering all the facts surrounding this draft (Exhibit 8) keeping in mind the pleadings, the way the cross-examination of Mr Doge proceeded, the fact that those minutes were not produced earlier, I am minded not to accept the same as a correct record of what may have transpired.

It is a matter of surprise to this court that despite Mr Silvester emphasizing the fact that he advised the litigation partners of these minutes and that this fact was within the knowledge of the plaintiff and his litigation partner (see Mr Muthoga's cross-examination of Mr Silvester on page 76 of my record) these matters were never put to Mr Doge.

Mr Sylvester was emphatic on the issue of the plaintiff company not being able to "give away" land to Mr Doge. He said it would have created difficulties.

Against this background I will revert to what has been otherwise said. Mr Kater in his affidavit sworn on the 13th day of November, 1986 says that Mr Marks asked him (Kater) about Sassa house and he replied that it was a good idea for the defendant to occupy Sassa house. That Mr Marks said it would no longer be maintained as a company staff house. That Mr Marks said that in the long term a proper transfer would be necessary but that, in the mean time the defendant could go ahead and occupy the house. That the defendant agreed to the application for an excision of that parcel of land in the long term but that, in the meantime, he would go ahead and occupy the house in 1974. I note that in paragraph 7 of this affidavit filed on 29th August, 1988 (marked as exhibit 12) Mr Kater is talking of making it clear to Mr Doge that the legal disposal of the house and a plot of land would require the making of an application to the Commissioner of Lands for proper survey, valuation and excision of land before a legal transfer. I wonder why this was ever discussed if the land was never to be given to the defendant as the plaintiff company wants this court to believe. He (Mr Kater) also talks of, in paragraph 8 of Exhibit 12 of an oral agreement (if any) being subject to a proper legal settlement being finalized with The

Government (underlining mine). He is not talking of any finalization between the plaintiff and the defendant.

In his letter of 5th June, 1986 Mr Kater is informing Mr Le Pelley that he made it clear to Mr Marks and Mr Doge on more than one occasion, that, although Mr Marks agreed to the occupation of Sassa house by Mr Doge, the legal disposal of the house and plot of land in his favour would require making application to the Commissioner of Lands for a proper survey, valuation and excision of that piece of land from the estate as whole before a legal transfer could be made.

If there was no question ever of any transfer of land to Mr Doge I do not see how the issue could have ever been discussed. It stands to reason that all that was discussed and it stands out clearly, factually that the defendant's possession of the house was independent of and not conterminous with, his contract of services with the plaintiff, whether as director or otherwise. This is what Hancox JA said in civil appeal No 11 of 1983.

I find therefore as a fact that Mr Doge was permitted to occupy the house and the land surrounding it and as shown on aerial photograph Ex. G on the basis as deponed to by Mr Doge and not as stated by the plaintiff.

I therefore must direct my mind to the law on this issue. Mr Muthoga's arguments may be summarized thus: The plaintiff acquiesced in and allowed the defendant to spend moneys to improve the house. Equity will not allow the plaintiff to chase away the defendant. That equitable doctrines apply to us generally or that if a statute does not say equity does not apply, the doctrines of equity are applicable.

If the Indian Transfer of Property Act precludes application of equity only then the court is precluded from invoking the doctrines of equity in aid of a litigant. Mr Muthoga referred to the case of *Century Automobiles vs: Hutchings Biemer* [1965] EA page 304 in which case then former Court of Appeal for East Africa did not agree with Miles J when Miles J had said that S 108 B of the Indian Transfer of Property Act and S. 99 of the Government Lands Act precluded the operation of equitable estoppel.

That court held that the doctrine of equitable estoppel applied in Kenya, following the decision in *Nurdin Bandali vs Lombank Tanganyika Limited* [1963] E.A. 304.

Spry JA said at page 312 – letter "E" –

"It would seem, therefore, that an unregistered transaction may be enforceable between the parties".

The former Court of Appeal came to that conclusion despite rather forceful arguments presented before it to support the judgment of Miles J.

Spry JA said further at page 312 – letter 'H" –

"I respectfully disagree with him, however in that I do not consider that the application of the doctrine of equitable estoppel would contravene any statute law."

Spry JA was obviously referring to Indian Transfer of Property Act and Government Lands Act.

Mr Le Pelley, whilst Mr Muthoga was arguing this point, conceded that subject to written laws equitable doctrines apply to us in Kenya, except to the extent of disposition or transfer of land.

In *Nurdin Bandali vs: Lombark* [1963] EA 304 it was stated by Newbold JA at page 318 – letter E –

“as the Privy Council held that S.115 enacted in term of the English law of estoppel, and as both the common law and equitable estoppel formed a part of the law of England at the time of the enactment of the Evidence Act and as the fact that the representation of a legal relationship could ground an equitable estoppel had been clearly stated before the Evidence Act was applied to Tanganyika, I am satisfied that there is no reason to restrict the meaning of the word “thing” in S. 115 to an existing fact, and that an equitable estoppel falls within the section”.

In *Commissioner of Income Tax vs: Hussein* [1968] EA 585 it was held that despite the disappearance of the Crown from the domestic law of Kenya, the defence of estoppel was still available to the defendant and therefore the plaintiff was estopped by acquiescence from claiming possession of the said premises.

I have already found that Mr Doge’s occupation of the house and land was pursuant to what was agreed between him and Mr Marks. I have no hesitation in saying that it was at all material times intended that Mr Doge would eventually get the land registered in his name after the necessary legal formalities were embarked upon a finalized. But there was no hurry it appears. The status quo was apparently sufficient until the parties fell out. Mr Doge incurred considerable expenditure with the knowledge and acquiescence of the plaintiff acting through its managing director Mr Marks.

Does equity therefore arise in favour of Mr Doge. Is there a promissory estoppel barring the plaintiff from taking away land in possession of the defendant.

Mr Muthoga referred to a passage in Spencer Bower & Turner’s second Edition of book *“Estoppel by Representation”.* The learned authors say at paragraph 289.

“an estoppel may never serve to found a cause of action; and this is a proposition to which this work has adhered throughout. But there are numerous cases in which estoppels arising from encouragement or acquiescence appear, at least at first sight, to have been used as a foundation for an action. Are these real exceptions to the general rule, or are they seen on examination to be apparent exceptions only"".

Mr Muthoga referred to chapter XIV of the same book at pages 339, 340 and 342.

At page342 the learned authors say this at paragraph 321;

“It has been pointed our in an earlier chapter that while an estoppel itself cannot found a cause of action the same representation of fact may in same cases do double duty, and may at the same time both found a cause of action (ie such a cause of action as can in law arise from it) and found an estoppel. Indeed in the case of acquiescence the coincidence between the requirement of estoppel and those of the equitable cause of action is so exact as to amount in effect (as we have seen) to enabling an action in this case to be founded upon the estoppel.”

I was referred to the decision in *In The Whitehead. Whitehead Vs whitehead & others* referred in (1948) NZLR page 1066 a photocopy whereof was supplied. In that case the facts were that deceased and his son built two cottages on the deceased’s land. There was an arrangement between them that one of the cottages was to be a gift to the son. Both helped in the building of the cottages and the son expended money on materials with the deceased’s knowledge. There was no understanding to subdivide or transfer to the son land on which the designated cottage was to be built. It was held that (by the Court of Appeal) the appellant had acquired an equitable charge or lien to be reimbursed. The value of labour and materials expended by him on the building and property as the deceased owner of land, with full

knowledge, had not only stood by, but he had also encouraged the appellant to make expenditure in the expectation that the cottage on the land available was his. I need not refer at length to what O'Leary CJ said at pages 1070 and 1072.

I was also referred to the case o*f Dillwyn vs Llewelyn* [1861-73] All ER 348 where it was held as long ago as 1862 that although a voluntary agreement will not be completed or assisted by Court of Equity in the cases of mere gift if anything be wanting to complete the title of the donee in obtaining it, the subsequent acts of the doner may give that right ; in the circumstances the subsequent expenditure by the plaintiff with the approbation of his father supplied available consideration originally wanting; and the plaintiff was entitled to the fee simple of the property. I was referred to another New Zealand case - *Thomas V Thomas* (1956) NZLR. 785. This case followed the *ratio decidendi* of *Dillwyn V Llewelyn* (Supra). In *Inwards & Others v Baker* [1965] 1 All ER it was held by the Court of Appeal in England that since the defendant had been induced by his father to build the bungalow on his father's land and had expended money for that purpose in the expectation of being allowed to remain there, equity would not allow the expectation so created to be defeated, and accordingly the defendant was entitled to remain in occupation of the bungalow as against the trustees.

I need not set out in detail here the editorial note or page 447 of that report (*inwards's case*).

The ratio of all these cases simply is this – and this is what I say:

"If a party is made so to believe in a certain state of facts and that party acts on those facts, to his detriment, and the other party stands by and does not stop him from so acting, that other party is estopped from changing his stand. If one says to A "go ahead, this is land, but you may build on it, spend money, we will go into formalities of transfer later' and A does all that the representor is estopped from denying the right accrued to and acquired by A".

That in my opinion is the position here factually. The decisions quoted to me are not binding on me. But they are of great persuasive value. These are decisions by eminent judges. I must and I do give due weight to them.

The question that arises next is can these principles be applicable to us in Kenya in view of the provisions of the Registration of Titles Act and the Transfer of Property Act. The land in question is held under the Registration of Titles Act (RTA). RTA has been borrowed by us from the Australian Torrens system. It gives sanctity of title to the title holder. But does it take away the rights that may accrue to a party as a result of what has for instance transpired in this suit. RTA says nowhere that the owner of land held under RTA cannot agree to transfer a portion of that land to someone else. In such circumstances the court will and must look into equity. It is of course trite that Equity follows the law, equally that equity will not be set up against a statute, equally that equity will not be used as a vehicle of fraud.

But faced with the findings of fact that I have already made it is for me to decide now if it is equitable that the defendant ought to become the registered proprietor of the land in question. On behalf of the plaintiff fit is argued that an interest in land cannot be coupled with an equity, since this could be contrary to the statues dealing with the creation of interests in land in Kenya. Such interests can only be created under the Registration of Titled Act. I have already said that RTA does not disentitle a party from acquiring land in the circumstances relevant to the facts of this case. Even the Transfer of Property Act of India as applied to Kenya, in my opinion, does not disentitle a party from acquiring land in circumstances relevant to the facts of this case as found by so far.

Although the interest of the plaintiff is leasehold there is nothing in RTA barring the defendant from

obtaining title (leasehold) to the land in issue. It has been argued and urged and as well deposed to that Mr Marks on his own had no authority to agree to any transfer of land. A company acts by its board generally. The Managing Director's acts can bind the company.

Section 34 (1) (b) of the companies Act reads:

34 (1) contracts on behalf of a company may be made as follows:

(a) .....

(b) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the Company by any person acting under its authority, express or implied.

S34 (1) (a) even envisages that an authorized person may enter into a contract which needs to be in writing.

So that it is not a must that in matters relating to this suit the plaintiff could only have acted through its board of directors. A managing director has such authority as I see it.

I ought to and will give due consideration to Mr Le Pelley's submissions.

He wants this court to find that evidence of the defendant as totally unbelievable and that he, the defendant will say "on oath whatever will get in this land regardless of truth". I have already gone at length into this issue. I have considered the defendant's evidence in conjunction with what was stated by Mr Kater and by Mr Marks through Mr Kater.

Looking at the totality of evidence I am bound to find as I have found.

I am urged to hold that the denial by the defendant on the fact of 8th April, 1980 meeting *ipso facto* suggests that Messrs. Brown, Bachmann and Silvester perjured themselves.

I have gone at length into the minutes (draft) of the meeting of 8th April, 1980. These were never confirmed. These were not put to the defendant in cross-examination. The contents thereof do not tally with the basis on which the plaintiff's suit is founded. I need not go further into this. I have already gone into all this at length. Mr Sylvester was cross-examined at length by Mr Muthoga. The substance of cross-examination speaks for itself. There is no need to put an obvious question when full crossexamination tends to discredit a witness. As I understood it Mr Muthoga made it clear, during the course of his cross-examination, that the minutes of 8th April, 1980 were not an authentic record of what may or may not have transpired.

I am not suggesting that Mr Sylvester perjured himself. I am not satisfied as to the correctness of these minutes, the draft that is. It could well be that the final record may have been different. No confirmed minutes were shown to the court. It is an issue of great importance. Such a vital document being offered *ex-post facto* in draft form does not satisfy me.

I will also add that vital witnesses whose evidence could have been taken on commission and whose evidence was available have not testified. I wonder why" I so wonder because their evidence would have turned on this the most important of this case, namely that had Mr Marks made the promises in question. Evidence of Mr David Harries does not take us very far. His father doubtless could have had very strong

views about not selling any land. But most people do consider selling at one time or another. Some may even want to know whether the land is easily saleable or not without wanting to sell the same.

I have very little acceptable evidence before me as to whether or not the rondavels belonged to or were occupied by squatters or servants of the plaintiff. I was not quite satisfied by Mr Mantu's evidence on this point.

The house allowance paid to the defendant has been attempted to be shown as a factor in deciding that the defendant had the use of the house.

My view on this is that this goes to show that the house occupied by the defendant was a company house. This is what Hancox JA says in this judgment in civil appeal Number 11 of 1983 earlier referred to.

It is now well settled in Kenya that an estoppel – proprietory estoppel –can be sued for founding a cause of action. See *Chase International Investment corporation and another VS Laxman Keshna & Others,* [1979] KLR 143. Doubt was expressed by Wambuzi JA as to whether or not a promissory estoppel can be used to found a cause of action. However Wambuzi JA Seems to have not dissented with what was stated by Scarman LJ in the case of *Crabb V Arun District Council* [1975] 3 WLR 847. In a passage at page 858 Scarman LJ said:

"Such therefore I believe to be the nature of the inquiry that the courts have to conduct in a case of this sort. In pursuit of that inquiry I do not find helpful the distinction between promissory and proprietary estoppel.

The distinction may indeed be valuable to those who have to teach or expound the law, but I do not think that, in solving the particular problems raised by a particular case, putting the law into categories is of the slightest assistance".

I would myself venture to suggest that it is the duty of courts in a case such as this to boldly state what the law ought to be. In my opinion the facts as put forward and as found by me, does entitle the defendant (as a counter-claimant) to found a cause of action as pleaded.

On this particular I would conclude by adopting and reiterating words of Denning LJ when he put it in the way the ordinary man understands and I quote:

"it is a principle of justice and equity. It comes to this: when a man by his words or conduct, has led another to believe that he may safely act on the faith of them – and the other does act on them – he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so".

All this is not the end. We have in Kenya the Land Control Act. The Act makes all "transactions" relating to agricultural properties void unless the consent of the Land Control Board of the area in question is obtained. The harshness of this Act has been demonstrated time and again in our courts. In many instances that Act has been used by unscrupulous vendors as an instrument of fraud and the Act has not, in many instances, served the purpose it had originally intended to. Our courts have held time and again that equity does not help the purchaser in softening the effects of this Act. If a transaction is void for lack of consent of the relevant Land Control Board it is void and there is nothing that the courts can do to help the person who had entered into such a transaction made void by the provisions of that Act.

In this particular case, in my opinion, that Act does not yet apply. There is no transaction here as is envisaged by the provisions of that Act. In this instances there is a promise to do something in future when the occasion arose. That is this: Kenya Canners Limited, through its managing director is saying to the defendant:

"Go ahead and occupy the house and the land; when time comes we will go into the legal formalities".

That time unfortunately never came. The parties fell out. Their relations soured. So the plaintiff tells the defendant "I do not want you any more here. Please get out of the land in question. We cannot get along any longer".

I note that this issue (consent of Land Control Board) was not pleaded. It was however, argued, by both parties. Therefore I have gone into it as I am indeed duty bound.

Section 6 of the Land Control Act refers to a dealing in land which requires the consent of the relevant Land Control Board. I am in full agreement with Mr Muthoga's argument or this point: Mr Muthoga puts it as follows:

"Accordingly if the defendant, in his counter-claim, were seeking to specifically enforce a contract to transfer the portion to him he would have to show that such consents had been obtained. Alternatively, he could apply to the High Court for an order directing the plaintiff to apply to such consents or for an order extending the time within which to apply for such consent. But in this case the defendant is not seeking to enforce specifically any contract. He is merely saying that the plaintiff should be held to its promise to seek relevant consents to enable him to obtain title to land or to use such alternative methods as can be used to procure such results".

I accept that argument as correct and say that he alleged lack of consent does not vitiate the promise. Consent issue will only arise in future. As is it, it is a matter, as I understand it, in escrow. I hope I could be forgiven perhaps for not fully appreciating, this rather complicated and extremely well argued case. I am a human being. I do err. I hope I have not done so.

I would therefore answer, issued numbered 6,7, 8 and 9 in favour of the defendant as already discussed in this judgment.

If however the higher court holds that I was wrong in all I said so far I must go into the alternatives. There can be no doubt that if I am completely wrong in all that I have found and said so far the obvious conclusion could and should be that the defendant's claim on this limb fails. If I am right on the issue of promissory estoppel then the question that would arise is was I wrong in ordering the transfer of the land to the defendant.

If so it could be said that the defendant has no right to continuous occupation of land and he must vacate, his right to stay there having come to an end.

If so, is the defendant entitled to any damages" My answer is that if the defendant fails on the issue of the consent of the Land Control Board, under the Land Control Act, he is not entitled to any damages.

If I am right in saying what I did say about the defendant's right to occupy the land pursuant to the promissory estoppel but without getting any title to land, then the defendant ought to be compensated for the improvements that he carried out. There has been no serious challenge (except in submission) to the evidence of the defendant to the effect that in 1974 or thereabouts he spent some nearly shs 400,000/=

in improving the house and land in question. I do not doubt what the defendant said although he had not much documentary evidence to support what he paid. After all one does not expect all this to happen and often one does not keep a record of what one spends. That does not preclude a court from believing the party. I have no reason to disbelieve what the defendant said on this score and if the defendant were to be ordered by another court to vacate the house and land on this ground in my view he ought to be paid shs 400,000/= but no more and no interest; as he had had the benefit of the house and land so far. I do not agree with Mr Muthoga when he says that the compensation should be Shs 6.5 Million, being the market value of the property to-day.

With that I turn to the issue of the termination of services of the defendant. The amended plaint shows specifically that the services of the defendant were terminated by a notice dated 18th April, 1980 which notice was delivered to one Christopher. Christopher was not called to give evidence. The defendant denies having received any such notice. But he admits having noted the fact of his dismissal from information he gleaned in or about May,1980. The plaintiff has attempted to show reason for termination of the services. The reason given was that the defendant was the cause of unrest among the plaintiff company's work-force. On this issue the plaintiff called the evidence of PW1 Mr Mantu, who said in answer to Mr Muthoga's questioning

" I would not say that the defendant was the cause of the troubles. It is anyone's guess" (see page 11 of my handwritten notes).

On the other hand the plaintiff company attempted to adduce evidence to the effect that the defendant volunteered to resign rather than head for collision with the Company. Mr Silvester said so. Mr Silvester was unable to say the defendant's services were terminated because of his performance or rather poor performance he said:

"I briefly discussed his performance with Mr Brown. We had heard about labour difficulties. I have never been formally informed of Mr Doge's performance from Mr Brown in February or March, 1980. Company had a great deal of difficulty about labour relations. Labour relations have improved considerably since Mr Doge left. Mr Marks never spoke to me about Mr Doge's performance."

So what is before the court is this:

The plaint says Mr Doges services were terminated for cause: That cause allegedly was Mr Doge's performance in relation to labour relations. The evidence attempted to show he had resigned. PW1 attempted to show that Mr Doge's services were terminated because of industrial unrest apparently caused by Mr Doge but he was unable to substantiate the same. He infact pointed out he could not blame Mr Doge.

Mr Silvester's evidence was, on this issue, hearsay. I cannot rely on it.

It is for an employer to prove upon a balance of probability that the employee was dismissed for a good cause. This burden has not been discharged by the plaintiff. I therefore hold that Mr Doge's services were not terminated properly. He is therefore entitled to damages.

What is the measure of such damages" I must point out at the outset that I do not agree with Mr Muthoga's method of calculating these damages. No job could be termed permanent as such. In this case no contract of service has been proved. The defendant was a director/employee of theplaintiff company.

I doubt if the defendant could bring himself, as a director, within the ambit of Ex A (Kenya Canners Limited Staff Policy document for Senior Managerial Staff). I doubt if he could also bring himself under full ambit of Exhibits “J” and “I”. The only way I can approach this issue is by following what the former Court of Appeal for East African decided in the case of *Knight v East African Airways* [1975] EA 165 Knight was an employee of the then East African Airways on expatriate term. When he became a citizen of this country his terms of service were attempted to be changed from those applicable to an expatriate employee to those applicable to a Kenyan citizen employee, as a result of which relations between parties soured and Knight’s services were terminated. The High Court (Simpson J as he then was) awarded to Knight the salary he would have earned had he worked until the retirement age of 50 years. This was reduced by the Court of Appeal to 18 months’ salary and other emoluments.

The Court of Appeal in arriving at the period of 18 months considered the fact that Knight was an experienced pilot and that the job of a pilot was a very specialized one. Mr Doge was holding a very high post. He was experienced particularly in pineapple industry. I would imagine there are not many like him. After all pineapples are grown in very few countries. For 20 years he was a director of the plaintiff company.

I have already held that there is no written contract governing the terms of Mr Doge’s employment. In such a case he is entitled to a reasonable notice, his services not having been terminated for any acceptable cause.

Considering all the circumstances I hold that reasonable notice in this instance should have been twelve months. Mr Doge is therefore entitled to 12 months emoluments.

Exhibit D shows Mr Doge’s emoluments at a gross figure of Shs 11,882/ 95 Nett salary was Shs 7,896/30. I award him on this basis a sum of Shs 94,755/60. I propose to award in addition to this sum a sum of Shs 61,638/95 being the amount contributed to the Staff Pension & Provident Fund by Mr Doge. I am unable to hold that pension is commutable. In arriving at the sum of Shs 61,638/95 I have gone by the figures given by Mr Gichohi in Exhibit M, upto end of 1980. I also propose to award to Mr Doge benefits for one year for car allowance and service fees, the sum being (shs 675 + shs 2,950 x 12) Shs 43,500/=. That makes a total of shs 199,894.55 which sum will carry interest at the rate of 12% per annum from the date of filing of the counterclaim until the date of payment in full. This answers the rest of the issues.

It has not been an easy task for me to decide this case. The hearing lasted many days. Many objections were taken. I had to give *ex-tempore* rulings. I do apologize to the counsel and parties for the delay, attributable only to me, in giving this judgment.

In the end result there will be judgment for the defendant against the plaintiff as follows:

1. That the plaintiff do transfer to the defendant the portion of land shaded and marked in red on exhibit “F”.

2. That the plaintiff do carry out all such acts as may be necessary for putting into effect order 1 above mentioned.

3. That there be liberty to apply generally to either party for better putting into effect the orders of this court.

4. That the plaintiff do pay to the defendant a sum of Shs 199,894/55 with interest thereon at the rate of

12 per cent per annum from the date of counterclaim until the date of payment.

5. That the plaintiff's claim be dismissed.

6. That the defendant do have costs of the suit and the counterclaim to be taxed and certified by the Taxing Master of this court.

Dated and delivered at Nairobi this 28th day of October , 1988

A.B. SHAH

JUDGE