

25, 1959

IN THE PRIVY COUNCIL

No. 17 of 1959

O N A P P E A L

UNIVERSITY OF LONDON  
INSTITUTE OF LEGAL STUDIES  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

- 9 MAR 1960

25 RUSSELL SQUARE  
LONDON, W.C.1H  
SHEIKH MOHAMMED

B E T W E E N

BASHIR (<sup>Defendant</sup>~~Plaintiff~~) Appellant

55484

- and -

THE COMMISSIONER OF LANDS (<sup>Plaintiff</sup>~~Defendant~~) Respondent

C A S E F O R T H E R E S P O N D E N T

Record

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1. This is an Appeal from a Judgment, dated the 24th March, 1958, of the Court of Appeal for Eastern Africa (O'Connor, P., Sinclair, C.J. and Forbes, J.A.), allowing an appeal from a Decree, dated the 2nd May, 1957, of the Supreme Court of Kenya, (Rudd, J.). By this latter Decree the Supreme Court had ordered that the Respondent should recover possession from the Appellant of certain land, but no steps should be taken for recovery of possession unless the Appellant failed to comply with conditions of relief set out in the Decree.

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2. The Appeal concerns a plot of land in the middle of Nairobi which was the subject of a grant, dated the 8th January, 1953, from the Governor of Kenya to the Appellant. The Governor thereby granted the land to the Appellant for a term of 99 years from the 1st September, 1952, subject to a rent of 200/- per annum for the first ten years of the term and increased annual rents during the rest of the term, and subject also to the provisions of the Crown Lands Ordinance and certain special conditions set out in the grant. The special conditions required the Appellant to erect complete for occupation within thirty-six months of the commencement of the term a hotel of at least six storeys. The hotel was not to be erected until plans, drawings, elevations and specifications should have been approved in writing by the local authority and the Respondent. Various other requirements affecting

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the hotel were also set out in the special conditions.

3. By the 1st September, 1955, the Appellant had not erected any buildings on the land.

4. The following provisions of the Laws of Kenya are relevant to this Appeal:

The Kenya Colony Order in Council 1921

Paragraph 2(1) All rights of His Majesty in or in relation to any Crown lands shall vest in and may be exercised by the Governor for the time being in trust for His Majesty. 10

Paragraph 2(2) The Governor may make grants or leases of any Crown lands or may permit them to be temporarily occupied on such terms and conditions as he may think fit, subject to the provisions of any Ordinance.

Letters Patent constituting the office of Governor and Commander in Chief of the Colony of Kenya.

Paragraph XVI The Governor, in Our name and on Our behalf, may make and execute, under the Public Seal, grants and dispositions of any lands within the Colony which may be lawfully granted or disposed of by Us: Provided that every such grant or disposition be made in conformity, either with some Order in Council or law now or hereafter in force in the Colony, or with some Instructions addressed to the Governor under Our Sign Manual and Signet, or through one of Our Principal Secretaries, of State, or with some regulation in force in the Colony. 20  
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The Crown Lands Ordinance Laws of Kenya 1948.  
Chapter 155.

3. The Governor, in addition to, but without limiting any other right, power or authority vested in him under this Ordinance, may:-

(i) Subject to the provisions of any Order in Council or to any general or special instructions of the Secretary of State, grant lease or otherwise alienate in His Majesty's behalf any Crown lands for any purpose and on any terms and conditions as he may think fit. 40

(ii) wholly or partially remit, except where otherwise provided, all or any of the covenants, agreements or conditions contained in any lease, agreement or licence, where, owing to special circumstances, compliance therewith would be impossible or great hardship would be inflicted upon the purchaser, lessee or licensee.

10 (iii) extend, except as otherwise provided, the time to the purchaser lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the  
20 purchaser, lessee or licensee, and all transferees, mortgagees, assignees and other persons claiming through him.

Section 13 Leases of town plots may be granted for any term not exceeding ninety-nine years

Section 14 Before any town plot is disposed of under the next succeeding section the Commissioner shall determine:

- (a) the rent which shall be payable in respect of such plot
- 30 (b) the upset price at which the lease of such plot will be sold
- (c) the building conditions to be inserted in the lease of the plot and
- (d) the special covenants, if any, which shall be inserted in the lease.

Section 83 If the rent or royalties or any part thereof reserved in a lease under the 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 express or implied by virtue of this  
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Ordinance, the Commissioner may serve a notice upon the lessee specifying the 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. 10

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.

Section 157

When any person without right, title or licence, or whose right, title or licence has expired or been forfeited or cancelled, shall be in occupation of Crown Land, the Commissioner or some person appointed by him in writing may enter a suit in any Court of competent jurisdiction to recover possession thereof. If on the hearing of such plaint the defendant does not appear or appears but fails to establish to himself an absolute right or title to the possession of the land, the Court shall order that possession of the land sought to be recovered shall be given by the defendant, either forthwith or on or before such a day as the Court thinks fit to name, and that the defendant do pay the costs; or, if it is shown by or on behalf of the plaintiff to the satisfaction of the Court hearing the plaint, that the title under which the defendant claims has, as between himself and His Majesty, expired or been forfeited or cancelled, the Court shall declare such title to be extinguished, and may order that possession of the land sought to be recovered be given by the defendant to the plaintiff, either forthwith or on or before such 20  
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a day as the Court thinks fit to name, and that the defendant do pay the costs.

Registration of Titles Ordinance (Laws of Kenya, 1948 Chapter 160) Section 2

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"grant" means any conveyance, agreement for sale, lease or licence for a period exceeding one year, made by and on behalf of the Crown, and includes a certificate of title (other than a certificate of interest) issued by the Land Registration Court, and a certificate of title issued pursuant to the provisions of this Ordinance;

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21. Grants shall be issued in duplicate in Form B(1) or B(2) in the First Schedule, as the case may be, and every grant, in addition to proper words of description, shall contain a diagram of the land on such scale as the Commissioner of Lands may from time to time direct.....

x x x x x x x x x

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FIRST SCHEDULE

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Section 21

Form B(1) - Grant for Land

Register of Titles.....Vol. ....Folio.....

Registration District No. ....

Annual Rent.....

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Know all men by these presents that I,..... Governor of the Colony of Kenya, do hereby under and by virtue of the powers vested in me by.....grant..... unto.....All that piece of land

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situate at.....containing  
 by measurement .....acres, more or less,  
 that is to say.....  
 .....  
 which said piece of land with the dimensions,  
 abuttals and boundaries thereof, is delineated on  
 the plan drawn on these presents and more  
 particularly on Cadastral Survey No.....  
 deposited in..... To Hold for.....  
 years, subject to the payment therefor of the  
 annual rent of Shillings.....Cents..... 10  
 revisable on.....and to the  
 provisions and conditions contained in the said  
 Ordinance and also to the special conditions  
 hereunder written.

SPECIAL CONDITIONS

In witness whereof I, the said  
 Governor, have hereunto set  
 my hand and the seal of the  
 Colony at.....  
 this.....day of..... 20  
 One thousand nine hundred  
 and.....

Registered at.....this.....day of  
 .....19.....

No. ....

No. of former title .....

Presentation No. ....

.....  
 Registrar of Titles

pp. 1-2

5. On the 16th November, 1955, the  
 Respondent issued a Plaint in the Supreme Court  
 of Kenya against the Appellant. In it he set out  
 the grant of the 8th January, 1953, the  
 condition that the Appellant should complete the 30

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hotel within thirty-six months of the commencement of the term, and the failure of the Appellant to erect any buildings by the 1st September, 1955. The Respondent claimed possession of the land and mesne profits. Alternatively, in case, contrary to his contention, it should be held that the condition of the grant was a covenant, the Respondent claimed a declaration that the lease be forfeited and damages for breach of covenant.

10           6. By his Amended Defence, dated the 5th November, 1956, the Appellant alleged that the grant constituted a lease and the special conditions constituted covenants. He admitted that he had erected no buildings by the 1st September, 1955, but alleged that this had been due to the failure of the Governor to clear the land of other buildings. He also alleged that the Governor had waived the requirement that the building should be completed within thirty-six months of the commencement of the term.

20           7. The action was tried by Rudd, J., between the 6th and the 19th December, 1956. The original grant of the 8th January, 1953, was produced. It was in the form required by the registration of Titles Ordinance. Evidence was also given showing that certain buildings which had been standing on the land at the time of the grant remained there with the Appellant's consent until June, 1953. They had then been requisitioned, but had been handed back to the Appellant by July, 1954. The Appellant had not obtained the local authority's approval of his plans until the 15th September, 1955. The evidence also showed that the original plans of the hotel had provided for a main tenance in a street called Lugard Avenue. There was a Town Planning Scheme, under which Lugard Avenue was to become a blind alley, but the Appellant had not learned this until 1954, although his Architect had been aware of it earlier.

30           8. Rudd, J., gave judgment on the 4th March, 1957. He said the importance of the question whether Section 83 of the Crown Lands Ordinance applied was that, if it did not apply, the Court could not grant relief from forfeiture except on the grounds allowed by the

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pp. 5-8

pp.169-172

pp.12,11,  
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pp.17,11,  
29-36

p.29,11.  
10-19

pp. 45-62  
p.45,1.36-  
p.46,1.14

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p.45-49 doctrines of equity as they existed in England before the Conveyancing Act, 1881. He set out the grant of the 8th January, 1953, and said that it was in the only form authorised by the Land Titles Ordinance for a grant by the Crown of a term of years. The ordinary form of lease executed by both parties had been used before the enactment of that Ordinance in 1919, but was no longer permitted. Since 1919, express covenants by a lessee from the Crown had had to be stated as special conditions. The Learned Judge held that the grant was a lease within the meaning of Section 83. Between the hearing of the case and the delivery of Judgment the Court of Appeal for Eastern Africa had decided (in Civil Appeal No.8 of 1956, Dedhar v. The Special Commissioner and Acting Commissioner for Lands) that Section 83 of the Crown Lands Ordinance applied to such a lease and gave the Court a discretion to grant relief from forfeiture. Rudd, J. said that the question whether Section 83 applied would have been difficult to decide, had it not been covered by that case. However, special conditions in such a grant had always been treated as covenants by the officers of the Department of Lands, and the Learned Judge thought it could not be denied that a construction of Section 83, whereby special conditions in Crown Leases were construed as covenants, had been accepted by the Department of Lands, persons dealing with it, the Supreme Court and the Court of Appeal. Such a construction, he said, should not be set aside without very strong grounds. Section 83, in his opinion, therefore applied, but the Learned Judge thought there was a case for consideration whether under the pure doctrines of equity the Appellant might not be entitled to relief on the ground of accident or surprise. The grant had been negotiated before the outbreak of the emergency in Kenya, and it had been because of the emergency that the buildings standing on the land at the time of the grant had remained in use until May, 1954. The Learned Judge also thought that the provisions of the Town Planning Scheme for turning Lugard Avenue into a blind alley might be brought under the head of surprise. It was not, however, necessary for him to decide this, as he held that Section 83 applied and there was therefore discretion to grant relief upon

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the extended grounds provided by Statute. He rejected the Appellant's contentions that the Crown was estopped from enforcing the building condition and had waived it.

p.56,1.40-  
p.57,1.5

The Learned Judge then went on to consider the terms upon which relief from forfeiture should be granted. He awarded to the Respondent by way of mesne profits the amount of the rent reserved by the grant.

pp.57-61  
p.61,11.19-  
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9. The conditions of the relief were contained in the Decree made on the 2nd May, 1957. In effect, they required the Appellant to complete the building of the hotel by the 1st March, 1961.

pp.62-64

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10. The Respondent appealed to the Court of Appeal for Eastern Africa. By his Memorandum of Appeal, dated the 5th October, 1957, he relied on the ground that the Learned Judge had had no jurisdiction to make the Order which he had made, and also on certain other grounds which do not now arise.

p.65

11. The Appeal was argued on the 24th and 25th February, 1958, and judgment was given on the 5th March, 1958.

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12. O'Connor, P. first set out the effect of the grant of the 8th January, 1953. He pointed out that this document had not been executed by the Appellant; it was expressed to grant land for a term of years subject to a rent and special conditions; the word "covenant" was nowhere used in it; it was expressed to be issued under the Registration of Titles Ordinance and subject to the provisions of the Crown Lands Ordinance. The grant had been in the form required by the Registration of Titles Ordinance. Before 1919 Crown leases executed by both parties with express covenants by the lessee had been used, but since 1919 it had been possible only to use a unilateral grant subject to a rent and special conditions. The Learned President summarised the course of the proceedings and the judgment of Rudd, J. He said that Counsel for the Respondent had argued that Section 83 of the Crown Lands Ordinance did not apply, because the building stipulation was a condition and not a covenant.

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p.133,11.  
19-40

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p.138,1.17-  
p.139,1.44

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Alternatively, if Section 83 did apply, the principles of English law to be applied included the principle that the Crown was not bound by a Statute, unless named in it expressly or by necessary implication, or the beneficial provisions of the Act would be wholly frustrated unless the Crown were bound. Counsel had argued that these considerations did not apply to the Conveyancing Act, 1881, that Act therefore did not bind the Crown, and so the Court could only grant relief on the doctrines of equity unaffected by the extension contained in the Act. He had submitted that Dedhar's case was not a binding authority, because in that case the power to grant relief under Section 83 had been conceded, and the question whether the Conveyancing Act bound the Crown had not been considered. The Learned President said he was satisfied that the grant was in law a lease. The building stipulation was expressed to be a condition. It appeared in a unilateral document framed according to a statutory form. Words of art used in a Statute were prima facie to be taken in their technical sense prima facie therefore the legislature must be taken to have used the word "condition" in a technical sense in the statutory form under the Registration of Titles Ordinance. The grant was also expressed to be subject to the Crown Lands Ordinance. The Learned President referred to various provisions of that Ordinance as showing that in it covenants were distinguished from conditions, and a building stipulation was always called a condition and never a covenant. According to the language used, such a stipulation was not a covenant under either Ordinance. Referring to the argument that before the enactment of the Registration of Titles Ordinance Crown leases had been issued with building stipulations in the form of lessees' covenant, and it could not have been the intention of the legislature to take away the right to relief for breach of such covenants. O'Connor, P. said that the plain language of an Ordinance had to be given effect, even if the results were unforeseen. Apart from that, the Crown Lands Ordinance showed that building stipulations were always intended to be inserted in leases as conditions, so even before 1919 no relief for breach of such a stipulation would have been obtainable under a properly drawn lease. Dedhar's case was not a binding authority

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p.143,11.  
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p.143,1.17-  
p.144,1.50

p.145,1.1-  
p.146,1.28

p.146,1.19-  
p.147,1.15

p.147,11.16-  
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on this point, since there the point had been conceded by both parties and so not argued. The practice of the Lands Department could not control the interpretation of Section 83. The Learned President therefore held that Section 83 did not apply, and Rudd, J. had had no jurisdiction under it to relieve against the forfeiture of the grant. He was unable to see how either accident or surprise could be said to exist, so as to justify relief under the doctrines of equity. It was unnecessary for him to consider whether the terms on which Rudd, J., had granted relief had been justified and he held that the award of mesne profits had been right. Although in his view the question did not arise the Learned President expressed the opinion that had Section 83 of the Crown Lands Ordinance applied to the case the principles of English law and the doctrines of equity therein referred to included S.14(1) of the Conveyancing Act 1881 notwithstanding that the Crown was not bound by that Act.

p.147,1.34-  
p.148,1.7

p.148,1.16-  
p.149,1.2

p.149,11.3-8

p.150,1.24-  
p.151,1.13

13. The other two Learned Judges of the Court of Appeal agreed with the judgment of O'Connor, P.

14. The Respondent respectfully submits that the judgment of the Court of Appeal was right. The Court was right in declining to regard Dedhar's case as a binding authority on the applicability of Section 83 of the Crown Lands Ordinance and in considering that point de novo.

The language of the Crown Lands Ordinance draws a clear distinction between covenants and conditions. By section 3 the Governor is given power to extend the time for the performance by lessees of conditions in leases whereas by Section 83 the Court is given power to give relief in respect of breaches of covenant in leases. Under Section 14 building stipulations in Crown leases are to take the form of conditions and therefore quite apart from statutory form of Crown Grant prescribed by the Registration of Titles Ordinance it would have been improper for building stipulations in a Crown Grant to be framed as covenants in respect of which the Court could give relief and not as conditions in respect of which the Governor alone had power to extend time for performance.

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15. Further the Court of Appeal was right in considering that the word "conditions" in the statutory form of Crown Grant prescribed by the Registration of Titles Ordinance was used in its technical sense. The grant is a unilateral document executed only by the grantor which is apt to contain conditions imposed by the grantor but not covenants entered into by the grantee.

16. If contrary to the Respondent's submission it should be held that the Court had any jurisdiction to grant relief in this case under the general doctrine of equity unaffected by statutory enlargement, the Respondent respectfully submits that no ground justifying such relief was shown by the Appellant.

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17. The Respondent will also if necessary contend that the view expressed by the Court of Appeal as to the application of Section 14(1) of the Conveyancing Act 1881 to Section 83 of the Crown Lands Ordinance was wrong.

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18. The Respondent respectfully submits that the judgment of the Court of Appeal for Eastern Africa was right and ought to be affirmed, for the following (amongst other)

R E A S O N S

- (1) BECAUSE the special conditions of the grant of the 8th January, 1953, were not covenants:
- (2) BECAUSE the Supreme Court of Kenya had no jurisdiction to grant relief under the Crown Lands Ordinance, Section 83:
- (3) BECAUSE no ground was shown upon which relief could be granted according to the doctrines of equity:
- (4) BECAUSE of the other reasons set out in the judgment of O'Connor, P.

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GEOFFREY CROSS

J. G. LE QUESNE

No. 17 of 1959

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE COURT OF APPEAL FOR EASTERN  
AFRICA

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B E T W E E N  
SHEIKH MOHAMMED BASHIR Appellant  
- and -  
THE COMMISSIONER FOR LANDS  
... .. Respondent

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C A S E F O R T H E R E S P O N D E N T

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