

25, 1959

1.

IN THE PRIVY COUNCIL

No. 17 of 1959

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 MAR 1960
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :

SHEIK MOHAMED BASHIR Appellant
(Defendant)

- and -

THE COMMISSIONER OF LANDS Respondent
(Plaintiff)

55/33

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CASE FOR THE APPELLANT

1. This is an appeal from a Judgment of the Court of Appeal for Eastern Africa, dated the 24th March, 1958, allowing an appeal by the Respondent from a judgment of the Supreme Court of Kenya, dated the 4th March, 1957, whereby the Appellant was granted, upon conditions, relief from forfeiture to the Respondent of certain land in Nairobi, which was leased to the Appellant by Crown Grant No. I.R. 9210.

Record
pp.131-154
pp.45-62

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2. The principal issues to be determined in this appeal are as follows:-

- (a) Whether the Supreme Court has jurisdiction to grant the Appellant relief from forfeiture of the said lease under Section 83 of the Crown Lands Ordinance;
- (b) Alternatively, whether the Supreme Court should have granted the Appellant such relief irrespective of the said Ordinance.

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3. The material statutory provisions are as follows:-

Conveyancing and Law of Property Act, 1881 -

"Section 14.(1) A right of re-entry or forfeiture

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under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

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(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

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(4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament."

Sections 4(1) and (2) of the Kenya Colony Order in Council, 1921 provides -

"(1) There shall be a Court of Record styled His Majesty's Supreme Court of Kenya (in this Order referred to as 'the Supreme Court') with full jurisdiction, civil and criminal, over all persons and over all matters in the Colony.

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10 (2) Subject to the other provisions of this Order; such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure and Penal Codes of India and the other Indian Acts which are in force in the Colony at the date of the commencement of this Order and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twelfth day of August, 1897, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdiction and authorities at that date save in so far as the Civil Procedure and Penal Codes of India and the other Indian Acts in

20 force as aforesaid and the said common law doctrines of equity and the statutes of general application and the said powers, procedure and practice may at any time before the commencement of this Order have been or hereafter may be modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of His Majesty in Council, or by any Ordinance or Ordinances for the time being in force in the Colony:

30 Provided always that the said common law doctrines of equity and the statutes of general application shall be in force in the Colony so far only as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary."

Section 83 of the Crown Lands Ordinance, which was enacted on the 18th May, 1915, provides -

40 "If the rent or royalties or any part thereof reserved in a lease under this Ordinance shall at any time be unpaid for the space of thirty days after the same has become due, or if there shall be any breach of the lessee's covenants, whether expressed or implied by virtue of this Ordinance, the Commissioner may serve a notice upon the lessee specifying the

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rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the Supreme Court for the recovery of the premises, and, on proof of the facts, the Supreme Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the Commissioner may re-enter upon the land.

In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity." 10

Section 20 of the Registration of Titles Ordinance, which was enacted on the 20th October, 1919, provides -

"After the commencement of this Ordinance and subject to the provisions of sub-section (2) of section 1 hereof, all land which is comprised in any grant issued subsequent to the commencement of this Ordinance shall be subject to this Ordinance, and shall not be capable of being transferred, transmitted, mortgaged, charged or otherwise dealt with except in accordance with the provisions of this Ordinance and every attempt to transfer, transmit, mortgage, charge or otherwise deal with the same, except as aforesaid, shall be void and of no effect." 20

p.169, L.25

4. By a document dated the 8th January, 1953, expressed to be made under the Registration of Titles Ordinance, the Governor of the Colony and Protectorate of Kenya, on behalf of Her Most Gracious Majesty Elizabeth II, granted to the Appellant a piece of land in Nairobi for a term of ninety-nine years from the 1st September, 1952, subject to the payment of a progressive rent therein mentioned. The grant was expressed to be subject "also to the provisions of the Crown Lands Ordinance (Ch. 155) and certain 'Special Conditions' including the following - 30 40

p.170, L.38

"1. The Grantee shall erect complete for occupation within thirty-six months of the commencement of the term an hotel building

of approved design on proper foundations constructed of stone burnt-brick or concrete with roofing of tiles or other permanent materials approved by the Commissioner of Lands and shall maintain the same (including the external paint-work) in good and substantial tenantable repair and condition. The building shall be of at least six storeys and the cost of construction shall be at least Shillings seven million.

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2. The building shall not be erected until plans (including block plans showing the positions of the buildings and a system of drainage for disposing of sewage surface and sullage water) drawings elevations and specifications thereof shall have been approved in writing by the Local Authority and the Commissioner of Lands."

There were further Special Conditions providing that the Grantee should use the land and buildings for hotel purposes only; should not sub-divide the land; should conform to a building line; should not sell, transfer, sub-lease or otherwise alienate or part with possession of the land or charge it without consent of the Commissioner of Lands; should pay his proportionate costs of roads, drains and sewers; and should pay rates and taxes. It was further provided that the Governor should have right to enter upon the land and lay and have access to water-mains, drains, telephone line, etc; that the main entrance to the building should be set back; and that the water supply should include storage for 24 hours' requirements.

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p.132, L.28

5. On the 29th September, 1955 the Respondent gave the Appellant a written notice, entitled "Notice of Breaches of Covenants" alleging that he had failed to observe and perform the condition requiring him to erect a hotel of approved design within three years of the commencement of the term, namely, the 31st August, 1955, and had also failed to pay such rates as had been assessed upon the land by the Nairobi City Council. The Notice provides as follows -

p.172, L.36

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"NOW, THEREFORE, by virtue of the provisions of Section 83 of the revised edition of the Laws of Kenya, Crown Lands Ordinance, 1915 (Cap. 155)

p.173, L.10

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NOTICE IS HEREBY GIVEN to the said Sheikh Mohammed Bashir of P.O. Box 1512, Nairobi that the Commissioner of Lands of the Colony and Protectorate of Kenya intends, after one month from the service of this Notice, to commence an action in the Supreme Court for the recovery of the said land and for a declaration that the said lease be forfeited."

No other notice was served by the Respondent upon the Appellant.

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pp.1-2

6. By a Plaint dated the 16th November, 1955, the Respondent instituted

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alleging that the Appellant had failed to comply with the first of the Special Conditions in that he had erected no buildings on the said land by the 1st September, 1955, and claiming possession, together with mesne profits at £833 per month from the date of the Plaint until possession was delivered up. The Respondent further claimed if, contrary to his contention, it were held that the condition was not in law a condition but a covenant then, a notice having been served upon the Appellant, as required by Section 83 of the Crown Lands Ordinance, a declaration that the Lease be forfeited and damages for breach of covenant.

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pp.5-8

7. By his Defence dated the 5th November, 1956, the Appellant contended that for all purposes the Grant was to be construed as a Lease for the term of 99 years, and that the Special Conditions were to be construed as covenants. He admitted that he had erected no buildings on the land by the 1st September, 1955, but said that he was prevented from doing so by reason of a breach of covenant on the part of the Grantor, his servants or agents and/or by circumstances beyond his control; that owing to a breach of covenant the Grantor had failed to give vacant possession of the land and the Appellant did not receive vacant possession of, nor was he permitted quietly to hold and enjoy the same without lawful interruption until the 24th July, 1954, or, alternatively, until the 28th October, 1955; alternatively, that the Respondent waived so much of the covenant as required the Appellant to erect the said

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buildings within 36 months of commencement of the term or, in the further alternative, by his conduct impliedly agreed to vary the same so as to give a reasonable extension of time to the Plaintiff for the completion of the said building. The Appellant prayed that the Respondent's claim might be dismissed with costs and/or alternatively that, by reason of the matters pleaded, he might be relieved against forfeiture of the said land pursuant to Section 83 of the Crown Lands Ordinance upon such terms as might appear just.

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8. By an undated Amended Reply and Defence to Counterclaim the Respondent denied that the Appellant was prevented from erecting buildings on the said land as alleged, and further pleaded, inter alia, that the failure to erect the said buildings arose from the failure of the Appellant to exercise any reasonable diligence in the performance of the Special Conditions of the said Grant, and from the inability of the Appellant to perform the same.

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pp.8-11

9. The action was heard by Mr. Justice Rudd from the 6th to the 19th December, 1956. Oral evidence was adduced by both parties, and a considerable number of documents were put in evidence.

pp.11-44

10. Frank Edwin Firminger, a Land Officer in the Respondent's Department, gave evidence which was in outline as follows:-

pp.11-24

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The Government were always anxious that the stipulated hotel should be built quickly. There were temporary buildings occupied by a government department on the site at the commencement of the lease but they would not have prevented a reasonably diligent man having plans, specifications and contract completed in 12 months. The Government were satisfied with the Appellant's financial position at the date of tender but by September 1955 had lost faith in him.

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The Government were now considering building a hotel themselves on the site. Extensions of time had been given in respect of several plots in the same area and in at least one case building only started after the grant expired. The special conditions in Crown grants had freely been called covenants by officers in the department and throughout the correspondence in this case. Notice of

pp.172-3

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breach of covenant was given to the Appellant to found a cause of action as was the practice. As far as the witness knew in practice a Crown grant has been treated as a lease and a condition as a covenant. There were difficulties over a car park and changes of plan; the temporary buildings were requisitioned and occupied from October 1953 to July 1954 preventing work; and there was a change in the City plan for Lugard Avenue which affected the site, and the plans. The delay resulted from the Appellant's temperament. Out of ten similar plots in the City Square granted on building conditions only three had been developed. In 1953 building in Nairobi was affected by the Emergency but it was more or less normal by 1954. If the witness had been satisfied of the Appellant's financial resources in April 1954 or even April 1955, the Appellant would have been given an extension of time.

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pp.25-44

11. The Appellant gave evidence on his own behalf which may be briefly summarized as follows:-

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He had always intended to erect the building referred to in the Grant. The delay was due to a number of causes including the Declaration of the State of Emergency, changes in the Respondent's requirements, the withholding by the City Council of the permission to start excavation until June 1955, the occupation of temporary buildings on the site by Police during the Emergency, encroachment of Labour Department buildings and further change of design after he became aware of the City Council's plan to close Lugard Avenue, and the refusal of the City Council or the Respondent to pass the new plans. He deposed that he had spent considerable sums of money and done much work, and was ready to start construction within a month and finish within three years, and had the necessary financial resources.

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p.51, L.1

12. By his Judgment dated the 4th March, 1957, Rudd J. held that the Grant was a lease within the meaning of Section 83. The learned Judge next considered whether the Special Conditions in the Grant should be construed as covenants. In this connection he referred to Hassanali R. Dedhar v. The Special Commissioner and Ag. Commissioner of Lands (1957) A.E.L.R. 104, in which it had been held

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that Section 83 of the Ordinance applied. He proceeded as follows:-

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p.52, Ll.5-24

10 "I do not think it can be denied that there has grown up and been established for a period which now extends over a generation, a construction which has been accepted by the Department of Lands itself; as well as by the persons dealing with it, and which has also been accepted by the Supreme Court of the Colony, and by the Court of Appeal whereby special conditions in Crown leases have been construed as being covenants within the meaning of section 83 of the Crown Lands Ordinance. In my opinion, such a well established construction established over so many years and hitherto recognised by the public and by the Courts, as well as the Department itself, should not be set aside without very strong grounds. In my opinion, the effect of section 83 of the Crown Lands Ordinance is to make every lessee's covenant into a condition, without the necessity of a specific proviso for re-entry. The section therefore applies to conditions, because it makes covenants into conditions."

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The learned Judge held that Section 83 of the Crown Lands Ordinance applied to this case and that the Court had power to grant relief from forfeiture on such grounds as might be just, being guided therein by the principles of English law and the doctrines of Equity. The decision in Dedhar's case fortified him in that opinion and the fact that this particular point was not argued in that appeal did not cause him any difficulty because the point was not taken. The decision in Dedhar's case was binding on him.

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p.54, Ll.30-40

The learned Judge next held that even if Section 83 did not apply the Court would still have a restricted power to grant relief under the pure doctrines of Equity. Apart from the Conveyancing Act, 1881, and the Law of Property Act, 1925 (which, it had been held in Dedhar's case, did not apply in Kenya), there was in his opinion a case for consideration as to whether, even under the pure doctrines of Equity, the Defendant was not entitled to some relief on the grounds of accident or surprise. The Grant was negotiated before the outbreak of the Emergency. It was difficult to assess the effect of the Emergency

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p.55, L.9

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upon large building operations in Nairobi. It appeared that, in fact, none of the building conditions attached to other grants of property in the City Square area were fulfilled in time. The learned Judge next held that the discovery by the Appellant of the City Council's intentions regarding Lugard Avenue, entitled the Appellant to change his plan and come under the heading of "Surprise". The learned Judge proceeded as follows:-

p.56, L.25

"In my opinion there are features in this case which might justify relief from forfeiture under the pure doctrines of equity irrespective of the statutory provisions of section 83 of the Crown Lands Ordinance or the Conveyancing Act 1881 in England. I do not however find it necessary to decide that as in my opinion section 83 of Crown Lands Ordinance applies and therefore the Court is not bound to consider the question as to whether or not relief from forfeiture should be granted on the basis of the pure antique principles of equity alone. It is entitled and indeed bound to take into consideration and apply the law of England as quoted in section 14 of the Conveyancing Act 1881 as well."

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pp.62-64

The learned Judge, therefore, held that this was a case in which relief from forfeiture could and should be granted on suitable terms which would have to be decided after hearing the parties. He passed a decree laying down the conditions of relief.

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pp.66-70
p.70

13. The Respondent appealed from the aforesaid decision to the Court of Appeal for Eastern Africa, where a Bench of three judges heard the appeal on the 30th January, 1958, and adjourned it for hearing before a full bench since the Respondent was inviting them to overrule a previous decision of the Court of Appeal. A full bench being unobtainable, the hearing was resumed before a different bench (Sir Kenneth O'Connor, President, Sir Ronald Sinclair, C.J. Kenya, and Forbes, J.A.) on the 24th and 25th February and 5th March, 1958.

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p.143, L.9

14. The principal Judgment in the Court of Appeal was delivered by O'Connor, P. He was satisfied that the Grant to the Appellant, though termed a grant, was in law a lease. In his opinion, however, a

building condition in a lease drawn in Form B1 in the Schedule to the Registration of Titles Ordinance did not fall within the phrase "Lessees Covenants" in Section 83 of the Crown Lands Ordinance. He did not feel constrained by Hassanali Dedhar's case to hold that it did because the point was never raised in Dedhar's case, which proceeded on the assumption, conceded by both parties (wrongly as he thought), and never contested or argued, that the building stipulation in that case was a lessee's covenant within Section 83 and the decision was therefore reached per incuriam.

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The learned President was, therefore, of opinion that Section 83 of the Crown Lands Ordinance did not apply and the learned Judge had no jurisdiction under it to relieve against the forfeiture which had taken place for breach of the building condition. He held that the learned trial Judge would, by virtue of Article 4(2) of the Kenya Colony Order in Council, 1921, have had power to relieve under the doctrines of equity, but not (if Section 83 of the Crown Lands Ordinance did not apply) under Section 14 of the Conveyancing Act, 1881, or under Section 146 of the Law of Property Act, 1925. Those Acts were not, he thought, statutes of general application within the meaning of the Article.

p.148, L.16

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The learned President next held that the doctrines of equity would not avail the Appellant since this was not a case of non-payment of rent or failure to insure, and he was unable to see how, on the evidence as recorded, either accident or surprise could be said to exist.

p.148

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15. The learned President further held as follows:-

(a) The Registration of Titles Ordinance must be taken to have used "condition" in its technical sense and the legislature must be taken to have intended that Crown grants for terms of years in future should be subject to conditions.

p.144, Ll.19-25
p.144, Ll.34-39

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(b) The practice of the Lands Department ought not to influence the Court's decision.

p.147, L.34 -
p.148, L.7

(c) The granting of relief from forfeiture in similar cases by the Supreme Court was not "authoritative" as their right to do so had not previously

p.148, Ll.8-15

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been questioned.

p.151, L.25
p.153, L.27

(d) In any grant to which Section 83 of the said Ordinance did apply the English law applicable includes the Conveyancing Act, 1881.

Sinclair, C.J. and Forbes J.A. agreed. The appeal was accordingly allowed.

p.157, L.9
pp.160 - 162

16. An Order granting conditional leave to appeal was passed on the 22nd April, 1958, but rescinded on the 27th October, 1958, when the Appellant's application for final leave to appeal was dismissed with costs.

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pp.162 - 164

Special leave to appeal to Her Majesty in Council was granted by an Order in Council dated the 11th March, 1959.

17. The Appellant respectfully submits that this appeal should be allowed with costs for the following among other

R E A S O N S

1. BECAUSE, as both courts below have rightly held, the grant was a lease within the meaning of Section 83 of the Crown Lands Ordinance.
2. BECAUSE the learned trial Judge was right in holding that the special condition in the grant should be construed as being a covenant within the meaning of Section 83 aforesaid, and because the Court of Appeal erred in holding the contrary.
3. BECAUSE the Supreme Court had jurisdiction under Section 83 aforesaid to grant relief from forfeiture of a Crown grant for a term of years.
4. BECAUSE the Registration of Titles Ordinance did not change the substantive rights of Crown lessees.
5. BECAUSE the word "condition" in the Registration of Titles Ordinance Form B(1) can rightly be construed as a covenant.
6. BECAUSE the Court of Appeal erred in holding

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that they were not bound by the decision in Hassanali Dedhar's case.

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7. BECAUSE the Court of Appeal erred in holding that the Conveyancing Act, 1881 was not a statute of general application within the meaning of Section 4(2) of the Kenya Colony Order in Council, 1921, and because it was open to the Court to grant relief under Section 4(1) thereof.
- 10 8. BECAUSE the learned trial Judge rightly held that there were features in this case which might justify relief from forfeiture under the pure doctrines of equity, irrespective of the statutory provisions of Section 83 aforesaid, or of the Conveyancing Act, 1881, and because the Court of Appeal erred in holding the contrary.
9. BECAUSE relief should be granted to the Appellant under the doctrines of equity.
- 20 10. BECAUSE no notice was served on the Appellant as required by Section 14 of the Conveyancing and Law of Property Act, 1881.
11. BECAUSE the Courts below should have held that the Respondent had waived the stipulation requiring the Appellant to erect the building within thirty-six months of commencement of the term.
- 30 12. BECAUSE the Courts below should have held that the Respondent had impliedly agreed to vary the agreement so as to give a reasonable extension of time to the Appellant for the completion of the said building.

DINGLE FOOT.

J.R. BISSCHOP.

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